Katalyst Kaleidoscope

March 2020: Tax and Regulatory Insights

A. Income-tax Highlights

1. Key amendments to the Finance Bill, 2020

On 23rd March 2020, the Lok Sabha passed the Finance Bill, 2020 with several amendments in light of the representations received from the stakeholders. Key amendments to the Finance Bill, 2020 are as under:

Residency provisions

- An individual, being an Indian citizen or a person of Indian origin, visiting India and having India-sourced income exceeding INR1.5mn during the relevant financial year, shall trigger residency if his/her stay in India exceeds 120 days (instead of 182 days as per existing provisions) in the relevant year. However, such person shall be considered as Resident but Not Ordinarily Resident (RNOR).

- Provision deeming an Indian Citizen, who is not liable to tax in any other country or territory by reason of domicile or residence or any other criteria of similar nature, as resident in India restricted to only those Indian citizen individuals whose Indian sourced income exceeds INR1.5mn in the relevant financial year. However, such person shall be considered as RNOR.

- Earlier amendment proposed to RNOR provisions (i.e. non-resident in India in 7 out of 10 preceding financials years) has been omitted and as a result, existing RNOR criteria of being non-resident in 9 out of 10 preceding financial years or stay in India of 729 days or less during preceding 7 financial years has been reinstated.

Dividend taxation

- Surcharge on dividend income for a taxpayer being an individual, HUF, Association of Persons, Body of Individuals or Artificial Juridical Person restricted to 10% if total income (including dividend income) does not exceed INR10m and 15% if total income (including dividend income) exceeds INR10m.

- Deduction of inter-corporate dividend u/s 80M of the Income-tax Act, 1961 ("ITA") extended to dividend received from a foreign company or REIT /InvIT.

- Transitional dividend (dividends declared on or before 31st March 2020 but received by shareholders on or after 01st April 2020) shall be exempt in the hands of recipient shareholder if the applicable Dividend Distribution Tax is paid by domestic company and tax u/s 115BBD (tax on dividend income exceeding INR 1mn), if applicable, is paid by recipient resident shareholder.

- Unit holders of REIT / InvIT shall not be required to pay tax on dividend income distributed by REIT / InvIT if SPV from which dividend income is received by REIT / InvIT has not opted for lower corporate tax of 22% u/s 115BAA of the ITA.

Other key amendments

- The scope of equalisation levy (currently applicable only on advertisement services provided by non-resident not having PE in India) extended to all sales, gross receipts or turnover of non-resident not having PE, who is providing online sale of goods or provision of services or both to a person resident in India or a non-resident using IP address in India or to a non-resident in specified circumstances related to date collected from India. The rate would be 2% and would be applicable on and from 1st April 2020 if Sales/ Turnover/ Gross receipts of NR e-commerce operator from e-commerce supplies or services is more than INR 20mn during the relevant financial year.

- Tax collection at source (TCS) applicability on remittances under Liberalised Remittance Scheme, overseas tour package and sale of goods as well as applicability of new withholding on e-commerce operator deferred to 1st October 2020.

- No double collection of TCS on LRS by Authorised Dealer if TCS already collected by seller of overseas tour package, No TCS on export and import of goods, TCS @0.5% on remittance out of education loan borrowed from specified financial institution.

- Withholding at the rate of 20% (plus applicable surcharge and cess) for dividend distributed to non-resident shareholders (other than companies) and foreign companies.

- Non-applicability of withholding on redemption/repurchase made by mutual funds to unit holders.

2. Reliefs announced by Finance Minister to ease burden of statutory compliances

Considering the distress caused by COVID-19, the Finance Minister on 24th March 2020 announced the following reliefs:

- Due date for filing revised return and belated return for FY 18-19 extended from 31st March 2020 to 30th June 2020. Deadline for Aadhar-PAN linking also extended to 30th June 2020.

- Extends Vivad se Vishwas scheme deadline by 3 months to 30th June 2020, Not required to pay additional 10% of disputed tax, if payment made by 30th June 2020.

- For delayed payments of advanced tax, self-assessment tax, regular tax, TDS, TCS, equalization levy, STT, CTT made between 20th March 2020 and 30th June 2020, reduced interest rate at 9% instead of 12 %/18 % per annum (i.e. 0.75% per month instead of 1/1.5 percent per month) will be charged for this period. No late fee/penalty shall be charged for delay relating to this period.

- Due dates for issue of notice, intimation, notification, approval order, sanction order, filing of appeal, furnishing of return, statements, applications, reports, any other documents and time limit for completion of proceedings by the authority and any compliance by the taxpayer

including investment in saving instruments or investments for roll over benefit of capital gains under Income Tax Act, Wealth Tax Act, Prohibition of Benami Property Transaction Act, Black Money Act, STT law, CTT Law, Equalization Levy law, Vivad Se Vishwas law where the time limit is expiring between 20th March 2020 to 29th June 2020 shall be extended to 30th June 2020.

Income-tax Highlights – Others:

3. **Assessment on non-existing amalgamated entity void-ab-initio & unsustainable[1]**

Siemens VAI Metal Technologies Pvt Ltd (SVAI) was merged with Siemens Limited. Pursuant to amalgamation, SVAI ceased to exist as an independent legal entity. Upon merger, even after repeated communications to the tax department about amalgamation, the assessment order was passed in the name of amalgamating company which ceased to exist on date of assessment order. Mumbai ITAT observed that assessee discharged his obligation of informing revenue about the amalgamation; and following SC ruling in the case of Maruti Suzuki held that assessment order passed in the name of non-existing entity is void-ab-initio and unsustainable in law.

4. **In the absence of element of voluntariness, amount received from sister concern considered as loan/advance (and not ICD) for deemed dividend purposes[2]**

Assessee received funds from sister concern (where it held 50% stake). The assessee claimed that the amount received is in the nature of Inter-Corporate Deposits ("ICD") and hence should not be treated as deemed divided u/s 2(22)(e) of the Income-tax Act, 1961 ("ITA"). Pune ITAT clarified that it is essential for the amount given as ICD, there should be voluntariness emanating from the lender to give the amount to the assessee and not from assessee. ITAT observed that in the given case the element of voluntariness was missing in the conduct of parties. Pune ITAT held that in absence of legal documentation and merely by mentioning ICD in the ledger account, the nature and colour of transaction would not change to ICD and upheld such receipt as deemed dividend.

5. **Indirect transfer not taxable in India under Article 13(6) of India – Belgium tax treaty[3]**

Assessee, a tax resident of Belgium, divested its entire stake in Singapore company which in-turn held 99.99% stake in an Indian company. The transaction undertaken by the assessee was within the ambit of provisions of indirect transfer as elucidated in Explanation 5 of the Section 9(1)(i) of ITA. However, the assessee took shelter under Article 13(6) of India-Belgium tax treaty and thus, declared nil income in India.

The tax department rejected the contention of the assessee and attempted to bring said transaction under tax net by invoking Article 13(5) of India-Belgium tax treaty (which allows India to tax capital gains arising from the sale of shares of Indian company) and Explanation 5 of the Section 9(1)(i) of ITA dealing with indirect transfer. On Appeal, Mumbai ITAT emphasized on the

[1] Siemens Limited Vs. ACIT (ITA No. 1824/MUM/2015) C.O. No. 67/MUM/2015 (Mumbai ITAT) 21st Feb 2020
[2] Dhariya Construction Pvt. Ltd. Vs. DCIT (ITA No. 1440/PUN/2015) (Pune ITAT) 11th Feb 2020
[3] Sofina S.A. Vs. ACIT (International Taxation) (ITA No. 7241/Mum/2018) (Mumbai ITAT)

fact that an unilateral amendment in the domestic law cannot override the provisions of DTAA and held that Article 13(5) does not permit a 'see through' approach and hence, the transfer of shares of the Singapore company cannot be construed as transfer of shares of its Indian Subsidiary. Also, relying upon AP HC ruling in Sanofi case, Mumbai ITAT concluded that such Indirect transfer of shares was exigible to tax under Article 13(6) and can only be taxed in Belgium and not India.

6. **AAR denied capital gains exemption under India-Mauritius tax treaty basis "commercial substance" and "business purpose" test**

Bid Services Division (Mauritius) Ltd ("assessee"), a Mauritian company, was a step-down wholly owned subsidiary of Bidvest Group Limited ("BGL"), a South-African listed company. The assessee held valid Tax Residency Certificate ("TRC") and the effective control and management of the assessee is situated in Mauritius. BGL along with other consortium entities won bid for operation, management and development of Mumbai Airport. Thus, assessee along with other consortium entities formed a joint venture company in India in 2006 in which the assessee held 27% stake. In 2011, the assessee sold 13.5% stake in aforesaid joint venture company in India and approached the Authority for Advance Rulings ("AAR") for its ruling on taxability of capital gains.

AAR ruled that the dominant purpose of interposing the assessee company in the investment holding structure was to avoid taxes and thus, denied benefit of capital gains exemption under India-Mauritius tax treaty based on the following factual observations:

- Consortium group did not include assessee as one of the members during the key stages of bidding process; but brought in just before filing of binding bid. In fact, the assessee was incorporated just two weeks prior to the submission of the binding consortium bid.

- Funds for share subscriptions were advanced to the assessee by its parent companies;

- No commercial justification for setting-up the assessee company in Mauritius and hence, the commercial substance and bona-fide business purpose test was lacking;

AAR also looked through the structure and invoked provisions of India-South Africa DTAA which allows India to tax capital gains arising from the sale of shares of Indian company.

Katalyst Comments: *It is very unfortunate that the India - Mauritius tax treaty once again comes into question for the grandfathered investment (i.e. investments made prior to 31st March 2017),though on the factual ground; and basis "commercial substance" and "business purpose" test, given the SC in the Azadi Bachao case has clearly held that Mauritius resident companies are eligible for treaty exemption so long as they hold a valid Tax Residency Certificate.*

7. **Deduction allowed for legal expenses incurred in respect of sale of "capital assets"[4]**

Assessee incurred legal expenses in the nature of advisory fees for the proposed sale of land (which was sold in the subsequent year) and claimed its deduction as a revenue expenditure. Hon'ble

[4] Pr. CIT Vs. M/s. Aker Powergas Pvt. Ltd. (Income Tax Appeal (IT) No. 1276 of 2017) (Bombay High Court)

Bombay HC affirmed Tribunal's view and allowed deduction of such legal expenses on the ground that merely because the transaction in question is a capital asset, the legal expenses incurred for the same will not ipso facto become capital expenditure.

8. **Deduction of partner's remuneration/interest allowed to firm opting for presumptive taxation u/s 44AD[5]**

Assessee had offered to tax 8% of its gross receipts under presumptive taxation u/s 44AD (where maintenance of books is not required) and had debited the interest/remuneration from such profits, which was disallowed by the AO on the ground that no books of accounts were maintained by the assessee. The Delhi ITAT held that even though the assessee has not maintained any books of accounts in terms of provision of sections 184 and 185 of the Act, deduction of interest and salary to partners has to be allowed.

9. **Loan waiver held not taxable u/s 28(iv)[6]**

Upon waiver of loan given by the Government of Karnataka to Essar Shipping Limited ("assessee"), the tax department held such waiver to be taxable u/s 28(iv). Bombay High Court relying on the SC ruling in the case of Mahindra & Mahindra Ltd (wherein it was held that for applicability of Section 28(iv), the income which can be taxed has to arise from the business or profession and the benefit to be received in the form other than the shape of money and held such waiver not taxable u/s 28(iv). Further, Bombay High Court rejected revenue's contention that upon waiver of loan, the amount covered by such loan would partake the character of operational subsidy and clarified that "loan" is a borrowing of money required to the repaid back with interest, whereas, "subsidy" is not required to be repaid back being a grant.

10. **CBDT released FAQs on Vivad se Vishwas Bill, 2020[7]**

The 'Vivad se Vishwas' Scheme was announced during the Union Budget, 2020, to provide for dispute resolution in respect of pending income tax litigation. Pursuant to the Budget announcement, the Direct Tax Vivad se Vishwas Bill, 2020 (VSV) the Lok Sabha on 5th February 2020 and passed by it on 4th March 2020. In order to address queries of the stakeholders, CBDT has released FAQs on VSV which deal with the issues of the eligibility of a taxpayer to settle the taxpayer's case under VSV in different situations, the manner of computing the quantum of disputed tax payable, consequences under VSV and certain procedural aspects, etc.

Key clarifications include: picking and choosing issues for settlement of an appeal is not permitted and complete order is required to be settled under VSV; Appeal-wise settlement is permitted ie. the taxpayer can opt to settle its own or the tax authority's appeal. Furthermore, in relation to appeals against regular assessment orders and reassessment orders for the same tax year which are pending at different appellate forums, the taxpayer can opt to settle one or both; If the payer settles the appeal in respect of tax deduction or collection at source under VSV, credit of such

[5] Singh Construction Company Vs. ITO (ITA No. 6847/Del/2017) (Delhi ITAT)
[6] Essar Shipping Limited [TS-171-HC-2020(BOM)]
[7] Circular No. 7/2020 dated 4th March 2020

taxes is to be allowed to the payee as on the date of settlement of the dispute by the payer and the payer shall be entitled to consequential relief of deduction of expenditure (in respect of which the payer failed to comply with the tax withholding provisions) in the year in which tax was required to be withheld.

11. CBDT notifies Direct Tax Vivad Se Vishwas Rules, 2020[8]

The Direct Tax Vivad se Vishwas Act, 2020 (VSV Act) grants a general power to the Central Government to make rules for carrying out the provisions of VSV Act. In deference of powers conferred, the CG has issued Direct Tax Vivad se Vishwas Rules, 2020 which prescribe the forms in which declaration, waiver of right to appeal and intimation of payment are required to be made as well as the certificate and order are to be issued by the Designated Authority (DA) under VSV Act; Computation of the losses, unabsorbed depreciation, Minimum Alternate Tax / Alternative Minimum Tax (AMT) credit that can be carried forward if the dispute settled under VSV Act pertains to such losses, unabsorbed depreciation and MAT/AMT credit; Computation of disputed taxes when some of the issues in appeal are covered in favor of the taxpayer, etc.

B. SEBI Highlights

1. Securities and Exchange Board of India (SEBI) relaxed compliance requirement with certain provisions of the SEBI (LODR) Regulations, 2015 due to the COVID – 19 virus pandemic

Regulation and associated filing	Frequency	Due date	Extended date
Regulation 33 - Financial Results	Quarterly / Annual	45 days from the end of the quarter for quarterly results (15th May) 60 days from the end of Financial Year for Annual Financial Results (30th May)	30th June 2020 30th June 2020
Regulation 7(3) - filing of compliance certificate on share transfer facility	Half yearly	30th April 2020	31st May 2020
Regulation 13(3) - filing of statement of investor complaints	Quarterly	21st April 2020	15th May 2020
Regulation 24A – filing of Secretarial Compliance Report	Yearly	30th May 2020	30th June 2020

[8] CBDT Notification No. 18 of 2020, F.No. IT(A)/1/2020-TPL

Regulation 27(2) – filing of Corporate Governance Report	Quarterly	15th April 2020	15th May 2020
Regulation 33 – filing of Shareholding Pattern	Quarterly	21st April 2020	15th May 2020

SEBI also exempts Board of Directors and Audit Committee of the listed entity from observing the maximum stipulated time gap between two board meetings for the meetings held or proposed to be held between the period 01st December 2019 and 30th June 2020, however, directs them to ensure meetings are held at least 4 times a year as stipulated under LODR Regulations.

2. **SEBI issued consultative paper with respect to Guarantees provided by Listed Companies for public comments**

   - To protect the interests of minority shareholders, in addition to extant provisions of the Companies Act, 2013 and disclosure requirements of SEBI (LODR) Regulations, 2015, it is proposed in the consultative paper that guarantee/ security can be extended by a listed entity, provided:

     A) Extension of such guarantee/ security to any person / entity (promoter(s)/ promoter group/ director / directors relative / KMP) is in the 'economic interest' of the listed company.

     B) The said listed entity shall obtain prior approval from the shareholders on a "majority of minority" basis, before extending any such loan or any guarantee / security.

3. **SEBI issued consultation paper on delisting of Listed Subsidiary without following Delisting Regulations through a scheme of arrangement with its Listed Parent Company**

   - SEBI issues consultation paper proposing amendments to SEBI (Delisting of Equity Shares) Regulations, 2009 (Delisting Regulations) in relation to scheme of arrangement between a listed parent company and its listed subsidiary wherein the listed subsidiary is desirous of getting delisted without following the provisions under the Delisting Regulations.

   - As per the existing Delisting Regulations, the listed subsidiary desirous of getting delisted would be required to follow the delisting norms in terms of the Delisting Regulations, which include reverse book building process.

   - The proposal provides that the shareholders of the listed subsidiary company will be offered shares of the listed parent company through a share swap under an NCLT scheme of arrangement. As a result, the subsidiary will continue to exist, albeit as an unlisted wholly owned subsidiary of the listed parent company.

- The proposal also provides following safeguards to ensure that undue advantage of this route is avoided and same is not detrimental to the interest of investors:

  - The exemption from Delisting Regulations, shall be confined to only a scheme of arrangement between a listed subsidiary and its listed parent.

  - The process of this proposed scheme shall be identical to a process followed in a merger wherein the holding listed company and the listed subsidiary shall seek no objection from stock exchanges and SEBI for the proposed merger in terms of Regulation 37 of SEBI LODR Regulations, 2015 and the Circulars issued thereunder.

  - Thereafter, the holding listed company and the listed subsidiary company shall file application(s) before the Hon'ble NCLT.

  - The independent valuation of shares of the listed subsidiary and the listed parent for the share swap will ensure that the share exchange ratio based on which all shareholders of listed subsidiary (except the parent company) receive shares of the listed parent in lieu of the shares they hold in the listed subsidiary.

  - The votes cast by public shareholders in favour of the proposal amount to at least 2 times the number of votes cast by public shareholders against it.

  - A minimum vintage of 3 years of listing of the shares of the listed subsidiary.

  - No adverse order or direction from SEBI.

  - No further restructuring by the listed holding company for a period of 3 years from the date of the NCLT Order.

4. SEBI allowed fast track rights issue for InvITs and REITs

SEBI has permitted fast-track rights issue by REITs and InvITs without filing draft offer document with the regulator subject to the fulfilment of the conditions as specified by the Board from time to time under SEBI (Infrastructure Investment Trusts) Regulations, 2014 and SEBI (Real Estate Investment Trusts) Regulations, 2014.

5. SEBI issued a press release to clarify that FPIs from Mauritius continue to be eligible for FPI registration with increased monitoring as per FATF norms[9]

The Financial Action Task Force (FATF) on 21st February 2020 placed Mauritius in the list of "jurisdictions under increased monitoring", commonly referred to as the "grey list". There have been apprehensions among market participants that whether inclusion of Mauritius in the 'grey list' would have an effect on the registration of FPIs from Mauritius.

[9] SEBI Press Release dated 25th February 2020

In this regard, SEBI issued a press release on 25th February 2020 to clarify that Mauritius-based FPIs continue to be eligible for FPI Registration with increased monitoring as per FATF norms. SEBI in its press release highlighted to the intermediaries that when a jurisdiction is placed under increased monitoring, it construes that the country has committed to resolve swiftly the identified strategic deficiencies within agreed timeframes and is subject to increased monitoring. The FATF does not call for the application of enhanced due diligence to be applied to these jurisdictions, but encourages its members to take into account this information in their risk analysis.

C. Corporate Law Highlights

1. Reliefs announced by Finance Minister to ease burden of statutory compliances under the Companies Act and IBC in view of COVID-19 outbreak

- The mandatory requirement of holding meetings of the Board of the companies within prescribed interval of 120 days provided in the Companies Act, 2013 (Companies Act) shall be extended by a period of 60 days till next two quarters i.e. till 30th September 2020.

- As per Schedule 4 to the Companies Act, Independent Directors are required to hold at least one meeting without the attendance of Non-independent directors and members of management. For the year 2019-20, if the Independent Directors of a company have not been able to hold even one meeting, the same shall not be viewed as a violation.

- Requirement to create a Deposit reserve of 20% of deposits maturing during the FY 2020-21 before 30th April 2020 shall be allowed to be complied with till 30th June 2020.

- Requirement to invest 15% of debentures maturing during a particular year in specified instruments before 30th April 2020, can be done before 30th June 2020.

- Non-compliance of minimum residency in India for a period of at least 182 days by at least one director of every company, under Section 149 of the Companies Act shall not be treated as a violation.

- Threshold of default under section 4 of the Insolvency and Bankruptcy Code 2016 (IBC) to Rs 1 crore (from the existing threshold of Rs 1 lakh). This will by and large prevent triggering of insolvency proceedings against MSMEs.

- No additional fees shall be charged for late filing during a moratorium period from 01st April 2020 to 30th September 2020, in respect of any document, return, statement etc., required to be filed in the MCA-21 Registry.

2. The Companies (Amendment) Bill, 2020 introduced in Lok Sabha

The Companies (Amendment Bill), 2020 (Bill) was introduced in Lok Sabha on 17th March 2020. Continuing its endeavors in increasing the Ease of Doing Business in India, it is proposed to make several amendments including decriminalising various offenses.

Key highlights of the Bill are as under:

a) **Decriminalization of certain offences** - The Bill seeks to remove penal provisions in relation to certain offences under the Companies Act, inter alia, including the defaults under the provisions pertaining to:

- Matters to be stated in prospectus
- Variation of shareholders' rights
- Reduction of share capital
- Power of company to purchase its own securities
- Issue of Debentures
- Registration of charges
- Investigation of beneficial ownership of shares in certain cases
- Investments of company to be held in its own name
- Related party transactions
- Merger and amalgamation of companies

b) **Reduction of Penalty** - The Bill amends various sections under the Companies Act in order to reduce the penalty imposed for a default. Some of the offences for which the penalty has been reduced are:

- Failure to file Annual Return
- Failure to file Resolutions and Agreements
- Failure to file Financial statement, Board's report, etc.
- Valuation by registered valuers

c) **Definition of Listed Company** - The Bill proposes to empower the Central Government to exclude, in consultation with the SEBI, certain class of companies from the definition of" listed company", mainly for listing of debt securities.

d) **Direct Listing on foreign stock exchanges** - The Bill recommends allowing certain class of public companies to list certain class of securities on stock exchanges in permissible foreign jurisdictions or such other jurisdictions as may be provided by rules.

e) **Reduction in timelines for applying for right issues** - The Bill seeks to enable the Central Govt. to provide by rules such days less than 15 for deeming the decline of the offer made under the said provision.

f) **Exemption from declaration in respect of beneficial interest in any share** - The Bill seeks to allow Central Govt. to exempt any class or classes of persons from complying with any requirements of Section 89 of the Companies Act [except sub-section (10)].

g) **Exemptions to NBFCs** - Bill proposes that certain NBFCs and HFCs be exempted from filing of resolutions passed to grant loans or give guarantees or to provide security in respect of loans under clause (f) of Sec. 179(3) of the Companies Act in the ordinary course of their business

h) **Exemption from CSR Committee constitution** - The Bill further recommends that the requirement of constitution of CSR Committee shall not be applicable, in case the amount required to be spent on CSR by the company does not exceed Rs. 50 lakhs. The Bill also puts forth that eligible companies' u/s 135 be allowed to set off any amount spent in excess of their CSR spending obligation in a particular FY towards such obligation in subsequent FYs.

3. MCA notified the Companies (Auditor's Report) Order, 2020

The format of the Auditor's report is governed by the Company (Auditor's Report) Order. The Ministry of Corporate Affairs (MCA), after consultation with the National Financial Reporting Authority (NFRA), on 25th February 2020 has issued the Companies (Auditor's Report) Order, 2020 (CARO 2020) in suppression of the existing the Companies (Auditor's Report) Order, 2016 (CARO 2016).

Under CARO 2020, the specific list of matters to be reported in the Auditor's report has increased to 21 areas as compared to 16 areas under CARO 2016. Further, the existing clauses of CARO 2016 have been re-drafted to seek detailed comments from the Auditors.

Amongst other, the following shall form part of Auditor's report under CARO 2020:

- Proceedings under the Benami Transactions (Prohibition) Act;
- GST dues payment and the amount of cash losses;
- Declaration of Company as willful defaulter by any Lender;
- Whether, the auditor has considered the whistle-blower complaints;
- Whether, there has been any resignation of statutory auditors during the year;
- Whether, the company is maintaining records of property, plant & equipment / intangible assets;
- Details of investments / guarantee / security / loans / advances. Whether, Sections 185 and 186 of the Companies Act have been complied with;
- Whether the company has defaulted in repayment of loans or other borrowings or in the payment of interest;
- Whether, moneys raised by way of public offer were applied for the stated purposes;

- Whether, the company has complied with the requirements of Sections 42 (private placement) and 62 (further issue) of the Companies Act;

- Whether, all related party transactions are in compliance with Sections 177 and 188 of Companies Act / disclosures are as per the accounting standards;

- Whether, the company has entered into any non-cash transactions with directors, etc. and if so, whether Section 192 of the Companies Act has been complied with;

- Whether, the company has conducted any Non-Banking Financial activities without a Certificate of Registration from RBI. Whether, the company is a Core Investment Company (CIC), if so, whether it continues to fulfil the CIC criteria;

- Compliance of laws / orders of Competent Authorities with respect to deposits accepted or amounts which are deemed to be deposits;

- Financial position and opinion on the solvency of the Company;

- Corporate Social Responsibility spend / obligations related details;

- Whether, there have been any qualifications or adverse remarks by the respective auditors in the CARO reports of companies included in consolidated financial statements, with references;

- Where, in the auditor's report, answer to any of the aforesaid questions is unfavourable or qualified, the auditor's report shall also state the basis for such answer.

Separately, the Auditing and Assurance Standards Board of ICAI has also issued Guidance Note on the Companies (Auditor's Report) Order, 2020 for guidance purposes.

Katalyst Comments:
Considering the distress caused by COVID-19, the Finance Minister on 24th March 2020 announced that the CARO 2020 shall be made applicable from FY 2020-2021 instead of from FY 2019-2020 notified earlier.

4. NCLT holds amalgamation of profit making wholly owned subsidiary with its loss-making parent company not against interest of revenue[10]

A joint application was filed before NCLT New Delhi bench for sanction of proposed scheme of amalgamation of profit making wholly owned subsidiary with its loss-making parent company. Income Tax Department objected to the proposed scheme of amalgamation on ground that amalgamated company was a loss-making entity and main object of scheme was to absorb losses and thus, evade payment of taxes.

[10] IMA(P.) Ltd. v. Skyroof Builders Ltd. [2020] 114 taxmann.com 370 (NCLT – New Delhi)

NCLT held that the Act provides for situations wherein it enables companies to offset losses against profits and therefore explicated that the said scheme cannot be said to be against the interest of the Revenue. NCLT also held that the provisions of section 72 of the Act would be wholly applicable and in the event of any liability still accruing, the same would devolve on the amalgamated company.

D. RBI and Foreign Exchange Regulations Highlights

1. RBI issued guidelines to regulate payment aggregators

On 17th March 2020, the Reserve Bank of India (RBI) issued guidelines under the Payment and Settlement Systems Act, 2007 to regulate payment aggregators. This is pursuant to discussion paper issued by RBI last year which highlighted the growth of online payments in India and gaps in the existing regulatory framework. Payment aggregators are now required to be authorised by the RBI, and their operations would be subject to the direct regulatory supervision of the RBI.

2. FDI Policy in Single Brand Retail Trading - Clarification issued for goods procured from Special Economic Zone

Under the extant Foreign Direct Investment (FDI) policy, 100% FDI is permitted under the automatic route in Single Brand Retail Trading (SBRT) entities, subject to their compliance with the local sourcing requirements, whereby an SBRT entity having FDI of more than 51% must ensure that 30% of the value of goods are procured from India.

The Department for Promotion of Industry & Internal Trade (DPIIT) on 25th February 2020 issued a clarification around the FDI policy of the Government of India on SBRT as contained in para 5.2.15.3 of Press Note 4 (2019) as outlined below:

- Sourcing of goods from units located in a Special Economic Zone (SEZ) in India would qualify as sourcing from India, as per the FDI policy.
- Goods sourced from SEZ's would qualify the local sourcing requirement of 30% mandatory sourcing from India for proposals involving FDI beyond 51%, subject to Special Economic Zones Act, 2005 (as amended from time to time) and other applicable laws, rules and regulations.
- Goods proposed to be sourced by an SBRT entity, from such units located in SEZ's in India must be manufactured in India.
- The responsibility for compliance with all the conditions enumerated in the FDI policy and as notified under the Foreign Exchange Management Act, 1999 (FEMA) would continue to vest in the manufacturing entity.

Katalyst Comments: *The Government's clarification is in sync with the current market practice and it will provide greater flexibility and ease of operations for the SBRT entities.*

3. Amendment to Foreign Direct Investment in Insurance Sector

The Government of India has reviewed the extant FDI policy on Insurance sector and has made following amendment in the Consolidated FDI Policy of 2017 (FDI Policy), as amended from time to time.

Sector/Activity	% of Equity/FDI Cap	Entry Route
Insurance Company	49%	Automatic
Intermediaries or Insurance Intermediaries including insurance brokers, reinsurance brokers, insurance consultants, corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by IRDA from time to time.	100%	Automatic

Conditions:

a) Total Foreign Investment in the equity shares of the Indian Insurance Company is allowed up to 49% under automatic route subject to approval/verification by IRDA and investment shall be subject to compliance with Insurance Act, 1938. Further, increase in foreign investment in Indian Insurance Company shall be in accordance with the pricing guidelines specified by RBI under the FEMA Regulations.

b) An Indian Insurance Company shall ensure that its ownership and control remain at all times in the hands of resident Indian entities as per relevant rules/regulations.

c) Foreign portfolio investment in an Indian Insurance company shall be governed by the provisions of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014.

d) The foreign equity investment cap of 100 percent shall apply on the same terms as above to insurance intermediaries, as may be notified by IRDA from time to time. However, the condition of Indian owned and controlled, as specified in clause (b) above, shall not be applicable to Insurance Intermediaries and composition of the Board of Directors and key management persons shall be as specified by the concerned regulators from time to time.

e) The insurance intermediary that has majority shareholding of foreign investors shall undertake the following:

   i) be incorporated as a limited company under the provisions of the Companies Act, 2013;

ii) at least one from among the Chairman of the Board of Directors or the Chief Executive Officer or Principal Officer or Managing Director of the insurance intermediary shall be a resident Indian citizen;

iii) shall take prior permission of the Authority for repatriating dividend;

iv) shall bring in the latest technological, managerial and other skills;

v) shall not make payments to the foreign group or promoter or subsidiary or interconnected or associate entities beyond what is necessary or permitted by the Authority;

vi) shall make disclosures in the formats to be specified by the Authority of all payments made to its group or promoter or subsidiary or interconnected or associate entities;

vii) composition of the Board of Directors and key management persons shall be as specified by the concerned regulators;

Katalyst comments: *The provision will help the insurance sector. However, the subjective aspect in the insurance intermediary conditionalities can create a lot of confusion; for example, the reference of bringing in the latest technological, managerial and other skills and the implication if IRDA does not think so.*

E. Goods and Service Tax Highlights

1. In view of COVID-19 pandemic affecting businesses across the country, Finance Minister Nirmala Sitharaman announced measures on 24th March 2020, to ease the GST compliance burden on businesses. Please find below the key Indirect tax announcements.

- **Extension of due date and relief in interest, penalty and late fees**
  - Due date for filing GST return in the month of March, April and May and composition returns extended up to 30th June 2020
  - No interest, penalty or late fee would be charged, for Companies with less than Rs. 5 Cr turnover
  - For other companies (turnover more than 5 Cr), reduced interest rate of 9% p.a. would apply while no late fee or penalty would be chargeable
- **Extension of payment date under Sabka Vishawas Scheme (Legacy Dispute Resolution) Scheme, 2019**
  - Due date of payment under the scheme extended till 30th June 2020; No interest to be charged for late filing under the scheme, irrespective of any amount.

- **Extension in due dates for notices, applications, etc.**
  - The due date for issue of notice, notification, filing an appeal, applications, or time limit for any compliance under the GST, customs, and other allied laws where the time limit is expiring between 20th March 2020 to 29th June 2020 has been extended to 30th June 2020.
- **Customs clearance to be an 'essential service'**
  - The clearance of customs shipments has been declared as an 'essential service' to ensure that imports and exports are not affected due to the lockdown announced by Central and State authorities.
  - The customs clearance will continue to operate 24/7, at least till 30th June 2020

2. Highlights of key decisions of 39th GST council meeting held on 14th March 2020

- **Interest for delay in GST payment –** Interest for delay in payment of GST to be levied on net liability i.e. on cash component and law to be amended retrospectively
- **Deferment of E-invoice and QR Code**[11] - E-invoicing and QR Code to be extended to 01st October 2020
- **Exemption from issuing E-invoices**[12] - Insurance company, banking company, financial institution, non-banking financial institution, GTA, passenger transportation service etc. to be exempted from issuing e-invoices or capturing dynamic QR code.
- **Know your supplier –** New facility to be introduced to have some basic information about the current or prospective suppliers
- **Existing return filing system**[13] - Continuation of existing system of furnishing FORM GSTR-1 & FORM GSTR-3B till September, 2020.
- **Extension of due date of filing GSTR-9 (Annual Return) and GSTR-9C (Reconciliation statement)** [14] **-** Due date for filing of GSTR-9 and GSTR-9C extended from 31st March 2020 to 30th June 2020
- **Measures to curb fake invoices** - Restrictions to be imposed on passing of the ITC in case of new GST registrations, before physical verification of premises and Financial KYC of the registered person
- **Export facilitation** – Bunching of refund to be allowed to exporter

[11] Notification no. 13 and 14/2020 -Central Tax, both dated 23rd March 2020
[12] Notification no. 13 and 14/2020 -Central Tax, both dated 23rd March 2020
[13] Notification no. 27,28 and 29/2020-Central Tax, all dated 23rd March 2020
[14] Notification no. 15/2020-Central Tax, dated 23, 2020

- **Customs** -The exemptions from IGST and compensation cess on imports made under the advance authorization, Export Promotion Capital Goods, and Export Oriented Unit schemes have been extended up to 31 March 2021. Also, it was announced that the e-wallet scheme would be implemented after 31 March 2021.

Katalyst Comments: *Long pending issue of interest payment on gross or on net liability has been resolved and other welcome decisions regarding measures to curb fake invoices, know your supplier facility, waiver of late payment fees for non-filing of annual returns for F.Y.2017-18 and F.Y.2018-19 for turnover below Rs. 2crores taken in the GST council meeting.*

3. **ITC apportionment in case of business reorganization**[15]

CBIC has clarified various issues relating to apportionment of ITC pursuant to a demerger under Rule 41(1) of the CGST Rules as under:

- **Value of assets of the new units** – To be taken at State level and not all-India level
- **Transferor required to file Form ITC-02** – in those states where transferor and transferee both are registered
- **Formula prescribed under Rule 41(1) of CGST Rules** – Applicable for all forms of business reorganization that results in partial transfer of business assets along with liabilities and that must be applied to total unutilized ITC of transferor. i.e. sum of ITC of CGST, SGST and IGST.
  - Transferor will have liberty to determine the amount to be transferred under each head of tax (CGST, SGST and IGST) within this total amount.
- **Relevant date to calculate unutilized ITC of transferor -** Date of filing of Form ITC-02 by the transferor
- **Relevant date to calculate ratio of value of assets** – "Appointed date of merger"

4. **Clarifications regarding GST issues for Companies under Insolvency and Bankruptcy Code, 2016 ('IBC')** [16]

- **Dues under GST during pre- Corporate Insolvency Resolution Process (CIRP) period** will be treated as 'operational debt' and claims may be filed by the proper officer before the NCLT in accordance with the provisions of the IBC
- **GST registration of corporate debtors** – GST registration of entity for which CIRP has been initiated should not be cancelled, if needed, same may be suspended. If registration has been cancelled, registration may be revoked by necessary steps

[15] Circular no. 133/03/2020-GST dated March 23, 2020
[16] Circular no. 134/04/2020-GST dated March 23, 2020

- **Liability to file return by Interim Resolution Professional (IRP)/Resolution professional (RP) –** No liability for pre-CIRP period.

- **New registration by corporate debtor during CIRP period –** Within 30 days of appointment of IRP/RP

5. **GST applicable on land development under JDA as it is not a 'sale on land'** [17]

   Authority for Advance Ruling ('AAR') of Madhya Pradesh held that activities of developing common facilities like drainage, electricity, road facilities, garden development etc. are in the nature of development of land into residential layout and sale of plots is incidental to main activity of land development and hence, liable to GST as 'works contract' service.

6. **ITC of goods and works contract services for construction and maintenance of warehouse for letting it out, is not available**[18]

   AAR of Madhya Pradesh held that no ITC of goods and works contract services for construction and maintenance of warehouse is available to the Clearing and Forwarding Agent (C&F Agent) in view of the restrictions imposed by section 17(5) (d) of the CGST Act. The AAR rejected the argument of applicant regarding 'no brake of tax chain' & 'double taxation' (by way of dis-allowing ITC and GST payment on renting no ITC).

   Katalyst Comments: *In case* ***of M/s Safari Retreats Pvt Ltd and Ors Vs. Chief Commissioner of Central Goods and Service Tax and Ors [TS-350-HC-2019(ORI)-NT],*** *the hon'ble High court of Orissa had allowed ITC of input materials and input services used for construction of shopping malls intended for letting out, as 'tax chain' is not broken even though services are covered under section 17(5) (d) of the CGST Act (blocked credit). However, under the instant case, AAR of MP held that construction services are covered under section 17(5) (d) of CGST Act and hence, ITC is not available.*

Do feel free to reach out to us for a detailed discussion on ketan.dalal@katalystadvisors.in

Our Offices:
Mumbai
71/75, Mittal Tower 'C'
Nariman Point,
Mumbai – 400021
Tel: +91 22 4917 1616

Pune
#402, Lunkad Sky Vista
New Airport Road,
Viman Nagar,
Pune- 411014, Tel: +91 20 6749 7700

[17] In the matter of Vidit Builders [TS-168-AAR-2020-NT]
[18] In the matter of Unity Tradors [TS-169-AAR-2020-NT]