

## Katalyst Kaleidoscope

May 2024: Tax and Regulatory Insights

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### A. Income Tax Highlights

#### 1. Madras HC<sup>1</sup>: Final order passed under Faceless Assessment sans issuance of draft order, unsustainable

In the present case, the assessee filed a writ petition with the Madras HC under article 226 of the Constitution of India to issue a Writ of Certiorari to the order passed by ACIT (e-verification). The assessee's case was selected through Computer-Assisted Scrutiny Selection (CASS) under E-Assessment Scheme, 2019 for limited scrutiny and a notice was issued by ACIT followed by a communication by the DCIT directing the assessee to furnish submission along with evidence.

ACIT issued draft assessment order u/s 144 read with Section 144B of the Income Tax Act, 1961 dated September 03, 2021 and thereafter, the final assessment order was passed dated September 17, 2021; the assessee challenged this Order that certain procedural requirements were not met:

- i. There was no proceeding for shifting the assessment from the Central assessment circle to the Regular assessment circle.
- ii. The National Faceless Assessment Centre did not issue an intimation under Section 144B(1)(iii) of the Act for assessment to be done as per the procedure under Section 144B.

The Delhi HC relied on W.P. No. 25303 of 2021 dated Sept 05, 2021 that held that it is impermissible to combine show cause notice and draft assessment order; as such, a draft assessment order has to be preceded by a show cause notice and failure to issue show cause notice as per Section 143(2) of the Act would vitiate the proceedings.

With regards to the respondent's submission that writ petition is not maintainable as there is an effective alternate remedy by way of appeal, it was held that there are exception to the rule of alternate remedy which include circumstances where violation of principles of natural justice is made; in the present case procedure that is provided under the act was not complied with, thus resulting in violation of the principles of natural justice.

Accordingly, the Madras HC set aside the best judgment assessment order passed under faceless assessment scheme as it was passed in gross non-compliance of the prescribed procedure.

#### ***Katalyst Comments:***

*The HC judgement emphasizes on importance of fulfillment of procedural requirements by assessing authorities given under the Income Tax Act, 1961 and also stressed on the importance of natural justice.*

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<sup>1</sup> Prakash Chand Jain [TS-250-HC-2024(MAD)] dated March 22, 2024

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### 2. Mumbai ITAT<sup>2</sup>: NCD-redemption premium taxable under 'Other Sources' as interest, not Capital Gains

In the present case, the assessee was a director of the Company which issued 0% secured NCDs redeemable at premium after 5 years on a private placement basis to the nationalized banks in settlement of its outstanding loan. The assessee purchased the NCDs from bank after 2 years of issue by the Company and thereafter, declared long term capital gain on subsequent redemption at 5<sup>th</sup> year and claimed exemption under section 54F and 54EC on purchase of flat under construction and REC bonds; the question was whether the surplus realized by assessee on surrender of NCDs upon its redemption on maturity would give rise to long term capital gain or income from other sources and accordingly, whether exemption u/s 54F and 54EC can be claimed or not.

On appeal, the Mumbai ITAT upheld that gain received by the assessee on redemption of NCDs is taxable as **interest income**; it considered the assessee as an intermediate purchaser and not original subscriber of NCDs and referred to a CBDT circular no. 002 of 2002 wherein tax treatment of Deep discount bonds and STRIPS upon redemption are given (the circular states that the difference between the redemption price and cost of purchase of bond by the intermediate purchaser will be taxable as interest or business income).

The ITAT further emphasized that Section 50AA of the Act which deems gains from the sale or redemption of debentures as short-term capital gains, is not applicable in present case, as it applies to market-linked debentures.

Accordingly, the ITAT held that gain received by assessee is to be treated as interest income and not capital gain, hence question of exemption u/s 54F and 54EC does not arise.

### 3. Bombay HC<sup>3</sup>: Gift is consideration-less transaction, not liable for capital gains tax; rejects Trust's reassessment

In the present case, the assessee had transferred shares of two listed companies to one private limited company by way of gift; thereafter, received notice u/s 148 of the Act to the effect that the income has escaped assessment for AY 2010-11 on transfer of shares as gift; the assessee filed a writ at Bombay HC on being rejected by AO for its objections raised.

The tax department contended that the assessee being a Trust, can be reasonably presumed that the transfer was for a consideration because anything a Trust does is for the benefit of its beneficiaries, to which HC held that the revenue department cannot proceed on the basis of hypothesis and such assumptions.

Further, the HC held that only if petitioner had received any consideration as a result of the transfer of such shares, then the same could be charged to tax under the head "capital gains" in terms of Section 45 read with Section 48 of the Act.

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<sup>2</sup> Khushaal C. Thackersey [TS-293-ITAT-2024(Mum)] dated April 15, 2024

<sup>3</sup> Jai Trust [TS-308-HC-2024(BOM)] dated May 08, 2024

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Accordingly, the HC quashed the reassessment notice and the impugned order u/s 148 of the Act issued by AO to the petitioner.

#### **4. Delhi ITAT<sup>4</sup>: Loss on forward contracts & forward premium account held as nonspeculative**

In the present case, the AO made additions on valuation of foreign exchange contract on mark-to-market basis, loss on foreign currency forward contract and loss on forward exchange contract on the grounds that these transactions are speculative in nature.

On appeal, the ITAT relied on the SC judgement in case of CIT vs Woodward Governor India P. wherein it was observed that the forward contracts were related to the export proceeds expected to be received in the course of the business and not for acquisition of any capital asset, and hence, held that the loss incurred on the date of balance sheet, due to the adverse exchange fluctuations would be allowable u/s 37(1) of the Act as the same cannot be termed as notional loss.

It was further held that provisions of section 43(5) of the Act apply only to transactions in "commodity" and the same is not applicable since foreign currency is not a commodity and hence, does not fall under the ambit of speculative transactions.

#### **5. Delhi ITAT<sup>5</sup>: Management fee & social security expenses reimbursement taxable as 'fee for technical services'; denies 'Most Favored Nation' benefit**

In the present case, the assessee being a French company entered into transactions with its associated enterprise, an Indian company, wherein the assessee provided management of human resource services in lieu of management fee and received reimbursement for social security contribution paid by it for employees of AE; the revenue taxed management fee and reimbursement as 'fee for technical services' by denying the benefit of MFN clause as per India-France DTAA and applying 'make available' clause as per India-UK DTAA.

In regard to management fee, the ITAT relied on the SC judgment in case of *New Delhi Vs. M/s Nestle SA*, wherein it was held that a notification under Section 90(1) of the Act is a necessary requirement and a mandatory condition for invoking the MFN clause, based on entry of DTAA between India and another state which is member of OECD (the relevant date is the date of treaty entering into force with India, and not a later date, when, after entering into DTAA with India, such country becomes an OECD member).

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<sup>4</sup> J. K. Techno soft Ltd [TS-318-ITAT-2024(DEL)] dated April 30, 2024

<sup>5</sup> JCDecaux S.A [TS-304-ITAT-2024(DEL)] dated May 03, 2024

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Further, the ITAT relied on Delhi HC judgement in case of *Centrica India Offshore Pvt. Ltd.* wherein it was held that; i) no mark-up charged by the assessee over and above the costs of the seconded employees cannot negate the nature of the transaction, ii) the seconded employees provided by the assessee for work conducted by them in assisting the business of AE fall within the “technical or consultancy services” and hence even a reimbursement is in nature of fees for technical services.

Accordingly, the ITAT upheld the taxability of management fees and reimbursement of expenses in hands of the assessee.

### 6. ICAI<sup>6</sup>: Guidance Note on Inventory valuation under the Income Tax Act, 1961

Pursuant to an amendment in section 142(2A) of the Act, to the effect that the AO at the time of such tax proceedings can direct the assessee to obtain inventory valuation report by a cost accountant; the Cost Accounting Standards Board (CASB) of the Institute of Cost Accountants of India (ICMAI) has issued a guidance Note on Inventory Valuation under the Income Tax Act of 1961; this Guidance Note has 8 chapters detailing various aspects of Inventory valuation which includes relevant legal provisions along with explanations, provisions of Income Computation and Disclosure Standards (ICDS) and notifications, standards and formats, as applicable.

#### ***Katalyst Comments:***

*Referring to this Guidance Note would be helpful in the context of inventory valuation including from an income tax perspective.*

## B. SEBI / RBI / Other Highlights

### 1. NSE<sup>7</sup>: Master Circular for Listed Companies

NSE has issued a circular to facilitate listed companies to have access to the applicable circulars at one place to comply with the regulatory requirements; this master circular is a compilation of relevant and updated circulars/guidelines issued by NSE as on April 29, 2024.

Listed below are the headings to which relevant circulars/guidelines can be referred, the circular consists of Two parts as follows:

#### Annexure A - Circulars/ Guidelines relating to Listing Approvals

- i. IPO / Direct Listing
- ii. Schemes of arrangement / Restructuring through Resolution Plan of equity and/or debt listed companies
- iii. Further Issues which consist of “Introduction of Issue Summary Document” and “Guidance note on inclusion of ‘object of the issue’ in case of preferential issue and in Qualified institutions placement”

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<sup>6</sup> Guidance noted dated May 10, 2024

<sup>7</sup> NSE Circular dated April 29, 2024, Reference No. NSE/CML/2024/10

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- iv. Migration from SME to Main Board
- v. Listing of Debt Securities / Commercial Papers
- vi. NSE Social Stock Exchange guiding on Requirements w.r.t to registration and listing of social entities on Social Stock Exchange
- vii. General - Submission of the Aadhar details in the Announcement/Offer Documents submitted to the Exchange
- viii. OFS Secondary Market - Framework for Offer for Sale (OFS) of Shares to Employees through Stock Exchange Mechanism

### Annexure B - Circulars/ Guidelines relating to Listing Compliances

- i. Circular Issued Pertaining to SH Pattern, Investor Grievance Report of SEBI (LODR) Regulation, 2015
- ii. Disclosures Under Regulation 23 ('RPT') & 34(2)(F) ('BRSR') Of SEBI (LODR) Regulations, 2015
- iii. Disclosures Under Regulation 24A i.e. Secretarial Audit and Secretarial Compliance Report, of SEBI (LODR) Regulations, 2015
- iv. Disclosure Under Regulation 27(2) i.e. Corporate Governance Requirements, of SEBI (LODR) Regulations, 2015
- v. Disclosures Under Regulation 30 i.e. Disclosure of events or information and Regulation 44 i.e. Meetings of shareholders and voting, of SEBI (LODR) Regulations, 2015
- vi. Circular Issued Pertaining to Financial Results, Annual Report and Statement on Impact of Audit Qualifications
- vii. Circular Issued Pertaining to Corporate Action, SEBI (SAST) Regulations, 2011 and SEBI (PIT) Regulations, 2015
- viii. Disclosures Under Listing Regulations for Issuers of Listed Non-Convertible Securities and / or Commercial Paper
- ix. Circular Issued Pertaining to Standard Operating Procedure and Waiver
- x. Maintenance of Corporate Group

## **2. NSE<sup>8</sup> and BSE<sup>9</sup>: Business Responsibility and Sustainability Report (BRSR) – FAQs & General Observations / Guidelines**

BSE and NSE have addressed FAQs w.r.t BRSR filing; key points of the circular are as follows:

- Top 1000 listed entities based on market capitalization are required to mandatorily submit BRSR; companies shall continue to comply with the requirement even if they fall below such thresholds.
- If the listed Company is in the top 1000 market capitalization list on any Exchange, then the listed Company is required to file BRSR with both the Exchanges.
- Listed entities who do not form part of top 1000 listed entities can voluntarily submit the BRSR.

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<sup>8</sup> Circular No.: NSE/CML/2024/11 dated May 10, 2024

<sup>9</sup> Circular No.: 20240510-48 dated May 10, 2024

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- Top 150 listed entities based on market capitalization are required to mandatorily obtain reasonable assurance of BRSR Core; this is mandatorily to be submitted with the Exchanges.
- BRSR need to be submitted on the same day of submission of Annual Report.
- In relation to companies that prepare sustainability reports based on Internationally Accepted Reporting Frameworks, cross-referencing of disclosures to the disclosures sought under the BRSR can be provided to avoid repetition in the Annual Report.
- BRSR filled can be revised and company need to submit covering letter wherein changes are mentioned

The Circular also specifies the disclosure requirements for the companies to ensure that useful information is available to the investors.

### 3. SEBI<sup>10</sup>: Regulatory framework for providing flexibility for increased contribution by NRIs, OCIs and RI individuals in FPIs based out of IFSCs

SEBI has approved framework for flexibility for increased contribution by NRIs, OCIs and RI individuals, in the corpus of FPIs based out of IFSCs and regulated by IFSCA; this shall be subject to certain conditions which are as follows:

- 100% contribution limits shall be available to the FPI on submitting of PAN cards of all their NRI/OCI/RI constituents with their economic interest in the FPI, to the Designated DP. In absence of PAN, submit declaration with prescribed identity documents, this same will also be required in case of indirect holding.
- Funds having 100% contribution from NRIs/OCIs/RI, shall not be required to submit the above documents, provided they satisfy the following conditions:
  - i. Contribution of all investors are pooled into one investment vehicle registered as an FPI, with no side-vehicles.
  - ii. The corpus is a blind pool (i.e. common portfolio) with no segregated portfolios. All investors shall have pari-passu and pro-rata rights.
  - iii. Has a minimum of 20 investors with each contributing not more than 25% to the corpus.
  - iv. A maximum of 20% may be invested in the equity shares of an Indian listed entity.
  - v. The Investment Manager (IM) is completely independent in taking investment decisions and Investors do not have a say in investment decisions.
  - vi. The IM of the fund is an Asset Management Company of a SEBI registered Mutual Fund which is sponsored by the RBI regulated Bank or its IFSC based subsidiary/branch.

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<sup>10</sup> SEBI Press Release No 08/2024 dated April 30, 2024

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- Above FPIs shall be bound by disclosure requirement in terms of SEBI circular dated August 24, 2023 if:
  - i. FPI holds more than 33% of Indian equity AUM in a single Indian Corporate Group; or
  - ii. Holds more than INR 25,000 crore of equity AUM in Indian Markets along with its Investors group.

#### 4. SEBI<sup>11</sup>: Enhanced compliance requirements for Listed Companies

In addition to amendments made by SEBI via PR No. 5/2024 dated March 15, 2024 (*please refer to April 2024 Katalyst Kaleidoscope*), SEBI has notified amendments under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015; key amendments are:

- Requirement of at least 1 independent woman director will be applicable to top 1000 listed entities w.e.f. December 31, 2024 (earlier was applicable to only top 500 listed entities).
- Requirement of (i) minimum 6 Directors on Board and (ii) 1/3<sup>rd</sup> of total strength or 3 directors, whichever is higher, including at least 1 independent director as quorum for board meeting, will be applicable to top 2000 listed entities w.e.f. December 31, 2024 (earlier was applicable to only top 1000 listed entities).
- The promoter(s), director(s), KMP or senior management of a listed entity will be liable to provide adequate, accurate and timely response to queries raised or explanation sought by the listed entity and the listed entity shall disseminate the response received from such individual(s) promptly to the stock exchanges.

#### 5. SEBI<sup>12</sup>: Issues framework for considering unaffected price for transactions upon confirmation of market rumors

In terms of Regulation 30(11) of SEBI (LODR) (Amendment) Regulations, 2024, a listed entity is required to verify market rumours upon unexpected material price movement; in this context, SEBI has issued new framework for considering unaffected price for transactions upon confirmation of market rumors; this shall be applicable to top 100 listed entities w.e.f. June 01, 2024 and to top 250 listed entities w.e.f. December 01, 2024.

Under the new framework, SEBI has specified that:

- The variation in daily weighted average price (WAP) from the day of material price movement till the end of the next trading day after confirmation of the rumour shall be attributed to the rumour and confirmation of the rumour (“WAP variation”)
- The adjusted daily WAP after excluding the WAP variation period shall be same as the daily WAP on the trading day preceding the day of material price movement.
- In case the price variation due to confirmation of the rumour, hits the price band limit on the next trading day post rumour confirmation, the price variation in the subsequent trading days shall be included for adjustment till such day the price does not hit the band limit.

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<sup>11</sup> Notification under SEBI (LODR)(Amendment) Regulations, 2024 dated May 17, 2024

<sup>12</sup> Circular 51/2024 dated May 21, 2024



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- The unaffected price shall be applicable only if the listed entity has confirmed the rumour pertaining to the transaction within 24 hours from the trigger of material price movement.

**Katalyst Comments:**

*This above framework can help companies address market rumour vis-a-vis the impact on deal pricing; this can also be helpful in addressing the issue of abnormal price increase derailing transactions.*

### 6. SEBI<sup>13</sup>: Amends definition of “generally available information” given under SEBI (Prohibition of Insider Trading) Regulations, 2015

SEBI has amended the definition of “generally available information” under Regulation 2(1)(e) of SEBI (Prohibition of Insider Trading) Regulations, 2015 specifically to exclude ‘any unverified event or information reported in print or electronic media’ as generally available information; now the amended definition stands as:

*“Generally available information” means information that is accessible to the public on a non-discriminatory basis and shall not include unverified event or information reported in print or electronic media.*

**Katalyst Comments:**

*This amendment intends to further specify on what constitutes “generally available information” and will make easier to crystallize what “unpublished price sensitive information” is.*

### 7. SEBI<sup>14</sup>: Levies Rs. 15 crore penalty on individual for violating GDR issue norms

In the present case, SEBI conducted investigation against the company that had issued GDRs and passed an Adjudication order against the Noticee for violation of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations 2003, imposing penalty of Rs. 25 crores; the SAT upheld that issuance of GDR did not suffer from any error or law and remanded back the matter to SEBI on two issues:

- i. Establish connection of the Noticee with the entities involved and flow of money from sub-account to the Noticee; and
- ii. Reconsider quantum of penalty.

On the remand, SEBI held that the company had issued significant number of GDRs, and the Noticee, along with his connected entities, played a central role in structuring the GDR issue; the Noticee's connected entities were involved in various stages of the GDR issue including subscribing to GDRs through loans and subsequently selling converted equity shares in the Indian securities market which involved misleading Indian investors by concealing crucial information and distorting GDR-related news; further, SEBI stated that it is evident that the Noticee was benefited from the scheme.

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<sup>13</sup> Notification under SEBI (PIT) Regulations, 2015 dated May 17, 2024

<sup>14</sup> GDR issue of Winsome Yarns Ltd. [LSI-419- SEBI-2024(MUM)] dated May 07, 2024

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It further held that the Noticee had no other incentive than to enter into such convoluted transactions with the prime objective to cash in on GDRs when they are sold.

Accordingly, SEBI imposed penalty of Rs. 15 crores for fraudulent and unfair trade practices on the Noticee u/s 15HA of the SEBI Act.

### 8. Supreme Court<sup>15</sup>: Transfer of share or interest in a cooperative society by its member in favour of nominee, binding on it

In the present case, Appellant was the daughter of a member of the Cooperative Society and was nominated as a nominee of share or interest of the Cooperative society. Member's Son asserted that membership should be transferred in the name of his mother challenging that nomination was not done in terms of Section 79 of West Bengal Cooperative Society Act read with rule 127. Another challenge was that Appellant being a married daughter is not a family member and hence nomination is not valid.

Noted by SC that the rights of other family members on account of an inheritance or succession is a subservient right. Only if a member had not exercised the right of nomination under Section 79, then and then alone, the share or interest of the member would devolve by way of succession or inheritance. Also rule 128 provides that only in absence of nominee, transfer of share or interest to any other member would be on the basis of claim by an order of probate.

Further, the SC upheld the decision of HC that rule 127 include major sons and daughters as members of the family, in addition to minor sons and daughters, without any clarification as to their marital status. Hence, the Appellant is a family member and can be nominated.

Further, the SC specified that such transfer of share or interest in favour of nominee would have no relevance to the issue of title between the inheritors or successors to the property of the deceased and it would be open to other family members to pursue their case of succession or inheritance, in consonance with law.

Accordingly, SC held that cooperative society shall transfer share or interest of the member to the Appellant.

#### ***Katalyst Comments:***

The SC emphasized that the method of nomination in a co-operative housing society does not create any right or title of the nominee in the property of the nominator; the nominee merely performs the function of receiving and holding the property of the deceased nominator until the property is transferred in favour of legal heir(s).

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<sup>15</sup> Indrani Wahi vs. Registrar of Coop Societies & others, Civil Appeal No. 4646 of 2006 dated March 10, 2016

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### C. Goods and Service Tax Highlights

#### 1. Calcutta HC<sup>16</sup>: No tax and penalty for transportation of goods without E-way bill, if transportation is in 'contingencies'

Tax and penalty were imposed as the truck was carrying the goods without having an 'E-way bill'; in this regard the Calcutta HC accepted the fact that the vehicle was not accompanied by 'E-way bill' due to change in vehicle carrying goods because of breakdown of the originally loaded vehicle. Also, the HC considered the 'peculiar' facts that on account of certain contingencies beyond the control of the assessee, the vehicle had to be changed and the transporter could not amend the E-way bill due to breakdown of the vehicle and therefore, no tax and penalty should be imposed as there was no intention to evade tax.

##### **Katalyst Comments:**

*The Allahabad High Court has given similar decision in the matter of 'E-way bill' in case of Mid-Town Associates vs. Additional Commissioner<sup>17</sup> wherein the goods were seized during transportation as the truck driver could not produce an e-way bill at the time of detention of goods; the HC held that an e-way bill was downloaded and was matching with the invoice; although, the same was not produced by the truck driver at the time of detention of goods; there was no intention to evade tax, therefore, no penalty was imposed.*

#### 2. Calcutta HC<sup>18</sup>: For non-remittance of tax by the supplier if the recipient is penalized without inquiring the supplier, the same is 'ill legal and without jurisdiction'

The Calcutta HC has held that once the tax is paid to the supplier, no recovery proceedings can be initiated against the recipient, unless there are exceptional circumstances as per the press release issued by the Central Board of Indirect Taxes and Customs (CBIC). The HC has emphasized on the "elementary principle" i.e. the necessity for the Department to conduct an inquiry with the supplier before penalizing the recipient by reversing ITC based on the allegation of non-remittance of tax by supplier to State exchequer. Thus, HC has held that penalizing the assessee without causing enquiry with the supplier is "arbitrary, illegal and without jurisdiction."

##### **Katalyst Comments:**

*The HC has set aside the SCN and order passed in writ and directed the Revenue authorities to first proceed against the supplier and only under exceptional circumstances, as clarified in CBIC press release dated May 4, 2018 (i.e., missing dealer, closure of business by supplier or supplier not having adequate assets etc.) proceed against the assessee-buyer.*

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<sup>16</sup> Nikita Singhania vs. Assistant Commissioner of State Tax [TS-248-HC(CAL)-2024-GST] dated April 30, 2024

<sup>17</sup> [TS-274-HC(ALL)-2024-GST] dated May 10, 2024

<sup>18</sup> Lokenath Construction Pvt Ltd vs Tax/Revenue Government of West Bengal & Ors [TS-261-HC(CAL)-2024 GST] dated May 7, 2024

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### 3. Patna HC<sup>19</sup>: For delay in filing of returns, interest liability is automatic as the payment of tax from 'Electronic Cash ledger' or 'Electronic Credit ledger' occurs upon return-filing

The Patna High Court has ruled that "on furnishing of delayed returns, interest liability would be automatic, whether the payment be made from the Electronic Credit Ledger or Electronic Cash Ledger as per the provisions of Section 50(1) of the CGST Act"; further, the HC held that furnishing of return results in 'Payment of tax' and not when deposit is made in cash ledger or remittances of tax at the time of purchases. The HC also clarified that the deposit is akin to a current account maintained, from which debits should be made for the purpose of payment of tax, interest, penalty or other amounts due under the Act; such debits are made only when return is furnished.

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<sup>19</sup> Sincon Infrastructure Pvt. Ltd. vs. UOI & Ors. [TS-216-HC(PAT)-2024-GST] dated April 22, 2024