KATALYST ADVISORS

# Katalyst Kaleidoscope

June 2023: Tax and Regulatory Insights

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## A. Income tax highlights

### 1. ITAT Delhi[1]: Deemed income provisions on infusion of share capital, is wholly inapplicable for transactions between holding and its subsidiary company

The Delhi ITAT held that shares allotted to holding company by its 100% subsidiary company at premium (exceeding the fair market value), would not fall in the ambit of deemed income provisions under section 56(2)(viib) of the Income-tax Act, 1961 ('Act') as (i) no benefit was derived by the subsidiary company, and the ultimate beneficiary i.e. the holding company, holistically, and (ii) it was transaction between self.

***Katalyst Comments:***

*As often mentioned in earlier issues of this newsletter, Section 56(2)(viib) of the Act, is a classic case of outlier legislation, a provision which should not have been there in the first place, and clearly has been introduced to address the mischief that has happened in some cases.*
*In general, a holding company investing into a subsidiary company, whether at par or at premium, is clearly an inhouse transaction and should logically be outside the ambit of section 56(2)(viib); in that context, a welcome order.*

### 2. ITAT Dehradun and Karnataka High Court: Order in name of non-existent entity is void-ab-initio

**ITAT Dehradun[2]: Assessment order in name of non-existent partnership firm is void-ab initio**

The Assessee was converted from a partnership firm to a private limited company w.e.f April 20, 2021, during the course of scrutiny assessment proceedings for AY 2018-19. The conversion was intimated to the Principal Commissioner of Income-tax, and Assessing Officer; however, the final assessment order (issued on December 28, 2021), was in the name of the partnership firm, instead of the company. The Assessee challenged the validity of the order, as it was passed in the name of a non-existent entity.

[1] BLP Vayu (Project-1) Pvt Ltd (Delhi ITAT) (ITA No 4895/Delhi/2019)
[2] Karam Safety Pvt Ltd (Dehradun ITAT) (ITA No 03/DDN/2022)

The Dehradun ITAT, relying on the coordinate bench ruling of BJN Holdings Ltd[3] (which followed the Supreme Court judgement in case of Maruti Suzuki[4]), quashed the final assessment order, in the name of a non-existent partnership firm.

**Karnataka High Court[5]: Sets aside Reassessment proceedings initiated, in the name of non-existent entity, pursuant to a merger**

An NBFC got merged into the Assessee, w.e.f. April 1, 2018, and re-assessment proceedings for AY 2019-20 were initiated on January 28, 2023 on the NBFC, which had ceased to exist from April 1, 2018. Accordingly, the Assessee filed a writ petition to seek quashing of the re-assessment proceedings initiated on the NBFC.

The Karnataka High Court, relying on the Supreme Court judgement, in case of Maruti Suzuki[6]), quashed the re-assessment proceedings, while giving the Revenue another opportunity to initiate reassessment proceedings against the Assessee.

## 3. ITAT Ahmedabad[7]: No deemed dividend tax on 'non- shareholder' loan recipient

In this case, the Assessing Officer held that loans and advances received by the Assessee, qualify as deemed dividend under section 2(22)(e) of the Act, as two shareholders of the Assessee Company, having substantial shareholding in the Assessee Company, held more than 10 percent shares in the company which had advanced the loans and advances to the Assessee.

The Ahmedabad ITAT, upholding the order of the CIT(A) and relying on the Delhi High Court judgement[8], held that, though the advances qualified as deemed dividend, the same cannot be taxed in the hands of the Assessee, not being shareholder of the company lending the loans and advances i.e. deemed dividend cannot be taxed in the hands of non-shareholders.

[3] BJN Holdings Ltd (Delhi ITAT) (ITA Nos 42 to 46/Del/2022)
[4] Maruti Suzuki India Ltd (Supreme Court) (Civil Appeal No 5409 of 2019)
[5] Coffee Day Resorts (MSM) Pvt Ltd (Karnataka High Court) (Writ Petition No. 9594 of 2023)
[6] Refer footnote 4 above
[7] Aaryavart Infrastructure P.Ltd (Ahmedabad ITAT) (ITA No 2105/Ahd/2015 with Cross Objection No:174/Ahd/2015)
[8] Ankitech Pvt Ltd (Delhi High Court) (ITA No 462 of 2009 and ITA No 2087 of 2010)

4. **ITAT Delhi[9]: Assessee eligible to benefits of Article 11 of India-Mauritius DTAA, on strength of TRC issued by the Mauritian Authorities**

In this case, the Commissioner of Income-tax ('CIT'), subjected revisionary proceedings against the Assessee; a Mauritius based Collective Investment Vehicle (CIV) and SEBI registered Foreign Portfolio Investor, holding that the Assessee would not be eligible to claim benefits under Article 11 (Interest income) of the India-Mauritius DTAA, based on the conclusion that the (i) Assessee: adopted treaty shopping, was a mere conduit, was not the beneficial owner of income and had no commercial rationale for establishment in Mauritius, and (ii) TRC is not conclusive to establish tax residency.

The Delhi ITAT, following the judgement of the Delhi High Court in Blackstone Capital[10], rejected the CIT's revisionary order, and held that the Assessee is a tax resident of Mauritius, and would be eligible for the benefits of Article 11 (Interest income) of India-Mauritius DTAA, on the strength of the TRC issued by the Mauritian Authorities.

5. **Telangana High Court[11]: Successor company entitled to refund of tax-credit migrated pursuant to merger**

In this case, a writ petition of the Assessee Company (successor company), to the High Court, for migration of the credit of advance tax and TDS (of the merged company), to the Assessee Company was accepted, and the credit was successfully migrated. Consequently, the High Court also acceded to the Assessee's petition for issue of the consequential refund to be remitted to the Assessee Company, along with applicable interest.

6. **ITAT Bangalore and ITAT Mumbai: Eligibility to claim exemption from capital gains invested into residential house property (section 54F):**

**ITAT Bangalore[12]: Assessee eligible to claim section 54F deduction even if new house not constructed within prescribed time limit**

The Bangalore Tribunal held that if the intention of the Assessee was to construct a residential house, but if the same was not constructed within the due date prescribed under section 54F of the Act (3 years from the date of sale of long-term capital asset), on account of genuine reason, Assessee would still be eligible for proportionate deduction under section 54F, since entire sale proceeds from sale of long-term capital asset were not utilized for the new assets.

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[9] Sapein Funds Ltd (Delhi ITAT)(ITA No 976/Del/2022)
[10] Blackstone Capital Partners (Singapore) VI FDI Three Pte Ltd (Delhi High Court) (CM Appeal 7332/2022)
[11] Virtusa Consulting Services Pvt. Ltd (Telangana High Court) (Writ Petition No. 6638 of 2023)
[12] Sharada Mohan Shetty (Bangalore ITAT) (ITA No 1060/Bang/2022)

**ITAT Mumbai[13]: Assessee eligible to claim section 54F deduction, as Assessee not exclusive owner of multiple house properties**

Section 54F of the Act (which provides a deduction from long-term capital gains on investment of the proceeds in a residential house property), inter-alia, provides a condition that the Assessee should not be owning more than one residential house, on the date of transfer of the long-term capital asset, for claim of the deduction.

The Mumbai Tribunal, in this case, following the judgement of the Madras High Court14, held that the Assessee, with multiple jointly-owned residential house properties, would be eligible for deduction under section 54F of the Act, against long-term capital gains, since the Assessee owned multiple residential house properties, jointly and was not the exclusive owner.

## 7. CBDT[15]: Clarification and extension of various due dates relating to charitable and religious trusts

The Finance Act, 2023, amended section 115TD of the Act, by providing that non-filing of application for registration within the prescribed time would trigger provisions of section 115TD of the Act, and the trust would lose its exemption as a charitable entity. Several trusts would have been adversely impacted, since they may not have filed the application within the prescribed time limit. Accordingly, the CBDT has provided extension of various due dates relating to charitable and religious trusts, and clarifications, as follows:

- Extension of due dates for filing application by trusts;

- Relaxation in the due dates for furnishing forms to be filed for accumulation of income and deemed application of income, as well as form to be filed intimating details of donations received by the trust from various donors who are eligible to benefit under section 80G of the Act,

- Clarifications regarding (i) applicability of provisional registration, (ii) denial of exemption in case where the statement of accumulation is not filed by due date, and (iii) audit report to be furnished in Form No 10B.

[13] Zainul Abedin Ghaswala (Mumbai ITAT) (ITA No 545/MUM/2023)
[14] Dr. (Smt) P.K.Vasanthi Rangarajan (Madras High Court) (Appeal No 1435 of 2005)
[15] Circular No 6 of 2023, dated May 24, 2023

### 8. CBDT[16]: Tax exemption limit on leave encashment raised for non-Government salaried employees

The CBDT, has increased the tax exemption limit on leave encashment, on retirement of non-government salaried employees, from Rs 3 lakh to Rs 25 lakh, w.e.f. April 1, 2023.

***Katalyst comments:***

*The increased exemption limit, would provide tax relief to non-government salaried employees, who were allowed a very low tax exemption limit of Rs 3 lakh.*

## B. Corporate Law Highlights

### 1. NCLT Bengaluru[17]: Grounds for modification of Appointed Date

The NCLT, post approval of a demerger scheme, allowed the application for modification of the appointed date of the scheme from April 1, 2022 to April 1, 2023, on account of operational and commercial reasons (the timelines for the completion of demerger was crossing over to Financial Year 2023-24, and the appointed date being April 1, 2022 was coming in the way of closure of books of accounts for Financial Year ending March 31, 2023, of the Applicant).

***Katalyst comments:***

*The decision is welcome from the perspective of companies undergoing corporate structuring, and seeking to amend appointed date, on commercial grounds.*

### 2. NCLAT Chennai and NCLT New Delhi: CCDs and security deposit collected for maintenance of real-estate project, not "Financial Debt"

**NCLAT Chennai[18]: Compulsory Convertible Debentures are "Equity Investments" not within "Financial Debt" definition**

In this case, the Appellant ('Financial Creditor') subscribed to the Corporate Debtor's Compulsory Convertible Debentures ('CCDs'), thereby providing financial assistance to a Corporate Debtor. Further, the Appellant entered into Share Buy Back Agreement to buy-back CCDs, meanwhile, Corporate Debtor sought restructuring of the terms of repayment of CCDs.

[16] Notification No. 31/2023/F. No. 200/3/2023-ITA-I dated May 24, 2023
[17] M/s Stump Schuele & Somappa Pvt.Ltd, (NCLT Bengaluru), dated April 21, 2023
[18] M/s IFCI Limited, NCLAT Chennai, dated June 5, 2023

The Corporate Debtor proposed One Time Settlement ('OTS') and Appellant agreed to the same; however on default of honoring the OTS proposal, Appellant invoked Corporate Debtor's corporate guarantee.

The NCLAT held that CCDs are in the nature of "Equity instruments" and do not fall within the definition of "Financial Debt" under the IBC Code, mainly on the basis that:

(i) the parties clearly treated the CCDs as Equity and highlighting that there is no condition in any of the agreements which changes the nature of the CCDs in the "happening of any event",
(ii) merely because interest is payable on the CCDs, in the case of a default, it cannot be construed that the CCDs fall within the definition of "Financial Debt",
(iii) the Supreme Court judgement[19], held that any instrument, which was fully, compulsorily convertible into shares, was regarded as "Equity", and not a "Loan" or "Debt",
(iv) CCDs do not postulate any repayment of Principal and accordingly do not constitute a 'Debenture' in its classic sense, and
(v) though there is no express definition or interpretation regarding whether CCDs are to be treated as 'Debt' or 'Equity', the NCLT has rightly relied on 'RBI Master Direction' of FDI in coming to a conclusion that Debentures which are fully, compulsorily and mandatorily convertible are to be treated as 'Equity Instrument'."

Accordingly, the NCLAT, dismissed the Appellant's application, challenging the rejection of claim by Resolution Professional of the Corporate Debtor (undergoing liquidation), despite Appellant's financial assistance (through CCDs) to Corporate Debtor.

**NCLT New Delhi[20]: Security Deposit collected for maintenance of real-estate project, not "Financial Debt"**

In this case, an allottee in a real estate project, filed an application for initiating Corporate Insolvency Resolution Process ('CIRP') against a real estate developer, on non-payment of maintenance corpus / security deposit (sum of money collected from various allottees to ensure maintenance of project) to the allottee, which according to the allottee was a "financial debt".

The NCLT (i) referring to the definition of "financial debt" under the Code, and the decision of the Supreme Court[21] (which settled the legal position for the definition of financial debt), and

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[19] Narendra Kumar Maheshwari (Supreme Court) [1990 Supp SCC 440]
[20] Verandas Apartment Owners Association vs. Saluja Construction Company Ltd., (NCLT New Delhi), dated May 4, 2023.
[21] Anuj Jain, RP for Jaypee Infratech Ltd. vs. Axis Bank Ltd.' (Civil Appeal Nos. 8512-8527 of 2019)

(ii) relying /referring the judgement of the Honorable Supreme Court[22], and order of the NCLT Mumbai[23], in a similar matter, held that, in case of allottees only the amounts which were disbursed with profit as the main aim can be considered as financial debt. Since the corpus collected by the real-estate developer was to ensure proper maintenance of project, it cannot be said that profit was the main aim for collection of such corpus. Further, the NCLT was of the view that the amount was similar to the money paid in advance to a service provider, which in the case is the service of maintenance. Accordingly, the amount of security deposit does not qualify as a financial debt.

### 3. Supreme Court[24]: Disproportionate allotment in a rolled-up rights offer is not "oppression" of shareholders who did not apply for shares after getting the offer

In this case, the shareholding of the Appellant group in the Company increased, as it applied for more shares in a rolled up offer (in the rolled up offer: a shareholder was free to not apply for the shares at all, could apply for less than its entitlement, could apply for shares as per the ratio, or apply for shares in excess), whereas the respondents group did not participate; and challenged oppression and mismanagement by Appellant, on various grounds.

The Supreme Court held that the application for more shares by the Appellants Group, and allotment of shares to them on the basis of the availability of the shares by reason of the choice exercised by the respondents not to be participate in the exercise, cannot be treated as defective, illegal, or an act of oppression; the reasoning of the Supreme Court was primarily that:

(i) it is not a case wherein there was any impediment for the respondents to apply; and

(ii) it is also not a case where allotment of additional shares was made to anyone other than the existing shareholders; it is a case where the terms were applied equally to all the existing shareholders. The appellant's shareholding grew, as a consequence of the respondents refusal to apply, despite being given the opportunity.

[22] Pioneer Urban Land Infrastructure Ltd. & Anr. Vs. Union of India & Ors.', Writ Petition (Civil) No. 43 of 2019
[23] Innova Premises Co-operative Society Limited V/s Marathon Nextgen Realty Limited, [CP (IB) No.1042/MB-IV/2020]
[24] Hasmukhlal Madhavlal Patel vs Ambika Food Products (P) Ltd (Civil Appeal Nos 8194 and 8195 of 2018), June 15, 2023

## C. SEBI/ FEMA/PMLA/OTHER

### 1. PMLA[25]: Penalty reduced on NRI violating FEMA for opening Bank A/c meant for Resident Indian

The Appellant, being a Non-Resident Indian ('NRI'), unintentionally opened a saving bank account (meant for resident Indian), mentioning his brother's residential status, instead of Non-Resident External / Non-Resident Ordinary Account (meant for NRI), for receiving the sale proceeds of land. No amount was repatriated out of India and hence there was no loss of foreign exchange to the Government. The Special Director (Appeals) FEMA, levied a penalty of Rs 5 lakh, for contravention of Regulation 8(a) of Schedule 3, issued under Regulation 5(1)(ii) of Foreign Exchange Management (Deposit) Regulations, 2000, which states that authorized dealers should designate the existing account of residents to Non-Resident (Ordinary) Account, on account of change of residential status to non-resident.

The PMLA Adjudicating Authority held that the aforementioned regulations is not applicable in the case of Appellant, as it pertains to regulations which are to be followed by Authorised Dealer / Bank; the appellant is only liable for commission of contravention, where the amount is not quantifiable, which is punishable up to penalty of Rs. 2 lakh, and thus reduced the penalty of the Appellant to Rs 1 lakh.

### 2. SEBI[26]: Notification of amendments in SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

SEBI has issued a notification, amending the SEBI (LODR) Regulations, 2015, for strengthening corporate governance at listed entities by empowering shareholders, streamlining the disclosure requirements for material events or information and strengthening compliance.

The amendments are in line with the consultation paper that was previously released by SEBI[27]; the key changes in the SEBI (LODR) Regulations, 2015, are as follows:

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[25] Avtar Singh Sekhon (Appelate Tribunal under SAFEMA/FEMA/FERA, New Delhi), February 21, 2023

[26] Notification No SEBI/LAD-NRO/GN/2023/131: SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2023,

[27] Refer 'SEBI: Consultation Paper on strengthening corporate governance' in Katalyst Kaleidoscope, February, 2023, for details

| Sr No | Particulars | New Provision | Katalyst comments |
|---|---|---|---|
| 1. | Filling of vacancy of compliance officer, key managerial person, and director.<br><br>[Effective July 14, 2023] | Vacancy of the following persons in a listed entity, to be filled up within 3 months from the date of such vacancy:<br><br>• Compliance Officer,<br><br>• Key Managerial Personnel (CEO, Managing Director, Whole Time Director, Manager Chief Financial Officer),<br><br>• Director (other than arising from completion of term office), where the listed entity does not fulfill the composition requirement, without filling the vacancy. | *The stricter timelines are intended to tighten governance* |
| 2. | Continuation of a Director<br><br>[Effective July 14, 2023] | 1. Continuation of a Director serving on the board of directors of a listed entity shall be subject to the approval by the shareholders in a general meeting at least once in every five years from the date of their appointment or reappointment, as the case may be, with effect from April 1, 2024.<br><br>2. Certain exceptions have been provided. | *Intended to facilitate good corporate governance as shareholders will get an opportunity to evaluate the performance of the directors* |
| 3. | Disclosure of material events<br><br>[Effective July 14, 2023] | 1. Quantitative threshold criteria, for determining the materiality of an event / information, required to be disclosed by the | *The introduction of thresholds, are intended to enhance disclosures and transparency.* |

| Sr No | Particulars | New Provision | Katalyst comments |
|---|---|---|---|
| | | board of directors of a listed entity, has been introduced.<br><br>2. Timelines for disclosure of material events revised; quicker disclosure.<br><br>3. Top 100 listed entities by market capitalization from October 1, 2023 and Top 250 listed entities from April 1, 2024, shall deny or clarify any reported event or information in the mainstream media (i.e. newspapers, news channels, etc) which is not general in nature and which indicates that rumors of an impending specific material event or information are circulating amongst the investing public, within 24 hrs from the reporting of the event or information. | *Quicker disclosures, intended to enhance communication of the material events soon.* |
| 4. | Disclosure of certain types of agreements binding listed entities<br><br>[Effective July 14, 2023] | All the shareholders, promoters, promoter group entities, related parties, directors, key managerial personnel and employees of a listed entity or of its holding, subsidiary and associate company, who are parties to the agreements specified i.e. agreements entered with purpose and effect is to:<br><br>• Impact the management or control of the entity, | *The introduction of this disclosure, intended to lead to information symmetry and would avoid significant market reactions when it is known to public at large, at later stage.* |

| Sr No | Particulars | New Provision | Katalyst comments |
|---|---|---|---|
| | | • Impose restrictions or create any liability on the Listed entity,<br><br>are required to inform the listed entity, who is not a party to such agreement within 2 working days from entering into such agreements. | |
| 5. | Special rights to shareholders<br><br>[Effective July 14, 2023] | 1. Special Rights granted to shareholders of a listed entity (like the right to appoint a director, the right to say on important matters in a meeting, etc.) shall be required to be mandatorily approved by shareholders by way of a special resolution once, in every five years, starting from the date of grant of such special right.<br><br>2. Exceptions of the aforesaid, in case of special right granted by a listed entity to financial institution or a debenture trustee. | *This amendment is intended to enhance transparency.* |
| 6. | Sale, lease or disposal of an undertaking outside Scheme of Arrangement<br><br>[Effective June 14, 2023] | 1. Any listed entity carrying out any sale/disposal of whole or substantially the whole of an undertaking shall be required to comply with the following:<br><br>• Prior approval by way of Special Resolution, and<br><br>• disclose the object and rationale for undertaking such action and the use of proceeds in the explanatory | *This is intended to safeguard the interest of minority shareholders, in case of slump sale.* |

| Sr No | Particulars | New Provision | Katalyst comments |
|---|---|---|---|
| | | statement annexed to the notice sent to shareholders.<br><br>2. Compliance requirements under 1 will not be applicable in case of the sale of undertaking to a wholly owned subsidiary ('WOS'). Where such undertaking has been transferred to WOS, neither the WOS shall not sell or dispose of the undertaking nor the listed entity shall reduce shall its shareholding in the WOS, without complying with (1)<br><br>3. Exceptions to such regulations have been provided. | |
| 7. | Disclosure of events / information to stock exchange | Disclosure to stock exchange regarding: sale of stake in associate company, actions initiated by regulatory bodies, delay in payment of fines, frauds, change in senior management etc, has been expressly introduced | *This is intended to enhance transparency.* |

### 3. SEBI[28]: Master Circular on schemes of arrangement and relaxation rules

SEBI has issued a comprehensive master circular focusing on two key aspects: Schemes of arrangement by listed entities, and relaxation rules in relation to requirements to be fulfilled by listed entity for listing of equity shares, application by a listed entity for listing of warrants offered along with Non-Convertible Debentures, etc. The Master circular provides consolidated guidelines and requirements for listed entities and stakeholders involved in such arrangements, and replaces the previous circulars in relation to the same.

[28] Master Circular No SEBI/HO/CFD/POD-2/P/CIR/2023/93, dated June 20, 2023

## 4. SAT[29]: Quashes SEBI order citing "unreasonable" exercise of discretionary powers under Takeover Regulations

The Appellants acquired more than 15% of the equity shares of a target company on March 12, 2007, and consequently triggered compliance for making a public announcement by way of an open offer to acquire the shares of the target Company in accordance with Regulation 10 of the Substantial Acquisition of Shares and Takeover Regulations, 2011 ('SAST'); however, the Appellants failed to make public announcement.

The Appellants made the necessary disclosures in 2019 and subsequently, show cause notice was issued after 14 years in December 2021; calling upon the appellants to show cause as to why appropriate directions including penalty should not be imposed under the SEBI Act, 1992, read with Regulation 44 of the SAST Regulations. Consequently, the Chief General Manager ('CGM') of SEBI, exercising its discretion, directed the Appellants to make an open offer within 15 days, pay interest, penalty, and restrained from accessing the securities market till compliance of the open offer is made.

The SAT quashed the aforesaid SEBI order, and remitted the matter to the CGM:

(i) on the basis that the exercise of discretionary powers under Regulation 44 was inappropriate in the case, as there was a long-lapse of time from date of acquisition till the date of impugned order, and will not provide equality of treatment to all stakeholders who held shares on the trigger date (since the number of shareholders reduced from the trigger date to the current date), and,

(ii) relying on the decision of Supreme Court[30] wherein, the Supreme Court, interpreted the aforesaid provisions and held that the use of the word "may" and not "shall" in Regulation 44 was significant, iterating that it was not mandatory that in case of every violation and breach of Regulation 10, 11 and 12, a direction under Regulation 44 should be issued.

## 5. SEBI[31]: Consultation paper on framework for mandating additional disclosures from Foreign Portfolio Investors ('FPIs')

Recent developments in the capital markets and the possibility of round tripping and/or any indirect circumvention of the 25% Minimum Public Shareholding ('MPS') requirement has been a cause of concern amongst regulators. In this context, SEBI has issued a consultation paper which deals with this aspect, as also another aspect, namely potential misuse of FPI

[29] Ferryden International Ltd (SAT Mumbai), May 12, 2023.
[30] Sunil Krishna Khaitan [2 SCC 643 (2023)]
[31] SEBI Consultation paper dated May 31, 2023

route for circumvention of conditions stipulated under Press Note 3 of April 17, 2020, which requires that an entity of a country that shares land border with India or where the beneficial owner is a citizen of such country, can invest only under the Government route.

In the above context, the consultation paper deals with SEBI proposals, briefly summarized as under:

- To mitigate the risk of circumvention of MPS regulations and potential circumvention of Press Note 3, it is proposed that enhanced transparency measures involving a look through ownership may be mandated for certain objectively identified "high risk FPI".

- Within the existing Category I and II FPI registration, FPIs may be further categorised as high, moderate and low risk; where Government and Government entities such as Central Bank, Sovereign Wealth Funds are investors, such FPIs could be considered as low risk, FPIs where pension funds or public retail funds are investors would be moderate risk, and others would be high risk.

- For requiring the additional disclosures, the risk categorisation is proposed to be coupled with the quantum of concentrated investments by FPIs in a single corporate group (to prevent circumvention of MPS etc.), or the size of the overall equity Assets under management (to prevent misuse of the FPI route to circumvent the requirements of Press Note 3).

- Currently, high-risk FPIs, holding more than 50 percent of their equity Asset Under Management in a single corporate group would be required to comply with the requirements for additional disclosures

- Separately, it is proposed that existing high risk FPIs with an overall holding in Indian equity markets of over Rs. 25,000 cr., shall also be required to comply with additional granular disclosure requirements within 6 months, failing which the FPI should bring down its AUM below the said threshold within that time frame.

  **Note:** Based on the data as of March 31, 2023, and on certain assumptions, it is estimated that FPI AUM of around Rs. 2.6 lac cr. (or around 6% of total FPI equity AUM, and less than 1% of India total equity market capitalisation) may potentially be identified as high-risk FPIs that meet either of the 50% group concentration or the Rs. 25,000 cr. Fund size thresholds.

## D. Goods and Service Tax highlights

### 1. Delhi High Court[32]: Refund rejection order regarding services provided to foreign parent, set aside

The Assessee i.e., McDonald India is the franchisee and provides services like consumer research, devising advertising strategy, Restaurant opening strategy, interviewing potential partner, employees etc. to McDonald USA and filed the refund claim for export of services. The Appellate authority rejected the refund claim on the ground that such services are performance-based services, Assessee is acting as an intermediary for such services and place of supply of such service is in India. Therefore, said services do not qualify as export of services.

The Delhi High Court has set aside the refund rejection order on the ground that scope of services also do not entail procurement or facilitating services from third-party suppliers and has no connection with what section 13(3)(b) (i.e., physical presence of McDonald USA) and section 13(5) (i.e., Conducting interviews of potential joint venture partners) of IGST Act requires or contemplates. Further, the High Court also held that Commissioner (A) has travelled suo motu beyond SCN to reject the refund claim on ground of intermediary services provided by the assessee and set aside the refund rejection order and remanded the matter to Adjudicating authority to consider the matter afresh.

***Katalyst comments:***

*Favourable judgment by the Delhi High court;  McDonald India held to be the intermediary of its foreign parent company and place of supply for such service be outside India; the transaction qualifies as export of service.*

### 2. Uttarakhand AAR[33]: Motor-vehicle service provider should charge GST on fuel reimbursement also.

Uttarakhand AAR has ruled that motor vehicle service provider has to charge GST on entire bill amount which includes monthly rental, night charges, fuel on mileage basis, and not just monthly rental (excluding night charges and fuel on mileage basis). The AAR has clarified that section 15 of the CGST Act which deals with 'value of supply' provides that transaction value includes any amount that the supplier is liable to pay and hence, reimbursement of expenses

[32] McDonald's India Pvt. Ltd vs Additional Commissioner, CGST Appeals - II [TS-203-HC(DEL)-2023-GST] – dated May 26, 2023

[33] In the matter of Uttarakhand Public Financial Strengthening Project [TS-201-AAR(UTT)-2023-GST] – dated May 24, 2023

for providing said services is nothing but additional consideration for the provision of motor vehicle hire services and forms part of value of supply and attracts GST on the total value.

***Katalyst comments:***

*Similar views were adopted by Uttarakhand AAR in case of Tata Genset Engineers[34] wherein it was held that GST is applicable on cost of diesel incurred for running DG Set in the course of providing Diesel Generator rental service.*

3. **Calcutta High Court[35]: ITC benefit cannot be denied to the recipient based on the retrospective cancellation of supplier's registration**

The ITC benefit was denied to the recipient on the ground that GST registration of the supplier was cancelled with retrospective effect. In this regard, the Calcutta High court sets aside the order denying ITC benefit and held that documents relied upon by the assessee were not considered by the Revenue and directs Revenue to consider Assessee's grievance afresh along with documents and pass a reasoned order after granting hearing opportunity. The High Court also apprises that, without proper verification, it cannot be said that there was any failure on the part of Assessee in compliance of any obligation required under the statute before entering the transactions in question.

***Katalyst comments:***

*Welcome judgment by the Calcutta High Court. The benefit of ITC should not be denied if the recipient has made full payment for value of supply and tax to the supplier. In a similar matter, the Delhi High Court [36] has held that refund of ITC cannot be denied on suspicion of fake invoicing without any cogent material and directed Revenue to process refund application.*

4. **Bombay High Court[37]: Provisions of section 13(8)(b) and section 8(2) of the IGST Act relating to place of supply of 'intermediary services'; are constitutionally valid and not applicable to CGST/SGST Act.**

The issue involved is whether the intermediary services provided by an intermediary located in India to the customer located outside India qualifies as export of service or not. In this regard, due to the divergent decision with respect to the constitutionality of Section

[34] [TS-651-AAR(UTT)-2022-GST] -dated December 14, 2022

[35] Gargo Traders vs. The Joint Commissioner, Commercial Taxes (State Tax) & Ors [TS-239-HC(CAL)-2023-GST] - June 14, 2023

[36] Balaji Exim [TS-86-HC(DEL)-2023-GST] dated March 16, 2023

[37] Dharmendra M. Jani vs UOI & ors [TS-228-HC(BOM)-2023-GST] dated June 6, 2023

13(8)(b) of the IGST Act which deals which place of supply of intermediary services, the matter was placed before the third judge of Bombay High Court, who upheld the provisions of Section 13(8)(b) and Section 8(2) of the IGST Act and held that the said provisions are confined in their operation to the provisions of IGST Act only and the same are not applicable to CGST and MGST Acts.

***Katalyst comments:***

- *If Section 13(8)(b) is Constitutionally Valid, then place of supply of intermediary services is the place of service provider, which is in India and as the place of supply is in India, GST will be leviable even though the recipient of service is located outside India. Thus, the transaction in question cannot be treated as export of service. On the other hand, if transaction in question is export of service as provided by the Bombay High Court, then, the provisions of section 13(8)(b) will be unconstitutional. In view of this discussion, we understand that the decision has thus created anomaly.*

- *Further, the Bombay High Court has relied upon the principle of destination-based tax to qualify the transaction in question as 'export of service' as the recipient of service is located outside India. However, the provisions of 'export of service' provides that in case of any transaction to qualify as 'export of service,' place of supply of service should be outside India whereas in the instant case, the place of supply of intermediary service is in India as per section 13(8) (b) of the IGST Act.*

- *The decision of Bombay High court has complicated the issue further, which presumably will be resolved at the level of Supreme Court.*

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