ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

ELP KNOWLEDGE SERIES

India Update

Part 3 of 2022

TABLE OF CONTENTS

FOREWORD

Dear Reader,

'India Update – Part 3 of 2022' is the latest addition to the ELP Knowledge Series.

This document is intended to keep you updated on the latest legal, policy and regulatory developments in India. 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.

The first section of the series discusses the recent GST Circular on Liquidated Damages by the Department of Revenue. Articles by ELP's tax and disputes team analyze this circular from a tax implication perspective as well as from the scope for revisiting contractual positions and particularisation of claims arising out of commercial contracts. Another article in this section discussed threadbare the Supreme Court's verdict on the constitutionality of various provisions of the Prevention of Money Laundering Act, 2002 .

An emergency arbitrator is relatively new to the scene of arbitration law in India. Our chapter titled *A Creature Called 'Emergency Arbitrator'* discusses the evolving role of the emergency arbitration in India, in the context of both, India-seated as well as foreign-seated arbitrations, with a focus on interim reliefs under Sections 9 and 17 of the Arbitration and Conciliation Act, 1996.

Against the backdrop of the Department of Consumer Affairs notifying the guidelines for prevention of misleading advertisements and endorsements, our team has authored an article which simplifies these guidelines by listing the Do's and Don'ts for advertising in India.

Our corporate team has authored a section on new overseas investment norms introduced by Reserve Bank of India and Ministry of Finance. The changes include clarity on ODI-FDI structure, allowing payment of deferred consideration, clear segregation of overseas direct and portfolio investment, and flexibility to make overseas direct investment in financial services by certain Indian entities with fewer restrictions.

Subsequent sections include articles by our banking team on *Trust Theory, Security & Margin Money* and on *Creating an Architecture for Net Zero Emissions* by our infrastructure and energy team.

Finally we end the Knowledge Series with two important articles – both of which will have implications for doing business in India. The first is is the decriminalization of labour penalties under the four new proposed labour codes, while the second discusses an important circular by the GST authorities on Inverted Duty Structures.

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

Regards,
Team ELP

GST Circular on Liquidated Damages – Part I
Damages have become Less Damaging

Author: Ritesh Kanodia, Partner- riteshkanodia@elp-in.com

The Government of India has issued a much-awaited clarification (vide Circular No. 178/10/2022-GST dated 3rd August 2022) on what could get covered as a 'supply' under the entry of "Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act". The entry has been a subject matter of deliberation and dispute since its introduction under the service tax regime, which then continued into the GST regime.

> The key question for determination has been that when a Party (say 'A') recovers compensation or damages or cancellation charges from another Party (say 'B') for non-performance or any breach of contract by it, then is that non-performance or breach a separate independent supply of 'tolerating an act' by Party A, and consequently whether GST is applicable.

The Circular clarifies that the following key aspects would be determinative of whether GST applies:

- There is a contract [express or implied] between parties for a consideration – A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such an act.
- There cannot be said to be a contract where a party agrees to tolerating a breach or to an illegal act or violating the provisions of law.
- There must be a necessary and sufficient nexus between the supply (i.e., agreement to do or to abstain from doing something) and the consideration.
- An agreement to do an act or abstain from doing an act or to tolerate an act or a situation cannot be imagined or presumed to exist just because there is a flow of money from one party to another.
- The amounts are recovered as a deterrent to avoid the event – if yes, they cannot be considered as consideration.
- The recoveries arise out of mere events in the contract and are not an independent supply.
- The recoveries are to compensate for the loss/damage that has been incurred.
- There is no option but to bear/tolerate the act when it happens (such as cancellation of coal block by the Government or dishonour of cheque)
- The other party does not get anything in return

Basis the above principles, it is clarified that that amount received towards liquidated damages, compensation for cancellation of coal blocks, cheque dishonour fine/penalty, penalty imposed for violation of laws, forfeiture of salary or payment of bond amount from employee on leaving the employment before minimum agreed period, is not liable to GST. The recoveries/payments are not made for tolerating an act, rather, they are amounts for not tolerating the act or a situation.

INDUSTRY IMPACT AND WAY FORWARD

Another aspect that has been clarified is of instances where amounts received is not to be treated as damages or penalty for breach or amount towards refraining from an act, however, are liable basis the taxability or the tax rate applicable to the dominant or principal service. In such a case, if the service is exempt or not liable, the question of levy of GST on such recoveries does not arise. The specific instances that have been clarified are compensation for not collecting

toll charges (user of service remains toll charges – which is exempt), late payment surcharge fee (taxable as principal supply), fixed capacity chargers for power (are charges for electricity which is exempt) and cancellation charges (such as cancellation charges train/flight tickets – liable at the rate at which the class booked is taxable).

The Clarification issued has aptly distinguished between a situation where two parties, whether by way of an express or implied contract, agree to tolerate an act, or an obligation to do an act or refrain from doing act in lieu of agreed consideration (such as a non-compete agreement) ***versus*** a situation where the flow of money is not arising out of a contractual quid pro quo between the parties, but is a compensation/penalty or charges to be recovered from another party for the loss/damages that it might have incurred consequential to the breach or a non-performance.

Consequently, in every contract, the key question for determination would be whether payments received constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a 'supply' within the meaning of the Act, otherwise it is not a 'supply.'

In this context, a key aspect that needs to be evaluated is whether the contracts in place communicate the proper characterization of the payments to be made under the contract e.g., whether the payment say for damages under the contract is arising out of a breach or is it for amounts payable (say arising out of a force majeure and not a breach) – will the taxability defer. The true nature and essence of the payment becomes critical here. Also, there could be instances where the contract provides for series of payments, such as consideration for a supply, or delayed payment charges or penalty for termination of a contract or waiver of payments etc, some of which could be taxable and some not. It would become important to differentiate between each of the aspects while drafting the contract and demarcate amounts individually – either immediately or subsequently. The same would also apply while for any claim in a litigation or any arbitration claim filed by the parties. Where such amounts are not broken up, there will be another debate on whether the supplies are mixed supply or composite supply and if composite supply, what is the dominant intent.

Also, now that the position on taxability stands clarified by the circular, it is important for companies to have a re-look at their past positions and assess the future course of action. Where the amounts are not liable basis the principles laid down in the circular, companies should immediately correspond with their employer/customers indicating the new position on applicability of tax. At this stage, it is to be noted that since GST is not attracted basis that there is no supply or that amount received is not consideration, there will also not be any reversal of credit (as the same is not an exempt supply).

There will be a need to carry out system changes for recoveries such as late payment charges or cancellation charges etc. which may either become non-taxable if principal supply is exempt or may now become liable at a lower rate of tax applicable to the principal supply. Additionally, there could be some loss of credit arising out of enhancement in reversal for common services.

For past instances, where the supplier has paid GST, filing of a refund claim can be evaluated in instances where the company has not recovered GST from the recipient (e.g., amount recovered from employee for his early exit) or where a company being a recipient has been charged GST and has borne the burden of tax. The refund would be available subject to the bar of unjust enrichment. Companies will also have to analyze whether such refund claims are barred by limitation. Needless to also mention that where any litigation is pending on the subject matter, the same should be dealt with expeditiously either by filing additional submissions and/or requesting for an early hearing in the matter.

This article has been published in Bloomberg Quint

GST Circular on Liquidated Damages – Part II Opportunities in Contracts/Claims

Authors: Naresh Thacker, Partner-nareshthacker@elp-in.com
Alok Jain, Partner- alokjain@elp-in.com
Tvisha Desai- tvishadesai@elp-in.com

CONTEXT SETTING

On August 3, 2022 the Department of Revenue, Ministry of Finance issued its clarificatory Circular No. 178/10/2022-GST (**Circular**) which primarily addresses the taxability of liquidated damages and penalty. The basic principle emanating from the Circular is that there must be a necessary and sufficient nexus between the supply (i.e., agreement to do or to abstain from doing something or to tolerate an act) and the consideration to give rise to a taxable event.

The Circular lists several examples where GST would not be applicable on the amounts which are a mere flow of money to deter a breach (which would not amount to an agreement to abstain from doing something). It also lists several examples where GST would apply on the amounts (whether such amounts are termed as fine or penalty) which would be consideration for a supply (which is ancillary to the principal supply).

Basis the principles stated in the Circular, this article discusses the scope for revisiting contractual positions and particularisation of claims arising out of commercial contracts.

CURATING CLAIMS

As the Circular is quite clear on the applicability of GST on liquidated damages, we consider aspects on which the Circular is silent, namely other claims that parties may have.

In a dispute arising from a construction contract, some of the common heads of claims include (i) claims for refund of deductions from running bills/invoices (ii) payment of amounts due and outstanding (iii) change order/variation claims (iv) delay claims (prolongation costs, disruption claims, acceleration claims, etc.) (v) claims for general damages and (vi) claims arising out of termination (While this article considers typical claims arising in a construction contract, it is relevant to note that the principles/observations below hold true for any commercial contract).

For (i) and (ii), as there is a supply element directly involved, GST would be applicable on the amounts claimed. For (iii), where the claim is for additional work performed, a similar conclusion may be reached. However, if the claim is for damages for unlawful descoping, the situation is not as straightforward. It may be arguable that since no supply was made, GST would not apply on the claimed amount (presumably the expected profits on the value of the descoped work). This would be heavily dependent on how the claim is structured and the factual matrix.

Whether GST would be applicable on delay claims is not entirely straightforward. This is because in a scenario where the claim is purely based on idling of machinery and equipment and the factual conspectus discloses that no supply occurred during such period of idling (for example, during a force majeure event), then there is a potential case to be made out that no GST should apply on the amount that may be eventually awarded. However, delay claims for extended stay often involve periods of reduced productivity rather than nil productivity.

Since they are linked back to supply, it is arguable that the amounts claimed form consideration that flows from an implied agreement that parties would be compensated for the decreased productivity. In fact, it could be considered consideration for tolerating the breach of the contract and therefore taxable.

While clarifying that liquidated damages would not attract GST, the Circular also seems to indicate a similar principle for general damages in paragraph 7.1, when it states that "The compensation is not by way of consideration for any independent activity; it is just an event in the course of performance of that contract". The observation may not be universally applicable. It may hold true for a claim for compensation for failure to accept delivery of goods or services (loss of expected profits or market price damages) or a failure to perform the obligations (risk and cost claims). However, claims for loss arising from delayed payments or claims such as warehousing costs on account of delayed acceptance of delivery may be treated as consideration for a supply, ancillary to the principal supply, and hence, may attract GST.

With respect to claims arising from termination, the issue becomes even more complicated. The causation will certainly be a determinative factor, but so will be the nature of the claim. For example, compensation payable on account of termination for convenience may in fact be construed as cancellation fee (see paragraph 11 of the Circular), as the facilitation service of allowing such termination against payment of termination charges, may be considered as a natural bundle of services that are being supplied. However, a termination pay out for breach could amount to mere flow of money that was stipulated to deter a breach. In a termination on account of continuing force majeure, since the claim would only pertain to payment for work performed, GST may be attracted.

Evidently, the characterization of the claim, be it at the stage when the claim is preferred during the contractual period or post contract, becomes critical for the purposes of understanding applicability of GST. There apart, at the stage of presentation of pleadings, it may also become relevant to understand on what heads one should claim GST (and interest) in addition to the quantified amounts.

Considering this Circular, it may also be interesting to see how arbitral tribunals deal with the applicability of GST on claimed amounts in the arbitral awards and how the tax authorities would treat the arbitral tribunal's award.

REVISITING THE CONTRACT

The Circular provides opportunities for tax planning through a surgical modification of the terms and conditions of the commercial contract. Payment events in a typical commercial contract can be innumerable. Some of these include advance payments (whether secured through advance bank guarantees), payment of running bills, payment of final bills, retention amounts and release thereof, penalties and fines, liquidated damages, delayed payment charges, force majeure costs, suspension costs, price escalation payments, indemnity, and termination pay-outs.

Some of the above are directly linked to the supply and others may be categorized as ancillary to the supply or consideration for the natural bundle of obligations associated with such supply. Other events are entirely de hors the supply, or do not qualify as consideration for tolerance of act/omission/breach.

Succinct redrafting of the clauses linked to such payment events can enable parties to plan and optimize their tax strategies in advance. Often, due to imprecise language or a lack of tax planning, even payment events that are ordinarily not forming consideration for supply may end up becoming taxable events. Equally so, over zealousness in tax planning could lead to contractual complications. By way of example, interest on delayed payments may ordinarily be liable to GST. A potential recasting of such a clause to reflect an intention to deter a party from delaying payments may rescue such amounts

from applicability of GST. At the same time, such revised clause may overstep the thresholds of reasonableness under section 74 of the Indian Contract Act, 1872, leading it to be struck down and negating its very purpose.

While the Circular obviously will result in refund applications in cases where GST liability has been imposed in disregard of the principles as laid out therein, it also acts as an important guide for contract draftsmen and dispute resolution practitioners. Tax planning and claim management can now be executed using the markers laid down in the said Circular.

The Verdict of the Supreme Court on Money Laundering – Takeaways and Aftermath

Authors: Kumar Visalaksh, Partner- kumarvisalaksh@elp-in.com
Ajitesh Dayal Singh, Associate- ajiteshdayalsingh@elp-in.com

INTRODUCTION

In the last week of July, one of the most awaited decisions this year was pronounced in Vijay Madanlal Choudhary. The three-judge bench of the Supreme Court headed by Justice A.M. Khanwilkar (now retired) considered the constitutionality of various provisions of the Prevention of Money Laundering Act, 2002 (**PMLA**). Most of these provisions, being deviations from the general procedural law which applies to other crimes, were assailed as being arbitrary, discriminatory, and violative of fundamental rights.

The bench, however, unanimously upheld each provision and amendment assailed. The basic premise of the decision is that money laundering by itself is one of the most heinous offences, comparable to terrorism and drug trafficking. The Court finds that the PMLA is a special statute, equipped with exceptions to criminal procedural law to combat this most heinous crime.

In an extraordinary turn of events, the Supreme Court has already issued notice in a review petition filed against the decision, less than a month after the order was passed. This article reflects on a few findings of the Court in Vijay Madanlal Choudhary and touches on the aspect of review.

SCOPE OF THE OFFENCE

Section 3 of the Act sets out the offence. The Section is widely worded, but a plain reading shows that the offence of money-laundering must have two components: (a) the money aspect, that is concealment, possession, acquisition, or use of 'proceeds of crime', and (b) the laundering aspect – claiming or projecting such proceeds as 'untainted property'. It suggests that without the second aspect, the offence under PMLA is not made out.

The judgment has upturned this understanding. As per the bench, the word 'and' which separates these two components in Section 3 is to be read as an 'or' to give full play to the provision. In effect, concealment, possession, acquisition, and use of 'proceeds of crime' all constitute independent offences of money-laundering.

The exercise of reading 'and' as 'or' (or the other way around) is not unheard of. The Court is often called upon to do so if it is the only way to give meaning to a provision. Section 3, however, in its plain meaning is not unworkable. Following the basic principle that a penal provision must be strictly construed; the Court could have chosen to not expand any further the already massive scope of the Section.

More confusion results from the Supreme Court interpreting 'and' as 'or' in this case – for example, if the Parliament had intended to use the word 'or', it could have replaced the word 'and' by an amendment. But in doing so, it would clearly not have been possible to say that concealment, possession, etc. of proceeds of crime were and had always been independent offences. On the other hand, the judicial clarification provided now risks placing that exact weapon in the hands of the ED for justifying ongoing and future prosecutions in respect of past actions (although a defence on the basis of Article 20(1) should be available to the accused).

The effect of holding 'possession' and 'concealment' to be independent offences is twofold – first, prosecution under the PMLA can be launched even in cases where the person is unknowingly in possession of property with criminal antecedents, and second, prosecution can be launched even if no action whatsoever is taken to "launder" proceeds of criminal activity from before the implementation of PMLA in 2005. The premise here is that a person commits a "continuing offence" of money laundering simply by retention of such proceeds.

REVERSE BURDEN OF PROOF

Section 24 provides that the burden of proving that the proceeds of crime are untainted property lies on the accused – meaning that for the offence of money laundering, a person is guilty until proven innocent. The Court has found this reverse burden to be justified and in line with the objects of the Act.

The bench referred in this regard to the 'foundational facts' that must be established by the authorities initiating action, including the existence of proceeds of crime. In its view, once such facts are established, the onus of proving money laundering is reasonably discharged. Given the wide interpretation given to the offence – where the possession of proceeds of crime is itself a crime of money laundering, the reverse burden of proof practically leaves little scope for defence.

THE TWIN CONDITIONS FOR BAIL

The conditions of bail under Section 45 are that (I) there should be reasonable grounds for believing that the accused is not guilty; and (ii) that he is not likely to commit any offence while on bail. The conditions are unusual, to say the least. For context, under the Code of Criminal Procedure, 1973 – such conditions are saved for only the most severe of crimes – those punishable by death or life imprisonment. In other cases, grant of bail depends not on any assessment of the guilt or innocence of the accused, but broadly on whether custody is essential to ensure compliance.

The 'twin conditions' in the PMLA were even struck down by a two-judge bench presided by Justice R.F. Nariman in Nikesh Tarachand Shah (2017) as they were creating discriminatory and manifestly arbitrary results, based on the nature of the 'predicate offence' instead of the offence of money laundering. The Court also noted that provisions akin to the twin conditions could only be upheld on the ground of "compelling State interest in tackling crimes of an extremely heinous nature" which was not true for all cases of money laundering.

Section 45 was thereafter amended, expanding their application from specified predicate offences to all offences of money laundering. In effect, the Parliament chose to address the defect of discrimination not by coming up with a reasonable classification for when the twin conditions should apply, but by making the conditions universally applicable. The amendment, which was ostensibly to cure the defect pointed out by the Supreme Court, only made the provision harsher and more blind.

However, the Court has now considered that the amended provision is valid. It disagrees heavily with the observations in Nikesh Tarachand which suggested that onerous qualifications on the right to bail are only justified in cases pertaining to the most heinous offences – such as those under the Terrorist and Disruptive Activities (Prevention) Act, 1987. In the Court's view, money laundering is no less heinous a crime.

A question that needs to be asked (especially with the now-enlarged scope of money-laundering) is whether every case of money-laundering is so inherently heinous and a 'threat to the sovereignty and integrity of the country' that the accused regardless must remain in custody if it merely seems that they are guilty. Remember that while making its mind on this question, the court is also by law required to presume the accused guilty. Effectively, all of this makes bail under the PMLA an improbability at best. To make things worse, the Court explicitly finds that even when exercising writ jurisdiction in PMLA matters, the courts must apply these conditions.

FINDINGS

The bench has also upheld various powers of the ED inter alia in relation to search and seizure, attachment of property, powers of arrest, summons, production of documents, etc., finding in respect of each power that it is subject to sufficient safeguards and has reasonable nexus with the purposes and objects sought to be achieved by the PMLA.

Importantly, the bench has also clarified that authorities under the PMLA are not police officers, and that proceedings under Section 50 (summons, production of documents, taking of evidence etc.) are inquiries and not 'investigations'. Production of Enforcement Case Information Report (ECIR) is also not required, and it is sufficient if the grounds of arrest are disclosed at the time of arrest. Statements recorded by the authorities have also been clarified to not be hit by Article 20(3) (right against self-incrimination) or Article 21 of the Constitution of India. In effect, the ED is validated as an authority having all police powers, but not subject to the same limitations.

WHAT COMES NEXT

There are two different things to be said about this decision. The first pertains to the findings on the various powers of the ED. While one may have hoped for a different result, these findings will most likely not make a change to the ED's approach. In the end, all the Court has done is accord its approval to the statute which carved out these powers, and which the ED was already enjoying. The second is a more discomforting thought, stemming from the possibility (and history) of misuse.

The PMLA makes exceptions to the established laws of evidence and procedure for an important sovereign purpose, viz. threats to the sovereignty and integrity of India. By equating money laundering to terrorism and drug trafficking, etc., the PMLA seems to have taken a different direction altogether. For example, after the 2019 amendment, the exceptions from the law (viz., the much higher standard for bail and reverse burden of proof) can be made for terrorists and copyright infringers alike. The PMLA has lost sight of the basic proportionality which holds criminal law together and makes it sensible.

At the end of the day, the PMLA is a penal statute, aimed at meting out punishment for money laundering. Money laundering is only punishable with a maximum of seven years imprisonment (ten, in cases of NDPS offences). Clearly then, even the substantive provisions of the PMLA do not consider money laundering to be a crime with the same magnitude as offences under the TADA or UAPA (punishable by death or life imprisonment), and for good reason. How is there any proportionality then in equating money laundering to such offences when it comes to procedure?

Ironically, while upholding such extreme measures reserved for the worst crimes, the Court has found that the PMLA is 'neither a pure regulatory legislation nor a pure penal legislation', but an 'amalgam'. It is another matter that the amendments to the PMLA were moved as money bills, the validity of which is still pending before the Supreme Court. All in all, the larger meaning given to money laundering and the unqualified approvals to the reverse burden and bail provisions, together risk creating something quite disconnected from money laundering, i.e., a tool to bully and harass.

Notably, on 23 August , 2022 the ratio of Vijay Madanlal Choudhary (on interim confiscation of property) was doubted in a decision authored by the Chief Justice in Ganapati Dealcom Pvt. Ltd., stating that much scope had been left for arbitrary application. Shortly thereafter, when the review petition was listed before and taken up by the bench comprising the Chief Justice along with Justice Maheshwari and Justice Ravikumar (who had both joined Justice AM Khanwilkar in Vijay Madanlal Choudhary), he observed that the bench was prima facie convinced that at least two of the issues raised in the instant petition require consideration, viz., the reverse burden of proof and the ECIR is not required to be provided to the accused.

For the time being, the Supreme Court has chosen

not to reconsider the decision completely. Some important grounds on which review has otherwise been sought are already captured in our analysis above, such as the improper reading the word 'and' as 'or', and the absurdity resulting from treating money-laundering as a 'continuing offence'. Review has also been sought on the ground that the validity of the amended sections (such as on the scope of the offence and twin-conditions for bail) could not have been decided without first considering whether such amendments can be brought about as money bills.

Regardless, even a limited outcome of in the review petition will create an interesting space for PMLA practice. At the pace things are currently proceeding, one may not have to wait too long.

This article has been published in Tax Sutra

Government Revamps Overseas Investment Rules: Allows Investment in Financial Services, Deferred Payment of Consideration, and Other Changes

Authors: Yashojit Mitra, Partner – yashojitmitra@elp-in.com/
Mitesh Chauhan, Director – miteshchauhan@elp-in.com
Devyani Singh, Director – devyanisingh@elp-in.com
Tanvi Goyal, Principal Associate –tanvigoyal@elp-in.com
Aditi Ladha, Associate- aditiladha@elp-in.com

With a view to liberalize and promote ease of doing business in India, the Central Government and the Reserve Bank of India (**RBI**) have simplified the existing framework for overseas investment by persons resident in India and has notified the Foreign Exchange Management (Overseas Investment) Rules, 2022 (**OI Rules**) read with the Foreign Exchange Management (Overseas Investment) Regulations, 2022 (**OI Regulations**) and the Foreign Exchange Management (Overseas Investment) Directions, 2022 (**OI Directions**) in supersession of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015 (collectively OI Rules, OI Regulations and OI Directions are referred to as the (**OI Regime**).

While clarity on certain aspects may be forthcoming soon, *prima facie* some of the key observations under the OI Regime are as follows:

OVERSEAS DIRECT INVESTMENT (ODI) IN FINANCIAL SERVICES ACTIVITY

An Indian entity which is not engaged in financial services activity in India has been permitted to make ODI in a foreign entity which is directly or indirectly engaged in financial services activity (except banking or insurance), subject to the condition that such Indian entity has posted net profits during the preceding three financial years. This was earlier not permitted and is likely to open doors for many Indian entities looking to invest in overseas financial services activities.

It is also interesting to note that the condition relating to obtaining of approval (as may be required) from regulators of relevant financial services activities, in India and host country/jurisdiction for engaging in such financial services activities in the host country/jurisdiction, (as applicable to an Indian entity engaged in financial services activities which intends to undertake such activity), is currently not applicable to an Indian entity which proposes to undertake financial services activity in host country/jurisdiction and is not engaged in the same in India.

Prior to the OI Regime, an Indian entity engaged in the financial services activity had to mandatorily obtain approval from the Indian regulator and regulator of host country/jurisdiction for undertaking financial services activity in the host country/jurisdiction. Under the present OI Regime, regulatory approval only if required, under Indian law or laws of the host country/jurisdiction, will need to be obtained. Family offices will likely explore this opportunity to invest overseas in financial services activity through their core investment company (**CICs**) and nonbank financial company (**NBFCs**).

CLARITY ON DEFINITIONS OF OVERSEAS DIRECT INVESTMENT (ODI) AND OVERSEAS PORTFOLIO INVESTMENT (OPI)

Overseas Direct Investment (ODI) has been defined as:

- acquisition of any unlisted equity capital (equity shares, perpetual capital, irredeemable or in the nature of fully and compulsorily convertible); or
- subscription as a part of the Memorandum of Association of a foreign entity, or
- with respect to listed foreign entity
  - investment in 10% or more of the paid-up equity capital of a listed foreign entity, or
  - investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity. Control in this context amongst other things includes shareholders agreement or voting agreements that entitle the holder to 10% or more of voting rights in the listed foreign company.
  - ODI investments will continued to be treated as such even where the above limits fall.

Overseas Portfolio Investment (OPI) has been defined as:

- investment, other than ODI, in foreign securities, but does not include
  - investment in any unlisted debt instruments; or
  - any security issued by a person resident in India who is not in an international financial services centre (IFSC).
  - any derivatives unless otherwise permitted by RBI; or
  - any commodities including Bullion Depository Receipts (BDRs)

OPI by a person resident in India in the equity capital of a listed entity, even after its delisting shall continue to be treated as OPI until any further investment is made in the entity.
Further, both in case of Indian entity and Resident Individuals specific investments have been identified as ODI and/or OPI. By defining the terms ODI and OPI, the Government has brought clarity on the distinction between the two, which has for long been debatable.

ODI-FDI INVESTMENTS

The OI Regime has permitted persons resident in India to make financial commitments in foreign entities that have invested prior to or invest into India at any time post such investment, either directly or indirectly, through structures **with up to two layers of subsidiaries.** By restricting only, the number of layers and not investment into India, its prima facie appears that investment by a person in Indian in foreign entity which invests back in India has been permitted by the Government.

However, resident individuals can make overseas investments by way of ODI only in an operating foreign entity (not engaged in financial services activity) which does not have subsidiary or step-down subsidiary where the resident individual has control (as defined in the OI Regime) in foreign entity.

Deferred payment of consideration: The OI Regime has permitted deferred payment of consideration for acquisition or transfer of foreign securities, subject to certain conditions, which was earlier not permitted.

Write-off on account of disinvestment: The OI Rules have dispensed with the requirement of approval for write-off on account of disinvestment. This is expected to make the process of disinvestment much faster and smoother.

Pricing to be at arms' length: The OI Rules require pricing to be done on arms' length basis for any issue or transfer of equity capital of a foreign entity from a person resident outside India or a person resident in India to a person resident in India who is eligible to make such investment or from a person resident in India to a person resident outside India. The onus has been put on the AD bank to ensure compliance with arm's length pricing taking into consideration the valuation as per any internationally accepted pricing methodology for valuation. Considering that the AD Banks will have flexibility to decide on this aspect, it is preferable that RBI specifies the guiding principles to determine 'arms length pricing'.

ODI in Start- Ups: ODI in start-ups is permitted to be made **only** out of internal accruals of the investing entity or own funds of the resident individual. As per the OI Rules, this investment is permitted in 'start-ups' recognized as such under the laws of the host country/host jurisdiction. Not many countries specifically define what is or is not a 'start-up', so in any country where there is no specific definition, this condition becomes infructuous. The RBI may need to clarify its position in this regard.

Grandfathering of transactions: The OI Regime mentions that any investment or financial commitment outside India made in compliance with the earlier regime and held as on the date of publication of the OI Rules shall be deemed to have been **made under the OI Regime**. However, if any investments or financial commitments have been made in the past which was not in accordance with the then prevailing law, then the OI Regime will not be applicable and specific compounding application will need to be made for the same.

Discontinuation of utilization of subsidiary holding net worth: Prior to the OI Regime, an Indian entity for purposes of overseas investments, could utilize the net worth of its Indian subsidiary/holding company to the extent not availed of by the holding company or the subsidiary company, subject to certain conditions. However, the OI Directions now specify that the concept of utilizing the net-worth of subsidiary/holding company by the Indian entity has been discontinued. This would impact large conglomerates where subsidiaries are typically used to structure foreign investments.

The OI Regime is expected to open avenues for investment by Indian residents in foreign country/jurisdiction, which were earlier restricted, and provide array of opportunities while structuring transactions.

A creature called 'Emergency Arbitrator'

Authors: Naresh Thacker, Partner- nareshthacker@elp-in.com
Harshvardhan Nankani, Associate- harshvardhannankani@elp-in.com

INTRODUCTION

The status of an 'Emergency Arbitrator' and that of an emergency award passed by it has been a point in issue on the Indian arbitration landscape for a while now. In its recent decision, the Supreme Court of India in *Amazon.com NV Inves*tment Holdings LLC v. Future Retail Ltd. & Ors.(**Amazon v. Future**) held that the decision of an Emergency Arbitrator in an arbitration seated in India is enforceable under Section 17(2) of the Arbitration and Conciliation Act, 1996 of India (**the Act**) as an interim order of an arbitral tribunal made under Section 17(1) of the Act.

This has, for the moment, settled the position of law about the status of Emergency Arbitrators and the enforcement of their decision in India, in the context of an India-seated arbitration governed by Part-I of the Act.

THE CREATURE, ITS CREATION AND EVOLUTION

The Emergency Arbitrator presents an efficacious alternative to a court when seeking interim relief in arbitrations before a merits-tribunal has been constituted. It is important to note that the Emergency Arbitrator steps in, as the name itself suggests, in an *emergency*. It is an arrangement, which addresses issues requiring urgent injunctive relief, that cannot await formation of the merits-Tribunal. Once the emergency has been addressed whether by redressing it or by refusing intervention, the job of the *Emergency* Arbitrator ceases, and it cedes ground to the merits-Tribunal.

Emergency Arbitrators are generally appointed by an arbitral institution, for example under Schedule-I of the Singapore International Arbitration Centre (**SIAC**) Rules 2016. Their appointment is legitimized by the consent of the parties to the institution's rules. Arbitral institutions administer arbitrations. These institutions have played an instrumental role in streamlining, standardizing and popularizing arbitration as a means of dispute resolution. The rules they publish are meant to transcend territorial boundaries. Resort to the rules of an arbitral institution headquartered in Paris or Singapore for instance, can be had by parties situated anywhere in the world, without the obligation to treat Paris or Singapore as the juridical seat. This has allowed them to be forerunners of arbitration law in many jurisdictions by ushering new developments in procedure. The concept of an Emergency Arbitrator is one such development.

It must be noted that 'Arbitrator' is a genus, whereas an 'Emergency Arbitrator' is a species within this genus. The Emergency Arbitrator has evolved from its lesser-known cousin, the 'Pre-Arbitral Referee' that was first introduced to the world by the International Chamber of Commerce (**ICC**) in 1990. This 'referee' was pitched as an alternative to local courts for emergency relief before a tribunal is constituted. However, recourse to this mechanism was far from easy. Parties were required to expressly opt-in for resort to be had to this procedure. Owing to this and a general lack of awareness, the Pre-Arbitral Referee is extinct today.

Emergency arbitration is now widely recognized in various institutional rules as an 'opt-out' feature, i.e., parties have to expressly opt-out of its application where they so choose. This 'opt-out' variant emerged in the 2006 rendition of the international arbitration rules of the International Centre for Dispute Resolution (**ICDR**) and has made its way into Stockholm Chamber of Commerce (**SCC**) Arbitration Rules in 2010, SIAC Rules 2010, ICC Rules 2012, Hong Kong International Arbitration Centre (HKIAC) Rules 2013 and London Court of International Arbitration (**LCIA**) Rules 2014. Subsequent iterations of these institutional rules have retained this procedure. The Mumbai Centre for International Arbitration (**MCIA**) Rules, 2016 also

provide for resort to be had to emergency arbitration proceedings.

The ruling of the Emergency Arbitrator, i.e., an 'Emergency Award' has entered common parlance but is in effect a misnomer and must be used with due regard to the surrounding factors. An award must necessarily resolve the dispute between parties to an arbitration agreement conclusively. However, when examined from this standpoint, it is apparent that the decision rendered by an Emergency Arbitrator does not resolve any disputes between parties definitively. It provides interim relief/protection to the aggrieved party until such time as the merits-Tribunal constituted in accordance with the requirements of the agreement comes into being. It is important to consider that such decision is based on a prima facie view and not premised on a full-length trial, thus clearly incapable of rendering a final view on any issue at hand. The decision of the Emergency Arbitrator is generally revisited by the merits-Tribunal once it is constituted, which may then uphold or over-rule such a decision. Afterall, the Emergency Arbitrator is a creature of institutional rules, devised to be a quick 'first port of call' for parties that have consented to resolve their disputes through arbitration. Its widespread adoption has led to the recognition of an Emergency Arbitrator under the curial law of states such as Singapore, which are popular arbitration destinations.

ADAPTING TO NEW LANDSCAPES

Some landscapes are more welcoming than others. To efficiently accommodate such a novel 'creature', express recognition under the curial law is preferable. Among the jurisdictions that have enacted amendments to explicitly recognize an Emergency Arbitrator are Singapore , Hong Kong and New Zealand.

PROPOSED LEGISLATIVE AMENDMENTS TO ACCOMMODATE EMERGENCY ARBITRATORS

The 20th Law Commission of India (**Law Commission**) in its 246th Report published in 2014 suggested an amendment to the definition of 'arbitral tribunal' contained in Section 2(1)(d) of the Act. The Arbitration and Conciliation (Amendment) Act, 2015 (**2015 Amendment Act**), unfortunately, did not feature this suggested amendment, which led many to interpret it as a tacit rejection of the Emergency Arbitrator by Parliament. It garnered attention once again in 2017 when the 'High-Level Committee to Review Institutionalization of Arbitration Mechanism in India' recommended that the 246th Law Commission Report be adopted on this aspect. Once again, it was to no avail. The Arbitration and Conciliation (Amendment) Act, 2019 (**2019 Amendment Act**) did not explicitly introduce the Emergency Arbitrator into the Act, reinforcing the belief that Parliament did not intend an Emergency Arbitrator to fall within the definition of an 'arbitral tribunal'.

The Act does not define 'arbitrator'; it defines 'arbitral tribunal' to mean a sole arbitrator or a panel of arbitrators. One view that has emerged is that an emergency arbitrator is, per se, neither. An Emergency Arbitrator is not an 'arbitrator' under the Act because an 'arbitral tribunal' is yet to be constituted. This, according to those who take the opposite view to that in Amazon v. Future, is more evidence of the fact that an Emergency Arbitrator is a separate species of arbitrator to accommodate which, explicit mention in Section 2(1)(d) would ideally be required. Notwithstanding this, the ability of the judiciary to interpret the statute in a way that recognizes an Emergency Arbitrator is in no way circumscribed. *Amazon v Future cites Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.* in holding that "the mere fact that a recommendation of a Law Commission Report is not followed by Parliament, would not necessarily lead to the conclusion that what has been suggested by the Law Commission cannot form part of the statute as properly interpreted."

THE CREATURE COMES TO INDIA

A similar arrangement was observed in the case of *Amazon v Future*, where the arbitration agreement envisaged arbitration under the SIAC Rules 2016, with the seat of arbitration being New Delhi, India.

The decision of the Supreme Court of India in *Amazon v Future* emanates from the controversy around the enforcement of the Emergency Arbitrator's 'interim award'. When the issue

erupted, proceedings were filed before the Delhi High Court. Questions such as, what ought to be the nature of proceedings, of jurisdiction, et. al., arose. Suffice to say that the prime question of whether this 'interim award' was an interim order passed by an 'arbitral tribunal' under Section 17(1) of the Act, and whether it could be enforced under Section 17(2) of the Act, came up before the Supreme Court.

The Supreme Court of India noted that the seat being New Delhi, Part-I (containing Section 17) of the Act would apply. There being no interdict to the application of institutional rules, an Emergency Arbitrator under those rules would qualify as an 'arbitrator' under the definition of an 'arbitral tribunal' where the context permits, such as for the purposes of Section 17 of the Act. This is because the definition of an 'arbitral tribunal' under Sec. 2(1)(d) is preceded by the words "unless the context otherwise requires." The interpretation would therefore have to be contextualized against the institutional rules subscribed to. In this case, under Rule 3.3 of the SIAC Rules, 2016, the arbitration is deemed to commence once the Registrar receives the complete Notice of Arbitration. Thus, the arbitration already having commenced, the expression "during the arbitral proceedings" in Section 17 of the Act would be satisfied and the 'interim award' of the Emergency Arbitrator would, (i) tantamount to an order under Section 17(1) and (ii) be enforceable under Section 17(2) of the Act. Therefore, an Emergency Arbitrator in an arbitration governed by Part-I of the Act has been held to be an 'arbitral tribunal' capable of passing an order under Section 17 of the Act, where the institutional rules permit.

The Supreme Court of India seems to have sanctified in *Amazon v Future* that an Emergency Arbitrator's legitimacy, much like that of a merits-Tribunal, is derived from parties' consent to certain procedural rules. Party autonomy being the grandmom of arbitration, the concept of an Emergency Arbitrator was read into the law by the judiciary rather than added to it by the legislature. This has left some lingering issues.

FOREIGN SEATED EMERGENCY ARBITRATIONS

Amazon v Future has resolved much of the controversy regarding India-seated emergency arbitrations. But questions still surround the enforceability of orders of foreign-seated Emergency Arbitrators. Orders of Emergency Arbitrators in foreign seated arbitrations have, in the past, been enforced in India by obtaining identical relief under Section 9 of the Act, which empowers courts to provide interim relief and which orders are then enforceable in India.

THE SECTION 9 ROUTE

In such cases, courts in India found a novel method where interim relief was granted by Indian courts under a Section 9 application on same terms and based on the Arbitrator/Emergency Arbitrator's order. This was indeed the case in *Raffles Design International India Pt. Ltd. & Anr. v. Edu comp Professional Education Ltd. & Ors.* and in *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*

This 'Section 9 Route' was often used before the 2015 Amendment Act which introduced sub-Section (3) whereby a court would not ordinarily entertain an application for interim relief if an arbitral tribunal already stood constituted. An interesting question that now arises is whether this route under Section 9 is yet accessible to parties post the 2015 Amendment Act? This is because, if an Emergency Arbitrator is an arbitral tribunal, then an Indian court would not ordinarily entertain an application for interim relief.

This issue is more nuanced now considering the changes brought about post introduction of proviso to Section 2(2) of the Act by the 2015 Amendment Act. The proviso was introduced to address the difficulties being faced by parties in an international commercial arbitration seated outside India when seeking interim relief from Indian Courts. But for the proviso, since Section 9 fell within Part 1 of the Act, the same applied solely to an arbitration where the place of arbitration was India. This issue was highlighted by the Supreme Court in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services.* While the

legislature has addressed the issue with the introduction of proviso to Section 2(2), the question that we are presently concerned with becomes more pronounced and acute because the provisions of Section 17, in its entirety, and Section 37 (2)(b) do not find a place in the amended proviso to Section 2(2). Simply put, when strictly read, the provisions of Section 17 (more particularly that of sub-Section 2 thereto relating to enforcement of an interim order) in case of a foreign seated arbitral tribunal, would have no application at all. Equally well, an interim order by a foreign seated tribunal would not be appealable before Indian courts. It is in these circumstances that the question posed above assumes significance.

CONCLUSION

It remains to be seen whether orders of an Emergency Arbitrator seated in India are enforceable in other jurisdictions. It also remains to be seen whether orders of foreign-seated Emergency Arbitrators will be enforced by Indian Courts, and the course that will be adopted to do so. An order of an Emergency Arbitrator in a foreign-seated emergency arbitration can certainly not be enforced in India as an award under the New York Convention considering the judgment of the Supreme Court of India in *Amazon v Future*, which clearly recognizes them as 'interim orders' and not 'awards.

Given that *Amazon v Future* has been decided in the context of an India-seated arbitration it would be a tenuous proposition to deploy this judgment on all fours in the context of a foreign-seated arbitration.

An Emergency Arbitrator is relatively new to the scene of arbitration law in India. Like any alien species that is transplanted into a new environment, either it or its environment must give way. In this metaphor the environment represents the legal terrain of a jurisdiction, having many other actors such as legislative bodies, courts and even parties. Yet, the Emergency Arbitrator is not as 'alien' a species as one might believe. Rather, it is the outcome of evolution. It has evolved from the existing idea of an arbitrator to fill the need for speedy relief outside of court. It will therefore put up a formidable fight for its existence and eventual adoption into the legal landscape of jurisdictions such as India.

A version of this article has been published in the ABA Newsletter

Guidelines on Mis-leading Advertisements in India: Much needed clarity on Do's and Don'ts for Advertisements in India

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

The Central Consumer Protection Authority (**CCPA**) under the Department of Consumer Affairs has notified 'Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022' (Guidelines) on June 9, 2022. While the parent legislation i.e., the Consumer Protection Act, 2019 (CPA) has been in force since 2020 and already contains provisions regulating misleading advertisements, it is for the first time, through these Guidelines, that the Government has clarified on the elements of a valid advertisement, laying down parameters for businesses to verify if their advertisements are compliant. The Guidelines also clarify key aspects of advertisements such as bait advertisements, surrogate advertisements, and advertisements addressing children and right usage of a disclaimer.

The key takeaways from the notified Guidelines are enlisted below:

APPLICABILITY OF THE GUIDELINES/COVERAGE OF ENTITIES UNDER THE GUIDELINES

The Guidelines will apply to all advertisements irrespective of their form, format or medium. Further, the Guidelines apply to three broad categories of entities:

- A manufacturer, service provider or trader whose goods, product or service is the subject of an advertisement.
- An advertising agency; and
- Endorser whose service is availed for the advertisement of such goods, product, or service

PARAMETERS FOR A VALID ADVERTISEMENT

While the CPA contains a definition of 'misleading advertisement', these Guidelines clarify the concept further and lay down an indicative list of elements which possibly constitutes a valid advertisement.

A valid advertisement:

- includes truthful and honest representations.
- does not mislead consumers by exaggerating the accuracy, scientific validity, uses , capability, performance or service of the goods or product.
- does not provide/offer as a distinctive feature or any rights conferred on consumers by any law.
- does not suggest any false claims about the advertisement being universally acceptable if there is a significant division of informed or scientific opinion pertaining to such claims.
- does not mislead the consumer about the risk to its personal security or that of their family in case they fail to purchase the advertised goods/product/service.
- complies with the provisions contained in any other sector specific law and the rules and regulations made thereunder.

GUIDANCE ON DISCLAIMERS

The disclaimers shown in an advertisement shall not contradict the material claim made in the advertisement or the main message conveyed by the advertiser and should not attempt to hide or conceal a material information which if provided is likely to make the advertisement deceptive or conceal its commercial intent. The Guidelines also mention certain requirements to be fulfilled by a disclaimer such as the following:

- the font used in a disclaimer shall be the same as that used in the claim.
- the disclaimer shall be at a prominent and visible place on the packaging.
- in case claim is presented as voice over, the disclaimer shall be displayed in sync with the voice over and at the same speed as that of original claim made in the advertisement.

ADVERTISEMENTS TARGETING CHILDREN

The Guidelines enumerates various factors to be considered in publishing advertisements especially targeting children. Considering the sensitivity and vulnerability of children and severe impact advertisements possibly make on the younger minds, several pre-emptive provisions have been laid down on advertisements targeting children. Some of the noteworthy guidelines for advertisements targeting children are:

Such advertisements shall not-

- take advantage of children's inexperience, credulity, or sense of loyalty.
- claim any health or nutritional claims or benefits without being adequately and scientifically substantiated by a recognized body.
- make the children feel inferior/disloyal if they do not purchase the goods/product/service.
- use qualifiers such as 'just' or 'only' to make the price of goods, product or service seem less expensive where such advertisement includes additional cost or charge.
- exaggerate what is attainable by an ordinary c hild using the product being marketed.

Moreover, the advertisements shall not feature personalities from the field of sports, music or cinema for products which under any law requires a health warning for such advertisement or cannot be purchased by children.

BAIT ADVERTISEMENTS

Bait advertising has been defined as "an advertisement in which goods, product or service is offered for sale at a low price to attract consumers". The conditions given under Guidelines to be fulfilled for bait advertisements are:

- it shall not seek to entice consumers to purchase goods/products/services without a reasonable prospect of selling such advertised goods/products/services at the price offered.
- the advertiser shall ensure that there is adequate supply of goods/products/services to meet foreseeable demand generated by such advertisement.
- such advertisement shall state the reasonable grounds which the advertiser has for believing that he might not be able to supply the advertised goods, products, or services within a reasonable period and in reasonable quantities, and in particular
  - if the estimated demand exceeds the supply, such advertisement shall make clear that the stock of the goods or services is limited.
  - if the purpose of the advertisement is to assess potential demand, it shall be clearly stated such advertisement; and
  - the advertisement shall not mislead consumers by omitting restrictions, including geographic restrictions and age-limit on the availability of the goods, products or services.
- such advertisement does not mislead consumers about the market conditions with respect to the goods, products or services or the lack of their availability to induce consumers to purchase such goods, products, or services at conditions less favourable than normal market conditions.

SURROGATE ADVERTISING

Surrogate advertising has been defined as "advertisement for goods, product or service, whose advertising is otherwise prohibited or restricted by law, by circumventing such prohibition or restriction and portraying it to be an advertisement for other goods, product or service, the advertising of which is not prohibited or restricted by law." The Guidelines prescribe that an advertisement will be a surrogate advertisement, if:

- it indicates or suggests directly or indirectly that it is an advertisement for a prohibited product or service, and
- it uses any brand name, logo, colour, layout, and presentation associated with such prohibited product or service.

The Guidelines prohibit any surrogate or indirect advertising on all forms of media, for goods or services whose advertising is otherwise prohibited or restricted by law (hereinafter 'prohibited products or services'). However, the Guidelines specifically state that a mere use of the brand name or company name which may be applied to prohibited products or services would not render the advertisement to be a surrogate advertisement if it is otherwise not objectionable as per the provisions.

It is noteworthy that the Guidelines do not impose a blanket ban on surrogate advertising. It is an attempt to regulate such advertising and prohibit advertisements that seek to indirectly advertise prohibited products or services. This is much in line with the intention and provisions of the guidelines on valid Brand Extensions issued by Advertising Standards Council of India (**ASCI**). Therefore, genuine brand extensions that fulfil the ASCI guidelines may continue to advertise.

FREE CLAIMS ADVERTISEMENTS

A free claims advertisement shall not describe any goods, product, or service to be 'free', 'without charge' or use such other terms if the consumer has to pay anything other than the unavoidable cost of responding to such advertisement and collecting or paying for the delivery of such item; or make clear the extent of commitment that a consumer shall make to take advantage of a free offer.

DUE DILIGENCE TO BE CARRIED OUT BEFORE ENDORSING

The Guidelines provides that a due diligence be conducted before endorsing the advertisements. Moreover, the endorsement in an advertisement must be genuine and based on the adequate information and shall not be deceptive. The endorsement should depict reasonably current opinion of the individual/group/organization while making such representation. The Guidelines also prescribe that in case there exists a connection between the endorser and the trader, manufacturer or advertiser of the endorsed product which might materially affect the value or credibility of the endorsement - and the connection is not reasonably expected by the audience - this connection shall be fully disclosed in making the endorsement.

PENALTY ON MANUFACTURERS, ADVERTISERS, AND ENDORSERS

The Guidelines do not mention any penalty for its violation. However, the CCPA established under the CPA may impose penalty of up to INR 10 lacs on manufacturers, advertisers and endorsers for any misleading advertisements. For subsequent contraventions, CCPA may impose a penalty of up to INR 50 lacs. In addition to the above penalties, CCPA can also prohibit the endorser of a misleading advertisement from making any endorsement for up to 1 year and for subsequent contravention, prohibition can extend up to 3 years.

IN CONCLUSION

The concept of misleading advertisement was loosely included under the broad concept of 'unfair trade practice', which germinated under the Monopolies and Restrictive Trade Practices, 1969, then found its way to the erstwhile Consumer Protection Act, 1986 and

continues even under the present Consumer Protection Act, 2019. However, the new CPA carves out the concept of 'misleading advertisement' separately, which highlights the focus of the government to enforce against the misleading advertisement. Now the new Guidelines clarify their scope even further, allowing better administration and enforcement in relation to this concept, given the changing times when advertisements/representations come in all forms, shapes and formats, whether physical or digital. In the recent past, the CCPA has been increasingly seen to take an active role both as an enforcing agency as well as issuing guidelines on aspects governed by the CCPA. As per reports, the CCPA has already issued notices in 113 instances, of which 57 are notices for misleading advertisements, 47 notices relate to unfair trade practices and 9 are for violation of consumer rights. With the new Guidelines now, one can anticipate further traction in efforts by the CCPA to curb misleading advertisements. Needless to add, it also acts as a useful benchmark and framework for the industry stakeholders to proactively prevent misleading advertisements.

Creating an Architecture for Net Zero Emissions

Authors: Aakanksha Joshi, Partner, aakankshjoshi@elp-in.com
Megha Agarwal, Associate Partner, meghaagarwal@elp-in.com
Pranaav Gupta, Associate, pranaavgupta@elp-in.com

As per a recent report published by the International Institute for Sustainable Development, fossil fuels account for around 76% of India's total primary energy supply. 18% of the total revenue of the Government is derived from fossil fuels. Against this backdrop, India is set to take a giant leap by the passing of the Energy Conservation (**Amendment**) Bill, 2022 (**Bill**) by the Lok Sabha on August 8, 2022.

The Bill seeks to amend the provisions of the Energy Conservation Act, 2001 (**Act**) and ensure faster decarbonisation of the Indian economy. This move is an endorsement of the "Panchamrit", or the five nectar elements presented by India in COP-26 (Conference of Parties -26) in Glasgow 2021.

CARBON MARKET

Currently, Energy Savings Certificates (**ESCerts**) and Renewable Energy Certificates (**REC**) are traded in the energy market in India.

ESCerts are certificates issued under the Perform Achieve Trade scheme (**PAT Scheme**) implemented by the Bureau of Energy Efficiency (**BEE**). The Act empowers the Central Government and in some instances the State Governments, in consultation with BEE to notify energy intensive industries, other establishments, and commercial buildings as designated consumers. Designated consumers who overachieve the energy consumption norms and standards individually allocated to them by a technical committee of the BEE are issued ESCerts. ESCerts are then traded on energy exchanges where designated consumers who underachieve their consumption norms can purchase ESCerts. As on October 6, 2021, there were 509 such designated consumers from industries ranging from aluminum, iron and steel, zinc units, copper units, mines, etc.

RECs are regulated by the Central Electricity Regulatory Commission (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022. Under the Electricity Act, 2003 (**Electricity Act**), the Ministry of Power prescribes a Renewable Purchase Obligation (**RPO**) trajectory. The RPO regime is enforced by State Electricity Regulatory Commissions who mandate that certain obligated entities purchase renewable power. These obligated entities include energy generators, distribution licensees and open access consumers.

Renewable energy generating stations are eligible to receive a REC if the tariff for the renewable energy generated is not determined or adopted under the Electricity Act or if the renewable energy generated is not sold for RPO compliance of the obligated entity. RECs are then traded on energy exchanges or through electricity traders and purchased by obligated entities to meet their RPO compliance.

The Bill introduces the concept of a carbon credit trading scheme which intends to combine the ESCerts and the REC scheme into one. The Central Government has been empowered to issue the carbon credit trading scheme pursuant to which carbon credit certificates would be issued. Such certificates can be purchased on a voluntary basis by any person and not just designated consumers.

This move is consistent with the Draft Blueprint on a National Carbon Market for India released by BEE in 2021 for stakeholder consultation. The draft emphasized the need of moving towards a voluntary carbon market in India.

ADDITIONAL MEASURES

The Bill seeks to meet India's climate change commitments by mandating the use of non-fossil sources, including Green Hydrogen, Green Ammonia, Biomass and Ethanol for energy and feedstock by certain energy intensive industries. The Central Government has been authorized to specify the minimum share of consumption of non-fossil sources by designated consumers. This would vary depending on the nature of the consumers. Given India's high dependency on fossil fuels, one would need to wait for the Central Government's proposals in this regard to ascertain whether this move will indeed help reduce India's carbon emissions.

Regarding decarbonization of energy intensive industries, the Power Minister, R.K. Singh cited the example of the European Commission's proposed carbon border adjustment mechanism. The mechanism proposes that a carbon tax would be levied on the imports of products such as steel which are not green. The Minister indicated that if an industry does not adopt green measures, it will no longer be competitive.

Significantly, the Bill has also expanded the requirement of conformation to energy consumption standards to include vehicles, vessels, residential and office buildings in addition to equipment or appliances. Specified industrial units would be required to close their operations unless they conform to the norms for processes or energy consumption standards that are laid down by the Central Government.

BILL FOR THE FUTURE

While the Bill was up for discussion before the Parliament, the Power Minister observed that it was the "bill for the future". Energy conservation and energy transition is undeniably the need of the hour. However, the manner of implementation of the Bill would really unfold the tale. Although India does not currently intend to export carbon trading certificates, in the long run, the national market could be integrated with the framework for international trading of mitigation outcomes, pursuant to Article 6 of the Paris Agreement. However, this may lead to fears of non-availability of carbon credits domestically that could in turn result in challenges in meeting India's decarbonization commitments.

This article has been published in Times of India

Trust Theory, Security & Margin Money

Authors: Mukesh Chand, Senior Counsel- mukeshchand@elp-in.com

[This write up delves upon some of the deeper underlying aspects of 'margin money'. It also discusses the effect of moratorium under the Insolvency and Bankruptcy Code on such transactions.]

In general terms, a Bank Guarantee (**BG**) is an instrument issued by a bank to a third party at the behest of its client by way of assurance to pay a specified amount should the client default. Letter of Credit (**LC**) is another similar instrument of assurance of payment of the covered amount if the contract is executed as per instructions. The difference being that in the case of LC the issuing bank assumes primary responsibility to pay, where as in BG the liability of the bank is secondary and contingent on default by the client. The principles governing these instruments have developed based on commercial practices and contract law. They have attained status of a 'virtual promissory note', as readily encashable instruments on demand. These instruments are highly relied upon and play a critical role in facilitating domestic and international transactions. Needless to add, any situation creating a doubt on sanctity of such instruments could have serious implications on the trade and commerce transactions especially international trade transactions.

The Courts in India have consistently upheld the sanctity of such instruments by laying down rules against injunction as regards enforcement of such instruments. The law relating to invocation of BG is well settled now. When during commercial dealings, an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee (in terms thereof) irrespective of any pending disputes. The bank issuing the guarantee is bound to honor it as per its terms and irrespective of any dispute raised by its customer. The very purpose of BG would otherwise be defeated and result in irretrievable harm or injustice to one of the parties concerned, since, in most cases, payment of money under such a BG would adversely affect the bank and its customer at whose instance the guarantee is given[1] .

Recognizing the sanctity of BGs, it has been held that a BG is the common mode of securing payment of money in commercial dealings. The beneficiary, under the guarantee, is entitled to realize the whole of the amount under that guarantee irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary[2]. An unconditional BG could be invoked by the person in whose favor the BG was given, and the Courts would not grant any injunction restraining the invocation. The only exception would be in the cases of fraud or irretrievable injury[3].

[1] Civil Appeal No. 15357 of 1961, decided on December 4, 1996 [(1997) 1 Supreme Court Cases 568]

[2] Hindustan Construction v. State of Bihar (1999) 8 SCC 436

[3] Svenska Handeisbanken v. Indian Charge Chrome: AIR 1994 S C 626.
Larsen & Toubro Ltd. v. Maharashtra State Electricity Board: An IR 1996 S C 334.
Hindustan S teel Works Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.: An IR 1996 S C 131.
National Thermal Power Corporation Ltd. v. Flowmeore (P) Ltd.: AIR 1996 SC 445.
State of Maharashtra v. National Construction Co.: [1996] 1 SCR 293.
Hindustan S teel Works Construction Ltd. v. Tarapore & Co: AIR 1996 SC 2268
U.P. State S ug a r Corporation v. Sumac International Ltd.: AIR 1997 S C 1644

ISSUE OF MARGIN MONEY

As a prudent banking practice, such BGs and LCs are issued by banks against fee and charges and are backed by security or cash deposits in the form of 'cash margin'. This cash margin enables the banks to limit their exposure and risk in such transactions. This margin could range from 25% to 100% depending upon type of BG/LC. A guarantee which is for an indefinite period would usually require 100% cash margin to back it. The client does not retain any right over this amount or exercise any control over it till the transaction gets culminated in discharge.

The advantage of the above arrangement is twofold. BG/LC in lieu of cash enables the client to retain the corresponding money and utilize available cash (depending upon cash margin) for its business operations on the other hand such cash margins work as hedge for the issuing bank to limit its contingent liability. There are two reasons as to why this margin amount is kept in a fixed deposit (**FD**) in the name of the client and not in the name of the bank. First, this arrangement enables the FD to earn interest during currency of BG and second, keeping it in the bank's name would have exposed the issuing the bank to additional tax obligations consequently increasing overall cost and fee for BG. Thus, it is an efficient and effective system to meet business obligations backed by sound legal principles.

IMPACT OF IBC OVER SUCH MARGIN MONEY

BGs are independent contracts and obligation of a third party - namely the bank - therefore remains unaffected by insolvency of the client. Performance guarantees have been specifically kept out of the definition of the term '**security interest**' under section 3(31) of the Insolvency and Bankruptcy Code, 2016 (**IBC/the Code**) so that the moratorium under section 14 of the Code does not impact sanctity of such instruments. However, in many Corporate Insolvency Resolution Processes (**CIRP**), Resolution Professionals (**IRP/RP**) demanded the release of such FDs (kept as cash margin with the bank) relying upon the provisions of section 18 (f) of the Code. Section 18(f) of the Code requires the IRP *to take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor … including assets that may or may not be in possession of the corporate debtor.* This gave rise to conflict and litigations. The conflict arose on account of firm belief of the banks that the margin money is not in the nature of a 'security'. Rather, it is a mechanism where the client cedes control over the margin money amount and puts the same at the sole disposal of the bank for issuance of BG.

However, the RPs, advised by their support team, went by a literal interpretation of the provisions mentioned above and thought it proper to leave the issue to be decided by the Courts. This ignored the Explanation attached to section 18 of the Code which provided that the term "assets" ***shall not include assets held under trust or under contractual arrangements including bailment.*** Initially, Tribunals also went by these assumptions and in many cases, directions were given to the Banks to reverse appropriation of margin money used by them to honor bank guarantees during the moratorium period[4]. Conflicting views were also expressed by the Appellate Authority as regards true nature of margin money.

While in the case of **Indian Overseas Bank** it was held that the 'margin money' is not a security …. "***The 'margin money' is the contribution on the part of the borrower who seeks 'Bank Guarantee'. The said margin money remains with the Bank, as long as the Bank Guarantee is alive[5].***" On the other hand in the case of ***C & C***

[4] Company Appeal (AT)(Insolvency) No. 635 of 2019

[5] Indian Overseas Bank' Vs. 'Arvind Kumar', Comp. App. (AT) (Ins.) No. 558/2020, dated 28.09.2020

Construction Ltd. Vs. Power Grid Corporation of India Ltd*[6],** it was held that …… ***"keeping in minds the provisions of Section 14 (1) (C) r/w Section 14 (3) (b), if any, such bank guarantee is liquidated, it can be restricted to the full value of the guarantee minus margin money provided by corporate debtor to the banker for taking that bank guarantee and accordingly, banks can release the fund to the extent of full value of the bank guarantee minus margin money provided by the corporate debtor to the banker for the bank guarantee."

The Principal Bench of National Company Law Tribunal, Delhi examined the issue in the right earnest in the case of ***Phoenix ARC Pvt. Ltd. vs. Anush Finleash & Construction Pvt. Ltd***[7] in light of judgment of the Bombay High Court in the case of Reserve Bank of India vs. Bank of Credit And Commerce (1993 78 Comp Cas 207 Bom) and laid down that the ***"FDRs are given towards margin money against the bank guarantees given to the beneficiary, not as FDRs to be realized by the Corporate Debtor as and when it wishes. …….. margin money is construed as substratum of a Trust created to pay to the beneficiary to whom Bank Guarantee is given. Once any asset goes into trust by documentation for the benefit of beneficiary, the original owner will not have any right over the said asset unless is it is free from the trust."*** Thus, strengthening the Trust Theory in the context of margin money.

While based on the "**Trust Theory**" the legal position around the bank guarantee margin money issue seems to be settling down, the issue of margin money in the context of LC came to be examined by the Appellate Authority in the case of *Punjab National Bank Vs Supriyo Kumar Chaudhuri Resolution Professional, JVL Agro Industries Ltd*[8]. The Appellate Authority in this case reiterated the case reiterated the legal position that margin money is construed as substratum of the trust towards the beneficiary to whom BG is given. Once any asset goes into trust by documentation for the benefit of beneficiary, the original owner will not have any right over the said asset unless it is has lived up to its commitment . … it cannot be said to be an asset of the 'Corporate Debtor'. The provision of Section 14(3)(b) specifically excludes the Application of Section 14 to a 'surety' in a contract of Guarantee to a 'Corporate Debtor'.

As regards the LC, the Appellate Authority held that ***"it is basically akin to a contract of Guarantee, as it is a contingent liability of the 'Corporate Debtor' which gets crystallized on the happening of a future e margin money can in no manner be said to be a 'Security Interest' as defined under Section 3(31) of the IBC. Section 14(1)(c) prohibits any action to foreclose, recover or ensure any 'Security Interest' created by the 'Corporate Debtor' in respect of its property. As we hold that no 'Security Interest' was created by the 'Corporate Debtor' with respect to the margin money that was deposited by the 'Corporate Debtor Company' towards the opening of the LC in the Appellant Bank, we are of the considered view that the Banks having appropriated this money during the period of Moratorium is justified as we hold that the amount is not an asset of the 'Corporate Debtor'."***

The legal position as reiterated by the Appellate Authority reinforces and restores the sanctity of BG and LC as trusted instruments of executing business transactions. This is reassuring for businesses especially in the case of overseas dealings.

[6] Company Appeal (AT) (Insolvency) No. 781 of 2019

[7] (IB)-1705(PB)/2018

[8] Company Appeal (AT) (Insolvency) No 657 of 2020

Decriminalization of Labour Penalties

Authors: Dr. PV Murthy - pvmurthy@elp-in.com
Retika Yadav, Associate- retikayadav@elp-in.com
Shenaya Ardeshir, Associate- shenayaardeshir@elp-in.com

To strengthen India's Labour jurisprudence and promote ease of doing business, the Indian Government is introducing the new labour codes, which will subsume the 29 archaic central labour legislations. The new labour codes will simplify and rationalize the current 29 central labour laws into 4 new labour codes. A crucial (and much welcome) change to be brought under the new labour codes is the decriminalization of penalties for certain offences. Through the new labour codes, the Government has tried reducing/removing imprisonment for certain offences altogether and substantially increase monetary penalties instead.

THE NEW LABOUR CODES AND THE NEED FOR ENACTMENT OF THE NEW LABOUR CODES

The new labour codes are one of the last regulatory reforms to be introduced in India. The Government which is proactively looking at reducing compliances has introduced these four new labour codes -

- Industrial Relations Code, 2020;
- Code on Social Security, 2020;
- Occupational Safety, Health and Working Conditions Code, 2020; and
- Code on Wages, 2019

They primarily seek to -

- Simplify, consolidate, and amend the labour laws
- Rationalize the definition of 'wage'
- Provide social security coverage to all types of employees
- Assist in ease of compliance and impose stricter penalties

PENALTIES UNDER THE CURRENT LABOUR LEGISLATION

- The current labour laws provide imprisonment as a punishment for provisions which do not have a mala fide or fraudulent intent. This has historically proved a hindrance to employers from the perspectives of a constant fear of consequences of non -compliance. This also led to a steady stream of disputes and was proving to be an impediment in ease of doing business and attracting investments.
- Currently, imprisonment as a penalty exists for the following offences-
  - Employer failing to pay contributions
  - Dishonestly making a false return, report, statement, or information that is to be submitted
  - Instigation of illegal strikes/lockouts
  - Giving financial aid to illegal strikes and lockouts
  - Dishonestly making a false return, report, statement, or information that is to be submitted

CHANGE OF PENALTIES UNDER THE NEW LABOUR CODES

Keeping the nature of the certain offences in mind (e.g.: employer failing to pay contributions), it is important to understand that negligence or inadvertent omission by the employer cannot be construed as mala fide or fraudulent and hence, he/she cannot be charged with such severe punishment like imprisonment.

The primary intent of decriminalization of these offences is that the penalties should be adequate

to act as a deterrent and should not act as an impediment in the smooth functioning of business. Hence, imprisonment has either been reduced or removed for several offences while monetary fines have been substantially increased. However, imprisonment as a penalty, has been maintained for the offences mentioned below –

- Instigation of illegal strikes and lockouts
- Providing financial assistance to illegal strikes and lockouts
- Employer deliberately failing to pay statutory contributions
- Dishonestly furnishing false returns, statements, or information to the authorities
- Failing to pay administration/inspection charges

As can be noted from the above offences, the new labour codes do not allow employers' grave and intentional contraventions to go unpunished.

Also, under the new labour codes, all general penalty clauses have been decriminalized. These clauses state the penalty for the contravention of certain provisions for which there is no penalty stated under the relevant labour law or the labour code.

As an illustration, we examine the difference in treatment for non-compliance for maternity benefits between the current and new labour codes.

Under section 21 (2) of the Maternity Benefit Act, 1961 (**Maternity Benefit Act**) it states that *'if any employer contravenes the provisions of this Act or the rules made thereunder, he shall, if no other penalty is elsewhere provided by or under this Act for such contravention, be punishable with imprisonment which may extend to 1 (one) year, or with fine which may extend to INR 5,000 (Indian Rupees Five Thousand), or with both.'*

Whereas, under the Social Security Code, 2020 which deals with maternity benefit, it states that *'if a person is guilty of any contravention of or non-compliance with any of the requirements of this Code or the rules or the regulations or schemes made or framed thereunder in respect of which no special penalty is provided in this Chapter'* he/she will be penalized with a fine which may extend to INR 50,000 (Indian Rupees Fifty Thousand). As such, the difference between the current and new labour codes is that the term of imprisonment has been removed and the penalty amount has been increased.

Further, the labour codes ensure that there is no leniency in dealing with the mala-fide intent of employers, if any. For example, prosecution for certain offences such as provident fund contributions which have been deducted by the employer but not paid are construed as intentional and wilful and have been strictly dealt with under the labour codes. Here, the defaulter will be punished with imprisonment for a term which may extend to 3 (three) years, but which will not be less than 1 (one) year. Further, the employer will also be liable to fine a of INR 1,00,000 (Indian Rupees One Lakh).

ELP COMMENT:

The new labour codes by applying the 'principle of proportionality' and reducing criminalisation on the businesses have either reduced or removed imprisonment as a penalty which is a welcome move for promoting ease of doing businesses. It also reduces the unnecessary burden of litigation for the employers.

COMPOUNDING OF OFFENCES UNDER THE NEW LABOUR CODES

In addition to decriminalization, the new labour codes have also introduced compounding of certain offences under the new labour codes.

- Compounding of offences is provided for offences such as non-maintenance of registers and records, not filing of returns, general penalties etc. Offences punishable with

imprisonment up to 1 (one) year and/or punishable with fine can be compounded.

- Offences committed for the first time can be compounded. However, compounding is not provided for offences committed for a second time or thereafter within a period of 3 (three) to 5 (five) years, as per the relevant labour code.
- Amounts collected from the compounding of offences will be credited to the social security fund maintained by State Governments and Central Governments and will be utilised for the welfare of unorganized workers.

ELP COMMENT:

Compounding of offences under the new labour codes will encourage the employers to rectify their non-compliance under the new labour codes and improve the overall compliance mechanism. This is a win-win for both employer and the employee.

Inverted Duty Structure – Towards making GST a Good and Simple Tax

Authors: Harsh Shah, Partner- harshshah@elp-in.com
Ankita Vashishtha, Senior Associate- ankitavashishtha@elp-in.com

Ordinarily, the phenomenon of taxation involves payment of tax at lower rates on the inputs and a relatively higher rate of tax on the final product/output. As the name suggests, inverted duty structure connotes a situation when the rate of tax on inward supply is higher than rate of tax on outward supply. There are several scenarios leading to inverted duty structure. One such example is a case where while the input and output supplies are same, the rate varies, especially, where the outward supplies are made under a concessional notification. Such concession on the outward supplies could be on account of several reasons such as, the purpose for which the goods are used by the receiver, entity status of the receiver, etc.

A classic example is supply of information technology products by an IT Company to Government Departments, PSUs, and to other Research and Educational Institutes. In this case, at the time of procurement from the Distributors and/or Original Equipment Manufacturers, 18% GST is levied. When such goods are supplied to specified institutions such as PSU, Government Departments, etc. (i.e., outward supply), 5% GST is levied. Same goods, when supplied to other users attract 18% GST. In this case, to the extent of supplies to specified end users for which a concessional rate has been prescribed, there is accumulation of input tax credit on account of inverted duty structure.

Section 54 (3) (ii) of the CGST Act, 2017 read with Rule 89 (5) of the CGST Rules, 2017, inter alia, provides for a refund of accumulated input tax credit on account of inverted duty structure. It may be worthwhile to note that the key conditions for being eligible for a refund in terms of the above provisions are that:

- Rate of tax on input is higher than rate of tax on output supplies.
- The output supplies are not exempt or nil rated supplies; &
- Refund on such supplies is not specifically restricted by the Government.

Be that as it may, various businesses suffering inverted duty structure under concessional rate supplies were hitherto getting refunds under the said provisions.

Subsequently, the CBIC issued Circular No. 135/05/2020 - GST dated 31.03.2020 (**Refund Circular**) which, inter alia, provided clarification on various aspects pertaining to GST refunds such as bunching of refund claims across financial years, guidelines for refunds of Input Tax Credit under Section 54 (3), requirement to mention HSN/SAC, change in manner of refund of tax paid on supplies other than zero rated supplies, etc.

Para 3 of the said Circular dealt with accumulation of credit on account of reduction in tax rate. Para 3.2 therein, covers a situation where there is accumulation of credit, on account of reduction in GST rate. The illustration provided in the Circular is a case where the rate of tax at the time of procurement is 18% and subsequently there is a change in rate to 12% thereby resulting in accumulation of credit. As per the Refund Circular, such accumulation, resulting on account of change in rate of tax is not eligible for a refund under Section 54 of the CGST Act.

This interpretation as held in Para 3.2 of the Refund Circular has led to considerable litigation, right up to verdicts of the Hon'ble High Courts. The Writ applicants have, inter alia, categorically,

requested the Courts either to strike down the Circular or read it down to the extent it denies refund in terms of Para 3.2. The key grounds in the Writs are:

- The governing section no-where provides a restriction on claiming a refund in cases where the accumulation is on account of rate change.
- The Circular has been issued in terms of the powers provided in Section 168 of the CGST Act. The said Section provides the powers to issue orders, instructions, etc. for the purpose of ensuring uniformity in the implementation of the Act. Thus, under the guise of Section 168, which is essentially for ensuring efficient implementation of the Act, the Circular cannot impose conditions which are not provided in the Act itself.

Rightly so, the Hon'ble High Court of Gauhati in the case of *BMG Informatics Private Limited vs. Union of India & Ors.* and the Hon'ble Calcutta High Court in the case of *M/s Shivaco Associates & Anr. vs. Joint Commissioner & Ors.* have taken a view in favour of the assessee basis the above. While providing the decisions, it has been observed that the legislature was mindful of the fact that there may be instances where the input and output supplies are same and consciously, did not create any dichotomy for allowing refund in such cases. Such interpretation which makes the main provision/Act redundant and otiose should be discarded. In yet another case, the Hon'ble Rajasthan High Court in the case of *Baker Hughes Asia Pacific Ltd vs UOI & Ors*, also held that refund should be available considering the clear language of the provisions.

An even bigger unfortunate leap in this regard has been issuance of notices to entities denying refunds in cases where the accumulation on account of difference in tax rates when there isn't any rate change between the inward and outward transaction. For instance, a trader purchasing goods i.e., LPG gas at the rate of 18% and selling the same at 5% to domestic customers. It may be apposite to note that such rates exist during the entire duration of purchase and sale transaction i.e., there isn't a rate change between the inward and outward supplies of these goods. The Departmental notices have been issued basis Para 3.2 of the Circular and on the ground that there is no value addition by the trader (the input and output is the same), both of which have effectively been set aside by the Hon'ble High Courts. It was a silver lining to note that the GST Council in its 47th meeting on 28th and 29th June 2022 had recommended issuance of clarifications to remove ambiguity and legal disputes on various issues including the issue of refund under inverted duty structure where the supplier supplies goods under concessional notifications. Considering the rulings of the Hon'ble High Courts and the language of the Act, it was likely that the clarification would be on the affirmative.

It's a sigh of relief to the industry that the recommendation suggested by the GST Council in its 47th Council meeting has finally taken a shape and Circular No. 173/05/2022 dated 6th July has been issued to address this situation. The Circular has categorically held that Para 3.2 of the Refund Circular didn't intend to deny refund to a supplier who was making a supply of goods under a concessional notification wherein the rate of tax of output supply is less than the rate of tax on input supply (of the same goods) at the same point of time.

It is good to see the Government acting so swiftly and issuing clarifications in the right direction at a brisk pace. The Circular thus brings a ray of sunshine again for the entities and we strongly believe that, in coming times, this Circular will play as catalyst to put an end to unwarranted litigation and expeditious disposal of long pending refund claims.

This article has been published in the Times of India

ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

MUMBAI
109 A, 1st Floor
Dalamal Towers
Free Press Journal Road
Nariman Point
Mumbai 400 021
T: +91 22 6636 7000

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

AHMEDABAD
C-507/508, 5th Floor
Titanium Square, Thaltej
Crossroads, SG Highway
Ahmedabad 380 054
T: +91 79 6605 4480/8

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

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

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

GIFT CITY
GIFT CITY Unit No. 605,
Signature, 6th Floor Block 13B,
Zone – I GIFT SEZ,
Gandhinagar 382355

FOLLOW US:

@ELPIndia

Economic Laws Practice

Economic Laws Practice (ELP)

elp_think_act_excel

elplaw@elp-in.com