

Katalyst Kaleidoscope

July 2023: Tax and Regulatory Insights

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A. Income tax highlights

1. **Pune ITAT: Allows carry forward of loss arising from intra-group share transfer and claimed through revised return¹**

In this case, taxpayer's wholly owned subsidiary in Singapore went into liquidation and the shares of said Singapore subsidiary were transferred to its another subsidiary in Mauritius for a nominal sale consideration of SGD 1. Although taxpayer had not reflected said sale of shares in its financial statements, it claimed deduction for loss arising from such sale in revised return, which was omitted in the original return. Revenue contended taxpayer's claim of above loss on the basis that the claim through a revised return was invalid and the sale transaction in itself was dubious and a colourable device to avail tax benefit.

Hon'ble ITAT held that the taxpayer had omitted to claim a genuine loss arising on sale of shares and, therefore, a revised return of income within the prescribed time is a valid revised return. Further, ITAT explained that there is no bar to claim higher loss during the course of assessment proceedings nor are there any fetters on the Revenue to allow such higher loss. As regards Revenue's allegation of transaction being dubious, ITAT observed that the taxpayer sold the shares after seeking permission of the High Court of Republic Singapore and both the investment and divestment transactions were duly reported by the taxpayer to RBI under FEMA Regulations, thus the transaction was real; there was nothing on record to show that the transaction was sham or bogus. It also held that mere tax planning without any motive to avoid tax through a colorable device was not frowned upon, and that the revenue department cannot put itself in the armchair of a businessman; Since the transaction of sale is genuine, the loss was held as allowable.

2. **Bombay HC allows write off of intra-group advances²**

In this case, the taxpayer (Mahindra & Mahindra) held 27% equity of Machinery Manufactures Corporation Ltd ('MMC'), which was engaged in the manufacture of textile machinery; due to severe recession in the textile industry, it started making losses and a rehabilitation scheme was worked out by lenders; The taxpayer agreed to the participation in the rehabilitation scheme and lent rehabilitation assistance by paying further amounts to MMC as well as by converting its existing intercorporate deposit with MMC into rehabilitation assistance.

However, inspite of above efforts, MMC could not be revised and it had to be wound up. During the period of suspension of operations and till winding up order was passed against

¹ Bilcare Ltd., Pune ITAT dated June 23, 2023

² Mahindra & Mahindra Ltd., Bombay High Court dated June 24, 2023

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MMC, the taxpayer due to commercial expediency and to preserve and protect the value of goodwill of Mahindra group, born within certain limits the unavoidable expenditure of MMC. The combined effect was that the advances given to MMC (as a part of the rehabilitation scheme) and the expenses incurred became write offs in the books of the taxpayer, and the issue was regarding the deductibility thereof.

The Bombay High Court held that Section 28 which talks of business income has to be looked at from the perspective of its ordinary commercial meaning and such advances written off should be allowed in arriving at business income; in this case, it was held that the advances given and expenses incurred were out of commercial expediency and should be allowed as a deduction.

3. CBDT Clarification on TCS on Liberalized Remittance Scheme & overseas tour package³

The issue of TCS on Liberalized Remittance Scheme ('LRS') has been the subject of much debate, particularly in relation to the intended TCS on international credit card spends as well as the increase in the rate of TCS from 5% to 20% in several situations. One of the issues has been that it is very difficult to implement the TCS on international credit cards and several representations to that effect had been made to the Government.

In response thereto, the Ministry of Finance issued a press release on June 28, 2023 and thereafter CBDT has issued FAQs on June 30, 2023 to remove difficulty in implementation of changes relating to TCS on LRS. Some of the key aspects of the press release are summarized below:

- It has been decided to postpone the implementation of TCS on international credit cards; no date has been given for its implementation. Hence, transactions through international credit cards shall not be considered as LRS and shall not be subject to TCS.
- Threshold of INR 7 lakhs per financial year per individual has been restored for all categories of LRS payment, and therefore, there will be no TCS for the spend upto INR 7 lakhs under LINR
- Increased TCS rate which was to come into effect from July 1, 2023 shall now apply from October 1, 2023.
- Earlier and new TCS rates are summarized as under:

Nature of payment	TCS rate till September 30, 2023	TCS rate w.e.f October 1, 2023
LRS for education financed by loan from financial institution	Nil up to INR 7 lakhs 0.5% Above INR 7 lakhs	Nil up to INR 7 lakhs 0.5% Above INR 7 lakhs

³ CBDT Circular No. 10 dated June 30, 2023

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LRS for Medical treatment/education (other than financed by loan)	Nil up to INR 7 lakhs 5% Above INR 7 lakhs	Nil up to INR 7 lakhs 5% Above INR 7 lakhs
LRS for other purposes	Nil up to INR 7 lakhs 5% Above INR 7 lakhs	Nil up to INR 7 lakhs 20% Above INR 7 lakhs
Purchase of Overseas tour program package	5% (without threshold)	5% till INR 7 lakhs 20% thereafter

Several other clarifications have been provided in the CBDT FAQs, including whether the limit of INR 7 lakhs applies separately for various purposes like education, health treatment and others or it is a combined threshold irrespective of the purpose of the remittance it has to be reckoned separately, it is clarified that it is a combined threshold.

4. ITAT Delhi: TDS not applicable on cross border reimbursement of salary of seconded employees⁴

In this case, the taxpayer (Serco India Private Limited), a subsidiary of UK company, seconded 3 employees of UK company on full time basis to work exclusively for the taxpayer and these employees entered into separate 'employees' contract' with the taxpayer; the taxpayer and UK company also entered into 'salary reimbursement agreement' wherein the UK company paid part-salary (40%) in foreign currency to such employees on behalf of the taxpayer for administrative and employees' convenience. Such salary was subsequently reimbursed by the taxpayer to UK company. However, the taxpayer had deducted tax on such salary payment under Section 192 and deposited the same with the government.

The ITAT held that there was an employer-employee relationship between the taxpayer and the deputed employees and taxpayer was the legal and economic employer of the deputed employees. Consequently, salary partly paid and reimbursed was chargeable to tax as salary (TDS as per section 192) and not as Fees for Technical Services, and hence no TDS was required to be deducted on the reimbursement made by the taxpayer to UK company.

⁴ Serco India Pvt. Ltd [TS-363-ITAT-2023(DEL)] dated July 5, 2023

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B. Corporate Law Highlights

1. NCLAT New Delhi: Schemes and dispensation of meeting⁵

In the Scheme of Arrangement between Reliance Industries Limited ('Resulting Company' or 'Appellant') and Reliance Projects & Property Management Services Limited ('Demerged Company' and wholly owned subsidiary of Resulting Company) for demerger/transfer and vesting of the Digital EPC and Infrastructure Business, NCLT Mumbai directed to Appellant to either obtain prior consent affidavits from at least 90% of shareholders and creditors or conduct the meeting.

An appeal was made before NCLAT, where it was submitted that pursuant to demerger there is no change in share capital structure of the Appellant as no shares are being issued. The Appellant further submitted that the right and liabilities of the creditors are not affected after implementing the scheme and both Demerged Company and Appellant has positive net worth to discharge its liabilities in ordinary course of business. NCLAT set aside the NCLT order and directed that requirement of convening and holding meetings of shareholders and creditors in the present case is not required and further directed that Appellant is not required to obtain consent affidavit from shareholders and creditors as entire economic benefit of Demerged Company is held with the Appellant.

2. NCLT Mumbai: Allows amalgamation scheme impending ROC non-compliances⁶

In this case, Transferor and Transferee Company had jointly filed Scheme of Amalgamation before NCLT, Mumbai Bench. The Regional Director submitted observations that Transferor Company had not filed financial statement for last 4 years with ROC and further the Transferor Company did not file BEN-2 (BEN-2 shows ultimate owner of the Transferor Company). The NCLT Mumbai approved the Scheme on the grounds that Transferee Company will comply with the provision of Companies Act, 2013, post approval of the Scheme. Mere non-compliance of Companies Act, 2013 should not derail the Scheme.

3. NCLT Chennai: Consolidation of face value of shares, post reduction of share capital⁷

In this case, the Petitioner Company had disclosed accumulated losses in the books and after analyzing various options available at the disposal Board of Directors, it was decided to reduce the face value of the shares by filing a petition before NCLT, Chennai Bench, under Section 66

⁵ Reliance Industries Ltd – Company Appeal (AT) No. 109 of 2023 dt. July 14, 2023

⁶ Windmere Hospitality (India) Private Limited & Sarayu Investments P. Ltd; CP (CAA)/07/MB-V/2023 dt. May 8, 2023

⁷ Pace Automation P. Ltd.- CP/107(CHE)/2022, NCLT Chennai, dt. May 31, 2023

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of Companies Act, 2013, wherein the face value was reduced and the reduction was adjusted by writing of accumulated losses. After the reduction, face value was consolidated back to its original face value.

4. Corporate Social Responsibility: Filing of CSR Report in Form CSR -2 for FY 2022-23⁸

Ministry of Corporate Affairs ('MCA') has amended, the Companies (Accounts) Rules, 2014 to provide that for the financial year 2022-23 a report on Corporate Social Responsibility in Form CSR-2 shall need to be filed separately on or before March 31, 2024 after filing financial statements with ROC.

C. SEBI/ FEMA/STAMP ACT/OTHER

1. Enhancement of disclosure and governance requirements by listed companies under LODR Regulations⁹

SEBI has amended SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR) by way of its notification dated June 14, 2023 which shall come into force on with effect from July 14, 2023. Some of the key changes include the following:

- **Quantitative materiality thresholds specified:** A listed entity is required to make disclosure of event/information if the value or expected value impact exceeds 2% of the turnover or net worth or 5% of the average profit/loss after tax. Further, these thresholds can't be diluted through company's internal materiality policy.
- **Comment on market rumours:** Top 100 listed entities (w.e.f October 01, 2023), and, later on, top 250 listed entities (w.e.f April 01, 2024) are required to confirm/deny/clarify on any reported event or information in 'mainstream media' within 24 hours.
- **Disclose agreements binding listed companies,** irrespective of whether the listed entity is a party to such agreements.
- **Timelines for disclosures:** listed entity is required to intimate stock exchanges not later than: (a) 30 minutes from closure of the board meeting, in which decisions pertaining to the event/information has been taken, (b) 12 hours from the occurrence of the event/information, in case the event/information is emanating from within the listed

⁸ The Companies (Accounts) Second Amendment Rules, 2023; notification no [F. No. 1/19/2013-CL-V-Part III] dt May 31, 2023

⁹ SEBI Circular No. SEBI/HO/CFD/CFD-PoD-1/P/CIR/2023/123, dated July 13, 2023

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entity, and (c) 24 hours from the occurrence of the event/information, in case the event/information is not emanating from within the listed entity.

- **New disclosure requirements and changes in existing disclosures:** listed entities are required to company with new disclosures such as ESG disclosures, cyber security incidents or breaches or loss of data/documents; communication from any regulatory, statutory, enforcement or judicial authority, unless prohibited; sale, lease or disposal of an undertaking outside scheme of arrangement (including taking prior approval of shareholders); sale or disposal of whole or substantially the whole of the undertaking and sale of stake in associate company of the listed entity; new ratings; change in senior management; certain announcement/communication by director, promoter, KMP or senior management in the social media, etc.

The notification contains 4 annexures with receipt to disclose requirements and these are as follows:

- Annexure I specifies the details that need to be provided while disclosing events given in Part A of Schedule III (Annexure 18 to the Master Circular).
- Annexure II specifies the timeline for disclosing events given in Part A of Schedule III.
- Annexure III provides guidance on when an event/information can be said to have occurred (Annexure 19 to the Master Circular).
- Annexure IV provides guidance on the criteria for determination of materiality of events/information.

Katalyst comments:

The Annexures are extremely detailed and very prescriptive and while the intent is laudable, the compliance burden on companies, including for tracking what has to be disclosed, is increasingly becoming very heavy.

2. Informal guidance on Related Party Transactions ('RPT')¹⁰

In this case, applicant (NTPC) sought an informal guidance by way of an interpretative letter under the Informal Guidance Scheme, wherein SEBI clarified the following:

¹⁰ SEBI Informal guidance no SEBI/HO/CFD/P/OW/2023/22380, dt May 31, 2023

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- As per April 08, 2022 SEBI Circular, omnibus approval of shareholders for material RPTs taken in an AGM shall be valid upto the date of the next AGM for a period not exceeding fifteen months.
- In case of omnibus approvals for material RPTs, obtained from shareholders in general meetings other than AGMs, the validity of such omnibus approvals shall not exceed one year.
- LODR clearly specify the types of transactions with related parties which are not to be considered as a related party transaction. Therefore, any transactions specified by Institute of Company Secretaries of India or any other authority in their suggested RPT policy, in so far as they are at variance with the express provision under Regulation 2 (1) (zc) of the LODR Regulations, are not relevant for the purpose of granting an exemption from the purview of Related Party Transactions.

3. Liquidation Scheme and for distributing the investments of AIFs in-specie¹¹

SEBI has notified the SEBI (AIF) (Second Amendment) Regulations, 2023 on June 15, 2023 and issued circular to lay down the procedural framework for launching a Liquidation Scheme and for distributing the investments of AIFs in-specie. Liquidation Scheme offers a practical solution to Alternate Investment Funds (AIFs), which are unable to liquidate their investments and wind up the fund within the stated fund life due to factors beyond their control.

4. SEBI Order: Vicarious liability of the directors; penalizes and bars MD and Directors for flouting accounting norms¹²

In the case of Sharon Bio Medicine, based on forensic audit, it was concluded that the company had indulged in misrepresentation of financials and book of accounts, non-compliance of accounting norms, inflated revenue, account manipulation, non-compliance of SEBI LODR etc.

SEBI in its order held that the directors of the company, who manage the affairs of the company, cannot evade accountability in respect of irregularities found against the company and remain vicariously liable for the acts of the Company, as the company being juristic person cannot act on its own. SEBI LODR and other regulations put various responsibilities on the directors of a listed entity, and irregularities found in forensic audit, indicate that they had failed to discharge their responsibilities, and concluded that apart from being vicariously liable, the directors are also independently and directly liable for failing to discharge their functions and responsibilities. SEBI banned the directors from accessing the security market for 3 years and imposed penalty as well.

¹¹ SEBI Circular No. SEBI/HO/AFD/PoD-I/P/CIR/2023/098 dated 21 June 2023

¹² SEBI Order no 26926/2023-2024 in Sharon Bio-Medicine Limited. dt May 31, 2023

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Katalyst comments:

This order further underlines the interpretation of independent director responsibilities and their need to focus on governance.

5. Delhi HC: Crystallization of timeline for Adjudication of Stamp Duty¹³

In this case, the Petitioner Company (Uno Minda Ltd) filed an application for adjudication of NCLT order with stamp duty authority post NCLT approval to composite scheme of amalgamation. The application was pending for more than one year. The Petitioner Company thereafter filed a writ petition before Delhi High Court and prayed to direct the stamp duty authority to adjudicate the stamp duty payable as expeditiously as possible so that the said scheme could be duly stamped. The Delhi High Court directed Collector to Stamps to adjudicate the matter within 30 days and if it involves complexity / extraordinary circumstances, adjudication can be extended for a maximum period of 3 months.

Katalyst comments:

This is a welcoming judgement as stamp duty authorities usually takes 1 /1.5 year to conclude the stamp duty adjudication process; This would help to conclude the scheme matters in a time bound manner.

6. RBI: Green Deposit Framework¹⁴

RBI has recently issued Green Deposit Frame Work which is applicable from June 1, 2023. Rationale for the framework is to encourage Regulated Entities (REs) to offer green deposits to customers, protect interest of the depositors, aid customers to achieve their sustainability agenda, address greenwashing concerns and help augment the flow of credit to green activities/projects. The framework is applicable on Scheduled Commercial Banks, including Small Finance Banks (excluding Regional Rural Banks, Local Area Banks and Payments Banks), all Deposit taking Non-Banking Financial Companies (NBFCs) registered with RBI and including Housing Finance Companies. REs will be required to allocate the proceeds raised through green deposits towards a list of green activities and projects that encourage energy efficiency in resource utilization, reduce carbon emissions and greenhouse gases, promote climate resilience and/or adaptation, and improve natural ecosystems and biodiversity.

¹³ Uno Minda Ltd v. Deputy Commisioner of Revenue Department Del. W.P. (C) 5184/2023

¹⁴ RBI's Green Deposit framework RBI/2023-24/14 DOR.SFG.REC.10/30.01.021/2023-24 dt April 11, 2023

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D. Goods and Service Tax highlights

The Central Board of Indirect Taxes and Customs ('CBIC') issued various circulars on July 17, 2023, pursuant to the recommendations made in the 50th GST Council Meeting. The CBIC has clarified tax implications regarding refunds, cross charge, taxability of holding shares in a subsidiary company, interest on wrongly availed ITC etc. The key tax implications clarified through circulars are as under:

1. Clarification relating to refund¹⁵

- a. It is clarified that with effect from January 1, 2022 onwards, refund of accumulated ITC shall be available only on the invoices / debit notes which are appearing in Form GSTR-2B instead of Form GSTR-2A, consequent to amendment in section 16(2) of the CGST Act providing mandatory condition for availing ITC only on appearance of invoices / debit notes in Form GSTR-2B.
- b. It is also clarified that refund for tax period from January 2022 onwards which are already processed, should not be reopened by the tax officer.
- c. The circular further provides that the Adjusted Total Turnover should be computed as per explanation to Rule 89 (4) i.e., lower of tax invoice value or FOB value of shipping bill.

2. Taxability of holding shares in a subsidiary company¹⁶

- a. Various holding companies were issued notices regarding non-payment of GST merely on holding shares in the subsidiary companies solely on the basis that there is a service code 997171 in the scheme of classification of services mentioning: *"the services provided by holding companies, i.e., holding securities of (or other equity interests in) companies and enterprises for the purpose of owning a controlling interest"*.
- b. In this regard, it is clarified that the securities held by the holding company in the subsidiary company are neither 'goods' nor 'services'. Further, there should be actual supply of goods or services as per section 7 of the CGST Act by the holding company to the subsidiary company and GST should not be levied solely based on the service code entry no. 997171 (as mentioned above). Thus, no GST is applicable on shares held by holding company in a subsidiary company.

¹⁵ Circular No. 197/09/2023-GST dated July 17, 2023

¹⁶ Circular No. 196/09/2023-GST dated July 17, 2023

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3. Allocation of common ITC by the Head Office¹⁷

- a. It is clarified that a head office ('HO') can avail ITC on common expenses (in its normal GST registration) and allocate such ITC amongst the respective branch offices ('BO') by raising tax invoices/cross charge invoices.
- b. Further, it is clarified that in respect of internally generated services provided by the HO to BOs, the cost of salary of employees of the HO, involved in providing the said services to the BOs, is not mandatorily required to be included while computing the taxable value of the supply of such services, even in cases where full input tax credit is not available to the concerned BO.

4. Other recommendations made in 50th GST council meeting held on July 11, 2023; however, notification in this regard is yet to be issued:

1) Online gaming, casino, and horse racing

- a. The recommendations were made to include Online gaming, casino, and horse racing under schedule III of the CGST Act to include as taxable actionable claim
- b. It is recommended that these services shall be taxed @ 28% at following Value:

Description of Service	Taxable Value
Casino	Face value of the chips purchased
Online gaming	Full value of the bets placed
Horse Racing	Full value of the bets placed with bookmaker/ totalizator

Katalyst comments:

- *The GST rate of 28% on Gross Gaming Value has created huge distress in the online gaming industry and will have far-reaching consequences for the industry. Such a huge rate of 28% on full value questions the viability of this industry.*
- *Further, the GST authority did not bifurcate between 'game of chance' and 'game of skill' while recommending levy of GST.*
- *In May 2023, the Karnataka High Court has given a favourable decision in case of GAMESKRAFT TECHNOLOGIES PVT LTD wherein the High court has bifurcated between 'game of chance' and 'game of skill' and held that 'game of skill' should be exempt from GST and only 'game of chance' should be taxable.*

¹⁷ Circular No. 199/09/2023-GST dated July 17, 2023

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- 2) **Goods Transport Agency (GTA):** GTA will not be required to file declaration for paying GST under forward charge every year unless they want to revert to Reverse Charge Mechanism (RCM). The GTAs shall exercise the option to pay under forward charge from the 1st January till the 31st March of preceding Financial Year.

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