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ELP KNOWLEDGE SERIES

India Update

Part 2 of 2021

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FOREWORD

Dear Reader,

'India Update – Part 2 of 2021' is the latest addition to the **ELP Knowledge Series**.

This document is intended to keep you updated on the latest legal, policy and regulatory developments in India. While many such developments have ramifications across sectors, an equally significant number pertain to specific industry sectors. It is our endeavor to short-list, collate and analyze the available data in order to curate information that provides a succinct overview of selected topics and issues.

Investors (including private equity funds, venture funds, institutional investors) are moving towards sustainable investing models and are now likely to assess ESG and CSR compliances more closely while identifying their potential investments. Against this backdrop, our Knowledge Series, examines the interplay of CSR and ESG regimes in India and how corporations and investors would be impacted by these measures.

Many developments over the recent past including India's Consumer Protection Rules and their impact on foreign e-commerce entities, the SC's recent decision clarifying that the power of the court to set aside an arbitral award does not include the power to modify or vary the arbitral award and the Delhi HC's judgement on the issue of claim period under bank guarantees are included in this edition of the Knowledge Series.

On the taxation front, the Series covers an analysis of India's 4 years of GST – including struggles with digitalization; issues with advance rulings and anti-profiteering rulings; inter state disputes and potential constitutional challenges. Also included is an article on how India's recent decision to be part of the OECD consensus on digital taxation might affect India-US relations especially in terms of retaliatory tariffs. A tax tribunal in India recently held VC funds liable to pay service tax on expenditure incurred in administration of a fund and carried interest. An analysis of this ruling along with the expected impact on the fund management industry also forms part of our newsletter.

As always, our Knowledge Series also focuses on recent sectoral developments. This issue includes liabilities of Directors in the hospitality sector, legal implications of cancellation of solar power projects and challenges in acquiring land in the state of Maharashtra.

We hope you will find the information contained in the subsequent sections to be helpful. For any clarification or further information, please reach out to your point of contact at ELP or any member of our team who has contributed to this iteration of the 'India Update'.

Happy reading

Regards,

Team ELP

The Interplay between CSR & ESG Norms: What India Inc. and Investors Need to Focus on

Authors: Manendra Singh, Associate Partner - manendrasingh@elp-in.com

Tanvi Goyal, Principal Associate - tanvigoyal@elp-in.com

Across the world, there is a growing demand on corporations to focus on sustainable development goals and strengthen the social responsibility of business. Investors too, have started to value and consider such factors as key parameters for making an impact with their investment. Investors (such as private equity funds, venture capital funds, social venture funds, banks, financial institutions) are looking towards going a step further to not just focus on monetary returns but also achieve positive social and environmental impact.

Against this backdrop, the framework in India has progressed significantly with increased accountability for directors, key personnel and more disclosures relating to businesses. A series of efforts have been taken by the Indian Government, one of which requires spend of 2% of average net profits by India Inc. (certain eligible companies) towards corporate social responsibility (CSR) activities in eligible areas such as eradicating hunger, poverty and malnutrition, promoting health care, education, gender equality, including environmental sustainability. The move to introduce the CSR regime went beyond philanthropic activities to create a systematic model to create an impact in society.

Given the above context, this article analyzes the interplay between the CSR and ESG regimes in India and how corporations and investors would be impacted by these measures.

DEVELOPMENT OF SOCIAL RESPONSIBILITY OF BUSINESSES: CSR MODEL CHANGED FROM 'COMPLY OR EXPLAIN', TO 'COMPLY OR PENALTY'

With the enactment of the Indian Companies Act, 2013 (CA2013), the concept of CSR spending

achieved legal recognition. Section 135 of CA2013 deals with the requirement, conditions and compliances for CSR spending. Additionally, Section 166 of CA2013 also emphasizes on the obligation of each director to act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of not only the company, its employees, shareholders, but also the community and for the protection of environment.

Section 135 of CA2013 and its rules were amended on January 22, 2021, to provide that spending a CSR amount will be mandatory and mere statement of a reason for not spending the required amount on CSR activities will not suffice. However, keeping in view that not all CSR activities are likely to be completed in the same year of its commencement, any unspent CSR amount for the financial year has been classified into two buckets, one relating to ongoing projects and another relating to non-ongoing projects. There is a sunset period within which the unspent CSR amount for each financial year is to be transferred to the specified Government fund or unspent CSR account opened by the company.

To further encourage CSR spending, the amount spent in excess of the CSR obligation of 2% of the average net profits of the company can now be utilized to set-off against the CSR obligation of 3 subsequent financial years. To further ensure that CSR amounts are spent in the manner intended under the CA2013, the new revised rules require the Chief Financial Officer of the company to certify that the CSR funds have been disbursed and utilized in the manner as approved by the board. Detailed information about the CSR projects, allocation of CSR funds, unspent amount, excess spending, carry forward, etc, are required to be reported.

ESG REPORTING: IMPACT INVESTING

Varied set of investors are looking to invest in assets which have ESG integrated or have a sustainable investing model. This increased focus on ESG and sustainability has witnessed the Government actioning various legislative changes.

The Securities and Exchange Board of India (**SEBI**) recently replaced BRR reporting with the Business Responsibility and Sustainability Report (**BRSR**) which imbibes the ESG principles. To begin with, BRSR has been made applicable to the top 1,000 listed entities (by market capitalization

calculated as on 31st day of March of every financial year), for reporting on a voluntary basis for financial year 2021 –22 and thereafter on a mandatory basis from financial year 2022 –23. SEBI has prescribed a detailed format and guidance note for BRSR and requires listed entities to disclose on their performance against the following 9 principles of the ‘National Guidelines on Responsible Business Conduct’ (**NGBRCS**). The reporting under each principle is divided into essential indicators which are mandatory to be reported and leadership indicators which are to be done on voluntary basis.

PRINCIPLES OF ESG REPORTING

Businesses should conduct and govern themselves with integrity, and in a manner that is Ethical, Transparent and Accountable

Businesses should provide goods and services in a manner that is sustainable and safe

Businesses should respect and promote the well-being of all employees, including those in their value chains

Businesses should respect the interests of and be responsive to all its stakeholders

Businesses should respect and make efforts to protect and restore the environment

Businesses should respect and promote human rights

Businesses, when engaging in influencing public and regulatory policy, should do so in a manner that is responsible and transparent

Businesses should promote inclusive growth and equitable development

Businesses should engage with and provide value to their consumers in a responsible manner

Some of the key disclosures under the new BRSR include disclosures relating to environment, waste generation and management, employees/workers employed including benefits given to them, and occupational and health safety

management systems implemented. It also includes safety related incidents, processes used to identify work-related hazards, measures taken to ensure safe and healthy work place, consumer complaints, product labelling and recall, CSR, details of fines/penalties paid in

proceedings with regulators, etc.

A systematic disclosure on BRSR will help stakeholders assess and mitigate ESG risks. It will also require companies to put systems in place to ensure that ESG reporting is true and correct as many investors will base their investment on ESG initiatives.

WAY FORWARD FOR CORPORATE INDIA AND INVESTORS

The revised CSR norms and ESG reporting are likely to help stakeholders in understanding new compliance requirements. While the benefits of CSR and ESG reporting are immense, corporates also need to be careful of what they disclose and ensure that the disclosures are in line with current legal requirements relating to labour, environmental law, consumer law, etc. Though, ESG and CSR have been made applicable to certain limited corporations currently, it is expected that its reach may well expand to other entities as well.

ESG may be in its nascent stage at the moment, however, with the focus of global economies shifting to sustainable development investors will now closely assess ESG and CSR factors in identifying their potential investments to have an impact investment. The diligence exercises carried out by investors will have an increased focus on ESG norms. It is important therefore, for corporations and stakeholders to carefully assess disclosures and compliances with ESG and CSR norms, in consultations with their legal and financial advisors.

This article has been printed in CSR Journal

India's Consumer Protection Rules: What Foreign E-Commerce Entities Need to be Cognizant of

Authors: Stella Joseph, Partner - stellajoseph@elp-in.com
Prakhil Mishra, Associate - prakhilmishra@elp-in.com

The recent difference of opinions between the Government and Twitter brings to fore the increasing scrutiny that foreign digital/e-commerce players are facing from multiple regulatory check-points in India, a trend which is mirroring the global current in that direction. Since many entities in the digital space have a prominent consumer interface, one of the significant compliance parameters for such entities is consumer protection laws.

Recently, the Government of India has been aggressively enforcing consumer protection laws against e-commerce players. It is pertinent to note that 148 notices have been issued to them in the last three months for disclosing 'country of origin' on the websites. However, an interesting point to examine is how consumer protection laws of India extend to foreign digital/e-commerce players, especially those who otherwise have no physical presence in the country.

The Consumer Protection Act, 2019 (CPA) has been enacted with the aim of safeguarding the interests of consumers in India against unlawful business activities and unfair trade practices and to serve speedy resolution to consumer related disputes.

In order to accommodate and regulate trade that is making a quick shift towards the online model, and particularly, without being hindered by geographic boundaries, the Government of India notified The Consumer Protection (E-commerce) Rules, 2020 (E-comm Rules) under the CPA. The E-comm Rules intend to cover such e-commerce entities which own, operate or manage digital or electronic facilities or platforms for electronic commerce.

COVERAGE OF E-COMM RULES

It is crucial to note that Rule 2(2) of E-commerce Rules very clearly extends the scope to an e-commerce entity having no establishment within India but which 'systematically offers goods or services to consumers in India'.

It is interesting to note that when the Draft E-commerce Rules were released in 2019 for comments from stakeholders, it did not provide for such an expansive scope. In light of this, it may be assumed that the inclusion of Sub-Rule (2) in Rule 2 in the notified E-comm Rules is deliberate and intended to extend the applicability to foreign entities. This means that an e-commerce entity which has a consumer base in India is deemed to be brought within the precincts of E-comm Rules.

EXTRA-TERRITORIAL REACH OF THE E-COMM RULES

Set against this context, a question which arises is one with respect to its extra-territorial applicability on the entities which otherwise may not have a physical presence or establishment in India. Such an aspect may become a matter of intense debate if not understood in light of the purpose to be achieved by the legislature.

The above question can be analyzed in light of the power vested with the Parliament of India to enact a legislation with respect to

extra-territorial aspects or causes which may have a nexus or connection with India. This issue was extensively deliberated by the Hon'ble Supreme Court in the matter of *GVK Industries Limited v. The Income Tax Officer & Anr.*¹, wherein the Apex Court has laid down the 'nexus rule' to check the validity of a law vis-à-vis extra-territorial applicability. In terms of the 'nexus rule', the Indian Parliament may exercise its legislative powers with respect to extra-territorial aspects which are expected to have some impact or consequences for

- Territory of India, or any part of India; or
- Interest and welfare of inhabitants of India, and Indians

Considering that the purpose and objective of the CPA and rules thereunder is to shield the interest of the consumers in India, it is possible to reason that an extra-territorial applicability of the E-comm Rules may stand the test of above 'nexus rule'.

COVERAGE OF FOREIGN E-COMMERCE ENTITIES UNDER THE RULES

The question as to which foreign e-commerce entities are covered by the E-comm Rules remains to be examined. As mentioned above, Rule 2(2) specifically covers e-commerce entities not established in India but systematically offering goods or services to consumers in India. Consequently, few key parameters have been prescribed for a foreign entity which has no establishment in India but still comes under the radar of the E-comm Rules. These parameters are:

- **Qualification as an 'e-commerce entity**

E-commerce, as defined under the CPA as also the E-comm Rules, covers every activity of buying or selling of goods or services including digital products over a digital or electronic network. The term 'e-commerce entity' is broadly defined under CPA to mean a person who owns, operates, or manages such a digital or electronic facility or platform for e-commerce, and specifically excludes sellers listed on marketplaces e-commerce entities.

¹CIVIL APPEAL NO. 7796 OF 1997.

² Article 3, GDPR. Accessible at <https://gdpr-info.eu/art-3-gdpr/> (Retrieved on 16.06.2021)

³ Accessible at <https://gdpr-info.eu/recitals/no-24/> (Retrieved on 16.06.2021)

- **Offering goods or services to consumers in India:**

Primarily, the CPA is intended to apply to goods or services purchased by 'consumers', and this notably excludes purchases made for commercial purposes. Thus, at the outset, the applicability is confined only to B2C sales effected by the foreign entities.

Barring governmental action or similar restrictions, most websites, including e-commerce websites, established in any corner of the world are accessible anywhere else. Merely because an Indian consumer is able to view and access a foreign e-commerce platform should not bring such platform within the ambit of these E-comm Rules. The term '*offering goods or services ... in India*', thus, becomes critical to demarcate accurately.

The General Data Protection Regulation (GDPR) enacted in the European Union culls out a similar scope in respect of offering of goods or services to subjects in the Union.² Although in the context of data protection laws, Recital 24 to the GDPR³ elucidates this concept as follows –

In order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union. Whereas the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union.

The above text sets out certain examples of relevant factors. Broadly, the test may be summed up as whether the platform maintained by a foreign entity makes any displays or allows for any accommodations to it which may be viewed as being specific to the Indian context. However, in the absence of any clear clarification in the Indian context, this aspect remains subject to interpretation and hence future litigation.

▪ **An offering to be made**

Another criteria is that of an offering to be made systematically. 'Systematic', however, is an ambiguous and undefined term in the present qualification and will be open to interpretation. Once again, since this term is reflective of that used in the GDPR, an interpretative reference may be drawn to the Guidelines on Data Protection Officers adopted by the European Union Article 29 Data Protection Working Party.⁴ These guidelines elaborate on the term 'systematic' as including one or more of the following –

- Occurring according to a system
- Pre-arranged, organised or methodical
- Taking place as part of a general plan [...]
- Carried out as part of a strategy

Broadly, a systematic offering of goods or services may be that which is undertaken regularly and in the course of business of the entity. One-off transactions outside of the general scope of business carried on by the foreign entity may not create any liability under the E-comm Rules, although such an interpretation would vary as per facts and on a case-to-case basis.

COMPLIANCE IS THE KEY

Given the points discussed in this article, it would be essential for foreign e-commerce entities which have regular transactions with end-consumers in India to consider updating their compliance in line with the display and process requirements under the E-comm Rules. There is a lot of scope for ambiguity and interpretation which might ultimately lead to drawn out litigations. Careful reading and interpretation of the laws will be the immediate ask.

-This article has been printed in Medianama

⁴Accessible at https://ec.europa.eu/information_society/newsroom/image/document/2016-51/wp243_en_40855.pdf?wb48617274=CD63BD9A (Retrieved on 16.06.2021)

All expenditure of VC Funds including Carried Interest to carry GST - A major setback to the Industry

Authors: Gopal Mundhra, Partner - gopalmundhra@elp-in.com
Ginita Bodani, Associate Partner- ginitabodani@elp-in.com

The decision of the Hon'ble CESTAT, Bangalore in the case of ICICI Econet Internet and Technology Fund⁵ ('the Appellants') where the Tribunal has unleashed an added twist to the already complicated doctrine of mutuality, has left Indian fund managers in dire straits over what awaits them next.

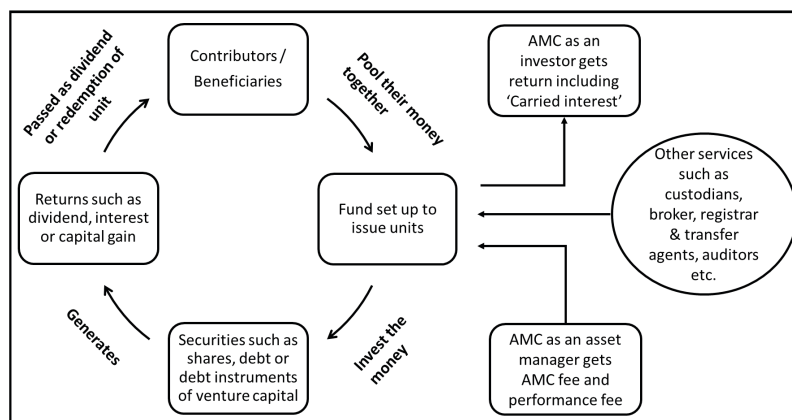
The decision, if not overturned, would adversely impact every Venture Capital Fund (VCF) or any other investment pooling fund set up as a trust. It confirms the demand of Service tax (on the amount withheld by the Appellant Trusts out of the gains of portfolio investments) on expenditure such as payments to AMC, Custodian, R&T agent, brokers, selling agents employed by the Trusts through their Trustees.

Moreover, it also treats 'Carried Interest' as a payment in nature of performance fee payable to an AMC towards rendition of services instead of return of investment. There is therefore now an enhanced liability on the Appellant Trusts to pay Service tax on the entire amount retained to meet all their expenditure including Carried Interest.

Unlike the Income Tax Act, wherein explicit provisions exist to tax the income of VCF in the hands of contributors, the Service tax law has been very reticent. The primary question before the Hon'ble CESTAT was whether the doctrine of mutuality can be said to exist between the Trusts and the Contributors/Beneficiaries. In this connection, the CESTAT placed heavy reliance on the decision of the Hon'ble Supreme Court in *Bangalore Club vs. CIT*, wherein the following three conditions have been laid down:

- There must be a complete identity between the contributors and participators;
- The actions of the participators and contributors must be in furtherance of the mandate of the association and
- There must be no scope of profiteering by the contributors from a fund which could only be expended or returned to themselves.

Before elaborating further, it is important for the readers to understand a VCF model with the help of the following illustrative diagrams:



⁵2021-TIOL-359-CESTAT-BANG

The CESTAT while examining the fulfilment of the aforesaid three conditions *inter alia* held that the Trusts have violated the principles of mutuality by concerning themselves in commercial activities and by using their discretionary powers by paying substantial amounts, in the form of performance fee and carried interest, to AMCs or their nominees which are neither contributors nor beneficiaries. In this connection, it captured following key findings:

- The trusts are essentially mutual funds engaged in portfolio management and its essential function was of commercial concern to maximize profit.
- The trust fund is managed by the trust which also distributes the dividends and other amounts payable in respect of units in accordance with Private Placement Memorandum and/or Scheme Document so created in this regard.
- The trusts are registered under VCF Regulations, 1996 issued under SEBI Act, 1992.
 - As the trusts are treated as juridical persons for the purposes of SEBI Regulations, they should also be treated so for the purpose of taxation.
 - The trusts unlike clubs are initiated with a profit motive and not for common benefit of its members.
 - Taxation Law being a specific legislation just as the SEBI Act, 1992 should prevail over the general Trust Act and the definition given thereof.

Against this background, the Hon'ble CESTAT examined the classification of the Appellant's activities and held that the Trust carries out the activity of venture capital i.e. manage the amounts invested by contributors/beneficiaries, receive the amounts in the form of dividend/profit in their escrow account and as per their discretion, distributes the same to subscribers and entities other than subscribers. The Tribunal held that the services provided by the Trust constituted asset management services squarely classifiable under the taxable service category of Banking and Other Financial Services.

The CESTAT also held that the Circulars which

provide exemption from levy of Service tax on entry and exit loads do not provide exemption on recurring expenses on account of stationery, postages, advertisements, listing on exchanges, publishing of Net Asset Value (NAV), distribution charges, custodian charges, audit fee, etc. Accordingly, CESTAT confirmed the levy under the category of Banking and Other Financial Services. However, the CESTAT accepted the claim of the Appellant as to the CENVAT credit and Cum-duty benefit and remanded the matter for verification and re-computation.

Further, on the aspect of carried interest, it was submitted by the Appellant that carried interest is a return on investment made by a certain class of investors and not performance fee paid to AMCs. The carried interest is payable only in Funds where the AMC also makes an investment in the Fund as a contributor. In such Funds, the AMC wears two hats; as a Contributor and as a manager and the carried interest is paid to the AMC as return of investment, contingent upon investment made and units held by AMC and is computed based on a pre-agreed formula. However, the Tribunal held that the schemes are designed in a manner that AMC and/or their nominees get huge sums of money in the guise of performance fee and carried interest with the twin motive of benefitting the AMC and/or their nominees at the expense of the subscribers and avoiding the taxes. The CESTAT also consented with the Revenue's inference that, in the disguise of return of investment, carried interest is retained and distributed to AMC and its nominees and such funds eventually flow back to Settlers and its nominees.

It must be noted that generally the industry treats Carried Interest as Capital gain (in nature of return on investment) and accordingly, it attracts Income tax at the rate of 20% in cases of investment in domestic unlisted companies. If the instant decision is also followed by the Income tax Authorities so as to treat Carried Interest as performance fee for a service, it may require an outgo of Income tax at the rate of 30% in addition to Indirect taxes.

However, certain key points which require deeper deliberation are as under:

- It is held in (Para 37.7 of the decision) that Trusts have violated the principle of mutuality by using discretionary powers to benefit entities which are not investors/contributors and beyond the interests of investors/contributors. It is, however, pertinent to examine the scope and ambit of the discretion entrusted on the Trust under the placement memorandum / scheme document/subscription agreement. Once the methodology has been agreed between the parties in their commercial wisdom, it is pertinent to examine whether it is open to the Department/Courts to question or undermine the same⁶

Whether principle of mutuality of interest can be said to be absent in all kinds of mutual funds or merely in respect of funds where the Trust has wide discretionary powers to distribute dividends/profits.

- It is pertinent to configure as to whether Securities Exchange Board of India or Tax Authorities have the requisite powers to doubt/challenge the sanctity of the placement memorandum/subscription agreement of the Fund to the extent it outlines the manner in which the benefits are to be distributed to the investors of the Fund and the fees to be paid to investment managers or such other affairs of a venture capital fund.

- Merely for the reason that different class of investment may attract different rates of returns as per the agreement, can 'Carried Interest' be termed as consideration in the nature of performance pay against a service.

- It is important to analyze whether the amounts retained by the Trust constitute pure reimbursement of costs and expenses and whether such reimbursements can be subject to Service tax prior to 01.03.2015⁷

Like all other cases involving the interpretation and applicability of the doctrine of mutuality, the instant issue is also likely to be ultimately resolved by the Hon'ble Apex Court.

The passing of this judgement is only a tip of the iceberg as this is likely to trigger issuance of numerous notices to funds and consequent rise in litigation. Further, in the absence of a single authority dealing with this issue, different state-wise authorities are likely to take difference views and add to the complexities. It is thereby advisable to approach Central Board of Indirect Taxes & Customs (**CBIC**), by way of a representation seeking suitable clarification or introduction of an explicit exemption.

This article has been published in Taxsutra

⁶Union of India v. Mahindra and Mahindra [1995 (76) E.L.T. 481 (S.C.)]

⁷ Intercontinental Consultants and Technocrats (P.) Ltd. vs. Union of India - 2012-TIOL-966-HC-DEL-ST

Deepening Uncertainty of Solar Power Contracts

Authors: Aakanksha Joshi, Partner - aakankshajoshi@elp-in.com

Megha Agarwal, Principal Associate - meghaagarwal@elp-in.com

The solar sector has been beset with challenges over the last few years, especially with respect to withdrawn or quashed tender processes and authorities reneging on power purchase agreements. Certain recent developments in this sector may compound challenges already being faced and throw light on certain risks and pitfalls that a solar power developer or investor may have to consider.

On June 17, 2021, the High Court of Andhra Pradesh (**APHC**) quashed a tender process conducted by the Andhra Pradesh Green Energy Corporation Limited (**APGECL**) for the award of solar power projects in Andhra Pradesh on a petition preferred by Tata Power Renewable Energy Limited (**TPREL**). TPREL sought the quashing of the relevant requests for selection (**RfS**) and the draft power purchase agreements (**PPAs**) on the grounds that they were in gross violation of the provisions of not only the Electricity Act, 2003 (**Electricity Act**) but also of the guidelines for tariff based competitive bidding process for procuring power from grid connected solar photo voltaic power projects.

TPREL claimed that the draft PPA ousted the statutory powers and jurisdiction vested in the Andhra Pradesh Electricity Regulatory Commission (**APERC**). TPREL's averment was that the dispute resolution process under the draft PPA was not in consonance with the Electricity Act. TPREL argued that since bureaucrats were empowered to manoeuvre through disputes, it would give rise to doubts in fair redressal of claims, hence discouraging participation of bidders.

A few months ago (January 2021), the APHC had passed an interim order directing the Andhra Pradesh Government (**AP Government**) not to enter into any agreements with the successful bidders. It has now been reported that the APHC has quashed such RfS and PPAs.

Whilst the order has not been uploaded on the APHC website (as on the date of this article) news reports indicate that the APHC has directed the AP Government to call for fresh tenders and formulate new PPAs. The APHC also required the AP Government to strictly comply with the provisions of the Electricity Act and the guidelines framed thereunder. If the AP Government is desirous of making any deviations from the guidelines, it has been instructed to seek the approval of the APERC.

Courts in India tend to exercise judicial restraint in adjudicating upon administrative actions, including tendering processes since Courts neither have the expertise to correct administrative decisions nor do they sit as courts of appeal for non-adjudicatory matters.

In particular, Courts usually avoid scrutinizing tendering processes so as not to impinge upon the Government's freedom of contract. However, Courts would review tendering processes from the lens of arbitrariness, bias, irrationality, unreasonableness or mala fides or bad faith. Accordingly, tendering process contrary to any provisions of law would be liable to be struck down.

The APHC held that the RfS and the draft PPA issued by APGECL were contrary to the Electricity Act and the guidelines issued thereunder, re-affirming the settled principle of law that the State and its instrumentalities are bound to adhere to the norms, standards and procedures laid down under law and cannot depart from them arbitrarily. They have the public duty to be fair to all concerned.

Whilst the APHC decision will ensure fair play, it would be a dampener on those declared successful pursuant to the RfS. In 2019, the then newly elected AP Government had sought to review high-priced PPAs and negotiate with solar and wind power producers to bring down the prices. While there is an oft-cited concern relating to the sanctity of contracts, the fact that the tender documents (including the PPA) were contrary to the law seems apparent. It is a principle of contract law that agreements that are contrary to law are void. Therefore, even if no challenge was mounted at this stage against the APGEL's tendering process, the risk of the executed PPA being held as void would have remained.

The other recent development of note is the cancellation by the Uttar Pradesh Government of solar auctions for a capacity of about 500 MW allegedly on account of lower price discovery in subsequent auctions in other states.

Reportedly, industry bodies have requested the Central Government to intervene and the successful bidders are also considering moving relevant judicial fora. Tender documents do usually permit the tendering authority absolute power to cancel or withdraw the tender at any time prior to the letter of award. However, in this case since the successful bidders were declared and were also allegedly asked to extend the validity of their earnest money deposits, they would have a legitimate expectation for the conclusion of the contract.

Government authorities are expected, and in some cases have been judicially required to live up to promises on the basis of certain legal principles of administrative law. Further, the law of contract and evidence also takes into account conduct of the parties to ascertain whether binding obligations are formed, or any other relief is available. However, protracted legal proceedings may only bear fruit long after the remedy is sought. Such cold comfort may not be palatable.

If authorities were to start cancelling tenders in the hope of procuring better tariffs, stakeholders may be deterred from participating in bids. Given India's renewable energy targets, it is important that the Government instrumentalities take steps to preserve the confidence of the stakeholders to boost further investment in the space. One of the measures envisioned in the proposed amendments to the Electricity Act was the constitution of an Electricity Contract Enforcement Authority to adjudicate disputes relating to contract enforcement. However, this would not cover cases where tendering processes are withdrawn. Arguably, successful bidders in such cases are not much worse off. However, successful bidders would have expended time and effort in complying with the tender terms as well as mobilizing resources in anticipation of the formal contract execution.

Given these developments, developers and investors would be well advised to tread with caution and carefully examine tender documents before making a bid.

Four Years of GST in India: Sizing up the Landmark Tax Reform

*Authors: Kumar Visalaksh, Partner - kumarvisalaksh@elp-in.com
Divya Jeswant, Counsel*

India is now four years into the unique experiment in fiscal federalism that is the Goods and Services Tax (GST). The introduction of GST did increase the tax base and revenue for the government; however, the journey has not been entirely smooth.

The consistent glitches in the portal with the failure to achieve full automation, multiplicity of forms, increased compliance burden, and absence of an appellate mechanism are some of the persistent issues which continue to plague GST.

However, as GST enter its fifth year, with the expiry of the five-year constitutionally guaranteed compensation payout by the Central government to the State governments looming large, it will perhaps be the first major test of the institutional framework of GST and its well-publicised motto of 'One Nation, One Tax.'

This article considers some of these critical issues which will shape the future of GST in India.

EXPIRY OF THE FIVE-YEAR COMPENSATION PAYOUT

GST was introduced to address the limitations of the former indirect tax regime, where multiple taxes were levied by the Centre and States with various overlaps and inefficiencies. This meant that States had to give up a host of levies that they previously controlled and from which they drew revenue. Also, with GST being a destination-based tax, revenues shifted from production States to consumption States.

As part of the 'grand bargain' that was struck in order to introduce the GST, the right to tax certain subjects (notably alcohol, which generates considerable tax revenue) remained with the States. Most importantly, States were entitled to annual compensation from the Centre to the extent of revenue loss on account of the implementation of GST, for a period of five years post the transition.

With this period due to expire in less than a year from now, the States have already begun clamouring for an extension of the compensation payout. While GST collections have no doubt increased over time (with a record high recently in April 2021) this does not obviate the need for compensation to the States. Given the current fiscal situation in most States, the failure to reach consensus on compensation may seriously undermine the cooperative federalism necessary for the continuity and stability of the GST. In the worst-case scenario, States could seek to deviate from GST, which will introduce distortions in taxation and credit flow (much like the former value-added tax regime).

STRUGGLES WITH DIGITALIZATION

One of the most-publicised benefits of GST was complete automation, which would minimise revenue leakage, eliminate bogus transactions and facilitate ease of doing business. However, various forms and returns which were initially intended to be brought in on the transition itself are yet to be rolled out four years into the regime, and a truncated return continues to be utilised instead.

Even among certain of the forms that have seen full implementation, pervasive technical issues have arisen—a case in point is Form TRAN-1, which was ironically one of the most litigated issues in the last four years.

Hence, apart from a fully automated system being incompatible with the low level of digital access in segments of the Indian business community, the GST portal has itself been unable to reach a stage of complete implementation even at the present date.

ISSUES WITH ADVANCE RULINGS AND ANTI-PROFITEERING RULINGS

Under GST, authorities were set up in each State to issue advance rulings clarifying various issues in order to enable smooth implementation and certainty for assesseees. Quite apart from the poor

quality of these rulings, a serious issue has arisen with conflicting rulings emerging from different States. While the government, in recognition of this problem, enacted provisions for a national-level body to resolve such disputes, this authority is yet to be established.

Separately, the infamous anti-profiteering clause was introduced to ensure that no business fails to pass on benefits introduced by GST to its customers. However, the mechanism still sets out no methodology to guide businesses as to how to pass on the benefits of GST. As a result, various critical issues have been arbitrarily determined by the authority in its rulings, often in a contradictory manner.

Currently, the validity of both the above mechanisms (particularly on account of the absence of a judicial member) remains pending before the High Courts. Meanwhile, these institutions continue to function, sometimes creating more issues than they resolve.

INTER-STATE DISPUTES

GST in its current form does not provide for a mechanism to address Centre-State and State-State disputes under GST. While Article 279A(11) of the Constitution enables the GST Council to institute a mechanism to resolve inter-State disputes, no such body has been seriously contemplated as yet. Today, the law only provides that if tax has been wrongly paid to the Centre there will be no interest liability (but not vice versa) and if tax has been wrongly paid to a State, it will be refunded. Hence, even where the Centre and States are themselves in a dispute as to who has the right to tax, the assessee could end up bearing the burden of tax twice over, as also interest and potentially penalty.

In this regard, GST may follow the example of a unique mechanism which was set up to resolve such disputes (over whether the Centre or State had the right to tax a sale of goods) under the earlier sales tax law. Pending the dispute, the tax already paid in one State was taken into account to ensure that assessee did not suffer a double levy on the same transaction.

WRIT INTERVENTION

With the advent of a new tax regime, it was only to be expected that there would be challenges to the validity of certain provisions by way of writ petitions. While various such challenges were raised, the larger volume of writs by far has involved issues such as detention of goods/vehicles, arrests, technical glitches on the GSTN portal, failure to disburse refunds, delayed refunds.

In this regard, the issuance of exhaustive departmental guidelines, coupled with more robust training and internal accountability mechanisms, will go a long way to ensuring that a more balanced approach is adopted by the Department, thereby alleviating the load for the already over-burdened courts.

THE FUTURE OF GST

Uncertainty remains over the stability of GST if compensation is cut off. Be that as it may, it is high time that the various inadequacies and shortcomings are suitably addressed. The failure to do so will only serve to compound their ill-effects as India enters into the next stage of GST.

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Duties of Directors of Ailing Hotel Companies

Authors: Sujain Talwar, Partner-sujaintalwar@elp-in.com
Megha Agarwal, Principal Associate
Ayesha Damania, Consultant

Asian Hotels (West) Limited (**Owner**) was recently in the news on account of suspension of operations of Hyatt Regency, Mumbai. Apropos such suspension, the Owner has been beset by several challenges, one of which is the resignations tendered by the independent directors of the Owner. The independent directors have cited the financial crunch faced by the Owner and alleged non-compliances of applicable laws by the Owner. It was also contended that the Chairperson and other directors of the Owner failed to convene a meeting of the board of directors to discuss the financial condition of the Owner. This incident, coupled with the financial constraints faced by several hotel companies across the country, begets the question as to what duties directors have in such circumstances.

With the enactment of the Companies Act, 2013 (**Companies Act**), the duties of directors were codified. Section 166(2) of the Companies Act requires a director of a company to *“act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.”* While the erstwhile jurisprudence only contemplated fiduciary duties of a director towards the company, the Companies Act has now extended the duties to not just the company but also the company’s employees and shareholders, the community and for the protection of environment. This provision has significantly broadened the scope of duties of directors.

Further, questions also arise as to which duty would be foremost pursuant to Section 166(2) under a given set of circumstances. Unlike jurisdictions where the company law specifies a hierarchy of duties, the Companies Act does not have any guidance on that. If we were to take the issue that has

plagued most hotel companies during this pandemic, employee lay-offs within the permit of applicable laws could have helped most companies stay solvent by cutting down on their operating expenses. By ensuring the solvency of the company, the directors would have been compliant towards their duty to the shareholders of the company. However, they would at the same time be in breach of their duty to the employees of the company. On the other hand, if the board of directors were to act in the best interests of the employees, they would run the risk of the company becoming insolvent in the long run. Accordingly, until there is clarity from the legislature as to the manner in which effective compliance of Section 166(2) can be ensured, it would be important for directors to strike a balance and ensure that the interests of all relevant stakeholders are borne in mind whilst taking any decision.

As regards independent directors of a company, Schedule 5 of the Companies Act offers guidance to such directors in the manner in which they are to conduct themselves. The Schedule also prescribes a wide range of duties some of which include assisting in protecting the legitimate interests of the company, shareholders and its employees. Further, where they have concerns about the running of the company or a proposed action, independent directors are to ensure that these are addressed by the Board and, to the extent that they are not resolved, insist that their concerns are recorded in the minutes of the Board meeting. However, Section 149(12) of the Companies Act and Regulation 25(5) of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015 do accord some level of protection to independent directors by stipulating that they could be held liable, only in respect of such acts of omission or commission by a

company which had occurred with their knowledge, attributable through Board processes, and with their consent or connivance or where they had not acted diligently.

Another aspect that all directors ought to bear in mind is whether the company meets the insolvency test. Under Section 66(2) of the Insolvency and Bankruptcy Code, 2016 (*whose operation was suspended for a year on account of the outbreak of Covid-19*), directors of a company would be personally liable to make such contribution to the assets of the company if such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of the company and such director or partner did not exercise due diligence in minimizing the potential loss to the creditors of the such company. Effectively, personal liability would accrue if a director allows a company to trade or incur debts knowing fully well that the Company was unlikely to meet its liabilities.

What then can the directors of hotel companies do in the present circumstances apart from playing by the book and exercising his/her duties with due and reasonable care, skill and diligence? They could revisit their directors and officers (D&O) liability insurance policies to ascertain the nature of liabilities that would be covered. Like other insurances, D&O policies also come with several exclusions and it would thus be important to get a sense of the level of protection accorded to them. Given the case of the Owner, it would also be important to check the extent to which the policies cover the directors for matters that may relate to issues during their term but arising only post their resignation. The D&O policy should help protect the interests of the directors considerably.

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Setting Aside of An Award – The Aftermath

Author: Alok Jain, Associate Partner-alokjain@elp-in.com

A recent decision of the Supreme Court of India (SC) in *The Project Director, National Highways No. 45E and 220, National Highways Authority of India v. M. Hakeem & Anr.*⁸ (“*NHAI v M. Hakeem*”) has settled a crucial point of law under the Arbitration and Conciliation Act, 1996 (“1996 Act”). The SC clarified that the power of a court to set aside an arbitral award under section 34 of the 1996 Act does not include the power to modify or vary the arbitral award. While the decision conclusively settles the position, the implications thereof are worth considering.

Although a detailed update on this decision is available [here](#), for the purpose of this analysis a quick recap is a must. In *NHAI v M. Hakeem*, several arbitral awards were passed by arbitrators in separate arbitration matters whereby landowners were compensated at various rates per square meter for the lands acquired by National Highways Authority of India (“NHAI”) for the purposes of construction of highways. The Respondents challenged these awards under section 34 of the 1996 Act seeking enhancement of the compensation. The District Court modified the arbitral awards increasing the rate of compensation per square meter. The Division Bench of the Madras High Court upheld the modification of the awards even in appeal under section 37 of the 1996 Act. The SC was hence called upon to decide on the issue whether the arbitral awards could be modified/varied when the same were challenged under section 34 of the 1996 Act. The SC categorically stated that the recourse against an arbitral award is a truncated right under which the only relief that can be requested is a setting aside of an arbitral award. The court considering the challenge has no power to vary or modify the arbitral award; at best it can, where appropriate and applied for, give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

Notably, the SC was of the view that although the SC had the power under Article 142 of the Constitution of India to do complete justice, and which included the power to modify an arbitral award, the lower courts could not exercise the same power even under their revisional jurisdiction under Section 115 of the Code of Civil Procedure, 1908. The SC clarified that it is up to the legislature to amend section 34 and endow the power to modify or vary an arbitral award.

Until the legislature amends the 1996 Act along the lines of the statutory provisions prevailing in countries such as England,⁹ USA,¹⁰ Australia¹¹ or Singapore¹² the settled position of law is that a court (save the SC under Article 142 of the Constitution), while considering a challenge to the arbitral award, does not have any power to modify or vary the same.

So, what is the ambit of the court’s powers under section 34 of the 1996 Act until the legislature amends the statute?

- At the outset, the court can set aside the arbitral award and not modify the award. This may not be a palatable scenario in certain cases. Take for example a case wherein the arbitral award decides the issue of liability correctly, but the quantum of compensation awarded is erroneous. Setting aside the entire award may cause more detriment than justice.
- The court may adjourn the proceedings to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award, strictly in terms of section 34 (4). However, this is restricted to cases where a party makes a request under section 34(4) for such a

⁸ 2021 SCC OnLine SC 473

⁹ See Section 67(3), 68(3) and 69(7) of the Arbitration Act, 1996

¹⁰ See Section 11, Federal Arbitration Act

¹¹ See Section 34A(7), Commercial Arbitration Act, 2012 (WA) ¹²

See Section 49(8), Arbitration Act, 2001

relief¹³ and not where the award is already set aside. The court has no suo motu power in this regard. Also, this does not amount to a remand.¹⁴ Once this power is exercised, the arbitral tribunal will remain *functus officio* in respect of matters not referred to it, but for the purposes of matters referred, it will have free play.¹⁵

- The court may resort to partial setting aside that does not amount to modification. The SC in *NHAI v. M. Hakeem* did not specifically state whether partial setting aside would amount to modification of an award and consequently, if partial setting aside will be impermissible from hereon. Prior to *NHAI v. M. Hakeem*, the courts have partially set aside arbitral awards, especially in case the different claims/issues are not intrinsically connected and are severable. In *J.G. Engineers*,¹⁶ the SC held that that if the court finds that the award is bad with respect to certain claims and if such award decides several claims distinctly, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. Endorsing the applicability of the principle of severability to section 34 of the 1996 Act, the Bombay High Court's full bench¹⁷ observed that (i) the judicial discretion vested in the court under section 34 takes within its ambit power to set aside an award partly or wholly depending on the facts of each case; and (ii) the proviso to section 34(2)(a)(iv) has to be read *ejusdem generis* to the main section, as in cases falling in that category, and there would be an absolute duty on the court to invoke the principle of severability where the matter submitted to arbitration can clearly be separated from matters not referred to arbitration. The principle of severability is also recognized in section 34(2)(iv) itself, albeit in the context of excising the portion of the award on disputes that fall outside the scope of submission. However, surgical precision is required in isolating and cutting away the malignant parts. The line between modification of an award and partial setting aside of an award is seemingly

blurred. For instance, in *Sun Media Services*,¹⁸ the Bombay High Court relied upon *JG Engineers* to “*modify the award as the claims are severable from each other*”. Therefore, the effect of *NHAI v. M. Hakeem* on the law regarding partial setting of an award is likely to unfold in due course.

In the view of the authors, if principles of severability can be applied, then partial setting aside would not amount to varying or modification as long as the setting aside results in a situation that no arbitral award exists on the severable issue. However, if the lower courts do not permit such partial setting aside, a party may also strategically drag the matter up to SC, make an argument that the case is fit for exercise of powers under Article 142 of the Constitution and thus have the arbitral award modified or varied rather than being set aside in toto. Thus, award holders facing challenge proceedings will have to be wary of the duration until the legislature amends the 1996 Act. This is because, a defect in a part of the award may render the whole award susceptible to be set aside in its entirety.

The legislature has an unenviable task at its hands. It may not be wise to leave the 1996 Act unamended as the social detriment caused by setting aside of otherwise sustainable awards, having curable defects, may be quite high. Instead, the legislature will have to craft provisions to secure the needs of genuine cases where the power to vary or modify should be exercisable against the potential abuse of this power, given that court interference in arbitral awards whilst a decreasing phenomenon has by no means been eradicated. Indeed, this will bring its own ordeals. Perhaps, the middle ground may lie in permitting partial setting aside where the issues are severable, whilst clarifying that such power does not include the power to vary or modify the arbitral award. What is inescapable is that until the dust clears, all award holders facing challenge proceedings will be examining that stamped piece of paper with a fine toothcomb while clenching that rosary.

¹³ *Kinnari Mullick and Anr. vs. Ghanshyam Das Damani*, (2018) 11 SCC 328

¹⁴ *Bhaskar Industrial Development Ltd. v. South Western Railway*, 2016 SCC OnLine Kar 8330 cited with approval in *Kinnari Mullick and Anr. vs. Ghanshyam Das Damani*, (2018) 11 SCC 328

¹⁵ *MMTC v. Vicivass Agency*, (2009) 1 MLJ 199

¹⁶ *J.G. Engineers Private Limited v. Union of India* (2011) 5 SCC 758

¹⁷ *R.S. Jiwani v. Ircon International Ltd.*, (2010) 1 Mah LJ 547

¹⁸ *Union of India v. Sun Media Services*, Mumbai, 2011 (5) Mh LJ 749

India in a quagmire over Digital Taxation

Authors: Kumar Visalaksh, Partner-kumarvisalaksh@elp-in.com; Arihant Tater, Senior Associate-arihanttater@elp-in.com

On the 1st of July 2021, the OECD nations adopted a High-Level statement containing an outline of the possible solution to address the tax challenges arising from the digitalization of the economies. India, which is also a signatory to the statement, has been consistent in its stand to equitably tax the digital economy.

With the advent of the NDA Government in 2014, India's pitch for accelerated digitalization was evenly matched with its quest to tax the growing digital economy, primarily driven by the fact that despite being one of the largest markets, most of the technology giants did not pay income tax in India.

INDIA'S FIRST MOVE:

While a consensus eluded the major nations on the appropriate manner of taxation of the digital economy, India, introduced a new concept called the Equalisation Levy (EL) in the 2016 Budget. India and Israel were among the earliest countries to unilaterally levy a digital tax on the foreign companies. India levied a 6% tax on the B2B online advertisement revenues of the foreign e-commerce companies.

On the indirect tax front, the Government started levying Service Tax (and later GST) on various cloud and electronic services rendered by these foreign companies in India.

EQUALISATION LEVY 2.0:

With a view to monetize the growing digital transactions further, via Budget 2020, India proactively (and unilaterally) expanded the scope of Equalisation Levy to levy a 2% tax on e-commerce transactions carried out by foreign companies in India. EL 2.0 taxed various forms of online sales and digital services including digital platform services, software-as-a-service etc.

The official stand of the Government is that EL is not income tax but a tax on the digital

transactions and creates a level playing field between foreign and Indian companies. This was deliberately done to disable non-e-commerce operators from avoiding paying any tax by claiming Tax Treaty Benefits, which is available for Income Tax.

US CRIES FOUL:

Meanwhile, USA initiated investigation against India for imposition of Digital Tax, under Section 301 of the Trade Act of 1974. Their 2021 Report finds India's levy of Digital Tax "discriminatory", "unreasonable" and burdens or restricts US commerce. USA now threatens to impose retaliatory tariffs against India.

This is not the first time USA has raised concerns over India's Taxation policy.

In 2019, Trump had famously called India "the king of Tariffs" over its levy of high customs duties on imports. The tariff war that followed greatly impacted India's steel & aluminum exports. At WTO, USA had challenged various export subsidies (such as Merchandise Exports from India Scheme (MEIS) etc.) which were granted by India to Indian exporters. Even though India has challenged the WTO's negative order before the Appellate Body, it has withdrawn the MEIS Scheme.

If USA goes ahead with its plan of imposing retaliatory tariffs, India could be on the backfoot again.

Many countries like France and Italy have followed India's example to go ahead and unilaterally levy digital tax, with a view to raise revenue from the increasing digital transactions.

Majority of jurisdictions claiming new source taxing rights are market countries of USA based

digital multinationals. USA is trying hard to protect its own tax base, as data rich, high consumption economies like India strive to increase their tax base. There was therefore felt a need for consensus based decision on the subject.

As per the recent high level statement, the OECD has agreed on two key elements to address the tax challenges arising from the digitalization - (a) ensuring multinational companies pay a minimum tax of 15% and (b) reallocation of additional share of profits *qua* the tech companies to the market jurisdictions. This is to ensure that digital companies operating in multiple countries pay taxes in all countries where they provide services. The profit allocation rules, which is a key element of the deal, is yet to be finalized.

If the plan is finalized, all countries will have to abolish Digital Services Taxes. This would mean that India would also have to abolish the existing Equalisation Levy.

THE ROAD AHEAD:

For the time being, India has issued a cautious statement – it is in favor of consensus solution, at the same time, the solution should result in allocation of meaningful and sustainable revenue to the developing and emerging economies.

India and other developing countries will only agree to abolish the existing Digital Tax, if they feel that the new solution is beneficial to them. A broad-based and neutral Tax Policy is the need of the hour.

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Claim Period Under Bank Guarantees

Authors: Babu Sivaprakasam, Partner - babusivaprakasam@elp-in.com; Yogesh Pirthani, Partner- yogeshpirthani@elp-in.com

On July 28, 2021 a significant judgement (**Judgement**) was passed by the Hon'ble Delhi High Court in the matter of *Larsen & Toubro Limited & Anr v/s Punjab National Bank & Anr*. The central issue in question is the issue of claim period under bank guarantees. This article provides an analysis of this judgement ([available here](#)) and its implication for businesses.

BACKGROUND

Section 126 of the Indian Contract Act, 1872 (**Contract Act**) defines Contract of Guarantee to mean “*a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the ‘surety’; the person in respect of whose default the guarantee is given is called the ‘principal debtor’, and the person to whom the guarantee is given is called the ‘creditor’.*”

In a contract of Bank Guarantee three parties are involved, viz the applicant (i.e. the debtor), the surety (i.e. the issuing bank) and the beneficiary (i.e. the creditor).

A contract of Bank Guarantee involves the following important features:

- Underlying contract between the applicant (i.e. the debtor) and the beneficiary (i.e. the creditor)
- Maximum amount that can be claimed under the Bank Guarantee
- Period of validity of the Bank Guarantee
- Period within which claim must be made by the beneficiary

The period of validity of the Bank Guarantee and the claim period under a Bank Guarantee are not necessarily same. The claim period under a Bank Guarantee may be over and above the period of validity of the Bank Guarantee.

As per Section 28 (a) of the Contract Act, an agreement shall be void to the extent:

- It restricts a party thereto **absolutely from enforcing** its rights under or in respect of a contract; or
- Which **limits the time** within which a party thereto may enforce its rights under or in respect of a contract; or

As per Section 28 (b) of the Contract Act, an agreement shall be void to the extent:

- It **extinguishes the rights** of any party thereto, under or in respect of any contract on the expiry of a specified periods so as to restrict any party **from enforcing its rights; or**
- It **discharges any party** thereto, from any liability, under or in respect of any contract on the expiry of a specified periods so as to restrict any party **from enforcing its rights.**

The first part of Section 28 i.e. sub-section (a) deals with restriction on enforcement of rights or limiting the time of enforcement of rights while second part of Section 28 i.e. sub-section (b) deals with extinguishment of rights or discharge of liability leading to restriction on enforcement.

Section 28 of the Contract Act provides for certain exceptions to the above restriction. One of these being Exception 3 which was introduced vide the Banking Law (Amendment) Act, 2012 (hereinafter referred to as **Amendment Act**) which came into force on January 18, 2013. The said Exception 3 deals with **guarantee agreement of a bank or a financial institution.**

As per the said Exception 3, a contract in writing, by which any bank or financial institution stipulate a term in a guarantee or any agreement, making a provision for guarantee for **extinguishment of the rights or discharge of any party thereto from any liability** under or in respect of such guarantee or agreement **on**

the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability, **shall not be illegal under Section 28 of the Contract Act.**

Post the above amendment and taking guidance from circulars issued by Indian Bank's Association (IBA) which were based on legal opinions obtained by IBA, banks started a practice of incorporating/insisting on incorporation of a minimum claim period of 12 months (i.e. the grace period beyond the validity of the bank guarantee) in the bank guarantees.

A view is prevalent that if a bank issues a bank guarantee with a claim period of less than 12 months then it will not have the benefit of the said Exception 3. It would stand exposed to the period of limitation under the Limitation Act, 1963 which would be 30 years in a case when the Government is the guarantee beneficiary and 3 years when some other party is the guarantee beneficiary.

PRESENT JUDGEMENT OF HON'BLE DELHI HIGH COURT

The Judgement held that

- A view that the law mandates to stipulate a claim period of 12 months in the bank guarantee failing which it shall be void under Section 28 of the Contract Act, is an erroneous view.
- Exception 3 does not deal with the claim period for lodging a claim with the issuing bank or under bank guarantee.
- Exception 3 deals with a period within which a beneficiary can approach a court/tribunal to enforce its rights in case of refusal to pay by the guarantor bank.

THE CONSEQUENCES

The consequence of incorporating a minimum claim period of 12 months in the bank guarantee is that the liability of the issuing bank remains open during such a claim period. Also, the applicant/borrower has to pay commission and keep alive the collaterals/cash margins for or during such claim period, even if validity of a bank guarantee is much shorter or has expired. Moreover, the period of limitation under the Limitation Act, 1963, for initiating proceeding would be available beyond the said claim period.

Basis the judgement, banks may now have to prescribe a minimum period of 12 months for a beneficiary to approach a court/tribunal and not a minimum claim period of 12 months for making a claim.

The judgement provides much needed clarity and interpretation on the said Exception 3 and will help the banks and applicants to prescribe the claim period as per the contractual arrangement (and not the minimum claim period of 12 months) between the parties (applicant and beneficiary) and to keep open their (issuing bank's and applicant's) liabilities only for a contractually agreed period.

Odyssey of purchase of agricultural lands in Maharashtra

Authors: Babu Sivaprakasam, Partner - babusivaprakasam@elp-in.com

Aditya Khadria, Partner - adityakhadria@elp-in.com

Rahul Veera, Principal Associate- rahulveera@elp-in.com

Owing to its colonial heritage and the political affinity towards the agricultural sector in India, most states in India, especially Maharashtra had agricultural land laws designed to promote and protect the agricultural sector and agriculturists.

However, with India's focus on globalization and the need to promote the industrial sector, the Maharashtra Government continued to liberalize laws in order to ensure ease of doing business in the State.

One such change which had a major impact was the introduction of and subsequent amendments made to Section 63 (1A) of the Maharashtra Tenancy and Agricultural Lands Act, 1948 (MTAL) which was an exception to the rule where non-agriculturists were barred from acquiring any agricultural property in the State.

The aforesaid provision was introduced under MTAL in 1994, allowing non-agriculturists to acquire agricultural lands for bonafide industrial use. The provision tried to strike a balance by laying down certain conditions and restrictions so that parties are not able to hoard large parcels of land in the garb of bonafide industrial use. In time, the government realized that the provisions were not supporting optimal growth for the State and was restricted to industry alone. Consequently the State introduced certain amendments to Section 63 (1A) of MTAL (discussed below) which came into force from January 01, 2016 with an aim for an overall growth in multiple sectors.

The noted amendments included: - (i) the expansion of scope for acquisition of the lands for integrated township projects in addition to bonafide industrial use, (ii) removal of requirement to take approval from the Development Commissioner (Industries) for purchase of large portions of land, (iii) Change in period to put the land to use for the intended purpose reduced from overall 15 (fifteen) years to 10 (ten) years with a provision of annualised penalty for the period the land is unutilised, after

expiry of 5 (five) years from the date of acquisition, (iv) on default in putting the land to use for the proposed permitted purpose within the specified time, the collector now has the power to suo-moto resume the land, and offer the same to the original agricultural sellers (as against the mere right of sellers to repurchase the lands), and upon rejection by them to auction the land, and (v) option for the acquirer to sell the property to a third party (subject to charges payable to authorities) who is willing to put the subject land to the intended use within the balance period as permitted under Section 63 (1A) of MTAL.

These amendments were welcomed by various stakeholders for various reasons such as:

- with the change in definition of industry and expansion of scope, the changes gave an impetus to various sectors including the renewable energy logistics and information technology sectors. It also encouraged the housing for all and affordable housing schemes of the Government;
- removal of approval requirement ensured that the transactions could be completed within good time and the practical concerns of the renegotiation of prices due to delay in transaction is checked. It may be pertinent to note that the State Government has also proposed an amendment to the Maharashtra Agricultural Lands (Ceiling on Holding) Act, 1961 thereby removing the ceiling limit for acquisition of the agricultural lands under Section 63 (1A) of (ii)MTAL which is presently a maximum of 54 acres. Presently, a state government approval is required for acquisition of land over ceiling limits, which once removed shall further expedite the acquisitions and completion of projects;

- expedited usage of land simultaneously with a better policy to ensure project completion by appropriate checks through government offices, on the entities which were hoarding land (by having a separate informal understanding with farmers that they would not repurchase the same at the expiry of 15 years) and
- the amendment provided an exit option to investors who are not able to complete the project within specified timelines (provided they are able to identify a party who may do the same).

While the amendments to Section 63 (1A) of MTAL have been welcomed as a boost to overall growth in the State, there remains certain checks (such as location of land, restriction on development of eco-sensitive zones, forest areas etc.) and compliances which are required to be taken care of while acquiring such lands to ensure better protection of the buyers/acquirers and it is pertinent that the acquirers seek professional advice on the same.



**ECONOMIC
LAWS
PRACTICE**
ADVOCATES & SOLICITORS

MUMBAI

9th Floor
Mafatlal Center
Vidhan Bhavan Marg
Nariman Point
Mumbai 400 021
T: +91 22 6636 7000

NEW DELHI

801 A, 8th Floor
Konnectus Tower
Bhavbhuti Marg
New Delhi 110 001
T: +91 11 4152 8400

AHMEDABAD

801, 8th Floor
Abhijeet III
Mitha kali Six Road, Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8

PUNE

202, 2nd Floor
Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400

BENGALURU

6th Floor, Rockline Centre
54, Richmond Road
Bangalore 560 025
T: +91 80 4168 5530/1

CHENNAI

No 18, BBC Homes, Flat-7
Block A, 1st Floor,
South Boag Road. T. Nagar
Chennai -600 017
T: +91 44 4210 4863

GIFT CITY

Unit No. 605, Signature, 6th Floor
Block 13B, Zone - I
GIFT SEZ, Gandhinagar 382355
E: elplaw@elp-in.com

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elplaw@elp-in.com