Katalyst Kaleidoscope

October 2019: Tax and Regulatory Insights

A. Income-tax

1. Conduct of Income tax assessments through Faceless Assessment:

In furtherance of the Finance Minister's Budget Speech on 5th July,2019 and in pursuance of the intent to reduce the interface between the tax department and the assessee, the Central Board of Direct Taxes ("CBDT"), vide its notification dated 12th September, 2019[1] has introduced the E-assessment Scheme, 2019 which has codified the process of e-assessment, along with designing the contemplated eco-system.

The key features of this scheme have been elaborated below:

a) Scope of the Scheme:

The Scheme for faceless assessment shall be made applicable -

- In specified Territorial area; or
- to specified Persons or classes of persons; or
- to assessee having Specified Incomes or classes of incomes;
- to specified cases or classes of cases **as may be specified by the CBDT**

b) The Contemplated Eco-System:

The contemplated eco-system involves a multiple number of stakeholders, mainly the following:

Stakeholder	Role
National e-assessment centre (NEC)	Facilitating conduct of e-assessment proceedings in a centralized manner
Regional e-assessment centre (ReAC)	Facilitating conduct of e-assesssments in the cadre controlling region of a Principal CCIT
Assessment Units (AU)	Performing the functions of making an assessment, seeking information, analysis of the information and making the assessment
Verification units (VU)	Performing the function of verification/inquiry, examination of books of accounts, examination of witness and related functions

[1] CBDT Notification No. S.O.3264(E) dt. 12th September,2019

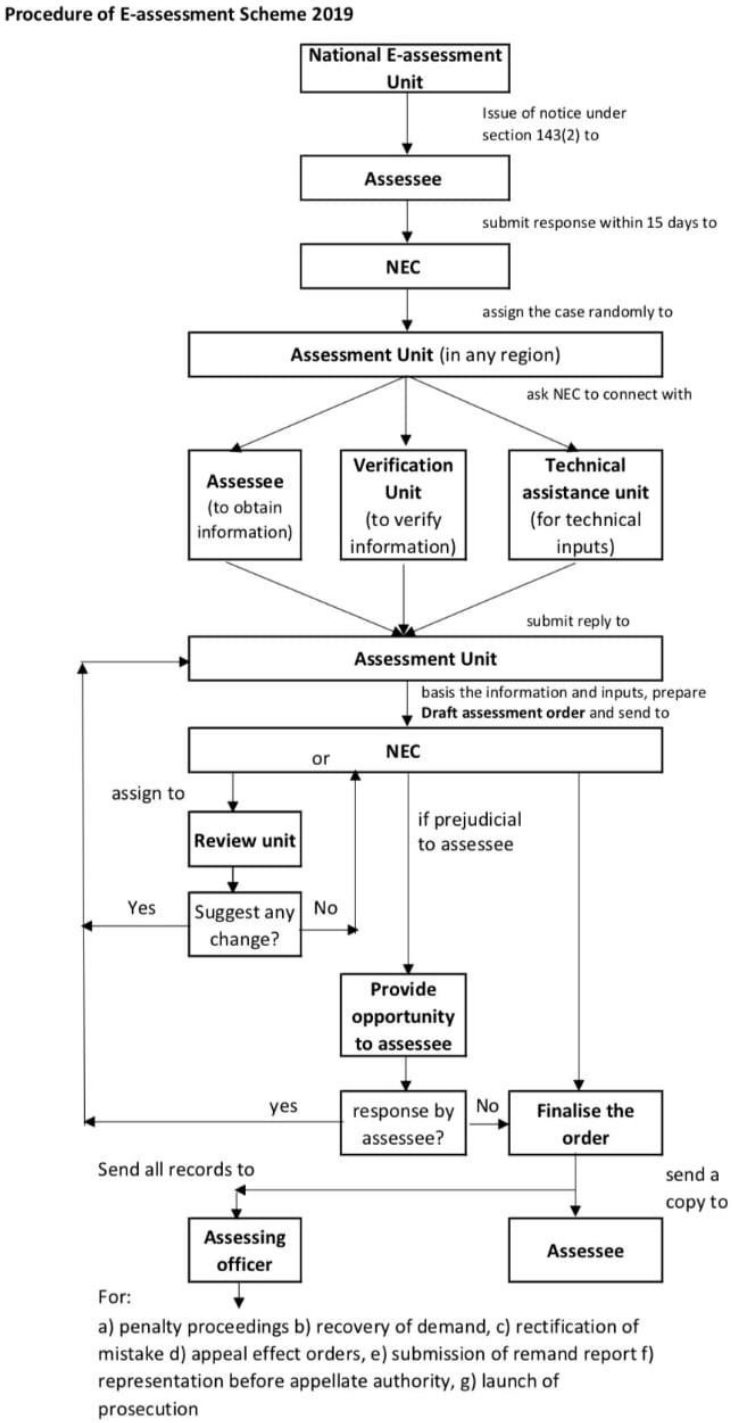
Stakeholder	Role
Technical units (TU)	Performing the function of providing technical function on legal, accounting, valuation, transfer pricing or any other technical matter
Review units (RU)	Performing the function of review of draft assessment order, including checking whether relevant evidence has been brought on record, whether points of fact and liability have been incorporated in the draft order, proper discussion on disallowance made and related aspects

Whilst the assessee/authorized representative is not required to appear personally in connection with proceedings under the e-assessment scheme, the assessee can seek a personal hearing to make oral submissions before the income tax authority, but such hearing shall be conducted exclusively through video conferencing in accordance with the procedure to be laid down by CBDT[2].

[2] Para 11(2) of the CBDT notification dated 12th September 2019

c) Procedure of E-assessment:

The procedure is depicted in the chart given below.



Katalyst Comments:

1. ***Issues***

   i. *The faceless assessment scheme will bring a paradigm shift in the manner in which income tax assessments have been handled till date and is likely to be a game changer. However, there are a variety of issues that need to be noted and are areas of concern, as stated below.*

   ii. *A key issue likely to emerge is that tax officers are often not familiar with business in general and very often, if the business of the assessee is complex or with sectoral nuances (e.g. pharma, shipping, banking, insurance, infra), there are likely to be serious communication issues and consequential issues that will arise therefrom.*

   iii. *Technological literacy, both on the part of the assessee/ their advisors and of the tax department, is likely to be another serious issue, as is internet speed and bandwidth.*

   iv. *The staffing of each of the stakeholders is likely to be another issue and the inability to communicate with the assessee will also create several issues.*

2. ***Some statistics***

   i. *It may also be noted that a very small percentage of returns are subjected to assessments. However, they make up a very large part of the tax collection (number of returns filed for FY 2018-19 are approximately 6.75 cr, out of which 6.32 cr are individuals and 0.10 cr are companies). Accordingly, whilst the issues stated in 1 above are relevant only when assessments are carried out in the cases wherein there are no assessments (large in number as a percentage of total return), these issues would not apply to such cases.*

2. Establishment of Regional E-Assessment Centres ("ReACs"):

As a part of the eco-system of the e-assessment scheme, the CBDT[3] has set up ReACs in the following locations:

- Delhi
- Ahmedabad
- Mumbai
- Pune
- Chennai
- Bangalore
- Kolkata
- Hyderabad

[3] CBDT Circular No. 29/2019 dt. 2nd October, 2019

3. CBDT Circular arising out of Taxation Laws (Amendment) Ordinance regarding brought forward loss, MAT credit etc.

The Central Government had issued an Ordinance, wherein it had introduced new tax provisions such as section 115BAA which gives an option to specified domestic companies to pay tax @ 25% (or new manufacturing companies to pay tax at 17%), subject to certain conditions (these have been discussed in detail in our special issue last month). The availability of brought forward losses on account of additional depreciation and brought forward MAT credit in this context was a key grey area.

In the above context, the CBDT has issued a circular to clarify that:

- A domestic company which exercises the option of a lower tax rate shall not be allowed to claim set off of any brought forward loss on account of additional depreciation for an Assessment Year for which the option to be taxed at a lower rate has been exercised.
- Similarly, a domestic company which exercises the option of a lower tax rate shall not be entitled to avail the brought forward tax credit of MAT.

It has also been mentioned in the circular that since there is no time limit for availing the option of moving to the lower tax rate, the company may exercise the option after set off of the said loss or utilisation of the said credit under the regular tax payable regime, existing prior to the Ordinance.

Katalyst Comment:

CBDT Circulars are binding on the tax department, but not on the assessee. Given judicial precedents in some other contexts, the possibility of litigation on this aspect by assesees seeking to challenge the Circular is likely.

4. Mumbai ITAT permits the carry forward and set-off of MAT Credit pursuant to the sanction of Scheme of Demerger by the High Court.

The facts in this case were that 3 SEZ units of TCS e-serve[4] were demerged into TCS and the MAT credit pertained to the 3 SEZ units. It was in this context that the Bombay Tribunal had occasion to consider the set off of MAT credit against the income of TCS e-serve beyond the date of the demerger. The Tribunal held that even though there are no specific provisions that permit the carry forward and set-off of MAT Credit, in light of the Bombay High Court Order sanctioning the Scheme of demerger, (which order had categorically approved that all the taxes, including income tax paid or payable by respondent shall be on account of the Assessee), the MAT credit brought forward (pertaining to the demerged SEZ units) could be set-off against the income of TCS E-serve, even though the income of TCS E-serve would be from another sources.

[4] TCS E-Serve International Limited [TS-516-ITAT-2019(Mum)]

5. Advance from subsidiary for making strategic investments in ordinary course of business not to be treated as "deemed dividend"

The Indore ITAT in the case of Asian Business Connections Private Ltd[5] held that advance received by the assessee company from its subsidiary company for making strategic investments in real estate projects shall not be construed as deemed dividend u/s 2(22)(e) of the Income Tax Act, since the advance is purely in the nature of a commercial transaction and the primary purpose of the holding company was to earn an income from strategic investments. The borrowings thus made, though from a related party, were at the prevailing market rate and this fact was substantiated with adequate documentation between the company, and its subsidiary company, and that these are commercial transactions which are out of the purview of Section 2(22)(e).

Katalyst Comment:

The decision also needs to be looked at in the light of the Circular No. 19/2017 which expressly provides a clarification trade advances in the nature of commercial transactions would not fall within the ambit of Section 2(22)(e) of the Act.

6. CBDT approves rules for making reference to approving Panel under GAAR provisions

GAAR Provisions have been introduced as Chapter XA of the Income Tax Act, 1961 w.e.f. Assessment Year 2016-17, in respect of which assessments are likely to be completed in the year 2020 as per time barring limits. The trigger of GAAR is for the assessing officer to come to a conclusion that there is an "impermissible avoidance agreement", in which case the CIT has to make a reference to the Approving Panel[6]

Subsequently, after giving the assessee an opportunity of being heard, if GAAR is intended to be invoked, the CBDT vide notification[7], has prescribed rules laying out the procedure for making reference to Approving Panel. The gist of the rules is as under:

Rule No	Purpose	Salient features
10UD	Reference to Approving Panel	• A reference to the Approving panel by the CIT shall be made in Form No 3CEIA, along with such other documents which the CIT deems fit.

[5] Asian Business Connections Private Ltd [TS-586-ITAT-2019(Ind)]
[6] Section 144BA of the Income Tax Act, 1961.
[7] Notification 67/2019 dt. 17th September, 2019.

10UE	Procedure before the Approving Panel	• The reference has to be circulated by the Chairperson of the Approving Panel among the other members within seven days from the date of receipt of such reference. • The Chairperson to issue the notice to the Assessing Officer and the assessee affording an opportunity of being heard.

Katalyst Comment:

There is no time limit prescribed for the date of the hearing. Incidentally, the composition of the GAAR Approving Panel has to be:

a. a Judge of the High Court,
b. one member of the Indian Revenue Service not below the rank of a CCIT, and
c. one member who shall be an academic or scholar having specialized knowledge[8].

No such panel has been set up as yet, and it is not clear whether there will be more than one panel all over India.

7. ITAT allows set-off of brought-forward losses to amalgamated company as no change in shares 'beneficially held' post-amalgamation,

The Mumbai ITAT in the case of BancTec TPS India Private Limited[9], allowed the set-off of brought forward losses to the assessee-company as there was no change in the 'ultimate holding company' post amalgamation with sister concerns. On merits, the ITAT observed that pre-amalgamation, the parent entity held 99.99% directly in assessee co., whereas post amalgamation, the parent entity held 42.19% equity directly in assessee co. and 57.81% indirectly in assessee co. through a sister concern. The ITAT noted that Section 79 provides that the shares should be 'beneficially held' by the existing shareholders. It is noted that both pre-amalgamation and post-amalgamation, 100% shares were 'beneficially held' (directly and indirectly) by the same holding company, thus ensuring compliance with the provisions of Section 79.

Katalyst Comment:

The purpose of section 79 of the Act is that it seeks to curtail the misuse of benefit of carry forward and set off of business losses of earlier years of a company and prohibits its availability in the hands of any new owner. In the instant case, it is manifest that no such misuse can be inferred since the beneficial ownership did not change hands.

[8] Section 144BA(16)
[9] BancTec TPS India Private Limited [TS-579-ITAT-2019(Mum)]

8. Delhi High Court dismisses Revenue's appeal and confirms invalidity of assessment order passed on non-existent amalgamated company

Delhi High Court[10] dismisses Revenue's appeal against ITAT order for AY 2010-11, confirms assessment order passed on non-existent amalgamating company as invalid; ITAT had observed that Genpact Infrastructure (Bhopal) Pvt. Ltd had amalgamated with Genpact India Pvt. Ltd with the effective date being 1st April,2010 pursuant to a High Court Order dated 19th November,2010, however, the Assessing Officer passed the assessment order incorporating a Transfer Pricing addition of Rs.33.95 cr in the name of Genpact Infrastructure (Bhopal) Pvt. Ltd;

High Court relies on the Supreme Court ruling in case of Maruti Suzuki India Ltd[11] where it was held that assessment on non-existent entity was a 'substantive illegality' and not a procedural violation; Remarks that “there is no merit in the present appeal and no question arises for consideration. Hence, the petition stands dismissed."

B. Corporate Law

1. Constitution of Company Law Committee

The Ministry of Corporate Affairs vide its order[12] and in furtherance of the Report Issued by the Company Law Committee on 27th August, 2018, has constituted a committee for examining and making recommendations to the Government on various provisions and issues pertaining to implementation of the Companies Act, 2013 and the Limited Liability Partnership Act, 2008. Some key aspects are as follows:

- Analyze and re-categorise the offences based on their nature and suggest measures to optimize the compliance requirements under the Companies Act, 2013 and concomitant measures to provide further Ease of Doing Business;
- Examine the feasibility of introducing settlement mechanism, deferred prosecution agreement, etc., within the fold of the Companies Act, 2013;
- Study the existing framework under the Limited Liability Partnership Act, 2008 and suggest measures to plug the gaps, if any.
- Propose measures to further de-clog and improve the functioning of the NCLT;
- Suggest measures for removing any bottlenecks in the overall functioning of various statutory bodies;

[10] Genpact India Pvt. Ltd [TS-572-HC-2019(DEL)]
[11] Principal CIT v. Maruti Suzuki India Ltd. [2019] 107 taxmann.com 375 (SC)
[12] F. No. 2/1/2018-CL-V dt. 18th September, 2019.

- Identify specific provisions under the Companies Act, 2013 and the Limited Liability Partnership Act, 2008 which are required to be amended to bring about greater Ease of Living for the corporate stakeholders, including but not restricted to review of Forms under the two Acts;

- Any other relevant recommendation as it may deem necessary.

The Committee shall initially have a tenure of 1 year from the date of its first meeting.

Katalyst Comment:

The genesis of terms of reference of the above constituted committee has been majorly based on smooth corporate governance. The committee has also extended its terms of reference to the limited liability partnership thereby bringing under its ambit the appropriate functioning of LLPs. Certainly, de-clogging and improving the functioning of the NCLT is a big issue.

2. NCLAT: payment of tax dues not a pre-condition for approval of any scheme of arrangement

NCLAT, in the case of Ad2Pro Global Creative Solutions Private Limited[13] held that the payment of outstanding tax liabilities shall not be treated as a condition precedent for implementation of the approved scheme in view of proceedings pending at ITAT. It observed that so long as the Income tax department did not raise any objection with respect to scheme and the Transferee Company has undertaken to satisfy all demands emanating from and raised by the competent tax authorities, the Scheme of Arrangement shall be approved without insisting upon payment of tax demands. The legitimate interest of the concerned tax authorities remain intact even after tax amalgamation.

Katalyst Comment:

This is a very welcome decision and provides some relief against a very difficult situation that exists in the context of matters before the NCLT, and the variety of reasons for endless and inordinate delays badly impacting scheme of arrangement.

3. NCLT not to examine the merit of the scheme or arrangement while approving the scheme of arrangement under section 230 of the Companies Act, 2013

The fact pattern in the given case was that one of the appellant companies Mineral Enterprises Ltd[14] that was a party to a scheme of demerger filed before the NCLT-Bangalore Bench. The said company had certain pending proceedings pertaining to their business activity. Additionally, the said scheme sought to separate the existing businesses into two resulting companies i.e the wind energy generation business of 'Mineral Enterprises Ltd.' (the

[13] Company Appeal (AT) No. 98 of 2019 dt. 25th September, 2019.
[14] Company Appeal (AT) No. 04 of 2019 dt. 27th May, 2019.

Demerged Company) was sought to be separated and given to 'MEL Windmills Pvt. Ltd.'[15] (Resulting Company No.1) whereas the real estate, shares and security investments were sought to be given to 'MEL Properties Pvt. Ltd.'[16] (Resulting Company No.2). The demerged company along with the resulting companies prayed for dispensation of meetings of their creditors and shareholders

The Tribunal rejected the proposed scheme at the initial stage itself, without eliciting the views of the stakeholders including regulatory authorities, on the sole grounds being dispensing with the meetings of the shareholders and creditors being sought, instead of directing to convene a meeting of the creditors and members of these companies for considering the proposed scheme of demerger.

NCLAT, on appeal filed by the appellant companies, held that for proper exercise of jurisdiction vested in the Tribunal, it was imperative either to call the meeting of creditors/ members for consideration of the proposed scheme of demerger or to dispense with such meeting by invoking Sub-section (9) of Section 230 as 100% of shareholders of each company, 100% of creditors of Resulting Companies and 97.18% of creditors of the Demerged Company had filed consent affidavits. The NCLAT held that the Tribunal failed to adhere to the mandate of law which was mandatory and imperative in nature and therefore, the order of Tribunal rejecting to admit the scheme cannot be sustained.

C. RBI and Foreign Exchange Regulations Highlights

1. No Indian Company can acquire stake in an Offshore Company with stake in Indian Company

In a frequently asked question ("FAQs") on Overseas Direct Investment (ODI)[17], RBI had stated that Indian Party can neither setup a Step-down Subsidiary/Joint Venture in India through its foreign Wholly Owned Subsidiary (WOS)/Joint Venture (JV) nor can it acquire a WOS or invest in JV that already has direct/indirect investment in India until prior approval (applied through AD Bank) is received from RBI.

Katalyst Comment:

The updation in the FAQs is to the effect that the Indian Party can approach the RBI through their AD, and the RBI will consider it on a case to case basis, depending on the merits of the case.

[15] Company Appeal (AT) No. 05 of 2019 dt. 27th May, 2019.
[16] Company Appeal (AT) No. 06 of 2019 dt. 27th May, 2019.
[17] RBI Frequently Asked Question on ODI updated on 19th September,2019

D. Goods and Service Tax Highlights

1. Maharashtra High Court - Supply by Duty Free Shops ('DFS') to outgoing passenger constitutes 'exports'

The Hon'ble Maharashtra High Court[18] has held that supply by DFSs to the outbound passengers constitutes 'exports' and in terms of section 16(1) of the IGST Act, the same should be treated as 'zero rated supply' and hence, full Input Input Tax Credit is available.

2. Advance Rulings

- **No abatement for preferential location charges and car parking charges**
  West Bengal Appellate authority[19] of advance ruling ('AAAR') has modified the order of Advance Ruling Authority ('AAR') and held that preferential location and car parking charges are not naturally bundled with construction services and hence, 1/3 abatement available to construction service is not available to the said charges.

- **Collections by rotary club and pooled for meeting expenses are liable to GST**
  Maharashtra AAR[20] has held that amount collected by Rotary Club, towards convenience of members and pooled together for paying meeting expenses, communication expenses, RI per capita dues, Magazine subscription fees, district per capita dues and deposited in a single bank account, is liable to GST.

  Katalyst Comments:

  The AAR has, vide the above ruling dated 4th October, 2019 (and available in public domain on 14th October, 2019), referred the erstwhile rulings of Maharashtra AAR and Maharashtra AAAR. The decision given by the hon'ble Apex Court in case of ***'State of West Bengal & Ors. Vs. Calcutta Club Limited' and 'Chief Commissioner of Central Excise and Service & Ors. Vs M/s. Ranchi Club Ltd'*** *(available in public domain on 4th October, 2019) regarding non-applicability of VAT and service tax both, in case of supply of foods and drinks by club to its members, has not been referred by the Maharashtra AAR.*

[18] In the matter of Sandeep Patil vs. Union of India and Others [TS-790-HC-2019(BOM)-NT]
[19] In the matter of Bengal Peerless Housing Development Company Limited [TS-771-AAAR-2019-NT]
[20] In the matter of Rotary Club of Mumbai Western Elite [TS-816-AAR-2019-NT]

3. Notifications

The government has made certain amendments to the Central Goods and Services Tax Rules, 2017 ('CGST Rules'), vide Notification No. 49/2019-Central Tax dated 9th October, 2019. The key amendments are as under:

- **Restriction on availment of ITC not appearing in GSTR-2A**
  A new sub-rule (4) has been inserted in Rule 36 to provide that ITC in respect of invoices / debit notes not uploaded by suppliers cannot exceed 20% of the eligible ITC pertaining to invoices / debit notes uploaded by the suppliers.

- **GSTR-3B to be considered as return under Section 39**
  Rule 61 of the CGST Rules, has been retrospectively amended with effect from July 1, 2017, to provide that in case where the time limit for furnishing GSTR1 or GSTR-2 has been extended, GSTR-3B should be considered as return under Section 39 of the CGST Act.

  Katalyst Comments:

  Recently, Gujarat High Court had ruled that GSTR-3B is not the return under section 39 of the CGST Act and therefore, ITC for F.Y.2017-18 could have been claimed till the due date of filing of annual return under GSTR-9 i.e. up to 30th November, 2019 (the current due date). It appears by way of this amendment that the decision of Gujarat High Court has been negated and due date for claiming ITC for the F.Y. 2017-18 should be the due date of filing GSTR-3B for the month of March 2019 (i.e. 20th April, 2019 and not the 30th November, 2019 as provided by the Gujarat High Court).

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