KATALYST ADVISORS

Katalyst Kaleidoscope

September 2022: Tax and Regulatory Insights

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A. Income tax highlights

1. Supreme Court: Bad debt deduction disallowed when sums were not written off in the books of accounts; not deductible even under residual provision of section 37(1)[1]

The assessee was engaged in the business of real estate development and had advanced an amount of INR 10 Cr to a party towards acquisition of commercial premises. The project did not make any progress, due to which the assessee sought a refund of the amounts from the party. However, the latter did not respond and as a result, the assessee claimed write off of advance as bad debt deduction u/s 36(1)(vii) of the Income tax Act, 1961 ("ITA") and alternatively, as revenue business expenditure or trading loss u/s 37(1). However, the assessee had not written off the amount in its books of accounts.

The Supreme Court ("SC") negated the claim of the assessee and reversed the judgment of the Bombay HC by laying down the following principles for claiming a bad debt written off as a business expenditure:

(i) Amount paid by assessee and written off as irrecoverable is deductible as bad debts written off u/s 36(1)(vii) of the ITA, only if assessee proves that it was lent by it in ordinary course of its money-lending business. Mere mention of lending as an object in assessee-company's Memorandum of Association will not prove that amount paid by it to a party was money lent in ordinary course of its money-lending business. Assessee's accounts will have to establish that it was an advance made by it to the party in the ordinary course of its business.

(ii) Further, since the advance was given to acquire immovable property, it was in the nature of capital expenditure, and, hence, not allowable as revenue business expenditure.

(iii) Relying on the ruling in case of ***Catholic Syrian Bank***[2], the SC observed that it is evident that merely stating a bad and doubtful debt as an irrecoverable write off without writing off in the accounts would not entitle the assessee to claim a deduction.

(iv) Provision for doubtful debt not allowable under s.36(1)(vii) is also not allowable under s.37(1), since s.37(1) applies only to items which do not fall under earlier provisions.

Katalyst Comments:

In the above judgement, the SC reiterated the principle that section 37 of the ITA applies only to items which do not fall within the ambit of Sections 30 to 36. If a provision for an expense or deduction is expressly excluded from Section 36(1)(vii), then such a situation cannot be subject of a claim u/s 37 of the ITA, even on the basis of "real income theory", since section 37(1) applies only to items which do not fall under earlier provisions.

[1] Pr. CIT Vs. Khyati Realtors Pvt. Ltd [(2022) Taxmann.com 461 (SC)] dated August 25th, 2022

[2] Catholic Syrian Bank Vs. CIT Thissur [(2012) 3 SCC 784

2. CBDT: Additional Guidelines issued for implementation of provisions of section 194R dealing with TDS on benefits and perquisites

Central Board of Direct Taxes ("CBDT") has issued a Circular[3] providing additional guidelines to "remove difficulties" with respect to implementation of Section 194R[4] in continuation of earlier Circular No. 12 issued on June 16th, 2022. They key clarifications are as under:

Sr. No	Issue	Clarification Issued
1.	Issuance of Bonus shares / rights issue	• No TDS is required to be deducted u/s194R on the issue of bonus shares or right shares issued by a company in which the public is substantially interested[5] as the overall value and ownership of their holding remains the same.
2.	Loan Settlement / Waiver of loan by banks or financial institutions	• No requirement to deduct tax u/s 194R on one-time loan settlement / waiver of loan granted to borrowers. • The aforesaid exemption is only applicable to by specified banks / financial institutions / systemically important NBFCs/ Asset Reconstruction Companies
3.	Reimbursement of expenses by service recipient to service provider	• If the expenses are incurred by service provider as a 'pure agent'[6] of service recipient and then reimbursement of such expenses should not be subject to deduction of tax u/s 194R.
4.	Out of pocket expenses	• Where tax already been deducted on the amount of 'out of pocket expenses' under other provisions (such as u/s 194J or 194C), there is no further benefit/perquisite which requires deduction u/s 194R • ITA
5.	Eligibility for claim of depreciation on capital asset received as benefit / perquisite	• Recipient shall be eligible to claim depreciation (on fulfillment of other conditions) on capital assets received as gift provided, the taxpayer has included the said benefit as income in his return of income and tax has already been deducted u/s 194R by benefit provider.
6.	Invitation to Dealers conference	• No TDS is required to be deducted u/s 194R even if only a few select dealers are invited to the conference and not all of them. • Day of stay i.e., one day prior and one day after the end of the conference will not be considered as an 'overstay'.

[3] Circular No. 18 of 2022 dated September 13th, 2022

[4] Section 194R provides a person, who is responsible for providing any benefit or perquisite to a resident (which may or may not be convertible into money but arises either from carrying out of business or from exercising a profession), to deduct tax at source @ 10% of the value or aggregate value.

[5] The term "company in which public are substantially interested" is defined under section 2(18) of the ITA

[6] "Pure agent" is defined under GST Valuation Rules, 2017

Sr. No	Issue	Clarification Issued
		• Any overstay by a dealer shall be treated as benefit / perquisite liable for deduction of tax u/s 194R. • Where it is not possible, owing to practical difficulties, to ascertain actual number of dealers for whom certain expenses were incurred which should be classified as benefit / perquisite, then in order to avoid any further challenges, the taxpayer who has provided the benefit / perquisite may suo-moto disallow the said expenditure and thereafter, there will not be any requirement to comply with provisions of section 194R.

Katalyst Comments:

(i) The issue of the Circular under the guise of "removing difficulties" is very unfortunate, since this Circular, as well as the earlier one dated June 16th, 2022 appears to go beyond the intent and even the language of Section 194R. Section 194R was intended to apply, as per the explanatory notes of the Finance Act, to a situation where the receipt of benefit or perquisite could go untaxed due to non-reporting. This itself is very tricky, but the ambit of the 2 circulars has sought to take the scope of the section into a very wide field and a lot of it appears unjustified.

(ii) The aspect regarding no TDS on waiver on loan by banks and specified institutions, as explained above, is one aspect, but there is an urgent need for clarifying that the waiver is not taxable in the hands of the borrower in the first place. This aspect is crucial from a NPA resolution perspective also.

(iii) The aspect regarding no TDS requirement on rights and bonus shares is restricted only to certain companies, and private companies are not referred to; one fails to understand how issue of rights and bonus to shareholders is a "benefit" to them and how TDS can even apply. The non referring to private companies in the circular is bound to create significant confusion and a lot of litigation, unless addressed quickly.

3. CBDT: Notified a modified return of income (Form ITR-A) to be furnished by the successor entity upon business reorganization (such as mergers / demergers)

The Finance Act 2022 inserted a new section 170A to enable for the entities going through business reorganization, for filing of modified returns for the period between the Appointed Date (date from which merger / demerger scheme comes into effect) and Effective Date (date on which merger / demerger scheme becomes effective i.e. typically upon filing of NCLT order with Registrar of Companies).

CBDT has notified[7] Rule 12AD under Income-tax Rules, 1962 ("IT Rules") and Form ITR-A as return of income u/s 170A[8] of the ITA to be filed by the successor entity pursuant to a business reorganization. Said rule comes into force with effect from Nov 1, 2022.

Rule provides that, if the assessment or reassessment proceedings for any year in which the order of the business reorganisation applies have been completed or are pending on the date of furnishing of the modified return (u/s 170A of the ITA), the Assessing Officer shall pass an order modifying the total income of the relevant year determined in such assessment or reassessment (or proceed to complete the assessment or reassessment proceedings, as the case may be), in accordance with the order of the business reorganisation and the modified return so furnished. The Rule also modifies ITR-6 for Assessment Year (AY) 2022-23 or prior AYs to include a tick box for ITR filed as per Section 170A.

Katalyst Comments:

Taking cognizance of the time involved in approving and giving effect to a Scheme of Arrangement, the Finance Act 2022 inserted a new section 170A to enable the entities going through business reorganization to file modified returns for the period between the Appointed Date (date from which merger / demerger scheme comes into effect) and the Effective Date (date on which merger / demerger scheme becomes effective i.e., typically upon filing of NCLT order with Registrar of Companies) within 6 months from the end of the month in which merger/demerger order is issued. Pursuant to the said section, the CBDT has now notified the Form ITR-A for filing such modified return by the successor entity w.e.f November 1, 2022.

4. CBDT: Revised Guidelines for Compounding Offences[9]

As a part of the Government's policy of facilitating ease of doing business and decriminalization of offences, CBDT has issued a fresh Guidelines on Compounding of Offences under the ITA, in supersession of the erstwhile guidelines[10] to "simplify and facilitate" the process of Compounding of Offences. Key amendments are as under:

(i) The meaning of offences is now classified into "Category A" and "Category B". Category A offences are ones where the offences are of technical nature and caused by an act of omission, whereas Category B offences are non-technical offences attributed to an act of commission.

(ii) The time limit for acceptance of compounding applications has been relaxed from the earlier limit of 24 months to 36 months, from the date of filing of complaint.

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[7] Notification No. 110/2022 dated September 19th, 2022

[8] Section 170A of the ITA - Effect of order of tribunal or court in respect of business reorganisation

[9] Guidelines for Compounding of Offenses under ITA dated September 16th, 2022

[10] Guidelines for Compounding of Offenses under Direct Tax Laws, 2019 dated June 14th, 2019

(iii) An offence punishable u/s 276[11] of the ITA is now compoundable under the revised guidelines. However, offences punishable u/ss 275A[12] and 275B[13] of the ITA shall not be compounded.

(iv) The scope of eligibility for compounding of cases has been relaxed whereby case of an applicant who has been convicted with imprisonment for less than two years being previously non-compoundable, has now been made compoundable. The discretion available with the competent authority has also been suitably restricted.

(v) Introduction of specific upper limits for compounding fee covering defaults across several provisions of the ITA.

(vi) Additional compounding charges in the nature of penal interest at the rate of 2% p.m upto 3 months and 3% p. m beyond 3 months have been reduced to 1% p.m. and 2% p.m. respectively.

5. Mumbai ITAT: Intrinsic Value of shares is a reasonable method for ascertaining FMV of shares acquired prior to April 1, 1981

In the given case[14], the assessee had sold certain equity shares held in a private limited company which were acquired prior to April 1, 1981. While computing the capital gains on the sale of these shares, the assessee took the cost of acquisition such shares as the Fair Market Value ("FMV") as on April 1, 1981 based on intrinsic value (i.e., valuation was done by dividing the net FMV of the assets of the company by the total number of equity shares). Further, the company also held land, whose valuation was supported by a report issued by a Government Approved Valuer.

The ITAT held that the intrinsic value of equity shares, particularly in the case of closely held private limited companies, is a reasonable and most appropriate method of ascertaining the FMV of equity shares. Further, the shares of a private limited company are not sold in an open market, and, therefore, when computing such a price u/s 2(22B)[15], one has to proceed on the basis that if the shares of private limited company are to be sold in an open market.

Katalyst Comments:

The date of April 1, 1981 is now amended to April 1, 2001. The valuation so arrived at can increase the base for indexation.

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[11] Section 276 of the ITA deals with removal, concealment, transfer or delivery of property to thwart tax recovery. It also provides for punishment with rigorous imprisonment for up to two years and a fine

[12] Section 275 – Bar of limitation for imposing penalties

[13] Section 275B – Failure to afford necessary facility to inspect the books of account or other documents, as required under section 132(1)(iib) of the ITA

[14] Sushiladevi R. Somani Vs. ACIT [(2022) 142 taxmann.com 123 (Mumbai Tribunal)] dated August 26th, 2022

[15] Section 2(22B) of the ITA defines the term "fair market value" in relation to a capital asset to mean
(i) the price that the capital asset would ordinarily fetch on sale in the open market on the relevant date; and
(ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with the rules made under the ITA

6. Mumbai ITAT: Share Premium not taxable on conversion of Optionally Fully Convertible Debentures (OFCDs) into Preference Shares since OFCDs were issued prior to introduction of section 56(2)(viib) [16]

The assessee had originally issued optionally fully convertible debentures ("OFCDs") at a premium in AY 2012-13 and during AY 2015-16, said OFCDs were converted into non-cumulative optionally convertible redeemable preference shares ("OCRPS") at the same price. The AO invoked provisions of section 56(2)(viib)[17] of the ITA on the ground that the provision deals with issue of shares (equity or preference) and accordingly, made additions to the income of the assessee on account of consideration received on such conversion. The AO also invoked Rule 11UA for computation of difference between fair market value of shares and actual consideration received by assessee.

The ITAT observed provisions of section 56(2)(viib) of the ITA cannot be applied at the time of conversion, since the said provisions do not only deal with issue of shares but also contemplate 'receipt' of funds. The term 'receives' as provided in the section means not only issue of shares, but also receipts of share consideration during the same year. Further, given that the ITA provides for a specific exemption u/s 47(x) for conversion of bonds/ debentures into shares, the same is not be considered as a taxable transfer and the cost of OCRPS relates back to the cost of OFCD as per section 49(2A) of the ITA. Separately, since the said consideration was received in AY 2012-13, section 56(2)(viib), which is incorporated w.e.f. April 1, 2013, did not have any applicability to the assessee.

B. Corporate Law Highlights

1. MCA: Definition of "small company" revised: Turnover and Paid-up share capital threshold increased to INR 40 Crs and INR 4 Crs respectively,

Vide a notification[18], the Ministry of Corporate Affairs ("MCA") revised the definition of "small company" u/s 2(85) of the Companies Act, 2013 with immediate effect, to include such companies falling within the ambit of the dual parameters as under:

Parameters	Erstwhile Threshold	Revised Threshold
Paid-up share capital	INR 2 Cr	INR 4 Cr
Turnover	INR 20 Cr	INR 40 Cr

[16] DCIT Vs. Rankin Infrastructure (P.) Ltd [(2022) 142 taxmann.com 37 (Mumbai Tribunal)] dated 22nd April, 2022

[17] Under section 56(2)(viib) provides that when a privately held company issues shares at a price, which is greater than FMV (as determined under Rule 11UA of the Income-tax Rules, 1961), tax is chargeable to the amount received in excess of FMV.

[18] MCA Notification No. G.S.R 700 (E) dated September 15th, 2022

Katalyst Comments:

Small companies have been provided some relaxations in the Companies Act and the increase in limit is welcome. The relaxations are in different baskets, such as the following:

(i) No requirement to appoint independent directors and no requirement of directors retiring by rotation;
(ii) Instead of 4 board meetings per year, small companies are required to hold only 2 board meetings in a year;
(iii) The audit reporting requirements under CARO 20 are lesser for small companies;
(iv) Auditor retirement provisions do not apply to small companies;
(v) Merger / Demergers of small companies does not need to go through NCLT process, but can be done through Regional Director approval.

2. **SC: Scheme seeking to convert redeemable preference shares into loans leading to possibility of reduction of DDT cannot necessarily be the basis for Scheme rejection**[19]

The SC dismissed Income-tax Departments appeal challenging the National Company Law Appellate Tribunal ("NCLAT") and National Company Law Tribunal ("NCLT") orders approving the Composite Scheme of Arrangement ("Scheme") between Reliance Jio Infocomm Ltd., Jio Digital Fibre Pvt. Ltd. and Reliance Jio Infratel Ltd, wherein it was to convert the redeemable preference shares into loans of Reliance Jio Infocom Ltd.

The Income-tax Department pleaded that the impugned orders of the NCLT and NCLAT for sanctioning of the Scheme may come in the way of the Tax Department while framing the assessment and to that extent, interest of the Revenue will be affected. SC negating the same observed that NCLT order has specifically clarified that it will be free to examine the aspect of any tax payable as a result of the sanction of the Scheme and in case it is found that the Scheme ultimately results in tax avoidance or is not in accordance with the demerger provisions of the ITA, and that the Income-tax Department will be at liberty to initiate appropriate course of action as per law. Accordingly, given that the NCLT as well as the NCLAT orders have sufficiently provided for protection of rights of the Tax Department, the apprehension on the part of the Income-Tax Department was not well founded.

Katalyst Comments:

Under the Scheme, Reliance Jio Infocomm Ltd was seeking to convert redeemable preference shares into loans. The Income-tax Department held that such conversion would bring down dividend distribution tax (as per the then dividend distribution tax regime) and thereby was a way to avoid payment of taxes, and hence averred that the structure of the Scheme adopted by the Companies was a method of tax planning or was a tool to avoid payment of taxes. However, the mere fact that a Scheme may result in reduction of tax liability does not furnish

[19] Joint Commissioner of Income-tax Vs. Reliance Jio Infocomm Ltd & Ors. [Civil Appeal No. 16409 of 2021] dated September 9th, 2022

a basis for challenging the validity of the same, and hence, the Tax Department's appeal was dismissed by the SC.

C. IBC Highlights

1. SC: Commercial wisdom of the Committee of Creditors will prevail over any judicial intervention under CIRP / NCLT and NCLAT process under IBC[20]

In the given case, a liquidation plea was filed by the Resolution Professional before NCLT when Vallal RCK, Promoter of Siva Industries, filed an application for a one-time settlement plan which was accepted by the 94.23% of the CoC. Therefore, once the OTS deal was accepted, the Resolution Professional filed for withdrawal of CIRP u/s 12A of the IBC with NCLT. However, NCLT and NCLAT, both authorities, rejected the OTS deal based on the reasoning that it seemed more like a Business Restructuring Plan than a settlement plan.

The SC referred to Section 12A of the IBC which allowed the withdrawal of insolvency application filed u/ss 7, 9 and 10, provided that, 90% of the CoC members through voting agree to withdraw the insolvency application. In this regard, it held that when 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders to permit settlement and withdraw CIRP, the NCLT or the NCLAT cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and de hors the provisions of the statute or the rules.

Katalyst Comments:

This ruling of the SC has reaffirmed the position that CoC's wisdom cannot be interfered by the adjudicating or the appellate authorities. The SC recognized the fact that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan and hence, their wisdom is given paramount status under the IBC.

2. SC: Resolution plan which ignored statutory dues payable to State Government / Legal Authority was rejected[21]

In this case, the Resolution Professional informed the State Tax Officer that its entire claim of dues payable under the Gujarat VAT Act, 2003 ("**GVAT Act**") was waived off, which was then challenged before NCLT and NCLAT. However, the NCLT and the NCLAT dismissed the appeal by holding that the Government cannot claim first charge over the property of the Corporate Debtor, as Section 48 of the GVAT (which provides for first charge on the property of a dealer in respect of any amount payable by the dealer), cannot prevail over Section 53 (which

[20] Vallal Rck Vs. Siva Industries and Holdings Ltd. [(2022) 139 taxmann.com 68 (SC)] dated June 3rd, 2022
[21] State Tax Officer Vs. Rainbow Papers Limited [Civil Appeal No. 1661 of 2020] dated September 6th, 2022

provides for the mode and manner for distribution of the proceeds of sale of the assets of a Corporate Debtor in liquidation) of the IBC.

On further appeal, the SC held that if the resolution plan ignores statutory demands payable to any State Government or a legal authority, the Adjudicating Authority is bound to reject such plan. It further held that the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority.

D. SEBI/ RBI /PMLA

1. SAT: Terms in Loan Agreement does not tantamount to “control” in a listed entity

In July 2009, the promoters i.e. [Dr. Prannoy Roy (“PR”) and Radhika Roy (“RR”)] and promoter-controlled company [i.e., RRPR Holding Private Limited (“RRPR”)] of NDTV took a loan of ~ INR 350 crores from VCPL (the appellant) in order to repay ICICI Bank. Simultaneously, two call option agreements dated 21 July, 2009 were also executed for 1,63,05,404 equity shares of NDTV representing 26% of NDTV shares.

In its order dated 26th June 2018, SEBI had observed that VCPL’s loan agreement with PR/RRP and RRPR was not a normal lending transaction and its primary purpose was to acquire NDTV’s shares. Further, SEBI pointed out that the loan agreement gave VCPL the right to convert its loan into shares aggregating to a 99.99% stake in RRPR at any time during the tenure of the Loan or thereafter without requiring any further act or deed on the part of the Lender. Considering such terms mentioned in the loan agreement, SEBI concluded that the exercise of the right to convert warrants into shares of a promoter company thereby leads to an indirect acquisition of 26% in NDTV and is not dependent on the repayment of the loan. Based on this finding, it held that VCPL had breached the SEBI Takeover Code regulations by not making an open offer for NDTV shares after signing the loan agreement.

The Securities and Appellate Tribunal (“**SAT**”) in its order dated July 20th, 2022 overturned SEBI’s order by observing as under:

(i) Loan agreement and the call option agreements indicated that either the loan had to be repaid or the call, conversion or purchase options, would get exercised.

(ii) Takeover Code Regulations do not apply to call option to lender to acquire 26% stake in company even if loan is interest-free & strike price exceeds FMV on date of loan. Further, such call option agreement does not tantamount to a "control transaction" and hence, does not attract Takeover Code Regulations.

(iii) Loan taken by RR/PR/RRPR giving call option to lender to acquire 26% stake in the company with protective rights to lender under the loan agreement does not put lender in "control" and does not amount to substantial acquisition of shares.

(iv) Loan with call option to lender to acquire 26% stake in company does not trigger an open offer obligation for the lender under Takeover Code Regulations till options are

exercised. This provision would be equally applicable if loans are made at 0% rate of interest and strike price under the call option would have exceeded the market value of shares on the date of the loan agreement.

(v) The wording of the agreement indicated that VCPL would be entitled to exercise the warrant conversion if the loan remains unpaid at the end of the tenure. Accordingly, it does not mean that the warrant conversion option could be exercised even after the loan is extinguished.

Relying on the SC ruling in case of ***Shubhkam Ventures (I) Pvt Ltd***[22], the SAT held that the affirmative / veto rights of VCPL are meant to ensure standards of good governance are not in the nature of day-to-day operational control or management or policy decisions. Since VCPL only has negative control and does not have the right to have any particular course of action to be adopted, VCPL cannot be construed to be in control of NDTV.

Katalyst Comments:

This order provides support to the view that negative control does not amount to 'control' for the purposes of Takeover Regulations. This should give relief to financial investors seeking affirmative/ veto rights in listed companies.

2. SEBI modifies Master Circular for depositories on opening of DEMAT account in case of Hindu Undivided Family

Securities and Exchange Board of India ("SEBI") has notified[23] certain modification to the master circular for depositories issued on 5th February 2021, on opening of demat account in case of HUF by providing that in the event of death of Karta of HUF, the name of the deceased Karta in the Beneficial Owner account shall be replaced by the new Karta of the HUF who, in such a case, shall be eldest coparcener in the HUF or a coparcener who is appointed as Karta by an agreement reached amongst all the coparceners of the HUF.

3. SC: Prohibition of Benami Transactions Act applies prospectively and pronounces section 3(2)[24] as unconstitutional[25]

The Benami Transactions (Prohibition) Act, 1988 ("Original Act") did not have the provisions relating to confiscation, appeal mechanism and other procedures in relation to benami transactions which could not be implemented effectively.

In 2016, Benami Transactions (Prohibition) Amendment Act, 2016 ("Amendment Act") was passed, which expanded the scope of "benami transactions" and enhanced the punishment for benami transactions, prescribed confiscation of the benami property and a fine of upto 25% of its FMV.

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[22] SEBI Vs. Shubhkam Ventures (I.) Pvt Ltd [Civil Appeal No. 3371 of 2010] dated 16th November 2011

[23] SEBI Circular No. SEBI/HO/MRD/MRD-POD-2/P/CIR/2022/114 dated August 26th, 2022

[24] Section 3(2) of The Benami Transactions (Prohibition) Act, 1988 prescribes punishment for entering into benami transactions

[25] Union of India Vs. M/s Ganpati Dealcom Pvt Ltd (Civil Appeal No. 5783 of 2022) dated 23rd August 2022

The SC held that the Amendment Act was prospective in nature. It held that section 3(2) of the Original Act is unconstitutional on the ground of being manifestly arbitrary for reasons cited as under:

(i) Absence of mens rea in the Original Act and appearance of the same in the Amendment Act (vide section 53) indicates that doing away of the mens rea aspect was without any 'rhyme and reason' and ended up creating an unusually harsh enactment;
(ii) Section 5 of the Original Act (which deals with acquisition of benami property by the Government), is a 'half-baked' provision which did not provide various items and merely left it to delegated legislation and hence, cannot be valid;
(iii) The gaps left in the Original Act were not merely procedural, but rather the same were essential and substantiative. Hence, SC concluded that Section 3 and Section 5 of Original Act were unconstitutional from the inception;
(iv) Attachment of benami property arising in the case of benami transaction is punitive in nature and cannot be said to be civil, accordingly the same cannot be applied retroactively.

Katalyst Comments:

In view of the above ruling, all the Benami transactions entered between the date of Original Act and the Amended Act have been granted immunity and all proceedings initiated would be required to be dropped. However, it is to be noted that under Article 20 of the Constitution of India, penal laws cannot be made retrospective. Hence, the principal objective of the Government for not introducing a new Benami Law and instead amend the Original Act was with an intention that new law would have given immunity to everybody from the penal provisions during the period 1988 to 2016 and giving a 28-year immunity would not have been in larger public interest, particularly if large amounts of unaccounted and black money have been used to transact those transactions. However, this objective was not considered by the SC and even after amending the Original Act, the Governments overarching intention was struck down. Chances of a review petition being filed before the SC cannot be ruled out.

4. RBI: Issue of guidelines on Digital Lending

In order to protect the data of borrowers and customers and keep them from being misused, RBI has issued new digital lending guidelines[26] including lending through online platforms and mobile apps. Key provisions are as under:

(i) Regulated Entities ("REs") shall ensure that any fees, charges etc., payable to Lending Service Provider ("LSP") are paid directly by REs and are not charged by LSP to the borrower of a digital loan;
(ii) REs to conduct enhanced due diligence before entering into a partnership with an LSP for digital lending, taking into account its technical abilities, data privacy policies and

[26] RBI Guidelines on Digital Lending dated September 2nd, 2022

storage systems, fairness in conduct with borrowers and ability to comply with regulations and statutes;

(iii) REs to ensure that LSPs/ Digital Lending Apps ("DLAs") engaged by them do not store personal information of borrowers except some basic minimal data and that all data is stored only in servers located within India, while ensuring compliance with statutory obligations/ regulatory instructions;

(iv) REs to provide a Key Fact Statement ("KFS") to the borrower before the execution of the contract in a standardized format for all digital lending products;

(v) REs to ensure that they and the LSPs engaged by them have a suitable nodal grievance redressal officer to deal with FinTech / digital lending related complaints/ issues raised by the borrowers;

These guidelines are effective immediately, however, in order to ensure a smooth transition, RBI has given REs time till November 30th, 2022.

Katalyst Comments:

Innovative methods of designing and delivery of credit products and their servicing through Digital Lending route have acquired prominence recently. However, considering that the said domain has not been regulated, such lending practices could erode the confidence of members of public in the digital lending ecosystem. Introduction of the aforesaid guidelines will require maintenance of adequate checks and balances amongst the REs and LSPs.

E. Goods and Service Tax highlights

1. Supply, erection, commission and installation of custom-made lifts is taxable at 18%

Kerala AAR[27] has ruled that supply, erection, commissioning and installation of tailor/custom made lifts/elevators undertaken by the applicant for single residential use falls under SAC 995466, liable to GST at 18% being the most specific description as per entry at SI.No.3 (xii) of Notification No.11/2017-CT dated June 28, 2017 and not at 12% as claimed by the applicant.

Katalyst Comments:

The AAR has relied upon the decision of Larger Bench of SC in case of Kone Elevator India Pvt. Ltd. vs State of Tamil Nadu, wherein it was held that, in the case of installation of lift after the goods are assembled and installed with skilled labour at the site, it becomes a permanent fixture of the building and therefore, it is the composite supply of 'works contract service' and liable to GST at 18%.

[27] In the matter of Smartech Elevators [TS-436-AAR(KER)-2022-GST]

2. **No ITC relating to vouchers supplied free of cost to customers under loyalty program is available to E-commerce retailer 'Myntra**

The Karnataka[28] AAR has held that the redemption of loyalty points by customer for receiving the vouchers implies that the vouchers are issued free of cost (FOC) and the same amounts to disposal of vouchers (goods) by way of gift and hence, the same squarely covered u/s 17 (5)(h) of the CGST Act i.e., blocked credit. Therefore, ITC of vouchers and subscription packages procured from third party vendors is not available.

Katalyst Comments:

The Authority has relied upon the ruling of Apex court in case of ***Tata Consultancy Services Vs. State of Andhra Pradesh (2004) and in case of Vikas Sales Corporation Vs. CCE (1996)*** *to hold that vouchers should be classified as goods and transfer of title in goods is supply of goods.*

3. **No GST is applicable on conversion/development of land into residential plots**

The Karnataka AAR[29] has held that GST is not applicable on consideration received for sale of land or sites. Also, GST is not applicable when the plots/sites are sold after completion of works related to basic necessities such as formation of roads, formation of rain water drains, laying of electricity cables, water pipes, sewerage lines, drilling of borewells, construction of water tanks, setting up of power substation as per regulations of District Town and Country Planning Act, in view of entry no. 5 of Schedule III of CGST Act read with CBIC Circular No. 177 dated August 3rd, 2022.

Katalyst Comments:

A welcome ruling by the Karnataka AAR post CBIC has issued the captioned circular. However, it is pertinent to note that the Madhya Pradesh AAAR in the case of ***Bhopal Smart City Development Corporation Limited*** *and Gujarat AAAR in case of* ***Dipesh Anilkumar Naik*** *had ruled that the activity of sale of developed plots is liable to GST at 18%.*

4. **When all the valid documents accompany goods, the assessee should not be dragged into 'unnecessary litigation'**

The Allahabad HC[30] has held that there was neither any intention to evade the payment of tax nor any fault or any contravention of the Act as all valid documents such as e-way bill and tax invoice, builty etc., were accompanying with the goods as required under the Act and hence, proceedings initiated against the assessee should be quashed and he should not be dragged in 'unnecessary litigation'

Katalyst Comments:

A welcome judgement by the Allahabad HC, the HC relied on the decision of Hon'ble Apex Court in Assistant Commissioner (ST) & Ors Vs. Satyam Shivam Papers Pvt. Limited & Anr. [TS-13-SC-2022-GST] wherein the Revenue's appeal was dismissed and it was held that it had attempted

[28] In the matter of Myntra Designs Pvt Ltd. [TS-470-AAR(KAR)-2022-GST]
[29] In the matter of Rabia Khanum [TS-471-AAR(KAR)-2022-GST]
[30] Sleevco Traders vs. Additional Commissioner [TS-421-HC(ALL)-2022-GST]

to treat validity of expiry on e-way bill as amounting to evasion of tax without there being any evidence of such evasion on Assessee's part.

5. **Refund of IGST paid under RCM was allowed along with interest in case of transportation of goods outside India**

   The Himachal Pradesh HC[31] has held that Indian importer is liable to pay IGST on composite supply of goods and supply of services including transportation, insurance, etc. in a CIF contract. Therefore, a separate levy on the Indian importer for the 'supply of transportation services' by the shipping line would be in violation of Section 8 of the CGST Act and hence, refund of IGST paid under RCM along with interest has been ordered.

   Katalyst Comments:

   A welcome decision by the Himachal Pradesh HC post the hon'ble Apex court has given its ruling in case of Mohit Minerals. The HC has followed the said ruling and allowed the refund of IGST along with interest.

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[31] Indorama Industries Ltd vs. Union of India & Ors. [TS-430-HC(HP)-2022-GST]