KATALYST
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Katalyst Kaleidoscope

June 2021: Tax and Regulatory Insights

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A. Income Tax highlights

1. Delhi High Court: allows[1] assessee's writ petition and quashes faceless assessment order which was passed without considering assessee's response to show cause notice

The revenue authorities had issued a show cause notice-cum-draft assessment order dated April 18, 2021 wherein the assessee was asked to respond to the same by 23.59 hours on April 22, 2021. However, the impugned assessment order was passed on 22 April, 2021 at 14.11 hours, i.e., before the time to file the response elapsed. The assessee, upon becoming aware of the same, placed its grievance before the revenue via the e-filing portal April 22, 2021 itself, in which, it stated that although at about 22:00 hours, it tried to upload a response to the aforementioned show cause notice-cum-draft assessment order, the same could not be uploaded since the impugned assessment order had already been passed. Hence, the assessee filed a writ petition with the Delhi High Court.

The Delhi High Court held that the revenue's argument that an alternate statutory remedy is available to the petitioner did not find any favour, as it was simply a self-imposed limitation which did not prevent a Court from entertaining a writ petition in a fit case. Further, the denial of opportunity to the petitioner to place its objections and/ or explanations before the assessing officer, by way of a response, has led to breach of principles of natural justice. The other argument that several opportunities were given to the petitioner, before issuance of the show cause notice-cum-draft assessment order was equally untenable, since the reason being the assessee ought to have been given an opportunity to file objections and such prior notices were issued only to ferret information and make inquiries with the object to ensure that there is no understatement of income or a claim of excessive loss, or a case involving under payment of tax; but once a show cause notice-cum-draft assessment order is issued, the assessee's statutory right to file a reply and to seek a personal hearing kicks in, cannot be curtailed.

Basis the above, the writ petition filed by the assessee was allowed and the faceless assessment order and notice of demand / penalty were quashed, with a liberty to pass a fresh assessment order as per the law.

Katalyst Comments:

The faceless assessment scheme is a relatively new ecosystem, for the both the tax payer and the department. Passing of order without adequate opportunities being provided is a clear

[1] Renew Power Private Limited [TS-391-HC-2021(DEL)] dt. May 26, 2021

violation of principles of natural justice. There have been multiple judgements[2] in favour of taxpayers wherein assessment orders are set aside on the grounds that no personal hearing was granted to taxpayers pursuant to specific request made by them.

2. Chennai Tribunal: Corporate restructuring held as not being a colorable device, upholds genuineness of amalgamation[3]

The Investment Trust of India Ltd ("Old ITI") having substantial reserves absorbed (by way of amalgamation) a company HCFL Infotel Ltd ('HCFL') having accumulated losses and unabsorbed depreciation under a Scheme of Arrangement. Under the same scheme, ITI also transferred its NBFC/finance business to its wholly owned subsidiary, Rajam Finance and Investments India Limited ("Rajam Finance") via a slump sale; which was later renamed to Investment Trust of India Ltd ("New ITI"). Prior to the scheme of arrangement, Old ITI transferred shares of a company which resulted in capital gains and were set off against the losses of HCFL, pursuant to the amalgamation.

Revenue argued that that such capital gains were taxable in the hands of New ITI, i.e., in the hands of the wholly owned subsidiary, where the finance business was transferred, since effectively New ITI was carrying out the business of the Old ITI and the entire exercise of amalgamation was a colourable device intended for avoiding tax arising from share transfer.

The ITAT ruled that transfer of shares was done prior to the amalgamation and was not an afterthought as contented by the Revenue and thus, will be taxable in the hands of the Old ITI. ITAT observed that the Scheme of Amalgamation was approved by two High Courts, shareholders, creditors and bankers of both the companies, RoC and Regional Directors, after giving due notice of publication in newspaper. The purpose and intent of the Scheme was put in place and it was highly incorrect to opine that the scheme of amalgamation was arranged to avoid payment of taxes on capital gain arising out of sale of shares; it rejected the revenue's argument of 'colourable device' by placing reliance on the Supreme Court decision in the case of Azadi Bachao Andolan[4] that each and every tax planning within four corner of tax laws, although could lead to payment of less taxes, cannot be termed as colorable device.

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[2] Ritnand Balved Education Foundation [TS-426-HC-2021(DEL)] dt. June 8, 2021, Satia Industries Limited [TS-423-HC-2021(DEL)], dt. June 8, 2021, Raja Builders [127 taxmann.com 339 (Bombay)] dt May 13, 2021

[3] The Investment Trust of India Ltd [TS-418-ITAT-2021(CHNY)] dt. 4 June, 2021

[4] Union of India vs.Azadi Bachao Andolan (263 ITR 706)

3. Mumbai Tribunal: Foreign exchange gains on repayment of loan (given by an individual to his relative under LRS) held as capital receipt and not taxable[5]

The assessee, an individual, received funds towards repayment of interest free loan given in USD under LRS to his relative. Since the repayment was converted at an accelerated exchange rate, the gains on account of foreign exchange rate difference, were taxed by the Assessing Officer as 'income' under the head Income from Other Sources.

With regard to the taxability of the gains arising pursuant to the foreign exchange fluctuations, the Tribunal held that what was missed out by the Assessing Officer was the critical fact that, in terms of the provisions of the Income Tax Act, 1961 ('ITA'), all 'gains' are not covered by the scope of 'income'. Section 2(24)(vi) provides that "income, includes any capital gains chargeable under section 45". Once the statutory provision itself lays down the principle that only such capital gains are included in the scope of 'income' as are chargeable under section 45, it is only elementary that a capital gain, which is not chargeable to tax under section 45, cannot be included in income.

Further, the Tribunal observed that there was a benefit or a gain to the assessee, however such benefit or the gain was not on account of interest payment; that benefit or gain was on account of foreign exchange fluctuation but since the foreign exchange fluctuation with respect to a transaction in capital field, on the facts of this case foreign exchange fluctuation receipt itself turned out to be a capital receipt and therefore, directed the assessing officer to delete the said addition.

4. Mumbai Tribunal: Allows write-off of investment in loss-making subsidiaries as business loss[6]

The assessee, a company, engaged in manufacturing and distribution of pharmaceutical products, had made investments in two companies, one in Netherlands and the other in Brazil. Due to uncertain market conditions, the subsidiaries could not achieve the targets and accumulated heavy losses which ultimately wiped off their net worth. Accordingly, such investments were written off and the assessee claimed a business loss for such write-off under section 37(1) of the ITA. The Assessing Officer denied the business loss by treating the same as capital investments whereas the CIT(A) allowed write-off of investment made in the Dutch company, but disallowed it for the Brazilian company by holding that there was no proximate direct nexus of the investment and business of the assessee.

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[5] Aditya Balkrishna Shroff *v.* Income Tax Officer, Ward-16(1)(1), [127 taxmann.com 343 (Mum)]
[6] Maneesh Pharmaceuticals Ltd [TS-462-ITAT-2021(Mum)] dt June 17, 2021

The ITAT observed that the investments were in furtherance of business of the assessee and were made out of commercial expediency. The main purpose of investment was not to acquire any manufacturing capacity or any infrastructural capacity but was to boost assessee's sales. Therefore, the investments could not be said to be in capital field rather the same were meant to improve the top line of the business by way of higher revenue profits. The ITAT also observed that the net-worth of the investee entities were eroded to a greater extent and was duly supported by their financial statements as submitted by the assessee during appellate proceedings. Relying on the decision of the Karnataka High Court in the case of ACE Designers vs ADIT[7] and Mumbai Tribunal in the case of Camlin India Pvt Ltd[8], the Hon'ble ITAT held that since the investments were made out of commercial expediency and in furtherance of assessee's business, thus any losses arising therefrom would be an allowable 'business loss'.

Katalyst Comments:

This is an important order and reiterates the position that write-off of investments, which are made out of commercial expediency and in furtherance of business, should be allowed as a business loss. However, the above position should not be considered as a general rule since commercial expediency of investments differs from case to case and establishing the same could be very challenging.

5. CBDT notifies[9] Cost Inflation Index for Financial Year 2021-22

The Central Board of Direct Taxes ("CBDT") has notified cost inflation index for the financial year 2020-21 as 317 (Base date is April 1, 2001).

6. CBDT issues instructions on ITR Forms for AY 2021-22

In the context of filing of Income Tax Returns, every year the CBDT issues the instructions for filing the return forms, so as to give the assessees guidance as to what information is expected to be disclosed by them. There are different forms for different persons based on their status under the tax laws. Over a period of years, the forms have got more and more detailed and prescriptive, and as a consequence, so have the instructions. Key changes are as under:

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[7] (120 Taxmann.com 321)
[8] (ITA No.928/Mum/1988)
[9] Notification dt. June 15, 2021

- Option to opt for availing the new tax regime under section 115BAC (lower tax rates with no loss the head House Property allowed to be set off and certain deductions/ allowances (such as HRA/ LTA, 80C, 80D, etc) also cannot be claimed) is provided in the ITR

- Information with respect to dividend income is to be reported separately, since the same is now taxable and not exempt. Further, quarter-wise reporting of such income is required.

- For companies, apart from the above changes, a new deduction is inserted under Chapter VI-A, 'Section 80M' (Intercorporate dividend) and Schedule DDT is now deleted.

B. Corporate Law Highlights

1. MCA liberalizes[10] the requirement for conduct of board meeting through video conferencing or other audio video means

The Ministry of Corporate Affairs ("MCA") has omitted Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 to relax the requirement of holding Board meetings with physical presence of directors in respect of the following matters:

- approval of the annual financial statements;
- approval of the Board's report;
- approval of the prospectus;
- audit committee meetings for consideration of financial statements;
- approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover

Katalyst Comments:

Earlier, MCA had given such relaxation (in a COVID-19 context) through a circular till June 30, 2021. Through this amendment, the requirement of physical meeting of the board for approving specified matters is altogether dispensed, and now all board meetings of a company can be conducted through video conferencing or other audio-visual means by ensuring compliance of the relevant rules.

[10] Notification No. G.S.R. 409(E), dt. June 15, 2021

2. MCA notifies[11] accounting standards for Small and Medium Sized Companies

MCA has introduced the Companies (Accounting Standard) Rules, 2021 which deals with applicability of accounting standards to Small and Medium Sized Companies ('SMCs') with effect from April 1, 2021. Further, the aforesaid rules also define SMCs to mean (i) a company, whose equity/ debt securities are not listed nor in the process of being listed; (ii) is not a banking, financial institution or insurance company, (iii) whose turnover (excluding other income) does not exceed INR 250 Crs in the previous year and whose borrowings does not exceed INR 50 Crs at any time during the previous year, (iv) should not be a holding or subsidiary of a company which is not an SMC. Further, the companies which qualify the above definition but is a company to which Ind-AS apply, will continue to apply Ind-AS to prepare its financial statements.

It is important to note that companies which did not qualify as an SMC earlier and subsequently becomes an SMC will not be eligible to for exemption or relaxation until such company remains an SMC for two consecutive accounting periods.

3. MCA-21 website revamped

The Minister of State for Finance and Corporate Affairs Shri Anurag Singh Thakur launched the first phase of MCA21 Version 3.0 (V3) comprising of revamped website, new email services for MCA Officers and two new modules, namely, e-Book and e-Consultation. The new website has hosted FAQs on the two modules, which can be accessed from the below mentioned links:

https://www.mca.gov.in/content/dam/mca/documents/EBookFAQ.pdf
https://www.mca.gov.in/content/dam/mca/documents/EConsultationFAQ.pdf

4. MCA issues clarification relating to offset of excess amount contributed to 'PM CARES Fund' in FY 2019-20 against CSR requirements for FY 2020-21

MCA has clarified that, where a Company has contributed any amount to the 'PM CARES Fund' on March 31, 2020, in excess of the minimum amount of CSR spend (as prescribed under the Companies Act, 2013), such excess amount can be offset against the CSR amount required to be spent for the FY 2020-21, subject to the following conditions:

[11] Notification dt. June 23, 2021

(i) the amount offset as such shall have factored the unspent CSR amount for previous financial years, if any;

(ii) the Chief Financial Officer shall certify that the contribution to "PMCARES Fund" was indeed made on March 31, 2020 in pursuance of the appeal and the same shall also be so certified by the statutory auditor of the company; and

(iii) the details of such contribution shall be disclosed separately in the Annual Report on CSR as well as in the Board's Report for FY 2020-21

5. Ahmedabad NCLT allows[12] transfer of authorized share capital upon demerger

A joint petition was filed by the petitioner companies under section 230 to 232 of the Companies Act, 2013, seeking sanction of the NCLT to a Scheme of Arrangement which inter-alia provided for demerger of Agrochemical and Pigment Undertaking from Meghmani Organics Limited to Meghmani Organochem Limited ("Scheme"). Under the Scheme, part of the Authorized Capital of the Demerged Company was proposed to be transferred to the Resulting Company.

In this context, it was submitted by the Regional Director that such transfer and consolidation of the Authorized Capital is permissible under the law only in case of Scheme of Amalgamation and mergers and not Scheme of Arrangement involving demergers. The petitioner companies submitted that there are no specific provisions under the law prohibiting such consolidation of capital in case of demerger and there are numerous precedents where such transfer of part of the Authorized Capital has been permitted in case of Demerger by the High Courts as well as the NCLT. In view of the above, the NCLT held that the Scheme was bonafide and in the interest of shareholders and creditors and accordingly, approved the Scheme.

Katalyst Comments:

This is a welcome order and facilitates transfer of authorized share capital in case of Schemes of Arrangement involving demergers.

[12] Meghmani Organochem Limited and Meghmani Finechem Limited CP(CAA) 8 of 2021 IN CA (CAA) 69 OF 2020, NCLT Ahmedabad Bench, order dated May 3, 2021

C. Securities' Law Highlights

1. SEBI introduces[13] New Delisting Regulations

In order to make the existing delisting regulations more transparent and investor friendly, the Securities Exchange Board of India ("SEBI") has introduced the SEBI (Delisting of Equity Shares) Regulations, 2021 ("New Delisting Regulations") which have replaced the erstwhile delisting regulations. A summary of key changes is as under:

- As per the New Delisting Regulations, the acquirer (usually, the promoter) is required to make an initial public announcement, via the stock exchanges, to delist the Company first and within one working day of the public announcement, they need to also inform the Board of the Company at its Registered Office. As per the erstwhile regulations, the acquirer had to first intimate the Board of the Company which then used to intimate the stock exchanges.

- Announcement will need to provide for an Indicative Price, definition of which has been introduced in the New Delisting Regulations, to mean any price which is higher than the floor price. Earlier, the promoters used to indicate to the Board, the price they were willing to offer, which has now become a statutory requirement.

- The Company is now required to set up a committee of independent directors who will have to give reasoned recommendations on the delisting offer and the voting pattern of independent directors is also required to be disclosed.

- The New Delisting Regulations also provide for prohibition on delisting within six months of buyback or preferential allotment

- The New Delisting Regulations provides for specific timelines at various stages of delisting process (for example, the board approval for delisting to be obtained within 21 days of the initial public announcement, special resolution has to be passed within 45 days of the board resolution) which was not there in the erstwhile delisting regulations

- The New Delisting Regulations now requires the acquirer/ promoter to take active steps to provide exit to public shareholders who have not participated in the reverse book building process by submitting quarterly reports to stock exchanges (with details such as

[13] SEBI/LAD-NRO/GN/2021-25 dt. June 10, 2021

number of shares tendered, etc.), sending follow up communications to shareholders, publishing advertisements to invite the shareholders to avail the offer and tender their shares.

- The New Delisting Regulations provide that the Company shall appoint (before the board meeting for granting approval) a Peer Reviewed Company Secretary (independent of the promoter/ acquirer/ merchant Banker) who will carry out the necessary due diligence.

- Reverse book building requirement will not apply if the listed company becomes 100% subsidiary if its listed parent company under a Scheme of Arrangement, if the listed parent and the subsidiary company are in the same line of business and subject to compliance with certain conditions.

Katalyst Comments

The New Delisting Regulations now provide for better accountability and greater transparency in the delisting process and also provide for clear timelines at various stages of the delisting process. However, the New Delisting Regulations has not made any change to the price discovery process, which was one of the biggest challenges for the promoters.

Further, the requirement of setting up of a committee of independent directors who will provide reasoned recommendations on the delisting offer is very onerous vis-à-vis the independent directors.

2. SEBI issues[14] interim order in connection with insider trading of shares of Infosys Ltd

SEBI has issued an interim order under section 11 of the Securities and Exchange Board of India Act, 1992 (“SEBI Act”) read with SEBI (Prohibition of Insider Trading) Regulations, 2015, 1992 (“Insider Trading Regulations”). The order is an important landmark in the light of several factors, including that it has been passed against senior officials of a company and a few related parties. Here are some key highlights of the order.

A SEBI alert system had generated insider trading alerts for the script of Infosys (INFY) for the period around 15th July 2020 i.e., around the corporate announcement of audited financial results of INFY for the quarter ended 30th June 2020. Based thereon, a preliminary examination was conducted as to whether certain persons/entities which traded in INFY were

[14] SEBI Order WTM/MPB/ISD/192/2021, dt May 31, 2021

in possession of Unpublished Price Sensitive Information (UPSI). The order makes a reference to extract of "Structured digital database" result in the financial results of INFY and came to the conclusion that UPSI came into existence on 29th June 2020 and UPSI was for a period from 29th June 2020 to 15th July 2020.

One of the senior officials was the Senior Corporate Counsel of INFY and the others were considered to be 'insiders' as defined in the regulations there and a lot of reference to "pre ponderance of probability" of being in possession of UPSI. An official in the corporate accounting group of INFY was identified as a 'designated person' by INFY for the purpose of UPSI and he was in frequent communication with the Senior Corporate Counsel, including through telecommunication and therefore, both were considered as having prima facie violated the Insider trading regulations.

A huge amount of detail has been gone into in terms of the INFY price movements, mobile communication done between the relevant parties, bank statements of the relevant entities, fund transfers, shares purchased and many other detailed factual aspects and based thereon, an interim ex-parte order has been passed by SEBI with several directions which shall be in force until further orders, including the following:

- Relevant parties restrained from dealing in securities, directly or indirectly, in any manner whatsoever until further orders.

- In relation to certain parties, their bank accounts (to the extent of proceeds generated) are impounded and are directed to open an escrow account with a nationalised bank to the extent of the gains generated from the proceeds of the prima facie insider trading.

- Several of the parties are directed to provide an inventory of assets held in their name within 5 days from the date of the order.

The relevant parties are required to submit their replies/ objections, if any, within 21 days of this order.

3. SEBI amends[15] Takeover Regulations

SEBI has notified the following amendments to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Regulations"):

[15] SEBI Notification No. SEBI/LAD-NRO/GN/2021/19, dt. May 5, 2021

- Relaxation from the open offer requirements under Regulation 3 of the Takeover Regulations by increasing the threshold from the existing 25% to 49% for entities listed on the Innovators Growth Platform.

- Relaxation from the disclosure requirements under Regulation 29 of Takeover Regulations by increasing the thresholds from the existing 5% to 10% entities listed on the Innovators Growth Platforms.

- The Committee of Independent Directors while providing reasoned recommendations on the open offer proposal, will also have to disclose the voting pattern of the meeting in which the open offer proposal was discussed.

Katalyst Comments

SEBI vide its notification dated April 5, 2019 amended the (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2019 and launched 'Innovators Growth Platform' erstwhile known as 'Institutional Trading Platform' for listing of issuers which are in intensive use of technology, information technology, intellectual property, data analytics, bio-technology or nano-technology to provide products, services or business platforms with substantial value addition. The first two bullets above are in the context of the IGP.

4. SEBI notifies[16] format of Compliance Report on Corporate Governance

As per the provisions of Regulation 27(2) of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("Listing Regulations"), a listed entity is required to submit a compliance report on corporate governance in the specified format. In this regard, SEBI had prescribed formats (three separate reports were to be filed i.e., on quarterly basis, at the end of financial year and at the end of 6 months from the close of financial year) for reporting on corporate governance and later modified them from time to time.

With an intention to bring about transparency and to strengthen the disclosures around loans/ guarantees/comfort letters/ security provided by the listed entity, directly or indirectly to promoter/ promoter group entities or any other entity controlled by them, SEBI has now notified an additional disclosure on half-yearly basis and has notified the formats for such half-yearly disclosures effective from FY 2021-22.

[16] SEBI Circular SEBI/HO/CFD/CMD-2/P/CIR/2021/567 dt. May 31, 2021

5. SEBI enhances[17] overall limits for overseas investment by AIF and VCFs

In consultation with RBI, SEBI has increased the overall limits for overseas Investments by SEBI registered Alternative Investment Funds ("AIF") and Venture Capital Funds ("VCF") from USD 750 million to USD 1,500 million.

6. SEBI exempts[18] private family trusts (set up by promoters) from making open offer upon settlement of shares of Vadilal Industries Ltd

SEBI has allowed the application seeking exemption from making open offer under Regulation 11 of the Takeover Regulations in the case of proposed transaction of direct and indirect acquisition of equity shares of the Vadilal Industries Ltd by the family trust (with individual family members as trustees and beneficiaries) from the existing promoters.

Katalyst Comments:

The above application was made in compliance with SEBI Circular dated 22nd December, 2017, which standardized the format of application under Regulation 11 of the Takeover *Regulations. Further, in the past one month, SEBI has also granted exemptions to other family trusts in the case of H.G. Infra Engineering Ltd[19] and Thirumalai Chemicals Limited[20].*

7. SEBI permits[21] off-market transfer of securities by FPI

The Finance Act, 2021 provided tax incentives for relocating foreign funds to International Financial Services Centre ("IFSC") in order to make the IFSC in GIFT City a global financial hub. In order to further facilitate such 'relocation', SEBI has issued a circular permitting an FPI ('original fund' or its wholly owned special purpose vehicle) to approach its Designated Depository Participants ("DDPs") for approval of a one-time 'off-market' transfer of its securities to the 'resultant fund'. The off-market transfer shall be allowed without prejudice to any provisions of tax laws and FEMA.

[17] SEBI Circular No. SEBI/HO/IMD/DF6/CIR/P/2021/565 dt. May 21, 2021
[18] Order WTM/SKM/CFD/ 23 /2021-22, dt. May 24, 2021
[19] Order WTM/SKM/CFD/ 22 /2021-22, dt May 24, 2021
[20] Order WTM/SKM/CFD/ 21 /2021-22, dt. May 24, 2021
[21] SEBI Circular No. SEBI/HO/FPI&C/P/CIR/2021/0569 dt. June 1, 2021

Katalyst Comments:

The current regulations only allowed 'off-market' transfers of securities in case of multi-investment management structure (under the same PAN). The above circular is welcomed and provides the necessary impetus to FPIs for availing the tax incentives provided by the Finance Act, 2021

D. Other key highlights

1. SC: Lenders free to invoke[22] Personal Guarantees of Corporate Debtor under the Insolvency and Bankruptcy Code, 2016

In this case, the petitioners had furnished personal guarantees to banks and financial institutions which had led to release to advances and loans to various companies with which the petitioners were associated as directors, promoters or key managerial persons. In some of these cases, the personal guarantees furnished by the writ petitioners were invoked; in several cases, recovery proceeding and insolvency proceedings were initiated against the companies also.

The core of the argument of the petitioners was that where a resolution plan is accepted and approved under the IBC, which results in finality as to the claims of the lenders and creditors, and given that the guarantors (i.e., the petitioners) liability is secondary, such a resolution would extinguish the guarantors' liability also. Reliance was also placed on Section 138, 133 and 140 of the Indian Contract Act which deals with the liability of surety as being co-extensive with that of the principal debtor and other related aspects.

The Supreme Court, however, held that the sanction of resolution plan and the finality imparted to it does not per se operate as a discharge of the guarantors' liability.

Katalyst Comments:

This is an important judgement and can have far reaching implications.

[22] Supreme Court decision in case of Lalit Kumar v/s Union of India [Transferred case (civil) no. 245/2020] dt. May 21, 2021

2. Introduction of Regulations Review Authority 2.0[23]

RBI has set up a Regulations Review Authority ("RRA 2.0"), initially for a period of 1 year from May 1, 2021[24] which will focus on streamlining regulatory instructions, reduce compliance burden of the regulated entities by simplifying procedures and reduce reporting requirements, wherever possible. The RRA 2.0 will review the regulatory prescriptions internally as well as by seeking suggestions from the RBI regulated entities and other stakeholders.

In this regard, the RRA 2.0 has constituted an Advisory Group, under the Chairmanship of Shri. S. Janakiraman, Managing Director, State Bank of India. The said Group had invited feedback and suggestions from all regulated entities, industry bodies and other stakeholders by June 15, 2021.

3. Expert Committee on Variable Capital Company submits its report to the International Financial Services Centres Authority (IFSCA)[25]

IFSCA constituted a Committee of Experts ("Expert Committee") to examine the feasibility of the Variable Capital Company ('VCC') in India to examine the suitability of the Variable Capital Company as a vehicle for fund management in the International Financial Services Centre ("IFSC") in India.

The Expert Committee has assessed the features of a VCC or its equivalent, in other jurisdictions such as the UK, Singapore, Ireland and Luxembourg and has recommended the adoption of a VCC structure for the purpose of conducting fund management activity in IFSCs.

The Expert Committee report can be accessed at https://ifsca.gov.in/CommitteeReport

[23] Press Release No. 2021-2022/179, dt. May 7, 2021
[24] Press Release dated April 15, 2021
[25] Press Release dt. June 1, 2021

E. Goods and Service Tax Highlights

1. Amendments in Real Estate sector

➢ **Tax position before amendment**

- Until now, GST law provided that Developer is liable to pay GST on construction service provided to landowner in lieu of Development Rights under an area sharing arrangement at the time of issuance of Completion Certificate (CC) or first occupation (OC), whichever is earlier.
- If Landowner further sells such allotted Flats to other intended buyers before issuance of CC/OC, he is required to raise invoice and charge GST as when payment is due from buyer.

➢ **Amendments**

- The Government provided[26] that the Developer can make payment of GST on construction services provided to Landowners at any time on or before issuance of CC/OC.

- The Government has also clarified27 that the Landowner can utilize the ITC of tax charged by Developer for payment of tax on outward liability of supply of under-construction property under the project.

Katalyst Comments:

- *Entry No. 3 of tax rate Notification No. 11/2017-CT(R) have a condition that the landowner is eligible for ITC of taxes charged by the developer for construction services supplied provided the landowner further supplies such apartments to his buyers before issuance CC and pays the tax on same.*

- *Thus, the literal meaning of the condition provides that at the time of sale of under-construction property, landowner is required to pay GST in cash on output supply.*

[26] Notification 3/2021-CT dated June 2, 2021
[27] Notification 2/2021-CT dated June 2, 2021

- *Further, due to timing difference regarding GST liability to be paid on output supply by the landowner and developer, the ITC of input service on construction services gets accumulated in the hands of landowner.*

- *Therefore, the Government has made amendments to provide that developer can discharge the GST liability on construction services in advance and landowner can avail ITC benefit of the same and utilise the said ITC at the time of supply/sale of under-construction property.*

2. Bombay High Court[28] judges split over the issue of constitutional validity of provisions of Section 13(8)(b) & Section 8(2) of the IGST Act, 2017 dealing with place of supply ('POS') in case of 'Intermediary service

The petitioner, a proprietorship firm is engaging in providing intermediary services (promotion and marketing of goods) to the recipient located outside India and consideration of the same is in foreign currency. In view of provisions of section 13(8) (b) of the IGST Act which provides that in case of intermediary services, where supplier or recipient, if located outside India, POS is the place of service provider i.e., intermediary service provider in India. Further, section 8(2) of the IGST Act provides that if location of supplier of service and POS are in the same state, CGST is applicable.

Hence, the petitioner who provides services outside India and receives consideration in foreign exchange is liable to pay CGST and SGST and said transaction can't be classified as 'export of service'. Therefore, constitutional validity of section 13(8)(b) and Section 8(2) of the IGST Act challenged.

The two judges' bench of Bombay High court has provided different views on the constitutional validity of provisions of section 13(8)(b) and section 8(2) of the IGST Act while dealing the provisions of POS in case of intermediary service and hence, the Registry to place the matter before the Chief Justice on the administrative side.

One order on the captioned subject passed in 2nd week of June provided that Section 13 (8) (b) of the IGST Act not only falls foul of overall scheme of CGST/IGST Act but also offends Article 245, 246A, 269Aand 288 (1) of Constitution and is also *ultra vires* IGST Act besides being unconstitutional.

[28] Dharmendra M. Jani vs. UOI [TS-271-HC(BOM)-2021-GST]

Whereas, another order on the same issue passed on 3rd week of June provided completely different view whereby it is held that neither Section 13(8)(b) nor Section 8 (2) of the IGST Act are unconstitutional nor are ultra vires the IGST Act and thus are constitutionally valid and operative for all purposes. Further, the High Court also dismissed the plea of assessee to challenge the Article 14 & Article 19(1) (g) of the Constitution of India.

Katalyst Comments:

The Gujarat High court in the similar type of matter in case of Material Recycling Association of India[29] held that section 13(8)(b) of the IGST Act cannot be said to be ultra vires or unconstitutional in any manner; however, Gujarat HC kept it open for Revenue to consider the representation made by Petitioner to redress its grievance in a suitable manner. Further, w.r.t. intermediary services provided to the recipient outside India, the Government should suitably amend the GST law to provide the benefit of export of service to all the taxpayers.

3. Amnesty scheme regarding late fees for pending GST Returns[30]

- Reduction in late fees for non-filing of GSTR-3B for the tax period from July 2017 to April 2021 as under:
  - If no tax liability for such tax periods – Rs. 500 per return
  - Other taxpayers – Rs. 1000 per return

- Such late fees would apply if return for the said tax period is filed between 01.06.2021 to 31.08.2021.

4. Relaxation in condition to claim ITC as per Rule 36(4)[31]

Rule 36(4) of the CGST Rules, 2017 provides that a registered person shall be entitled to claim ITC to the extent of 105% of eligible ITC reflected in GSTR 2A/2B. This condition shall not apply for the GSTR-3B filed for the month of April and May 2021. However, the cumulative adjustment of ITC to be done at the time of furnishing GSTR-3B for the month of June 2021.

[29] [TS-5 86-HC-2020(GUJ)-NT]
[30] Notification no. 19/2021-CT Dated June 1, 2021
[31] Notification no. 27/2021-CT Dated June 1, 2021

5. **Reduction in late fees for delay in furnishing GSTR-3B and GSTR-1 for prospective tax periods[32]**

Turnover	Quantum of late fees
Nil tax liability / Nil outward supplies	Maximum late fees Rs. 500 per return (Rs. 250 CGST + Rs. 250 SGST)
Up to Rs. 1.5 crores in preceding year	Maximum late fees Rs. 1000 per return (Rs. 500 CGST + Rs. 500 SGST)
Between Rs. 1.5 crores to Rs. 5 crores	Maximum late fees Rs. 5000 per return (Rs. 2500 CGST + Rs. 2500 SGST)
Above Rs. 5 crores	Maximum late fees Rs. 10000 per return (Rs. 5000 CGST + Rs. 5000 SGST)

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[32] Notification no. 20/2021-CT dt. June 1, 2021