ECONOMIC
LAWS
PRACTICE
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ELP KNOWLEDGE SERIES

India Update

Part 1 of 2023

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Internationalization of Rupee Trade

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The RBI Report on Currency and Finance for 2020-21 stated; "Looking ahead, the emergence of the Indian Rupee as an international currency appears inevitable."[1] Against this backdrop, it seems likely that the newly notified Foreign Trade Policy 2023 has provided the policy springboard to turn this prediction into reality. The initiative by the Government of India has come at about the right time where India is emerging as only the large economy growing above the world growth rate.

Simply put, the internationalization of a currency refers to its ability to be freely transacted between residents and non-residents and act as a reserve currency for global trade.

The new FTP provides for the settlement of foreign trade in rupees for both imports and exports. However, this must be done through a freely convertible Vostro account of a non-resident bank, not situated in a country part of the Asian Clearing Union **(ACU)**, Nepal or Bhutan[2]. The FTP also places minor additional conditions to allow said realization, but notably, the FTP also allows exports in INR to notified countries under the "Import for Export" mechanism.[3] These provisions give substantial impetus towards internationalizing the Indian Rupee.

The aforementioned Vostro-based payment must be matched with a payment in free foreign currency, and notably, the remission of the aforesaid foreign currency by the buyer to its non-resident bank will be considered as export realization under the FTP[4].

An alternative to the above mechanism is also allowed via settling transactions through "Special Rupee Vostro Accounts" operated by certain authorized banks. This allows for importers and exporters to make/redeem payments in INR, with the same being adjusted against the Special Vostro account of the corresponding bank of the partner country[5].

The internationalization of the rupee has been the subject of many policy initiatives and discussions by the Indian government. It has also enjoyed some international support with the arrangement of rupee denominated trade being at various levels of completion with Botswana, Fiji, Germany, Guyana, Israel, Kenya, Malaysia, Mauritius, Myanmar, New Zealand, Oman, Russia, Seychelles, Singapore, Sri Lanka, Tanzania, Uganda and the United Kingdom[6].

[1] Report on Currency and Finance, RBI (2021), available at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RCF26022021FUL14763733401448089D2B70141732D717.PDF.

[2] Para 2.52, Foreign Trade Policy 2023, available at https://content.dgft.gov.in/Website/dgftprod/4f665d2f-20cc-4887-ae6a-5ec912bc0d44/FTP2023_Chapter02.pdf.

[3] Id, Para 2.46 II. (b).

[4] Para 2.52, Foreign Trade Policy 2023, available at https://content.dgft.gov.in/Website/dgftprod/4f665d2f-20cc-4887-ae6a-5ec912bc0d44/FTP2023_Chapter02.pdf.

[5] Id, Para 2.52 (d).

[6] ET Now Digital, India shining: Rupee inches closer to becoming international currency; these 18 countries now accept trade payment in INR - Full list, Times now, available at https://www.timesnownews.com/business-economy/india-shining-rupee-inches-closer-to-becoming-international-currency-these-18-countries-now-accept-trade-payment-in-inr-full-list-article-98683541#:~:text=According%20to%20the%20details%20shared,Uganda%20and%20the%20United%20Kingdom

International trade transactions in Indian Rupee offer a unique opportunity to Indian businesses to increase their exports as foreign countries are now incentivized to procure goods from India. This also presents a potential path to limiting exposure of routine trade due to imposition of economic sanctions, as the monetary component of the transaction would be conducted in the rupee.

Trade in Rupee would reduce transactional cost in terms of fees and time as businesses will not have to deal with complex regulations for cross-border transactions for imports and exports. Increased usage of the rupee to settle payments would also provide a panacea to redress the depreciation of the rupee to some extent and shocks from foreign rate fluctuations. It would also somewhat diversify our foreign exchange reserves away from the USD, reducing our exposure to risks and turmoil in external markets.

It must be noted that if a substantial portion of India's trade is in rupees, then in the course of status-quo economic activities, non-residents would hold substantial rupee balances. This would heighten India's vulnerability to external shocks, affecting our monetary stability.

The increased rupee trade would entail the development of banking infrastructure and integration with external financial markets where RBI and the Government of India could play a pivotal role. Although, the development of infrastructure poses a massive regulatory challenge, along with a substantial fixed cost, particularly to the Indian banking industry. The Government should engage with the foreign government for wider acceptance of the rupee-denominated trade to a sustainable level for the Indian banking industry as well as for the Indian trade community.

The Conundrum of Procedure: Extension of the Mandate of the Arbitral Tribunal: Who Has Jurisdiction?

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INTRODUCTION

It is an emerging trait in new-age contracts to include arbitration and/or mediation clauses with the hope that the institution of such clauses would provide for a cost and time efficient mechanism for resolution of disputes. However, this has seldom been the case. It is only after commencing arbitration that the parties realize that timelines are rarely followed, and extensions are astonishingly common. It is at this juncture, the parties wonder about the forums and criteria to seek such extensions.

These questions consequently prompted this article to delve deeper and understand the process of extending timelines for ongoing arbitrations in India. The provision for extension of ongoing arbitrations can be found in Chapter VI of the Arbitration and Conciliation Act, 1996 (**the Act**) under the caption of "Making of arbitral award and termination of proceedings". Section 29A was introduced vide the Amending Act 3 of 2016 and came into effect on October 23, 2015. On a bare reading of Section 29A, it is amply clear that the section provides for an entire procedure vis-à-vis extension/substitution of the arbitral tribunal.

For obtaining extension of arbitration proceedings under Section 29A of the Act, one must satisfy two criteria in court: (i) the application has been filed before the correct forum; and (ii) there is sufficient cause for extension. Whilst the extension of arbitration proceedings on the basis of sufficient cause depends solely on the facts of the case, it is imperative that one first identifies the correct forum for seeking such an extension.

Largely, there have been two schools of contrasting interpretation that have been discussed in multiple cases by various High Courts. While one school interprets the definition of "court" in the literal sense wherein Section 2(1)(e) is strictly construed to say that the District Court is also empowered to direct extensions and substitutions under Section 29A; the other insists that only the High Courts and the Supreme Court are empowered to direct extensions and substitutions under Sections 11, 14, 15 and 29A.

LITERAL INTERPRETATION OF 'COURT'

The *Kerala High Court*[7], *Bombay High Court*[8] and the *Orissa High Court*[9] interpreted the term "court" strictly and literally as defined under Section 2(1)(e). All these High Courts held that in cases where the High Courts were unable to exercise their ordinary original civil jurisdiction, the District Courts being the principal Civil Courts would have the jurisdiction to extend/substitute the mandate of arbitral tribunals under Section 29A.

The *Gauhati High Court*[10], *Kerala High Court*[11] and the *Bombay High Court*[12] addressed these questions and held that where the parties mutually appoint the arbitral tribunal, then the procedures of Section 11, 14 and 15 become distinguishable.

[7] M/s. URC Construction Private Limited v M.s BEML Limited 2017 (4) KER LT 1140
[8] Chief Engineer v Devdatta P. Shirodkar 2018 SCC OnLine Bom 368
[9] Liladitya Deb v Tara Ranjan Pattanaik 2021 SCC OnLine Ori 928
[10] Aplus Projects and Technology (P.) Limited v Oil India Limited (2020) 1 Gauhati Law Reports 99
[11] Ekk and Co. v State of Kerala 2020 SCC OnLine Ker 23002
[12] Magnum Opus IT Consulting Private Limited v Artcad Systems Civil Writ Petition No. 1090 of 2021

Therefore, under Section 29A of the Act, the term "court" should be interpreted in the literal sense, hence, empowering the District Courts to substitute/extend the mandate of the tribunal. The said High Courts seek to make a classification and division of powers on the basis of the method in which the arbitral tribunal was initially appointed.

However, on a plain and simple reading of the section itself, such a distinction or a classification is not available in Section 29A. Having arrived at the conclusion that the jurisdiction to extend the mandate of the Tribunal under Section 29A, would be with the High Court in the case where the initial appointment was under Section 11, no other contrary conclusion could have been arrived at, even in the case of mutual appointment of arbitrator.

PURPOSIVE INTERPRETATION OF "COURT"

A strict and literal interpretation of the term "court"- with reference to the jurisdiction of courts under Section 29A – is erroneous and fails to consider the intention of the legislature in empowering courts to substitute/extend the mandate of the tribunal, after the expiry of the statutory period provided in Section 29A(1) and (3). In *Shailesh Dhairyawan v Mohan Balakrishna Lulla*[13], as also in various other judgments, the Supreme Court has emphasized that 'purposive interpretation' or 'purposive construction' is necessary in order to attach meaning to the provisions which will serve the "purpose" behind the provision. Therefore, to avoid any inconsistencies within the Act, Section 2(1) begins with a caveat, "*in this Part, unless the context otherwise requires…*" suggesting that the definitions provided herein should not be result in situations which would defeat the intention of the legislature. The *Andhra Pradesh High Court*[14], *Allahabad High Court*[15], *Kerala High Court*[16], *Delhi High Court*[17] and *Calcutta High Court*[18] held that the term "court" under Section 29A has to be read along with Sections 11, 14 and 15 to realize the true intent of the legislature.

Since Section 29A also empowers the court to substitute and/or extend the mandate of the arbitrator(s), it is pertinent to compare this authority of the court with the jurisdiction of the High Court under Sections 11, 14 and 15. Section 11(6) read with Section 11(12) unambiguously states that the appointment of arbitrator(s) in cases other than international commercial arbitration shall be the exclusive jurisdiction of High Courts. Under Section 29A(6) of the Act, the "court" is granted the power to substitute the arbitral tribunal thereby bestowing the power to appoint new arbitrators as is provided for under Section 11 of the Act. This would imply that the "court" under Section 11 and "court" under Section 29A would necessarily need to be the same "court", i.e. the High Court. Therefore, it is unlikely that the legislature would envisage a situation where the arbitrator(s) is appointed by the High Court or the Supreme Court and a reference is made to the District Court for extension and/ or substitution under Section 29A. Furthermore, it would be in the teeth of the provisions of Section 11 of the Act if any other court, other than the High Court, was empowered to substitute the appointments made by the High Court itself.

Interestingly, in the case of *Indian Farmers*[19], *Lots Shipping*[20] and *Ekk and Co.*[21] , various High Courts have expressly recognized the extent of jurisdiction of the principal Civil Courts to be restricted to petitions under Sections 9 and 34 and do not extend to petitions under Sections 11, 14, 15 or 29A.

[13] (2016) 3 SCC 619
[14] K. V. Ramana Reddy v Rashtriya Ispat Nigam Limited 2023 SCC OnLine AP 398
[15] Indian Farmers Fertilizers Cooperative Limited v Manish Engineering Enterprises 2022 SCC OnLine All 150
[16] Lots Shipping Company Limited v Cochin Port Trust AIR 2020 KER 169; 2020 SCC OnLine Ker 21443
[17] DDA v Tara Chand Sumit Construction Co. O.M.P. (Misc.) (Comm.) 236/2019
[18] Amit Kumar Gupta v Dipak Prasad 2021 SCC OnLine Cal 2174
[19] Supra note 10
[20] Supra note 11
[21] Supra note 6

THE CONNUNDRUM

The Bombay High Court in the case of *Cabra Instalaciones Y Servicios, S. A*[22] and the Gujarat High Court in the case of *Nilesh Ramanbhai Patel & Ors.*[23] have provided well-reasoned judgments on the interpretation of the term "court" under the Act and held that only the High Courts will have jurisdiction to try and entertain applications under Section 29A.

However, there still exist varied interpretations of the term "court" as interpreted by various High Courts. In fact, the Bombay High Court, in a later judgment, of a coordinate bench in the case of *Magnum Opus IT Consulting Private Limited*[24] has, in fact, held to the contrary and proceeded to make a distinction between the jurisdiction of the High Court and the District Court under Section 29A of the Act, on the basis of initial appointment of the arbitral tribunal. The Kerala High Court in the case of *Ekk and Co.*[25] (Single Judge) has distinguished the proposition of law laid down by the division bench of the Kerala High Court in *Lots Shipping*[26], to state that in the case of *Lots Shipping*, the initial appointment of the arbitrator was under Section 11 of the Act and therefore, where there initial appointment of the arbitral tribunal was by mutual consent of parties, the application under Section 29A could be made to the District Court.

This article has been published in Mondaq

CONCLUSION

The Arbitration and Conciliation Act, being a central legislation, always intended to uniformly regulate the practice and procedure of arbitration proceedings throughout the territory of India. It would indeed be incongruent to the intention and purpose of the Act where different High Courts interpret the provisions of the Act differently, especially with regard to procedure for appointment and/or substation of arbitrator(s) as well as extension of the mandate of a tribunal under Section 29A of the Act. Certain High Courts, while interpreting the term "court" provided in Section 29A to mean "court" as defined in Section 2(1)(e), in our opinion, have lost sight of the intention of the legislature, which very specifically provides to confer jurisdiction on the High Court to appoint arbitrator(s) and/or substitute them under Section 11, 14 or 15. To interpret "court" as provided in Section 29A of the Act to mean the definition provided under Section 2(1)(e) would lead to a complete absurdity. The jurisdiction under Section 29A of "court" has to necessarily partake the character of the jurisdiction of the High Court to appoint arbitrator(s) under Section 11 of the Act.

[22] 2019 SCC OnLine Bom 1437
[23] (2019) 2 GLR 1537
[24] Supra note 7
[25] Supra note 6
[26] Supra note 11

New Foreign Trade Policy: A Tightrope walk between export targets and WTO commitments

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In response to the significant supply chain disruptions accompanying the last three (pandemic-ridden) years, manufacturers across the globe have undertaken strategies to diversify their supply sources. During these years of uncertainty, India has catapulted itself into becoming a strong trading partner for several countries and multinational companies on the back of a stable economy, prospects for growth, a vast consumer base, and natural resources.

India's new Foreign Trade Policy, 2023, capitalizes on these opportunities and sets ambitious aspirations for the country's role in the global market. The Indian government appears to be performing a delicate balancing act between meeting its obligations under the WTO and achieving its target of exporting goods and services worth USD 2 trillion by 2030[27]. At the launch of the FTP, the Indian government stressed the WTO compatibility of the new policies.

At the same time, sections of the FTP either incorporate export incentives from previous policies or allude to the introduction of new export-boosting programs. Given this context, this article examines some of the questions that may arise out of India's new FTP (with a focus on subsidies) given its commitments under the WTO.

WHAT ARE INDIA'S COMMITMENTS UNDER THE 'WTO'

The General Agreement on Tariffs and Trade is the primary multilateral agreement relating to international trade in goods under the WTO. Among other features, the GATT empowers members to impose countervailing duties on imports made from another member, including India, if the government provides trade-distorting subsidies to its exporters.[28] This provision is supplemented by the Agreement on Subsidies and Countervailing Measures.

The ASCM distinguishes between 'prohibited' and 'countervailable' subsidies.[29] Subsidies that are based on local content manufacturing or are contingent on exports are prohibited under the ASCM.[30] Other subsidies are not strictly prohibited under the ASCM but may be subject to being countervailed by other members by way of an anti-subsidy duty.[31]

HOW DOES THE FTP WEIGHT AGAINST INDIA'S WTO OBLIGATIONS

With the current iteration of the FTP, India has switched from an incentive-based regime to a remission-based one,[32] as Minister of Commerce and Industry Piyush Goyal highlighted. Simply put, remission of local taxes is permissible under the ASCM since it only prevents exporters from exporting local[33] taxes by refunding such taxes upon export.[34] Accordingly, in line with its 2020 decision, the FTP has replaced the MEIS with

[27] Directorate General of Foreign Trade, "Foreign Trade Policy 2023: Event Presentation" available at < https://www.dgft.gov.in/CP/> last accessed April 4, 2023.
[28] Article VI, GATT.
[29] Article 1 and 3, ASCM.
[30] Article 3, ASCM.
[31] Article 4, ASCM.
[32] Directorate General of Foreign Trade, "Foreign Trade Policy 2023: Event Presentation" available at < https://www.dgft.gov.in/CP/> last accessed April 4, 2023.
[33] Footnote 1 and Annex 1, ASCM.
[34] Notification No. 30/2015-20 dated September 1, 2020.

the Remission of Duties and Taxes on Exported Products.[35] Since the RoDTEP Scheme merely refunds domestic taxes imposed on goods upon export, a plain reading of the scheme suggests that it is neither countervailing nor prohibited under the ASCM.[36]

RETAINS SUBJECT THAT HAS BEEN WTO DISPUTES AGAINST INDIA

The Indian government has retained schemes such as Duty Free Import Authorization, Export Promotion of Capital Goods Scheme, and Export Oriented Units in the new FTP. In 2018, the United States filed a complaint with the WTO against certain Indian trade policies. It was alleged that programs such as the ones listed above are export subsidies and are therefore prohibited under the Agreement on Subsidies and Countervailing Measures.

During the dispute with the United States at the WTO, India made detailed submissions regarding the permissibility of these schemes under the WTO regime. However, the WTO's panel concurred with the United States and directed India to withdraw the flagged schemes. India has since appealed the (panel report)[37] into the void, whereby the report remains pending in appeal. Until the appellate body deadlock at the WTO is resolved[38], the panel report is unlikely to get adopted by the dispute settlement body. As a result, the panel report did not confer any additional commitments on India, and India appears to keep its position intact on these schemes.

INTRODUCTION OF OTHER POTENTIAL SUBSIDIES

The FTP also allows authorities to support local industries in specific districts to boost manufacturing and exports of selected priority products and services.[39] The details of the support available to the exporters will become clearer once the respective District Export Promotion Committees formulate their plans. Relevant authorities will likely shape the nuances of such programs with due consideration to India's obligations under the WTO. From past experience, Indian lawmakers will be well advised to bear in mind that supporting manufacturing contingent on the use of local content or export orientation could result in the program being challenged under the ASCM as 'prohibited'.

PREVIOUSLY COUNRERVAILED INDIAN PROGRAMMES

Additionally, the FTP has proposed changes that are likely to impact how investigating authorities across the globe calculate the benefit conferred on Indian exporters under certain programs that have historically been countervailed in anti-subsidy investigations against India.

For example, exporters may now self-ratify 'additional inputs' for products for which Standard Input Output Norms have been notified without the intervention of the Norms Committees and seek an advance authorization for the same.[40] This may further impact an investigating authority's assessment of whether India has a reasonable and effective system in place to confirm which inputs and in what amounts are consumed in the exported products.

Similarly, it would be interesting to see whether the waiver on the export obligation default under the Amnesty Scheme[41] would impact benefit calculation in any potential anti-subsidy investigations against Indian exporters.

In conclusion, India's new Foreign Trade Policy, 2023, clearly reflects India's aspirations to play a more prominent role in the global supply chain. The FTP has provided Indian regulatory authorities with the framework to boost exports while maintaining compliance with its WTO obligations. As the Indian economy continues to grow in the context of the global value chain, it will be important for the Indian government to be mindful of its obligations under the WTO and work towards finding a balance between its development goals and international trade commitments.

This article has been published in BQ Prime

[35] Chapter 4, Foreign Trade Policy 2023.
[36] Footnote 1 and Annex 1, ASCM.
[37] Panel Report, India – Export Related Subsidies.
[38] Aarshi Tirkey, "The WTO's Appellate Body Crisis: Implication for trade rules and multilateralism" (January 13, 2020) Observer Research Foundation, available at < https://www.orfonline.org/expert-speak/the-wtos-appellate-body-crisis-implication-for-trade-rules-and-multilateralism-60198/> last accessed April 5, 2023.
[39] Chapter 3, Foreign Trade Policy 2023.
[40] Para. 4.06(i), Foreign Trade Policy 2023.
[41] Public Notice No. 2/2023 dated April 1, 2023.

Competition Act Amendment: CCI gets more Enforcement Tools to address Emerging Challenges

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The Competition (Amendment) Bill, 2023 (**Bill**) was passed by the Lok Sabha on March 29, 2023. The Bill, previously introduced in the Lok Sabha on August 5, 2022, was then referred to the Parliamentary Standing Committee on Finance (**PSC**) which presented its report on December 13, 2022, setting out its recommendations on certain key amendments.

In addition to addressing some key learnings from the past fourteen years of enforcement, the amendments to the Competition Act, 2002 (**Competition Act**) also seek to strengthen the Competition Commission of India (**CCI**) as it continues its tryst with markets driven by technology and data. Some of the key changes introduced by the Bill, along with potential implications, are highlighted in this article.

INTRODUCTION OF 'DEAL VALUE' THRESHOLD

In addition to asset/turnover-based thresholds set out under the Competition Act, a 'deal value' threshold of INR 2000 crores (**DVT**) has been introduced. Transactions that exceed the DVT will require prior mandatory notification to the CCI for its review and approval. Previously, such a notification was subject to any party having "substantial business operations" in India, however, based on the PSC's recommendation, the Bill clarifies that "substantial business operations" in India are for the target company. Although 'deal value' is defined to include direct, indirect, or deferred consideration, the CCI will now have to consider factors including fluctuations in share value, performance-linked payouts etc. in assessing notifiability of such transactions.

The impact of the DVT will most likely be seen in sectors that are driven by technology and data – which have seen a slew of small acquisitions that are otherwise not notifiable but have the potential to substantially alter market conditions. Enterprises in the tech sector will now have to grapple with the merger control provisions of the Competition Act while deciding their growth strategies.

DEFINTION OF 'CONTROL'

The definition of 'control' has been widened to include the 'material influence' standard. The broader definition of 'control' could result in more transactions becoming notifiable. It is expected that the CCI will publish additional guidance to clarify the scope of 'material influence' to provide some clarity to transacting parties to help them determine the notifiability of their planned transactions.

'SETTLEMENTS' AND 'COMMITMENTS'

The Bill also introduces a settlement and commitment system that would be available in cases relating to anti-competitive vertical agreements and abuse of dominant position. While commitments can be offered after an investigation has been directed and before the Director General (**DG**) report is received by a party, a settlement application can be filed after receiving the DG Report but before CCI passes a final order. In line with the PSC's recommendation, claims for compensation/damages will lie in cases of loss/ damage suffered as result of a settlement order by the CCI.

It is expected that the settlement and commitment system will lead to speedy disposal of cases, reduced litigation, and efficient deployment of resources by the CCI. However, since compensation claims can also be filed in settlement cases, it is unclear if this implies an admission of liability by the party seeking a settlement. If yes, this would result in further litigation, diluting the underlying objective of introducing the settlement system.

PENALTY BASED ON GLOBAL TURNOVER'

A significant change to the penalty regime has been the expansion of 'turnover' to mean the 'global turnover' of an enterprise, accounting for all its products and services. Pegging penalty computation to a 'global turnover' standard will be an overturn of 'relevant turnover' as settled by the Supreme Court in *Excel Crop*, in terms of which, the turnover for computing penalties is limited to the turnover accruing from infringing products/services. This amendment will likely have far-reaching financial ramifications for global companies, especially those in the technology sector, facing inquiries under the Competition Act.

WITHDRAWAL OF LENIENCY APPLICATIONS

The Bill has also introduced a provision allowing a party to withdraw its application for lesser penalty in cases relating to cartels. While such a withdrawal will not preclude the DG and CCI from using the evidence submitted by such party during the process, any admission of liability made by such a party cannot be used. The lesser penalty regime has been a valuable tool, increasingly used by the CCI to inquire into cartels. Allowing such a withdrawal brings much needed flexibility, as the DG/CCI can use the evidence provided under the application and on the other hand, an applicant would have the option to withdraw its leniency request without limiting its defence.

LENIENCY 'PLUS'

The Bill permits a lesser penalty applicant to submit another application, containing disclosures with respect to another cartel, provided that the first application is undergoing investigation. This adds to the tools available with CCI to inquire into cartels and could potentially incentivize parties to report more than one cartel to be eligible for greater penalty reductions.

'HUB AND SPOKE' CARTELS

The Bill has introduced a provision which would penalize 'hub and spoke' arrangements by adopting a presumption that an enterprise that participates in the furtherance of a horizontal agreement is part of such an agreement, even though it may not be engaged in an identical or similar trade. Based on the PSC's recommendation, the Bill has removed the requirement for 'active participation' and an enterprise would be liable if it participates or 'intends' to participate in furthering a horizontal agreement. This would potentially allow parties to take the defence that there was no 'intention' to participate in the cartel.

EXPEDITED TIMLEINES

The timelines for clearance of combinations by the CCI have been reduced from 210 days to 150 days. The truncated timelines will likely exert some pressure on the CCI to adopt a more efficient review process. It will also mean that notifying parties will have to ensure the completeness and adequacy of the information being provided to the CCI.

POWER TO ISSUE GUIDELINES

The Bill has introduced a provision requiring the CCI to ensure transparency in passing new regulations by publishing the draft regulations on its website and inviting public comments. A newly included provision also requires the CCI to publish guidelines on provisions under the Competition Act. This would also include guidelines for appropriate amount of penalties, which are required to be considered by the CCI while imposing penalties. This is a significant addition to the existing regime as comprehensive and clear guidelines, especially on matters such as penalties, would impart much needed legal certainty especially from the perspective of concerned stakeholders.

In conclusion, the introduction of the DVT, a settlements and commitments system, provisions capturing 'hub and spoke' cartels etc. seek to align the Competition Act with global competition regimes. The long-awaited amendments are poised to significantly overhaul the Competition Act by arming the CCI with newer enforcement tools to address emerging challenges.

This article has been published in Money Control

Rights of Creditors and Protection of Individual Right of Borrower/Promoters

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The Reserve Bank of India (**RBI**) as regulator of the banking system in India has laid down robust system to deal with delinquent accounts/borrowers. RBI has, from time to time, issued various guidelines to the lenders in this regard - most importantly the guidelines to declare an account as Non-Performing Account (**NPA**), Red Flag Account, Non-Co-operative Account and Fraud as these issues have far reaching consequences. It goes without saying that these guidelines were necessitated in light of the behavior of the borrowers, to check misuse of banking systems. These guidelines also include a built-in early warning system to thwart possible threats posed by such delinquent borrowers. To keep record of such behaviors and to disseminate information to the players in the system, the RBI has also laid down reporting requirements[42] for the lenders so that the system is not take for ride in the absence of authentic information about such borrowers. These arrangements have in fact helped and protected the banking system from possible attempts to access credit by such delinquent borrowers. Non-reporting and delay in reporting of fraud may attract penalties for the Bank and sever punishment for the banking staff.

While the systems are well settled and followed, the procedure laid down for declaring an account as 'willful defaulter' or as 'fraud' has come under scrutiny of the Hon'ble Supreme Court on account of consequences that it entails for the borrower and the impact it will have on the fundamental right to do business. In the matter of Jah Developers[43], the Hon'ble Supreme Court, while dealing with the issue of declaration of borrower as willful defaulter, held that Article 19(1)(g) of the Constitution of India is comes to the fore in such cases. The moment a person is declared to be a wilful defaulter, the impact on its fundamental right to carry on business is direct and immediate as no additional facilities can be granted by any bank/financial institutions, and entrepreneurs/promoters would be barred from institutional finance for five years.

Banks/financial institutions can even change the management of the wilful defaulter, and a promoter/director of a willful defaulter cannot be made promoter or director of any other borrower company. Under Section 29A of the Insolvency and Bankruptcy Code, 2016, a wilful defaulter cannot be a resolution applicant. Based on such serious consequences that follow declaration of declaration of an account as willful defaulter, the Apex court construed the Master Circular of the RBI on Willful Defaulters by harmonizing it with the principles of natural justice - by allowing the borrower the right to file a written representation before the Review Committee against the order of First Committee. The Court also laid down that the Review Committee must pass a reasoned order which must be provided to the borrower. However, the Court did not allow any representation through a lawyer before such committees of the bank on the grounds that these in-house committees are neither a tribunal nor vested with any judicial powers and their powers are only administrative in nature. They are not legally authorized to take evidence by statute, or

[42] In terms of the circular DBS.OSMOS. No.14703/33.01.001/2013-14 dated May 22, 2014 and subsequent amendments thereto, lenders are required to send periodic reports to Central Repository of Information on Large Credits (CRILC), on all borrowers having aggregate exposure of ₹ 50 million and above. The CRILC-Main Report is to be submitted monthly and a weekly report of default by close of business on every Friday. List of suit-filed accounts and non-suit filed accounts of wilful defaulters of Rs.25 lakh and above on a monthly or more frequent basis to all the four Credit Information Companies. Frauds: In cases of individual frauds involving amounts of less than ₹ 1.00 lakh are not to be reported individually to the RBI, but statistical data is to be submitted in a quarterly statement. The cases of individual frauds of ₹ 1.00 lakh and above but less than ₹.25.00 lakh are to be reported to the Regional Office of RBI, and of individual frauds of ₹ 25.00 lakh and above are to be reported to Central Frauds Monitoring Cell, Department of Banking Supervision, RBI Bengaluru.

[43] State Bank Of India vs M/S. Jah Developers Pvt. Ltd. Decided on 8 May, 2019

subordinate legislation, as such no lawyer would have any right to appear before such committees.

RBI issued the **Master Directions on Frauds** on July 01, 2016 by consolidating earlier circulars on classification of fraud, reporting and monitoring mechanism. The Master Directions on Frauds were updated onJuly 03, 2017. Recently, the issue of declaration of an account as fraud by the Banks/FIs in terms of the RBI guidelines also came up before the Apex Court in the case of State Bank of India Vs Rajesh Agarawal[44]. The Apex Court acknowledged the fact that the procedure which has been laid down in the Master Directions on Frauds is conceived in public interest and to protect the banking system. The Court, however, also noted that declaration of the account as fraud led to serious civil consequences including reporting to investigating agencies. Additionally, the Court noted that there is a consistent pattern of judicial thought that civil consequences entail infractions not merely of property or personal rights, but also of civil liberties, material deprivations, and non-pecuniary damages. Every order or proceeding which involves civil consequences or adversely affects a citizen should be in accordance with the principles of natural justice. The Apex Court, accordingly, held that the Banks need to serve a notice to the borrowers, and give them adequate opportunity to submit their reply and representation regarding the findings of the forensic audit report and before classifying their account as fraud.

In this context, it is noteworthy that the Supreme Court has been consistently recognizing the need to harmonize public interest and personal interest in light of Constitutional protection in the form of fundamental rights. The Court has reconfirmed the need to follow the settled principle of law that the rule of audi alteram partem applies to administrative actions. While the Court has recognized the authority of the RBI and Banks to deal with delinquent borrowers, at the same time, it has tried to ensure that such actions and procedures do not result in arbitrary and unilateral decision-making exercises. There have been numerous instances of mechanical exercise of such powers and in many cases the proprietary action of the banks/FIs were questioned -where accounts with proper track records of over twenty years were declared as fraudulent without a proper understanding of the explanations provided by the promoters.

Here, it may need to be noted that earlier the Hon'ble Supreme Court[45] while dealing with the issue of **publication of photograph of defaulters by the Banks/FIs,** in the light of right to privacy, allowed publication of names and photographs on the grounds that Rule 8 framed under the SARFAESI Act specifically authorized the bank to publish the names and address of wilful defaulter/s and there is also no legal bar that prohibits them from publishing such information. The duty to maintain secrecy is superseded by a larger public interest as well as bank's own interest under certain circumstances. The Supreme Court in the matter of *Reserve Bank of India vs Jayantilal N. Mistry*[46], also held that the RBI is obliged to disclose defaulters list, inspection reports, annual statement etc. related to banks under RTI Act (this issue is still before the Supreme Court).

It may be seen that the Apex Court has tried to harmonize individual rights in the light of the larger public interest. Industry, especially when it does business with borrowed funds, has a greater responsibility to conduct the business in a fair and lawful manner and nobody can claim to have any vested right to conduct business and operation in any manner harmful to public and the system. The rights of creditors in this regard are well recognized and protected under statutes. Under the earlier regime under Companies Act, 1956, Section 542 provided for criminal liability in instances where in the course of winding up of a company, it appeared that the business of the company has been carried on with an intent to defraud creditors or any other persons, or for any fraudulent purpose. Section 540 provided for

[44] Civil Appeal No. 7300 of 2022
[45] SLP No. 37726 /2013 in the matter of DJ Exim (India) Vs. State Bank of India
[46] Reserve Bank Of India vs Jayantilal N. Mistry decided on 16 December, 2015

penalties on officers of such a company who were involved in disposing off the property of the company or concealing it with the intent of defrauding the creditors of the Company. Similarly, section 543 provided accountability of promoters, directors and other officials for any money or property of the company, and for misfeasance or breach of trust. Section 538 too provided for criminal prosecution of officials of the Company for fraudulent acts and omissions. Under Companies Act, 2013, Sections 339, 340 and 341 deal with the fraudulent conduct of business. Section 339 provides that in case any director, manager, officer or any persons knowingly carried on the business with the intent to defraud creditors or for any fraudulent purpose, the Tribunal may order that such persons will be personally responsible, without any limitation of liability, for all or any of the debts or liabilities as the Tribunal may direct.

The provisions relating to fraudulent and wrongful trading have now been shifted to the Insolvency and Bankruptcy Code, 2016. Section 66 of the Code provides for liability on any persons who knowingly carry on of business with a dishonest intent to defraud creditors and make them liable to make contributions to the assets of the corporate debtor as per the order of the Adjudicating Authority.

To further strengthen the regime for protection of interest of Creditors, Section 143(12) of the Companies Act, 2013 provides for **responsibility of auditors to report instances of frauds committed by officer(s) or employee(s) of the company,** if during performance of duties, the auditor has reason to believe that an offence involving fraud has been committed against the company. This must be reported within sixty days of the fraud being detected, by following the procedure under Rule 13 of the Companies (Audit and Auditors) Rules, 2014. Non-compliance of Section 143(12) will attract penal action against the auditor by way of imposition of a fine and imprisonment for a term which may extend to one year.

One more principle which is aimed at protection of interest of the creditor and the public at large is "**Piercing the corporate veil".** Under this rule the corporate veil could be lifted to pin the liability on the individual members for wrongful acts. The concept of corporate entity has evolved to encourage and promote trade and commerce, but not to commit illegalities or to defraud people.

Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The Supreme Court accepted fraud as an appropriate ground for piercing the corporate veil in **Delhi Development Authority v Skiper Construction,** where it was held that *"if it is found that someone has acquired properties by defrauding the people and if it is found that the persons defrauded should be restored to the position in which they would have been but for the said fraud, the court can make all necessary orders. This is what equity means and in India the Courts are not only courts of law but also courts of equity."*

Thus, law gives precedent to the public interest and interest of the creditors over individual rights. Where such interest comes into conflict, the law has created ample avenue for creditors to pursue remedial measures not only to recover their dues but also to pursue remedies for fixing the liability of people responsible for conduct of affairs of the borrower. However, it is experienced that while the system has been proactively examining the cases from the point of view of compliance of the RBI guidelines for declaration of delinquent account as willful, red flag, non-co-operative or fraud, as the case may be, and initiating legal action for recovery of dues - it has been somewhat inactive as regards initiating actions against the responsible promoters/officials, be it under the Companies

Act or otherwise. The reason could be two-pronged, one is lack of internal guidelines in Banks/FIs to deal with such situations and second lack of effective jurisprudence and delay in dealing with such matters in courts. On account of such issues, delinquent promoters and officials usually are not prosecuted by Banks/FIs (though actions are initiated based on guarantees, if provided, by such promoters) even though there are sufficient provisions in the relevant statutes for such actions. This one sided approach has not allowed any effective deterrent to be developed for delinquent borrowers and promoters in India where they continue to deal business of the firm with impunity with instances of willful default, misfeasance and fraud. Despite stringent provisions as regards to conduct of business during the twilight period, these borrowers and promoters continue to resist application of the creditor on the insolvency process on one pretext or the other, as they believe that neither the banking system nor the legal system would be eager to initiate action for infringement of their fiduciary duty towards creditors.

Therefore, there is a need to shift focus from the 'compliance' part to 'action' to bring the delinquent borrowers or promoters to the books under the existing available legal provisions. We may take a cue from UK's Company Director Disqualification Act, 1986 and have a full-fledged legislation laying down the grounds for director disqualification, procedure for disqualification and consequences of contravention to strengthen the system and responsibilities of the promoters as regards conduct of the business as merely routine action of reporting in terms of RBI guidelines only serves a partial purpose.

Explained: Why were Crypto Intermediaries brought under PMLA

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The Indian government introduced a significant notification on March 7, 2023 bringing into coverage various crypto intermediaries within the purview of the Prevention of Money Laundering Act, 2002 (**PMLA**). The move comes at a time when many crypto intermediaries are already facing investigations from the Enforcement Directive (**ED**), the enforcing agency of the PMLA. News reports suggest that over Rs 9 billion has already been attached as proceeds of crime in connection with crypto frauds.

With the notification, **the government has specified that a reporting entity (RE)** under the PMLA would now include persons carrying out "for or on behalf of another natural or legal person in the course of business" the below-mentioned activities:

- exchange between virtual digital assets **(VDA)** and fiat currencies
- exchange between one or more forms of VDAs
- transfer of VDAs
- safekeeping or administration of VDAs or instruments enabling control over VDAs and
- participation in and provision of financial services related to an issuer's offer and sale of a VDA

ENTITIES COVERED

The coverage under the **PMLA** is borrowed from the definition of Virtual Asset Service Provider **(VASP)** in the Report of the Financial Action Task Force (**FATF**) on 'Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers' released in October 2021.

Since the government has not given a detailed explanation about the entities that will be covered under the PMLA due to the notification, one can usefully refer to the guidance provided in the FATF report in relation to the definition of VASP. From this guidance, it may be gleaned that the following services would now be covered under the PMLA:

- Services provided by cryptocurrency exchanges such as order-book exchange services, which bring together orders from buyers and sellers, typically by enabling users to find counterparties, discover prices, and trade.
- Brokerage services that facilitate the issuance and trading of VDAs on behalf of a natural or legal person's users.
- VDA escrow services including services involving smart contract technology that VDA buyers use to send, receive or transfer fiat currency in exchange for VDAs when the entity providing the service has custody over the funds.
- Advanced trading services which may allow users to access more sophisticated trading techniques, such as trading on margin or algorithm-based trading.

Further, per the guidance given in the FATF report, the coverage would not extend to:

- An internal transfer of virtual assets by a single legal person within that legal person – i.e., within units of a particular company.
- Persons providing ancillary services or products to a VDA network like hardware wallet manufacturers or providers of unhosted wallets to the extent that they do not also engage in or actively facilitate as a business any of the aforementioned covered VDA activities or operations for or on behalf of another person.

- Persons solely engaged in the operation of a VDA network, such as providers of internet network services and infrastructure, computing resources such as cloud services and creating, validating, and broadcasting blocks of transactions.

IMPACT OF THE AMENDMENT UNDER PMLA

With this notification, money laundering issues associated with cryptocurrencies/VDAs are now sought to be addressed. VDAs allow a great extent of anonymity due to the inherent nature of the technology itself, making it difficult for the government to track the trail of transactions in VDAs, both within and outside the country. This had led to a risk of VDAs facilitating money laundering and other nefarious activities/ economic offences.

The amendment clears the position on the KYC and reporting requirements for crypto exchanges and intermediaries in the country and has been welcomed by many in the industry as it will help enhance the confidence of retail investors in cryptocurrency/VDAs. Crypto exchanges/ intermediaries would now qualify as "reporting entity" and be required to **follow KYC requirements** and maintenance of records in terms of the PMLA as well as the PML (Maintenance of Records) Rules, 2005. Once such KYC and record-keeping requirements are in place, the government will be able to track any instances of money laundering. Persons found to be engaged in money laundering or terrorism financing by transferring cryptocurrency/VDAs would then be subjected to rigorous penal consequences including imprisonment.

WHERE INDIA STANDS ON CRYPTO REGULATIONS

The present notification is only one piece of the overall regulatory framework of VDAs/cryptocurrency in India and globally. Other aspects such as setting up an overseeing regulatory body, stipulating corporate governance requirements, securing consumer/investor protection, etc. should also be considered while bringing in an overall crypto regulatory regime. The absence of licensing/registration regimes for crypto intermediaries may make it difficult for the government to monitor and administer the present regulation under PMLA also.

Globally, major jurisdictions are transitioning from a light-touch approach, i.e., regulating from an anti-money laundering **(AML)** or payment perspective, to a more comprehensive approach, i.e., regulating from an investor protection perspective.

Under India's G20 presidency this year, there is a clear push to arrive at a global consensus - and rightly so considering the nature of the underlying technology - on the suitable regulatory framework for cryptocurrency. In the interim, India has been prudent to take measures to safeguard its revenue interest by bringing VDAs under the Income-tax Act, 1961 last year as well as countering risks of money laundering and other economic offences through the present inclusion under PMLA.

This article has been published in Money Control

Payment to the Supplier for Availment of ITC- An Additional Imposition?

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Since the inception of GST, it has always been the intention and endeavor of the Government to provide seamless flow of Input Tax Credit (**ITC**) and reduce cascading of taxes. In line with this intention, the Government has been making continuous changes to the provisions relating to ITC. One such notable change was made when the GST Council in the 48th meeting held on December 17, 2022 recommended amendment to Rule 37(1) of CGST Rules with effect from October 1, 2022 to provide for reversal of ITC only proportionate to the amount not paid to the supplier, instead of in toto reversal, thereby providing relief to the taxpayers.

However, the eligibility, availment and utilization of ITC under the CGST Act still remains a widely debated and disputed topic. Section 16 of CGST Act provides for eligibility and conditions for taking ITC encompassing a gamut of conditions which a registered person requires to comply with for the purpose of taking ITC.

Recently, the Hon'ble Finance Minister of India presented the Union Budget 2023-2024 wherein various amendments have been proposed under GST. Amongst several other amendments, second proviso to Section16(2) of the CGST Act has been proposed to be amended to provide that where the recipient fails to pay to the supplier the amount towards value of supply along with tax payable within 180 days from issue of invoice by the supplier, an amount equal to ITC availed by recipient shall be paid by him along with interest payable under Section 50 in such manner as may be prescribed. Whereas the unamended provision required the amount to be added to output tax liability instead of payment/reversal.

Further, the third proviso to Section16(2) has been proposed to be amended to state that the recipient shall be entitled to avail ITC on payment made by him 'to the supplier' towards value of supply along with tax payable thereon. Whereas, in the unamended provision the payment was stated to have required to be made by the recipient.

While from a perusal of the memorandum issued it may appear that the intention of the amendment is only limited to aligning Section 16 (2) with the return filing system. The actual impact of the amendment, however, might have a far-reaching impact.

> Under the CGST Act, "supplier" is defined to mean a person supplying the goods or services or both including an agent acting on behalf of the supplier. However, in actual business transactions, there may be instances and situations where payments are made to any other person other than the supplier. For example, payment made to any other person on the instruction of the supplier, payment made to the Government on receipt of a Garnishee notice, payment made to the Insolvency Professional **(IP)** where IBC proceedings are initiated against the supplier etc. ("any other person than the supplier").

Therefore, a question arises on whether the intention of the Government is to merely align the provisions of Section 16(2) with the return filing system or to further restrict availability of ITC in case where payment is made to any other person than the supplier? Also, whether bonafide recipients can also be denied ITC under the garb of payment not being made to the supplier?

Generally, in a contract between two parties, the receiving party promises to pay the supplying party an amount towards the supply of goods or services, or both so received. The contractual agreement obligates and makes the recipient liable to make payment to the supplier. Such a liability gets discharged only on payment made to the supplier as per the terms of the agreement. However, in cases where this amount is required

to be paid to any other person than the supplier on the direction of supplier or on an obligation arising out of a direction from the Government, it is worth pondering whether the same would still be tantamount to have been made to the "supplier". The recipient would treat such payments in his books as payment made to the supplier and thereby, completing the entire transaction of supply. In other words, the payment made to any other person would merely be a book adjustment.

In the case of *Modern Food Industries (India)*, the Hon'ble CESTAT, Delhi has even gone to the extent of holding that even when there is no payment in cash or in case where there is book adjustment, it cannot be claimed that there has been no sale. Similarly, West Bengal Authority for Advance Ruling in the case of *Senco Gold Limited* has held that consideration paid by way of setting off book debt is proper payment and ITC shall be admissible even if consideration is paid through book adjustment. In view of these rulings, it can be said that payment made to any other person would still be construed as payment made to supplier. In other words, another person other than the supplier steps into the shoes of supplier.

In the case of *Krishna Devloor (D.S. Krishna)*, the Hon'ble High Court of Delhi has observed that only when money is paid by one, to another, with a specific understanding, that it is the consideration for a contract, that the contract can be said to have come into existence. Hence, communication via E-mail or through proper modes should be made to the person other than the supplier informing that such payment is being made under the contract of agreement entered with the supplier.

This article has been published in Tax Sutra

This would strengthen the position of the recipient for availing ITC. Further, in the contract for supply, specific clauses may also be inserted stating that in case value of supply/ consideration towards the supply is required to be paid by the recipient to any other person than the supplier, such payment for the purposes of commercial understanding be deemed to have been paid to the supplier.

Even viewed from a different angle, the restriction regarding availability of ITC only upon payment to the supplier seems incongruous as any other person to whom payment is made can set off the liabilities/ dues accrued on account of the supplier. As long as the payment is made and the circle of supply is completed, there is no logic behind denying ITC merely on account of payment not made to the supplier.

However, in hindsight, the Revenue may argue basis judgments passed by the Hon'ble Supreme Court in the cases of *Jayam and Company, Godrej and Boyce Mfg. Co. Pvt. Ltd. And Ors, ALD Automotive Pvt. Ltd.* that taxing statute must be strictly interpreted, and ITC is only a statutory right subject to conditions and restrictions which the legislature may specify. Therefore, when the law requires payment to the supplier, payment made to any other person would not satisfy the proviso proposed to be inserted in Section 16(2)(c).

In view of the above it would be interesting to see how the amendment unfolds on actual implementation. Whether it leads to unnecessary litigation or not, only time will tell.

Statutory glitches in Online Gaming in India

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The advent of India's online gaming industry dates back to more than 2 decades when console and PC gaming brought several middle-income group Indians to digital gaming platforms. With higher disposable incomes, new gaming genres, and increased tablet and smartphone users, gaming is becoming increasingly accessible to India's massive population.

The online gaming websites host various forms and formats of games including cash games, guaranteed prize pools, tournaments, head-to-head competitions in which players compete amongst each other, etc. India's gaming market size grew 21% in 2021 and is expected to reach US$ 1.9 billion by 2024.[47]

LAWS REGULATING ONLINE GAMING IN INDIA

In the wake of the gaining impetus by the gaming industry, the Government of India has appointed Ministry of Electronics and Information Technology **(MeitY)** to regulate and oversee the online gaming industry in India. In April 2022, MeitY has amended the Intermediary Guidelines and Digital Media Ethics Code Rules, 2021 (applicable to social media intermediary) to regulate online gaming websites.

In keeping with this, the tax regime is also evolving to match up with the brisk changes in the gaming industry. In this article income tax provisions relating to deduction of tax on winnings from online gaming, its nuances and open areas are discussed.

Hitherto, the income by way of winnings from card games or other games of any other sort was chargeable under the category 'winnings from lottery or crossword puzzle, etc'. in terms of Section 115BB of the Income-tax Act, 1961 **(the Act)**. Taxes were required to be deducted under Section 194B at the rate of 30% only on winnings exceeding the threshold of INR 10,000.

The threshold limit for deduction of TDS provided under the earlier provisions resulted in players withdrawing amounts in multiples of INR 10,000 to escape from the trigger of deduction of TDS on such winnings. The Hon'ble Finance Minister in her Budget speech 2023 noted that deductors (online gaming websites) are withholding taxes under Section 194B of the Act by applying the threshold of INR 10,000 per transaction to avoid tax deduction, by splitting a winning into multiple transactions each below INR 10,000, which is not the intention of the statute. This resulted in the Government becoming attentive to the gaming industry and understanding the need to introduce a specific mechanism for charging income earned from online gaming.

INTRODUCTION OF SECTION 115BBJ AND SECTION 194 BA VIDE FINANCE ACT, 2023

New provisions have been introduced in the Act specific to taxing winnings from online gaming vide Section 115BBJ, which provides a rate of 30% for the purpose of levying income tax on such winnings. Also, Section 194BA has been inserted, which specifically deals with the liability to deduct TDS on net winnings earned from online gaming. Under the said provision, the liability to deduct TDS on such winnings arises at the time of withdrawal of 'net winnings', as well as any balance of such net winnings in the user account at the end of the financial year. The net winnings are required to be computed in the manner prescribed under the Rules. The threshold limit of INR 10,000 is no longer applicable.

[47] https://www.investindia.gov.in/sector/media/gaming

OVERLAPPING OF THE CHARGING SECTION AND THE MANNER OF DEDUCTING TDS

Section 194BA, which deals with TDS on online gaming was earlier proposed to be made effective from July 1, 2023. Consequently, Section 194B, the erstwhile provision that governed online games, was amended to be operative on online games until June 30, 2023. Au contraire, the charging provision for TDS on online games, i.e., Section 115BBJ, was proposed to come into force on April 1, 2023.

The misalignment in the dates of applicability of the two new sections was one of the preliminary issues faced by the gaming industry. In the transitional phase, there was a loose connection between the applicability of the charging section and the manner in which TDS is required to be deducted.

In order to plug together the dates of implementation of both the provisions, the Finance Bill, 2023 was amended and Section 194BA was brought into force from April 1, 2023 instead of the earlier proposed date of July 1, 2023.

Although the date of implementation of both the provisions has fixed certain challenges, absence of any prescribed mechanism for computing the 'net winnings' is causing nightmares to the online gaming intermediaries. There is no clarity as to what would be construed as 'net winnings', on which the TDS is required to be deducted.

AMBIGUITY IN THE MEANING OF THE TERM 'NET WINNINGS'

The term 'winnings' has not been defined under the Act. There are divergent views possible on what would be construed as winnings. For instance, a person used INR 100 to play a game which involved a prize money of INR 1,000. The said prize money was pooled by 10 players to play the game. At the end of the game, the winning player was handed over INR 1,000 which was pooled at the start of the game. In this case, what would be construed as its 'winnings' – INR 1,000 or INR 900 (INR 1,000 – INR 100).

As per the dictionary meanings, 'winnings' is something won such as money won by success in a game or competition. One can, therefore, interpret that amount net of money used to play the game i.e., INR 900 is the winnings from the game. Whereas another interpretation is possible that the prize money is the total amount won irrespective of the initial investment/ expenditure.

It is relevant to note that Section 58(4) of the Act states that no deduction would be allowed against income earned from winnings. As such there is a possibility that the department may take a view, that the intention of the law is crystal clear that they would not allow any kind of expenditure or allowance against winnings including that towards the amount used to play an online game.

However, if the Department takes a liberal approach and allows deduction of the amount used to play an online game, the concern that would arise is whether the entire amount deposited by a player in the wallet be allowed as a deduction to arrive at net winnings or only the amount appropriated towards a game be allowed to be deducted. In either case, the amount liable to deduction of TDS would be the same; only in cases where the deduction of the entire deposited amount is allowed, the liability to deduct TDS may get deferred. For instance, Mr. A deposits INR 500/-, uses INR 100/- towards playing a game, wins INR 1,000/- (including INR 100/- used to play) from the game and withdraws INR 900/- during the year. In this case, either of the following mechanism could be adopted to withhold.

INCREASE IN COMPLIANCE BURDEN OF THE ONLINE GAMING PLATFORMS

With the threshold limit of INR 10,000/- removed, TDS will have to be deducted even in case of withdrawal by players generating miniscule income from such games.

SET-OFF OF LOSSES OF ONE CONTEST/GAME AGAINST ANOTHER

Another issue that is yet to be fixed include whether losses from a contest or game can be set off against another contest or game and whether balance reflecting as on April 1, 2023 would be considered in computing net winnings.

It is expected that all the unsettled issues under the new regime for deduction of TDS on net winnings from online games will be put to rest post detailed guidelines and suitable clarifications from the Government. What remains a mystery is whether the guidelines will burden the industry with further compliances or give certain leniency to boost the sector's growth.

FOOD FOR THOUGHT- WHETHER ONLINE GAMING PLATFORMS CAN BE CONSIDERED AS 'PERSON RESPONSIBLE FOR PAYING'?

Section 194BA requires the 'person responsible for paying' to deduct TDS on income from any online game. Section 204, which specifies who can be considered as the person responsible for paying, does not cover online gaming websites.

The formats of online games where the role of the online gaming intermediary is limited to providing a platform to the interested players, collecting amount from the players and at the end of the game, distributing the same to the winner, is very similar to the offline games where the players gather to play a game, set aside an amount and all the players who lost the game pay the said amount to the winning player. Here, the player/s who lost the game is/are the person responsible for paying. In such situations, each and every player who is responsible to pay an amount would be the person responsible for paying and would be required to deduct TDS.

Further terms and conditions of each gaming platform would also be a factor in determining whether it takes any responsibility to make good the losses in the event of a default by any player.

Recently in the case of *Uber India Systems (P.) Ltd.* v. *JCIT*[48], Mumbai ITAT it was held that, Uber B.V. provided lead generation services on a principal-to-principal basis via an app for which service fee was charged and the role of Uber India Systems (P.) Ltd was only to act as a payment and collection service provider of Uber B.V. Thus, Uber India Systems (P.) Ltd could not be held as an 'assessee-in-default' for non-deduction of tax under Section 194C of the Act, in respect of payments made to drivers on behalf of Uber B.V. In this case, the contract for providing cab service was between the user of the app and the driver-partner. As such, the user of the app is the person responsible for paying and not Uber India Systems (P.) Ltd. which is merely acting as the facilitator.

When it comes to Section 194BA of the Act, it defines 'online gaming intermediary' to mean an intermediary that offers one or more online games. The responsibility to deduct TDS is on the 'person responsible for paying'. Thus, for withholding tax obligation to arise under Section 194BA, the online gaming platforms should fall within the ambit of the phrase 'person responsible for paying' as outlined under Section 204 of the Act.

Even after outlining the definition of 'online gaming intermediary' the issue w.r.t whether online gaming websites would be construed as a person responsible for payment or not still persists, since bare provisions do not cast an obligation on 'online gaming intermediary' for withholding of taxes.

This article has been published in Medianama

[48] [2021] 125 taxmann.com 185

Vivad se Vishwas II – A Window of Opportunity to Reap the Fruits of your Award

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Although, in the Union Budget 23-24, the Government of India had allocated INR 10 lakh crore (3.3% of GDP) towards infrastructure development, over the past decade, some of the biggest names in infrastructure have faced a torrid time financially. Some of this has been attributable to the fact that the contractors/concessionaires have been involved in long drawn disputes with the government and its entities resulting in crippling effects to cashflows and over leveraged balance sheets. With government officials being reluctant to approve payouts (even after arbitral awards/court decrees had been issued in favor of contractors) due to potential vigilance enquiries, private participation in infrastructure development began to adopt a more cautious approach. This approach of the government led to a backlog of litigation cases, working capital constraints, a reduction in competition in public tenders and a downward outlook in fresh investment.

In 2021, the government introduced the novel concept that whilst the government appealed against the arbitral award in favor of the contractor, the government would release funds against security to the contractor[49]. That concept fell quickly out of favor with contractors who could not utilize such funds except by way of margin money for providing the security to procure these very funds. Most importantly, the litigation between the government and the contractors did not come to an end through the implementation of this concept.

To rectify this, the government, one of the largest litigants in India, has brought out *'Vivad se Vishwas II (Contractual Disputes)'* Scheme (**Scheme**) to settle disputes as set out in the Office Memorandum dated 29.05.2023 issued by Ministry of Finance, Department of Expenditure, Procurement Policy Division (**Office Memorandum**).

WHICH ENTITIES CAN SETTLE UNDER THE SCHEME?

Disputes between a Procuring Entity and a Contractor can be settled through this Scheme.

Procuring Entity

- Inclusions
  - Central Government Ministries/Departments and attached and subordinate bodies.
  - Autonomous Bodies such as National Highways Authority of India **(NHAI)**, some of the major ports, Central Government Employees Welfare Housing Organisation **(CGEWHO)**, Central Power Research Institute **(CPRI)**, Council of Scientific and Industrial Research **(CSIR)**, Indian Railways Institute of Civil Engineering **(IRICEN)**, and others[50].
  - Public Sector Banks and Financial Institutions such as SBI, BoI, BoM, Bank of Baroda and others.
  - Central Public Sector Enterprises such as ONGC, BPCL, HPCL, GAIL, EIL, AAI, HAL, IRCTC, BEML, DFCCIL, BSNL, CCL, CIL, NMDC, MMTC, NALCO, NTPC, PEC, PFC and others[51].

[49] 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.

[50] For a detailed list see https://igod.gov.in/ug/E051/organizations

[51] For a detailed list see http://www.bsepsu.com/list-cpse.asp

- Union Territories without legislature and all agencies/undertakings thereof.
- All organizations where GoI holding is 50%, unless these organizations have opted out.

- Exclusions
  - The State Government and Union Territories with legislature and attached and subordinate bodies have been urged to adopt the Scheme but are presently not included.

CONTRACTOR

- Any contractor willing to participate, including Central Public Sector Enterprises who are contractors to the procuring entities[52].
- However, a concern exists. As per Paragraph 8, the scheme shall not apply to *'cases under international arbitration'.* This should ordinarily be interpreted to mean cases where the seat is situated outside India. However, if this is interpreted to mean *'international commercial arbitration'* under the Arbitration and Conciliation Act, 1996, this scheme would only apply to parties who are Indian nationals and corporate entities registered in India.
- The contractor need not be an award-holder. Importantly, even where the contractor is the award/judgment debtor, it can opt to settle under this Scheme[53]. So, if the contractor has an Arbitral Award or a Court Award against it, it can reduce its liability by opting to settle under this Scheme as per the same mathematical calculation provided below. This is indeed a welcome and bold move by the government.

WHAT DISPUTES CAN BE SETTLED?

- Only contractual disputes can be settled[54]. These include:
  - Procurement contracts (whether goods, services or works)[55].
  - PPP arrangements.
  - Earning contracts where the government receives money in exchange for goods, services, rights and other considerations.
- The Scheme is restricted to where:
  - An arbitral award has been issued up to 31.01.2023 (**Arbitral Award**).[56] Only cases involving domestic arbitration and not cases involving international arbitration are included.[57] MSEFC awards are included. The Arbitral Award does not include interim orders.
  - A court award has been issued up to 30.04.2023 (**Court Award**).[58] Court Award can include a decree arising out of a civil suit or arising out of any proceeding pursuant to an arbitral award. The Court Award does not include interim orders.
  - Conciliation is ongoing after Arbitral Award or Court Award.[59]
  - Monetary relief is the only relief granted. Where the Arbitral Award or Court Award includes a relief involving specific performance, this Scheme will not apply.[60]
- It is clear from the above that non-contractual disputes cannot be settled through this Scheme. Further, it is not applicable to matters which have not resulted in an arbitral award up to 31.01.2023 or a court decree up to 30.04.2023.

[52] Para 7, Office Memorandum
[53] Para 11, Office Memorandum
[54] Para 4, Office Memorandum
[55] Para 9, Office Memorandum
[56] Para 10b, Office Memorandum
[57] Para 8, Office Memorandum
[58] Para 10a, Office Memorandum
[59] Para 23, Office Memorandum
[60] Para 5, Office Memorandum

WINDOW OF APPLICATION

The Scheme, currently, will be open between 15.07.2023 to 31.10.2023.[41] However, depending upon when the government is able to have the portal up and running, this may be extended.

Arbitral[42] Award	65% of the net amount awarded or amount claimed under the Scheme, whichever is lower. (-) Amount already paid. (+) Pre-reference interest and pendent lite interest at actuals. (+) 9% simple interest as post award interest.
Court Award[43]	85% of the net amount awarded or amount claimed under the Scheme, whichever is lower. (-) Amount already paid. (+) Pre-reference interest and pendent lite interest at actuals. (+) 9% simple interest as post award interest.

- Net amount is calculated after deducting setting off any claims and counterclaims awarded.[44]
- 9% p.a. post-award simple interest is payable after time period provided in Arbitral Award or Court Award for payment lapses until date of acceptance of settlement offer. If no time period is stipulated in the Award, the default time period which is interest free shall be 30 days.
  - If some part payment has already been made, post-award interest will be calculated on balance amount.[45] However, deposit in court shall not be considered as payment.[46]
  - Post-award interest of 9% simple interest p.a. shall override the rate prescribed in the Arbitral Award or Court Award

WINDOW OF APPLICATION

- Claims are to be submitted through Government e-Marketplace or relevant portals.
- Choice of opting for settlement lies with the Contractor who has to key in details of eligible matters on said portals.

[41] Para 17, Office Memorandum
[42] Para 10b, Office Memorandum
[43] Para 10a, Office Memorandum
[44] Note 1 to Para 10, Office Memorandum
[45] Note 2 and 3 to Para 10, Office Memorandum
[46] Para 12, Office Memorandum

- Each matter is treated distinctly. Even multiple arbitrations/litigations under one contract are treated distinctly.
- The Procuring Entity shall verify and update details.
- The Procuring Entity shall make an offer within 2 weeks of receipt of claims.
  - The Procuring Entity is bound to make an offer if the claim is below INR 500 cr.
  - If the claim is above INR 500 cr., the Procuring Entity has the discretion not to make an offer, but such a decision has to be reasoned and is to be reviewed. However, the Contractor can avoid such a situation by choosing to reduce the claim amount to below INR 500 cr. even if the Arbitral Award / Court Award is greater than INR 500 cr.
  - From the language of the Office Memorandum, it appears that the Procuring Entity has no discretion to reduce the offer below an amount arrived at through the mathematical

calculations prescribed in the Office Memorandum. However, there may be differences of opinion when the Procuring Entity changes the claim amounts upon verification thereof.

- The Contractor is not bound to accept the offer. However, Contractor has to convey acceptance of the offer within 30 calendar days. The Procuring Entity can amend/withdraw the offer prior to acceptance. If prior to acceptance, the net amount changes on account of any order of any court, the Procuring Entity can amend the offer. Notably, the Contractor cannot withdraw its request.
- Upon acceptance within the time period specified, auto generated acknowledgment shall be issued which shall bind parties. If after acknowledgment, the net amount changes on account of any order of a court, neither party can back out of settlement.
- Upon issuance of acknowledgement, Contractor or Procuring Entity, as the case may be, is to file application for withdrawal of case within 45 days.

  a. In the case of Contractor filing the withdrawal, Contractor shall upload proof of withdrawal and settlement agreement shall be executed within 30 days thereafter.

  b. In the case of the Procuring Entity filing the withdrawal, settlement agreement shall be executed within 30 days of filing of such application.

- A settlement agreement is to be drawn up. Stamp duty is to be borne by the Contractor.
- Payout shall happen within 30 days of execution of the settlement agreement.

COMMENTS AND CONCERNS

Although the Office Memorandum is definitely a forward-looking step for reducing backlog and settling matters, it requires a few clarifications and there are a few concerns and suggestions.

- As per Paragraph 8, the Scheme shall not apply to *'cases under international arbitration'*. This should ordinarily be interpreted to mean cases where the seat is situated outside India. However, if this is interpreted to mean 'international commercial arbitration' under the Arbitration and Conciliation Act, 1996, this Scheme would not apply to cases where the Contractor is a foreign national or a corporate entity not registered in India. The distinction between the applicability to domestic and international arbitrations should be removed, or at the very least clarified.
- The distinction between the percentage amount payable for Arbitral Awards (65%) and Court Awards (85%) has no reasonable basis and should be removed.
- There is a potential confusion that arises from Illustration 1. It appears that the net amount excludes pre-reference and pendent lite interest, i.e., the net amount is the basic awarded. If so, the pre-reference and pendent lite interest up to date of the Arbitral Award will be paid separately and is not based on the percentage payout but on the net amount. However, this is not distinctly brought out in the Office Memorandum.
- It should be clarified in Step 3 of Para 14 of the Office Memorandum that:

  - The evaluation by the Procuring Entity of any request for settlement made by the Contractor should only be limited to:

    - verification of whether there exists an Arbitral Award or Court Award,
    - whether the same is eligible under the Office Memorandum, and
    - whether the claim amounts are true and correct as per the Arbitral Award or Court Award.

  - If there is a difference of opinion on the claim amounts, the verification of the same ought to be done along with the Contractor and an independent body within one week.

  - Apart from the limited verification set out above, the Procuring Entity should have no leeway (except where the claim amount is in excess of INR 500 cr.) to make an offer that falls below the mathematical calculations set out in the Office Memorandum.

- The Office Memorandum ought to urge State Governments to exempt settlement agreements executed pursuant to the Office Memorandum from stamp duty implications.

CONCLUDING REMARKS

Notwithstanding the above concerns, this is a much-needed boost to a sector that is plagued by years of uncertainty when it comes to realization of amounts under arbitral awards. Although the percentage realizations may be lower than the industry's expectations, they may still be sufficient to alleviate immediate cash flow constraints. If executed well, the impact of this Office Memorandum on judicial backlog could be sizeable. Importantly, this may very well rescue contractors in deep financial trouble and give relief to banks and creditors who were struggling to realize value in infrastructure development companies that were undergoing Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016. This would also lead to a direct injection of cash into this sector and bring back competition in newly floated tenders. Provided the state coffers can bear the sudden burden and the processing of requests is glitch free, there may just be a deluge of requests to settle. Perhaps Vishwas or trust can indeed be rebuilt in this manner.

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