

Katalyst Kaleidoscope

January 2024: Tax and Regulatory Insights

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A. Income Tax Highlights

1. Delhi ITAT: No tax on difference between fair value and buyback value on buyback of shares¹

The assessee company carried out a buyback of its own equity shares; the assessing officer observed that the buyback value was less than the fair market value of the equity shares, and held that such difference in fair market value and buyback value be taxed in the hands of the assessee company.

On appeal, Delhi ITAT observed that where a company buys back its own shares, resulting in a reduction of share capital, there is no 'acquisition' of 'property'; further, such reduction in share capital would lead to increase in value per share of the company, thus enhancing its value.

Accordingly, the Delhi ITAT held that the difference between fair value and buyback value of the equity shares bought back will not be chargeable to tax in the hands of the assessee company.

Katalyst Comment:

Several case laws in favour of the assessee, such as Vora Financial Services Pvt Ltd in Mumbai ITAT² and TPS Infrastructure Ltd in Delhi ITAT³, have held that buyback does not amount to 'receipt' of shares or property, since a company cannot acquire its own shares.

2. Mumbai ITAT: Brought forward losses on change in shareholding where all shareholders belong to the same group⁴

Section 79 of the Income Tax Act, 1961, provides that in order to claim set-off of brought forward losses, at least 51% of the voting power of the company in the year in which the set-off loss is being claimed is beneficially held by the same persons in the year in which such loss was incurred.

In the given case, the assessee had only two shareholders, belonging to the same group of companies, where one shareholder was the holding company of the other shareholder. During the assessment year, issuance of equity shares of the assessee to one of the shareholders resulted in a change in the shareholding pattern by more than 51%, but the assessee claimed set-off of losses in the same assessment year, regardless of the change.

¹ DCIT Central Circle-15, New Delhi v Globe Capital Market Ltd (Delhi ITAT) [2023] 203 ITD 758/156 taxmann 620 (Delhi-Trib) dated September 25, 2023

² Vora Financial Services (P.) Ltd. v Assistant Commissioner of Income-tax, Mumbai [2018] 96 taxmann.com 88 (Mumbai)/[2018] 171 ITD 646 (Mumbai)[29-06-2018]

³ DCIT, Circle-25(2), New Delhi v TPS Infrastructure Ltd. (Delhi ITAT) [2022] ITA.No.6433/Del/2018

⁴ Hiranandani Healthcare Pvt Ltd v CIT(A), National Faceless Appeal Centre, Delhi (Mumbai ITAT) [2023] 157 taxmann 551 (Mumbai-Trib) dated July 27, 2023

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The Mumbai ITAT observed that both the shareholders, as a group, beneficially held 51% in of voting power in the assessee, both, in the year of incurrance of loss and the year in which such loss has been set-off. The increase in shareholding of one shareholder did not impact the change in shareholding of the group, and accordingly, the assessee can claim the set-off of loss.

Katalyst Comment:

There have been a series of decisions on the same aspect which have been favourable to the assessee, such as the decision of the Delhi ITAT in the case of WSP Consultants India (P.) Ltd⁵, and the decision of the Karnataka High Court in the case of AMCO Power Systems⁶. On the contrary, there have also been some decisions in the favour of the Revenue, such as the decision of the Mumbai ITAT in the case of Aramex India (P.) Ltd.⁷ and the decision of the Delhi High Court in the case of Yum Restaurants⁸.

However, the decisions passed in the favour of the assessee seem to be more reasonable, since the change in shareholding within a group should not mean that the beneficial shareholding has changed.

3. Mumbai ITAT: Compensation on termination of agreement treated as business income⁹

The assessee received compensation for an out of court settlement for termination of agreement for agency, distribution and manufacturing rights. The terms and conditions of the original agreement and the settlement agreement shows that the assessee was working as an agent for all intents and purposes and received a compensation for loss of agency business.

The assessee contended that compensation received for termination of agreement is a capital asset and offered it to tax as capital gains. The Mumbai ITAT rejected the assessee's argument and observed that when the assessee has not lost its source of income on account of termination of the business agreement, compensation received by it by virtue of the termination agreement is business income.

4. Mumbai ITAT: Capital loss on capital reduction¹⁰

Tata Tele-Services Company Ltd ("TTSL") filed a scheme of arrangement as per Companies Act, 2013, for restructuring of its share capital, thereby reducing and cancelling its share capital without payment of consideration to its shareholders. Such scheme was approved by

⁵ ACIT v WSP Consultants India (P.) Ltd [2022] 140 taxmann.com 65 (Delhi - Trib.)[22-02-2022]

⁶ CIT v AMCO Power Systems Ltd. [2015] 62 taxmann.com 350 (Karnataka)/[2015] 235 Taxman 521 (Karnataka) / [2015] 379 ITR 375 (Karnataka)/[2015] 281 CTR 332 (Karnataka)[07-10-2015]

⁷ Aramex India (P.) Ltd. v. Dy. CIT [2019] 112 taxmann.com 172

⁸ Yum Restaurants (India) (P.) Ltd. v. ITO [2016] 66 taxmann.com 47/237 Taxman 652 (Delhi)

⁹ Piramal Enterprises Limited Vs Dy. Commissioner of Income Tax dated January 11, 2024 [TS-33-ITAT-2024(Mum)]

¹⁰ Tata Sons Ltd v CIT [2024] [TS-42-ITAT-2024(Mum)] dated January 22, 2024

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the Delhi High Court, and half of the shares held by Tata Sons Ltd in TTSL, were cancelled without payment of any consideration.

Tata Sons Ltd claimed such cancellation of its shareholding in TTSL without consideration as capital loss; but the Revenue denied the capital loss. The Revenue's contentions primarily depended upon the case of Bennett Coleman and Co. Ltd¹¹.

The Mumbai ITAT observed that reliance cannot be placed on the case of Bennett Coleman and Co. Ltd, since substitution or replacement of shares does not amount to transfer at all.

The ITAT concluded that in the case of TTSL, the reduction of capital is extinguishment of right in the shares and it amounts to 'transfer', and the loss suffered is not a notional loss; accordingly, the assessee was allowed to claim a long-term capital loss pertaining to such cancellation of shares.

B. Corporate Law Highlights

1. Delhi HC: Physical transfer of shares not incomplete if consideration unpaid¹²

In the given case, the seller and buyer entered into an oral agreement for transfer of shares of a private limited company held in the form of physical share certificates. The seller of shares delivered the respective share certificates and transfer deed in Form SH-4 to the buyer, and the transfer was duly registered by company; the buyer was also represented as shareholder to several parties during agreements. However, the purchase consideration was not paid by the buyer, and hence the seller of the shares claimed that the property / title in the shares did not pass onto the buyer.

The High Court held that the transfer is not incomplete merely because of non-payment by seller of purchase consideration and that seller cannot repudiate the contract for sale of shares; this is especially when buyer did not reserve any right or lien of unpaid seller in the agreement for sale of shares.

C. SEBI / RBI / Other Highlights

1. SEBI: Consultation paper on verification of market rumours¹³

Recently notified Regulation 30(11) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, requires, with effect from February 1, 2024, top 100 listed companies,

¹¹ Bennett Coleman and Co Ltd c Addl CIT 2011 (9) TMI-ITAT

¹² Shashvat Nakrani v Ashneer Grover [Delhi HC] dated December 15, 2023 [2024] 158 taxmann 453 (Delhi)

¹³ Consultation Paper on Amendments to SEBI Regulations with respect to Verification of Market Rumour dated December 28, 2023

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(and with effect from August 1, 2024, top 250 listed companies), to verify and confirm, deny or clarify market rumours reported in the mainstream media.

To bring more clarity to the 'rumour verification requirement', SEBI has published a consultation paper seeking comments and views on the following proposals:

- a. The rumour verification requirement is proposed to be applicable if there is a material price movement in the securities of the listed entity due to the rumour; where the material price movement may be determined based on percentage variation in the price depending upon their price range, as well as movement of the benchmark index (Nifty50 / Sensex).
- b. Since market price of the shares of the listed entity is affected upon confirmation of market rumours, the unaffected price is proposed to be made applicable and operational for a period of 60 days from the date of confirmation of the market rumour till the 'relevant date' under the extant regulations (public announcement, board approval, etc., as the case may be). However, in case of a competitive bidding process for a potential M&A deal, where the sole / exclusive bidder has not been identified, the unaffected price is proposed to be applicable for a time period of 180 days. Two frameworks for calculating unaffected prices have been proposed in the consultation paper.
- c. Unverified market rumours pertaining to unpublished price sensitive information ("UPSI") proposed to continue to be treated as UPSI, and not 'generally available information'.

Katalyst Comment:

While the consultation paper has considered the competitive bidding process in case of a mergers and acquisitions deal, an unaffected price concept would lead to several complications in other forms of deals within the same universe.

2. FEMA: Receipt and Payment between PRI and PROI¹⁴

The RBI notified Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023, in supersession of erstwhile regulations notified in 2016¹⁵, dealing with the manner of making or receiving payment by a person resident in India to or from a person resident outside India, through an Authorised Bank or Authorised Person, in supplement to the FEMA Act and relevant rules and regulations.

¹⁴ Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023, vide Notification No. FEMA 14(R)/2023-RB dated December 21, 2023

¹⁵ Notification No. FEMA 14(R)/2016-RB dated May 02, 2016

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The notification segregates the applicable regulations into trade transactions (import and export of goods and services) and non-trade transactions. It specifies the mode of payment based on whether the receipt or payment is made from or to Nepal or Bhutan, a member country of the Asian Clearing Union, or other countries.

It further clarifies that any current account payment or receipt in India other than trade transactions between any person resident in India and a person resident outside India, who is on a visit to India, may be made only in Indian Rupees.

Katalyst Comment:

The erstwhile regulations did not have such a distinction between trade and non-trade transactions.

3. FEMA and Companies Act: Listing on international exchanges in GIFT City¹⁶

The Ministry of Finance has amended Foreign Exchange Management (Non-debt Instruments) Rules, 2019 and notified the 'Direct Listing of Equity Shares of Companies Incorporated in India on International Exchanges Scheme'. Simultaneously, Ministry of Corporate Affairs also notified Companies (Listing of Equity Shares in Permissible Jurisdictions) Rules, 2024.

Jointly, these allow direct listing of securities by Indian public companies on International Exchanges of the GIFT IFSC. The framework also allows unlisted public Indian companies to list their shares on an international exchange; SEBI is in the process of issuing operational guidelines for listed public Indian companies.

Certain key aspects are as given below:

- The company intending to issue such shares can be a company not yet listed in India; shareholders of such a company can also make an offer for sale
- Only non-residents will be permitted to invest
- The offering (fresh issue or offer for sale by existing shareholders) is subject to FPI investment limits
- The offering is subject to prohibited sectors / sectoral guidelines
- Pricing guidelines, as applicable, will also apply

Katalyst comment:

The key impact of this amendment is as follows:

- *It will allow companies to access a wider investor base*
- *Companies can fetch a better valuation*
- *Neutralises the foreign exchange risks in forex transactions*

¹⁶ Foreign Exchange Management (Nondebt Instruments) Amendment Rules, 2024 dated January 24, 2024; Companies (Listing of equity shares in permissible jurisdictions) Rules, 2024 dated January 24, 2024

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4. Draft Indian Stamp Bill, 2023

The Ministry of Finance, with an intent to align with the modern stamp duty regime, and replace the Indian Stamp Act, 1899, notified draft Indian Stamp Bill, 2023.

The key highlights of the draft bill are as follows:

- e-Stamping: An electronic stamp or e-stamp is proposed to be included in the definition of impressed stamp to mean an electronically generated impression denoting the payment of stamp duty by electronic means or otherwise; and includes digital / paperless e-stamp.
- Electronic records: The definition of 'instrument' is proposed to be expanded to include electronic records.
- Several instruments used in a single transaction: Where several instruments are employed for completing a transaction of sale, mortgage, and settlement, the Indian Stamp Act, 1899, prescribes that only the principle instrument would be chargeable with stamp duty. This provision is proposed to be extended to transactions of gift or lease.
- Debentures and gift deeds: It is proposed to be clarified that in the case of debentures and gift deeds, stamp duty shall be payable by the person drawing, making, or executing such instruments.

5. SC: Adani-Hindenburg Verdict¹⁷

In the background of the year long discussion surrounding the alleged stock manipulation by Adani group of companies, stemming from the report published by Hindenburg Research, and subsequently another report published by OCCRP, resulting in a SEBI investigation, the Supreme Court bench, led by the Chief Justice, dismissed reliance on third-party reports and instead relied on the investigations being conducted by SEBI, and denied a transfer from SEBI to a Special Investigation Team.

The key highlights from the verdict are as follows:

- Courts do not act as appellate authorities over the policies framed by SEBI, and may only interfere when the actions are arbitrary or violative of constitutional or statutory mandates
- The regulations applicable to FPIs have not been diluted, but instead tightened by making disclosure mandatory
- Mere 10-day delay by SEBI on filing a status report with the apex court does not amount to inaction or regulatory failure, and SEBI asked to complete the pending investigations in three months

¹⁷ Vishal Tiwari v Union of India % Ors., Supreme Court, dated January 3, 2024

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- Loss sustained by Indian investors as a result of the volatility caused on short position taken by Hindenburg Research and affiliated entities to be probed
- Recommendations made by the Expert Committee in its report in May 2023, to strengthen regulatory framework and secure compliance to protect investors, to be followed.

6. Orissa HC: Court have limited power to interfere in arbitral awards¹⁸

Appellant approached the court on matter under the Arbitration and Conciliation Act, 1996, aggrieved by the award of the sole arbitrator regarding escalation charges.

Orissa High Court remarked that courts have limited power to interfere with an arbitral award and cannot adjudicate in matter related to interpretation of contract, determination of facts, errors on application of law, reassessment or re-appreciation of evidence as the arbitrator is the master judge for qualitative and quantitative interpretation of contract, facts, evidence and relevant application of law to them; the range of the jurisdiction of the court is restricted to checking the arbitral award being not arbitrary, perverse or patently illegal going against public policy or vitiated by fraud, bias and corruption.

Hence, the Orissa High Court rejected the appeal under the Arbitration Act.

D. Goods and Service Tax Highlights

1. Allahabad HC: Typographical error in e-way bill cannot invite penalty if intent to evade tax is absent¹⁹

Allahabad High Court quashes order of penalty for typographical error of mentioning vehicle number in the e-way bill. The court held that penalty should be not levied without any material to substantiate the intention to evade tax. This apprised that the principle of mens rea of criminal intent for evasion of tax is essential for imposition of penalty and in absence of intent to evade tax, no penalty is payable.

2. Madras HC: Taxability of gift voucher at the time of its issuance²⁰

The Madras HC has held that if a gift voucher is for a specified item of merchandise of specified value, tax is payable at the time of its issuance, which will be considered as the time of supply. On the other hand, if there is no specification and hence no supply, time of supply will get postponed to the actual time of redemption of the voucher on sale of merchandise when such gift voucher / card is presented by the customer.

¹⁸ Dhiren Kumar Singh v State of Odisha & Ors (High Court of Orissa) ARBA No. 27 of 2022 [LSI-1252-HC-2023(ORI)] dated November 10, 2023

¹⁹ Hindustan Herbal Cosmetics vs. State of U.P. and Ors [TS-01-HC(ALL)-2024-GST]

²⁰ Tvl.Kalyan Jewellers India Pvt Ltd vs. UOI & Ors. [TS-704-HC(MAD)-2023-GST]

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Katalyst comment:

The AAR and AAAR had earlier ruled that all 'gift voucher' is taxable at the time of issuance; however, the Madras HC has now clarified that taxability of gift voucher depends upon terms at the time of issuance of voucher and time delivery of goods and not merely at the time of issuance of voucher itself.

3. Gujarat HC: Refund allowed in case of export of goods without payment of tax where drawback was also claimed²¹

Gujarat High Court has allowed refund by setting aside a refund denial order in case of export of goods without payment of tax where a higher drawback rate was selected at the time of export. The court observed that the Circular²² relied upon by the Revenue does not pertain to IGST refund and hence, the assessee is entitled to refund along with simple interest of 7%.

4. Gujarat AAR: ITC of goods and services used to procure 'rooftop solar plant'²³

The applicant capitalised the cost of goods and services used to procure a 'rooftop solar plant', including its installation and commissioning services. The Gujarat Authority for Advance Ruling observed that a rooftop solar plant is not embedded to the earth and accordingly, it is not an immovable property, but a plant and machinery, which is utilized to generate electricity, and will not be a blocked credit; hence, input tax credit can be claimed.

²¹ Ramdev Chemical Industries vs. State of Gujarat [TS-703-HC(GUJ)-2023-GST]

²² Customs Circular no. 37/2018 dated October 9, 2018

²³ Unique Welding Products Pvt Ltd [TS-04-AAR(GUJ)-2024-GST]