Katalyst Kaleidoscope

October 2021: Tax and Regulatory Insights

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A. Income Tax highlights

1. CBDT notifies new Rules for implementing the amendments made by Taxation Laws (Amendment) Act, 2021 on taxing indirect transfers of Indian assets retrospectively

The Taxation Laws (Amendment) Act, 2021 ("2021 Act"), inter-alia, amended the Income-tax Act, 1961 (IT Act or the Act) 1961 (the Act/ ITA) (covered in our August 2021 edition of Katalyst Kaleidoscope) to provide that no tax demand shall be raised in future based on the amendment to section 9 of the IT Act made vide Finance Act, 2012 for any offshore indirect transfer of Indian assets if the transaction was undertaken before the presidential assent i.e., May 28, 2012.

The 2021 Act also provides that the demand raised for offshore indirect transfer of Indian assets made before May 28, 2021 (including the validation of demand provided under Section 119 of the Finance Act 2012) shall be nullified on fulfillment of specified conditions such as withdrawal or furnishing of undertaking for withdrawal of pending litigation and furnishing of an undertaking to the effect that no claim for cost, damages, interest, etc. shall be filed and such other conditions are fulfilled as may be prescribed. The amount paid/collected in these cases shall be refunded, without any interest, on fulfillment of the said conditions.

In view of the above, CBDT has notified two new Rules vide Income-tax (31st Amendment) Rules, 2021[1] as under:

(i) **Rule 11UE** which provides for the specified conditions in order to be eligible to claim relief under 2021 Act which effectively require the declarant and all the interested parties to irrevocably withdraw, terminate or discontinue all claims, appeals etc.

(ii) **Rule 11UF** which provides the form and manner of furnishing the undertaking for withdrawal of pending litigation, claiming no cost, damages, etc.

2. Pune ITAT: no reduction in Written Down Value ("WDV") of assets upon waiver of loan[2]

The assessee had purchased plant & machinery from Sermo Sable ("SS") in FY 2002-03 for which the payments were outstanding. SS waived off the outstanding sums payable by the assessee in FY 2005-06 (AY 2006-07) and accordingly, the assessee wrote back the amount payable and created Capital Reserve in its books of account in that year for an equal amount. During the reassessment proceeding of FY 2010-11 (AY 2011-12), the Assessing Officer ("AO") disallowed the depreciation claim on the loan written back which was transferred by the assessee to the Capital reserve account in FY 2005-06.

[1] Notification No. G.S.R 713(E) published in the Official Gazette on October 1, 2021
[2] Shapers India Private Limited v. DCIT [2021] 130 taxmann.com 409 (Pune Tribunal)

The Pune ITAT in this regard observed that the cost as is relatable to any subsidy or grant or reimbursement should have been excluded from the actual cost of the asset in the Assessment Year in which the subsidy or grant received.

Ld. Tribunal further added that "once the assessment for the AY 2006-07 got concluded with such gross value of the asset, the stage for altering the actual cost/ WDV on account of the loan waiver got over. The AO got denuded of the power to reduce the amount of depreciation after so many years in the AY 2011-12." Accordingly, the Pune ITAT held that the waiver of loan in the earlier year has no impact either on the actual cost under section 43(1) of the IT Act or WDV of block of asset under section 43(6) of the IT Act for the year under consideration i.e. AY 2011-12.

Katalyst Comments:

One needs to keep in mind that assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement received which was not reduced from the actual cost of the asset will be taxable as income under section 2(24)(xviii) w.e.f. April 1, 2016.

3. Ahmedabad ITAT: assessment on non-existent entity invalid

Suzlon Global Services Limited (SGSL)[3] acquired a division of its holding company under slump sale for Rs. 2,000 Cr., whereby excess purchase consideration of Rs. 1,922.92 Cr. was treated as goodwill on which depreciation was claimed since AY 2014-15. Subsequently, Assessee was amalgamated with Suzlon Structures Ltd. (SSL) effective from March 31, 2016, which resulted in goodwill of Rs. 1,427.90 Cr for SSL; Pursuant to the amalgamation, SGSL claimed the depreciation on the Goodwill up to 30 March 2016 which were transferred to SSL, and SSL claimed depreciation on Goodwill acquired from SGSL only for a day for FY 2015-16. AO completed the assessment under section 143(3).

Principle CIT sought revision of assessment under section 263 as he contended that Assessee was not eligible for claiming depreciation on goodwill arising out of amalgamation on account of section 32 and 43(6) of the IT Act. Aggrieved Assessee challenged the validity of the assessment under section 263 with Ahmedabad ITAT as the assessee was merged with SSL and ceased to exist.

With regards to the validity of assessment framed on erstwhile entity, Ld. Tribunal relies on the Supreme Court ruling in Maruti Suzuki and Delhi HC ruling in Kaizen Products and held that the assessment to be invalid as it was made in the name of the non-existent company and that it could not be made subject to revision under section 263.

[3] Suzlon Global Services Limited [TS-935-ITAT-2021(Ahd)]

4. Mumbai ITAT: Allotment of shares on rights issue does not attract anti-abuse provisions of Section 56(2)(vii)

Assessee-Individual[4] was a director and major shareholder in Kennington Fabrics Private Limited (KFPL) and during AY 2014-15 was allotted 3.95 Cr shares of KFPL at a face value of Re.1/- each in the right issue; the revenue took the view that there was disproportionate allotment of shares and alleged that this was less than FMV as per Section 56(2)(vii) (currently Section 56(2)(x)) read with Rule 11U & 11UA and the difference between FMV and the consideration paid was taxable.

The Mumbai ITAT observed that this disproportionate allotment of shares as deemed by tax authorities was a fallacy as they overlooked that there were two right offers during the year and the right issue was offered, on both occasions, to existing shareholders in the ratio of 7:8 on first occasion and 5:8 on the second occasion and since Assessee subscribed his entitlement but the other shareholders did not, Assessee's overall holding increased at year-end and the holding ratio got skewed in his favour.

The ITAT relied on coordinate bench ruling in Sudhir Menon HUF[5] wherein it was held that if there was no disproportionate allotment, there is no scope for any property being received by them on the said allotment of shares and held that there being only an apportionment of the value of their existing holding over a larger number of shares and Section 56(2)(vii)(c) would not get attracted.

The ITAT noted that in the aforesaid ruling it was held that Section 56(2)(vii) does not apply to bonafide business transactions and referred to CBDT Circular No.1/2011 which states that "the intention was not to tax transactions carried out in the normal course of business or trade, the profit of which are taxable under the specific head of income" and held that since the transactions were carried out in normal course of business, Section 56(2)(vii) doesn't apply.

Katalyst Comments:

This ruling is one more guiding principle in interpreting the wide scope of the Section 56(2)(x) and reiterates that the Section, being a deeming provision, must be applied to its purpose which was to prevent anti-abuse, especially because the literal text of the Section as such covers genuine business transactions as well. There would still be a very fine line between this Section not being applicable to bonafide transactions vis-à-vis intentional misuse, which may also be dealt with by the Revenue Authorities through invocation of General anti-abuse rules (GAAR).

[4] Rajeev Ratanlal Tulshyan [TS-950-ITAT-2021(Mum)]
[5] Sudhir Menon HUF [TS-146-ITAT-2014(Mum)]

5. Ahmedabad ITAT: Choosing a tax effective option out of two legally permissible options is not the same as employing a colourable device

Assessee-Company[6] engaged in the business of construction and development of real estate sold shares of a company called ARGHPL and incurred a long-term capital loss in AY 2012-13; Revenue contended that ARGHPL owned only one immovable property as asset and held that Assessee used colourable device by resorting to sale of shares resulting in long term capital loss, instead of sale of property, which would have resulted in short term capital gains.

The Tribunal remarked that the term colourable device means "transactions which appear to be authentic on the face but in actuality they are false". Ld. Tribunal drew support from the Ahmedabad HC ruling in Banyan Berry wherein it was held that "every Act which results in tax deduction, exemption of tax or not attracting tax authorized by law cannot be treated as a device of tax avoidance and the real question to be asked is whether the act of the assessee falls in the category of a colourable device, a dubious method or subterfuge which the judicial process may not accord approval."

The Tribunal held that that the Assessee chose one of the two legally permissible options which it deemed to be the most tax effective or viable and mere holding period of 34 months for land cannot be a criterion to hold the transaction as a colourable device as assessee could easily postpone the transaction by 2 months to avoid the possible hassles of the income tax proceedings.

Katalyst Comments:

This ruling is one more precedent on differentiating between tax avoidance and tax planning. The tax authorities usually resort to allegation of tax avoidance, often without recognising commercial rationale of the transactions. With GAAR being part of the new law, such litigation will have a defined framework, although GAAR itself remains widely worded.

[6] Venus Infrastructure & Developers (P) Ltd [TS-906-ITAT-2021(Ahd)]

B. Corporate Law Highlights

1. Important aspects of a Scheme of Arrangement under Companies Act, 2013

Some recent NCLT schemes have surfaced some interesting dimensions as per the table given below:

Issues	RD Queries	Response of Petitioner Company and approved by NCLT
Uses of Capital Reserve arising out of the Amalgamation *(Scheme of Arrangement of Garware Holdings Limited approved by NCLT Mumbai) - (CA (CAA) 1089/MB/2020 dated 23.07.2021)*	Regional Director raised query that Capital Reserve should not be available for distribution of dividend and other similar purposes.	Petitioner undertook that Capital Reserve would not be available for the stated purposes.
The reduction of capital effected as an integral part of the Scheme without following the process under section 52 read with sections 66 of the Companies Act, 2013 (Cos Act, 2013) *(Scheme of Arrangement of Garware Holdings Limited approved by NCLT Mumbai) (CA (CAA) 1089/MB/2020 dated 23.07.2021)*	Regional Director asked the Petitioner Company to comply the provisions of Section 52 read with Section 66 and other relevant provisions of the Companies Act, 2013 to effect the reduction of the capital which was integral part of the scheme.	When reduction of capital is effected as an integral part of the Scheme, the consent accorded to a Composite Scheme by the Shareholders of the Petitioner Companies shall be construed / deemed to be the consent required under Sections 52/66; no separate compliance shall be required for such reduction of share capital.
Buy-back like transaction falls under Automatic Route of Foreign Exchange Management Act (FEMA). *(Scheme of Capital Reduction of GNQ (GHQ) Copper Private Limited approved by NCLT Ahmedabad) - (CP No 17 of 2020 dated 14.09.2021)*	The scheme envisaged the reduction of share capital held by Foreign Corporate Body and NRI. In this context, RD sought clarification that whether the scheme is in compliance with the FEMA provisions or not.	The Petitioner Company clarified that Buyback like transactions envisaged in the Scheme of Arrangement involving Reduction of Share Capital falls under the automatic route and is considered as a transfer of shares from non-resident to resident and requires the filing of specified forms as per the FEMA. Thus, prior permission under FEMA and of the RBI is not required for reducing foreign shareholding and further undertook that it will comply with the applicable requirements under FEMA.

2. NCLAT rejected plea seeking modification of order rejecting merger scheme and its partial enforcement[7]

NCLAT dismissed application seeking modification/ clarification of its judgment rejecting the Scheme of Amalgamation and Arrangement which had been approved by NCLT. Brief facts of the case are as follows:

- The scheme was between 9 Petitioner Companies and their shareholders and filed with NCLT Mumbai and Chennai;
- The scheme envisaged merger of Petitioner Companies 1 to 6 into Petitioner Company 9 and demerger of Business undertakings of Petitioner Companies 7 and 8 into Petitioner company 9;
- Petitioner Companies 3 to 6 and 9 were Private Companies and others were unlisted public companies.
- The scheme was approved by both NCLT Mumbai and NCLT Chennai. However, certain shareholders of Petitioner Company 1 and Petitioner Company 2 objected the scheme by appealing with NCLAT and NCLAT rejected the scheme.

Appellant further appealed under Rule 11 of NCLAT Rules for partial enforcement of the scheme to the extent merger of Petitioner Companies 3 to 6 with Petitioner Company 9 arguing that no objections were received from Petitioner Companies 3 to 6 and 9 and such partial enforcement of the scheme can work out satisfactorily and in accordance with law.

In this matter, the NCLAT remarked that "Rule 11 of NCLAT Rules gives Inherent Powers to pass such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal and further stated that this Tribunal can rectify any mistake apparent from the record and amend any order passed by it. However, what the Applicant, in effect, is seeking from this Tribunal is to reopen the whole Appeal and consider if the scheme can be partly enforced with regard to the Private Companies. This cannot be done relying on powers under Rule 11."

The NCLAT held that the concerned order of this Tribunal sought to be modified/ clarified has dealt with the scheme as a whole which was proposed, challenged and even the Regional Director looked at the scheme as a composite scheme, thus, rejected the argument that the scheme should be segregated in the context of Private Limited vis-à-vis Public Limited Companies.

Further responding to appeal for exercising powers under section 231 of CA, Ld. Appellate Tribunal clarified that modification under Section 231 can be made only if the scheme is sanctioned and ruled that "When the scheme has been rejected, Section 231 cannot be relied upon to seek a modification".

[7] Rama Investment Company Pvt. Ltd. vs. Ankit Mittal. [LSI-830-NCLAT-2021(NDEL)]

C. Securities' Law Highlights

1. SEBI informal guidance: Inter-se transfer of locked-in shares between promoters is permissible subject to remaining locked-in period continuing with transferee[8]

Applicant submitted that Jammu & Kashmir Bank ('J & K Bank') issued and allotted commensurate equity shares on preferential allotment basis to the U. T of Jammu and Kashmir ('J&K Govt.') who is the promoter and majority shareholder in the Bank. The shares issued were to be locked-in for 3 years and the entire pre-preferential holding of the Govt was locked in for 6 months. J&K Govt. issued guidelines for apportionment of assets including transfer of 8.23% shareholding in the J&K Bank to the U.T. of Ladakh and for which applicant applied to SEBI for informal guidance.

SEBI has issued an Informal Guidance clarifying that the specified securities may be transferred among promoters or to a new promoter or persons in control of the issuer provided that the lock-in period of 3 years continues for the remaining period with the transferee and subject to the provisions of Takeover Regulations. After the transfer of such shares U.T of Ladakh would also be classified as Promoter of J&K Bank.

2. Securities Appellate Tribunal ('SAT'): on facts, no acquisition of indirect control by Reliance Industries Limited over Network18[9]

SAT affirmed SEBI order rejecting Appellants' application challenging the open offer price of Network18, allegedly controlled indirectly by Reliance Industries Ltd. ('RIL') through Indian Media Trust ('IMT') and 6 other entities ('Holding Companies').

SAT noted that a Deed of Trust was executed for the sole beneficiary (i.e. RIL) under which IMT was floated, and the entity appointed as the Trustee was controlled by Mr. Raghav Bahl (Founder and former MD, Network18 Group). Mr. Bahl subsequently entered into a Single Unit Agreement ('SUA') on behalf of IMT as well as the holding companies, controlled by him and TV18, NW18, and as per the said SUA, the parties thereto were to act as largest Indian shareholders of NW18. Later, a Zero Coupon, Optionally & Fully Convertible Debentures Agreement ('ZOCD Agreement') was entered into between these holding companies and under the ZOCD Agreement, IMT agreed to invest the subscription amount into ZOCDs of the holding companies, which were required to utilize the funds for subscribing to the right issues of NW18 and TV18.

SEBI had held that the ZOCD Agreement read independently or combined with the SUA neither triggered any open offer, nor require any disclosure under Clause 36 of the Listing Agreement.

[8] Informal Guidance sought by Jammu and Kashmir Bank Ltd.[LSI-842- SEBI-2021(MUM)]
[9] Victor Fernandes and Anr. vs SEBI and Ors. [LSI-800-SAT-2021(MUM)]

Further stated that a reading of the ZOCD Agreement would show that it was merely an investment made by IMT in the concerned entities, and the control of the affairs of these entities, TV18, etc. remains with the holding companies.

SAT further noted that as per the ZOCD Agreement, Mr. Bahl continued to be in control of TV18, NW18 etc. on behalf of the holding companies, and IMT, RIL did not have any say in the management affairs of TV18, NW18, and effectively, there was no change in control of NW18 as a result of the execution of the ZOCD Agreement and held that since the conversion option was not exercised at any time before making the public announcement, the ZOCD Agreement itself did not entail any indirect control of IMT or RIL in NW18, and therefore, no disclosure was required to be made.

Katalyst Comments:

In such transactions, one needs to look on a case to case basis, depending upon the factual circumstances and terms of the agreement.

3. SEBI circular: RTAs to transmit Securities to surviving joint Holder(s) in case of demise of joint holder(s)

SEBI vide circular[10] dated October 18, 2021, has asked Registrars to an issue and share transfer agents (RTAs) to transmit securities in favour of surviving joint holder in case of demise of a joint holder.

SEBI observed that, in some cases, due to counterclaim or dispute from the legal representative of a deceased holder, RTAs have not effected transmission to the surviving joint holders. In this regards, SEBI advised RTAs to transmit securities in favour of surviving Joint holder(s), in the event of demise of one or more joint holder(s) in compliance with the clause 23 of Table F in schedule 1 read with section 56(2) & 56(4)(c) of the Companies Act 2013 provided that there is nothing contrary to the same in the Article of Association of the company.

[10] SEBI/HO/MIRSD/MIRSD_RTAMB/P/CIR/2021/644 dated October 18, 2021

4. SEBI circulars: amended mechanism of providing exit option to dissenting unit holders of Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs)

In July 2020, SEBI issued two circulars[11] providing a mechanism to provide an exit option to dissenting unitholders of REITs and InvITs. SEBI has further amended the two Circulars[12] and provided the following:

- The exit option for dissenting unit holders would be available in case of an acquisition, change in sponsor, inducted sponsor or change in control of sponsor or inducted sponsor is triggered pursuant to an open offer.

- In this instance the relevant date will be the date of public announcement made for the acquisition in terms of said Regulations and the exit option price would be enhanced by an amount equal to a sum determined at the rate of 10% per annum for the period between the first notice date and second notice date

- The acquirer shall give first notice to Manager regarding acquisition along with Public Announcement made for the acquisition in terms of Substantial Acquisition of Shares and Takeover Regulations.

- The Manager (who manages open offer) to convene a meeting of unit holders for voting, to be completed not later than three working days from the cut-off date and within 21 days from the date of receipt of second notice from the acquirer and provide the list of dissenting unit holders to the Lead Manager(s) within 48 hours of the last day of voting.

5. SEBI notifies limited review and audit report formats for issuers of Non-Convertible Securities[13]

SEBI notified revised formats for limited review/audit report for issuers of non-convertible securities, to be submitted to stock exchanges and placed on listed entity's website; The said formats have been notified pursuant to recent LODR amendments which mandates entities with listed non-convertible securities to disclose financial results on a quarterly basis, including assets & liabilities and cash flows as well as requiring certain changes in the line items in the financial results;

Accordingly, provides the formats for –

- Limited Review Report for quarterly standalone financial results,
- Audit Report for quarterly standalone financial results,

[11] SEBI/HO/DDHS/DDHS/CIR/P/2020/122 and 123 dated July 17, 2020
[12] SEBI/HO/DDHS/DDHS_Div3/P/CIR/2021/639 and 640 dated October 05, 2021
[13] SEBI/HO/DDHS/CIR/2021/0000000638 dated October 14, 2021

- Audited Annual consolidated financial results, for Banks and NBFCs and for entities other than Banks, NBFCs, respectively.
- Insurance companies shall disclose limited review/audit reports as per the formats specified by IRDAI.

D. Foreign Exchange Management Act, 1999

1. RBI notifies framework for Scale Based Regulation for Non-Banking Financial Companies[14]

- **Section I: Regulatory Structure for NBFCs**

Regulatory structure for NBFCs shall comprise of four layers based on their size, activity, and perceived riskiness

NBFC Layers	NBFCs covered
Base Layer: (NBFC – BL)	– Non-deposit taking NBFCs below the asset size of ₹1000 crore; and – NBFCs Peer to Peer Lending Platform (NBFC-P2P), – NBFC-Account Aggregator (NBFC-AA), – Non-Operative Financial Holding Company (NOFHC) and – NBFCs not availing public funds and not having any customer interface.
Middle Layer: (NBFC – ML)	– All deposit taking NBFCs (NBFC-Ds), irrespective of asset size, – Non-deposit taking NBFCs with asset size of ₹1000 crore and above and – Standalone Primary Dealers (SPDs), – Infrastructure Debt Fund - Non-Banking Financial Companies (IDF-NBFCs), – Core Investment Companies (CICs), – Housing Finance Companies (HFCs) and – Infrastructure Finance Companies (NBFC-IFCs).
Upper Layer: (NBFC – UL)	– NBFCs specifically identified by RBI as warranting enhanced regulatory requirement based on a set of parameters and scoring methodology as provided in the framework. – The top ten eligible NBFCs in terms of their asset size shall always reside in the upper layer, irrespective of any other factor.
Top Layer: (NBFC – TL)	– The Top Layer will ideally remain empty. – This layer will be populated at the discretion of RBI in case of a substantial increase in the potential systemic risk from specific NBFCs in the Upper Layer.

[14]RBI/2021-22/112 - DOR.CRE.REC.No.60/03.10.001/2021-22 dated October 22, 2021

- **Section II: Scale Based Regulatory Framework**

All the layers of NBFCs shall be subject to respective regulations as currently applicable to them, except for the changes mentioned below and additional requirements:

NBFC Layers	Requirements
Additional Requirements applicable to **all layers of NBFCs**	– **Net Owned Fund:** Regulatory minimum Net Owned Fund (NOF) for NBFC-ICC, NBFC-MFI and NBFC-Factors will be increased to ₹10 crore gradually by March 2027. There is no change in NOF requirement for rest of the NBFCs. – **NPA Classification:** Overdue period for NPA commence from 90 days for all categories of NBFCs. – **Experience of the Board:** At least 1 of the directors shall have relevant experience of having worked in a bank/ NBFC. – **Ceiling on IPO Funding:** A ceiling of ₹1 crore per borrower for financing subscription to Initial Public Offer (IPO).
Additional Specific Requirements applicable to **NBFCs – BL**	– Certain additional disclosure and governance requirements need to be complied with.
Additional Specific Requirements applicable to **NBFCs – ML**	– A single merged exposure limit of 25% for single borrower/ party and 40% for single group of borrowers/ parties for borrowing/investment. These limits shall be determined based on the NBFC's Tier 1 capital instead of their Owned Funds. – Exposure to capital market and commercial real estate shall be reckoned as sensitive exposure for NBFCs. For which Board-approved internal limits to be fixed for these exposures. – Regulatory restrictions in respect of the granting loans and advances to director and their relatives, senior officers etc.
Additional Specific Requirements applicable to **NBFCs – UL**	– Maintenance of Common Equity Tier 1 capital of at least 9% of Risk Weighted Assets and leverage requirement. – A single merged exposure limit of 25% for single borrower/ party and 40% for single group of borrowers/ parties for borrowing/investment. These limits shall be determined based on the NBFC's Tier 1 capital instead of their Owned Funds.

NBFC Layers	Requirements
	– Exposure to capital market and commercial real estate shall be reckoned as sensitive exposure for NBFCs. For which Board-approved internal limits to be fixed for this exposures. – Large exposure ceiling will be specified for an NBFC for exposure to a single group. – Regulatory restrictions in respect of the granting loans and advances to director and their relatives, senior officers etc.
Additional Specific Requirements applicable to **NBFCs – TL**	– Additional requirements shall be specifically communicated to the NBFC at the time of its classification in the Top Layer. There will be enhanced and intensive supervisory engagement with these NBFCs.

- **Section III: Transition Path for NBFC – UL:**

  Once a NBFC is identified for inclusion as NBFC-UL, the NBFC shall be advised about its classification by RBI. Within 3 months of being advised by the RBI, the NBFC shall put in place a Board approved policy for adoption of the enhanced regulatory framework and chart out an implementation plan.

  The Board shall ensure implementation within a maximum time-period of 24 months from the date of advice. The period of 3 months provided for charting out the plan for implementation shall be subsumed within the 24-months' time-period referred to above.

2. RBI issues master circular consolidating prudential norms on income recognition, asset classification for banks[15]

RBI issued Master Circular consolidating instructions / guidelines issued to banks till date on matters relating to prudential norms on income recognition, asset classification and provisioning pertaining to advances; Inter alia specified that -

– Interest realised on NPAs may be taken to income account provided the credits in the accounts towards interest are not out of fresh/ additional credit facilities sanctioned to the borrower concerned, however in absence of a clear agreement between the bank and the borrower for the purpose of appropriation of recoveries in, banks should adopt an accounting principle and exercise the right of appropriation of recoveries in a uniform and consistent manner;

[15] RBI/2021-2022/104 - DOR.No.STR.REC.55/21.04.048/2021-22 dated October 1, 2021

- Banks to classify NPAs further into 3 categories, namely (i) Substandard Assets, (ii) Doubtful Assets and (iii) Loss Assets, based on the period for which the asset has remained non performing and the realisability of dues, while explaining each of these categories in detail;

- Advances against term deposits, National Savings Certificates (NSCs) eligible for surrender, Indira Vikas Patras (IVPs), Kisan Vikas Patras (KVPs) and life policies need not be treated as NPAs, provided adequate margin is available in the accounts;

- Credit facilities backed by guarantee of the Central Govt. though overdue may be treated as NPA only when the Govt. repudiates its guarantee when invoked, however clarifies that this exemption from classification of Govt. guaranteed advances as NPA is not for the purpose of recognition of income.

E. Black Money Act

Mumbai ITAT: there cannot be simultaneous proceedings under Black Money Act and Income-tax Act on the same asset/ income; revenue cannot collapse offshore trust structure by lifting the corporate veil[16]

Assessee, an Indian national and tax-resident was served a notice u/s 10(1) of the Black Money Act ('BM Act') for AY 2016-17 alleging the Assessee to be a beneficial owner of foreign bank accounts and offshore entities and the beneficiary of foreign discretionary trusts. Assessee challenged the notice to be defective for being legally and factually untenable on following grounds that:

a) There cannot be simultaneous proceedings on the same asset under ITA and BM Act; and
b) Assessee cannot be a beneficial owner of the foreign bank accounts of offshore entities and beneficiary of a foreign discretionary trust only because for the purpose of anti-money laundering laws, the Assessee had been declared as 'beneficial owner'.

The Tribunal held that the BM Act has an inbuilt bar "inasmuch as it has been provided that assets out of income assessed to income tax shall be excluded from the purview of undisclosed asset in Black Money Act. Hence, it is abundantly clear that as per the scheme of the act, there cannot be a simultaneously proceedings on the same asset/income under Income Tax Act, 1961 as well as Black Money Act".

Further, the Tribunal followed coordinate bench ruling in the wealth tax appeal for AYs 2007-08 to 2013-14 in Assessee's own case where the Assessee was held not liable for wealth-tax on funds lying in offshore bank accounts, financial interests in various companies, and properties held abroad despite the fact that for the purpose of anti-money laundering laws, the Assessee had been declared as 'beneficial owner' and that no investments were moved abroad from India by the settler or any beneficiaries.

[16] Yashovardhan Birla [TS-393-ITAT-2021(Mum)-TP]

The Tribunal held that Revenue as well as ITAT cannot shift stands under different proceedings that involve same facts and noted that Revenue, before ITSC, had not doubted the trust deed executed by Assessee's Uncle that forms the edifice of the assessment and therefore, by virtue of the doctrine of approbate and reprobate, CIT(A) could not have taken a different stance on the trust deed.

The Tribunal relied on SC ruling in Estate of HMM Vikramsinhji of Gondal where in the context of the discretionary trust and beneficiary, it was held that "discretionary trust gives beneficiary no right to any part of the income of the trust property but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. Beneficiary have no power to bind themselves for the future and has no more than a hope that the discretion will be exercised in his favour." Thus, Ld. Tribunal held that the ownership of the assets cannot be thrust upon the Assessee.

F. Insolvency and Bankruptcy Code, 2016

1. IBBI amends CIRP regulations to restrict number of modifications to EOI and Resolution Plan

IBBI amended Insolvency Resolution Process for Corporate Persons Regulations, 2016[17] (CIRP Regulations) w.e.f. September 30, 2021, with a view to ensure adherence to timeliness by addressing the delays in CIRP, and to maximize value in corporate insolvency proceedings.

IBBI placed a cap on the number of times modifications may be made to invitation for expression of interest (EOI), and request for resolution plans, thereby specifying that such modifications shall not be made more than once. Alternatively, Resolution Professional, if envisaged in the request for resolution plan, may use a challenge mechanism to enable resolution applicants to improve their plans.

Further provided that the Committee of Creditors shall not consider any resolution plan received after the time as specified by the committee or received from a person who does not appear in the final list of prospective resolution applicants.

2. NCLAT affirms NCLT order which held that default in payment of interest does not qualify as a 'financial debt'

Delhi NCLAT[18] affirmed order of Delhi NCLT dismissing Appellant's application for initiation of insolvency process against the Corporate Debtor ('Respondent') for default in payment of interest on grounds that default of payment of interest is not covered under the definition of 'financial debt' u/s 5(8) of IBC and the Appellant does not fall within the ambit of 'financial creditor'

[17] IBBI/2021-22/GN/REG078 dated September 30, 2021
[18] Nitin Rekhan vs. Hightime Marketing Pvt. Ltd. [LSI-816-NCLAT-2021(NDEL)]

Respondent received sum for issuing shares to him but since no shares could be allotted to the Appellant, Respondent refunded the principal amount, but no interest was paid on the principal amount as is required.

Appellant filed the application u/s 7 of IBC for default of payment of interest which was rejected by Ld. Tribunal on grounds that the Appellant is not covered under the definition of 'financial debt' and no financial contract has been produced by the Appellant in compliance of the provisions of IBC.

The NCLAT remarked that debt is a much bigger set of financial liabilities whereas 'financial debt' is only a subset of the overall set of debt. As per IBC provisions, 'financial debt' to mean a debt along with interest which is disbursed against the consideration for the time value of money, where money should necessarily be borrowed against the condition of time value of money.

The NCLAT dismissed the appeal holding that it was not persuaded by the contention of the Appellant that there was a time value of money attached with the deposits which was established through a prior contract and Appellant has not given any document or argument to show that the amount deposited by him was to be used by the Respondent for establishing or running his business.

G. Goods and Service Tax Highlights

1. No input tax credit of GST charged on inputs and input services used for supply of Corporate Social Responsibility ('CSR') activities is available

The Gujarat Authority for Advanced Ruling ('AAR')[19] has held that the CSR activities, as per Companies (CSR Policy) Rules, 2014 are those activities which are excluded from normal course of business of the applicant and, therefore, not eligible for ITC, as per Section 16(1) of the CGST Act, 2017 ('CGST Act'). Due to this, the ITC of inputs and input services used for supply of such CSR activities in the form of donations to the Government relief funds or educational societies, civil works or installation of plant and machinery items in schools or hospitals, distribution of food kits etc. has been denied.

Katalyst comments: *The CSR activity is mandatory in nature as per the provisions of the Companies Act and necessary to continue running the business. The ITC of inputs and input services used for CSR activity cannot be denied based on the literal interpretation provided under the Companies Act. The Government should suitably amend the GST Law to allow the ITC of CSR activity as these activities are essential to continue running the business.*

[19] In the matter of Adama India Pvt. Ltd. [TS-505-AAR(GUJ)-2021-GST]

2. Managerial and leadership services provided by corporate offices to its other site officers and group entities are liable to GST and lump-sum amount for such services can be charged if the recipient is entitled to ITC

The registered/Corporate Office supplies managerial and leadership services to the distinct and related persons in the areas off finance, operation, etc. for which it charges fixed monthly charges on lump sum basis. The charges are at the discretion of the Registered /Corporate Office and not supported by any specific valuation method under Section 15 of CGST Act read with GST Valuation Rules. In this regard, the Maharashtra AAR[20] has held that services supplied to the distinct and related persons is liable to as per schedule I of the CGST Act read with the Rule 28 of the CGST Rules and the Applicant can adopt the price on lump sum basis if the recipient is entitled for ITC.

Katalyst comments: *The AAR has clarified that if lump sum value is charged for services provided to the distinct person or related person, the said value is as per the proviso to Rule 28 of the CGST Rules and is valid.*

3. Metro-car commissioning and installation by separate cost centres is not 'composite supply'

Bharat Earth Movers Ltd. ('BEML') has entered into the contract with Bangalore Metro Rail Corporation Ltd. ('BMRCL') for manufacture and supply of Standard Gauge Intermediate Cars. The Karnataka AAR in this regard held that the supply by BEML to BMRCL is a composite supply and hence, highest GST rate is applicable to the entire supply. However, the Karnataka AAAR[21] reverses AAR order and observed that the scope of work undertaken by each Cost Centre is entirely independent and specific to that Cost Centre and is not associated with any other Cost Centre. Further, the Karnataka AAAR also reiterates that obligations of supplies envisaged in the supply contract are distinct and separable and hence, separate activities of supply of goods and services have to be viewed independently on its own merits. Therefore, specific rate of tax for various activities should be applied although single contract has been made for supply.

Katalyst Comments: *A welcome ruling by the Karnataka AAAR. Mere the fact that number of tasks for supply goods and services entrusted through a single contract, it can't be considered as 'composite supply' to levy highest rate of GST to the entire supply. If various cost centres are working independently and supply by various cost centres are separate and distinct, separate GST rate for supply of goods and services should be adopted.*

[20] In the matter of B.G. Shirke Construction Technology Pvt. Ltd. [TS-491-AAR(MAH)-2021-GST]
[21] In the matter of M/s Bharat Earth Movers (BEML) Ltd. [TS-485-AAAR(KAR)-2021-GST]

4. Land sold after development of civil structure or complex or building is liable to GST

TIF Integrated Industrial Parks Pvt. Ltd. ('applicant') is an SPV and it represents its members industrialists with an objective of providing industrial infrastructure by development of land acquired by Telangana State Industrial Infrastructure Corporation Limited (TSIIC).

As per the contract entered by the applicant with the TSIIC Ltd, the property in land will be transferred to the applicant only when the applicant completes the development of infrastructure of schedule land. Further, the agreement between the applicant and one individual allottee, the individual allottee will get the title of the land only on commencement of industrial production.

In this regard, the Telangana AAR[22] has held that sale of land after developing by way of erecting or civil structure or a building or a complex then such supply is liable to GST. However, if land is sold without any development, such supply is exempt under schedule III of section 7(2) of the CGST Act. The AAR has also held that if the applicant executes works contracts involving transfer of property in goods for a consideration under an agreement of contract, such consideration will be liable to tax. However, if these elements are missing in execution of a construction of building or complex, it shall not be liable to tax.

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[22] In the matter of TIF Integrated Industrial Parks Pvt. Ltd. [TS-537-AAR(TEL)-2021-GST]