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ELP KNOWLEDGE SERIES

India Update

Part 3 of 2021

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FOREWORD

Dear Reader,

We are pleased to share our latest iteration of ELP's Knowledge Series - 'India Update - Part 3 of 2021'.

With a new year come new beginnings. The immersive world of the Metaverse, increasing popularity of crypto currencies and the ability to own and trade NFT's are heralding a new way of thinking. These sweeping paradigm shifts have challenged regulations like never before. One section of our Knowledge Series attempts to understand the impact of these technologies on current and future regulations in India.

In this edition of the Knowledge Series, ELP's trade team has authored an incisive piece on 'The Public Interest Test' in anti-dumping investigations in India. This article compares public interest approaches across the world and the need for legislative amendments under India's anti-dumping rules.

On another note, our capital markets team has authored on the welcome change by way of SEBI's ICDR Amendments, while our infrastructure team discusses the pros and cons of Ministry of Power's Draft Open Access Rules which aim to find a balance between consumers and DISCOMs.

Also forming part of our Knowledge Series is an article titled 'A breather for construction projects under litigation' from our disputes team. The article throws light on how India's construction sector - though often obtain arbitral awards against government entities - it is seldom that the judgement creditor is able to secure the fruits of the award in reasonable time. Hence, to bring much needed relief to judgement creditors, India's NITI Aayog has proposed measures to address these issues. Our article discusses these amendments in detail and what it entails for investments in the construction sector.

ELP’s tax team secured a landmark judgement recently in the Delhi High Court recently. The court ruled on the issue of faceless assessment with the clear finding that a personal hearing must be granted by the revenue wherever sought by the taxpayers. A detailed analysis on this decision also forms part of our publication.

We hope you enjoy our Knowledge Series. Through this book, 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.

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

A Breather for Construction Projects under Litigation

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Over the last few years, companies in the construction sector have been hit by cash flow concerns. While these companies may have obtained arbitral awards against government entities, it is seldom that the judgement creditor is able to secure the fruits of the award in reasonable time, considering that a challenge to the award is a likely scenario. To bring much needed relief to judgement creditors, National Institution for Transforming India Aayog (**NITI Aayog**) proposed measures to address the issues plaguing the construction sector, for consideration of the Cabinet Committee on Economic Affairs (**CCEA**).

NITI Aayog's suggested measures have been introduced in the General Financial Rules, 2017 by an amendment (referred to as the **'Amendment'**). The Amendment provides that government entities challenging an arbitral award shall release 75% of the award amount to the contractor/concessionaire (collectively referred to as **'Contractor'**) in an escrow account, against a bank guarantee for the said 75%.

The Amendment assumes significant relevance, in context of proceedings for enforcement of an arbitral award under section 36 of the Arbitration and Conciliation Act, 1996 (referred to as '**Act**'). As per the judicial trend, courts may or may not insist on a deposit as a condition for staying the execution of an arbitral award under section 36 (3) of the Act. However, with the Amendment in place, the judgement creditor can contend before the courts that the government entity is required to deposit at least 75% of the award amount against a bank guarantee (referred to as a '**BG**') to proceed with a challenge to such award. The Amendment will aid the contractor/judgement creditor to secure and utilize a major portion of the amounts awarded, notwithstanding long drawn proceedings challenging the arbitral award.

TRACING THE DEVELOPMENTS IN 2016 AND 2019

In August 2016, CCEA approved the measures proposed by NITI Aayog, which included for government entities to pay 75% of the award to the Con actor against a BG. Accordingly. NITI Aayog issued two office memoranda dated 5 September 2016 (collectively referred to as '**2016 OM**') i.e., for measures to revive the construction sector[1](referred to as '**OM 1**') and for initiatives on the measures for revival[2] (referred to as '**OM 2**'), respectively. The 2016 OM provided that Government departments/ministries shall comply with the measures set out therein and directed them to issue necessary instructions, OM 1, inter alia, provided the following reliefs to judgement creditors:

- An interim payment of 75% of the arbitral award to be made to a Contractor against a BG, in the event the arbitral award was sought to be challenged by a public sector undertaking / government department (collectively referred to as '**PSU**')[3].
- The payment was to be made by the PSU to at designated escrow account with stipulations that the amount released would be utilized in the sequence more particularly provided under OM 1[4].
- The Contractor shall refund the money paid by the PSU in case of a subsequent direction of the court, along with appropriate interest which would be decided by the PSU itself [5].

[1]Office Memorandum dated 5 September 2016 bearing reference number N-14070/14/2016-PPAU titled 'Measures to revive the Construction Sector' issued by the NITI Aayog.
[2]Office Memorandum dated 5 September 2016 bearing reference number N-14070/14/2016-PPAU titled 'Initiatives on the measures for revival of the Construction Sector' issued by the NITI Aayog.
[3]Paragraph 2.2 of OM 1
[4]Ibid.
[5]Paragraph 2.3 of OM 1

Upon perusal of the CCEA's Press Release[6] and 2019 OM (defined hereinafter), it appears that at the time of implementing the 2016 OM, there was an insistence on a BG for the interest component as well, should the subsequent court order require refund of the amount paid by the PSU. This policy of the PSUs demanding BG for the interest component was also discussed in the Supreme Court judgement in Hindustan Construction Company Limited,[7] wherein the Supreme Court held that the requirement of the additional BG was not arbitrary. Resultantly, the CCEA and NITI Aayog found that the policy for 75% deposit failed to achieve its objective of infusion of liquidity into the construction sector[8].

In the circumstances, NITI Aayog suggested ameliorative measures which were then approved by the CCEA at its meeting held in November 2019; and encapsulated in the office memorandum dated 28 November 2019 issued by the NITI Aayog (referred to as '**2019 OM**')[9]. The 2019 OM, inter alia, prohibited the requirement of the Contractor providing BG for the interest on 75% of the arbitral award that was required to be paid by the government entity. The 2019 OM further provided that (i) in cases where the BG for interest had already been supplied by the Contractor, the same would be returned by the concerned government entity; and (ii) the opinion of a law officer of India, in consultation with the Department of Legal Affairs, must be sought prior to initiating proceedings for setting aside arbitral award(s), and any appeal(s) thereto.

RECENT INSERTION OF RULE 227A IN GENERAL FINANCIAL RULES (GFRS), 2017

By a department order dated 7 October 2021, NITI Aayog directed the Department of Expenditure, Ministry of Finance (referred to as '**DOE**') to incorporate the above decisions of the CCEA under the General Financial Rules (GFRs), 2017 (referred to as '**GFR**'). Accordingly, the DOE issued office memorandum dated 29 October 2021[10] to insert Rule 227A, which inter alia provided that:

- Where the Ministry / Department (collectively '**Ministry**') has challenged an arbitral award, 75% of the arbitral award (which may include interest up to the date of the award) shall be paid by the Ministry to the Contractor against a BG. The BG would only be for the said 75% of the arbitral award as above
- The payment would be made into a designated escrow account and would be subject to the same stipulations as to its utilization, as set out in OM 1; and
- Retention money and other amounts withheld may also be released against the BG if found eligible and subject to contractual provisions.

IMPACT

Rule 227A of the GFR seeks to align itself with CCEA's decisions and the office memoranda issued by NITI Aayog. In a welcome move, the Amendment is likely to infuse much-needed liquidity in infrastructure companies, whose funds have either been spread thin or entangled in disputes with government entities. Rule 227A of the GFR has also been introduced at a time when construction companies are grappling with the aftermath of the pandemic.

Interestingly, in cases such as *Godawari Marathawada Irrigation Development Corporation*[11], *Candor Gurgaon Two Developers and Projects Ltd.*[12], and *Power Mech Projects Ltd.*[13], the Supreme Court and high courts have recently directed deposit of 100% of the award amount before staying the enforcement of an arbitral award under section 36 (3) of Act. Therefore, the Amendment is also in consonance with the recent judicial trends, which seems to pursue the same objective i.e., secure the award amount in favor of the judgement creditor.

This article has been printed in Construction Week

[6] Press Release dated 20 November, 2019, Press Information Bureau, Government of India, Release ID: 1592542 <https://pib.gov.in/PressReleasePage.aspx?PRID=1592542>.
[7] Hindustan Construction Company Limited & Anr. v. Union of India & Ors. [2019 SCC OnLine SC 1520].
[8] Paragraph 2 of Office Memorandum dated 28 November 2019 bearing reference number N-14070/14/2016-PPAU titled 'Initiatives on the measures for revival of the Construction Sector – Implementation of CCEA decision dated 31 August 2016' issued by the NITI Aayog.
[9] Ibid.
[10] Office Memorandum dated 29 October 2021 bearing reference number F.1/9/2021-PPD titled 'Insertion of Rule 227A in General Financial Rules (GFRs) 2017 – Arbitration Awards' issued by the Department of Expenditure, Ministry of Finance.
[11] Manish v. Godawari Marathawada Irrigation Development Corporation Order, dated 16 July 2018 passed by the Supreme Court in Petitions for Special Leave to Appeal (C) No. 11760-11761 of 2018.
[12] SREI Infrastructure Finance Limited v. Candor Gurgaon Two Developers and Projects (P) Limited; Order dated 14 September 2018 passed by the Supreme Court in Petitions for Special Leave to Appeal (C) Nos.20895-20897/2018.
[13] Power Mech Projects Limited v. SEPCO Electric Power Construction Corporation, 2020 SCC OnLine Del 2049.

Metaverse – Are the Indian Laws Ready?

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In just over three decades of the world wide web's existence, over half of the world is now online; with the recent pandemic only augmenting it multifold. With the first generation of the web mostly being a passive "read-only" web (based on information) and Web 2.0, being a "read-write" web (based on social networks, wikis and blogs), a major shift in tax policies was not direly warranted. The essential reason for this being, that the underlying activity continued to serve as a license (of data, information, software, algorithms, etc.) - which most tax policies view as a service. With online data/information business growing manifold, the Indian indirect tax laws were maneuvered to include these transactions in the fiscal revenue realm through prescription of specific provisions for "online information and database access or retrieval services". Most global B2C online licensing transactions purchased in India, were set down as taxable under the indirect tax laws with administrative/adjudication control on global suppliers of such services also manifested with the Indian tax authorities.

A paradigm shift in indirect tax laws was not warranted as most transfers on web only included temporary transfers and not "ownership" per se. However, a recasting may be imperative with the next generation of world wide web – Web 3.0 or Metaverse. Although metaverse, as imagined in its true essence, is yet to take complete shape, technological foundations such as blockchain and crypto assets are steadily being developed, setting the stage for the digital space becoming increasingly real with augmented reality. In Mark Zuckerberg's words, we would soon experience the internet that one is inside rather than just looking at. In the metaverse era, nonfungible tokens (**NFT**) could be owned and swapped. For the uninitiated, NFTs operate like cryptographic tokens, but unlike crypto currencies are not mutually interchangeable. Each NFT may represent a different underlying asset and thus have a different value. In summary, one would be able to purchase physical-world items in the metaverse and "hold/"own" 3D models of what they've shopped for, own piece of art or music, to which no one else could claim ownership of.

With the arrival of Magicverse (Metaverse) imminent, it is important for Governments to translate laws and regulations to make this age more competitive, innovative and equitable to the conventional physical age. Some important concepts may need a re-alignment and rethink for the digital age. With a redefinition of "ownership" in Web 3.0, it is imperative to analyze whether digital goods should continue to be treated as "services" under the GST law. Currently, no customs duty is leviable on import of intangibles into India unless recorded on a media. GST is leviable on most digital supplies as supply of services, where either GST is payable by the supplier of services/recipient of services, as the case may be. The essential reason linked to intangibles being perceived as "supply of services" is that currently most digital transfers operate on a license model. Most digital creations currently include a temporary licensing with currently blockchain not allowing owning of digital goods. Hence, current stipulations of no levying customs duty on such movement of intangibles and most of these triggering a standard rate of GST at 18% (as supply of services), fit well with the Government's laid objective on taxing such supplies.

However, with technology maturing and the shift from temporary transfer to ownership of digital goods, various alignments in the law are imperative. To illustrate, say, a 3D digital car is purchased by an Indian customer from someone in New Jersey, U.S, in the current framework, it may be difficult to tax such transactions in India. As there would be no physical movement of goods, there exists no mechanism for levy/ collection of

duty under the Customs Act and hence, customs duty would not be payable on such transactions. This principle already having been upheld by India's Apex Court in the case of *Commissioner Vs Oracle India Pvt Ltd [2016 (342) ELT A40]*. The current framework of the GST law links "goods" to movable property with no explicit definition of "movable property" being prescribed. As movable property could be tangible/intangible and where the said position is accepted, these transactions may remain untaxed under the GST law as well. This is because transactions of import of goods are to be administered under the Customs Act. While currently the volume of such transactions may be miniscule/negligible, increasing volumes and inclination of the millennials and Gen Z would engender a relook at conventional definitions and provisions of indirect tax laws to clip dents in fiscal revenue.

Another example to the above quandary is taxability of events. Currently, GST on global events is taxed basis the place where the event is actually held. Events held outside India do not trigger a GST levy; with neither the supplier nor the recipient being liable to discharge GST. With the digital revolution unfolding and anticipations of virtual reality becoming the preferred choice, more and more of entertainment, artistic, musical and similar events are expected to be held virtually. Unless explicitly clarified, determination of location of such events would be obscure including possibilities like location being determined basis hosting location, key performers' location (which could also be multiple locations for a large scale event), etc.

The virtual space is being designed to also facilitate buying and selling of real estate in the virtual world. With taxation of immovable property being conventionally determined basic actual location of property including stamp duty, GST on services liked to immovable property, etc., a relook at the concept of "immovable property" may be inevitable – as space in the virtual world may also have boundaries and ownership. Similar issues, as above, would also be relevant for domestic transactions (given the federal structure) including time of supply, rate of tax, etc.

The above illustrations are only a trailer to the multitude of apprehensions, dilemmas and disarrays that would crop up in the new era of Internet 3.0. This would be further stressed with the apprehensions on taxability of cryptocurrency tokens/ wallet, which would be the major tender for most transactions in the virtual world. With it not being a legal tender currently under Indian laws or securities, the GST position on transaction in cryptocurrency tokens also remains a vexed one; with various revenue investigations already being underway.

With this new iteration of internet already gaining traction, it is imperative for policy makers and businesses to relook at conventional legal provisions for taxing such transactions. It would be interesting to see the new challenges and also the new opportunities that the next big thing – metaverse would unleash.

Powering India's Green Revolution through Open Access Reform[1]

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Open access is envisaged as one of the corner-stones of the Electricity Act, 2003 **(Electricity Act)**. Open access means non-discriminatory access to the electricity transmission and distribution system provided to eligible consumers, generators and state distribution companies **(DISCOMS)**.

So far, DISCOMs have imposed heavy non-tariff barriers in the form of operational constraints and state Electricity Regulatory Commissions **(ERCs)** have approved tariff barriers in the form of cross-subsidy surcharge, additional surcharge, wheeling charge, standby charge, etc. on consumers seeking to avail open access. This makes availing open access uneconomical.

The National Tariff Policy for Electricity, 2016 and the National Electricity Policy, 2005 (NEP) have emphasized the importance of finding a balance between bringing open access to consumers and maintaining the financial viability of DISCOMs. The NEP also states that state ERCs need to provide a facilitative framework for non-discriminatory open access as this would provide efficient choices in locating generation capacity and encourage trading of electricity for optimum utilization of generation resources, thus reducing the cost of electricity supply.

In consonance with this aim, the Ministry of Power on August 16, 2021, released the Draft Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules, 2021 (Open Access Rules). These rules have the potential to get state DISCOMs and state ERCs to change their outlook about granting open access. While the Draft Open Access Rules attempt to address the concerns of the DISCOMs in granting open access, they also have implementation challenges.

SOME OF THESE ASPECTS ARE HIGHLIGHTED BELOW:

- **Eligibility:**

  The Electricity Act currently states that State ERCs shall make open access available to consumers whose power demand at any time exceeds 1 mega-watt (1,000 kilo-watt). A report by the Forum of Regulators titled 'Review of Status of Open Access in Distribution' issued in September 2019 notes that only the Haryana ERC had permitted consumers with less than 1 mega-watt consumption to avail open access. The Draft Open Access Rules makes an entity having a sanctioned load of more than 100 kilo-watt eligible for open access. This ten-fold reduction is certainly a bold move and has the potential of creating a large constituency that would benefit from this proposed reform.

- **Application Process:**

  The Draft Open Access Rules also seeks to bring in uniformity in the application procedure for grant of open access to consumers. Under this process, a central nodal agency will be notified by the Central Government that will operate a single-window system via an online portal. All applications for green energy open access will then be routed to the nodal agency notified by the state ERC, which will be required to dispose of the application within 15 days. This reform can bring in transparency in the entire application process. The Forum of Regulators report also stated that in some states, the applicable open access regulations stipulate that the application procedure can take up to 180 days – thus making it a cumbersome and burdensome process.

- **Additional surcharge and subsidies:**

  Currently, commercial and industrial consumers, are charged a higher tariff to enable

cross-subsidization of electricity to residential consumers. If open access is granted to commercial and industrial consumers, without charging the appropriate charges, DISCOMs fear a severe strain on their finances. As there is no uniform process under which state ERCs approve additional surcharges and cross-subsidy surcharges on open access consumers, the sector is beset by confusion. With respect to additional surcharge and cross-subsidies, the Draft Open Access Rules mark a radical step by eliminating such surcharge on green energy open access consumers.

- **Demand variation**

  When open access consumers keep switching on and off from open access, DISCOMs face challenges in estimating demand forecast thus leading to potential security challenges for the electricity grid. To ensure that there is no high variation of demand in the energy to be purchased by the DISCOM, the Draft Open Access Rules state that reasonable conditions such as requirement of a minimum number of time blocks during which the open access consumer will not change the quantum of power consumed can be imposed.

CONCLUSION

The Draft Open Access Rules have the potential to change how electricity consumption and distribution is imagined. Yet for their implementation, amendments would be required to the Electricity Act. The current rules run in conflict with many of the Electricity Act's existing provisions. For example: the imposition of additional surcharge is permitted under the Electricity Act; permission to give open access is given to state ERCs and the jurisdiction to frame open access regulations lies with CERC or the state ERC and not the Ministry of Power

To ensure enforceability, making such amendments to the Electricity Act prior to the notification of the Draft Open Access Rules is essential.

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"Public Interest Test" in Anti-Dumping Investigations – Recent Developments in India

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Anti-dumping measures are part of a defensive toolkit used by members of the World Trade Organization **(WTO)** to protect their domestic producers from the effects of injurious dumping. However, the levy of such measures may negatively impact other stakeholders of a given industry, such as users, importers, upstream suppliers and final consumers. To balance the competing interests of these stakeholders and prevent any negative impact on the broader trade and economy, several WTO member countries like the European Union **(EU),** Canada, China, and Ukraine have introduced public interest clauses under their national legislations. Public interest assessments allow the importing country to decide if the imposition of anti-dumping measures is not in the larger public interest, despite dumping, injury, and casual link. In India, in the recent past, post Covid 19, the Ministry of Finance has not been imposing duties on a host of products recommended for anti-dumping duties mainly due to issues concerning public interest of users.

PUBLIC INTEREST ASSESSMENTS IN WTO MEMBER COUNTRIES

WTO member countries utilize differing approaches in how they assess public interest. For instance, the EU conducts a union/public interest test in each investigation prior to deciding on the imposition of anti-dumping measures. According to EU law, the union interest test requires an appreciation of the various interests in the EU, taken as a whole by analyzing the likely economic impact of the imposition or non-imposition of measures on the stakeholders in the EU[14]. While assessing the union interest test, the EU considers the information filed by various parties, including users in the form of user questionnaire[15] responses.

On the other hand, Canada, after issuing a finding on injury caused by dumped imports, can initiate a separate public interest inquiry[16]. If the concerned authority finds reasonable grounds, a detailed inquiry is conducted whereby detailed information is collected, and an assessment of specific public interest factors (including economic and non-economic factors)[17] as specified under Canada's corresponding legislation are assessed. Pursuant to such an inquiry, a recommendation on whether the measures should be eliminated/reduced is made by the concerned authority to the Ministry of Finance, who, in turn, can make the final decision[18].

Evidently, the EU and Canada (amongst others) have incorporated public interest provisions in their respective local laws. Under the Indian legal framework, there are no specific provisions that pertain to the larger public interest. Nevertheless, the Indian Directorate General of Trade Remedies **(DGTR)**, frequently examines public interest as part of its investigative process. However, due to an increasing number of cases where the user industries have made strong cases for the consideration of public interest, the DGTR is now considering a more structured approach to the public interest.

[14] Replies of the European Communities to the List of Questions Posed by Members on the Application of the Lesser Duty Rule and Consideration of Public Interest, G/ADP/AHG/W/114, dated 11 April 2001.
[15] Trade Defense Instruments, Anti-dumping and Anti-subsidy, A Guide for Small and Medium-Sized Businesses, European Commission, 2018, available at: https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156892.pdf
[16] Canadian International Trade Tribunal's Public Interest Inquiry Guidelines, available at: https://www.citt-tcce.gc.ca/en/resource-types/public-interest-inquiry-guidelines.html#26
[17] Section 40.1 (3) of the Special Import Measures Regulations
[18] Supra at fn. 4

On December 21, 2021, the DGTR issued a proposal to introduce a comprehensive questionnaire response to assess public interest in trade remedy investigations[19]. The questionnaire formats cover various aspects of public interest and invite Indian stakeholders to provide detailed evidence to substantiate their public interest concerns. However, there are certain procedural and substantive threshold issues that India needs to address before formally incorporating these public interest questionnaire responses and any other such examinations on public interest.

THE PROCESS OF LEVY IN INDIAN INVESTIGATIONS

In India, anti-dumping investigations are a two-tier procedure,[20] which is in the form of objective and reasoned recommendation followed by further examination and issue of notification, i.e., an act of delegated legislation, which is necessary to impose and levy anti-dumping measures. The DGTR, being a quasi-judicial body, presents its recommendation to the Ministry of Finance upon the perusal of evidence and responses received from various parties over the course of an investigation. The decision to levy (or not levy) the anti-dumping measures recommended by the DGTR ultimately rests with the Ministry of Finance. If the Ministry of Finance decides to levy the recommended anti-dumping measures, a customs notification is issued to such effect, and duties are applicable from the date of such notification. If the Ministry of Finance decides not to levy such measures, it can either refrain from issuing any such notification or issue a memorandum reflecting its decision not to levy the anti-dumping duty.

The relevant provisions, i.e., Rules 4 and 17 of the Customs Tariff (Identification, Assessment, and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (Indian AD Rules), do not require the DGTR to consider public interest prior to recommending the anti-dumping measures. Rule 17[21] of the AD Rules only require the DGTR to recommend the measures necessary toremove the injury to the domestic industry on account of dumping. At the same time, AD Rules do not preclude the DGTR from considering public interest while recommending imposition or non-imposition of anti-dumping measures. Indeed, the DGTR, in various recent final findings, has been considering and examining the public interest while concluding whether the imposition of the duties would be in the public interest. However, the DGTR is not empowered to "not recommend anti-dumping measures" solely on public interest grounds. Based on the duties of the DGTR identified under Rules 4 and 17 of the AD Rules, in the event that the DGTR finds the existence of dumping, injury, and causal link between dumping and injury, the DGTR is compelled to recommend duties even if it finds that such a recommendation would be contrary to the public interest. In fact, any recommendation of the DGTR to not levy duties solely on the ground of public interest would be contrary to its obligations under Rules 4 and 17 of the AD Rules and may be susceptible to appellate/writ challenge as being ultra vires of the AD Rules[22].

[19] Stakeholder Consultation-Proposal for Public Interest Questionnaire, available at: https://www.dgtr.gov.in/sites/default/files/Public%20Interest%20QR%20-21%20DEC%202021%20%281%29.pdf

[20] Jindal Poly Film Ltd Vs. DA, 2018 (362) E.L.T. 994 (Del.)

[21] Rule 17 of the AD Rules reads as follows: "17. Final findings. – (1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final finding –
(a) as to, -
(i) the export price, normal value and the margin of dumping of the said article;
(ii) whether import of the said article into India, in the case of imports from specified countries, causes or threatens material injury to any industry established in India or materially retards the establishment of any industry in India;
(iii) a causal link, where applicable, between the dumped imports and injury;
(iv) whether a retrospective levy is called for and if so, the reasons therefor and date of commencement of such retrospective levy:
Provided that the Central Government may, in its discretion in special circumstances extend further the aforesaid period of one year by six months:
Provided further that in those cases where the designated authority has suspended the investigation on the acceptance of a price undertaking as provided in rule 15 and subsequently resumes the same on violation of the terms of the said undertaking, the period for which investigation was kept under suspension shall not be taken into account while calculating the period of said one year,
(b) Recommending the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry after considering the principles laid down in the Annexure III to rules." [Emphasis supplied]

[22] The Apex Court in Rohitash Kumar and Ors. Vs. Om Prakash Sharma and Ors., AIR 2013 SC 30 has noted that the courts lack the power to either add or subtract a word from the provision or by construction make up for any deficiencies in an Act.

THE NEED FOR A LEGISLATIVE AMENDMENT UNDER INDIA'S AD RULES

As the AD Rules do not expressly warrant the DGTR to consider public interest while making a recommendation, it would be advisable for India to first incorporate the necessary legislative amendments in the AD Rules to empower the DGTR to consider the public interest before deciding on whether to recommend or not to recommend imposition of anti-dumping measures. Given the subjectivity of the public interest analysis, there needs to be some certainty on the concept of public interest while considering the public interest. Accordingly, India may consider defining the broader parameters and framework to assess public interest to add further objectivity to the process before the DGTR. The provisions and factors maintained by the EU and Canada may be considered while making necessary legislative amendments to the AD Rules[23]. This will minimize the ambiguity surrounding the contours of public interest in India and the scope of powers sought to be exercised by the DGTR while assessing public interest before recommending imposition of anti-dumping measures.

Until such necessary amendments are incorporated, the recommendations and the findings of the DGTR, for instance, not to impose anti-dumping measures solely on public interest concerns, may be subject to challenge before the courts or tribunals in India on the ground that such an examination by the DGTR is ultra vires of the AD Rules. Indeed, the DGTR, on 6 June 2018, proposed amendments to Rule 17 (b) of the AD Rules to allow the DGTR to assess if imposition of the anti-dumping measures is found to be in the public interest[24]. While the Indian legislature did not give such amendments effect, India should take recourse to the public interest clauses and practice in the EU and Canada and make amendments to its anti-dumping legislation to define the broader parameters and framework to assess public interest.

Alternately, the DGTR can, as a quasi-judicial body collecting and examining evidence, can be allowed to make an observation on public interest as part of its finding without letting its final recommendation on imposition of duties getting affected by such an observation on public interest. The detailed examination of public interest can continue to be considered by the Ministry of Finance as it currently does – whose powers are broader under Section 9A of the Customs Tariff Act, 1975 and Rule 18 of the AD Rules before issuing the final notification levying the anti-dumping measures.

[23] India must clarify if the concept of public interest would be applied like in the case of EU and Canada, where the public interest clauses are characterized as negative clauses, whereby, the levy of duties can be avoided but only if it is found that the imposition of anti-dumping measures are not in the public interest. In the event that the position which India seeks to take is characterized as a positive clause, which would require positive evidence that imposition of anti-dumping measures is in the interest of the public / industry is required, the same must be clarified.

[24] Stakeholder Consultation-Proposal for change in Indian Anti-dumping and Anti-subsidy rules, available at: https://www.dgtr.gov.in/sites/default/files/Stakeholder%20Consultation_0.pdf

Interpreting The India-US Interim Agreement on Equalisation Levy 2020

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On October 8, 2021, a "landmark" deal was reached amongst more than 130 countries where the broad contours of Two Pillar Solution to Address the Tax Challenges arising from the Digitization of the Economy was finalized **(October Statement)**.

The key impetus of these global negotiations was to stop digital services taxes from being imposed by different countries unilaterally. In keeping with this objective, on October 21, a Joint Statement was issued between US and Austria, France, Italy, Spain, and United Kingdom (Unilateral Measures Compromise). An interim measure was agreed between these countries as regards withdrawal of "Unilateral Measures" and a commitment from the US for not initiating any trade action under Section 301.

Now, finally, there is also an agreement between US and India, as regards to the interim arrangement, till the time the Global Tax Deal is put in place.

Significantly, during Ambassador Katherine Tai's (United States Trade Representative) recent visit to India, the agenda of this interim agreement was taken up. As a result, on November 24, the government of India gave a press release in terms of which it has been agreed between the US and India that the "same terms that apply under the 21st October Joint Statement shall apply between the United States and India with respect to India's charge of 2% equalization levy on e-commerce supply of services and the US trade action regarding the said Equalisation Levy" (**India US Interim Arrangement**). The press release further states that the final terms of the Agreement shall be finalized by February 1, 2022.

WHAT ARE THE TERMS AGREED UPON BY BOTH SIDES?

While one awaits the final text of this interim arrangement, certain aspects are worth considering:

Interim Period as per financial year: The understanding of "Interim Period" under the Unilateral Measures Compromise is different from that under the India US Interim Arrangement. The "Interim Period" under the Unilateral Measures Compromise begins on January 1, 2022 and ends on the date the Pillar 1 multilateral convention comes into force or December 31, 2023 (whichever is earlier). The "Interim Period" under the India US Interim Arrangement will be April 1, 2022 till the implementation of Pillar One or March 31, 2024, whichever is earlier. This is taking into account the concept of "financial year" as recognized in India.

The agreement only covers 2% levy: While the Unilateral Measures Compromise defines "Unilateral Measures" widely as "Digital Services Taxes and other relevant similar measures", the India-US Interim Agreement only covers the 2% Equalisation Levy of 2020. This is logical since the USTR action was initiated only in relation to the 2% Equalisation Levy and thus this Interim Agreement speaks of a commitment from the US to not initiate any trade measure in relation to such 2% Equalisation Levy.

WHAT DOES THIS MEAN FOR TECH MULTINATIONALS?

For the entities which will be covered under Pillar One (whose global turnover crosses the threshold of € 20 billion, with the profitability of above 10%) i.e. about 100 ultra-profitable MNEs, will be required to pay a 2% Equalisation Levy on e-commerce supply of services made to Indian customers (and to non-residents in certain situations) during the Interim Period. If the quantum of this Equalisation Levy exceeds the "Amount A" computed under Pillar One, then such an entity would be eligible to take credit of the same (as per the prescribed prorated manner)

and its corporate income tax in India arising from the new taxing right under Pillar 1 would get reduced to that extent.

- For entities other than the above, i.e for a majority of the MNEs, 2% Equalisation Levy will continue to be applicable on e-commerce supply of goods and services, until the implementation of Pillar One. Thereafter, in terms of India's commitment to the October Statement, the said Equalisation Levy should ideally be withdrawn for all companies.
- Since the US-India Interim Agreement does not speak generally of "Digital Services Taxes and other relevant similar measures" but only "2% equalization levy on e-commerce supply of services", it does not impact the 6% equalization levy which was imposed in 2016 on online advertisements. Thus, as regards the 6% Equalisation Levy, the ultra-profitable MNEs covered under Pillar One would not be able to avail any interim credit once Pillar One gets implemented. The other MNEs would in any case continue to pay the 6% Equalisation Levy till Pillar One is implemented.
- Once Pillar One is implemented, whether the 6% Equalisation Levy would be withdrawn will have to be seen. Since the October Statement speaks of withdrawal of "all Digital Services Taxes and other relevant similar measures", it should ideally also result in withdrawal of 6% Equalisation Levy on online advertisement services.

The continual developments in relation to this significant global tax deal will have to be closely monitored and assessed, to gauge the impact on digital businesses.

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Decoding NFTs and their Regulation in India

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The increasing popularity of cryptocurrencies has no doubt sparked several debates around the world on their legality and efficacy. It is a topic that has split the global economy down the middle, with many now believing it is a monetary revolution.

The rise in cryptocurrency and its growing acceptance worldwide, has led to the creation of a frenzy centering around **Non-Fungible Tokens or NFTs** (especially post the record smashing NFT sale for USD 69 million!)

A Non-Fungible Token is a unique token, in the form of a link, that represents real life objects or digital works on the internet. It is a one-of-its-kind asset that is not interchangeable in nature, similar to a one-of-a-kind trading card. A NFT is essentially metadata or code which is minted on a blockchain and stored in the form of a link. Basically, it is like a certificate of ownership for virtual or physical assets, and is a digitized token that represents real-life objects, such as art, videos, audio files, memorabilia, game assets etc., and is recorded on a blockchain.

NFT AND THE BLOCKCHAIN

A blockchain is essentially a public ledger, that is being maintained by thousands of computers worldwide working together, to record every single transaction taking place (using cryptocurrency) and maintain such records publicly. Similar to how a bank records a customer's activities in order to determine if he has enough money left in his bank account, the blockchain records all transactions involving cryptocurrency and maintains a public record of the same for any person in the world to view. No valid record or transaction can be changed on the blockchain, and anyone can verify the transactions that have been recorded.

NFTs are bought and sold through the blockchain, as the blockchain will publicly record the transfer or purchase of such NFTs for anyone to see, and the owner of a NFT will have the records of his ownership available publicly for anyone to verify. Buying a NFT usually gets the owner some basic usage rights, like being able to post the image/video/audio files/image online (not to mention the unique blockchain record and bragging rights!)

NFTs must be viewed in the same way as art. They are designed to give the owner something that can't be copied - ownership of the work (though the artist can still retain the copyright and reproduction rights, just like with physical artwork). If one were to compare it with collecting physical art- , anyone can buy a Van Gogh print, but only one person can own the original.

A common misconception is that NFTs are a type of cryptocurrency. Rather, NFTs are digital assets that can be purchased using cryptocurrency. The only similarity between crypto and NFTs is that they both have a stored digital record on a blockchain. With NFTs, each token has a unique value and cannot be exchanged for another of equal value. With cryptocurrency, the value and transparency are more obvious and one can exchange one Bitcoin for another.

LAWS GOVERNING NFTS

NFTs can only be purchased through a specifically designed platform which performs the function of a facilitator (similar to an auction house). It will list the seller's NFT and encourage buyers to either pay a certain price for the same or purchase it vide an auction. Prior to any successful purchase/ auction, the terms and conditions of the sale are made available to the buyer through a smart contract which establishes all the terms regarding the use of this NFT by the buyer, such as whether he shall obtain copyright rights or only be entitled to use the same for personal non-commercial purposes. Upon the buyer

making payment of the consideration, the contract comes into effect and both parties shall be bound by the laws of the Indian Contract Act, 1872. It is important to note that these smart contracts are only entered between the buyer and the seller with the platform companies being just facilitators.

Unless agreed between the parties through the smart contract, the copyright usually remains with the creator of the work of art, painting, music, etc., and the NFT serves as a unique and recognized replica of the same. Additionally, it must be noted that notwithstanding the terms of the smart contract, the rights of the creator/artist as provided in section 57 of the Copyright Act, 1957, namely, his right to claim authorship over the work and his right to restrain or claim damages in respect of any distortion, mutilation or modification of the said work, shall continue to vest with the creator/artist.

The growing popularity of NFTs is also attributable to the fact that the artists/creators tend to have resale royalties for any future sale of the NFTs. In order to ensure this, the resale royalty figures need to be coded into the smart contract being executed between the artist and the buyer. The advantage of this smart contract is that, as a rule, if the token is resold through a blockchain-enabled marketplace, the royalty payment will be made automatically without the need for any further action by the artist. However, it must be noted that automated distributions of resale royalties could be frustrated by transactions that occur outside of the blockchain (which can also be a possibility when physical assets are involved). All in all, however, the reseller shall be bound by his obligation to make royalty payments to the artist and the same can be enforceable under law.

ITS A WAIT AND WATCH FOR NFT REGULATIONS

Presently there is no separate legal framework for NFTs in India, and as such it is currently only governed by the general principles of contract. However, whilst most stakeholders believe that Cryptocurrency and Regulation of Official Digital Currency Bill, 2021l would carve out exceptions for NFTs considering its immense popularity, one will only have to wait and assess the implications NFTs may have if the Indian Government comes out with a clear ban on cryptocurrencies.

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SEBI's ICDR Amendment: A Welcome change (but some additional clarifications would be welcome too!)

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The Securities and Exchange Board of India (**SEBI**) amended the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (**ICDR Regulations 2018**) by way of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2021 (**ICDR Amendment 2021/the Amendment**) in August 2021.

The key aspects of the ICDR Amendment 2021 relate to the reduction of lock in period for promoters post an initial public officer (**IPO**).

WHAT THE NEW PROVISIONS ENTAIL

As per the new provision 16(1)(a) of ICDR Regulations, the minimum promoter's contribution (**MPC**) post an IPO has a lock-in period of 18 months (vis-à-vis the lock-in period of 3 years earlier). The rider is that if majority of the issue proceeds are proposed to be utilized for capital expenditure – the lock-in is for a period of 3 years. The same conditions also apply for promoters holding an excess of MPC [Regulation 16 (1)(b)].

Additionally, the new amendment to Regulation 17 is that the lock-in period for persons (other than promoters) who hold the entire pre-issue capital is 6 months (the earlier lock-in period was 1 year).

RATIONALE FOR REDUCTION OF LOCK-IN PERIOD

Previously, the lock-in of promoters' shareholding for 3 years was considered necessary in order to ensure continuous 'skin in the game' by the promoters post an IPO.

However, current trends indicate that companies which go public are well established with mature businesses, have pre-existing institutional investors and their promoters have already demonstrated 'skin in the game' for several years before going public. There is no longer a need to have a lock-in period of 3 years with respect to the aspect of ensuring participation by the promoters, which plays into the concept of "personality driven" public issues.

Moreover, an analysis which was carried out of the companies that got listed during 2007–15 indicated that in several of these companies, the promoters did not materially sell their shares even after the expiry of the lock-in period.

INTERPRETATION AND APPLICABILITY OF THE ICDR AMENDMENT 2021

There is nothing explicit in the text of the ICDR Amendment 2021 to demonstrate that the intention behind the Amendment was to apply it retrospectively. Thus, in our interpretation, the ICDR Amendment 2021 will now apply prospectively.

There are however certain interpretational issues, in the ICDR Amendment 2021, which may arise with respect to different classes of promoters. For instance, if companies have not yet completed their public issue will they be eligible for the new ICDR Amendment? In our view, the answer is in the affirmative. The Red Herring Prospectus may be amended and these companies should be given the benefit of the amendment, upon application to SEBI.

On the other hand, a company, which has completed its public issue prior to the ICDR Amendment 2021, was governed by the pre-existing ICDR Regulations, 2018 as it stood at the time of completing the public issue.

THE WAY FORWARD AND RIGHTS OF SHAREHOLDERS

Given this scenario, it is important to understand the rights of the shareholders.

A prospectus is a contract between the promoters and the investing shareholders. As per the Companies Act 2013 (**Companies Act**), any changes proposed to be made to the terms of contracts in the prospectus must be ratified by shareholders.

Given the above compliance with the Companies Act, corporate India is still ambivalent if the changes in lock-in period (as prescribed by the ICDR Amendment 2021) need to be modified in the prospectus and ratified by shareholders. It would be prudent for promoters to clarify the above with SEBI.

Assuming SEBI were to allow the promoters and persons other than promoters to modify their lock-in period, the pertinent question would be whether SEBI's approval is suffice or whether the promoters and persons other than promoters would then need to approach the shareholders for approval of change in lock-in period, as per Section 27 of the Companies Act.

Also, once the promoters approach the shareholders, another contentious issue would be, whether the promoter can be allowed to vote in the shareholder's ratification for change in lock-in period.

A clarification from SEBI on all these aspects would be much welcomed by the securities market.

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Income Tax Assessment - It is faceless but not voiceless!

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The scheme of assessment under Income Tax witnessed a paradigm shift with the introduction of faceless assessment. The underlying intention behind this transition was to eliminate exceptionable activities by avoiding high level of personal interaction between taxpayers and the tax officials. Though the underlying intent of the faceless assessment scheme, is no doubt in the right direction, taxpayers have been facing multiple issues. One of them is that assessment orders are being passed without following due process prescribed under Section 144B of the Income Tax Act, 1961 **'IT Act'**.

This has led to a whole new series of litigation where almost every other assessment order is being challenged before jurisdictional High Courts on the grounds of violation of principles of natural justice. During the course of these hearings, the Revenue more or less conceded where the Assessment Orders under challenge were passed without issuance of show cause notice or draft assessment order or any other procedural infirmities. However, on the issue of granting a personal hearing to the assessee, the Revenue was of the view, that under the scheme of faceless assessment, a grant of a personal hearing is not mandatory in every case.

As per Section 144B(7) of the IT Act, the assessee may request for a personal hearing where a variation is proposed in the draft assessment order and the assessee is issued a show cause notice. Further, the Chief Commissioner or the Director General, in charge of the Regional Faceless Assessment Centre, 'may' approve the request for personal hearing if he is of the opinion that the request is covered by the circumstances as laid down by the Principal Chief Commissioner with approval of CBDT. In this regard, Circular dated 23.11.2020 (as made applicable to Faceless Assessment Scheme under Section 144B by Circular dated 31.03.2021) has been issued stating that personal hearing would be granted by the Department to assessee where:

- The assessee has submitted written submission in response to the Draft Assessment Order; and
- The assessee in his/her written response disputes the facts underlying the proposed modification and makes a request for personal hearing.

In light of the word 'may' used in Section 144B(7)(viii) and the SOP laid down in Circular dated 23.11.2020, the Revenue took the position that the personal hearing is discretionary and could be granted only where any dispute on fact is involved.

The issue was initially addressed by the Hon'ble Delhi High Court in *Sanjay Aggarwal vs. NFAC [[2021 (6) TMI 336 - Delhi High Court]* and by the *Hon'ble Bombay High Court in Piramal Enterprises Ltd. vs. ACIT [WP(L) No. 11040 of 2021]* wherein it was held that it was incumbent upon the Department to accord a personal hearing to the assessee where such a request was made. Failure to do so would amount to violation of principles of natural justice as well as mandatory procedure prescribed in the Faceless Assessment Scheme under Section 144B of the Act. However, these decisions did not delve into the impact of the word 'may' in Section 144B and the SOP laid down in Circular dated 23.11.2020. Further, another question which remained unanswered was whether grant of personal hearing frustrates the concept and purpose of faceless assessment as the underlying objective is to eliminate any personal interaction between taxpayers and the Department.

The controversy has now been put to rest by the Delhi High Court in is recent landmark ruling in the case of *Bharat Aluminium Company Ltd. vs. Union of India & Ors. [WP(C) 14528/2021]* wherein it is held that even under the faceless assessment scheme, the assessee would have a vested right to personal hearing and the same has to be given by the Department if an assessee asks for it, irrespective of the facts of each case. The key findings of the decision have been summarized below:

- Faceless assessment does not mean no personal hearing. Grant of personal hearing would neither frustrate the concept nor defeat the purpose of faceless assessment. Reference was placed on the decision of Bombay High Court in Piramal Enterprises (supra).

- Where an action entails civil consequences, observance of natural justice would be warranted and unless the law specifically excludes the application of natural justice, it should be taken as implanted into the scheme. Reference was placed on decision of Supreme Court in *Raghunath Thakur vs. State of Bihar [(1989) 1 SCC 229] and Sahara India (Firm) v. CIT [[2008] 169 Taxman 328 (SC)].*

- As per the settled legal position inter alia laid down in *State (Delhi Admn.) vs. I.K. Nangia & Anr. [(1980) 1 SCC 258]*, where a discretion is conferred upon a quasi-judicial authority whose decision has civil consequences, the word ‘may’ which denotes discretion should be construed to mean a command. Therefore, the word “may” in Section 144B(viii) should be read as “must” or “shall” and requirement of giving an assessee a reasonable opportunity of personal hearing is mandatory.

- The identity of the assessing officer can be hidden/protected while granting personal hearing by either creating a blank screen or by decreasing the pixel/density/resolution.

- The distinction made under Circular dated 23.11.2020 with respect to question of facts and question of law is untenable and not founded on intelligible differentia. The right to personal hearing cannot depend on facts of each case and would be universally available where the assessee asks for it.

In view of the above decision of Delhi High Court, the Department would be mandatorily required to grant personal hearing to the assessee under faceless assessment wherever the assessee asks for it and irrespective whether the assessee disputes any question of fact or question of law. This ruling not only upholds the settled legal position on principles of natural justice but also discards the myth that the scheme of faceless assessment would be frustrated with grant of personal hearing. It must be appreciated that if the ultimate objective of faceless assessment is to prevent malpractices occurring due to human interactions behind closed doors, this objective would be met if personal hearing is granted by way of virtual means with the identity of the Assessing Officer being hidden. Therefore, there is no plausible logic to take away the right of personal hearing from the assessees in the garb of faceless assessment. It would also reduce unnecessary litigation arising out of incorrect understanding of legal implications on facts in hand by the Assessing Officers, which one may be aware, is rampant. With the Union Budget 2022-23 just round the corner, it would be a welcome move if Section 144B is amended to explicitly make personal hearing mandatory in faceless assessments. On the other hand, it would be a major setback if the Government decides to amend Section 144B to take away the right to personal hearing from assessees. We can only wait till the curtains drop on 01.02.2022. In any case, this judgement has come as a breather for taxpayers – one can now be assured that income tax assessment can be faceless but certainly not voiceless!

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