



SINGH & ASSOCIATES

Founder - Manoj K. Singh

ADVOCATES & SOLICITORS

June 2016. Vol. IX, Issue VI

INDIAN LEGAL IMPETUS®



® TM



**PROTECTING
DESIGNS**

New IPR Policy
is aimed at building
“Creative & Innovative India”
through...

Support
systems
for MSMEs,
startups

Wider access
to Traditional
Knowledge
Digital Library





EDITORIAL



Manoj K. Singh
Founding Partner

“With immense pleasure, I introduce the latest June 2016 edition of our Newsletter “Indian Legal Impetus”. This Newsletter is one more addition towards our constant effort to discuss the latest developments in the legal arena and their application in the various fields. The whole Singh and Associates team thanks its readers for their overwhelming responses towards our endeavors in making the legal information more accessible.

The present edition brings forth the article on **“Cabinet Approves India’s IPR policy: “Creative India; Innovative India: रचनात्मक भारत; अभिनिव भारत”** providing an introductory overview for the Union Cabinet on 13 May 2016 approved the National Intellectual Property (IPR) policy roadmap to foster creativity and innovation, promote entrepreneurship and enhance socio development, enhance access to healthcare, food security and environmental protection.

An article on **“INTELLECTUAL PROPERTY CRIME & TERRORISM FINANCING”** which describes Indian scenario on intellectual property crime & terrorism financing. Moving further we have an article discussing the **DESIGN PIRACY IN INDIA** along with case laws related to design infringement in India.

Our Corporate section starts with an article **“PRESUMPTIVE TAXATION SCHEME FOR PROFESSIONALS”** stipulates Finance Bill 2016 in which the Government has introduced presumptive taxation scheme for the persons earning professional income. Further there is an article Participatory Notes (P-notes) highlighting measures taken to check on P-Notes and their Impact.

In the Litigation section, there is an article on **“INSOLVENCY AND BANKRUPTCY CODE, 2016: A BOON FOR SECURED CREDITORS”** which provides a background of the existing laws relating to Insolvency and highlights the salient features of the insolvency and bankruptcy code, 2016. Moving further, there is an article discussing the doctrine of “per incuriam” and how the Indian Courts have dealt with the said doctrine.

Then there is an article titled as **“SICA TO PREVAIL OVER RDDB ACT”**, which discusses the landmark decision of the Hon’ble Supreme Court of India in the year 2014 wherein it was held that the provisions of the Sick Companies (Special Provisions) Act, 1985 is to prevail over the recovery of debts under the Recovery of debts Due to Banks and Financial Institutions Act, 1993. There is an article highlighting the various problems faced by domestic solar manufacturing industry that despite huge steps taken by the government for increase in solar power generation.

Last but not least, latest developments in various fields of law which has been summarized in the Newsbytes Section of the present issue.

The firm participated in the 138th Annual Meeting & Conference of International Trademark Association at Orlando, Florida. This year, the conference was attended by over 10,000 lawyers and professionals from across the globe. Similar to last year, our firm reserved a booth in the exhibition area of the conference in order to have meetings with existing clients and to make new friends. A few pictures from the conference have been included in this issue.

I hope that our esteemed readers find useful the information furnished through this newsletter and also such an effort will enable them to understand and further interpret the recent legal developments thus enabling our readers to avail new gateways. I welcome all suggestions, opinions, queries or comments from our readers. You can also send your valuable insights and thoughts at newsletter@singhassociates.in

Thank you.



All ©Copyrights owned by Singh & Associates

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means without the prior permission in writing of Singh & Associates or as expressly permitted by law. Enquiries concerning the reproduction outside the scope of the above should be sent to the relevant department of Singh & Associates, at the address mentioned herein above.

The readers are advised not to circulate this Newsletter in any other binding or cover and must impose this same condition on any acquirer.

For internal circulation, information purpose only, and for our Clients, Associates and other Law Firms.

Readers shall not act on the basis of the information provided in the Newsletter without and seeking legal advice.

2016 © Singh & Associates

INDIAN LEGAL IMPETUS®

Volume IX, Issue VI

Singh & Associates
Founder-Manoj K. Singh
Advocates & Solicitors

NEW DELHI (HEAD OFFICE)

N - 30, Malviya Nagar, New Delhi - 110017
Email: newdelhi@singhassociates.in

BANGALORE

N - 304, North Block, Manipal Centre 47,
Dickenson Road, Bangalore - 560042, INDIA
Email: bangalore@singhassociates.in

MUMBAI

48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai, Maharashtra - 400021, INDIA

RANCHI

Chamber No. C-7, New Lawyers Chamber,
1st Floor, Jharkhand High Court, Ranchi
Jharkhand- 834002." INDIA

Ph : +91-11-46665000, 26680331

Fax : +91-11-46665001, 26682883

www.singhassociates.in



SINGH & ASSOCIATES
Founder - Manoj K. Singh
ADVOCATES & SOLICITORS

Managing Editor
Manoj K. Singh

Editor
Priyanka Rastogi
Shweta Vashist

Published by
Singh & Associates
Advocates and Solicitors

Contents

1.	CABINET APPROVES INDIA'S IPR POLICY "CREATIVE INDIA; INNOVATIVE INDIA: रचनात्मक भारत; अभिनव भारत"-	04
2.	JUDICIAL ANALYSIS OF ORDER OF ABANDONMENT	08
3.	DESIGN PIRACY IN INDIA	11
4.	PRESUMPTIVE TAXATION SCHEME FOR PROFESSIONALS	14
5.	P-NOTES: AN EFFECTIVE INSTRUMENT WITH TWISTS AND TURNS	16
6.	INSOLVENCY AND BANKRUPTCY CODE, 2016: A BOON FOR SECURED CREDITORS.	19
7.	THE DOCTRINE OF "PER INCURIAM"	22
8.	SICA TO PREVAIL OVER THE RDDB ACT	25
9.	DOMESTIC SOLAR PV MANUFACTURING INDUSTRY PLAGUED BY DISPUTES, TRADE TENSIONS AND UNCERTAIN FUTURE	26
10.	THE PATENT AMENDMENT RULES 2016	28
11.	GLOBAL PROMOTION OF TRADITIONAL SYSTEM FACES A CATAPULT AS INDIA AND WHO SIGN A LANDMARK APPLICATION	31
12.	INDIA'S OWN 'PATENT BOX' REGIME	32
13.	INCOME DECLARATION SCHEME, 2016	34
14.	100% FDI FOR ARCS THROUGH AUTOMATIC ROUTE	35
15.	NEWSBYTES	36



CABINET APPROVES INDIA'S IPR POLICY "CREATIVE INDIA; INNOVATIVE INDIA: रचनात्मक भारत; अभिनवि भारत"-

Priyanka & Saipriya

The Union Cabinet on 13 May 2016¹ approved the National Intellectual Property Right (IPR) policy roadmap to foster creativity and innovation, promote entrepreneurship and enhance socio development, enhance access to healthcare, food security and environmental protection. The Policy recognizes the abundance of creative and innovative energies that flow in India, and the need to tap into and channelize these energies towards a better and brighter future for all.

The National IPR Policy is a vision document that aims to create and exploit synergies between all forms of intellectual property (IP), concerned statutes and agencies. It sets in place an institutional mechanism for implementation, monitoring and review. It aims to incorporate and adapt global best practices to the Indian scenario. This policy shall weave in the strengths of the Government, research and development organizations, educational institutions, corporate entities including MSMEs, start-ups and other stakeholders in the creation of an innovation-conducive environment, which stimulates creativity and innovation across sectors, as also facilitates a stable, transparent and service-oriented IPR administration in the country.²

The Policy lays down the following seven objectives:

1. IPR Awareness, outreach and promotion;
2. Stimulate generation of IPR;
3. Legal legislative Framework;
4. Administration and Management;
5. Commercialization of IPR;
6. Enforcement and Adjudication;

7. Human Capital Development.

It is mentioned in the policy that these objectives are sought to be achieved with detailed action points. It is further mentioned that the respective departments shall be monitored by Department of Industrial Policy Promotion (DIPP) which shall be the nodal department to coordinate the implementation and future developments of IPR in India.

The Policy recognizes that India has a well-established TRIPS-compliant legislative, administrative and judicial framework to safeguard IPR. Further it meets international obligations while utilizing the flexibilities provided in the international regime to address its developmental concerns.³

The broad contours of the National IPR Policy are as follows⁴:

VISION STATEMENT:

An India where creativity and innovation are stimulated by Intellectual Property for the benefit of all; an India where intellectual property promotes advancement in science and technology, arts and culture, traditional knowledge and biodiversity resources; an India where knowledge is the main driver of development, and knowledge owned is transformed into knowledge shared.

MISSION STATEMENT:

Stimulate a dynamic, vibrant and balanced intellectual property rights system in India to:

- o foster creativity and innovation and thereby, promote entrepreneurship and enhance socio-economic and cultural development, and
- o focus on enhancing access to healthcare, food security and environmental protection, among other

¹ http://dipp.gov.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_12.05.2016.pdf

² <http://pib.nic.in/newsite/PrintRelease.aspx?relid=145338>

³ <http://pib.nic.in/newsite/PrintRelease.aspx?relid=145338>

⁴ *Ibid*



sectors of vital social, economic and technological importance.

IPR AWARENESS THROUGH OUTREACH AND PROMOTION

To create public awareness about the economic, social and cultural benefits of IPR among all sections of society the policy mandates a list of step which can be summarized as below:

- i. By launching associated campaign on electronic, print and social media and by linking the campaign with other national initiatives such as "Make in India", "Digital India", "Skill India", "Startup India", "Smart cities" and other new initiatives in future.
- ii. Customizing programs for MSMEs, start-ups, R&D institutions, universities, colleges, inventors, creators, entrepreneurs; Reaching out to IP generators in rural and remote areas; case studies of successful use of IPRs, promoting high quality and cost-effective innovation, involving eminent personalities as 'ambassadors' of IP, creating materials for IP promotion in multiple languages.
- iii. Create awareness programs providing scientists/researchers with a deeper understanding to protect their inventions, Engaging public and private research organizations to create campaigns for IP creation, Encouraging MNCs to develop IP programs for their employees, creating materials for MSMEs to develop and protect IP.
- iv. Create well publicized events and ongoing programs to emphasize the importance of IP.
- v. Create suitable course materials for educational institutions at all levels, apart from it creating online and distance learning programs for all categories of users; Including IPR at school curriculum at appropriate level
- vi. Engage with media to sensitize them regarding IP related issues.

GENERATION OF IPR

The Policy suggests the following steps taken towards attaining this objective,

- i. To take steps to increase domestic filings of patent applications. To stimulate large corporations both Indian and foreign, that have R&D operations to create, protect and utilize IPR in India;
- ii. Improve awareness of the value of copyright for creators, the importance of their economic and moral rights;
- iii. To promote 'infusion of funds to public R&D units' as a part of corporate social responsibility to foster culture of open innovation. Traditional Knowledge Digital Library (TKDL) to be allowed access for further R&D in case of public research institutions.
- iv. Encourage the registration of Geographical Indications (GIs) through support institutions; assist GI producers to define and maintain acceptable quality standards and providing better marketability.
- v. Encourage creation of design related IP rights by identifying, nurturing and promoting the aspects of innovation protectable under the design law and educating designers to utilize and benefit from their designs.

LEGAL AND LEGISLATIVE FRAMEWORK

The policy describes the difficulty to predict the reach of existing laws in a changing and dynamic knowledge fields, therefore it becomes necessary to carry out legislative changes as may be required from time to time. The steps suggested by the policy on attaining this objective are as follows:

- i. Revision of existing IP laws wherever necessary if any in consultation with stakeholders; engage constructively in the negotiation of international treaties and agreements in consultation with stakeholders; Engage worldwide to protect traditional knowledge, genetic resources and traditional cultural expressions.



- ii. Review and update IP related rules, guidelines, procedures and practices for clarity, simplification, streamlining, transparency and time bound processes in administration and enforcement of IP rights;
- iii. To identify important areas of study such as IP interface with competition law and policy; Provide guidelines for authorities whose jurisdictions impact administration or enforcement of IPR such as patents and Biodiversity; protection of trade secrets.
- iv. To examine the issues of technology transfer, know-how and licensing on fair and reasonable terms and provide a suitable legal frame work to address these issues.

ADMINISTRATION AND MANAGEMENT

- i. The administration of Copyright Act 1957 along with the Office of the Registrar of Copyrights, under the Department of Higher Education as well as the administration of the Semiconductor Integrated Circuits Layout Design Act 2000 along with the office of the Semiconductor Integrated Circuits LAYOUT-Design Registry under the Department of Electronics and Information Technology is being transferred to DIPP.
- ii. The office of Controller General of Patents, Design, Trademarks (CGPDTM) has undergone up gradation in the last few years and mentions a list of changes such as fixing and adhering to timelines of registrations and disposal of opposition matters, adopting best practices of filing and docketing of documents, maintenance of records, user-friendly IP offices, to expedite digitization of Design office to enable online filing, examine joining of Centralized Access and Examination (CASE) and WIPO Digital Access Services (DAS) and few other changes in order to advance further.
- iii. The office of Registrar of Copyrights will take measure to digitize copyrights records and introduce online facility, upgrade manpower resources for effective management as well as streamline processes for the grant of Copyrights.

COMMERCIALIZATION OF IPR:

It is described in the policy that a common public platform can serve as a database of IPRs would help creators and innovators connect to potential users, buyers and funding institutions. Few pivotal points mentioned in the policy can be summarized as below:

- i. Promote licensing and technology transfer for IPR; devising suitable contractual and licensing guidelines to enable commercialization of IPR; promote patent pooling and cross licensing to create IPR based products and services. Examine standard Essential Patents (SEPs) on fair, reasonable and non-discriminatory terms.
- ii. Facilitating investments in IP driven industries and services through the proposed IP Exchange for bringing investors/funding agencies and IP owners/users together. Promote use of Free and Open source software along with adoption of open standards.

ENFORCEMENT AND ADJUDICATION

In order to strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements the policy suggests various steps. The important points are summarized below:

- i. Measures to check counterfeiting and piracy are to be undertaken by the Government; To engage with all levels of industry, including e-commerce, in order to create respect for IP rights and devise collaborative strategies and tools; To undertake stringent measures to curb manufacture and sale of misbranded, adulterated and spurious drugs; measures to combat online and offline piracy;
- ii. To strengthen the enforcement mechanisms for better protection of IP rights by augmenting manpower, infrastructure facilities and technological capabilities of the enforcement agencies and building capacity to check proliferation of digital crimes;
- iii. Licensing practices or conditions that may have an adverse effect on competition will be addressed through appropriate measures,



including regulation of anti-competitive conduct in the market by the competition commission of India; to adjudicate IP disputes through commercial courts, set up at appropriate level.

HUMAN CAPITAL DEVELOPMENT

The steps to be taken as mentioned in the Policy to strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPR can be summarized in the following points. It is mentioned in the Policy that the Department of Industrial Policy and Promotion shall be the nodal point to coordinate, guide and oversee the implementation and future development of IPRs in India.

- i. To strengthen and empower Rajiv Gandhi National Institute of Intellectual Property and Management, Nagpur to conduct training for IPR administrators, managers in industry and business, academicians, R&D institutions, IP professionals, inventors and civil society; train the trainers and develop training modules; develop links with other similar entities at the international level; provide legal training for examiners
- ii. Strengthen IP teaching, Research and Training in collaboration with WIPO, WTO and other International Organizations and reputed foreign Universities.

CONCLUSION

The approved IPR policy is comprehensive that reiterates India's stand in terms of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). A systematic implementation of the steps and strategies mentioned in the Policy will promote for a holistic and conducive environment to tap the full potential of Intellectual Property Rights for the country's growth and economic development.



JUDICIAL ANALYSIS OF ORDER OF ABANDONMENT

Martand Nemana

INTRODUCTION:

Intellectual Property has always been seen an exclusive set of rights which command protection for the moral and economic rights of the original creator. While the major emphasis of these rights is to entrust legal protection, the rights also ensure in creating healthy opportunities for the right holders to developing financial assets and also gain favorable incentives for further progress. These legal rights, most commonly in form on patents, trademarks and copyright, protect the creativity and dissemination of their work. Infringement has been defined as “the action of breaking the terms of a law, agreement, and violation.” Intellectual Property rights are infringed when a product, creation or invention protected by laws is exploited, copied or otherwise used without having the proper authorization, permission or allowance from the person who owns those rights. The motives for protecting the IP rights are a matter of crucial interest to both company and consumer. From a practical perspective “Intellectual Property Crime” refers to counterfeited and pirated goods, manufactured and sold for profit, without the consent of the patent or trademark holder¹; it also has been defined as:

Criminal IP offences are also known as “IP crime” or “counterfeiting” and “piracy”. Counterfeiting can be defined as the manufacture, importation, distribution and sale of products which falsely carry the trade mark of a genuine brand without permission and for gain or loss to another. Piracy, which includes copying, distribution, importation etc of infringing works, does not always require direct profits from sales wider and indirect benefits may be enough along with inflicting financial loss onto the rights holder.

Trading standards are primarily responsible for enforcing the criminal IP laws, with support from the police, and with investigative assistance from the IP rights owners. Private criminal investigations and prosecutions may also be launched by the right owners in some cases. Criminal IP offences can take

place in a variety of ways², they include:

- employees selling copies of protected works or supplying fake goods within the working environment
- company servers and equipment being used to make available (i.e. uploading) infringing content to the internet with the knowledge of management
- using the work intranet to offer for sale infringing products to colleagues
- external visitors entering your premises, to sell counterfeit and pirated items
- using unlicensed software on business computer systems with the knowledge of management

INDIAN SCENARIO

There are over seventy Central Laws covering many offences apart from those in the Indian Penal Code. To prevent and punish violations under economic offences, there are large numbers of agencies with investigative and quasi-judicial powers. As the magnitude of economic offences is enormous, it is essential to make rigorous laws and strengthen the regulation, investigation and enforcement systems adequately.

IP and Cyber Crime: IP theft (copyright, trademark) industrial / commercial secrets, cyber squatting etc., the cost of which runs to a few hundred billion dollars every year in the US alone.

Technology and Crime: With increasing e-commerce, there is an increase in cyber economic crimes. For every economic crime, there is a cyber version with much more potential, larger profits and lesser risks. While the e-commerce, as a system is speedy and efficient, its speed and efficiency are creating problems.

¹ The Organized Crime Task Force, Annual Report 2005, Serious and Organized Crime in Northern Ireland, p 27

² Intellectual property crime and infringement – Published 22nd February 2016 – Accessed on 29th March 2016. <https://www.gov.uk/guidance/intellectual-property-crime-and-infringement>



The Internet has made all borders and legal jurisdictions absolutely obsolete. Criminals can remain in one jurisdiction and commit crimes elsewhere and avoid prosecution. Therefore, a high degree of co-ordination to prevent crime and co-operation to prosecute and punish crime become essential especially as the proceeds of these crimes go into further crimes including drugs and arms. All such definitions would include all contemporary economic crimes, would also cover the persons who are outside an organization and would not be confined to just non-violent white-collar crimes.

This would also include Corporations and members of professions such as the Law, Accounting, Management etc., and would cover both Banking and non-Banking financial frauds, violations of the Stock Market, Smuggling, Money Laundering, and Intellectual Property Rights (IPR) related offences, Insurance and Health frauds, IT related offences (cyber-crimes), Telecommunication, Theft and misuse of Credit card & identity and Corruption.

LINKS BETWEEN IPC & TERRORIST FINANCING

Law enforcement agencies have to recognize that Intellectual Property Crime is not a victimless crime. Because of the growing evidence that terrorist groups sometimes fund their activities using the proceeds generated from IPC, it must be seen as a very serious crime with important implications for public safety and security³. The links between IPC and terrorist financing can be categorized as follows:

Direct involvement: Where the relevant terrorist group is implicated in the production, distribution or sale of counterfeit goods and remits a significant proportion of those funds for the activities of the group. Terrorist organizations with direct involvement include groups who resemble or behave more like organized criminal groups than traditional terrorist organizations.

Indirect involvement: Where sympathizers or militants are involved in IPC and remit some of the funds, knowingly to terrorist groups via third parties. Terrorist organizations whose sympathizers are involved in IPC and who use some of the funds generated from this

activity to support the terrorist group. In many cases the funding is further attenuated, involving unrecorded movements of cash via third parties.

METHODS OF FINANCING

Several cases that directly link terrorist groups with counterfeiting and piracy activities have been reported through various reports⁴. The following are some of these:

- Interpol seized US\$1.2 million worth of counterfeit German brake pads in 2004. Later, investigations revealed that these were to be used to support the Lebanese terrorist organization Hezbollah.
- Based on evidence with FBI, the terrorists who bombed the World Trade Center In 1993 used funds channeled from counterfeit textile sales in New York.
- It was found that Chechen rebels were financing their operations by selling pirated CDs.
- According to New York's Police Commissioner, the Madrid train bombing incident was funded through the sale of pirated CDs.
- According to an interview, published in French daily *Le Monde*, of the head of a French security agency, Afghan terrorist groups have been found to use the proceeds of duplicates of credit cards and counterfeit designer products.
- A suspect, Faruk Aksu, who is allegedly linked to several terrorist groups, was arrested in Turkey with US\$3.2 million fake US dollars, which he had obtained from Iraq. These dollar notes used the paper used by the US Government and incorporated all the security features of a real US dollar.
- Al Qaeda training manuals recovered in 2002 reveal that the organization recommends the sale of fake goods as a means of fundraising for cells.

³ Northern Ireland Organized Crime Task Force, *The Threat Assessment 2002: Serious and Organized Crime in Northern Ireland*. Available at http://www.nio.gov.uk/organised_crime_threat_assessment_2002.pdf.

⁴ *Counterfeiting and Organised Crime, Report by Union des Fabricants, Links between terrorism and other forms of crime, Foreign Affairs Canada and the United Nations Office on Drugs and Crime, April 2004*



In testimony before the House Committee on International Relations in 2003, Interpol's Secretary General stated that the link between organized crime and counterfeit goods (also known as intellectual property crime) was long established, but announced that the international law enforcement body was "sounding the alarm that Intellectual Property Crime is becoming the preferred method of funding for a number of terrorist groups."⁵

An intangible significant impact is seen on the long generated goodwill and reputation of the product which ends up paying the opportunity cost for the activity. It also has to be emphasized and looked into; as the general customer is getting affected and an irreversible damage is being caused in the process. The companies involved in the other hand have no clue of the transactions and before any whiff is gained the damage has already occurred. The underlying bottom line is that the act leaves no room for the product to rejuvenate and this becomes the breeding criterion for terrorist groups involved in such activities. The ripple generated from the insurgence of the impact continues to affect and absorb all relative industries while the main prey being film and audio industry with all the concerned and dependent electronic distribution channels.

While it comes to the injection of counterfeit goods into the market for making quick money, it clearly strikes the death knell for the product manufacturers. Surprisingly majority of the producers and the consumer accessing / buying the product are not aware of the defect in authenticity of the product and its impact. The high end retails brand shopping chains which play host to the top of the line world class goods easily fall prey to the benevolence of goods in disguise only to later ascertain that not only has the money generated been pooled for financing an act of terror but also has created a dent in the lustrous market value of the product.

NEED FOR REGULATION(S)

India inherited the present system of classification of offences from its colonial rulers more than 140 years

back, in which the police are the primary enforcers of the law. Considering the nature of the impact of colonial law making, suffice it to say that it is time to reexamine and reframe the laws as appropriate to the twenty first century Indian society and its emerging complexities. Many countries in the world have started their own initiatives in improving their domestic Criminal Justice Systems. England, USA and Australia are all in the process of charting out reforms. As societies continue to change, crimes become complex and new crimes emerge, it is imperative for India to work out a comprehensive Criminal Justice System, suited to the ethos of this country.

The basis for the classification of crime is that contained in the Indian Penal Code (IPC) and the Criminal Procedure Code (CrPC). But, over a period of time, various statutes have been added with different provisions about evidence, burden of proof etc., and often, the crimes themselves are not of the kind covered in the IPC; in fact, many of the special laws relate to social inequities. All these have only added to the burden of work on the Criminal Justice System. Further, with the changing views of what constitutes crime all over the world and not just in India, unless there is a re-look at the classification also, it will be difficult to work out appropriate prevention and detention strategies for different kinds of offences which are now clubbed together as crime. The economic and other Offence Code would include all economic offences, like tax fraud, money laundering, stock market scams and also offences like cyber crimes, intellectual property violation, etc.

The challenge lies in assigning priority of execution and operation; as, if the options are to decide between critical objectives like rural empowerment, healthcare, provision of medical facilities and intellectual property code violation; there is no scope for second thought. However this alarming situation being on a constant rise highlights the immediate need to frame redressal mechanism and update the present statutes, as the vacuum of which is reflected in form of billions of dollars which drastically affects the financial and economic standard of the Country.

⁵ Ronald K. Noble, "The links between intellectual property crime and terrorist financing" Testimony before the U.S. House Committee on International Relations, July 16th 2003, available from [\[http://www.interpol.int/Public/ICPO/speeches/SG20030716.asp\]](http://www.interpol.int/Public/ICPO/speeches/SG20030716.asp)



DESIGN PIRACY IN INDIA

-Aayush Sharma & Martand Nemana

INTRODUCTION:

Industrialisation and innovation have been revolving upon the theory of value for money. The consumer always tries to gain value of the product from its utility whereas the producer aims at harvesting profits from the investment to develop the product. Given the plethora of options available, preference would always be given for the product with original innovation, novelty and distinctiveness. To reflect globalization, registration of a novel designs is now a common practise amongst every enterprise as they try to keep their product ahead & superior to others. Racing to protect one's own design, these enterprises face a crucial threat of design infringement for their registered design.

The intellectual assets developed by these enterprises are vulnerable and stand prey to infringement. Though there are many strict provisions in IP laws dealing with infringement issues but they are not capable enough for protecting the intellectual assets. Industrial Design, has been serving as a secondary source for protection of products made by an enterprise on the basics of their appealing nature and novelty. These are granted for a period of 10 years from the date of filing and are further renewed for a period of five years accordingly. The main intension behind the registration of the design is to gain monetary value and protection. The monetary gain and protection are both hampered once the design is infringed by another party. To keep a check, the Indian government recently announced its National IPR policy, which compliant with the World Trade Organisation's agreement on Trade Related aspects of IPRs (TRIPS) and moreover the policy also has been keen upon increasing awareness for generation and effective enforcement of IPR, besides

encouragement of IP commercialisation through various incentives. The IPR policy mainly highlights the issue of infringement in Patents, design and Trademark and the steps being taken by the authority to stop the practise of infringement or piracy in Indian jurisdiction respectively¹.

Design is defined as *"drawing or the deception of an original plan for a novel pattern, model, shape, configuration, that is chiefly decorative or ornamental."*

The proprietor of the registered design has the exclusive rights to sell, make, license or to use articles embodying such design. In Design Act, 2000, Section 22 actively deals with the piracy of the registered design in India. According to the law, the Piracy of design is considered for any person:

- for the purpose of sale, make or license use any of the design as registered under the Design Act, 2000 without the written consent or license of the registered proprietor;
- applies to the design or any fraudulent or obvious imitation tries for the purpose of sale, of any article in any class of article in which the design has been registered without the consent of the registered proprietor
- Publish or expose or cause to be published or exposed for sale that article, knowing that the design or any fraudulent or obvious imitation there has been applied to any article in any class of article where the design is registered.

Taking into consideration the above stated

¹ <http://economictimes.indiatimes.com/news/economy/policy/national-ipr-policy-will-soon-go-for-cabinet-approval-nirmala-sitharaman/articleshow/49386064.cms>



section it would not be lawful to apply for a registered design, or a fraudulent or obvious imitation of such, to an article or to import, publish or expose an article to which such a design has been applied in the same class of articles in which the design is registered, without the consent from the registered owner. In response to this the said section also highlights provisions for one who acts in contraventions of this section which includes filing suit to recover a nominal sum from the infringer as a contract debt or seeking damages and an injunction against misuse of the design.

In the Piracy of registered design, every resemblance doesn't seem to be the action of infringement or imitation. An obvious imitation is, one where immediately strikes another design as being so similar to the original registered design, to be almost impossible to differentiate. The most common method to identify infringement as stated in (*Veeplast v Bonjour, 2011*): the two products need not be placed side by side, but rather examined from the point of view of a customer with average knowledge and imperfect recollection. The main consideration is whether the broad features of shape, configuration and pattern are similar to one another².

Further as per s. 19 of the Design Act, 2000 which provides a provision to a registered proprietor for cancellation of registration of design on the various grounds such as novelty etc. All grounds available to a person seeking cancellation may be adopted as a defence in infringement proceedings. In *Steelbird v Gambhir (2014)*³ the Delhi High Court upheld the defendants' plea that the design was

neither novel nor original and thus it is not eligible for protection under the design law. The court vacated the injunction.

CASE LAWS RELATED TO DESIGN INFRINGEMENT IN INDIAN SCENARIO.

In the case of *Dabur India Ltd. v. Rajesh Kumar and Ors [2008]*⁴ the Delhi high court has raised the questions against the frivolous Design litigation. The Court in the case seems to have given due regards to all the aspects appended to the use of the bottle's design in question and going beyond the tenets of design law, the Court has taken into consideration practicalities mainly.

In *Marico v Raj Oil (2008)*⁵ the court held that caps were articles as defined under the Designs Act and were "capable of being made and sold separately". However, an injunction in this instance was refused, since the rival caps were dissimilar.

In *Troikaa v Pro Labs*⁶ (2008) the defendant was restrained from manufacturing, marketing and using tablets that were similar in shape and colour to the plaintiff's tablet, as it had registered the shape and configuration under the Designs Act.

CONCLUSION

Better protection of the design infringement law in India is an actual need of the hour. The design law needs to be clearer regarding the laws of registration of design and more precisely the laws related to protection of registered design proprietor. There should be proper deterrent remedies including stringent fines. Further, the Design Office needs to review its examination procedure and include more thorough novelty searches to ensure that when applicants are granted a right, they can be reasonably sure that it is stable and can be

² <https://indiankanoon.org/doc/1360425/>

³ <http://spicyip.com/2014/03/delhi-hc-vacates-injunction-granted-in-favour-of-steelbird-design-not-new-or-original.html>

⁴ <http://www.mondaq.com/india/x/65772/Trademark/Dabur+Design+Decided+Upon+No+Infringement>

⁵ <https://indiankanoon.org/doc/759618/>

⁶ <https://indiankanoon.org/doc/1901149/>



relied upon to prevent misuse. The Design Office also needs to improve its e-filing initiative and make design records available online. The prior art search up to most extent can be useful for limiting the cases of design infringement in India. As in the cases of Patent, every inventor wishes to first go for prior art search so that the risk of infringement can be minimised, in the same way a proper search system should be created in the Industrial design system in India. Within the existing legislative framework, courts in India have also helped in maintaining the rights of the registered proprietor and in providing clear observation of the law.



PRESUMPTIVE TAXATION SCHEME FOR PROFESSIONALS

Arpita Karmakar

INTRODUCTION

Vide Finance Bill 2016, the Government has introduced presumptive taxation scheme for the persons earning professional income. The existing scheme of presumptive taxation is dealt under section 44AD of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'), wherein the section provides for simplified taxation scheme for eligible persons engaged in certain eligible business only. Persons earning professional income were excluded from this list prior to this proposed amendment.

What is presumptive taxation scheme (PTS)? Presumptive taxation is a scheme under which one can file the return on the basis of 'presumed' income. Accordingly, under PTS, the professionals, whose gross receipts does not exceed *fifty lakh rupees*, and eligible businesses, as prescribed under the Act, can compute income on presumed/estimated basis under section 44ADA and Section 44AD of the Act, respectively, at a minimum prescribed rate.

AMENDMENTS BROUGHT ABOUT

Accordingly, the following changes in the Act have been introduced:

1. Presently, Section 44AA of the Act deals with the maintenance of accounts by certain persons carrying on profession or business. This section has been amended to the extent that from the 1st day of April, 2017, the following person shall maintain such books of account and other documents for total income in accordance with the provisions of this Act:—

"(iv) where the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds

the maximum amount which is not chargeable to income-tax in any previous year".

2. In Section 44AB of the Income-tax Act, also amendments have been proposed which will come into effect from the 1st day of April, 2017,—

i. *in clause (b), for the words "twenty-five lakh rupees", the words "fifty lakh rupees" shall be substituted; Therefore from 1.04.2016, every person carrying on profession will, if his gross receipts in profession exceed fifty lakh rupees in any previous year will have to get his accounts of such previous year audited by an accountant before the specified date and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed.*

ii. *in clause (d),—*

a) *for the word "business" wherever it occurs, the word "profession" will be substituted;*

b) *for the words, figures and letters "under section 44AD", the words, figures and letters "under section 44ADA" shall be substituted;*

c) *for the words "previous year", the words "previous year; or" shall be substituted;*

iii. *After clause (d), a new clause will be inserted, specifying that every person, fulfilling the clause (e) below, shall also get the accounts of such previous year audited as mentioned in para (i).*

"(e) carrying on the business shall, if the provisions of sub-section (4) of section 44AD are applicable



in his case and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year,"

3. The Finance Bill has also introduced a new section after section 44AD of the Income-tax Act. The following section shall be inserted with effect from the 01.04.2017, namely:—

Section 44ADA:

- (1) Notwithstanding anything contained in sections 28 to 43C, in the case of an assessee, being a resident in India, who is engaged in a profession referred to in sub-section (1) of section 44AA and whose total gross receipts do not exceed *fifty lakh rupees* in a previous year, a sum equal to *50% of the total gross receipts* of the assessee in the previous year on account of such profession or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the assessee, *shall be deemed to be the profits and gains of such profession chargeable to tax under the head "Profits and gains of business or profession"*.
- (2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed.
- (3) The written down value of any asset used for the purposes of profession shall be deemed to have been calculated as if the assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.
- (4) Notwithstanding anything contained in the foregoing provisions of this section, an assessee who claims that his profits and gains from the profession are lower than the profits and

gains specified in sub-section (1) and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (1) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB.'

CONCLUSION

In order to reduce the compliance burden of the small tax payers having income from profession and to facilitate the ease of doing business, this presumptive taxation regime has been proposed for persons carrying on the professions such as legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette and whose total gross receipts does not exceed *fifty lakh rupees* in a previous year, at a sum equal to *50% of the total gross receipts* or as the case may be at a sum higher than the aforesaid sum earned by the assessee. The scheme will apply to such resident assessee who is an individual, Hindu undivided family or partnership firm but not Limited Liability partnership firm.

Also, under PTS, the assessee is exempt from paying advance tax under section 208 of the Act. Accordingly, the person availing the PTS does not have to estimate her income four times a year and pay advance tax accordingly. Instead, the person availing the PTS has to go through the exercise only once.



P-NOTES: AN EFFECTIVE INSTRUMENT WITH TWISTS AND TURNS

Kumar Deep

UNDERSTANDING P-NOTES

Participatory Notes, (“**PN**”) commonly known as P-Notes are instruments used for making investments in the stock markets. In Indian context, PNs are such instruments which are issued by registered Foreign Institutional Investors (“**FII**”) or Foreign Portfolio Investors (“**FPI**”) to overseas investors, who wish to invest in the Indian stock markets without registering themselves with the Securities and Exchange Board of India (“**SEBI**”).

Such PNs are also called Offshore Derivative Instruments (“**ODI**”) as they are used outside India for making investments in shares listed in the Indian stock market. P-Notes are as good as contract notes which are transferrable by endorsement and delivery. Therefore P-notes are easy to operate as compare to other instruments which are being used by foreign investors for making investment in Indian market. Such P-notes are free from any jurisdiction or control of SEBI, therefore, such P-Notes are being traded outside India freely.

P-Notes are not required to be registered as registration of FIIs with SEBI is mandatory for trading such P-Notes. This is the reason P-Notes are very popular instrument for investment in India as it permits the identity of the investor to be kept unidentified and anonymous. Thus, trading of such P-Notes freely makes it very difficult to find the original owner of these P-notes as these are impenetrable and the identity of the owner is known only to the FII.

NECESSITY TO CURB P-NOTES

Trading in P-Notes is believed to be a murky route for investment in India as such course provides scope for round-tripping of money i.e. the practice of money squirrel away overseas by Indians returning home through tax havens in the form of foreign capital and promoting money laundering.

Since introduced in the Indian market, P-notes have been recognized contentious instruments and it seems

very sentimental issue as whenever the Government or SEBI tries to regulate them, the market starts falling thwart the government to take the inconsiderate move. It is also anticipated that through this course of P-Notes the promoters of an Indian company may re-route their funds in their own companies. Therefore, such promoters or existing shareholders may defy the norms of insider trading as formulated by the SEBI for all listed companies in India.

SEBI, the market regulator for the securities market in India, in the year 1992 has permitted FIIs to register and participate in the Indian stock market. However, since the time they were introduced in Indian securities market, the Government has been seeking to regulate them. The Reserve Bank of India (“**RBI**”) has been against the idea of P-Notes and also raised its concern from time to time on the hidden identities of investors and multi-layering of investment. Therefore, it has been considered that P-notes may be used as money laundering instrument.

However, during the initial period of its implementation in the Indian market, FIIs generated a lot of business from monies routed through P-notes. With these amount of investments in the form of P-notes the security market was stimulated during the early period of liberalization in India.

MEASURES TAKEN TO CHECK ON P-NOTES AND THEIR IMPACT

It has been observed that SEBI and RBI were not happy with the salient character of the P-Notes being unattainable to know the holder of the underlying securities. Due to this character of P-Notes the funds may be hedged to cause volatility in the Indian securities markets.

With this viewpoint, the SEBI, on October 16, 2007, proposed curbs on P-Notes which accounted for roughly 50% of FII investment at that time. However the proposals of SEBI were not clear and this led to a hasty crash down of the market when it was opened



on the following day i.e. October 17, 2007. Within a minute of opening trade, the Sensex crashed by 1744 points approximately 9% of its value. This was believed to be the biggest intra-day fall in Indian stock-markets in absolute terms. This led to automatic suspension of trade nearly for 1 hour. The then Finance Minister Mr. P. Chidambaram issued clarifications, in the meantime, that the government was not against FIs and was not immediately banning P-Notes. Mr. Chidambaram clarified that SEBI's move to impose some restrictions on investments through the P-Notes route was aimed at moderating capital inflows and were in the interest of investors across all categories.

This was, however not the end of the volatility. The next day again i.e. October 18, 2007, the Sensex tumbled by 717.43 points (3.83%) its second biggest fall. The slide continued the next day when the Sensex fell 438.41 points to settle at 17559.98 at the end of the week, after touching the lowest level of that week at 17226.18 during the day.

Thereafter, the then SEBI chief, Mr. M. Damodaran on October 22, 2007 announced that funds investing through P-Notes were most welcome to register as FIs, whose registration process would be made faster and more streamlined. The markets welcomed the clarifications with an 879 point gain, its biggest single-day surge on October 23, 2007, indicating the end of the P-Notes crisis.

The above stated remembrance of the fall of stock market by 1744 point on October 17, 2007 and subsequent volatilities on following days when SEBI first proposed curbs on P-notes is enough to spread fear in the mind of investors.

Since then, SEBI has adopted a cautious approach towards tightening of regulations relating to P-Notes. The norms have been tightened considerably for P-Notes over the years to put in place strong checks and balances to avoid misuse of P-Notes.

RECENT MOVES

As observed from the past, whenever there was an attempt to curb flows of P-notes by tightening the norms, the Indian securities market has fallen. As seen in the past and noted herein above concentrated effort

was attempted in 2007 when a phasing out of P-Notes was sought and consequent crash of the market around 10% within minutes of market opening for the first time after the announcement.

Accordingly, with due care and deliberation, SEBI announced in the year 2014, that P-Note can be issued only to investors coming from jurisdictions that have anti-terror funding norms and anti money laundering norms just to keep a limit on the flow of money through P-Notes and to check on the flow of black money in India.

The Hon'ble Supreme Court has appointed Special Investigation Team (SIT) on black money in the year 2014 which has also recommended some checks on P-Notes upon which the SEBI has started implementing the said recommendations. The SIT report in July 2015 made some critical observations on P-Notes and suggested increased regulation of fund flows through this route.

The SIT strongly suggested that the SEBI should put in place more stringent regulations to help identify individuals holding P-Notes or other ODIs, and take other steps required to curtail black money and tax evasion through the stock market route.

As per recommendations of the SIT, SEBI exposed new norms for P-Notes which includes that all details of the 'beneficial owner' must be disclosed in accordance with the KYC norms. Thus, in case there is transfer of P-Notes, SEBI can be able to identify the 'final beneficial owner'. In this regard, SEBI has mandated all P-Notes issuers to capture the details of all intermediate transfers during the month and report the same. Thus, the transfer of P-Notes will be restricted and allowed only after prior consent of the issuer. It means that for every downstream transfer of a P-Note, prior consent of the issuer would be needed. In addition to this, transfer of a P-Note will be allowed only to a pre-approved list of subscribers.

Further, now P-Notes Issuers will need to verify entities that hold more than the predefined thresholds. Such predefined thresholds for companies would be 25% of the total P-Note size and for proprietorship and partnership firms and trusts, the limit of such predefined thresholds has been set at 15%. Accordingly, the



P-Notes issuer will now need to report who controls the management and operations of a P-Note subscriber.

The above said proposed changes came in the wake of the concerns raised by the Supreme Court-appointed Special Investigation Team (SIT) on black money on the identification of beneficial owners and on the transferability of P-Notes.

SEBI has also made it mandatory that P-Note issuers would have to follow the Indian know-your client (KYC) and anti- money laundering norms instead of the norms prevalent in the jurisdiction of the end beneficial owner or of the P-Note issuer.

ANALYSIS

The SEBI had permitted the issuance of P-Notes in 1992 to encourage foreign investments in wake of the crisis of 'balance of payments' during the year 1991. Since then, such P-Notes has contributed around 11.5% of the total assets held by Foreign Portfolio Investors in India. It is important to note that majority of foreign portfolio investments in India are made in the form of P-Notes or ODIs. Therefore, for the fortification of foreign investment in India P-Notes are very important tool.

However, at the same time it is not free from hitches. The main and serious concern in the P-Notes, as discussed herein above as well, that it can encourage black money and money laundering activities including promoting terror funding as the identity of persons investing in the P-Notes remain unidentified to the regulators. Due to this drawback the Government attempted from time to time to curb the norms relating to P-Notes. However, the Indian securities market is more sensitive with respect to this instrument and it reacted badly whenever there is any proposal to curtail the P-Notes as seen in the past as well. Recently, SEBI has introduced a number of compliance to be made to the FII and P-Notes issuers with the objective of keeping check on the flow of black money. Such norms or compliance may reduce the interest of investors in the P-Notes and consequently this may result in making the instrument irrelevant in long run. Therefore, the ideas to curb P-Notes more strictly would be harmful for the Indian securities market. Any rigid regulation or

compliance may create a sense of insecurity in the mind of foreign investors which could lead to the collapse of the security market. Hence, it may be considered to regulate wisely such P-Notes and simultaneously, if it is proposed to phase out this instrument from the market, other alternative lucrative instruments should be promoted by the regulators to maintain the foreign investment in India unaffected.

Source: Recommendations of SIT on Black Money as contained in the Third SIT Report, Press Information Bureau, Ministry of Finance, Government of India, July 24th, 2015



INSOLVENCY AND BANKRUPTCY ACT, 2016: A BOON FOR SECURED CREDITORS.

Rahul Pandey and Arjun Gupta'

Insolvency is a term which has always been related to an individual or a company/business. Often the term is used for describing the insolvency of a company. A company is said to have become insolvent when the net liabilities of its business becomes greater than the assets possessed by the business organization. One of the major concerns which arise at the time of winding up of a company is recovery of the debts. Companies are given various loans and investments by numerous banks, shareholders, secured creditors etc. Secured creditors are the entities which must be the first to be satisfied by paying back the debts at the time of winding up. Banks are the major creditors in this group, often holding a fixed charge on property or other business assets. At present there are numerous laws and adjudicating institutions dealing with financial failures in India. However, the legal and institutional framework did not aid lenders in effective and timely recovery or restructuring of defaulted assets and caused undue strain on the Indian credit system. For this reason, the Government of India after the recommendation of the joint committee of Parliament introduced the Insolvency and Bankruptcy Bill on 21st December 2015, which subsequently became an Act after the assent of the President on 28th May 2016.

The new Insolvency Act incorporates certain changes and brings forth new provisions which promise to discard the faults which were present in the previous acts. Prior to the Act, the Indian banking system was highly fragmented, implemented by multiple judicial forums resulting in lack of certainty in jurisdiction with almost every statute having an overlapping jurisdiction upon the other. Even though there was no single law that dealt with insolvency and bankruptcy in corporate sector; there were two prominent statutes that dealt with debt recovery, i.e. the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDDB") and the Securitizations and Reconstruction of Financial Assets and Enforcement of Security Interests Act,

1. *Studying in 4th Year at Dr. Ram Manohar Lohiya National Law University, Lucknow.*

2002 ("SARFAESI"). In addition to this, the revival and rehabilitation of "sick" industrial companies was looked into by the Sick Industrial Companies (Special Industries) Act, 1985. In addition, Banks could seek recourse to the corporate debt restructuring (CDR) and joint lenders forum (JLF) mechanism for resolving stressed consortium loans.

LIMITATIONS OF PREVIOUS ACTS

The previous acts suffered from various limitations which included applicability, fulfilling objectives, and being effective.

- The RDDB Act and SARFAESI Act applied only to Indian banks and not to foreign banks and non-banking lenders (increasingly important sources of funding for business of in India). In addition to this, a major issue is that these acts are also aimed at debt recovery rather than assessment of an enterprise as a going concern. Even when the proceedings are triggered, the directors of the company retain their control over the Company and its assets, thereby creating a risk of asset depreciation.
- The SICA applies only to industrial companies which creates a major problem since India is increasingly becoming a services-led economy. Further, under SICA, even if the Board for Industrial & Financial Reconstruction ("BIFR") recommends liquidation, a reference is made to the High Court, which re-examines the recommendation and potentially even reverses it.
- Like RDDB Act, CDR and JLF also apply only to regulated banks and non-banking finance companies and are meant as banking regulation to give capital relief rather than address insolvency in a systemic manner.

With an aim to address these problems, provide with expeditious recovery, to empower all classes of creditors



and redeploy capital into more profitable ventures, the Ministry of Finance formed the Bankruptcy Law Reform Committee which submitted its report and a draft Insolvency and Bankruptcy Code (“IBC”) in November 2015.

The objectives of this Act are –

1. To empower all creditors-secured, unsecured, domestic, international financial and operational to trigger resolution;
2. To enable the resolution process to start at earliest sign of financial distress;
3. It provides a single forum overseeing all insolvency and liquidation proceedings;
4. It enables a calm period where other proceedings do not derail existing ones;
5. It replaces existing management during insolvency proceedings while keeping the enterprise as a going concern;
6. It offers finite time limit within which debtor’s viability can be assessed and
7. Under bankruptcy, lays out a linear liquidation mechanism.

The Insolvency and Bankruptcy Act, 2016 has various salient features which makes the Act an important milestone in the field of expeditious recovery of debts and ensuring the secured creditors with successful credit recovery. The salient features are –

1. **Insolvency Resolution Process:** The Act specifies similar insolvency resolution processes for companies and individuals, which will have to be completed within 180 days. This limit may be extended to an additional 90 days in certain circumstances. The resolution process will involve negotiations between the debtor and creditors to draft a resolution plan. The process would end under two circumstances,
 - (i) When the creditors decide to evolve a resolution plan or sell the assets of the debtor and;

- (ii) When 180 days time period for negotiations has come to an end.

In case a plan cannot be negotiated upon during the time limit, the assets of the debtor will be sold to repay his outstanding dues.

2. **Priority under liquidation:** The assets will be distributed in the following order, in case of liquidation:

- (i) fees of insolvency professional and costs related to the resolution process,
- (ii) workmen’s dues and secured creditors,
- (iii) employee wages,
- (iv) unsecured creditors,
- (v) government dues and remaining secured creditors,
- (vi) any remaining debt, and
- (vii) Shareholders.

3. **Insolvency professionals and agencies:** The resolution process will be conducted by a licensed insolvency professional (IP). The IP will control the assets of the debtor during the process. Insolvency professional agencies will be created to regulate these IPs. The agencies will conduct examinations to enroll IPs and enforce a code of conduct for their functioning.

4. **Insolvency Regulatory Board:** A separate Board shall be established other than the National Company Law Tribunal (“NCLT”) and the Debts Recovery Tribunal (“DRT”) for dealing with matters of Insolvency and Bankruptcy of Companies. This board would oversee and regulate the functioning of the IPs, insolvency professional agencies and information utilities. The composition of the Board would be of 10 members, which would include representative members from Central Government and the Reserve Bank of India.

5. **Insolvency and Bankruptcy Fund:** The Act shall create an Insolvency and Bankruptcy Fund. The



Fund would receive contributions from any person. This contribution has to be voluntary. In cases where the insolvency proceedings start against any of such contributors, the member shall be allowed to withdraw his contribution from the IB Fund so as to protect his assets from being liquidated and for making payments to the workmen etc.

6. Adjudicatory Authorities: The Act proposes two tribunals to adjudicate insolvency resolution cases:

- (i) National Company Law Tribunal will adjudicate cases for companies and limited liability partnerships, and
- (ii) Debt Recovery Tribunal will adjudicate cases for individuals and partnership firms.

7. Moratorium: One of the most significant features of the Act is the grant of moratorium during which creditor action will be stayed. This is not automatic and has to be granted by the Adjudicating Authority on the recommendation of the Resolution Professional.

8. Offences: The Act also provides with penalties for the companies or the individuals who commit offences under the act (such as concealing property). The punishment for companies defaulting under the corporate insolvency is imprisonment up to five years, fine to the tune of One Crore Rupees, or both. Whereas, punishment under individual insolvency (such as providing false information) shall be an imprisonment for a period of six months, or a fine up to the tune of Five Lac Rupees, or both.

CONCLUSION

The previous acts dealing in insolvency and recovery of debts had cluttered the whole procedure and effectiveness of the acts by giving overlapping powers to each other. The overlapping powers had led to haphazard procedures and confusing scenarios where the secured creditors i.e. the banks did not had the proper remedies when it came to recovery of debts. The mere fact that the decisions given by the DRT could be reversed by High Court on appeal made it very lengthy

and tiring process for the creditors. The time taken by such proceedings proved to be beneficial for the Board of the Companies as they used to get time for asset stripping.

The new Insolvency and Bankruptcy Act provides for speedy disposals of these processes as it divides the authority and the jurisdiction of the NCLT and DRT between individuals and companies. It also provides with a list of priorities which shall be given preference for settlement of such debts at the time of liquidation of the assets of the company (first on the list is settlement of liquidation cost). The New Act which provides for various funds and offences seems to be a touchstone for providing fair chance to the creditors for recovery of their debts in a very simple process, free from any encumbrances.



THE DOCTRINE OF “PER INCURIAM”

Arvind Thapliyal

THE MEANING

Per incuriam, literally translated as “through lack of care”, refers to a judgment of a court which has been decided without reference to a statutory provision or earlier judgment which would have been relevant.

SIGNIFICANCE

The significance of a judgment having been decided *per incuriam* is that it does not then have to be followed as precedent by a lower court. Ordinarily, in the common law, the *rationes* of a judgment must be followed thereafter by lower courts while hearing similar cases. A lower court is free, however, to depart from an earlier judgment of a superior court where that earlier judgment was decided *per incuriam*. Also the said doctrine is an exception to article 141 of Constitution of India which embodies the doctrine of precedents as a matter of law.

Sir John Salmond in his ‘Treatise on jurisprudence’ has aptly stated the circumstances under which a precedent can be treated as ‘per incuriam’. It is stated that a precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute or delegated legislation.

C.C.K. Alien in ‘Law in the Making’ (Page No. 246) analyzed the concept of ‘per incuriam’. According to him, ‘Incuria’ means literally ‘carelessness’ which apparently is considered less uncomplimentary than ignorantia; but in practice ‘per incuriam’ applies to mean ‘per ignorantiam’. It would almost seem that ‘ignorantia juris neminem excusat’ – except a Court of law, ignorance of what? Ignorance of a statute, or of a rule having statutory effect which would have affected the decision if the court had been aware of it.

The rule applies even though the earlier court knew of the statutes in question but it did not refer to and had not present to its mind, the precise terms of the statute. Similarly a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand, such a mistake is again such ‘incuria’ as to vitiate

the decision. Even a lower court can impugn a precedent on such grounds.¹

INTERNATIONAL VIEW

The Court of Appeal in *Morelle Ltd v Wakeling* [1955] 2 QB 379 stated that as a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong.

In Lord Godard, C.J. in *Huddersfield Police Authority v. Watson* (1947) 2 All ER 193 it was observed that:

“Where a case or statute had not been brought to the court’s attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in *per incuriam*.”

INDIAN PERSPECTIVE

The Apex court in *Siddharam Satlingappa Mhetre v. State of Maharashtra*² refused to follow the decision of co-ordinate benches, which was opposed to the decision of an earlier Constitutional Bench. The Hon’ble Supreme Court explained the concept of “per incuriam” as following:

“139. Now we deem it imperative to examine the issue of per incuriam raised by the learned counsel for the parties. In *Young v. Bristol Aeroplane Company Limited* (1994) All ER 293 the House of Lords observed that ‘Incuria’ literally means ‘carelessness’. In practice per incuriam appears to mean per ignorantium. English courts have developed this principle in relaxation of the rule of stare decisis. The ‘quotable in law’ is avoided and

¹ *INVOKING THE DOCTRINE OF ‘per incuriam’ by Mr. M. GOVINDARAJAN*

² *Criminal Appeal No. 2271 of 2010 (Arising out of SLP (Crl.) No. 7615 of 2009)*



ignored if it is rendered, 'in ignoratium of a statute or other binding authority. The same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

..... In Halsbury's Laws of England (4th Edn.) Vol. 26: Judgment and Orders: Judicial Decisions as Authorities (pp. 297-98, para 578) per incuriam has been elucidated as under:

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (Young v. Bristol Aeroplane Co. Ltd., 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300.

In Huddersfield Police Authority v. Watson, 1947 KB 842 : (1947) 2 All ER 193.); or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

140. Lord Godard, C.J. in Huddersfield Police Authority v. Watson (1947) 2 All ER 193 observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam.

141. This court in Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs. and Others (2000) 4 SCC 262 observed as under:

"The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

142. In a Constitution Bench judgment of this Court in Union of India v. Raghubir Singh (1989) 2 SCC 754, Chief Justice Pathak observed as under:

"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

143. In Thota Sesharathamma and another v. Thota Manikyamma (Dead) by LRs. and others (1991) 4 SCC 312 a two Judge Bench of this Court held that the three Judge Bench decision in the case of Mst. Karmi v. Amru (1972) 4 SCC 86 was per incuriam and observed as under:

"...It is a short judgment without advertent to any provisions of Section 14 (1) or 14(2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in Badri Pershad v. Smt. Kanso Devi. The decision in Mst. Karmi cannot be considered as an authority on the ambit and scope of Section 14(1) and (2) of the Act."

144. In R. Thiruvirkolam v. Presiding Officer and Another (1997) 1 SCC 9, two Judge Bench of this Court observed that the question is whether it was bound to accept the decision rendered in Gujarat Steel Tubes Ltd. v. Mazdoor Sabha (1980) 2 SCC 593, which was not in conformity with the decision of a Constitution Bench in P.H. Kalyani v. Air France (1964) 2 SCR 104. J.S. Verma, J. speaking for the court observed as under:

"With great respect, we must say that the above-quoted observations in Gujarat Steel at P. 215 are not in line with the decision in Kalyani which was binding or with D.C. Roy to which the learned Judge, Krishna Iyer, J. was a party. It also does not match with the underlying juristic principle discussed in Wade. For the reasons, we are bound to follow the Constitution Bench decision in Kalyani, which is the binding authority on the point."

145. In Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangra and others (2001) 4 SCC 448 a Constitution Bench of this Court ruled that a decision of a Constitution Bench of this Court binds a Bench of two learned Judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness.



146. A Constitution Bench of this Court in Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 673 has observed that the law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

147. A three-Judge Bench of this court in Official Liquidator v. Dayanand and Others (2008) 10 SCC 1 again reiterated the clear position of law that by virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in State of Karnataka and Others v. Umadevi and Others (2006) 4 SCC 1 is binding on all courts including this court till the same is overruled by a larger Bench. The ratio of the Constitution Bench has to be followed by Benches of lesser strength. In para 90, the court observed as under:-

“We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed.”

148. In Subhash Chandra and Another v. Delhi Subordinate Services Selection Board and Others (2009) 15 SCC 458, this court again reiterated the settled legal position that Benches of lesser strength are bound by the judgments of the Constitution Bench and any Bench of smaller strength taking contrary view is per incuriam. The court in para 110 observed as under:-

“Should we consider S. Pushpa v. Sivachanmugavelu (2005) 3 SCC 1 to be an obiter following the said decision is the question which arises herein. We think we should. The decisions referred to hereinbefore clearly suggest that we are bound by a Constitution Bench decision. We have referred to two Constitution Bench decisions, namely, Marri Chandra Shekhar Rao v. Seth G.S. Medical College (1990) 3 SCC 139 and E.V. Chinniah v. State of A.P. (2005) 1 SCC 394. Marri Chandra Shekhar Rao (supra) had been followed by this Court in a large number of decisions including the three-Judge Bench decisions. S. Pushpa (supra) therefore, could not have ignored either Marri Chandra Shekhar Rao (supra) or other decisions following the same only on the basis of an administrative circular issued or otherwise and more so when the constitutional scheme as contained in clause (1) of Articles 341 and 342 of the Constitution of India putting the State and Union Territory in the same bracket. Following Official Liquidator v. Dayanand and Others (2008) 10 SCC 1 therefore, we are of the opinion that the dicta in S. Pushpa (supra) is an obiter and does not lay down any binding ratio.”

149. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength. In the instant case, judgments mentioned in paragraphs 135 and 136 are by two or three judges of this court. These judgments have clearly ignored a Constitution Bench judgment of this court in Sibbia’s case (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under section 438 of Cr.P.C. Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are per incuriam.”

Therefore, it can be concluded that when a lower court ignores the decision of a higher court, the decision passed by such court can be discarded as being *per incuriam* of the decision of the higher court.



SICA TO PREVAIL OVER THE RDDB ACT

Shweta Vashist

The Hon'ble Supreme Court of India while putting at rest a controversial issue has held that the revival of a sick company will take precedence over recovery proceedings. A three-judge bench, headed by Justice HL Dattu and comprising of Justice SA Bobde and Justice Abhay Manohar pronounced that the provisions of SICA in particular Section 22, shall prevail over the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDDB).

The appeal was placed before the three judges bench by a reference made by a two judge bench, whereby Justice Thakker and Justice Altamas Kabir had a difference of opinion regarding the interpretation of Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Justice Thakker opined that by virtue of Section 34 of RDDB Act, the provisions of the RDDB Act should be given primacy and priority over SICA as Section 34 had been inserted through a subsequent enactment in order to ensure expeditious adjudication and recovery of debts. On the other hand, Justice Altamas Kabir was of the opinion that, "the non-obstante clause in Section 34(1) contains an exception, to be found in sub-section (2). Sub-section (2) provides that the Act shall be in addition to and not in derogation of inter alia the SICA." As per Justice Kabir, in view of the specific exception to Section 34(1) carved out in Section 34(2), the intention of the legislature was that the RDDB Act would prevail over SICA.

The brief facts of the matter are that M/s Arihant Threads had set up an export oriented unit for manufacturing of cotton yarn, for which it had taken a loan to the tune of Rs. 93.1 million from Industrial Development Bank of India ("IDBI"). Once the Company failed to repay the said loan, an Original Application was filed by IDBI against the Company, wherein the Debts Recovery Tribunal ordered an ex-parte order in favour of the Bank, directing a recovery of Rs. 252.6 million along with interest at the rate of 7.8%. and in the event of the failure of the Company to pay the said amount, IDBI was entitled to sell the mortgaged property of the Company.

Upon the failure of the Company to pay the decreed amount, the Recovery Officer of the DRT fixed the

reserve price of the immovable and moveable assets of the Company and KSL was the highest bidder in the auction of the mortgaged property of the Company. The Company approached the DRT for setting aside of the auction sale of its mortgaged property. DRT allowed the said prayer of the Company subject to the payment of a particular amount.

Thereafter, the Company filed an appeal before the Debts Recovery Appellate Tribunal ("DRAT") and during the pendency of the said appeal, the Company invoked the provisions of The Sick Companies (Special Provisions) Act, 1985 ("SICA"). The DRAT confirmed the auction sale in favor of KSL industries. Aggrieved by the same, the Company, Arihant Threads moved to the Delhi High Court on the ground that the Recovery Proceedings could not be pursued against the Company in view of Section 22 of SICA. The High Court set aside the order passed by the DRAT in view of the express bar contained in Section 22 of the SICA.

The matter then reached the Hon'ble Supreme Court of India where the Division Bench had a difference in opinion following which the matter was referred to the three judges bench which held that:

"The purpose of the two Acts is entirely different and where actions under the two laws may seem to be in conflict, Parliament has wisely preserved the proceedings under the SICA, by specifically providing for sub-section (2), which lays down that the later Act RDDB shall be in addition to and not in derogation of the SICA."



DOMESTIC SOLAR PV MANUFACTURING INDUSTRY PLAGUED BY DISPUTES, TRADE TENSIONS AND UNCERTAIN FUTURE

Avneet Jha

In June 2015, the Ministry of New and Renewable Energy ("MNRE") announced that the total solar PV cell and module manufacturing capacity in India touched 1386 MW and 2756 MW respectively. This may seem significant from the environmental standpoint, however, the rise has been gradual despite the implementation of the Jawaharlal Nehru National Solar Mission ("JNNMS") which was launched on the 11th January, 2010, to achieve 100 MW of solar generated power by year end 2021-22. To achieve the said target under the National Solar Mission, the Ministry laid down year-wise milestones, including targets of 2,000 MW for the current year and 12,000 MW for the coming year. The manufacturing capacity utilization for domestic cells and modules manufacturers does not even come close to this required capacity. According to an MNRE report, domestic cell and module manufacturers utilize 297 MW and 1304 MW of their respective cumulative manufacturing capacities. As a result of this, the promoters and investors have been driven to distress, especially those that had planned to benefit from the launch of programs like the JNNMS. Domestic manufacturers, among other thing, allege that the high demand for imports is to be blamed for their capacity underutilization.

The foreign solar cell and modules markets have experienced similar setbacks due to oversupply of products, low margins and drop in cost of raw materials, cells and modules. However, demand for imported solar cells and modules has been significantly higher in India due to better cost effectiveness, quality and efficiency compared to the domestically manufactured products.

In order to achieve increase in domestic manufacturing capacity and utilization to levels required to meet annual targets under the National Solar Mission, also envisaged in the 'make in India' plan by the current Government, domestic content requirement ("DCR") of cells and modules was launched for a portion of projects undertaken under the said Mission. However, none of the policy initiatives at the state level (Gujarat, Rajasthan, Tamil Nadu, etc) mandated any DCR.

Despite the said initiative, the domestic solar cell manufacturers continued to see sporadic and low levels of utilization of their manufacturing capacity over the years and most of the solar cell manufacturers recorded losses in their quarterly and annual reports since starting the manufacturing business. They attribute their losses, among other thing, to high cost of production and capital expense, decline in exports, and demand for imports.

In response to the DCR, USA, in February 2013, filed a complaint with the World Trade Organization (WTO) against the DCR provisions in JNNMS stating that DCR was against international trade agreements. On February 24, 2016, the WTO found and declared that DCR was imposed in violation of the Trade-related Investment Measures ("TRIMs") agreement and the 1994 General Agreement on Trade and Tariffs ("GATT"). India's continued negotiations with the United States and offers to limit DCR to projects awarded through solicitations also failed. In response to the above finding, India appealed against the order of the lower panel, invoking the United Nations Framework Convention on Climate Change as part of its defence to continue with the domestic content requirements. In India, similar response to the imposition of DCR was seen from Indian project developers and module manufacturers who allege that the projects have become economically unviable for them. According to these domestic project developers and module manufacturers, imported solar cells offer better quality, efficiency and are cost effective compared to their domestic counterparts.

Similarly, imposition of anti-dumping duties has created barriers for free trade and the uncertain future has limited interest of investors and project developers, alike, in furthering their hold on the solar industry. In May 2012, US imposed Anti-Dumping Duties (ADD) on Chinese solar imports. In June 2013, European Union also imposed ADD against Chinese solar imports to which China responded by increasing the import duties on US and Korean Polysilicon.



As for the Indian solar manufacturers, the Indian Solar Manufacturer's Association ("ISMA") filed a petition on behalf a handful of cell manufacturers (that made the domestic market under applicable) alleging dumping of imported solar PV modules from China, Taiwan, Malaysia and the USA. This anti-dumping allegation put manufacturers of cells and domestic manufacturers and the project developers on different sides with varied interests, since imposition of anti-duties duties was bound to have significant impact on project costs and reduce options available for sourcing quality products for project developers and module manufacturers. While DGAD found dumping by importing countries and imposed duties of \$0.48 a unit to \$0.81 a unit on the solar cells imported from the said countries, the finance ministry did not impose the same and let the duty lapse in May of 2014.

However, in September 2015, Indian solar cell manufacturers again demanded action against the US, European Union, China, Malaysia and Taiwan for dumping products in India. This application was filed by the same manufacturers with both the Directorate General of Anti-Dumping ("DGAD") under the commerce ministry and Directorate General of Safeguards (DGS) under the ministry of finance. However, no steps have been taken by the Government in this regard as yet.

So, in order to sum up the state of participants in the solar industry, while imposition of anti-dumping duties may deter participants in all forms (cell and module manufacturers, project developers and investors) from entering the industry, implementation of DCR will decrease profitability of project developers and module manufacturers, and, in the event the DCR is not allowed for violation of international trade laws, sustainability of domestic solar cell manufacturers will become even more difficult.

Considering the aforesaid scenario, it is fair to say that despite huge steps taken by the government for increase in solar power generation with a view to fight the good environmental battle, the environment for the domestic solar manufacturers seems to be murky, and the immediate future, bleak at best. However, the future of solar generated power will remain as bright as the sun itself.



THE PATENT AMENDMENT RULES 2016

THE PATENT AMENDMENT RULES 2016

The Patent (Amendment) Rules, 2016 (Revised Rules) have come into force from 16 May 2016. The key highlights of the Revised Rules are broadly set out below:

START UP A NEW APPLICANT CATEGORY

- Under the Revised Rules, a new applicant category, called 'Startup' has been introduced. A 'Startup' can be a private limited company, a registered partnership firm or a limited liability partnership, which satisfies the criteria prescribed in the Revised Rules.
- Fees applicable to a 'Startup' are the same as those applicable to a natural person. A 'Startup' can also avail of the expedited examination procedure provided under the Revised Rules.

PROSECUTION

- At the time of filing a national phase application (in India) corresponding to an international application filed under the Patent Cooperation Treaty, the applicant may now be allowed to delete claims.
- The time for putting an application in order for grant has been reduced from one year to six months, i.e. six months from the date of issuance of the first examination report. Such period may be extended by three further months by filing for an extension of time in the prescribed manner.
- A request for expedited examination has been introduced for applicants who choose India as an International Search Authority or an International Preliminary Examining Authority in the corresponding international application.
- It is now possible to get a refund of 90% of fees paid for request for examination / expedited examination, if a request for withdrawal of a patent application is made before the issuance of the first examination report.

- Hearings held before the Patent Office may also be held through video-conferencing or audio-visual communication devices. In all cases of hearings, written submissions and the relevant documents, if any, are required to be filed within fifteen days from the date of hearing.
- A request for adjournment of hearing has to now be accompanied with prescribed fees and is to be filed at least three days before the date of the hearing.

ELECTRONIC SUBMISSION OF DOCUMENTS:

The Revised Rules have made it mandatory for patent agents to file all documents via the e-filing portal. However, documents such as proofs of right, assignments, licenses, powers of authority, priority documents are still required to be submitted in original. Such documents, in original, can be submitted within 15 days of filing scanned copies via the e-filing portal.

- The address for service is required to include a postal address in India and an email address as well. Any written communication from the patent office to the postal address or email address as provided shall be deemed to be properly addressed.

1. RULE 2: CLAUSE (DB) INSERTED

This is an important insertion in Rule 2, as it paves the way for requesting expedited examination of patents, and lays the foundation for the newly inserted Rule 24C.

2. REQUEST FOR EXPEDITED EXAMINATION

The introduction of Form 18A sets up the mechanism for an applicant to file a request for an expedited examination. As per rule 24 (C), an applicant may file a request for expedite examination if:

- he/she has indicated India as the competent International Searching Authority or elected India as an International Preliminary Examining Authority; or
- applicant is a start-up



The introduction of Rule 24C is a major step towards expediting the patent prosecution process by laying down clear provisions with regard to the grounds on which it can be done, payment of fees, special provisions focusing on startups, etc. Further, a request for examination filed under rule 24B may be converted to a request for expedited examination.

The First Examination Report (FER) in case of expedited examination shall be issued in 3 and half months and the reply to the office action shall be filed within 6 months from the date of issuance of FER. The Controller shall dispose off the application within 3 months of receiving FER response.

3. REFUND OF FEE

The Proviso added to sub-rule 4 of Rule 7 allows refund of excess fee in cases where fee was paid more than once during the online filing process, for the same proceeding. Sub-rule 4A also added after sub-rule 4 provides for refund upon withdrawal of application on a request made by the applicant on Form 29.

4. FORM 30 INTRODUCED WHERE NO FORM SPECIFIED

The amended Sub-rule (2) provides for Form 30 to be used where no form has been specified for any purpose.

5. REQUEST FOR WITHDRAWAL ON FORM 29

This amendment lays down that request for withdrawal of application shall be made in Form 29, and not "in writing".

6. LEAVING & SERVING DOCUMENTS –ONLINE FILING; DELAY IN FILING TO BE CONDONED ONLY UNDER LIMITED CIRCUMSTANCES

As per inserted sub-rule 1A, electronic transmission is the only way through which a patent agent can file the required documents (which are authenticated) before the Controller, thereby providing for more efficient transmission, cataloguing, and preservation of the documents. The proviso imposes an obligation to file the electronically submitted documents in original within 15 days.

Under sub-rule 6, the reasons for condonation of delay are limited to war, revolution, civil disorder, strike, natural calamity, and a general unavailability of

electronic communication services. There is a further requirement that the situation must have been of such severity as to disrupt the normal communication in that area. This provision ensures that delay is not condoned for superficial reasons. Sub-rule 7 clarifies that the burden of proof of authenticity of documents shall lie with the one who files.

7. HEARING THROUGH VIDEO-CONFERENCE IN CASES OF ANTICIPATION BY PRIOR PUBLICATION

The amendment allowing hearing in anticipation matters under section 13 to be held through video-conferencing is a welcome addition as it provides for an inclusive and efficient procedure for interested parties who are based outside India or not available to attend the hearing.

8. ADDRESS FOR SERVICE

Rule 5 now clarifies that every person/applicant shall furnish a postal address in India, along with an e-mail address to the Controller. The obligation on the Patent agent to provide a mobile number registered in India makes this provision more stringent and effective.

9. WRITING CLAIMS AND AMENDMENTS TO SPECIFICATIONS – PROCEDURE CLARIFIED

In Rule 13, it has been directed to include the reference number of drawings in the claims as well. The amendment to Rule 14, with regard to amendments to specifications has been elaborated upon, and the procedure in this respect is further clarified.

10. TIME PERIOD FOR POWER OF ATTORNEY SUBMISSION

From the date of filing of application, a time period of 3 months is given for filing of Power of Attorney. Once the prescribed time period of 3 months is lapsed then no action shall be taken.

11. TIME PERIOD REDUCED FORREPLY TO OFFICE ACTION

Rule 24B (6) is amended. The time period for putting an application in order for grant is reduced to 6 months from the earlier time period of 12 months. However, the Office by a further notification on May 18, 2016 clarified that the time for replying to FER is 6 months



for the cases where the FER is issued on or after May 16, 2016. Hence the time period for filing response to FER for cases where it has been issued before May 16, 2016 shall remain 12 months from the date on which the same was issued.

12. ADJOURNMENT OF HEARINGS

Rule 129A inserted. An applicant seeking an adjournment has to make a request for hearing with reasonable cause, at least three days before the date of hearing, and no party under no circumstances shall be given more than two adjournments and each adjournment shall not be for more than thirty days



GLOBAL PROMOTION OF TRADITIONAL SYSTEM FACES A CATAPULT AS INDIA AND WHO SIGN A LANDMARK APPLICATION

In an information release by Press Information Bureau on 14th May 2016, Ministry of AYUSH Government of India and the World Health organization (WHO) have signed an historic Project Collaboration Agreement (PCA) **for cooperation on promoting the quality, safety and effectiveness of service provision in traditional and complementary medicine.** The PCA agreement will become functional between 2016 and 2020. It was mentioned that the aim of the PCA agreement is to support WHO in the development and implementation of the 'WHO Traditional and Complementary Medicine Strategy: 2014-2023' and will contribute to the global promotion of traditional Indian Systems of Medicine.

A BOOST FOR TRADITIONAL MEDICINE:

The PCA further aims to deliver WHO benchmark documents for training in Yoga, for practice in Ayurveda, Unani and Panchakarma. Subsequently, these will ensure in establishing regulatory frameworks for traditional medicine products and practice and promote their integration in national healthcare systems.

The minister of AYUSH Mr. Shripad Yesso Naik highlighted the numerous initiatives undertaken to functionally integrate AYUSH in India's national health programmes and for achieving Universal Health Coverage. The Minister also mentioned the initiatives and activities undertaken in India to align with the WHO Traditional Medicine Strategy 2014-2023. Further India's unique example for adopting pluralistic health care delivery system that allows every recognized medical system to develop and be practiced with a view to provide integrated and holistic healthcare services was quoted by the minister.

SIGNIFICANCE OF PCA

The recognition of India's rich experience in the development and governance of traditional medicine is the main significance of PCA with WHO. The agreement will pave the way for India's long-term collaboration with the WHO **"in fostering the global promotion and integration of AYUSH systems of medicine including through the inclusion of Ayurveda**

and Unani in the International Classification of diseases and the International Classification of Health interventions".



INDIA'S OWN 'PATENT BOX' REGIME

INDIA'S OWN 'PATENT BOX' REGIME

In order to encourage more research and development activities in India, the Government has made the tax regime for royalty income of inventors at a concessional rate of 10% from 30% on the gross income of royalty.

The Union Finance Bill of 2016, vide clause 52, introduced a new section 115BBF giving a chance of concessional tax regime for the companies to encourage them to locate development, manufacturing and exploitation of patents in India.

Accordingly, after section 115BBE of the Income-tax Act, 1961 (hereinafter referred to as 'Act'), the following new section shall be inserted with effect from 01.04.2017, namely:—

Section 115BBF:

- (1) Where the total income of an eligible assessee includes any income by way of royalty in respect of a *patent developed and registered in India*, the income-tax payable shall be the aggregate of:
 - (a) the amount of income-tax calculated on the income by way of royalty in respect of the patent at the rate of 10% and
 - (b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the income referred to in clause (a).
- (2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the eligible assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).

Explanation.—For the purposes of this section:

- (a) "developed" means the expenditure incurred by the assessee for any invention in respect of which patent is granted under the Patents Act, 1970 (herein referred to as the Patents Act);
- (b) "eligible assessee" means a person resident in India and who is a patentee;
- (c) "invention" shall have the meaning assigned to

it in clause (j) of sub-section (1) of section 2 of the Patents Act;

- (d) "lump sum" includes an advance payment on account of such royalties which is not returnable;
- (e) "patent" shall have the meaning assigned to it in clause (m) of sub-section (1) of section 2 of the Patents Act;
- (f) "patentee" means the person, being the true and first inventor of the invention, whose name is entered on the patent register as the patentee, in accordance with the Patents Act, and includes every such person, being the true and first inventor of the invention, where more than one person is registered as patentee under that Act in respect of that patent;
- (g) "patented article" and "patented process" shall have the meanings respectively assigned to them in clause of sub-section (1) of section 2 of the Patents Act;
- (h) "royalty", in respect of a patent, means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains" or consideration for sale of product manufactured with the use of patented process or the patented article for commercial use) for the—
 - i. transfer of all or any rights (including the granting of a license) in respect of a patent; or
 - ii. imparting of any information concerning the working of, or the use of, a patent; or
 - iii. use of any patent; or
 - iv. rendering of any services in connection with the activities referred to in sub-clauses (i) to (iii);
- (i) "true and first inventor" shall have the meaning assigned to it in clause (y) of sub-section (1) of section 2 of the Patents Act.



AMENDMENT PROPOSED BY THE LOK SABHA

The Finance Bill 2016 was passed by the Lok Sabha on 5th May, 2016 with a number of proposals of official amendments by the government. Subsequently, the finance ministry released an explanatory note explaining the amendments. With regards to clause 52, wherein section 115BBF has been introduced, the following amendment has been passed:

- a. Sub-clauses (3) and (4) have been added to proposed section 115BBF, which provides an option to the eligible assessee to tax on gross basis i.e. 10% presumptive tax regime for royalty income for income from patents developed and registered in India. The eligible taxpayer can exercise this option within time allowed for filing return under section 139(1). If the presumptive tax option is not opted for 5 years, then the option cannot be exercised for the next 5 years either.
- b. Also it was explained that '*developed in India*' means that at least 75% of expenditure incurred for any invention with a granted patent is incurred in India by the Indian resident himself.



INCOME DECLARATION SCHEME, 2016

INCOME DECLARATION SCHEME, 2016

The Ministry of Finance on 11th May, 2016 vide a press release stated that the Income Declaration Scheme, 2016 would come into force from 1st June, 2016 and will remain in force for 4 months till 30th September, 2016, for filing of declarations and payment towards taxes, surcharge and penalty to be made latest by 30th November, 2016.

What is Income Declaration Scheme, 2016? The Income Declaration Scheme, 2016 has been incorporated as Chapter IX of the Finance Act 2016 which provides an opportunity to all persons who have not declared income correctly in earlier years to come forward and declare such undisclosed income(s).

Following particulars were stated vide this press release:

- i. All the declarations are to be filed online or with Principal Commissioners of Income Tax across the country;
- ii. The income declared under this scheme would be taxed at the rate of 30% along with a 25% "Krishi Kalyan Cess" on the taxes payable and a penalty of 25% on the taxes payable thus, totaling it to 45%;
- iii. The undisclosed income in form of investment in assets or otherwise, pertaining to financial year 2015-16 or earlier would be covered under the scheme;
- iv. The declaration for the purpose of undisclosed income, done in form of investment in assets, would be deemed to be the Fair Market Value of such assets as on 1st June, 2016. Foreign assets or income to which the Black Money Act, 2015 applies would not be covered under this scheme;
- v. Assets specified in the declaration shall be exempt from Wealth Tax;
- vi. No scrutiny and enquiry shall be undertaken on declarations done under the scheme with respect to the Income-Tax Act or the Wealth Tax Act;

- vii. Apart from the immunity from prosecution is granted under the Income Tax Act and Wealth Tax Act, immunity from Benami Transactions (Prohibitions) Act, 1988 shall also be provided if the assets are transferred to the actual owner within the period specified in the Rules made under such Act;
- viii. The declaration would be rendered void if the facts of such declaration are misrepresented or suppressed;
- ix. Also, non-payment of taxes, surcharge and penalty shall render the declaration void.
- x. The Section 196 (Chapter IX) of the Finance Act, 2016 lists down the circumstances in which the scheme shall not apply or a person is held disqualified;
- xi. Undisclosed income would be liable for taxation in the previous year in which it was detected by the Income Tax Department if, not declared under this scheme. Non-declaration would also attract other penal consequences.

"1. A pharmaceutical composition comprising a solid dosage form comprising:

- (i) ritonavir or a pharmaceutically acceptable salt and ester thereof;
- (ii) darunavir or a pharmaceutically acceptable salt and ester thereof;
- (iii) Optionally, at least one pharmaceutically acceptable excipient, which composition is a tablet formulation comprising said ritonavir in a first layer of the formulation and said darunavir in a second layer of the formulation."



100% FDI FOR ARCS THROUGH AUTOMATIC ROUTE

The Department of Industrial Policy & Promotion vide press note no. 4(2016 series) dated 6th May, 2016 amended paragraphs 6.2.18.1 and 6.2.18.2 of "Consolidated FDI Policy Circular of 2015" with regard to the Foreign Investment in the sector of Asset Reconstruction Companies (ARC).

What is an ARC? An ARC as defined in the FDI policy is a company registered with the Reserve Bank of India under section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI).

The earlier position laid in Para 6.2.18.1 of the FDI Policy was that, an ARC could have 100% paid-up Capital (FDI + FPI/FII) out of which 49% could come through automatic route and beyond 49% would come through Government route. After this circular came into effect, the position would be amended to the extent that now the FDI cap would be 100% coming through automatic route. No Government approval shall be required if the investment in ARC by foreign entities exceeds 49%.

The subsequent amendments in Para 6.2.18.2 took place which are as follows:-

- i. Persons' resident outside India, who are Qualified to be investor, can now invest up to 100% on the automatic route in the capital of ARC;
- ii. The investment limit of a sponsor and institutional/non-institutional investors, in shareholding of ARC, will be governed by the SARFAESI Act which is amended from time to time. Earlier, not more than 50% shareholding by way of FDI or routing it through a FPI/FII by a single sponsor was permitted;
- iii. The total shareholding of an individual FPI/FII shall be below 10% of the total paid-up capital;
- iv. FIIs/FPIs can now invest up to 100% of each tranche scheme in Security Receipts (SRs) issued by ARCs, subject to the guidelines of RBI. The earlier limit set for such investment

was 74% of each tranche scheme in SRs;

- v. All the investments shall be done in accordance with the SARFAESI Act, 2002 as amended from time to time.



NEWSBYTE

MODIFICATIONS IN THE PRUDENTIAL GUIDELINES ON REVITALIZING DISTRESSED ASSETS IN THE ECONOMY AND STRATEGIC DEBT RESTRUCTURING MECHANISM BY THE RESERVE BANK OF INDIA (RBI):

The Reserve Bank of India (“RBI”) had issued various Guidelines with the objective of stimulating the stressed assets in the economy. Such Guidelines are relating to Strategic Debt Restructuring (SDR) Mechanism, Framework to Revitalize the Distressed Assets in the Economy, Restructuring of Advances by Banks, Flexible structuring of Long Term Project Loans and Guidelines on Sale of Financial Assets to Securitization Companies (SC)/Reconstruction Companies (RC). Further, the RBI vide various circulars/notifications issued from time to time has decided that such Guidelines, to the extent applicable, would also be applicable to all Non-Banking Financial Companies (“NBFCs”) as well. Continuing with this move, recently, RBI, on review of Framework for Revitalizing Distressed Assets in the Economy and SDR Mechanism, issued following notifications on May 26, 2016:

- 1) Notification No. DNBR. 041/CGM(CDS)-2016 dated May 26, 2016 amending the Systemically Important Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2015;
- 2) Notification No. DNBR.042/CGM(CDS)-2016 dated May 26, 2016 amending the Non-Systemically Important Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2015; and
- 3) Notification No. DNBR.043/CGM(CDS)-2016 dated May 26, 2016 amending the Non-Banking Financial (Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007 are enclosed.

By issuance of above stated notifications, the following changes in general conditions under the respective Directions (applicable to NBFCs) would be applicable in all cases of restructuring:

- a) All restructuring packages under CDR/ JLF/ Consortium/ MBA arrangement should be

implemented within 90 days from the date of approval. Other restructuring packages should be implemented within 120 days from the date of receipt of application by the NBFC.

- b) Promoters must bring additional funds in all cases of restructuring. Additional funds brought by promoters should be a minimum of 20% of NBFCs’ sacrifice or 2% of the restructured debt, whichever is higher. The promoters’ contribution should invariably be brought upfront while extending the restructuring benefits to the borrowers. Further, the Promoter’s contribution need not necessarily be brought in cash and the same can be brought in the form of conversion of unsecured loan into equity;
- c) NBFCs should determine a reasonable time period during which the account is likely to become viable, based on the cash flow and the Techno Economic Viability (“TEV”) study.
- d) NBFCs should be satisfied that the post restructuring repayment period is reasonable and commensurate with the estimated cash flows and required Debt-Service Coverage Ratio (“DSCR”) in the account as per their policy approved by their respective Board.
- e) Each NBFC should clearly document its own due diligence done in assessing the TEV and the viability of the assumptions underlying the restructured repayment terms.

It has been decided that in case of replacement of existing promoters by new promoters due to fraud/ malfeasance by previous promoters, NBFCs and JLF may take a view on restructuring of such accounts based on their viability, without prejudice to the continuance of criminal action against the erstwhile promoters/ management. In this regard, the NBFCs are advised to follow the “Prudential Norms on Change in Ownership of Borrowing Entities (Outside Strategic Debt Restructuring) Scheme” issued by RBI on September 24, 2015 and formulate their own policy and requirements as approved by their Board.”



AMENDMENT IN INDIA-MAURITIUS TAX TREATY

The Central Board of Direct Taxes (CBDT) vide press release dated 10.05.2016 issued the protocol for amendment of the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains between India and Mauritius.

Under the current tax treaty between India and Mauritius, capital gains arising from the sale of investments in shares of companies resident in India by a Mauritius resident were subject to tax only in Mauritius. Now, Mauritius does not levy capital gains tax under its new domestic tax laws. Thus, the transaction resulted in a nil tax liability and double non-taxation. However, now with the amendment in the treaty, the capital gains exemption has been withdrawn, in a phased manner. Accordingly, the protocol was shared by the CBDT amending the Article 12 of the Treaty.

This protocol was signed by the respective governments on 10th May, 2016 at Port Louis, Mauritius. The key features of the Protocol are as under:

- i. Source-based taxation of capital gains on shares:** With this Protocol, India gets taxation rights on capital gains arising from alienation of shares acquired on or after 1st April, 2017 in a company resident in India with effect from financial year 2017-18, while simultaneously protection to investments in shares acquired before 1st April, 2017 has also been provided. Further, in respect of such capital gains arising during the transition period from 1st April, 2017 to 31st March, 2019, the tax rate will be limited to 50% of the domestic tax rate of India, subject to the fulfillment of the conditions in the Limitation of Benefits Article. Taxation in India at full domestic tax rate will take place from financial year 2019-20 onwards.
- ii. Limitation of Benefits (LOB):** The benefit of 50% reduction in tax rate during the transition period from 1st April, 2017 to 31st March, 2019 shall be subject to LOB Article, whereby a resident of Mauritius (including a shell / conduit company) will not be entitled to benefits of 50% reduction in tax rate, if it fails the main purpose test and bonafide business test. A resident is deemed to be a shell/ conduit company, if its total expenditure on operations in Mauritius is less than Rs. 2,700,000

(Mauritian Rupees 1,500,000) in the immediately preceding 12 months.

- iii. Source-based taxation of interest income of banks:** Interest arising in India to Mauritian resident banks will be subject to withholding tax in India at the rate of 7.5% in respect of debt claims or loans made after 31st March, 2017. However, interest income of Mauritian resident banks in respect of debt-claims existing on or before 31st March, 2017 shall be exempt from tax in India.
- iv. Other Provisions:** The Protocol also provides for updations of Exchange of Information Article as per international standard, provision for assistance in collection of taxes, source-based taxation of other income, amongst other changes.

The Protocol will improve transparency in tax matters and will help curb tax evasion and tax avoidance. It will also tackle the long pending issues of treaty abuse and round tripping of funds attributed to the India-Mauritius treaty, curb revenue loss, prevent double non-taxation, streamline the flow of investment and stimulate the flow of exchange of information between India and Mauritius.

In pics: S & A at the 138th Annual Meeting & Conference of INTA at Orlando, Florida (May 21-25, 2016)





SINGH & ASSOCIATES
Founder - Manoj K. Singh
ADVOCATES & SOLICITORS

NEW DELHI [HEAD OFFICE]

N-30, Malviya Nagar, New Delhi-110017
Phone : +91-11-46665000, 26680927
Fax : +91-11-26682883, 46665001
newdelhi@singhassociates.in

MUMBAI

48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai, Maharashtra-400021
mumbai@singhassociates.in

BANGLORE

N-304, North Block, Manipal Centre
47, Dickenson Road, Bangalore - 560042
Ph : +91-80-42765000
bangalore@singhassociates.in

RANCHI

Chamber No. C-7, New Lawyers Chamber,
1st Floor, Jharkhand High Court, Ranchi,
Jharkhand- 834002

Ph : +91-11-46665000, 26680331 - Fax : +91-11-46665001, 26682883

www.singhassociates.in
