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Katalyst Kaleidoscope

March 2023: Tax and Regulatory Insights

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A. Income tax highlights

1. The Finance Bill, 2023 passed by the Lok Sabha on March 24, 2023 with certain amendments

The Lok Sabha has passed the Finance Bill, 2023 ("Bill") on March 24, 2023, with certain amendments to the original Finance Bill presented on February 1, 2023. Key highlights as under:

i. Section 50AA of the Act (i.e., taxation of market linked debentures ("MLD") introduced originally) is further amended, whereby short term capital gains tax will be levied on transfer of units of a specified debt mutual fund, which are acquired on or after April 1, 2023 (specified debt mutual fund is defined to mean any mutual fund wherein not more than 35% is invested in equity shares of domestic companies). As a consequence, any capital gains on transfer of units of a debt mutual fund would be subject to applicable rates (slab rates in case of individuals), without any indexation benefit vis-à-vis cost of acquisition, which was available earlier in case such units were held for more than 36 months. Further, while the new tax regime in relation to debt mutual funds would only apply to units acquired post April 1, 2023, taxation on transfer of MLDs would continue to apply retroactively.

ii. Any sums distributed to the units holders of REITs/ InvITs will only be taxable as income from other sources under section 56(2)(xii) of the Act, if such sums (other than interest/ dividend/ rental income are already taxed in the hands of the unit holders on a pass through basis) are in excess of the cost of original investments (this provision is not applicable to any such sums distributed to sovereign wealth funds/ pension funds). To this extent, it has also been provided that such sums so received, but are not subject to tax yet shall be reduced from the original cost of acquisition of such units. Further, it has been provided that such cost adjustment shall be deemed to applicable retrospectively.

iii. The rate of tax under section115A of the Act on royalty and fees for technical services ("FTS") payable to non-residents has been increased from 10% to 20%. Earlier, if the rate of tax on royalty/ FTS under the relevant DTAA was higher than 10%, then the benefit of lower tax of 10% under the domestic law was available; this benefit would not be available henceforth.

iv. TCS under section 206C(1G) is to be collected in case of remittance under LRS even if remittance is not made out of India (say, in case of gift by a resident to the NRO account of a non-resident). Earlier, TCS was collectible only if LRS is made out of India. Of course, TCS is not an additional tax but results in a cash flow issue; credit of TCS so collected would be available against the final tax liability of a taxpayer, but this again became a cash flow/refund issue.

v. While it was expected that tax on "excessive" premium under secion 56(2)(viib) of the Act would not be extended to non-residents, especially since the provisions of FEMA governs the valuation of investments into India by non-residents, there has been no change in relation to the same. Accordingly, any investments by non-residents in India would also be required to be justified either through the DCF valuation approach or Net Asset Value approach

2. ITAT Mumbai: No implications under section 79 for a year if set-off of brought forward loss is not claimed during the year[1]

The Mumbai ITAT quashed the revision of Sodexo India's (Assessee) assessment initiated on the basis that the Assessee sought to set-off brought forward losses of Rs.12 cr. despite change in its shareholding beyond 51%; held that since the Assessee was assessed at a loss in regular assessment for AY 2017-18 and did not utilise the brought forward losses, thus the question of invoking section 79 is not sustainable.

The change in shareholding pattern that triggered the revision occurred during the relevant previous year, whereby the shareholding of Sodexo France SA increased from 25% to 99.99%, whereas the shareholding of Sodexo Services Asia Pte. Ltd. reduced to zero. However, as no set-off of loss was claimed during the year under consideration, implications under section 79 could not arise, and hence, action of PCIT under section 263 was not tenable.

3. ITAT Delhi: Article 13(4) of India-Singapore tax treaty – Tax authorities cannot go behind TRC issued by Singapore tax authorities; gain on sale of shares acquired prior to April 1, 2017 not taxable in India[2]

The facts of the case were that the assessee, a Singapore based company, sold shares of an Indian Company. It claimed refund of TDS on the ground that capital gains is not taxable in India as per article 13 of India – Singapore DTAA. The Revenue denied benefit under article 13(4A) of the India-Singapore DTAA on the ground that the assessee had no economic substance or commercial substance and is a shell or a conduit company. Aggrieved by order of revenue, the assessee filed an appeal before ITAT.

The ITAT observed that the revenue completely ignored the following while denying the benefit under India-Singapore DTAA:

- TRC issued by Singapore Tax Authority,
- Tax assessments carried out in Singapore,
- Financial statements for 3 years i.e., 2016, 2017 and 2018 and
- The two shareholders of the assessee are also residents of Singapore as per the TRC

[1] Sodexo India Services Private Limited [ITA 930/Mum/2022]

[2] Reverse Age Health Services Pte. Ltd. vs. DCIT [ITA No. 1867/Del/2022]

The ITAT further held that the assessee cannot be termed as a shell or conduit company, since the veracity of the expenditure incurred by the assessee in Singapore was the subject matter of tax scrutiny in Singapore, and the same was found to be genuine by the Singapore Tax Authorities as per tax assessment orders.

The ITAT further observed that section 90(2) allows the provisions of a DTAA to supersede the provisions of the Income Tax Act in case the application of the former is more beneficial; it concurred with Revenue's argument that GAAR is applicable to the relevant year but held that, the present case falls under the exceptions carved out under rule 10U, as the tax benefit in the relevant assessment year arising in aggregate, to all parties to an arrangement does not exceed the sum of Rs. 3 crores and also that the shares in the concerned transaction were acquired prior to April 1, 2017.

4. **ITAT Raipur: Where additional shares were issued by assessee-company to its existing shareholders on right basis, provisions of section 56(2)(viib) - "excessive" share premium, could not be invoked[3]**

The Assessing Officer observed that the assessee-company during the year under consideration had allotted 5000 shares of face value of Rs. 10 each at a premium of Rs. 90 per share. It was observed that though the fair market value (FMV) of the unquoted equity shares of the assessee-company as per rule 11UA was admittedly Rs. 85 per share, the same were allotted to the existing shareholders at a rate of 100 per share. The Assessing Officer was of the view that the excess amount of Rs. 15 per share received by the assessee-company was liable to assessed as its income from other source's.

The ITAT concluded that as the newly issued shares were distributed proportionally among existing shareholders, the percentage of ownership remained the same before and after the allotment; the allotment of additional shares only resulted in a distribution of the value of the existing shares over a larger number of shares. In fact, the CBDT had issued a circular[4], clarifying that section 56(2)(viia) would not apply in cases where a shareholders received new shares, including bonus, right, or preference shares. Although the circular was later withdrawn, section 56(2)(viib) was introduced as an anti-abuse measure to prevent the laundering of unaccounted money under the guise of gifts. Accordingly, the provisions of section 56(2)(viib), in the backdrop of the facts of the case, could not have been triggered.

[3] Chhattisgarh Metaliks and Alloys (P.) Ltd. v/s Income-tax Officer [ITA No. 102(RPR.) of 2019] dated July 26, 2022.

[4] Circular No. 10 of 2018, dated December 31, 2018

5. Accounting Standard-7 (Construction Contracts) and Income Computation and Disclosure Standard-III (Construction Contracts) are not applicable in the case of builder and developer[5]

The fact of the case was that the assessee is in real estate development and uses the project completion method for revenue recognition as per AS 9 since the beginning. Despite this, the AO used the percentage of completion method in the assessment order.

Before the ITAT, the Assessee presented a reconciliation statement to show that the revenue from the sale of flats had already been reported in the audited profits and loss account for subsequent assessment years; it argued that the AO's presumption that this income was from the impugned assessment year resulted in double taxation. The Assessee also contended that the project completion method is the correct method for determining its income as a builder and developer, according to Accounting Standard-9, and contended that following either method would have a revenue-neutral effect, making any addition unnecessary.

The ITAT relied on the decisions of the Bangalore ITAT in Trishul Buildtech & Infrastructure Pvt. Ltd.[6] case and the Karnataka HC in CIT v. Banjara Developers & Constructions Pvt. Ltd.[7], which had held that if an assessee consistently follows the completed contract method of accounting and this method has been accepted by revenue authorities in the past, there is no justification for the Assessing Officer to change it and determine the income of the assessee on an estimated basis in the assessment year in question.

The ITAT also held that the Assessee is a builder and developer, not a construction contractor, and that AS-7, which is applicable only to contractors, does not apply to developers and builders. This is supported by the opinion of the Expert Advisory Committee of ICAI. Additionally, ICDS III, which deals with construction contracts, is not applicable to the Assessee, and there is no standard for a development project.

6. ITAT Bangalore: rules in Flipkart's favour on alleged Rs.1700 Cr. marketing intangibles & ESOP cross charge[8]

The facts of the case that the assessee filed the return of income for AY 2017-18 declaring a loss. The AO made the following additions/disallowances:-

(i) Disallowance u/s. 37 towards ESOP expenses.
(ii) Addition on account of valuation of marketing intangibles of assessee.

On second appeal the Bangalore ITAT allowed the appeal of Flipkart India and deleted the disallowance made towards ESOP by following the ruling of the jurisdictional High Court in

[5] M/s Corporate Leisure & Property Development Pvt. Ltd. v/s DCIT Central Circle 2(1)(1), Bangalore
[6] ITA No. 107 to 109/Bang/2022
[7] CIT v. Banjara Developers & Constructions Pvt. Ltd. (425 ITR 673)
[8] Flipkart India Pvt. Ltd. v/s ACIT, Bangalore [ITA No. 1141 & 1115/Bang/2022] dated March 9, 2023

Biocon[9]. The ITAT relied on the coordinate bench ruling in Novo Nordisk[10] and found that ESOP expenses incurred on the issue of overseas parent company's shares were to be considered as revenue expenditure. Additionally, it relied on the Special Bench order in Biocon (upheld by the jurisdictional HC) and held that the term 'expenditure' also includes a loss. Therefore, issuance of shares at a discount where the Assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purpose of Section 37(1). Accordingly, the ITAT held that expenditure incurred towards ESOP is eligible for deduction under Section 37(1).

In relation to marketing intangibles, the ITAT relied on the Assessee's own case for AY 2015-16 and held that the profit margin foregone by the Assessee could not be considered as expenditure incurred in creating an intangible or goodwill, and the ITAT dismissed the Revenue's appeal and deleted the addition.

B. Corporate Law Highlights

1. NCLT Hyderabad: trite law on dispensation of meetings for WoS fold-up[11]

Under consideration was an application filed under Section 230 of the Companies Act, 2013, seeking dispensation of the meetings of the respective shareholders and creditors of the Applicant-Companies, with regard to the proposed Scheme of Amalgamation. The Scheme was for the merger by absorption between wholly owned subsidiaries (WoS) and their holding company in terms of the law and procedure under Companies Act, 2013. The entire share capital of the Transferor Companies was held by the Transferee Company and the assets and liabilities of the Transferor Companies were already reflected in the balance sheet of the Transferee Company. Under the proposed Scheme, all the debts, liabilities and borrowings of the Transferor Companies will be undertaken by the Transferee Company. Accordingly, there is no compromise or arrangement with the shareholders or creditors and no alteration of any debts due to the creditors. Hence, the proposed Scheme would not prejudicially affect the creditors or shareholders of the Applicant-Companies and thus meetings of creditors were not required to be convened.

The NCLT observed/held that:

- The Hon'ble NCLAT in case of Ambuja Cements Limited[12], dispensed with the meetings of the shareholders and creditors of the Transferee Company, on the ground that the Transferor Company was a subsidiary of the Transferee Company and therefore, no new

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[9] Biocon Ltd. (2013) 25 ITR (T) 602 (Bang. Trib.)
[10] Novo Nordisk India P. Ltd. v. DCIT, [2014] 42 taxmann.com 168 (Bang. ITAT)
[11] GVK Power & Infrastructure Limited [C.A. (CAA) No. 10/230/HDB/2022]
[12] Company Appeal (AT) No. 19 of 2021

shares would be issued, causing no dilution in the shareholding of the Transferee Company and the Transferee Company would not incur new liabilities after the Scheme was effected.

- The Hon'ble NCLT, Ahmedabad in the case of Vodafone Idea Ltd.[13], held that, as no compromise is offered by the Applicant Transferee Company under the Scheme of Amalgamation to the creditors and considering the fact that the net worth of the Companies including the Applicant Transferee Company is positive, it is deemed appropriate to order that meetings of the Secured Creditors (including secured debenture holders), and Unsecured Creditors (including unsecured debenture holders) of the Applicant Transferee Company are not required to be held and are hereby dispensed with.

2. NCLAT: Income Tax dues are "Government dues", Income Tax Department qualifies as "secured creditor" under Insolvency and Bankruptcy Code[14]

The NCLAT overturned an NCLT decision that allowed Assam Company India Ltd.'s application to set aside an attachment order by the Income Tax Department. The NCLAT held that the Income Tax Department's dues are considered "government dues" and are, therefore, considered secured creditors under the IBC. The NCLAT emphasized the position of law laid down by the Supreme Court in **Rainbow Papers**[15], which stated that the definition of secured creditor in the IBC did not exclude any government or governmental authority; The NCLAT noted that the NCLT did not consider the I.T. Department's claims filed before the RP and remitted the matter to the NCLT with a request to hear the parties, consider the facts and the Supreme Court's judgement, and pass fresh orders as soon as possible.

3. ROC Delhi: Private Limited companies were fined for issuing securities through online investment platform[16]

Two Private Limited Companies and its directors were penalized by the ROC (NCT of Delhi & Haryana) for using the website Tykeinvest.com to raise securities in violation of section 42(7) of the Companies Act. The companies issued CCDs through Tyke on a private placement basis, and Tyke collected fees from the companies for various services, including providing onboarding services and charging a commission when investors deposited funds into the company's virtual escrow account.

[13] CA (CAA) NO. 50/NCLT/AHM/2019
[14] Principal Commissioner of Income Tax & Anr. vs. Assam Company India Ltd. [LSI-155-NCLAT-2023(NDEL)]
[15] State Tax Officer (1) vs. Rainbow Papers Limited, Civil Appeal No. 1661 of 2020
[16] ROC Delhi Adjudication order dated March 1, 2023

The ROC found that the companies used Tyke's website as a marketing and distribution channel to inform the public about the securities issue, which is not allowed under section 42(7) of the Act. As a result, the ROC imposed a penalty of Rs. 2 lakhs on the company and Rs. 1 lakh on each of the two directors for violating section 42(7) of the Act, pursuant to section 42(10) read with section 446B.

Katalyst comments:

With the increase in number of Start-Ups and business ventures, several entities are resorting to newer means of raising capital for their ventures through marketing & such investment raising platforms. Such activity is not permitted under the Companies Act for Private Limited Companies, which the promoters should be careful of.

4. MCA: imposes penalty on the company and its director for not filing FORM CAA-8 on time[17]

The facts of the case that M/s ABIS Agrotech Private Limited (hereinafter referred as 'company') filed an application for amalgamation of 5 companies with itself which was approved by NCLT on August 20, 2020. According to section *232(7) every company in relation to which the* ***order is made shall, until the completion of the scheme****, file a statement in form CAA-8 within 210 days from the end of each financial year with the Registrar every year* ***indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not****.*

The company had filed a statement in Form CAA-8 along with an NCLT order. The deadline for the company to file the form was October 27, 2022, but it was filed on December 19, 2022, 52 days after the due date. The Registrar acknowledged that the company had admitted to violating section 232(7) of the Companies Act and that there was a delay in filing Form CAA-8. As a result, the Registrar imposed a penalty of Rs. 61,000 on the company and Rs. 50,000 on each of its two directors under section 450 of the Act.

5. Supreme Court: NCLAT & NCLT approved schemes no bar to regular tax proceedings[18]

The facts of the case were that a composite scheme of arrangement between petitioner companies, involving conversion of redeemable preference shares to loan, was approved by NCLT. However, the Income-tax department filed an appeal against said NCLT order before NCLAT on the ground that conversion of preference shares into loan would substantially reduce profitability of the demerged company, which would act as a tool to avoid and evade taxes.

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[17] ROC-cum-OL-C.G./Adj/u/s/232(7)/009167/2022-23/2834 to 2837 dated February 24, 2023

[18] JCIT (OSD), Circle-3(3),1, Mumbai v/s Reliance Jio Infocomm Ltd. [Civil Diary No. 16409 of 2021 dated September 9, 2022

The NCLAT held that without going on record and without placing evidence to substantiate allegation by appearing before Tribunal, it was not open to Income-tax department to hold that overall scheme was giving undue favour to shareholders of the company and resulted into tax avoidance and approval by NCLT to such scheme was not be interfered with. NCLAT further held that the Income-tax department was entitled to take appropriate proceedings for recovery of any tax statutorily due from transferor or transferee company or any other person who was liable for payment of such tax due.

The department further filed an appeal before the Supreme court. Supreme Court upheld the orders of NCLT & NCLAT, as both tribunals had already held that the Income-tax department will be free to examine the aspect of any tax payable as a result of the sanction of the Scheme and in case it is found that the Scheme of Arrangement ultimately results in tax avoidance or is not accordance with the provisions of Income Tax Act, then the department will be at liberty to initiate appropriate course of action as per law.

C. SEBI/ FEMA/PMLA/OTHER

1. SAT: Shared common objective 'sine qua non' for establishing PACs' relationship; Quashes SEBI penalty[19]

SEBI penalized the appellants for breaching Regulation 11 of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, on the ground that they failed to disclose their offer to acquire shares publicly. The Appellate Tribunal noted that SEBI ignored the objection that there was no common intention or meeting of minds, and instead relied on the fact that the Appellants were interconnected with the other Noticees, and therefore deemed to be PACs. The Tribunal also noted an undue delay in issuing the SCN and cited the Daiichi Sankyo[20] Supreme Court judgement, which states that a shared common objective or purpose does not constitute PACs unless it is for a substantial acquisition of shares in a target company.

The SAT emphasized that, for there to be PACs, there must be a shared common objective or purpose of substantial acquisition of shares of the target company between two or more persons. The tribunal also rejected the argument that once a person acts in concert with an acquirer, they are always considered to be acting in concert. The SAT observed that it depends on the intent and action of that particular person as to whether they are acting in concert with the acquirer. The mere fact that the appellants and other noticees are inter-connected is meaningless without a finding that they shared a common objective or purpose of substantial acquisition of shares of the target company.

[19] Veerendra Kumar Singh & Anr. vs. SEBI dated January 19, 2023
[20] Daiichi Sankyo Company Limited v. Jayaram Chigurupati and Ors. (2010) 7 SCC 499 dated July 8, 2010

2. SEBI : Informal guidance regarding the exemption from the open-offer requirement in case of amalgamation between promoter entities of a listed company[21]

Facts of the case were that Karun Carpets Private Limited (KCPL), which holds 55.55% equity shares and is a promoter of Greaves Cotton Limited, proposed an amalgamation of KCPL into its wholly owned subsidiary DBH Holdings (India) Private Limited (DHPL). KCPL sought informal guidance from SEBI through a "no action letter" on the following:

(i) confirmation that the transfer and vesting of shares of the Target Company into DHPL, pursuant to the scheme of amalgamation of KCPL into DHPL, would be exempt from open offer obligations by virtue of Reg. 10(1)(d)(iii) of the Takeover Regulations;

(ii) whether the Target Company will need to comply with the procedural compliances in terms of Reg. 29 of Takeover Regulations and under the PIT Regulations.

SEBI noted that the proposed amalgamation scheme does not involve the Target Company as a transferor or transferee, and the entire consideration for amalgamation was to be paid for by issuing shares, with no cash involved. Shareholders currently holding 100% shares and voting rights in DHPL, will continue to do so after the amalgamation. SEBI specified that the transfer and vesting of shares of the Target Company into DHPL would be exempt from open offer obligations, subject to the approval of the scheme of amalgamation by NCLT, but disclosure requirements under Regulation 29 of the Takeover Regulations must be complied with.

3. SEBI issues operational guidance on amended Buy-Back Regulation for companies[22]

SEBI has issued operational guidance to companies based on the amendments made to SEBI Buy-Back of Securities (Amendment) Regulations, 2023 (for more details on the amendment in the Buy-Back regulation, please refer Katalyst Kaleidoscope February 2023 edition).

The circular containing operational guidelines outlines the following:

i. The company shall not purchase more than 25% of the average daily trading volume (in value) of its shares or other specified securities in the ten trading days preceding the day in which such purchases are made.

ii. Companies are not permitted to place bids in the pre-open market, first 30 minutes, and last 30 minutes of the regular trading session.

iii. Companies are required to ensure that the purchase order price is within the range of ±1% from the last traded price.

The margin requirement for deposits in Escrow Account are as follows:

[21] Karun Carpets Pvt. Ltd. [LSI-1168- SEBI-2022(MUM)]

[22] SEBI Circular No. SEBI/HO/CFD/PoD-2/P/CIR/2023/35 dated March 8, 2023

i. As per the Regulation 9(xi)(c) and Regulation 20(ii) of the Buy-back Regulations, the escrow account shall consist of cash and/or other than the cash.
ii. The portion of escrow account of other than cash shall be subject to appropriate haircut, in accordance with the SEBI Master Circular for Stock Exchange and Clearing Corporations dated July 05, 2021, as amended from time to time.
iii. Merchant Banker to buy-back offer is advised to ensure that the adequate amount after the applicable haircut is available in escrow account till the completion of all formalities of buy-back.

4. SEBI: Releases Master Circular for Foreign Venture Capital Investors (FVCIs)[23]

SEBI has released a Master Circular for Foreign Venture Capital Investors (FVCIs), which outlines certain requirements for those looking to register with SEBI as an FVCI, such as obtaining a commitment from investors for a minimum contribution of USD 1 million at the time of application. The circular rescinds three previous circulars and states that any pending applications will be considered under the provisions of the new Master Circular. FVCIs are required to submit venture capital activity reports to SEBI every quarter, which must be uploaded online within seven days of the end of the calendar quarter. SEBI also notes that all FVCI registration applications must be submitted online through the SEBI Intermediary Portal, and compliance reports and other requests must also be filed online.

5. Supreme Court: Insolvency resolution of company will not extinguish Director's Liability Under Section 138 of Negotiable Instruments Act, 1881[24]

A company borrowed Rs. 30 crores from a public financial institution and issued a post-dated cheque towards the payment of one of the instalments, but it bounced due to a closed account. The respondent issued a notice to settle the debt under section 138 of the Negotiable Instruments ('NI') Act, but the amount was not paid, and a criminal complaint was filed. In the meantime, Corporate Insolvency Resolution Process ('CIRP') was initiated against the accused company under the IBC.

The appellant sought exemption from personal appearance, invoking a moratorium under section 14 of the IBC, which was rejected. The appellant later filed an application for discharge from criminal proceedings, arguing that the debt was settled in the IBC proceedings. The application was rejected, and the appellant filed a Criminal Revision Application before the Additional Sessions Court, arguing that the debt was settled as part of the approved resolution plan. The Court had taken a view that the creditor has no option but to join the process under the IBC. Once the plan is approved, it would bind everyone under the sun. The making of a claim under the IBC and accepting the same and not making any claim, will not affect the finality of the resolution plan under section 31 of the IBC.

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[23] SEBI Master Circular No. SEBI/HO/AFD/Po/P/CIR/2023/34 dated March 23, 2023

[24] Ajay Kumar Goenka v/s Tourism Finance Corporation of India Ltd. [Criminal Appeal No. 172 of 2023 Crl. A. No.170/2023 Crl.A. No.171/2023 dated March 15, 2023

Thus, where the proceedings under section 138 of the NI Act had already commenced and during the pendency the plan is approved or the company gets dissolved, the directors and the other accused cannot escape from their liability by citing its dissolution. What is dissolved is only the company, not the personal penal liability of the accused covered under section 141 of the NI Act.

6. Bar Council of India Rules for foreign law firms[25]

The issue of foreign law firms operating in India has been a subject matter of debate for many years and this has now fully culminated in the captioned rules. The summary of key aspects is as follows:

(i) The statement of Objects and Reasons, inter alia mentions as follows:

"In the opinion of Bar Council of India the legal profession in India has to rise to the occasion to meet the global changes in the Legal Arena caused by migration of people from one country to other on such a large scale that had not been witnessed in earlier days. The world is becoming a global village".

"Bar Council of India was initially opposing entry of foreign lawyers and foreign law firms in India in any form. However, it was authorised by the legal fraternity of the Country in the years 2007-2014 in Joint Consultative Conferences of Bar Council of India and Chairmen, Vice-Chairmen and Chairmen of Executive Committees of all the State Bar Councils in India to hold dialogue and to interact with the Government of India, Ministry of Law and Justice, Ministry of Trade and Commerce and Law Councils/Law Societies of foreign countries to explore the potential and prospects of opening the law practice in India to foreign lawyers in the field of practice of foreign law and diverse international legal issues in non-litigious matters on the principle of reciprocity and it has been doing so".

"It is relevant to note that recently in course of some discussions and deliberations with the Law Society of England and Wales and some Governmental delegates of U.K with the Secretary of Department of Legal Affairs, Government of India, it has been stated by the side of U.K. that Indian lawyers/law firms can establish in England and Wales and can practice Indian law, international law as well as provide English law advice. They however, normally cannot practice in any of the six reserved activities detailed in the high-level summary of the regulation of foreign lawyers in UK (example, exercise of a right

[25] FN: Bar Council of India rules for Registration and Regulation of Foreign Lawyers and Foreign Law firms in India 2022; Bar Council notification dated March 10, 2023

to audience/appear before a Court, conduct litigation, carry out reserved instrument activities) …..".

"Time has come to take a call on the issue. Bar Council of India is of the view that opening up of law practice in India to foreign laywers in the field of practice of foreign law; diverse international legal issues in non-litigious matters and in international arbitration cases would go a long way in helping legal profession/domain grow in India to the benefit of lawyers in India too".

(ii) **Some key aspects of the rules are as follows:**

- The foreign lawyer or foreign law firm shall not be entitled to practice law in India unless he/it is registered under Bar council under these rules.

- As the statement of objects and reasons mentions, a foreign lawyer registered under these rules shall be entitled to practice law in India in non-litigious matters only subject to such exceptions, conditions and limitations as are laid down under these Rules and he/it shall be deemed to be an advocate within the meaning sections 29, 30 and 33 of the Act qua such acts and deeds as are envisaged to be performed by him under these Rules as a foreign lawyer.

- Rule 9 deals with "incidental matters" as regards opening of law office, entering into partnership, procuring other legal expertise and advice and some facets which are as follows:

  - The registered foreign lawyer or foreign law firm shall be entitled to open law office for carrying on law practice in India.
  - To engage and procure legal expertise/advise of one or more Indian Advocates Registered as foreign lawyers.
  - To procure the legal expertise/advise of any Advocate enrolled with any State Bar Council in India on any subject relating to Indian Laws.
  - To enter into Partnership with one or more Foreign Lawyers or Foreign Law Firm registered in India under these rules.

(iii) There is also a subsequent press release[26] which, inter alia, has sought to "clarify" the following:

- Foreign lawyers and Law firms shall be allowed to advise their clients about Foreign laws and International laws only.
- They would render advisory work about such laws for their foreign clients only.
- Foreign lawyers and law firms shall be allowed to function in non-litigation areas only.

[26] FN: Bar Council of India Press Release dated March 19, 2023

- Foreign lawyers and law firms shall not be allowed to appear in any Court, Tribunal, Board, before any Statutory or Regulatory Authority or any forum legally entitled to take evidence on oath and/or having trappings of a court.

It would be seen this press release has significantly restricted the scope for foreign law firms in India, and one has to wait and see how this unfolds.

D. Goods and Service Tax highlights

1. GST under reverse charge mechanism is payable if guest house of registered person is used as 'residential dwelling' for employees of the Applicant

Odisha[27] AAR has ruled that the services of renting of residential dwelling by a registered person to another registered person being a Company, attracts GST under the reverse charge mechanism irrespective of the nature of use in view of the notification no. 5/2022-CT(R) dated July 13, 2022, w.e.f. July 18, 2022 onwards.

Katalyst comments:

CBIC has issued notification no. 15/2022-Central Tax (Rate) providing that no GST would be payable where residential dwelling is rented to a registered person if it is rented in his/her personal capacity for use as his/her own residence and on his own account and not on account of his business.

2. The purchaser is not entitled to ITC if seller or preceding seller does not discharge the tax liability

The Punjab[28] AAR has held that as per section 16(2) (c) of the CGST Act, 2017, the purchaser is not entitled to avail ITC if the seller or preceding seller does not discharge the tax liability although the documents regarding proof of tax payment to seller, invoice, actual procurement of goods or services etc., are available with the purchaser. It is also pertinent to note that the AAR has not answered the questions relating to (1) mechanism available with purchaser to know whether seller has discharged his tax liability, (2) ITC availability to purchaser in case of lack of infrastructure provided by the Government to know whether seller has discharged the tax and (3) ITC availability to purchaser as if he has discharged tax and having invoices and received actual goods and services as these questions are not covered under the purview of AAR.

[27] In the matter of Indian Metals and Ferro Alloys Ltd. [TS-88-AAR(OD)-2023-GST]
[28] In the matter of Vimal Alloys Pvt Ltd [TS-76-AAR(PUN)-2023-GST]

Katalyst comments:

*The Punjab AAR has not considered the Punjab and Haryana High Court decision in case of **M/s Shiv Enterprises vs. State of Punjab and others**[29]**,** wherein the issue was relating to detention of goods as the seller did not pay the taxes. The HC in this regard has held that it is impossible for a trader to ascertain whether taxes has been paid by the predecessor or not and for this reason ITC cannot be made subject to scrutiny or assessment.*

3. The burden of proving correctness of ITC lies upon the purchasing dealer

The Supreme Court[30] has set aside a decision by the Karnataka High Court and held that denial of ITC is justified in the absence of any cogent material to prove the genuineness of transactions disputed by the Revenue authorities. The Supreme court is of the view that mere production of the invoices or the payment made by cheques is not enough, and cannot be said to be discharging the burden of proof cast under Section 70 of Karnataka VAT Act, 2003. The dealer claiming ITC must prove the actual transaction beyond doubt, by establishing actual physical movement of goods, and furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars. Thus, the burden of proving the correctness of ITC lies on the purchasing dealer who is claiming such ITC, and it cannot be shifted on the Revenue.

Katalyst comments:

It is pertinent to note that the GST law has a similar provision regarding the burden of proof to claim ITC. Based on this decision, matching of ITC between Forms GSTR-1 and GSTR-2A/ 2B may not be considered sufficient to prove the genuineness of the ITC claims and actual physical movement of goods also needs to be established. Taxpayers should also ensure that their systems are proper to track and maintain adequate documentation to establish receipt of goods as well as services, which could be a greater challenge.

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[29] 2022-TIOL-169-HC-P&H-GST

[30] The State of Karnataka v. Ecom Gill Coffee Trading Private Limited [TS-99-SC-2023-VAT]