KATALYST
ADVISORS PVT. LTD.

Katalyst Kaleidoscope

July 2021: Tax and Regulatory Insights

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A. Income Tax highlights

1. CBDT issues guidelines on partnership firm taxation on reconstitution and dissolution of firms[1]

Pursuant to the insertion of Section 9B and substitution of Section 45(4) of the Income tax Act, 1961 (hereinafter referred as "ITA") by the Finance Act, 2021, the CBDT has issued guidelines under Section 9B(4) of the ITA. As per the newly inserted Section 9B, whenever a partner receives capital asset or stock in trade or both from a partnership firm in a previous year, in connection with the dissolution or reconstitution of such partnership firm, then it shall be deemed that the partnership firm has transferred such capital asset or stock in trade or both, as the case may be, to the partner (hereinafter referred to as "deemed transfer"), and taxable as income of the partnership firm under the head "Profits and gains of business or profession" or "Capital Gains", in accordance with the provisions of the ITA. The FMV of the asset shall be deemed to be the full value of the consideration for the purpose of computation of gains *(This is elaborately dealt with in our earlier release for the month of March, 2021: katalyst-kaleidoscope-march-2021.pdf (katalystadvisors.in))*.

Also, substituted section 45(4) of the ITA provided that where a partner receives any money or capital asset or both from a partnership firm on reconstitution, the profits arising shall be chargeable to income-tax as income of the partnership firm under the "Capital gains".

In furtherance of the aforementioned provisions, the CBDT has issued specific guidelines (with the help of illustrations) as below. Also, CBDT has issued Notification[2] to insert sub-rule 5 to Rule 8AA and a new rule 8AB so as to prescribe the manner of calculating the income chargeable to tax under section 45(4) of the Act as "capital gains" and also the manner in which such income shall be attributed to remaining assets with the partnership firm under clause (iii) of section 48 of the Act.

(i) Amount taxed u/s 45(4) of the ITA is to be attributed to the remaining capital assets of the partnership firm, so that when such capital assets are transferred in future, the amount attributed to such capital assts gets reduced from the full value of the consideration and to that extent the partnership firm does not pay tax again on the same amount – Rule 8AB brought by specific notification;

(ii) For capital assets forming part of block of assets, WDV is determined by Section 43(6)(c) of the ITA and capital gains of such assets is determined by Section 50 – In

[1] CBDT Circular No. 14 of 2021 dated July 2, 2021
[2] Notification No. 76/2021 dated July 2, 2021

order to clarify that the amount taxed u/s 45(4) could also be attributed to capital assets forming part of the block of assets, Rule 8AB of the IT Rules would also apply to such capital assets.

Katalyst Comments:

Section 9B and substituted section 45(4) are relatively new provisions. The above guidance by the CBDT seeks to address difficulties relating to computation under the newly introduced provisions.

2. Delhi ITAT: Funds in overseas bank account cannot be taxed in the hands of Indian resident, if he is not a beneficial owner

The Assessee had settled a revocable trust in April 2005, with Merrill Lynch Bank and Trust Company (Cayman) Ltd as the Trustee and his sons and grandson as beneficiaries. The Memorandum of Family Arrangement provided that the son of the Assessee, an NRI, was to form a Trust in any tax free jurisdiction and the Assessee would be made the nominal settler for the said Trust out of love and respect. No settling amount or any other sum was to be contributed by the Assessee in the said Trust; the purpose of the Trust would be the furtherance of education/vocation/technical skills and for the furtherance of research on Hindu scriptures. Total Corpus of the Trust would be USD 250,000, out of which USD 50,000 was to be contributed by the son of the Assessee and the balance USD 200,000 was to be raised from friends, associates, and affiliates. The trust deed was revoked in Nov 2011, and the funds were transferred to the overseas bank account held by a BVI incorporated company. Also, based on information received under Exchange of Information article of India-Singapore DTAA, the AO found that the Assessee was the beneficial owner of the overseas bank account, showing a credit of USD 834,025 and issued a notice to the assessee u/s 10(1) of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ('BMA'). The AO treated it as undisclosed foreign income and assets under the BMA, and passed an order u/s 10(3) of the BMA, determining assessee's total income including such bank balance.

Assessee submitted that the overseas bank account is in the name of the company where his son is the sole shareholder and director, and Assessee has neither contributed nor invested any amount to the account. Assessee further submitted that his name was mentioned as beneficial owner out of gratitude and respect shown by his son.

The Delhi Income Tax Appellate Tribunal ("ITAT")[3] referred to the provisions relating to taxability of undisclosed assets located outside India under BMA, and notes following conditions to be fulfilled:

(i) There has to be an asset located outside India;
(ii) The asset must be in the name of the Assessee which can also be held by the Assessee as beneficial owner; and
(iii) No explanation is offered by the Assessee about the source of such investment, or in the opinion of the AO, the information offered is not satisfactory.

ITAT examined the term "beneficial ownership" on a touchstone of various statues including Income-tax Act, Prevention of Money Laundering Act, The Benami Property (Prohibition) Act and Black's Law and Webster's dictionaries to conclude that in the instant case, the Assessee fails the test of beneficial ownership. The ITAT observes that the mere account opening form (where the assessee is mentioned as the beneficial owner of the account, mentioning details of his passport as an identification document) does not necessarily, in absence of any other corroborative evidence of the beneficial ownership of the assessee, over that for an asset cannot lead to taxability in the hands of the assessee under BMA. ITAT relies on the Mumbai bench ruling in case of Kamal Galani[4], wherein under similar facts, additions of money lying in foreign bank account was deleted under Income-tax Act, 1961.

Katalyst Comments:

The evidence verified in the case being "Bank account opening form" which mentions the name of assessee, shows the extent of information being exchanged across borders and the depth of verification by revenue authorities. In addition to the above, this order briefly deals with the concept of "beneficial ownership" and holds that mere mention of assessee's name on the form will not make him beneficial owner. One should be mindful of reporting the assets in Schedule FA of the Return of Income.

3. 130 countries agree on a new international corporate tax framework

130 countries, representing more than 90% of global GDP, have joined the two-pillars plan to reform international taxation rules and ensure that Multinational Enterprises (MNEs) pay a fair share of tax wherever they operate. A small group of the Inclusive Framework's 139

[3] Jatinder Mehra [128 Taxmann.com 152 (DEL)]
[4] TS-498-ITAT-2020 (Mum ITAT)

members have not yet joined the Statement. This includes countries like Barbados, Estonia, Ireland, Hungary, Kenya, Nigeria, Saint Vincent, Sri Lanka and The Grenadines.

The framework aims to update key elements of the century-old international tax system, which is no longer fit for purpose in a globalized and digitalized 21st century economy. The two-pillar package, which is the outcome of negotiations coordinated by the OECD during the last decade, aims to ensure that large MNEs pay tax where they operate and earn profits, while adding much-needed certainty and stability to the international tax system.

Under Pillar One, a formula-based share of consolidated profit of a MNE will be allocated to markets i.e., where sales arise. For application of Pillar One, profitability threshold and turnover threshold has been prescribed for the MNEs. The percentage of profit that will be allocated, once the thresholds are met, has also been provided for. Key sectors which have been kept out of the purview of Pillar One are extractive industries and regulated financial services. Pillar One will ensure a fairer distribution of profits and taxing rights among countries with respect to the largest MNEs, including digital companies. It would re-allocate some taxing rights over MNEs from their home countries to the markets where they have business activities and earn profits, regardless of whether firms have a physical presence there. Under Pillar One, taxing rights on more than USD 100 billion of profit are expected to be reallocated to market jurisdictions each year.

Under Pillar Two/ GloBE, the OECD/ G20 Inclusive Framework on BEPS (IF) members have agreed to enact a jurisdictional-level minimum tax system with a minimum effective tax rate (ETR) of at least 15%. Key exclusions from Pillar Two are pension funds or investment funds that are Ultimate Parent Entities (UPE) of an MNE or holding vehicles used by such entities, organisations or funds. The Pillar Two seeks to put a floor on competition over corporate income tax, through the introduction of a global minimum corporate tax rate that countries can use to protect their tax bases. The global minimum corporate income tax under Pillar Two, with a minimum rate of at least 15%, is estimated to generate around USD 150 billion in additional global tax revenues annually.

Katalyst Comments:

There are many technical details to work out before the October deadline, as agreed by the IF members, including the method used to calculate the amount of taxes to be redistributed. The two-pillar package will provide much-needed support to Governments needing to raise necessary revenues to repair their budgets and their balance sheets while investing in essential public services, infrastructure and the measures necessary to help optimise the strength and

the quality of the post-COVID recovery. The implementation is a major challenge and the Indian response, and impact on India needs to be seen.

4. Chennai ITAT: Set-off of accumulated losses denied on amalgamation for non-fulfilment of 75% shareholding u/s 2(1B)(iii) on Appointed date

Assessee-Company absorbed Espiern Plastics Limited (EPL) and claimed set off of accumulated losses of EPL to the extent of Rs.7.04 Cr. for AY 2014-15. Assessee held 26% shares of EPL as on April 1, 2013, balance 74% were bought on February 14, 2014. Assessee Company moved a petition for amalgamation, which was sanctioned by Madras High Court on April 28, 2014, with the appointed date of April 1, 2013. On Assessee's claim of set off of accumulated losses of EPL, Revenue held that requirements of section 2(1B) were not fully satisfied on the court appointed date (assessee company did not have 3/4th of the shares of the transferor company as on March 31, 2013, the appointed date being April 1, 2013) and therefore the Assessee was not entitled to claim carry forward and set off of loss u/s 72A. Assessee contended that the shareholders of amalgamating company would be vested with the right/ interest arising from the scheme of amalgamation only upon scheme becoming effective and pleaded effective date has to be regarded for compliance of conditions specified u/s 2(1B)(iii).

Chennai ITAT[5] dismissed Assessee's appeal, holding Assessee was not entitled to carry forward and set off of loss of the transferor company. It further noted that it's a settled law that once amalgamation is approved, the amalgamating company ceasing to exist, it can't be regarded as a person u/s 2(31) of the ITA against whom assessment proceedings can be initiated or an order of assessment passed. Therefore, appointed date, April 1, 2013, is crucial in this case. ITAT finds that it was not in dispute that Assessee was holding only 26% of equity shares in EPL as on March 31, 2013. ITAT held that since the assessee did not have 3/4th of the shares of the transferor company as on March 31, 2013, the appointed date being April 1, 2013, assessee shall not be eligible to claim carry forward and set off of losses of the transferor company as on March 31, 2013.

Katalyst Comments:

This order clarifies that to be a tax neutral amalgamation, in accordance with the provisions of the ITA, compliance as to the conditions of a merger are to be tested as on the "Appointed date", as approved under the scheme of amalgamation.

[5] Roca Bathroom Products Pvt. Ltd [TS-508-ITAT-2021(CHNY)]

5. Mumbai ITAT: "Doubting" Delhi Bench ruling in Giesecke & Devrient, refers question of beneficial treaty-rate over DDT to Special Bench

Assessee, being an Indian Company, paid dividend to its shareholders in France and sought to pay DDT at the lower rate prescribed under India-France DTAA for AY 2016-17 by relying upon Delhi and Kolkata Bench rulings in Giesecke & Devrient and Indian Oil Petronas.

Mumbai ITAT, in the Assessee's case[6], has expressed 'doubts' over the correctness of certain decisions rendered by co-ordinate benches of the Tribunal on the issue of tax treaty applicability to dividend distribution tax (DDT). ITAT gave the following key reasons/ perspectives –

(i) DDT should be considered as a tax on the company and not shareholders, hence treaty protection for resident company not available in the absence of a specific provision *(Supreme Court ruling in Godrej & Boyce Manufacturing Company Limited v. DCIT (2017) 394 ITR 449 (SC));*

(ii) Where intended, tax treaty provisions specifically provide for treaty application to taxes like DDT (like India-Hungary Tax Treaty);

(iii) Tax treaties do not envisage any tax credits in the hands of the shareholders in respect of DDT paid by the company in which shares are held. The Tribunal reasoned that in such a case, DDT cannot be equated with a tax paid by or on behalf of a shareholder;

(iv) Foreign jurisprudence [ruling of the South African High Court in Volkswagen of South Africa (Pty) Ltd v Commissioner of South African Revenue Service (Case no. 24201/2007)] on taxes like DDT support the above view;

(v) No extension in the scope of treaty benefits w.r.t taxes paid by Indian tax-resident is envisaged by non-discrimination clause under India-France DTAA;

(vi) Taxation is sovereign's power and DTAA is a self-imposed limitation on states' inherent right to tax and "Inherent in the self-imposed restrictions imposed by the DTAA is the fact that outside of the limitations imposed by the DTAA, the State is free to levy taxes as per its own policy choices;

[6] Total Oil India Pvt. Ltd. [TS-473-ITAT-2021(Mum)]

(vii) It is a macro issue affecting virtually every company which has shareholders in the country with which India is a tax treaty partner and also has substantial revenue implications.

Having expressed doubts over the correctness of those decisions, the ITAT has requested the President of the Tribunal to constitute a 'Special Bench' (comprising three or more Tribunal members) to adjudicate on this issue.

Katalyst Comments:

This issue though irrelevant for future years (owing to the change in the manner in which Dividend payouts are taxed), decision of SB will serve as a useful guidance for the pending cases in relation to the said issue.

6. Delhi High Court: Revenue expenditure is deferrable only when specified, allows one-time lease rent on crystallisation

The Assessee-Company, Coforge Limited (formerly, NIIT Ltd) during AY 2007-2008, executed a lease deed with Greater Noida Industrial Development Authority (GNIDA) for 90 years. The Assessee, under the lease deed, had an option either to pay annual rent of Rs.7.08 lacs during the tenure of the lease, or pay a commuted and discounted one time lease rent of Rs.77.98 lacs, which was 11 times the annual lease rent. The Assessee opted to pay the commuted lease rent and claimed it as business expenditure. AO disallowed the lease rent on the basis that it resulted in enduring benefit and thus was classifiable as capital expenditure. However, CIT(A) deleted the disallowance and held that the expenditure was incurred wholly and exclusively for the business purpose. ITAT accepted the classification of the commuted lease rent as revenue expenditure, but directed the Assessee to be spread the expense over the tenure of the lease, i.e., 90 years, applying the matching principle of accounting.

Delhi HC allows[7] assessee's appeal, holding that ITAT erred in applying the matching principle. HC noted that matching principle is an accounting concept, which requires entities to report expenses at the same time as the revenue, and considering the facts of instant case, it would have no applicability. HC accepted Assessee's argument that there is no concept of deferred revenue expenditure under the Act and observes that an expenditure can be spread over a time span only if it is so provided in the Act. HC refers to SC ruling in Taparia Tools Ltd wherein it was held that it has been explained in various judgments that there is no concept of deferred

[7] TS-527-HC-2021(DEL)

revenue expenditure in the Act except under specified sections, i.e., where amortization is specifically provided, such as Section 35-D of the Act.

Katalyst Comments:

The subject of capital vs revenue expenditure has been a prominent issue and there have been number of judgements in the past, where Revenue has contested in similar lines as that of ITAT in the present case (i.e., spread the expense in the years of benefit derived). The judgement will now clarify that the expense is either capital in nature or revenue in nature, and not deferred revenue. The concept of deferred revenue is only for such expenditure which is specified in the ITA to be so.

7. Karnataka High Court: Overturns Special Bench ruling in Nandi Steels allowing set-off of brought-forward business-loss against capital gain

The Assessee Company (Nandi Steels Ltd.) for AY 2003-04 had set-off brought forward business loss against capital gains arising from sale of land along with building and borewell which was disallowed by the Special Bench.

Karnataka HC[8] overturned ITAT Special Bench order that had decided against set-off of brought forward business loss against capital gains. HC noted the following while ruling in favour of the Assessee:

(i) Attention has to be paid to what has been said and what has not been said and observed that Sec. 72(1) employs the expression "under the head Profits and gains of business or profession" whereas clause (i) of Sec. 72(1) does not use the words "under the head", thus, the "legislature has consciously left it open that any income from business though classified under any other head can still be entitled to the benefit of set off" - SC ruling in GVK Industries[9] where SC dealt with *legal maxim expressio unius est exclusio alterius* and held that expressed mention of one thing implies the exclusion of another;

(ii) In Express Newspapers[10] (followed by ITAT Special Bench), the question whether income from capital gains had character of business income was not even considered;

[8] TS-483-HC-2021(KAR)
[9] 332 ITR 130 (SC)
[10] 53 ITR 250 (SC)

(iii) SC ruling in Cocanada Radhaswami Bank[11] (distinguished by ITAT Special Bench) dealt with the set off of brought forward business loss against the entire income including income from interest on securities - SC in Cocoanada Radhaswami Bank dealt with the applicability of Express Newspapers and held that the ruling was on the character of capital gains and not about their non-inclusion under the head "business"

HC, thus, follows the exposition of law in Cocoanada Radhaswami Bank to answer the questions of law in favour of the Assessee and held that Assessee was entitled to set-off brought forward business loss against income which has the attributes of business income even though the same is assessable to tax under a head other than profits and gains from business.

Katalyst Comments:

In the context of set-off of brought forward losses, it has been a long-standing practice that they are set-off only against income within the same head of income. Whether tax returns / utilities provide such kind of adjustment needs consideration.

B. Corporate Law Highlights

1. NCLAT allows dispensation of equity shareholders and creditors meeting for amalgamation of WOS into Parent

NCLAT allows application[12] filed by Transferor and Transferee Companies u/s 230 and 232 of the Companies Act, 2013, seeking dispensation of Equity Shareholders', Secured Creditors' and Unsecured Creditors' meeting in respect of the scheme of Amalgamation of both the entities, holding that:

(i) NCLT ought to have exercised discretion to save time and resources;

(ii) Transferor Company is a wholly owned subsidiary of the Transferee Company and was acquired as a business supportive mechanism for ease of operations;

(iii) Amalgamation of the business of both the Companies would result in simplification of the corporate structure and elimination of duplicate corporate procedure;

[11] 57 ITR 306 (SC)

[12] Order dated June 28, 2021 passed by NCLAT, arising out of Order dated March 10, 2021 passed by NCLT, Ahmedabad Bench in C.A. (CAA)/6(AHM)2021) in the case of Mohit Agro Commodities Processing Pvt Ltd. (Transferor Company) and Gujarat Ambuja Exports Ltd. (Transferee Company)

(iv) Amalgamation was approved by the Board of Directors of both Companies;

(v) The rights and liabilities of secured and unsecured creditors were not getting affected in any manner by way of the proposed scheme as no new shares were being issued by the Transferor company, and no compromise was offered to any creditor of the Transferee company.

Therefore, NCLAT sets aside the directions issued by NCLT in respect of Transferee company, to convene the meetings of the Equity Shareholders, Secured Creditors and Unsecured Creditors.

Katalyst Comments:

Though decision as to the procedure on conducting secured and unsecured meetings surprisingly differs across different benches of the NCLT, this decision will serve as a welcome move and guidance for all the NCLTs. Conducting meeting for secured and unsecured creditors takes a lot of time and energy, and it makes a lot sense if the meetings are dispensed with, particularly when a WOS is being amalgamated into Parent.

2. NCLT approves reduction of Equity and Preference Share Capital without reference to the RBI in respect for foreign shareholders

The petitioner company, Druva Software Private Limited, files this Petition[13] u/s 66 of the Companies Act for reduction of Share Capital.

Learned Counsel for the Petitioner Company submitted that, the Company has passed a special resolution on July 19, 2018, for the reduction of its paid-up equity share capital, by extinguishing and cancelling equity shares held by the shareholders, other than 6,229 equity shares held by Durva Technologies Pte. Ltd and 1 equity share held by Mr. MB, without any payment. Further, the special resolution also authorised the extinguishment and cancellation of the Compulsory Convertible Participant Preference shares, without any payment.

The Regional Director (RD) filed his Report and observed, inter-alia, that, the applicant has to undertake to serve notice to RBI as some of the shareholders were foreign entities. The Company responded the following to the RD's observations:

(i) The transaction complied with the pricing guidelines as applicable for an Indian Company to undertake Reduction of Capital as per the provisions of the Foreign

[13] In the matter of Druva Software Private Limited, CP 3268/MB-I/ 2018, NCLT, Mumbai, dt. February 2, 2021

Exchange Management Act, 1999 along with rules and regulations issued thereunder from time to time (FEMA);

(ii) There is no requirement to serve notice to the RBI to give effect to the petition;

(iii) The Company undertook to comply with all the post-facto reporting/ filings to be done with RBI under FEMA.

In view of the above, the petition for reduction of share capital was allowed.

3. NCLT approves post-delisting exit opportunity to the minority shareholders through a Scheme of Arrangement

The present Petition[14] was filed under, inter-alia, u/s 230 read with Section 66 of the Act. According to the Petitioner Company, as on December 31, 2018, total shares held by its promoters aggregated 98.11%, the remaining shares i.e., 1.89% were held by the Minority Shareholders. As part of the Scheme, the Applicant Company intended to cancel and extinguish 7,34,688 equity shares (i.e., 1.89%) held by the Minority Shareholders, by paying cash in lieu of the equity shares held by them for the following reasons:

(i) As there were no operations and company was incurring continuous losses, the promoters had provided delisting exit offer during the year 2014.

(ii) Considering the declining performance of the company over the past several years, which had also adversely impacted the liquidity status of the Company's Equity Shares, the promoters of the Company, as a good gesture and considering long standing relationship with the shareholders, had now offered another exit opportunity to the public shareholders.

(iii) The promoters had made an offer to the public shareholders for the acquisition, upon voluntary delisting, of equity shares of INR 10 each of the Company, at an exit price of INR 40 per share, calculated by the reverse book building process (as against the floor price of INR 30).

(iv) The Company had been receiving numerous requests from the Minority Shareholders to provide an exit option by way of buying their shares, as they could not participate in Delisting offer. The Scheme of Arrangement provided an opportunity to Minority

[14] In the matter of Novopan Industries Limited, CP (CAA) No. 432/230/hdb/2019, NCLT, Hyderabad Bench, dated June 18, 2021

Shareholders to liquidate their entire shareholding in respect of the equity shares held by them. According to the valuation report, the Fair Value of each share worked out to Rs. 32/-. However, the promoters decided to offer INR 40/- per share, which was the price arrived at by reverse book building mechanism during the Delisting process.

The NCLT observed/ held that:

(i) There were applications filed by ex-employees of the Petitioner Company to settle their outstanding dues. In this regard, it was contended that the Company was not going to get dissolved post sanctioning of the present Scheme and the said employees would always have a window to settle their unpaid dues, if any. Further, the Scheme involved arrangement between the shareholders and the Petitioner Company. In view of the above, such applications were closed.

(ii) The RD was of the opinion that, the Company ought to have gone for voluntary liquidation due to its continuous losses and no operations, whereas the Company had come out with a Scheme of Arrangement and intended to wipe out Minority Shareholders by making payment from Reserves. Hence, the Company may be directed to place full facts about the rationale of the Scheme. In response, the Company submitted that, it was only to provide an exit route to the Minority Shareholders. It had no intention to go for liquidation and hence the company preferred to have a Scheme of Arrangement.

In view of the above, the aforesaid Scheme appeared to be fair and reasonable, not contrary to public policy and no violative of any provisions of law. Accordingly, the same was approved.

Katalyst Comments:

The Scheme could have been filed only under Section 66 of the Companies Act, 2013. However, apparently, the Company has filed the Scheme under section 230-232 read with Section 66 out of abundant caution and to achieve greater level of transparency and to secure full involvement of the shareholders of the Petitioner Company.

C. Securities' Law Highlights

1. SEBI approves key amendments in meeting dated June 29, 2021

SEBI has, inter-alia, approved following key amendments in its press release dated June 29, 2021[15]:

(i) **Revamped framework of issue and listing of debt securities**:

- Merger of SEBI (Issue and Listing of Debt Securities) Regulations, 2008 and SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 into a new regulation called "SEBI (Issue and Listing Non-Convertible Securities) Regulations, 2021 ("SEBI NCS Regulations");
- New Issuers with less than 3 years of existence permitted to tap bond market through private placement of bonds on Electronic Book Provider (EBP) platform;
- Requirement of minimum issue size of ₹100 Cr for NCD Public Issue has been removed;
- Restriction of maximum 4 tranches through single shelf prospectus has been done away with;
- EBP Platform mandatory for private placement of NCDs changed to ₹100 Cr in a FY (as against existing limit of ₹200 Cr);
- Format of abridged prospectus is streamlined to around 10 pages from over 50 pages.

The aforesaid amendments shall come into force from the dt. of notification of SEBI NCS Regulations.

(ii) **Amendment in provisions of the SEBI (LODR) Regulations, 2015 pertaining to regulatory provisions of Independent Directors (IDs) which, inter-alia, include:**

- Passing of special resolution for appointment/ reappointment/removal of IDs;

[15] SEBI Press Release PR No. 22/2021, June 29, 2021

- Composition of Nomination and Remuneration Committee (NRC) changed to have at least 2/3rd IDs (as against 50% of the directors being IDs);

- Cooling off period of 3 years has been introduced for KMPs (their relatives) or employees of promoter group companies, for appointment as an ID;

- At least 2/3rd of the members of the audit committee shall be independent directors and all related party transactions to be approved by only IDs on the Audit Committee;

- Requirement of undertaking Directors & Officers insurance has been extended to top 1,000 companies based on market capitalization (previously top 500 companies by market capitalization);

- Reference to MCA for giving greater flexibility to companies while deciding the remuneration for all directors (including IDs) which may include profit inked commissions, sitting fees, ESOPs, etc., within the overall prescribed limit specified under Companies Act, 2013.

The aforesaid amendment shall be applicable with effect from January 1, 2022.

(iii) **Other Amendments:**

- Amendment in SEBI (Prohibition of Insider Trading) Regulations, 2016 to increase the reward to informant from INR 1 Cr to INR 10 Cr.

- Amendments in SEBI (Bankers to an Issue) Regulations, 1994 to permit banks other than scheduled bank to register as Banker to an Issue.

- Amendments in SEBI (Mutual Funds) Regulations, 1996 to provide for investment of a minimum amount as skin in the game in the Mutual Fund (MF) schemes by Asset Management Companies (AMCs) based on the risk associated with the scheme, instead of the current requirement of one percent of the amount raised in New Fund Offer or an amount of INR fifty lacs, whichever is less.

The aforesaid amendments shall come into force from the dt. of notification of relevant amendment Regulations.

Katalyst comments:

The amendments made are quite comprehensive and will have far reaching regulatory implications.

2. SEBI relaxes minimum vesting period requirement for ESOPs, to aid deceased employees' families

With the intent to provide relief to the families of the deceased employees of listed companies on account of COVID -19, the SEBI, vide Circular[16] dt. June 15, 2021, decided that minimum vesting period of one year under ESOP and SAR shall not apply in case of death (for any reason) of an employee and in such instances all the options, SAR or any other benefit granted to such employee(s) shall vest with his/ her legal heir or nominee on the date of death of the employee.

This relaxation shall be available to all such employees who have deceased on or after April 1, 2020.

Katalyst Comments:

This is a welcome move particularly in such critical scenarios that may occur as a result of the ongoing pandemic.

3. Stock Exchanges issue guidance[17] note on Analyst/ Institutional Investors Meet

While referring to the disclosure of schedule and outcome of Meets under the LODR, SEBI has advised the stock exchanges to issue guidance under the SEBI (Prohibition of Insider Trading) Regulations, 2015 to listed entities. Therefore, as per the Guidance dt. June 29, 2021, issued by BSE & NSE, all listed companies shall be required to disclose audio recordings or transcripts of information, if Unpublished Price Sensitive Information is shared during the analysts/ research personnel/ investor meet (attended by persons representing the Company, whether one on one or group meet), irrespective of whether the said meet was organized by the Company or any other entity.

[16] Circular SEBI/HO/CFD/CIR/P/2021/576 dated June 15, 2021
[17] BSE & NSE Circulars dated June 29, 2021

D. Other Highlights

1. Bombay HC dismisses petition challenging SEBI Circular prescribing modes of charging fee by Investment Advisers

In this case, the petitioner, being an investment adviser, submitted that (i) SEBI has no authority under the SEBI Act to make regulations concerning fees to be charged by Investment Advisers, (ii) making of the impugned Regulation 15A of SEBI (Investment Advisers) (Amendment) Regulations, 2020 and prescribing fees under Circular[18] tantamount to a breach of the Petitioner's fundamental right to practice a profession or business of its choice, (iii) restrictions introduced by the Regulation and the Circular amount to unreasonable restrictions on the Petitioner's business or profession.

Bombay HC dismissed the petition remarking that:

(i) the impugned Regulation as well as the Circular does not in any way prohibit any party from carrying on the business or profession of Investment Adviser;

(ii) the nature and manner of measures, which can be adopted by the SEBI for giving effect to the functions assigned to it, have been left to the discretion and wisdom of the SEBI, such discretion not being curtailed or whittled down in any manner by any other provision of the SEBI Act;

(iii) specification of the manner of charging fees by Investment Advisers and fixation of a ceiling of such fees by the SEBI does not amount to imposition of tax or fee, it is simply a measure of regulation of the business of Investment Advisers in the interest of investors and for healthy growth of the securities market;

(iv) power to make such regulation is specifically delegated to the Board by virtue of Section 30 of the SEBI Act read with Section 11 of the Act.

Katalyst Comments:

This decision further enhances the power SEBI has in regulating the securities market, to the extent it works for better accountability and greater transparency for the investors.

[18] Circular Reference No. SEBI/HO/IMD/DF1/CIR/P/2020/182 dated November 23, 2020

2. ICAI notifies Chartered Accountants (Amendment) Regulations, 2021, allowing multi-disciplinary partnership firms

ICAI notifies Chartered Accountants (Amendment) Regulations, 2021[19] (by issuing revised format of Form 18 i.e., Particulars of Offices and firms), which allows CA firms to have multi-disciplinary partnerships with CMAs, CSs, Advocates, Engineer, Architects, Actuaries, others permitted under regulation 53B of the Chartered Accountants Regulations.

Katalyst Comments:

This is a welcome move from ICAI since partnering of CAs with professionals like CMAs, CSs, Advocates, etc. will prove beneficial, both to the business community (to avail more integrated services) and also to the professional community.

E. Goods and Service Tax Highlights

1. No ITC reversal required for loss of inputs during manufacturing process

In case of ARS Steels & Alloy International Private Limited v. STO[20], the Petitioner incurred loss of some portion of inputs during manufacturing process. The department demanded reversal of ITC on inputs lost during manufacturing process as per the provisions of Section 17(5)(h) the CGST Act, 2017 'CGST Act').

In this regard, the hon'ble Madras High court has held that the loss occasioned by consumption during manufacture is inevitable and hence, is inherent to the process of manufacture itself. Further, section 17(5) (h) of the CGST Act covers the situation of quantifiable loss of inputs which involve external factors. And hence, ITC reversal is not required as per section 17(5) (h) of the CGST Act.

Katalyst Comments:

A welcome judgment by the hon'ble Madras High court. Based on the provisions of section 17(5) (h) of the CGST Act, ITC reversal is required in case where goods are lost, stolen, destroyed, written off or disposed of by way of gift or free samples and not at the time of loss of inputs during the manufacturing process. Similar view was expressed in the case of General Manager Ordinance Factory Bhandara[21] by the Appellate Authority of Advance Ruling

[19] Notification No. 1-CA(7)/197/2021 dated July 8, 2021
[20] TS-287-HC(MAD)-2021-GST
[21] [TS-1300-AAAR-2019-NT]

2. Arranging sales for overseas supplier constitutes 'intermediary service' and not the 'export of service'

Applicant[22] procures purchase order for supply of goods from the buyers located in India and outside India and then connects such prospective buyers with the supplier of goods located outside the country. Further, the applicant gets commission at 1% or 2% depending on volume of trade and treats the transaction as export of service outside India. The department has treated the transaction as intermediary service, liable to GST as per section 13 (8) read with section 8(2) of the IGST Act.

In this regard the AAR has held that services provided by the Applicant is covered within the definition of 'intermediary service' as per section 2(13) of IGST Act, 2017 ('IGST Act') as the Applicant can neither change the nature and value of supply of goods nor holds the title of goods at any point of time during the entire transaction and doesn't supply such goods on its own account. Also, place of supply for intermediary service is the place of service provider as per section 13(8) of the IGST Act and if the place of supply and place of supplier is in the same state, then the transaction is taxable under GST as intra-state supply as per section 8(2) of the IGST Act.

Katalyst Comments:

Constitutional validity of section 13(2) of the IGST Act read with section 8(2) of the IGST Act has been challenged before High Court of Gujarat in case of 'Material Recycling Association of India[23]' and Maharashtra in recent case of 'Dharmendra M. Jani[24]'. Due to divergent views of the High courts, the issue is yet to attain the finality.

3. Gujarat High Court[25] holds parallel proceedings by Directorate General of Goods and Services Tax Intelligence (DGGI) and Directorate of Revenue Intelligence (DRI) are sustainable

(i) The DRI initiated an inquiry against the taxpayer for claiming of double benefit i.e., IGST exemption at the time of import under Advance Authorisation license/Export Oriented Unit Scheme (EOU) and refund of IGST at the time of export of goods manufactured using imported material.

[22] In the matter of Teretex Trading Pvt. Ltd [TS-295-AAR(WB)-2021-GST]
[23] [TS-586-HC-2020(GUJ)-NT]
[24] [TS-272-HC (BOM)-2021-GST]
[25] Yasho Industries Ltd. vs. UOI [2021-TIOL-1381-HC-AHM-GST]

(ii) A writ was filed in the High Court of Bombay and vide its order a notice was issued to the DRI.

(iii) Subsequently, the officers of DGCI visited Gujarat location of taxpayers and recovered a sum on account of incorrect refund of IGST and the sum was paid by the taxpayer under protest. Also, DGGI issued summons u/s 70 of the CGST Act to give evidence and/ or to produce documents.

(iv) The same resulted into two parallel proceedings by DRI and DGGI.

(v) In this regard, the writ was filed and reliefs sought for (i) to quash and set aside Circular No. 3/3/2017-GST dt. July 5, 2017 and (ii) to refund/ allow re-availment of IGST credit paid under protest.

The Gujarat High Court has held that officer of DGGI is a proper officer and is entitled to issue summons based on the Supreme Court's decision in case of Cannon India Private Limited. Further, no parallel proceedings are initiated by DGGI and DRI as subject matter of both the proceedings were different. Also, there is no interim order by the High Court of Bombay restraining the authorities from proceeding with the enquiry.

Katalyst Comments:

The appointment of proper officer through the circular no. March 3, 2017 under Section 5(2) of the CGST Act seems erroneous. Further, the principle of comity would apply under the present case i.e. for a matter that is being dealt with under the authority of 'the proper officer', no other proper officer can intervene.

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