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Editorial:

REGULATION OF REAL ESTATE PROJECTS

Though housing is one of the basic needs of habitants, yet the Parliament could not pass any legislation on this subject since independence, possibly because 'Land', which is essential for housing, is in the State List of the Constitution of India. In the absence of any legislation in this regard, the consumers are being exploited in the hands of unscrupulous builders. However, consumer grievances were/are being redressed under the erstwhile Monopolies and Restrictive Trade Practices Act, 1969, and the Consumer Protection Act, 1986 by including Real Estate/Housing constructions within the definition of 'Service' under the respective Central legislations. Taking a cue from the above, perhaps the Central Government has now exercised its powers under the Concurrent List of the Constitution of India dealing with 'contractual obligation and transfer of property', in order to enact a law on this subject.

Development) Bill, 2009 was presented in the Parliament after which it underwent numerous changes. Finally, the Real Estate (Regulation and Development) Bill, 2013 (said Bill) was presented to the Parliament and was referred to the 'Standing Committee' which suggested over 100 amendments. Thereafter, the said Bill was re-introduced in the Parliament and was further referred to the 'Select Committee' on May 06, 2015 which has submitted its Report on July 30, 2015. The Report suggests that the regulation of the real estate industry will not only protect buyers' interests, it will also ensure growth of the sector through better flow of finances from Foreign Direct Investment and Indian financial institutions.

The Report recommends the mandatory registration of the projects where the plot size is 500 square meters or the number of apartments is 8, instead of plot size of 1000 square meters or 12 apartments as per the said Bill. However, the dissenting view suggests that it will exclude the bulk of urban middle and lower class home buyers from the protection of the said Bill and therefore, in the interest of the public at large, there should be no minimum size for plot nor should there be a minimum number of apartments in the project, keeping in view the lower strata of our society.

The Report also recommends that 50% of the project cost shall be kept in escrow account which shall only be used for the purpose of construction, whereas the Bill suggested that such percentage should be 70%.

The Report further recommends that for effective dispute resolution mechanism, state-level Real Estate Regulatory Authorities (RERA) and quasi-judicial Appellate Tribunal shall be empowered to impose penalty up to 10% of the project cost and/or imprisonment for a term up to 3 years and in order to ensure transparency, the builder shall disclose the status of all his projects over the last 5 years on the Regulator's website.

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New Legislation:

The Coal Mines (Special Provisions) Act, 2015

On September 24, 2014, the Supreme Court cancelled the allocation of 204 coal blocks allocated by the Ministry of Coal under the Coal Mines (Nationalisation) Act, 1973 on grounds of arbitrariness in the allocation process. The Coal Mines (Special Provisions) Act, 2015 ("**Coal Mines Act**") which was notified on March 30, 2015 lays down the process for allocation of the coal blocks which were cancelled by the Supreme Court order.

The coal blocks are categorised into three categories, Schedule I, Schedule II and Schedule III. Schedule I consists of the 204 mines cancelled by the Supreme Court, Schedule II consists of 42 mines of the 204, which are under production. Schedule III comprises of mines with specified end uses e.g. power, iron and steel, cement and coal washing.

Key provisions of the Coal Mines Act are as follows:

i. **Allocation process:** Schedule I mines may be allocated by way of either public auction or allocation. Government, private and joint venture companies are eligible to bid for the coal blocks under Schedule I. Schedule II and Schedule II mines are to be allocated by way of public auction. Any government company, private company or a joint venture with a specified end-use is eligible to bid for these mines.
ii. **End use:** Coal mined from Schedule I blocks can be used for captive consumption, sale or for any other purpose as specified in the mining lease.
iii. **Prior allottees:** Prior allottees are not eligible to participate in the auction process if: (i) they have not paid the additional levy imposed by the Supreme Court; or (ii) if they are convicted of an offence related to coal block allocation and sentenced to imprisonment of more than three years. Prior allottees are to be compensated for land as per the registered sales deed value together with 12% simple interest from the date of purchase or acquisition and for mine infrastructure as per the value indicated in the audited balance sheet of the previous financial year.
iv. **Authority:** An authority is to be set up by the Central Government to conduct the process of auction and allotment, executing the vesting and allotment orders and for collecting and apportioning the auction proceeds to the relevant State Governments.

Public Premises (Eviction of Unauthorised Occupants) Amendments Act, 2015

The Public Premises (Eviction of Unauthorised Occupants) Amendments Act, 2015 ("**Public Premises Act**") was notified on March 13, 2015. It amends the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. The primary objective of the Public Premises Act is to bring the properties of Delhi Metro Rail Corporation ("**DMRC**") and other Metro Railway property which may come up in future and also the properties of New Delhi Municipal Council ("**NDMC**") within the ambit of the Public Premises Act. The Public Premises Act extends the definition of public premises to include premises of companies in which at least 51% shares are owned by the central government and partly by one or more state government (including subsidiaries of these companies), and which carry on the business of public transport, including metro railways and premises belonging to the Municipal Corporation of Delhi or any Municipal Committee or notified area Committee.

Time bound processes for determining whether premises are in unauthorised occupation are laid down. If the Estate Officer is satisfied that premises are in unauthorised occupation, he may order the eviction of the premises, which should be done within 15 days from the order. If an Estate Officer receives information that a person is in unauthorised occupation of the premises, he must make an order within 7 days of receiving this information, directing persons who have occupied the premises to show cause as to why they should not be evicted. When a person is in arrears of rent payable, the Estate Officer may order that he pay rent or damages, after issuing a notice asking the person to explain why such as order should not be made. The explanation must be provided within 7 days of the notice. The Public Premises Act states that every appeal to the Estate Officer's orders must be disposed of as quickly as possible.

The Insurance Laws (Amendment) Act, 2015

The Insurance Laws (Amendment) Act, 2015 ("**Insurance Act**") was notified on March 20, 2015. Its key features are as follows:

i. **Increase in foreign investment limit:** The maximum foreign investment (including direct and indirect foreign direct investment as well as foreign portfolio investment) permitted in the equity shares of an Indian Insurance Company have been increased from 26 % to 49%. Foreign investment is under the automatic route up to 26% and under the approval route above 26% till 49%. Foreign portfolio investment has been defined to include investments by foreign institutional investors, qualified financial investors, foreign portfolio investors and non-resident investors. The increase in foreign investment in the insurance sector is applicable to insurance brokers, third party administrators, surveyors, loss assessors and other insurance intermediaries appointed under applicable IRDA regulations.

ii. **Control and ownership:** The ownership and control of an Indian Insurance Company must remain with Indian residents. Indian ownership is defined to mean more than 50% of the equity share capital being held by Indian residents. Control is defined to include the right to appoint majority directors on the board of the company or to control the management or policy decisions, including by virtue of shareholders or management rights or shareholder agreements or voting agreements.

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iv. **Access to capital market:** Public sector undertakings in the insurance sector are permitted to raise funds from the public, provided that government stake in such entities shall not be diluted below 51 per cent.

v. **Regulation of health insurance business:** The health insurance sector has been recognised as a distinct sector, subject to separate regulation.

vi. **Enhancement of regulator's powers:** The Insurance Regulatory and Development Authority of India has been given the power to make rules on matters such as management fees, commissions and composition of the insurance company's investment portfolio.

vii. **Re-insurance business:** Foreign re-insurers are now permitted to set up branches in India. Re insurance' is defined to mean "the insurance of part of one insurer's risk by another insurer who accepts the risk for a mutually acceptable premium".

viii. **Appeals process:** The securities appellate tribunal has been designated the appellate authority for quasi-judicial and administrative rulings of the IRDA (as opposed to the central government earlier).

Motor Vehicles (Amendment) Act, 2015

The Motor Vehicles (Amendment) Act, 2015 ("MV Amendment Act") was notified on March 19, 2015.The purpose of this legislation is to bring e-carts/e-rickshaws within the purview of the Motor Vehicles Act, 1988. The term "e-cart/e-rickshaw" is defined as follows: "e-cart or e-rickshaw" means a special purpose battery powered vehicle of power not exceeding 4000 watts, having three wheels for carrying goods or passengers, as the case may be, for hire or reward, manufactured, constructed or adapted, equipped and maintained in accordance with such specifications, as may be prescribed in this behalf.

The MV Amendment Act gives the parliament the power to make rules and regulations in relation to specifications of e-carts and for driving licenses in relation to the same.

The Mines and Minerals (Development and Regulation) Amendment Act, 2015

The Mines and Minerals (Development and Regulation) Amendment Act, 2015 ("MMDRA Amendment Act") was notified on March 26, 2015. It amends the provisions of the Mines and Minerals (Development and Regulation) Act, 1957. Its key provisions are as follows:

i. **New Schedule:** A new, fourth schedule has been added to the MMDRA which includes bauxite, iron ore, limestone and manganese ore as notified minerals.

ii. **Prospecting license-cum-mining lease:** A new category of mining license, i.e. the prospecting license-cum-mining lease, has been created, which is a two stage-concession for the purpose of undertaking prospecting operations (exploring or proving mineral deposits), followed by mining operations.

iii. **Maximum area for mining:** The central government is empowered to increase the area limits granted to a lessee for mining, instead of the earlier practice of providing additional leases.

iv. **Lease period:** For all minerals other than coal, lignite and atomic minerals, mining leases shall be granted for a period of 50 years, and all mining leases granted for such minerals before the amendment, shall be valid for 50 years. On expiry of the lease, instead of being renewed, the leases shall be put up for auction.

v. **Lease extensions:** Any lease granted before the commencement of the amendment will be extended: (i) up to March 31, 2030 for minerals used for captive purpose and up to March 31, 2020 for other minerals, or (ii) till the completion of renewal period, or (iii) for a period of 50 years from the date of grant of such lease, whichever is later.

vi. **Auction of notified and other minerals:** The MMDRA Amendment Act states that state governments shall grant mining leases and prospecting license-cum-mining leases for both notified and other minerals. Prospecting license-cum-mining lease for notified minerals shall be granted with the approval of central government. All leases shall be granted through auction by competitive bidding, including e-auction.

vii. **Transfer of mineral concessions:** The holder of a mining lease or prospecting license-cum-mining lease may transfer the lease to any eligible person, with the approval of the state government, and as specified by the central government. The

state government has to convey its permission/refusal within 90 days of receiving the notice, failing which the transfer will be considered approved. Only mineral concessions granted through auction are eligible for transfer.

viii. **Institutions:** A District Mineral Foundation ("DMF") and a National Mineral Exploration Trust ("NMET") are to be established, by the state government for the benefit of persons in districts affected by mining related operations and by the central government for regional and detailed mine exploration, respectively. Licensees and lease holders are required to pay the DMF an amount not more than one-third of the royalty prescribed by the central government, and the NMET two percent of royalty.

Citizenship (Amendment) Act, 2015

The Citizenship (Amendment) Act, 2015 ("Amendment Act") was notified on March 10. 2015. It amends certain provisions of the Citizenship Act, 1955. Its key provisions are as follows:

i. **Citizenship by registration and naturalisation:** Under the Citizenship Act, a person may apply for citizenship by registration if they or their parents were earlier citizens of India, and if they resided in India for one year before applying for registration. A person may apply for a certificate of naturalisation if they have resided in India or have served a government in India for a period of 12 months immediately preceding the date of application. The Amendment Act permits the central government to relax the requirement of 12 months' stay or service up to 30 days if special circumstances exist.

ii. **Registration of Overseas Citizens of India:** The Amendment Act provides certain additional grounds for registering for an Overseas Citizen of India card viz. (i) a minor child whose parent(s) are Indian citizens; or (ii) spouse of foreign origin of an Indian citizen or spouse of foreign origin of an Overseas Citizen of India cardholder subject to certain conditions; or (iii) great-grandchild of a person who is a citizen of another country, but who meets the conditions stipulated (for example, the great-grandparent must be a citizen of India at the time of commencement of the Constitution or any time afterwards). Further, if special circumstances exist, the central government is empowered to register a person as an Overseas Citizen of India cardholder even if she/he does not satisfy any of the listed qualifications.

iii. **Persons from Pakistan/Bangladesh:** The Amendment Act extends the provision declaring persons who are/have been a citizen of Pakistan or Bangladesh/ any other country which is notified by the central government ineligible to apply for Overseas Citizenship of India to persons whose parents/grandparents/ great-grandparents were citizens of any of the above countries.

iv. **Merger of Overseas Citizen of India and Persons of Indian Origin schemes:** The Amendment Act provides that the central government may notify that Persons of Indian Origin cardholders shall be considered to be Overseas Citizen of India cardholders from a specified date.

v. **Renunciation and cancellation of overseas citizenship:** The Act provides that where a person renounces their overseas citizenship, their spouses shall also cease to be an Overseas Citizen of India. Further, the Amendment Act allows the central government to cancel the Overseas Citizenship of India card which is obtained by the spouse of an Indian citizen or Overseas Citizen of India cardholder, if: (i) the marriage is dissolved by a court, or (ii) the spouse enters into another marriage even while the first marriage has not been dissolved.

Infrastructure:

Government of India Launches Smart Cities Mission

- Only capable cities to be chosen through two stage competition
- Past track record under JNNURM, service levels, financial strength to decide selection at State level
- Economic impact of smart city plan, inclusivity, e-governance, citizen participation to decide financing of smart cities in Stage-2

Given the challenges involved in developing 100 smart cities, only the capable cities will be chosen under the Smart Cities Mission through a two-stage competition. This was indicated in the Operation Guidelines for Smart Cities Mission released by Prime Minister Shri Narendra Modi on June 25, 2015. The selection criteria to be used in both the stages of competition are elaborated in the Guidelines.

STAGE 1:

In the Stage-1 of City Challenge Competition, each State and Union Territory will score all their cities based on a set of criteria and nominate the top scorers as per the indicated number of potential smart cities for participation in the Stage-2 of competition. The evaluation criteria for Stage-1 of competition within the State/UT are as below:

1. Existing Service Levels (25 points): This includes Increase in service levels over Census 2011, an operational Online Grievance Redressal System, Publication of at least first monthly e-newsletter and online publication of municipal budget expenditure details for the last two financial years on website.
2. Institutional Systems and Capacities (15 points): This covers imposition of penalties for delays in service delivery and improvement in internal resource generation over the last three years;
3. Self-financing (30 points): This would be reflected in payment of salaries by urban local bodies up to last month, Auditing of accounts up to financial year (FY) 2012-13, Contribution of internal revenues to the Budget for 2014-15 and Percentage of establishment and maintenance cost of water supply met through user charges during 2014-15.
4. Past track record (30 points): Percentage of JNNURM projects completed which were sanctioned till 2012, Percentage of City level reforms achieved under JNNURM and extent of capital expenditure met from internal resources.

The 100 potential smart cities nominated by all the States and UTs based on Stage-1 criteria will prepare Smart City Plans which will be rigorously evaluated in the Stage-2 of the competition for prioritizing cities for financing. In the first round of this stage, 20 top scorers will be chosen for financing during this financial year. The remaining would be asked to make up the deficiencies identified by the Apex Committee in the Ministry of Urban Development for participation in the next two rounds of competition. 40 cities each will be selected for financing during the next rounds of competition.

STAGE 2:

Stage-2 criteria for evaluation of Smart City Plans is as below:

CITY LEVEL EVALUATION (30 points)

1. Credibility of implementation : This encompasses improvement in operational efficiency over the last three years as reflected in average time taken to give building plan approvals, increase in property tax assessment and collection, collection of user charges for water, improvement in power supply, easing of traffic congestion, online accessing of statutory documents through adoption of IT etc.
2. City Vision and Strategy: As reflected in the degree of correlation with the needs and aspirations of the residents, use of ICT to improve public service delivery, impact on core economic activity and inclusiveness.

PROPOSAL LEVEL EVALUATION (70 points)

3. Impact of proposal: To what extent the proposal is inclusive in terms of benefits to the poor and disadvantaged, Extent of employment generation, Articulation of quantifiable outcomes based on citizen consultations, Impact on environment, etc.
4. Cost effectiveness of Smart City Plan: Application of smart solutions for doing more with less of resources, Alternatives considered to enhance cost effectiveness of the proposal, firming up of resources required from various sources, Provision for Operation & Maintenance Costs, IT interventions to improve public service delivery.
5. Innovation and Scalability: Extent of adoption of best practices in consultation with citizens, Applicability of project to the entire city, Adoption of smart solutions and Pan-city developments.
6. Processes followed: Extent of citizen consultations, vulnerable sections like the differently abled, children, elderly, etc., ward committees and area sabhas and important citizen groups, Extent of use of social media and mobile governance during citizen consultations and Accommodation of contrary voices in the strategy and planning.

AMRUT

As a part of a major initiative for urban development in the country the Prime Minister Mr. Narendra Modi has launched three massive projects for which a budget of INR 300,00,000 trillion to INR 400,00,000 trillion has been allocated, to be spent in the next 5 years. Smart Cities Mission, Atal Mission for Rejuvenation and Urban Transformation (“AMRUT”) and Housing for All, now named as Pradhan Mantri AwasYojana (“PMAY”), are the three programs that have been initiated. The main objective of the three ambitious schemes is to develop Indian cities and towns as new engine of growth. At the launch of these urban development initiatives, the Prime Minister cited the existing housing shortage of 20 million units and ensured that by 2022, it was his responsibility to provide a house for everyone.

About AMRUT

- AMRUT is a renewed scheme to substitute the Jawaharlal Nehru National Urban Renewal Mission (JNNURM).
- AMRUT is proposed to be a 10-year programme with total investment of about INR 200,00,000 trillion.
- AMRUT seeks to ensure basic infrastructure and sanitation across 500 selected cities having population above 0.1 million in the country and provide basic services (e.g. water supply, sewerage, urban transport) to households.

Coverage

Five hundred cities will be taken up under AMRUT. The list of cities will be notified at the appropriate time. However, the categories of cities that will be covered in the AMRUT are: i. All Cities and Towns with a population of over 0.1 million with notified Municipalities, including Cantonment Boards (Civilian areas), ii. All Capital Cities/Towns of States/ UTs, not covered in above, iii. All Cities/ Towns classified as Heritage Cities by MoUD under the HRIDAY Scheme, iv. Thirteen Cities and Towns on the stem of the main rivers with a population above 75,000 and less than 0.1 million, and v. Ten Cities from hill states, islands and tourist destinations (not more than one from each State).

Fund Allocation

The total outlay for AMRUT is INR 500 billion for five years from FY 2015-16 to FY 2019-20 and AMRUT will be operated as a Centrally Sponsored Scheme. AMRUT may be continued thereafter in the light of an evaluation done by the Ministry of Urban Development (MoUD) and incorporating learning in the AMRUT. The AMRUT funds will consist of the following four parts:

1. Project fund - 80% of the annual budgetary allocation.
2. Incentive for Reforms - 10% of the annual budgetary allocation.
3. State funds for Administrative & Office Expenses (A&OE) - 8% of the annual budgetary allocation, iv. MoUD funds for Administrative & Office Expenses (A&OE) - 2% of the annual budgetary allocation

However, for FY 2015-16 the project fund would be 90% of the annual budgetary allocation as incentive for Reforms will be given only from FY 2016-17 onwards

Working of AMRUT

Earlier, the MoUD used to give project-by-project sanctions. In AMRUT this has been replaced by approval of the State Annual Action Plan once a year by the MoUD and the States have to give project sanctions and approval at their end. In this way, AMRUT makes States equal partners in planning and implementation of projects, thus actualizing the spirit of cooperative federalism. A sound institutional structure is the foundation to make AMRUT successful. Therefore, Capacity Building and a set of Reforms have been included in AMRUT. Reforms will lead to improvement in service delivery, mobilization of resources and making municipal functioning more transparent and functionaries more accountable, while capacity building will empower municipal functionaries and lead to timely completion of projects.

National Smart Grid Mission

Government has approved the National Smart Grid Mission (NSGM) -an institutional mechanism for planning, monitoring and implementation of policies and programs related to Smart Grid activities. The total outlay for NSGM activities for 12th Plan is INR 9.8 billion with a budgetary support of INR 3.38 billion. NSGM has three tier structure:

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- At the apex level, NSGM has a Governing Council headed by the Minister of Power. Members of the Governing Council are Secretary level officers of concerned Ministries and departments. Role of Governing Council is to approve all policies and programme for smart grid implementation.

- At the second level, the NSGM has an Empowered Committee headed by Secretary (Power). Members of the Empowered Committee are Joint Secretary level officers of concerned Ministries and departments. Role of Empowered Committee is to provide policy input to Governing Council and approve, monitor, review specific smart grid projects, guidelines / procedures etc.
- In a supportive role, NSGM has a Technical Committee headed by Chairperson (Central Electricity Authority). Members of the Technical Committee are Director level officers of concerned Ministries & departments, representatives from industries and academia. Role of Technical Committee is to support the Empowered Committee on technical aspect, standards development, technology selection guidelines, etc.
- For day-to-day operations, NSGM has a NSGM Project Management Unit (NPMU) headed by the Director, NPMU. The Director, NPMU is a Member of the Governing Council and Empowered Committee, and Member Secretary of Technical Committee. NPMU is the implementing agency for operationalizing the Smart Grid activities in the country under the guidance of Governing Council and Empowered Committee.
- Grant up-to 30% of the project cost is available from NSGM budget. For selected components such as training & capacity building, consumer engagement, etc., 100% grant is available.

Corresponding to NSGM, State Level Mission chaired by the Power Secretary of the State has also been proposed. Support for training & capacity building to State Level Project Monitoring Units (SLPMUs) for smart grid activities is provided by NSGM

Clean Ganga Mission

An Integrated Ganga Conservation Mission – 'Namami Gange' has been launched which approaches Ganga rejuvenation based on lessons learnt and by consolidating the existing ongoing efforts and planning for integrated and comprehensive action plan for 'Short-term' (3 years), 'Medium-term' (5 years) and 'Long-term' (10 years and more). The projects and activities under this plan include pollution abatement measures for different sources of pollution and other policy initiatives. A report on "Ganga River Basin Management Plan – 2015" has been prepared and submitted by the consortium of 7 Indian Institutes of Technology ("IITs"), which has identified 7 thrust areas and 21 action points for the rejuvenation of Ganga and its tributaries.

Work has already been taken up in identified towns located along the main stem of river Ganga and the State Project Management Groups ("SPMGs") of the respective states have been requested to take up Sewage Treatment Plants ("STPs") on a priority basis so that the sewage from these towns does not fall in to river Ganga. The deadline for installing real time effluent discharge meters for polluting industries located on the banks of the Ganga has been extended to June 30, 2015 with stricter conditions since several industries did not meet the earlier deadline of March 31, 2015.

Defence & Civil Aviation:

Scheme for raising ECBs for Civil Aviation Sector Extended

In terms of A.P. (DIR Series) Circular No. 113 dated April 24, 2012 issued by Reserve Bank of India ("RBI"), external commercial borrowings ("ECB") was allowed to be raised by airline companies for working capital as a permissible end-use, under the approval route, subject to the conditions stipulated therein. The scheme was extended initially till December 31,

2013 vide A.P. (DIR Series) Circular No.116 dated June 25, 2013 and thereafter till March 31, 2015 vide A.P. (DIR Series) Circular No. 113 dated March 26, 2014.

Now the said scheme of raising ECB for working capital for Civil Aviation Sector has been extended till March 31, 2016 with the same terms and conditions by RBI vide its Circular bearing no. RBI//2014-15/638 A.P. (DIR Series) Circular No.109 dated June 11, 2015.

The overall ECB ceiling for the entire civil aviation sector would continue to be USD 1 billion and the maximum permissible ECB that can be availed by an individual airline company will also continue to be USD (United States Dollar) 300 million. This limit can be utilized for working capital as well as refinancing of the outstanding working capital rupee loan(s) availed of from the domestic banking system.

Exchange Control:

Reserve Bank of India Prohibits Citizens of Macau and Hong Kong from Acquiring / Transferring Immovable Property in India

The RBI includes citizens of "Macau" and "Hong Kong" in the list of Asian countries whose citizens are required to have prior approval of RBI to acquire/ transfer immovable property in India, other than lease not exceeding 5 years. Other Asian countries include Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan, where the citizens of these countries cannot acquire property in India unless they have the permission of RBI.

Foreign Direct Investment in Insurance Sector

Foreign Direct Investment ("FDI") policy for Insurance sector has been liberalized. FDI in Insurance sector is permitted up to 49 percent. "Other Insurance Intermediaries" has also been included within the definition of 'Insurance'. FDI in Indian insurance company shall be limited up to 49 percent of the paid up equity share capital.

FDI up to 26 percent shall be under automatic route (i.e. no prior approval is required) and beyond 26 percent and up to 49 percent shall be with Government approval. Further, an Indian insurance company shall ensure that its "ownership" and "control" remains at all times in the hands of resident Indian entities.

FDI Scheme under E-Business platform

RBI, under the e-Biz project of the Government of India has enabled the filing of the following returns online:

- Advance Remittance Form - used by the companies to report the FDI inflow to RBI.
- Foreign Collaboration General Permission Route Form - which a company submits to RBI for reporting the issue of eligible instruments to the overseas investor against FDI inflow.

Following are the main features of e-Biz portal:

- The design of the reporting platform enables the customer to login into the e-Biz portal, download the reporting forms, complete and then upload the same onto the portal using their digitally signed certificates.

- The banks will be required to download the completed forms, verify the contents from the available documents, if necessary by calling for additional information from the customer and then upload the same for RBI to process and allot the Unique Identification Number.

External Commercial Borrowings denominated in Indian Rupees and Transaction Swap

RBI has decided that recognized non-resident ECB lenders may extend loans in Indian Rupees (INR) subject to the lender mobilizing INR through a swap undertaken with a bank in India. To facilitate ECB lending denominated in INR by overseas lenders, it has now been decided that such lenders may enter into swap transactions with their overseas bank which shall, enter into a back-to-back swap transaction with any bank in India by following a prescribed procedure.

Increase in the Limit of Liberalised Remittance Scheme

RBI has increased the limit of Liberalised Remittance Scheme ("LRS") from USD 1,25,000 to USD 2,50,000 for resident individuals. The banks may now allow remittances by a resident individual up to USD 250,000 per financial year.

If an individual has already remitted any amount under the LRS, then the applicable limit for such an individual would be reduced from the present limit of USD 250,000 for the financial year by the amount already remitted. Further, to facilitate ease of transactions, all the facilities (including private/business visits) for release of exchange/remittances for current account transactions available to resident individuals shall now be subsumed under the overall limit of USD 250,000.

External Commercial Borrowings for Low Cost Affordable Housing Projects

RBI has decided that the scheme of raising ECB by eligible borrowers for low cost affordable housing projects will continue for FY 2015-16 with the same terms as before with the following changes:

- Developers/builders should have a minimum of 3 years' experience in undertaking residential projects as against 5 years prescribed earlier and should have good track record in terms of quality and delivery.
- The condition of minimum paid-up capital of not less than INR 50 Millions, as per the latest audited balance sheet, for Housing Finance Companies stands withdrawn. However, the condition of the minimum Net Owned Funds of INR 3 billion for the past 3 financial years remains unchanged.
- The aggregate limit for ECB under the low cost affordable housing scheme has been extended with a ceiling of USD 1 billion for 2013-2014 and 2014-2015.
- The ECB availed by developers and builders shall be swapped into Rupees for the entire maturity on fully hedged basis.

100 Percent FDI in Construction Development Sector

The Department of Industrial Policy and Promotion ("DIPP") has allowed 100 percent FDI in Construction Development sector under automatic route subject to the following conditions:

- No Minimum land area is to be developed in case of serviced house plots is and in the case of construction-development projects a minimum floor area of 20,000 sq. mts. is to be developed.
- Investee Company is to bring in minimum FDI of USD 5 million within 6 months of commencement of project. The project is to commence from the date of approval by the statutory authority of the building lay out plan. Subsequent portion of FDI can be brought till the ten years from the commencement or before the completion of project, whichever expires earlier.
- An investor can exit on completion of the project or after development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage.
- Subject to facts and circumstances government may permit return of FDI or transfer of stake by one non-resident investor to another non-resident investor, before the completion of project. However subject to consideration by Foreign Investment Promotion Board ("FIPB") on case to case basis
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- The Indian investee company permitted to sell only developed plots which will mean plots where trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage, have been made available.
- All necessary approvals need to be obtained including those of the building/layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/bye-laws/regulations of the State Government/ Municipal/Local Body concerned.
- The approving State Government/Municipal/Local Body concerned, is to monitor compliance of the above conditions by the developer.

FDI in Pharmaceuticals sector with special exception for medical devices

The DIPP has revised the limits of FDI in the Pharmaceutical sector and allowed 100 percent FDI in pharmaceuticals sector for greenfield investment projects under automatic route and 100 percent FDI in pharmaceuticals sector for brownfield investment projects under Government approval route subject to the following conditions:

- Non-compete clause not allowed except in special circumstances with the approval of FIPB.
- The prospective investor and prospective investee are required to provide a certificate along with FIPB application;
- The Government may incorporate appropriate conditions for FDI in brownfield cases, at the time of granting approval.

Further, it is to note that 100 percent FDI under automatic route for manufacturing of medical devices for both greenfield investment and brownfield investment will not be subject to the above mentioned conditions.

Foreign Investment by Foreign Portfolio Investors in India

RBI has revised the position of investment by Foreign Portfolio Investors ("FPI's") in India

- Future investment in government securities to be made in government bonds with a minimum residual maturity of three years.
- FPIs shall be permitted to invest in government securities, the coupons received on their existing investments in government securities. These investments shall be kept outside the applicable limit (currently USD 30 billion) for investments by FPIs in government securities. Authorised Dealer banks shall ensure reporting of such investments as may be prescribed from time to time.
- All future investment in the debt market to be made with a minimum residual maturity of three years.
- Investment to be made in corporate bonds in few circumstances.
- FPIs not allowed any further investment in liquid and money market mutual fund schemes.

However limitations of lock-in period and selling the securities to domestic investors are not applicable.

Corporate Laws:

Posh Exports Private Ltd. v. The Registrar of Companies

Posh Exports Private Limited ("Petitioner Company") was incorporated as a private limited company. The board of directors in the meeting came to know that the documents compulsorily required to be filed by an Indian company under Companies Act, 1956 ("CA 1956") had not been filed with the RoC by the Petitioner Company and therefore, decided to take steps in the present petition and seek revival of the Petitioner Company. The board of directors also undertook to make the statutory compliances and file the requisite statutory records and the balance sheets in accordance with CA 1956. When the documents i.e., annual returns and balance sheets, etc., were sought to be filed on website of MCA, the directors came to know that name of the Petitioner Company has been struck of for the failure to file requisite statutory documents. The Petitioner Company contended that the balance sheets of the company were prepared from time to time, however, it was only recently discovered that none of the balance sheets and the statutory records have been filed with RoC. It was contended that the accountant did not co-ordinate and further the learned counsel for the petitioner company submitted that the part time accountant of the company who was dealing with the aforesaid work was no more an employee of the company.

The petition was allowed in view of the fact that this non-compliance was due to the non-coordination of the part time accountant and thus the petition was allowed subject to payment of costs. Consequently, it was decided to restore the name of the Petitioner Company on the register of the RoC subject to Petitioner Company filling all the statutory documents and returns for the outstanding period along with the prescribed fees in accordance with CA 1956.

[Note: Restoration of a struck off company was allowed by the courts under Section 560 of CA 1956]

Bajaj Auto Ltd v. Western Maharashtra Development Co. Ltd.

The present case dealt with Section 111A of CA 1956 and section 58 of CA 2013 (both relating to free transfer/transferability of shares). The parties to the Protocol Agreement (Clause 7) referred their dispute relating to transfer of shares to arbitration. The real

controversy that revolved around clause 7 was whether it impinges on the free transferability of shares of a public company as contemplated under section 111A of CA 1956. Clause 7 of the Protocol Agreement inter alia provided that if either party desires to part with or transfer its shareholding or any part thereof in the equity share capital, such party shall give first option to the other party for the purchase of such shares at the agreed price. The party desiring to part with or transfer its shareholding or any part thereof, is required to give written notice to the other party specifying its intention to do so and the rates at which it is willing to transfer / part with the same. The arbitral award declared the said Clause 7 as inoperative in the present case. Being dissatisfied with the arbitral award, the respondent company challenged the same before the learned Single Judge on various grounds as were also covered under the Arbitration petition.

After hearing the parties, the learned Single Judge, negated all the contentions of the respondent, save and except one, on the basis of which the award was set aside. In a nutshell, the ground on which the award was set aside by the learned Judge was that Clause 7 of the Protocol Agreement entered into between the parties which gave the right of first refusal to the appellant to purchase the shareholding of the respondent, was not contrary to section 111A of the CA 1956. The learned Judge held that the effect of Clause 7 of the said agreement was to create a right of pre-emption between the appellant and the respondent for the purchase of each other's shares. The conclusion made by the single Judge was that because shares of a company are movable property and the right of the shareholder to deal with his shares and / or to enter into contracts in relation thereto (either by way of sale, pledge, pre-emption, etc.), is nothing but a shareholder exercising his property rights. Such contracts voluntarily entered into by a shareholder for his own shares giving rights of pre-emption to a third party / another shareholder, cannot constitute a restriction on free transferability as contemplated under CA 1956. The court held that in fact, such contracts (either by way of sale, pledge or pre-emption) are entered into by a shareholder in exercise of his right to freely deal with and / or transfer his own shares and that two Joint Venture partners among themselves having provision of right of first refusal is tenable. Thus, appeal was allowed.

CASE LAWS:

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Securities Laws:

SEBI Impose Penalty on Listed Companies for Non–Appointment of Woman Director

The Securities and Exchange Board of India ("SEBI") has earlier imposed additional compliance requirement in respect of Clause 49 of the Listing Agreement which mandated that the board of directors of listed entities to have an optimum combination of executive and non-executive directors with at least one woman director on the board. However, vide circular dated September 15, 2014, the time to comply the compliance requirement was extended to March 31, 2015. Now, SEBI has advised stock exchange to penalize the companies (who has not complied with this requirement) by imposing penalty to the extent of INR 50,000 to INR 142,000 plus INR 5,000 per day from October 2015 till the date when they comply with the provision. In case of non-compliance beyond September 30, 2015, SEBI may take action against non-compliant companies, their promoters, directors or issue direction in accordance with law.

SEBI Grants Time to Companies of Non-Operational Stock Exchanges to Obtain Listing

SEBI has granted the time limit of 18 months to listed companies, which are currently listed on non-operational stock exchanges, to obtain listing on nationwide stock exchange subject to fulfilment of certain conditions specified under :-

(a) Nationwide listing is permitted only for classes of securities that are already listed on non-operational stock exchanges subject to condition that those exclusively listed companies should not have undergone any material changes in their shareholding pattern.

(b) The exclusively listed companies which were filing returns for the last two financial years with the Registrar of Companies will be treated as compliant companies and requirement of no objection certificate from non-operational stock exchanges will not be insisted upon by the nationwide stock exchange.

(c) If promoter and directors of listed companies have failed to provide trading platform or existing opportunity to the shareholders even after extended time of eighteen months, then they have to undergo stricter scrutiny with regard to association with securities market.

(d) Nationwide stock exchanges are required to have dedicated cell for processing applications of exclusively listed companies and expedite the disposal of such application not later than two months from the date of receipt of such application.

SEBI Releases Discussion Paper on Overseas Investments by Venture Capital Funds ("VCF") and Alternative Investment Funds ("AIF")

SEBI received representations from the industry that there had been a major shift of Indian entrepreneurs from India. So there is a need to allow higher overseas investment by VCFs more than existing 10 percent limit. Therefore, SEBI has proposed to increase investment limits of alternative investment funds (AIFs) and venture capital funds in foreign countries that have an Indian connection with an aim to prevent Indian entrepreneurs to shift their business to foreign countries. SEBI has floated a consultation paper allowing AIFs and VCFs to invest up to 25 percent of their investment funds.

Notification of SEBI (Prohibition of Insider Trading) Regulations, 2015.

SEBI has notified the Prohibition of Insider Trading Regulations, 2015 replacing two-decade old framework. SEBI has tightened the insider trading norms by widening the definition of an insider to cover any person who is a "connected person" or in possession of or having

access to unpublished price-sensitive information. “Connected Person” is defined as any person who is or has during the period of six months prior to committing of concerned act been associated with a company in any capacity, including by reason of frequent communication with its officers or by being in any contractual, fiduciary or employment relation or by being a director, officer or employee. It also covers person’s holding any position that allows access to unpublished price-sensitive information.

Under new insider trading norms in cases of connected persons, the onus of establishing that they were not in possession of unpublished price sensitive information shall be on such connected persons. However, if the person who has been alleged with insider trading violations is not connected with the company, then the onus of proving the same would be on SEBI.

SEBI Notifies Revised Delisting Norms

In order to make delisting more effective, SEBI has notified revised regulations for delisting process through the reverse book-building route that would make the delisting easier for companies. Under the revised delisting norms the timeline for completing the process has been reduced. It provides for relaxation of rules on a case-to-case basis.

The key features for revised regulations are as under:

1) Timeline for completing the delisting process has been reduced to 76 working days from 17 calendar days.

2) Now stock exchanges would be given five working days’ time to give their in-principle approval for delisting.

3) Delisting would be considered successful only if at least 25 percent of the public shareholders participate in the reverse book building process.

4) To ensure that a delisting plan has been decided in a fair manner, company’s board would have to approve of it only after due diligence process.

5) Further, company’s board would have to certify that the company is in compliance with applicable security laws and that it would be in the interest of the shareholders.

6) Companies having paid-up capital of not more than INR 100 million and net worth that does not exceed INR 250 million as on the last day of the previous financial year are exempted from following the Reverse Book Building process.

7) The exemption would be available only if there is no trading in the shares of the company in the last one year from the date of the board’s resolution authorizing the company to go in for delisting and trading of shares of the company has not been suspended for any non-compliance during the same period.

SEBI Fixes Cap on Application Money

SEBI vide notification has amended the Issue of Capital and Disclosure Requirements Regulation wherein the tenure of warrants issued along with public issue/rights issue has been extended to 18 months from the date of public/right. Earlier the tenure was 12 months. Besides extending tenure of warrants a condition has been stipulated that

price/conversion formula of warrants shall be determined upfront and at least 25 % of the consideration amount should be received upfront. It has also been clarified that in case warrant holder does not exercise option to take equity shares against any of the warrants held by him, consideration paid on them shall be forfeited by the issuer company.

SEBI Announces Guidelines for International Financial Services Centres

SEBI has issued SEBI (International Financial Services Centres) Guidelines, 2015 to facilitate and regulate financial services relating to securities market in an International Financial Services Centre ("IFSC") set-up under section 18(1) of the Special Economic Zones Act, 2005. The salient features of the said guidelines are as under:

1) Any entity desirous of operating in an IFSC shall have to take prior approval from SEBI.

2) Any recognized entity desirous operating in IFSC as an intermediary, may form a company to provide such financial services relating to securities market, as are permitted by SEBI.

3) Any recognized domestic or foreign stock exchange is allowed to establish its subsidiary provided it holds at least 51 percent of shareholding in the venture.

4) Stock exchanges are required to have a minimum net worth of INR 250 million to begin their operations. However, such entities would be required to raise their net worth to INR 1 billion within 3 years from the start of their operations.

5) In case of clearing operations, the initial minimum net worth requirement is INR 500 million, which need to be increased to INR 3 billion within three years of its establishment.

6) Domestic companies intending to raise capital, in a currency other than Indian Rupee, in an IFSC shall have to comply with the provisions of the Foreign Currency Depository Receipts Scheme, 2014.

7) Entities operating in IFSC can issue debt securities subject to certain conditions. Such debt securities should be listed in any one or more stock exchanges in IFSC.

Angel Broking Private Limited v. SEBI

Angel Broking Private Limited ("ABPL"/ "Appellant") has filed this appeal against order of Adjudicating Officer (AO), SEBI, for imposition of penalty of INR 1 million under Section 15HA of Securities and Exchange Board of India Act, 1992 for violation of Regulation 3(a), 4(1) and 4(2)(a), (b), (e) and (g) of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ("PFUTP Regulations") and also violation of Regulation 7 read with Clause A(1), A(3), A(4) and A(5) of Code of Conduct for Stock Brokers under Securities and Exchange Board of India (Stock-Brokers and Sub-Brokers) Regulations, 1992.

SEBI investigated trading in scrip of Sterling Green Wood Limited ("SGWL") for the period from November 6, 2009 to December 2, 2009 (hereinafter referred as Investigation Period), and observed that during this period price of scrip of SGWL has been increased from INR 19.80 to INR 42.50. It has been also observed that ABPL was holding more than 1 percent shares of SGWL as on September 30, 2009.

It was alleged that ABPL consciously executed self-trades for its client and hence ABPL connived with its client for self-trades. Accordingly, a Show Cause Notice was issued by AO to the Appellant and it was found that Appellant had executed 4 Self-trades in scrip of SGWL, which constituted 7.45 percent of total buy and 10.20 percent of total sale of SGWL scrip. So, the buying shares at higher price and selling same at lower price by the Appellant were not normal trades and in violation of regulations 3 and 4 of PFUTP Regulations.

In view of above, ABPL and its client have been held violative of regulation 3(a), 4(1) and 4(2) (a), (b), (e) and (g) of PFUTP Regulations and ABPL held violative in addition to regulation 7 read with Clauses A (1), A (3), A (4) and A (5) of Code of Conduct of Stock-Brokers, as specified in Schedule II of Stock-Broker Regulations.

Further, regarding quantum of penalty and considering 15(J) of SEBI Act, into consideration, it was held that disproportionate gains or unfair advantage by an entity and the consequent losses suffered by the investors, are difficult to quantify, but since Appellant has executed self-trades which do not result in change of beneficial ownership, created false volumes and manipulated price of SGWL scrip and thus sent wrong signals to gullible investors about trading in scrip and hence considering that self-trades have 13 serious consequences and is serious violation on 4 occasions on November 30, 2009 and December 1, 2009 and since ABPL was previously also held to violative of Stock-Brokers Regulations and PFUTP Regulations; exemplary penalty needs to be imposed on Appellant.

Thus, it was held that the Adjudicating Officer is justified in holding that self-trades were executed with ulterior motives. Therefore, quantum of penalty imposed upon Appellant based on facts on record, mitigating factors and past conduct of Appellant cannot be faulted. Accordingly, the appeal could not succeed.

Banking & Finance:

NBFCs raising money through private placement of NCDs

The RBI vide its circular dated February 20, 2015, has issued revised guidelines in relation to issue of non-convertible debentures ("NCDs") by the non-banking finance companies ("NBFCs") on private placement basis. In terms of the revised guidelines, any issue of NCDs by NBFCs on private placement shall inter-alia be governed by the following instructions:

- The minimum subscription per investor shall be INR 20,000;
- The issuance of private placement of NCDs shall be in two separate categories, those with a maximum subscription of less than INR 10 million and those with a minimum subscription of INR 10 million and above per investor;
- There shall be a limit of 200 subscribers for every financial year, for issuance of NCDs with a maximum subscription of less than INR 10 million, and such subscription shall be fully secured;
- There shall be no limit on the number of subscribers in respect of issuances with a minimum subscription of INR 10 million and above; the option to create security in favour of subscribers will be with the issuers. Such unsecured debentures shall not be treated as public deposits as defined in NBFCs Acceptance of Public Deposits (Reserve Bank) Directions, 1998, etc.

Securitisation Company (SC) / Reconstruction Company (RC) – Change in Shareholding

The RBI vide its circular dated February 24, 2015, has mentioned that the prior approval of the RBI shall be required only in case of the following changes in the shareholding of SC / RC:

- any transfer of shares by which the transferee becomes a sponsor.
- any transfer of shares by which the transferor ceases to be a sponsor.
- an aggregate transfer of ten percent or more of the total paid up share capital of the SC / RC by a sponsor during the period of five years commencing from the date of certificate of registration.

NBFCs – Lending against Shares

The RBI has issued a circular dated August 21, 2014, pursuant to which, the RBI has laid down a minimum set of guidelines in relation to lending by NBFCs against shares. The RBI vide its circular dated April 10, 2015, has further clarified that:

(i) The above mentioned circular is not applicable to unlisted shares.

(ii) LTV ratio of 50% is required to be maintained at all times. Any shortfall in the maintenance of the 50% LTV occurring on account of movement in the share prices shall be made good within 7 working days.

(iii) The condition of acceptance of only Group 1 securities (specified in SMD/ Policy/ Cir - 9/ 2003 dated March 11, 2003 as amended from time to time, issued by SEBI) as collateral for loans of value more than INR 0.5 million, is applicable only where the lending is done for investment in the capital market.

(iv) The reporting to the Stock Exchanges shall be quarterly.

Mechanism for identification of wilful defaulters

The RBI vide its circular dated April 23, 2015, has amended the paragraph 3 of the Master Circular on Wilful Defaulters dated January 7, 2015. In terms of the amended paragraph 3, the RBI has laid down the guidelines / procedure for declaring the borrowing company and its promoter / whole-time director as wilful defaulters. It is further mentioned in the aforesaid circular by the RBI that except in very rare cases, a non-whole time director should not be considered as a wilful defaulters unless it is conclusively established that such non-whole time director was aware of the fact of wilful default by the borrower or such wilful default had been taken place with the consent or connivance.

Private Banks – Guidelines on compensation of Non-executive Directors

The RBI vide its circular dated June 1, 2015, has advised private banks to formulate and adopt a comprehensive compensation policy for the non-executive directors (other than part time non-executive chairman) in consultation with its remuneration committee. Such compensation, however, shall not exceed INR 1 million per annum for each director.

Strategic Debt Restructuring Scheme

The RBI vide its circular dated June 8, 2015, has issued new norms for strategic debt restructuring ("SDR") which gives lenders the right to convert their outstanding loans into a majority equity stake if they feel that a change in ownership can help turn around the borrower's business. The decision on invoking the SDR by converting the whole or part of the loan into equity shares should be well documented and approved by the majority of the JLF members (minimum of 75% of creditors by value and 60% of creditors by number). Further, the shareholding of respective lending bank will be subject to statutory ceiling limit as prescribed under Section 19(2) of the Banking Regulation Act, 1949.

The equity conversion clause needs to be incorporated at the time of restructuring, and the conversion of debt into equity should be at a conversion price (fair value) as calculated in accordance with the norms laid down by the RBI.

The aforesaid pricing formula has also been exempted under the Securities Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 subject to some conditions. Further, in case of listed company, the acquiring lender has also been exempted from an obligation to make an open offer under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Environment & Climate Change:

Environmental Clearance ("EC") Requirement for Mining Lease Renewal

The Ministry of Environment & Forests ("MoEF") has issued office memorandum clarifying that the project proponent which has a valid and subsisting EC for their mining project either under the Environmental Impact Assessment ("EIA") Notification, 1994 or under the EIA Notification, 2006, would not be required to obtain fresh EC at the time of renewal of their mining lease. However, such relaxation from obtaining fresh EC at the time of renewal of the mining lease is subject to the maximum period of the maximum validity of an EC for mining lease, which is 30 years.

EC Requirement for Captive Diesel Generating Sets

MoEF vide a circular issued by it has clarified that diesel generating sets which are used for captive purpose and not supplying power to grid do not fall under Thermal Power Plant Category of EIA Notification, 2006. Thus the activity of operating diesel generating sets for captive purpose does not attract the provisions of the EIA Notification, 2006 and therefore, does require EC. However, the said activity would be governed by the emission standards notified under the Environment (Protection) rules, 1986 and guidelines issued by Central Pollution Control Board in this regard.

EC Validity for Cancelled Coal Blocks

MoEF vide a circular issued by it has amended the EIA Notification, 2006. In terms of the said amendment, now where an allocation of coal block is cancelled in any legal proceeding, or by the Government in accordance with law, the environmental clearance granted in respect of such coal block may be transferred, subject to the same validity period as was initially granted, to any legal person to whom such coal block is subsequently allocated. In such a case, obtaining of "no objection" from either the holder of environment clearance or from the regulatory authority concerned shall not be necessary and no reference shall be

made to the Expert Appraisal Committee or the State Level Expert Appraisal Committee concerned for fresh appraisal of the coal mining project for EC.

EC Requirement for Captive Diesel Generating Sets

MoEF vide an office memorandum issued by it has clarified the meaning of word "Industrial Shed" used in its Notification No. S.O. 3252 (E) dated 22.12.2014whereby exemption of "Industrial Shed" from requirement of EC under the provisions of the EIA Notification, 2006 was granted.

As per the said office memorandum the word 'Industrial Shed' implies building (whether RCC or otherwise) which is being used for housing plant and machinery of industrial units and shall include godowns and building connected with production related and other associated activities of the unit in the same premise.

The said office memorandum has further clarified that the construction of the industrial building shall follow the guidelines as prescribed by MoEF.

Competition Law:

CCI ordered Investigation against REC Power Distribution Company Ltd. and the Rural Electrification Corporation Ltd. for Abuse of Dominant Position

XYZ ("Informant") filed information against REC Power Distribution Company Ltd. ("Opposite Party") alleging an abuse of dominant position in contravention of the provisions of Section 4 of the Competition Act, 2002 ("Competition Act"). The Opposite Party was a wholly owned subsidiary of Rural Electrification Corporation Ltd. ("REC") and was the nodal agency for the implementation of the Rajeev Gandhi Grameen Vidyutikaran Yojna ("RGGVY") scheme.

It was alleged that the Opposite Party had leveraged its association with the REC in order to secure orders by giving a verbal promise that it would be able to get the approval from REC as the head of RGGVY scheme of REC is its Chief Executive Officer ("CEO"). Accordingly, the Informant prayed that the Opposite Party be stopped from bidding a consultancy work of project funded by REC and to stop the alleged anti-competitive activity being promoted by REC and the Opposite Party.

The Competition Commission of India ("CCI") inter alia drew out two relevant markets for the determination of contravention of section 4 of the Competition Act. The first relevant market being the 'market for financing of rural electrification schemes' and the second relevant market being the 'market for providing consultancy services in power projects'. On the point of abuse of dominance it was inter alia noted that the act of leveraging ultimately excluded other power utilities from the market for providing consultancy services in power projects appeared to be violative of section 4(2)(e) of the Competition Act and resulted in exclusionary conduct amounting to denial of market access to other utilities who were capable of preparing DPR's, which contravened section 4(2)(c) of the Competition Act.

Due to the foregoing reasons, the CCI vide order dated January 13, 2015 opined that prima facie the conduct of the REC and the Opposite Party appeared to be anti-competitive and hence, merits investigation by the Director General under section 26(1) of the Competition Act.

CCI Ordered Investigation against DLF Universal Limited for Abusing its Dominant Position

Mr. Vijay Kapoor ("Informant") filed information against M/s DLF Universal Limited ("Opposite Party") alleging inter alia contravention of section 4 of the Competition Act in development and sale of residential units in Gurgaon as the Opposite Party imposed extremely harsh and one sided terms and conditions in the 'Agreement to Sell' ("Agreement").

The CCI observed that the relevant market was the provision of services for development and sale of residential units in Gurgaon and prima facie the Opposite Party appeared to be dominant in the same. Further, the CCI noted that the terms of the Agreement appeared one-sided and such abusive conduct appeared to contravene section 4 (2)(a)(i) of the Competition Act.

Due to the foregoing reasons, the CCI vide order dated February 04, 2015 opined that prima facie the Opposite Party abused its dominant position and hence, merits an investigation by the Director General under section 26(1) of the Competition Act.

CCI Closed Complaint against M/S Volkswagen Group Sales India Private Limited for Abuse of Dominance

M/s Bhasin Motors (India) Private Limited ("Informant") against M/s Volkswagen Group Sales India Private Limited ("Opposite Party") alleging inter alia contravention of provisions of section 4 of the Competition Act. The Informant was a company which dealt with the distribution of cars in the Delhi/NCR region while the Opposite Party was a company that manufactured and sold automotives. The said parties had entered into Dealer Agreement as well as 'Basic Agreement for Sales and Purchase of Volkswagen Products' ("Agreement").

It was inter alia alleged that the Opposite Party, by virtue of its dominant position in the market, had exploited the Informant by forcing it to sign a unilateral agreement which was unfair and one sided and has excluded OP from any obligation and liability thereunder.

The CCI vide order dated February 11, 2015 inter alia stated that the information does not disclose a competition concern. Furthermore, the market share of Opposite Party was very negligible in comparison to the other market players and hence, it was not a dominant player. Hence, due to the foregoing reasons the CCI ordered the information to be closed in terms of section 26(2) of the Competition Act.

CCI Closed Complaint against M/S Lifestyle International Private Ltd. for Abuse of Dominance

Mr. Kamble Sayabanna Kallappa ("Informant") filed information against M/s Lifestyle International Private Ltd. ("Opposite Party") alleging, inter alia, contravention of the provisions of section 4 of the Competition Act. The informant had alleged that the Opposite Party had alleged its dominant position by charging an additional amount of INR 5 for plastic carry bags.

The CCI observed that the impugned practice carried out by the Opposite Party was in accordance with the provisions of Plastic Waste (Management & Handling) Rules, 2011, which was notified by the MEF vide notification dated February 04, 2011. The CCI vide order dated March 18, 2015 opined that no prima facie case was made out against the Opposite

Party for contravention of the provisions of section 4 of the Competition Act and the information was ordered to be closed under section 26(2) of the Competition Act.

CCI Closed Complaint against M/S Flipkart India Private Limited and Others for Abuse of Dominance and Anti-Competitive Practices

Mr. Mohit Manglani ("Informant") filed information against M/s Flipkart India Private Limited ("Opposite Party No. 1"), M/s Jasper Infotech Private Limited ("Opposite Party No. 2"), M/s Xerion Retail Private Limited ("Opposite Party No. 3"), M/s Amazon Seller Services Private Limited ("Opposite Party No. 4"), M/s Vector E-commerce Private Limited ("Opposite Party No. 5") and other e-commerce/portal companies (collectively hereinafter, "Opposite Parties") for their alleged contravention of the provisions of section 3 and section 4 of the Competition Act. The Informant had alleged that Opposite Parties had been indulging in anti-competitive practices in the nature of 'exclusive agreements' with sellers of goods/services which contravened section 3(1) read with section 3(4) of the Competition Act and also alleged violation of sections 4(a) (i), 4(b) (i) and 4(b) (ii) of the Competition Act leading to appreciable adverse effect on competition.

The CCI inter alia observed that although there were agreements between the manufacturer and the Opposite Parties, the same did not satisfy the requisites of section 19(3) of the Competition Act in order to establish appreciable adverse effect on competition. With regard to the question of dominance, the CCI noted that irrespective of whether it considered e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the Opposite Parties were seen to be individually dominant.

In the light of the foregoing reasons, the CCI vide order dated April 23, 2015 held that prima facie no case of contravention of the provisions of either section 3 or section 4 of the Competition Act is made out against the Opposite Parties and hence, ordered the closure of matter under section 26(2) of the Competition Act.

CCI holds DLF Gurgaon Home Developers Private Limited liable for Abuse of Dominance

Mr. Pankaj Aggarwal, Mr. Sachin Aggarwal, Mr. Anil Kumar ("Informants") filed information against DLF Gurgaon Home Developers Private Limited ("Opposite Party") under separate cases alleging, inter alia, contravention of the provisions of Section 4 of the Act. It was alleged that the Opposite Party had imposed unfair and onerous terms and conditions in the Buyers Agreement ("Agreement"). The Informants prayed before the CCI to initiate an inquiry into the alleged conduct of the Opposite Party for abuse of dominant position in contravention of section 4(2)(a)(i) of the Competition Act.

The CCI stated that the activity of constructing apartments intended for sale to the potential consumers after developing the land came within the ambit of a 'service' for the purpose of the Act. The Director General ("DG") had delineated the relevant product market in three different ways in three different cases. However, the CCI opined the relevant market to be the market for the 'provision of services for development/sale of residential apartments in Gurgaon'. It was also stated that the terms and conditions imposed through the Agreement were abusive being unfair within the meaning of Section 4(2)(a)(i) of the Competition Act. The CCI in order to deduce dominance relied on the Belaire Owners" Association vs DLF Limited, HUDA & Ors. (Case No. 19 of 2010) ("Belaire's Case") case as its facts squarely applied to the instant case.

Accordingly, CCI vide order dated May 12, 2015, under section 27(a) of the Competition Act directed Opposite Party and its group companies operating in the relevant market to cease and desist from indulging in the impugned anti-competitive practices. The CCI also observed that since a penalty of INR 6.3 billion had already been imposed on the Opposite Party in the Belaire's Case for the same time period to which contravention in the present cases belong, no financial penalty under section 27 of the Competition Act was required to be imposed.

CCI Imposes Penalty on M/s GlaxoSmithKline Pharmaceutical Limited, Mumbai and M/s Sanofi, Mumbai for Abuse of Dominance

M/s Bio-Med Private Limited ("Informant") filed information against Union of India through Deputy Assistant Director General (Stores), Medical Store Depot ("DADG"), Ministry of Health and Family Welfare, Government of India, New Delhi ("OP-1"); M/s GlaxoSmithKline Pharmaceutical Limited, Mumbai ("OP-2"); and M/s Sanofi, Mumbai ("OP-3"); alleging, inter alia, contravention of the provisions of sections 3 and 4 of the Competition Act. The Informant alleged that OP-1 had abused its dominant position by unilaterally introducing and modifying the turnover conditions without any reasonable rationale and explanation. It was also alleged that OP-2 and OP-3 had cartelized through bid rotations and geographical allocations from the period 2002 to 2012. The Informant had prayed, inter alia, for issuance of a direction to the DG to investigate into the alleged abuse of dominant position by OP-1; to direct OP-1 to remove the restrictive conditions in the tenders; to investigate the marketing designs of OP-2 and OP-3 from 2002 to 2012 and to hold them guilty of cartelization in the market.

The CCI cumulatively on the findings of the DG as well as other instances opined that OP-2 and OP-3 had acted collusively which violated section 3(3)(d) read with Section 3(1) of the Competition Act. Accordingly, the CCI vide order dated June 04, 2015 under section 27(b) of the Competition Act imposed penalty on OP-2 and OP-3 at the rate of 3% of their turnover which amounted to INR 604.890 million and Rs.30.434 Million respectively. The CCI also directed OP-2 and OP-3 to cease and deist from indulging in the impugned anti-competitive practices.

COMPAT sets aside the order of the CCI under Section 43 against All India Organization of Chemists and Druggists

All India Organization of Chemists and Druggists ("AIOCD") filed an Appeal before the The Competition Appellate Tribunal ("COMPAT") against the penalty of INR 10 million imposed by the CCI for non-furnishing of information to the DG during Investigation under Section 43 of the Competition Act in Case No. 20 of 2011. The COMPAT vide its order dated April 27, 2015 had partly allowed the said Appeal and held that the order passed by the CCI violates one of the important facets of the Principal of Natural Justice – a person who hears must decide the case. It was also held that the penalty imposed by the CCI under Section 43 of the Competition Act became inoperative from the date of submission of the report by the DG; the CCI committed serious error by not rectifying the mistake and directed that the AIOCD shall be entitled to get refund of penalty imposed in excess of what was payable till the date of submission of the report by the DG.

Since the establishment of COMPAT in May 2009, for the first time it has upheld that one who hears must decide and this may have wide ramifications on the other pending matters involving similar issue.

Technology, Media & Telecommunications:

Telecom Regulator Recommends Introduction of Virtual Network Operators in the Telecom Space

The Telecom Regulatory Authority of India ("TRAI") has issued its recommendations for introducing Virtual Network Operators ("VNOs") in the telecom sector vide press release no. 30/2015 dated May 1, 2015. Last year, the DoT, while exploring the possibility to permit entry to the VNOs, had sought the views of the TRAI.

The TRAI in its recommendations has proposed introduction of a licensing regime for the VNOs, allowing them to offer all segments of telecom services, including voice, data and video. The VNOs are service delivery operators that provide telecom services without owning spectrum or network infrastructure, but rely on the network and support of infrastructure providers.

In terms of the recommendations, the VNOs are to be introduced on the basis of the mutually accepted terms between a Network Service Operator and a VNO. TRAI also proposes that VNOs can be permitted to set up their own network equipment, in cases where there is no requirement of interconnection with other Network Service Operators. In the recommendations, it has been observed by TRAI that the terms and conditions of sharing infrastructure between network operators (such as Airtel, Vodafone and BSNL) and a VNO should be left to the market forces, with the TRAI or the DoT having right to intervene to protect the interests of consumers and the telecom sector.

In relation to the licensing regime, the TRAI has proposed a separate service authorization under the Unified License, which is the single license for all telecom services in India. The term of the license for the provision of VNOs is proposed as 10 years, extendable by further periods of 10 years.

One Nation – Full Mobile Number Portability: Inter Circle Portability Introduced in India

TRAI issued the Telecommunication Mobile Number Portability (Sixth Amendment) Regulations, 2015 vide its Press Release No. 15 of 2015, for full Mobile Number Portability ("MNP") initiating the implementation of the 'One Nation – Full Mobile Number Portability'.

Initially envisaged to be implemented from fixed May 3, 2015 as the deadline for implementation of full / inter telecom circle MNP was extended by the DoT to July 3, 2015, to enable the telecom operators to make technical modifications to their networks.

Implementation of full MNP would imply an inter telecom circle portability of mobile numbers, which presently is permitted only within the telecom circle of such user. The Telecom Commission, which is the highest decision making body of the DoT had given its nod to the implementation of full MNP in June last year.

The Telecom Regulator initiates a consultation on OTT Services and Net Neutrality - Seeks Comments on Proposed Regulations for OTT Services

TRAI on March 27, 2015 issued a 'Consultation Paper on Regulatory Framework for Over-the-top ("OTT") services' inviting comments from the stakeholders on the issue.

The TRAI observed that there is an ongoing debate worldwide among governments, industry and consumers regarding regulation of OTT services and net-neutrality.

The telecom service providers ("TSPs"), offering fixed and mobile telephony have witnessed large revenues owing to the online content in the OTT services and applications, such as WhatsApp, Skype, Viber and a gamut of others.

As on date, users can directly access these OTT applications online from any place, at any time, using a variety of internet connected devices. The chief characteristic of these OTT services for the TSPs is that the TSPs realize revenues solely from increased data usage by the devices for various applications and do not realize any other revenues, be it for carriage or bandwidth.

Presently, there is no legislation or specific regulations on net-neutrality and the OTT Services in India are being offered as part of the internet service package.

TRAI, by way of the present consultation process, had invited comments on the following:-

♣ Policy and regulatory environment and the need for regulation,

♣ Current policy dispensation for the OTT players vis-à-vis the TSPs,

♣ Security concerns of OTT players providing communication services,

♣ Issues related to security, safety and privacy of the consumer,

♣ Issues arising because of net-neutrality,

♣ Network discrimination and traffic management practices,

♣ Non-price based discrimination of services and other pricing-related issues.

The consultation process witnessed millions of responses being filed with the TRAI by the telecom service providers, OTT players, industry associations and other stakeholders expressing their concerns.

The TRAI would issue its recommendation on the issues to the DoT, pursuant to this public consultation process.

The National Roaming Tariffs Set to Reduce by Virtue of the TRAI's Tariff Order

In a step towards implementing the One Nation – Free Roaming objective of the National Telecom Policy, 2012, TRAI issued the Telecommunication Tariff (Sixtieth Amendment) Order, 2015 (3 of 2015) vide Press Release No. 26/2015 dated April 9, 2015 ("60th Tariff Order"), reducing ceiling tariffs for national roaming calls and SMSes. The TRAI has fixed the limits on the tariff chargeable by TSPs. TRAI has also specifically made it mandatory to offer a special roaming tariff plan, which means a plan to be offered by the TSPs, where the subscriber would not be charged for an incoming voice call on national roaming upon payment of a fixed charge, if any.

The 60th Tariff Order would be implemented with effect from May 1, 2015.

Regular Consultations between the Telecom Department and Operators

The DoT has decided to hold consultations between the Telecom Secretary and executives of the telecom operators on a regular basis.

This move came subsequent to the spectrum auctions, which apparently left the telecom players unhappy with the hefty amounts they had to pay for buying back airwaves.

The DoT expressed its willingness to hear all the grievances of the industry and take steps to address them. For the initial meetings with the industry, the agenda would cover a road map on spectrum trading and sharing, spectrum availability and the plan about the quantum of spectrum to be auctioned for different bands.

Spectrum Auctions 2015

The Department of Telecommunications ("DoT") had put up spectrum in 4 bands of 800 MHz, 900 MHz, 1800 MHz and 2100 MHz, spread across the 22 telecom circle of the country for auction. The auctions were carried out in the months of February-March, 2015.

The auction process concluded last week after fierce bidding by eight telecom players over 19 days and 115 rounds. The telecom players involved in the auction included Airtel, Vodafone, Idea Cellular, Reliance Communications, Reliance Jio Infocomm, Tata Teleservices, Aircel and Uninor.

A total of 465 MHz of spectrum across the four bands (103.75 MHz in 800 MHz band, 177.8 MHz in 900 MHz band, 99.2 MHz in 1,800 MHz band and 85 MHz in the 2,100 MHz band) has been put up for auctions.

These auctions fetched the Government approximately INR 10,900,000,000 billion.

Earlier, a Supreme Court bench headed by Justice Dipak Misra had on February 26, 2015 allowed the scheduled commencement of spectrum auctions, but directed that the results should not be finalized without its approval. However, on March 26, 2015 the Supreme Court lifted a restraint order and allowed finalization of the auction result.

Some of the key highlights of the auction were:-

♣ Bharti Airtel, Vodafone and Idea Cellular retained their 900 MHz spectrum holdings;

♣ Reliance Jio Infocom managed to win CDMA band spectrum;

♣ Although Reliance Communications lost in three telecom circles, but it became India's first and only operator with a nationwide footprint of the contiguous 800 MHz spectrum;

♣ Uninor did not win spectrum in any telecom circle;

♣ Aircel only participated in the bidding process for 1800 MHZ spectrum band, since it was disqualified from bidding for any new spectrum; and

♣ The Maharashtra circle generated the most revenue, accounting for INR 10,822 crore for 14 MHz of spectrum.

In-flight Wi-Fi in India Likely Soon

According to certain media reports, the Department of Telecommunications is understood to have informally agreed to allow the use of Wi-Fi while in flight in the Indian air space

Presently, the internet connectivity service is not permitted for the Indian carriers and only foreign airlines such as Emirates, Lufthansa and Turkish Airlines offer internet connectivity on international flights.

Generally, Airlines provide Wi-Fi services by installing a server on board planes, which connects with a ground-based mobile broadband network or links to the satellites.

The use of Wi-Fi is a matter of regulatory clearances, similar to the use of mobile phones onboard even in the flight mode.

Supreme Court of India strikes down Section 66A of the IT Act as Unconstitutional

The Supreme Court struck down Section 66A of the Information Technology Act, 2000 ("IT Act"), vide its order dated March 24, 2015. This decision is widely been hailed as a major boost to freedom of speech online in India. The court struck down a draconian law that was poorly conceived, loosely worded and widely misused as a tool by the state machinery to muzzle free speech online.

The court, however, allowed the government to block websites if their content had the potential to create communal disturbance, social disorder or affect India's relationship with other countries.

The bench opined that the public's right to know is directly affected by Section 66A of the IT Act and the section clearly affects the right to freedom of speech and expression enshrined under the Constitution of India.

Further, the court observed that Section 66A of the IT Act was unconstitutional because it failed two major tests – the clear and present danger test and the tendency to create public disorder test.

The court also found the language used in the section vague and nebulous observing that the same does not appropriately define words like 'offensive' or even 'persistent'.

The court was of the view it cannot move forward on the government assurances that the provision would not be misused, as any such assurance would not bind on successive governments and thus, the provision would have to be judged on its own merits. The court observed that there is a difference between discussion, advocacy and incitement.

An Apex Court bench comprising of Justice J. Chelameswar and Justice R.F. Nariman had on February 26, 2015 reserved its judgement on one of the most controversial issues regarding the freedom of expression that the courts have dealt with in the recent times.

The government pleaded it did not want to curtail the freedom of speech and expression but contended that the cyber space could not be allowed to remain unregulated. During hearing however, the court had found several issues with the wording of the law. In particular, it said that terms like 'grossly offensive' and 'of menacing character', used to classify content

as illegal, were vague expressions and these words were likely to be misunderstood and abused.

This section had been widely misused by police in various states to arrest innocent persons for posing their comments on social network sites on social events and political leaders. Section 66A of the IT Act gives arbitrary powers to the police to make arrests for anything deemed annoying – an entirely subjective term. Not only does it have the potential for being abused, the law attacks the root of liberty and fundamental right of freedom of speech and expression, the two cardinal pillars of democracy and is therefore the Supreme Court declared it as being unconstitutional.

The first Public Interest Litigation on the issue was filed in 2012 by a law student Shreya Singhal, who sought an amendment in Section 66A of the IT Act. This was filed after two girls – Shaheen Dhada and Rinu Srinivasan – were arrested in Palghar in Thane district as one of them posted a comment against the shutdown in Mumbai following Shiv Sena leader Bal Thackeray's death and the other 'liked' it.

Proposal to bring Electronic Media under the Press Council of India

The Press Council of India ("PCI") is presently considering a proposal to bring the electronic media under its own jurisdiction. The inclusion of electronic media would have to be done by carrying out certain modifications to the Press Council Act, 1978 to enlarge the scope of the legislation.

The Minister of State for Information and Broadcasting, Mr. Rajyavardhan Rathore, observed in a written response to a question by Congress MP Mr. S P Muddahanume Gowda in the Parliament on whether the government proposes to set up a common statutory regulator.

The Minister stated in his response that the PCI is in the process of deliberating and considering its earlier proposal for amendments to the Press Council Act, 1978 to bring electronic media under the jurisdiction of the PCI. However, this may be considered after receiving the views of Chairman of the PCI.

Justice Markandey Katju, a former chairman of the PCI, had earlier recommended setting-up of a Media Council and having both print and electronic media within its ambit.

The Parliamentary Standing Committee on Information Technology in its 47th Report recommended for the establishment of a statutory body to look into contents of all media, both print and electronic media. Even the Telecom Regulatory Authority of India, which operates as the regulator for telecom and media, in its recent Recommendations on Cross Media Ownership has recommended a single regulatory authority for print and electronic media.

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Supreme Court Orders Sharing of Live Feed of the World Cup Matches

The Supreme Court has permitted Prasar Bharti to share the live feed received by it from Star India Private Limited of on-going Cricket World Cup matches, with the private cable operators across the country.

In terms of its order dated February 20, 2015, the Supreme Court has extended the operation of its earlier interim order of February 10, 2015. In terms of this order, Prasar Bharti is allowed to share the live feed of the World Cup matches with private cable operators. On February 10, 2015 the Supreme Court of India stayed the execution of an order of the High Court of Delhi that barred Prasar Bharti, the statutory body set-up as the public sector broadcaster, from sharing the feeds of the upcoming 2015 edition of the Cricket World Cup with Doordarshan. The High Court had based its decision on the interpretation of Section 3 of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007 ("Sports Signals Act") and Section 8 of the Cable Television Networks (Regulation) Act, 1995 ("Cable TV Networks Act"). The Sports Signals Act mandates that the broadcasters are mandated to share the feed of the sporting events with Prasar Bharti. Further, the Cable TV Networks Act requires cable operators to carry Doordarshan channels compulsorily over their networks.

Through the interim order, the Supreme Court had suspended the order passed by the Delhi High Court on February 4, 2015, which ruled that Prasar Bharti should telecast the coverage from the feed shared by the broadcasters only on its terrestrial and direct-to-home networks.

The Supreme Court, while pronouncing the said order, considered the suggestions put forward by the broadcasters. The Court did not accept the suggestion of setting-up an additional / alternative channel by Prasar Bharti. To this suggestion, Prasar Bharti had earlier contended the option to be unviable and technically unfeasible within a reasonable period of time and even was not inclined to consider availing the expertise and personnel offered by Star India for the purpose. Further, the Supreme Court also declined to accept the suggestion of putting a scroll indicating that the channel displaying the ICC World Cup 2015 matches is meant for Doordarshan only.

The order comes as a potential blow to Star India, which had paid nearly INR 300 billion to the International Cricket Council ("ICC") for exclusive rights for two World Cups and two World Twenty20 events proposed to be played between 2015 and 2023. During the course of the proceedings, Star India had also claimed that Prasar Bharti's tie-up with private cable operators was a dent on its six year commercial contract worth INR 38.50 billion with the Board of Control for Cricket in India ("BCCI"). Since, the Indian law mandates that two Doordarshan channels are to be mandatorily carried on cable networks, thus the operators for these cable networks could access sporting events on two different channels, i.e. Doordarshan and ESPN or Star, as the case may be. However, while ESPN or Star requires a subscription fee to be paid, Doordarshan is without any charge.

The Supreme Court stated that at this stage it ought not to consider the submission on behalf of the parties on merits of the case.

E-Commerce Likely to Come under Nine Ministries and Departments

The Indian Government is considering a proposal for the regulation of the e-commerce industry, which presently is facing criticism for heavy discounting, poor products, and delayed delivery services. The infuriated growth rate of the sector has startled the traditional brick and mortar businesses and demands have been raised for an oversight of

the business practices. A Government panel would soon consider a proposal for potential regulation of the sector in India.

The Ministry of Consumer Affairs has issued a note for consideration of a Committee of Secretaries, citing its inclination towards developing a level-playing field between online and offline retailers. In the absence of specific regulations for online trade as compared to the brick and mortar (offline) business, those are set-up after a tedious process of licenses, approvals and permits, together with the supervision of Government authorities, presently there exists vast discrepancies between online and offline business.

The note proposes that e-commerce involves diverse activities, thus making it too complex to be under the purview of a single department or agency and necessitating a clear demarcation of activities. The draft note broadly identifies the following departments / ministries and earmarks responsibilities for the regulatory overview:-

Taxation Department of Revenue under the Ministry of Finance

Foreign exchange and banking Reserve Bank of India

Allegations and complaints regarding predatory pricing, unfair trade practice and criminal fraud Ministry of Corporate Affairs

Foreign Direct Investment (FDI) policy Department of Industrial Policy and Promotion, Ministry of Commerce and Industry

Data protection and cyber security Department of Electronics and Information Technology

Advertising and guidelines Ministry of Information and Broadcasting

Consumer grievances and consumer protection Ministry of Consumer Affairs

The relevant ministries / departments have been asked to give their view on the issues before the same are taken by the Committee of Secretaries.

Supreme Court Directs Google, Microsoft and Yahoo to Refrain Showing Ads for Sex Determination Tests

The Supreme Court of India has recently issued orders directing Google, Microsoft and Yahoo search engines not to advertise or sponsor any advertisement relating to sex determination tests since the same are in violation of the law.

The bench comprising of Justice Dipak Misra and Justice Prafulla C. Pant directed, as an interim measure, that Google, Yahoo and Microsoft shall not advertise or sponsor any advertisement which would violate the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994. The order also directed the three internet giants to withdraw advertisements forthwith, in case the companies were carrying any such advertisements presently.

The said interim order has been passed during hearing of a petition filed by Sabu Mathew George in the year 2008 that sought direction for prohibiting sex determination test advertisements on the Internet. The court based the conclusion on the submission of the central government that the three search engines have relevant technology and deep-

domain knowledge and expertise to block and/or filter words, phrases, expressions and sponsored links in this regard.

The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 under provisions of Section 22 prohibits advertisements related to pre-natal determination of sex and stipulates punishment for contravention of the said provision.

Counsel appearing for Google, told the court that the Internet was an uncensored medium and ordering the blocking of the information is very dangerous as it amounts to pre-censorship. In this relation to the contention of pre-censorship, the Court observed that censorship and legal provisions were two different things and anything can take the colour and flavour of advertisement. Human mind is ingenious and there is a scope for mischief. Counsel Divan informed the court that Google has already clamped down on such advertisements promoting sex determination techniques.

On behalf of the government it was said that the government can block links and stop showing any kind of thing that relates to sex selection and eventual abortion, if the URL and the IP addresses are given along with other information by the companies. However, alternatively it was submitted that these companies themselves can block these ads since they have access to their respective mathematical algorithms all the time.

The internet companies, Google, Yahoo and Microsoft contended that they were not in violation of the law since they merely provide a 'corridor' for content over the internet. Nevertheless, the Supreme Court said that an effort has to be made by these parties so that nothing contrary to the laws of India is advertised or shown on these websites.

The Court directed that matter to be listed for further hearing on February 11. However, in the meanwhile Google, Microsoft and Yahoo have been directed to carry out the Court's order on their respective policy page and terms and conditions of service page.

The Telecom – Defence Spectrum Swapping Receives Cabinet Nod

The resolution of the long pending spectrum swapping issue between the Department of Telecommunications, Ministry of Communications and Information Technology ("DoT") and the Ministry of Defence ("MoD") has received the approval of the union cabinet. The cabinet approved the swapping of 15 MHz of the 2,100 MHz spectrum band used for 3G services, presently with the MoD, in return for a release of an equivalent amount in the 1,900 MHz spectrum band by the DoT.

However, the DoT is of the view that it would take a year to harmonise the 15 MHz spectrum, conceding that the same would not be available for the forthcoming auctions proposed in February, 2015. The 15 MHz spectrum would only be available for sale after technical issues are sorted out, which process can take at least a year. Harmonisation refers to making spectrum contiguous, or continuous, for both the defence as well as the telecom services. This has the effect of increasing the efficiency of spectrum, without any added costs. The Telecom Commission, DoT earlier this week, while approving the base price for 3G spectrum, also signalled that only 5 MHz of 3G spectrum would be put up for auction.

Additionally, the cabinet has also earmarked 49 slots for defence use in the 3 MHz – 40 GHz spectrum bands, including 9 for exclusive defence use and 31 for defence use along with other agencies for sectors such as space, broadcasting and aviation, which are 50 km around border areas (categorised as defence interest zones). This would constitute as the defence band. However, for the remaining 9 slots, certain issues remain to be resolved

between various ministries. In the defence interest zones, the spectrum would be used by telecom operators during peace time, however during war or hostility time, the areas would come under the MoD's jurisdiction.

Regardless, the decision of the cabinet puts an end to long tussle between the DoT and MoD on the defence band and swapping of spectrum. The spectrum swapping was in-principle agreed between the DoT and the MoD in December, 2014.

Further, it is understood from certain news reports that the DoT is considering a Swachh Bharat cess of 0.1 per cent on the service tax currently levied on telecom services; however a final decision will be based on inputs from various ministries. It is also expected that after the spectrum auctions next month, the government will announce the re-worked guidelines for mergers and acquisitions and spectrum sharing and trading, to bring about the much-needed consolidation in the telecoms sector.

Intellectual Property & Pharamaceuticals

Proposal for online sale of drugs under consideration

The Ministry of Health and Family Welfare is considering a proposal for online sale of drugs, according to certain news reports.

This proposal comes subsequent to an FIR filed by the officials of the Maharashtra Food and Drug Administration against the dealers and distributors of the e-commerce entity, Snapdeal, for selling prescription drugs online for a violation of the Drugs and Cosmetics Act, 1940 and Drug and Magic Remedies Objectionable Advertisement Act, 1954. As per the Drugs and Cosmetics Act, 1940 the sale of Schedule H medicines without a medical prescription is prohibited.

The Pharmaceuticals Secretary said a committee has submitted its recommendations and the Department of Pharmaceuticals, Ministry of Health and Family Welfare is examining the same and would subsequently strategize on the subject.

In July, 2015 the Telangana Drug Control Administration instructed prominent online pharmacies in the state to stop the sale of all drugs online.

Ultratech Cement Limited and Ors v. Dalmia Cement Bharat Limited

The Ultratech Cement (the plaintiff) is a part of the Aditya Birla Group and together with the other plaintiffs are the registered proprietors of various trademarks, all containing the words 'UltraTech' or 'Ultra'. Dalmia Cement (the Defendant) had started using a mark containing the word 'Ultra' and their mark was identical with / deceptively similar to the 'UltraTech' trademarks of the plaintiff.

The Plaintiff contended that these words were essential and prominent features of the trademarks of the Plaintiffs and were distinctive of their goods. The Plaintiff approached the court that the use of the word 'Ultra' by the Defendant amounts to infringement and passing off. The plaintiff had combined the cause of action of infringement and the cause of action of passing off in the same suit. The Defendants objected stating that the Plaintiff, being the registered proprietor of the Trademarks, was entitled to file the suit for infringement and the Court did not have the jurisdiction to entertain the said suit with both the combined cause of action. However, the court held that the Court has jurisdiction to entertain the

cause of action of infringement. The other cause of action, namely, the cause of action of passing off, being claimed on the same set of facts as in the case of the cause of action for infringement, the two causes of action can be conveniently combined and no prejudice is likely to be caused to the Defendant if they are so combined.

The issue of territorial jurisdiction was also raised in the present case. In this regard, the Court held that where one of many plaintiffs has the territorial jurisdiction, the matter may be tried for all of the plaintiffs.

Indchemie Health Specialties v. Intas Pharmaceuticals and Anr.

Indchemie Health Specialties (the Plaintiff), registered proprietors of the trademark 'CHERI' since May 14, 1987, manufacture and deal in pharmaceutical and medical preparations and marketing their products under various trademarks and trade dress. During the registration process, certain objections were raised and the Plaintiff was made to drop 'medicinal preparations' from the goods, in accordance with restrictions under Section 18(4) of the Trade Marks Act, 1999.

Intas Pharmaceuticals (the defendant) produces dietary supplements named 'Multi Cherry', a propriety food to be consumed on the advice of a dietician.

While deciding the case, the court analysed the relationship between Section 18, 28 and 29 of the Trade Marks Act. Section 28 gives the proprietor of a registered trademark the exclusive right to use it as per the classes of registration. In the present case, the classes of registration for the plaintiff were curtailed by the Registrar under Section 18. Further, Section 29 provides that in case of a likelihood of confusion due to the similarity of the trademarks and/or the goods and services, the same amounts to infringement of the trademark.

The court, while deciding the issue of infringement under Section 29, narrowly construed the term 'similar' and held that since the Plaintiff had the protection for a narrow class of goods, the balance of convenience is in favour of the Defendant. The Court concluded that the Defendant was not infringing the trademark of the Plaintiff, since the Plaintiff's trademark does not cover medicinal preparation.

IPRS v. Sanjay Dalia

In this case, the Plaintiff, with their registered office in Mumbai sued the Defendant, who owned theatres in Maharashtra for copyright infringement in Delhi. The issue regarding the jurisdiction arose in this case since the cause of action arose in Maharashtra.

The court laid down that in a copyright or trademark infringement case, the Plaintiff can sue and initiate proceedings either in the place of the registered office or where the cause of action arose, but not in an altogether different jurisdiction. The court observed that this is not the legislative intent behind the additional remedy of Section 62 of the Copyright Act, 1957 and Section 134 of the Trademarks Act, 1999 over Section 20 of the Code of Civil Procedure.

Industria De Diseno Textile SA v. Oriental Cuisines Pvt. Ltd. and Ors.

Industria De Diseno Textile ("the Plaintiff") is engaged in the business of manufacture, design and sale of fashion and lifestyle products and is the owner of the trademark 'ZARA'

under various classes of the International classification of goods and services. The Plaintiff registered in India in 1993 under Class 25. The Plaintiff operated as a joint venture with Trent Limited, a concern of the Tata Group and under the name Inditex Trent Retail India Private Limited, although the first store in India was seen in 2010. Further Oriental Cuisines (the Defendant), a leading chain of restaurants, operates in the name of 'ZARA TAPAS BAR'. By the time the Defendant opened their first outlet, the Plaintiff already had stores in 44 different countries. The Plaintiff approached the court for an ad-interim injunction against the Defendant for passing off, dilution and infringement, by trading under the reputation and goodwill of the Plaintiff's trademark 'ZARA'.

On the issue of dishonest and/or fraudulent adoption of the trademark, despite various grounds taken by the Defendant, such as the meaning of the word in Hindi, Urdu, Arabic, etc., the court referred to their press note wherein they admitted to having taken the concept from Paris and accordingly concluded that the Defendants were in fact relying on the Plaintiff's reputation.

With regard to the question of the trademark 'ZARA' being publici juris, the court held in favour of the Plaintiff in light of the Defendant's inability to establish their mark as generic. The court also decided the acquiescence issue in favour of the Plaintiff as there was no bar in granting injunction in favour of the Plaintiff.

In relation to the final issue of injunction, the court held that the Plaintiff's trademark has trans-border reputation and is a well-known trademark and thus granted the injunction in favour of the Plaintiff restraining the Defendant from using the trade mark.

SRF Foundation & Anr. v. Ram Education Trust

SRF Foundation ("the Plaintiff") established their first school in 1988 under the name 'SHRI RAM' and over time the schools run by the Plaintiff were contended to have carved out a unique space. On the other hand, Ram Education Trust (the Defendant) opened their first school around 2011 by the name of 'SHRI RAM GLOBAL PRE SCHOOL' right next to the Plaintiff's school. Both the Plaintiff and Defendant were using this name / mark as it was their family name.

An interim application was filed by the plaintiff in order to restrain the Defendant from using the said name / mark. The Court, while hearing the matter observed that the 'essential feature' test was satisfied and thus the marks were deceptively similar and that the essentials of 'prior use' and 'claiming party to be proprietor' were satisfied, which are necessary for a passing off action. However, since surnames are protected, the Court held that the essential of confusion and deception was held to be not satisfied.

Despite there being a strong case in favour of the Plaintiff, the injunction, being an equitable remedy, was not granted by the Court in this case. It was observed that an injunction order would cause great hardship not only to the Defendant, but to the students already enrolled and their families who have paid the fees. The Court allowed the Defendants to use the mark 'SHRI RAM', subject to the disclaimer that they will run a notice on all their stationary items and signboard that they have no relation with the Plaintiff's school.

Shamnad Basheer v. Union of India

Shamnad Basheer ("the Petitioner") filed a writ before the Madras High Court to declare the establishment of Intellectual Property Appellate Board ('IPAB') as unconstitutional, contending that the criteria for qualification of the members consisted of the executive and was thus violative of the doctrine of separation of powers.

The Petitioner also contended that the procedure for selection, in absence of any statutory procedure, was in contravention to the decision in Union of India v. R Gandhi. The Court, upon hearing the parties and analysing the provisions and held that though the tribunal had judicial functions it consisted of executive members. Thus, the Court held that the Search-cum-Selection Committee should include Judges from higher judiciary.

Further, discussing the concerned provisions (Section 85) of the Trade Marks Act, 1999, in light of the principles laid down by various landmark judgments, the Court laid down the following broad qualifications for the IPAB members:

(i) Technical Member: Holding at least the post of Joint registrar. But now, also must have 12 years of practice in a State Judicial Service with a degree and law along with other qualifications.

(ii) Judicial Member: Cannot be exercised by any executive, how highsoever if he has no experience in Judiciary.

(iii) Vice-Chairman: Member of the Indian Legal Service, holding a post of Grade I or higher of that service, for at least for 5 years. Court struck it down as unconstitutional since they were being accorded a judicial function and reiterated the qualifications of the Technical member as laid down by the Court for this post.

(iv) Chairman: A Vice-Chairman could become a Chairman without any judicial qualification/experience as such. Now qualification for a post of Vice-Chairman to Chairman also requires same judicial qualifications at least, as laid down for the other lower posts by this Court. Also, the Court laid down that recommendation of the Chief Justice of India to the post of Chairman should be given due consideration by the Appointment Committee of the Cabinet and the process does not involve any 'approval'.

In this case, the Court held and declared Section 85(2)(b) and 85(3)(a) of the Trade Marks Act, 1999 to be unconstitutional and the qualifications mentioned under Section 85(4) were modified.

Havells v. Amritanshu

In this instant case before the Delhi High Court, the primary issue was whether an advertisement which compares one product with a similar rival product must necessarily compare all its features in order to be an honest advertisement.

This case was initiated against an advertisement by the Defendant for their 'Eveready LED Bulbs' with the tagline 'Switch to the brightest LEDs' and a chart that compared the brightness and price of the bulbs manufactured by Havells (the Plaintiff) with that of the competitors, including the Defendant's with the heading 'check lumens and price before you buy'. The Plaintiff contended that this heading made the consumers only consider these two factors for comparison and excluded all other significant factors and was thus not in lines of honest practices in industrial or commercial matters, as required by the rules laid down in the Advertising Standards Council of India Code as well as Section 29(8) and Section 30(1) of the Trade Marks Act, 1999. In this regard, the Defendant argued that limiting the

comparison to only some features does not in itself amount to a misleading or dishonest advertisement.

The Court ruled that it is open to the advertiser to choose what feature to compare as long as it is true. While deciding the case, the Court analysed the tests of 'honest' advertising as per Section 29(8) and Section 30(1) of the Trade Marks Act, 1999; test of a 'misleading advertisement'; and the standard used in deciding a case of comparative advertisement and ruled that none of these mandated comparison of all the features of products in an advertisement, which is also not quite possible at times.

The Court thus ruled in negative and held 'in the opinion of this Court, it is open to an advertiser to highlight a special feature / characteristic of his product which sets it apart from its competitors and to make a comparison as long as it is true'.

Lupin Ltd. v. Johnson & Johnson

In this case, both Lupin Limited (the Plaintiff) and Johnson & Johnson (the Defendant) are engaged in manufacturing, marketing and selling of pharmaceutical products. The Plaintiff has a registered mark 'LUCYNTA' and has brought an action of infringement against the Defendant, who uses the mark 'NUCYNTA' for a drug sold worldwide.

The Defendant contended before the court that his mark was registered in several countries, much prior to the registration of the Plaintiff's mark in India. The Defendant further alleges that it is the plaintiff who has adopted a deceptively similar mark and hence should not be entitled to any relief.

The question before the Court was whether the Court can go into the question of the validity of the registration of the plaintiff's trade mark at an interlocutory stage when the defendant takes up the defence of invalidity of the registration of the plaintiffs trade mark in an infringement suit?

In this regard, the Court observed that the expression 'if valid' used in Section 28 of the Trade Marks Act, 1999 and the words 'prima facie evidence of validity of the trade mark' used in Section 31 of the Trade Marks Act, 1999 permit the Court to consider the Defendant's plea regarding invalidity of the registration of the Plaintiff's trade mark at the interlocutory stage. The court reasoned that the terms 'if valid' and 'prima facie' imply that the registration is not conclusive. The court noted that while a registered proprietor of a trade mark would ordinarily be entitled to a finding that the trade mark is prima facie valid, the jurisdiction of the Court is not barred from considering the plea of the Defendant at the interlocutory stage.

Thus, the Court concluded 'in cases where the registration of trade mark is ex facie illegal, fraudulent or shocks the conscience of the Court, the Court is not powerless to refuse to grant an injunction, but for establishing these grounds a very high threshold of prima facie proof is required. It is therefore, open to the Court to go into the question of validity of registration of plaintiff's trade mark for this limited purpose, to arrive at a prima facie finding.'

Real Estate & Hospitality:

Taxation of Non-Occupancy Charges and Transfer Fees

New Gulistan Co-op Housing Society, a south Mumbai housing society ("Housing Society") has won an appeal in a tax dispute relating to taxation of non-occupancy charges and transfer fees received by the Housing Society from its members.

The Housing Society had received transfer fees aggregating to INR 0. 5 million and non-occupancy and other charges aggregating to about INR 0.2 million during the financial year 2000-01. The Commissioner of Income-Tax (Appeals) had held in favour of the Housing Society that these sums would not be taxable. The income tax department went in for appeal before the Income-Tax appellate tribunal ("ITAT"). However, the ITAT dismissed the appeal and also held that these receipts would not be taxable in the hands of the Housing Society.

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Regulations for operationalisation of the Land Pooling Policy of Delhi Development Authority ("DDA") Approved

The Ministry of Urban Development, GOI has approved the regulations for operationalisation of the Land Pooling Policy of the DDA ("Regulations"). The approval has been given for the operationalisation of the Land Pooling Policy with certain amendments to ensure timely completion of real estate projects with all necessary infrastructures.

As per the Regulations, two categories of land pooling exist – Category I which includes land owners with land above 20 hectares and Category II which includes land owners with land between two and 20 hectares. The land returned to the developer entity in Category I will be 60 per cent while the remaining will be retained by DDA. The land returned to the developer entity in Category II will be 48 per cent while the remaining will be retained by DDA. Residents will be given an additional floor area ratio ("FAR") of 400 if they apply for re-development through the Land Pooling Policy of DDA. Further a developer who constructs housing units on a piece of land that has been re-developed under the Land Pooling Policy of DDA and returned to him by the DDA, he shall be obliged to constructs 15 per cent of the total housing units constructed by him for the economically weaker sections ("EWS") category housing. Of this 15 per cent, 7.5 per cent shall be handed over by the developer to DDA and the remaining shall be retained by the developer. The Developer shall construct the EWS housing as a separate block.

If there is any delay in completion of development of land by DDA (which is the land pooling agency) under the said Land Pooling Policy, DDA shall be liable to pay a penalty of 2 per cent of external development charges ("EDC") per year for the first two years and 3 per cent of EDC per year thereafter to the developer entities (farmers/land owners) for delay beyond the date of completion of the construction by such developer entities or five years whichever is later till the external development works are completed.

Maharashtra Government proposes to Dematerialize Transferable Development Rights ("TDRs")

According to the draft housing policy of the Government of Maharashtra ("Maharashtra Government"), all TDRs issued by civic and local bodies in Maharashtra will be made through an electronic system to be developed by the Maharashtra Government. In this direction, the Maharashtra Government has proposed to dematerialise TDRs issued to land owners and developers in exchange of development rights. The urban development department of the Maharashtra Government is evaluating the possibility of converting TDRs into a financial instrument that can be traded in an open market, thereby expanding the market for TDRs and preventing cartelisation. The principal secretary and urban development department of the Maharashtra Government will coordinate with SEBI to execute the concept of dematerialization of TDRs.

TDRs are certificates that allow a builder to construct buildings up to a specified floor space index ("FSI"), and the holder of TDRs can either develop the land himself or sell them to any other developer who needs additional FSI. These TDRs are usually traded among realty developers for use in their respective projects at a price.

Taxation:

Direct Tax

1. India-USA sign historic, reciprocal Foreign Account Tax Compliance Act, ("FATCA") agreement to fight black money menace

Recently, India–USA has signed FATCA Agreement containing the ten Articles which will help to detect and discourage offshore tax evasion and to fight the menace of black money. This Inter Governmental Agreement ("IGA") shall enter into force on the date of India's written notification to the US that India has completed its necessary internal procedures for entry into force of the Agreement. The following are key points of FATCA Agreement:

- Article 2 provides for obligations to obtain and exchange information with respect to Reportable Accounts. In India's case, information with respect to each US Reportable Account (accounts of US Citizen and residents) of each Reporting Indian Financial Institution may be obtained and exchanged. Similarly, in case of US, information with respect to each Indian Reportable Account (Indian residents) of each Reporting US Financial Institution may be obtained and exchanged;
- Information with respect to 2014 and all subsequent years may be obtained and exchanged under IGA;
- Article 6 provides for mutual commitment to enhance the effectiveness of information exchange and transparency;
- This automatic exchange of information to begin from September 30, 2015.

2. Central Board of Direct Taxes ("CBDT") says no capital gains on roll-over of Fixed Maturity Plan ("FMP") Mutual Fund units

CBDT Circular has clarified that capital gains will not be applicable to investor at the time of exercising option to roll-over units of Mutual Fund under FMP in accordance with SEBI guidelines.

It was mentioned that roll-over does not result in 'transfer' since scheme remains the same and the gains will arise at the time of redemption or opting out of the scheme. Further, a clarification is issued in view of amendment made by Finance Act, 2014, increasing holding period for classifying asset as 'long term' from 12 to 36 months. CBDT notes that FMPs are closed ended funds with fixed maturity date and option allowed by mutual funds to roll-over

beyond 36 months to allow qualification of FMPs as a long term capital asset, in accordance with SEBI regulations.

3. Government notifies September 30 deadline for one–time compliance window under Black Money law

Recently, the Government has enacted Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (hereinafter referred to as "Black Money Law") which has shall come into force from April 01, 2016 and provides for a one-time compliance opportunity for a limited period to residents who have any undisclosed foreign assets which have hitherto not been disclosed for the purposes of Income-tax. In this regard, the Government has also notified Rules for Black Money Law and issued a circular explaining substance of provisions of compliance window under the new law. The key provisions relating to one-time compliance opportunity are prescribed as under:

- Declaration in respect of an Undisclosed Asset outside India, to be made on or before September 30, 2015;
- Tax at the rate of 30 percent and an equal amount by way of penalty in respect of the undisclosed assets declared, to be paid by December 31, 2015;
- Such persons making disclosure in respect of an Undisclosed Asset outside India will not be prosecuted under the stringent provisions of the Black Money Law;
- After the compliance window is over, any undisclosed income or asset discovered by the Tax officer would be subjected to tax @ 30%, penalty @ 300% of the tax payable and the resident may also be liable to prosecution proceedings.

4. India signs Multilateral Convention on Automatic Information Exchange

India has signed Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information ("AEOI"). This Agreement has also been signed by other countries including Australia, Canada, Costa Rica, Indonesia and New Zealand, taking total number of countries on board to 60. Upon full implementation of the Agreement, AEOI will enable India to receive information from almost all signatory countries including offshore financial centres and information about assets of Indians held outside India.

5. India-Denmark Tax Treaty amended; banking secrecy can't restrict information exchange

India-Denmark Double Taxation Avoidance Agreement has been amended to expand the scope of Exchange of Information ("EOI"). Newly inserted Clause 4 under Article 26 debars Contracting States from declining to supply information requested solely on the ground of 'no domestic interest' in such information. Also, the amendment makes it obligatory for the Contracting States to provide information requested by other States even when the other state may not need the information for its own tax purpose.

Newly inserted Clause 5 further prohibits Contracting States from denying information solely "because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person."

This amendment has been brought into effect from February, 2015.

International Trade and WTO

1. Key takeaways from Foreign Trade Policy ("FTP") 2015-2020 - issued by Ministry of Commerce & Industry on April 01, 2015

FTP 2015-2020 focuses on promotion of manufacture and service exports and employment generation, in line with Central Government's "Make in India", "Digital India" and "Skills India" initiatives / campaigns. The key takeaways of FTP 2015-2020 are as follows:

- Merges 5 schemes, viz. Focus Product Scheme, Market Linked Focus Product Scheme, Focus Market Scheme, Agri. Infrastructure Incentive Scrip, Vishesh Krishi Gram Udyog Yojana into a single, transferable, 'Merchandise Export from India Scheme' ("MEIS");

- Rewards for export of notified goods to notified markets (categories A, B & C countries) under MEIS payable at 2% to 5% of realised Free on Board value (in free foreign exchange);

- 'Service Exports from India Scheme' ("SEIS") replaces 'Served From India Scheme' ("SFIS"), applies to all "service providers in India" instead of "Indian service providers" of notified services, regardless of constitution / profile of service provider;

- Duty credit scrip under said scheme no longer with actual user condition or restricted to usage for specified types of goods but be freely transferable and usable for all types of goods and service tax debits on procurement of services / goods;

- Grants reward rates of 3% and 5% based on net foreign exchange earned and debits would be eligible for CENVAT credit or drawback;

- Both MEIS & SEIS incentives under Chapter 3 shall be available to Special Economic Zones ("SEZ") units;

- Business leaders who have excelled in international trade and have successfully contributed to country's foreign trade to be recognized as "Status Holders" and be given special treatment and privileges to facilitate their trade transactions, in order to reduce their transaction costs and time;

- Criteria of export performance for recognition as "Status Holder" changed from Rupees to US dollar earnings;

- Where capital goods are sourced indigenously under Export Promotional Capital Goods ("EPCG") Scheme, Export Obligation could be reduced by 25% than normal obligation (6 times the duty saved amount) in order to promote domestic capital goods manufacturing industry;

- Export items with high domestic content and value addition to be given higher level of rewards vis-à-vis products with high import content and less value addition;

- Inter-ministerial consultations for approval of export of Special Chemicals, Organisms, Materials, Equipment and Technologies ("SCOMET") items, Norms fixation, Import Authorisations, Export Authorisation, to be made online in a phased manner, with the objective to reduce time for approval, hence exporters are no longer required to submit hard copies;

- Simplifies procedures / processes, focussing on digitisation and e-governance, inter alia introduces online filing of application for Terminal excise duty refund under new Aayat Niryat Form;

- Provides various initiatives for Export Oriented Units ("EOU"), Software Technology Parks ("STP"), Electronic Hardware Technology Parks ("EHTP"), such as (i) allows sharing of infrastructural facilities among themselves, (ii) allows inter-unit transfer of goods and services, (iii) units can set up warehouses near port of export, (iv) they can use duty free equipment / goods for training purposes, (v) EOUs can supply spares / components up to 2% of value of manufactured articles to buyer in domestic market towards after sales services, (vi) 5 years period to achieve positive Net Foreign Exchange extendable by 1 year in case of adverse market condition / genuine hardship, (vii) Letter of Permission ("LoP") to have initial validity of 2 years (extendable by 1 year) to enable construction of plant and installation of machinery;

- To encourage domestic manufacturing of capital goods, import under EPCG / Authorisation Schemes shall not be eligible for exemption from payment of anti-dumping duty, safeguard duty and transitional product specific safeguard duty;

- Commerce exports of handloom products, books/periodicals, leather footwear, toys and customized fashion garments through courier or foreign post office would also be able to get benefit of MEIS (for values up to INR 25,000);

- Incorporates new Chapter on Quality complaints and Trade Disputes in an endeavour to resolve quality complaints and trade disputes between exporters and importers.

2. Finance Ministry facilitates export of notified e-commerce goods under MEIS through air couriers

The Finance Ministry amends Courier Imports and Exports (Clearance) Regulations, 1998 to extend the applicability to goods sought to be exported through e-commerce platform under MEIS from Chennai, Delhi and Mumbai airports, in consignments up to INR 25,000 involving transaction in foreign exchange.

For such exports, authorised courier shall make entry in the form prescribed in Shipping Bill and Bill of Export (Form) Regulations, 1991.

Goods for export as per this Shipping Bill include only bonafide commercial samples and prototypes of goods of a value not exceeding INR 50,000 per consignment and bonafide gifts of articles for personal use of a value not exceeding INR 25,000 per consignment and which are for the time being not subject to any prohibition or restriction on their export from India and on export of which no transfer of foreign exchange is involved.

3. Extension of Anti-Dumping Duty ("ADD") on Nylon Tyre Cord

ADD has been imposed on imports of Nylon Tyre Cord Fabric ("NTCF") originating in or exported from the People's Republic of China and imported into India. The ADD has been extended for a period of five years.

4. Zero Duty on Anti-Retroviral Drugs ("ARV Drugs") and Diagnostic Equipment

There will be zero duty on ARV Drugs and Diagnostic Equipment when imported into India subject to the condition that the importer produces the said goods. The duty will remain in force up to April 01, 2016.

5. Extension of ADD on Poly Vinyl Chloride ("PVC") Paste Resin

ADD has been imposed on PVC Paste Resin originating in, or exported from, the European Union and imported into India. The ADD has been extended to remain in force up to June 24, 2016.

ADD has been imposed on PVC Paste Resin, originating in, or exported from, Korea RP, Taiwan, and People's Republic of China, Malaysia, Thailand and Russia and imported into India. The ADD has been extended for a further period of one year and shall remain in force up to July 25, 2016.

6. Extension of ADD on Acrylic Fibre

ADD has been imposed on imports of Acrylic Fibre, originating in or exported from Korea RP and Thailand and imported into India. The ADD has been extended for a period of five years.

TAX CASES

Income Tax

DDIT vs. Serum Institute of India Limited (Pune Tribunal)

Section 206AA is not a charging section and can't override beneficial DTAA rates

Serum Institute of India Limited ("the assessee") is engaged in the business of manufacture and sale of vaccines. The assessee made some payments to the non - residents on account of business, royalty, and fee for technical services. The payments so made were subject to tax under section 195 Income Tax Act, 1961 ("IT Act"). The assessee thus deducted tax deducted at source ("TDS") on such payments applying the rates provided under Double Taxation Avoidance Agreement ("DTAA") with respective countries. The tax rate provided in the DTAA was lower than the rate prescribed under the IT Act and therefore in terms of provisions of section 90(2), TDS was deducted by assessee applying the lower (beneficial) rate prescribed under the DTAA.

The Revenue noted that the recipients of royalty and technical services payments had not obtained Permanent Account Number (PAN). The Revenue therefore invoked provisions of section 206AA and held that TDS @ 20% should have been applied on such payments. The Revenue treated such payments as cases of "short deduction" (being difference between 20% and the actual tax rate on which the tax was deducted) in terms of section 206AA of the IT Act.

Aggrieved the assessee carried appeal before Commissioner of Income Tax (Appeals) ("CIT (A)"). CIT (A) ruled in favour of the assessee and held that where the DTAAs provide for a tax rate lower than that prescribed in 206AA of the IT Act, the provisions of the DTAAs shall prevail and the provisions of section 206AA of the IT Act would not be applicable. Thus, CIT (A) deleted the tax demand raised by the Revenue relatable to the difference between 20% and the actual tax rate provided by the DTAA.

Aggrieved by the CIT (A)'s Order, the Revenue filed an appeal before Income-Tax-Appellate-Tribunal ("ITAT") Pune.

Before ITAT, the Revenue contended that in absence of furnishing of PAN, assessee was under obligation to deduct tax @ 20% following the provisions of section 206AA of the IT Act and thus the beneficial provisions under DTAA won't be applicable. However, assessee on the contrary contended that Section 206AA of the IT Act would not override the provisions contained in section 90(2) of the IT Act.

ITAT after analyzing the facts of the case observed that in case of non – resident's tax liability in India was liable to be determined in accordance with the provisions of the IT Act or the DTAA whichever was more beneficial.

Further, ITAT held that provisions of Chapter XVII-B governing TDS were subordinate to section 90(2) of the IT Act and also section 90(2) of the IT Act override provisions of section 4 and 5 of the IT Act.

ITAT ruled in favour of the assessee and held that the provisions of section 206AA of the IT Act cannot be invoked by the Assessing Officer to insist on the tax deduction @ 20%, having regard to the overriding nature of the provisions of section 90(2) of the IT Act. Accordingly, ITAT held that the assessee rightly deducted tax at a lower rate than prescribed under section 206AA i.e. 20% on the strength of the beneficial provisions of DTAA and thereby upheld CIT (A)'s order.

DIT vs Lufthansa Cargo India (Delhi High Court)

Aircraft maintenance and repair related services are Fee for technical services ("FTS").

However, these payments were made to earn income from source outside India and therefore, not deemed to accrue or arise in India

Lufthansa Cargo India ("the assessee") is engaged in the business of wet leasing of aircrafts to foreign companies. The assessee wet leased four aircrafts to a foreign company, Lufthansa Cargo AG, Germany ("LCAG"). Wet leasing is defined as leasing an aircraft along with the crew in flying condition to a charterer for a specified period wherein the lessor has the responsibility of maintaining the crew and the aircraft in airworthy condition and the lessee is free to direct the flight operations by naming designations in advance. Accordingly, the assessee was obliged to maintain the aircraft in flying condition, in accordance with Directorate General of Civil Aviation ("DGCA") guidelines to possess a valid airworthiness certificate. Thus, it entered into overhaul agreement ("the Technick agreement") with a German Company i.e. Lufthansa Technik's ("Technik") workshops in Germany (as there was no overhaul repair facilities in India) to undergo periodic overhaul repairs and made payments for same. Such overhaul repairs were permissible only in workshops authorized for the purpose by the manufacturer as well as duly approved by DGCA Technik under agreement carried out the maintenance repairs without providing technical assistance by way of advisory or managerial services. The repairs by way of component overhaul in the Technik workshops in Germany and other foreign workshops were in the nature of the routine maintenance repairs and thus no Technik's personnel were ever deputed to India for rendering any technical or advisory services to the assessee.

During assessment proceedings before the Tax officer, the assessee submitted that the Technick carried out normal maintenance repairs, including supply of spares, and therefore

had Technick been a domestic company the payments to it would not have been covered under section 194J which covers fees for technical services ("FTS"). The assessee thus argued that the technical repair work carried out be Technick was not in the nature of technical assistance or technical services. The assessee argued that the components were sent to authorized workshops for carrying out overhauling of components and not for seeking any technical or advisory services and thus the repairs did not constitute "managerial" or "technical " or consultancy services " as defined under section 9(1)(vii)(b) of the IT Act to attract TDS under section 194J of the IT Act. Further, the assessee also referred the exclusionary clause of section 9(1)(vii)(b) of the IT Act which provides that FTS would not be taxable in India where said services are utilized for earning income from any source outside India. The assessee argued that the payment for repairs were incurred for earning income from sources outside India and thus even if the payments were considered to be FTS, the same won't be taxable as the case would fall within the exclusionary clause of section 9(1)(vii)(b) of the IT Act.

The Assessing officer rejected assessee's alternative arguments and thus passed the orders for non – deduction of TDS under section 194J of the IT Act and levied tax as well as interest under section 201 (1A) of the IT Act.

On appeal CIT (A) upheld the departments' order. Further, ITAT after careful analysis of various terms of the agreement between the assessee and Technik held that the amount received was a routine business receipt and not technical fee. Aggrieved, the Revenue then filed an appeal before Delhi High Court ("HC").

The Hon'ble Delhi HC ruled on the following two issues:

i) Whether the services offered by Technik falls under "Technical service" and thus TDS section 194J attracted?

- The HC held that unlike normal machinery repair, aircraft maintenance and repairs inherently are such that at no given point of time can it be compared with contracts such as cleaning. Component overhaul and maintenance by its very nature cannot be undertaken by all and sundry entities.

- The level of technical expertise and ability required in such cases is not only exacting but specific, in that, an aircraft supplied by a manufacturer has to be serviced and its components maintained, serviced or overhauled by designated centres. It is this specification which makes the aircraft safe and airworthy because international and national domestic regulatory authorities mandate that certification of such component safety is a condition precedent for their airworthiness.

- The exclusive nature of these services lead to the inference that they are technical services within the meaning of section 9(1)(vii) of the IT Act.

  ii) Whether the payments made by assessee towards "overhaul repair expenses "fall under exclusionary part of section 9(1)(vii)(b)?

- Explanation to section 9(2) of the IT Act is deemed to be clarificatory and also retrospective in nature but it does not override the exclusion of payments made under section 9(1)(vii)(b) of the IT Act which was clarified by the Supreme Court in the case of G.V.K. Industries vs ITO [2015] 371 ITR 453 (SC).

- The 'source rule', i.e. the purpose of the expenditure incurred for earning the income from a source in India, is applicable, as stated by the Supreme Court in the case of G.V.K. Industries (supra).

- The Tribunal had held that the overwhelming or predominant nature of the taxpayer's activity was to wet-lease the aircraft to LCAG, a foreign company. The operations were abroad, and the expenses towards maintenance and repairs payments were for the purpose of earning an income abroad.

- Accordingly, these payments are not taxable because they have been made earning income from sources outside India and therefore fall within the exclusionary clause of Section 9(1)(vii)(b) of the IT Act.

Accordingly Delhi HC, observed that aircraft maintenance and repairs require specific level of technical expertise which are exclusive services and these, technical services under the IT Act. The payments were made to earn income from sources outside India since aircraft were allowed to be used only on international routes. Such payments are expressly excluded from the scope of FTS under section 9(1)(vii)(b) of the IT Act and therefore, not deemed to accrue or arise in India i.e. not taxable in India.

Indirect Tax

Value Added Tax ("VAT")

Asian Oilfield Services & Others vs. The State of Tripura & Other (Tripura High Court)

Absent equipment transfer, seismic survey for Oil Co. pure 'service', not 'works-contract'

Asian Oilfield Services ("the assessee") had entered into a contract with Jubilant Oil and Gas Pvt. Ltd., which is engaged in oil exploration in the State of Tripura in joint venture with c, to provide 2D Seismic Data Acquisition & Basic Processing Services.

The issue arose as to whether services rendered by the assessee were in the nature of works contract or were pure and simple services. Also, whether equipment brought in by the assessee for own use to carry out the surveys had been transferred to Jubilant Oil and Gas Pvt. Ltd. resulting in 'sale' within the meaning of section 2(25)(d) of Tripura VAT Act read with Rule 7(2) of Tripura VAT Rules, and therefore eligible to tax under section 4(2).

The VAT Department alleged that since tax on sale or purchase of goods includes tax on transfer of right to use any goods for any purpose in terms of Article 366(29-A)(d) of the Constitution, the assessee was liable to pay VAT on such transfer.

The assessee on the other hand, urged that since it was paying service tax to the Centre, in case of any conflict between Central law and State Act, VAT Act must necessarily give way to the provisions of Finance Act for service tax imposition. Being aggrieved, the assessee filed a writ petition before the High Court ("HC").

The HC observed that as per the contract with Jubilant Oil and Gas Pvt. Ltd., there was no transfer of any property. In fact, none of assessee's machinery was to remain with Jubilant. The Revenue had also failed to point out any stipulation in the contract which indicated that

there was any transfer of right to use property. Hence, it was obvious that it was not a 'works contract' in terms of section 2(36) of Tripura VAT Act because no works was to be done except carrying out a survey.

The HC held the assessee remained in exclusive possession and control of the equipment and all resources supplied by the contractor. Therefore, HC concluded that the assessee was only rendering services which were amenable to tax only by the Union of India.

Accordingly, HC allowed the assessee's writ petition and directed refund of tax deducted from its account along with statutory interest.

Commercial Taxes Officer, Ajmer VSC (Rajasthan High Court)

Allows Input Tax Credit ("ITC") where sale price lower than purchase price, due to turnover discount

Sharda Agencies ("the assessee") is a dealer in cement. The assessee claimed ITC on the basis of VAT invoice, whereas it sold goods at rate lower than price shown in VAT invoice considering discount/incentive received.

The VAT Department disallowed ITC and added discount / incentive as according to him, ITC could not have been allowed on the basis of VAT invoice which was claimed higher than the price shown in VAT invoice.

The Deputy Commissioner (Appeals) allowed appeals by holding that assessee was entitled to ITC. The Tax Board, on further appeals by Revenue, upheld the order of Deputy Commissioner (Appeals). Thus, present revision petitions were filed by Revenue before Rajasthan HC.

The Revenue contended that, the VAT Department was justified as discount and commission ought to have been part of trading account and assessee claimed excess ITC which was not legally permissible.

The HC observed that the assessee received discount/incentives from the wholesaler/manufacturer on account of turnover by way of credit notes etc. which was separately shown by assessee was not in conflict under VAT Act. The assessee managed its affairs in such a manner that it sold goods lower than the value as shown in VAT invoice obviously keeping in mind that discount/commission.

The HC stated that "Act does not prohibit selling of goods lower than purchase value as per VAT invoice but ITC is to be allowed on the basis of VAT invoice".

Service Tax

Coal Handlers (P.) Ltd. vs. Commissioner of Central Excise, Kolkata, Supreme Court

Liaisoning with Coal Collieries / Railways for timely delivery to principal, not 'clearing and Forwarding agent' service

Coal Handlers Limited ("the assessee") is providing certain services as 'Agent' to Gujarat Ambuja Cements Limited and Ambuja Cements Eastern Limited ("Industries"). These

Industries are public sector undertakings that need coal as a raw material for production of cement, which is their main manufacturing activity.

These Industries approached the Ministry of Industries and Ministry of Coal for determining the quantity of coal that is required to be supplied to such public sector undertakings.

These Industries had appointed the assessee for maintaining constant liaison with the railways for the actual placing of coal rakes and other related activities.

The issue was whether the services provided by the assessee amounted to 'Clearing and Forwarding Agent's services' under section 65(25) of the Finance Act, 1994 and hence subject to service tax liability.

Section 65(25) provides that a 'Clearing and Forwarding Agent' is any individual who provides a service which is either directly or indirectly connected to clearing and forwarding operations in any way, to another individual or corporation and includes a consignment agent.

After much litigation on the issue, the matter travelled to the Supreme Court ("SC"). The apex court observed that the assessee has no role in getting the coal cleared from coal collieries/supplier, nor at any stage is the custody of the coal taken by the assessee or transportation of the coal is arranged by the assessee as forwarders.

Accordingly, the apex court held that the assessee providing the service of 'Agent' does not fall within the definition of "Clearing and Forwarding Agent" and hence was not subject to service tax liability.

General Case Laws:

Ashapura Mine-chem Ltd. V. Gujarat Mineral Development Corporation

In the present case, Ashapura Mine-Chem Ltd. ("Appellant") and the Gujarat Mineral Development Corporation ("Respondent") entered into a Memorandum of Understanding ("MoU") to constitute a joint venture along with Chinese Company namely; "M/s. Qing TongXia Aluminium Group Company Ltd., Ningxia of China for the purpose of setting up an alumina plant in the Kutch District of Gujarat. The MoU also recorded that the Government of Gujarat had agreed to encourage and support the proposed joint venture for setting up of the alumina plant.

Subsequent to the execution of the MoU, a new Mineral Policy was introduced by the Government of Gujarat. In the light of the said new Mineral Policy various modifications in the terms and conditions of the MoU were required to be made by the parties.

Eventually, the Respondent decided to forthwith cancel the MoU in view of failure on part of the Appellant in complying with various terms and conditions of the MoU.

The Appellant invoked clause 27 ("Arbitration Clause") of the MoU and approached the High Court of Gujarat ("Gujarat High Court") under Section 11 of Arbitration and Conciliation Act, 1996 ("Arbitration Act") for appointment of an arbitrator.

The Gujarat High Court upon hearing both the parties observed that the parties had no consensus ad idem even with reference to the terms and conditions of the MoU and in these

circumstances, there was no scope left to apply the relevant clauses to invoke arbitration under the MoU.

Aggrieved by the judgment of the Gujarat High Court, the Appellant approached the Supreme Court of India ("Supreme Court"). The primary issue before the Supreme Court was whether the MoU fructified into a full-fledged agreement or not and secondly whether the Arbitration Clause mentioned in the MoU survives and continues to bind the parties as a separate clause different from MoU."

The Supreme Court while deciding the matter, set aside the judgment of the Gujrat High Court and held that the Gujarat High Court failed to appreciate the legal position with respect to the validity of an arbitration agreement in the MoU, irrespective of the failure of the parties to reach a full-fledged agreement with respect to the various terms and conditions contained in the MoU for a joint venture. The Supreme Court observed that the Arbitration Clause contained in the MoU was an independent Arbitration Agreement and, therefore, even if the Respondent had chosen to terminate the MoU, the Arbitration Agreement would continue to be valid and consequently the parties were entitled to invoke the said Arbitration Clause. The Supreme Court emphasized on the concept of separability of the Arbitration Clause/Agreement and determined that it is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not extinguishes with every challenge to the legality, validity, finality or breach of the underlying contract.

Krishna Textport & Capital Markets Ltd. V. Ila A. Agrawal & Ors

In the present case, a complaint was filed by the Krishna Textport & Capital Markets Ltd. ("Appellant") under Section 138 of Negotiable Instruments Act, 1881 (herein referred to as "Negotiable Instruments Act") on account of dishonour of cheque issued by M/S Indo French Bio Tech Enterprises Ltd to the Appellant which was returned by the bank with endorsement "Funds Insufficient".

The criminal Complaint filed by the appellant before the Additional Chief Metropolitan Magistrate was directed against M/S Indo French Bio Tech Enterprises Ltd. ("Company") and 12 of its directors including the Chairman and Managing Director of the Company.

The Metropolitan Magistrate took cognizance of the dispute and while deciding the matter convicted the Company but acquitted two of its directors of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. Relying on the judgment of the Division Bench of Madras High Court in B. Raman and Ors v. Shasun Chemicals and Drugs Ltd the Court observed that, statutory notice under Section 138 of the Act had not been issued to the two said Directors and hence no proceedings could be initiated against such Directors.

In response to the said verdict the aggrieved Appellant approached the High Court of Bombay ("Bombay High Court"), which dismissed the appeal while relying on judgment of Madras High Court in B. Raman & Ors. Vs. M/s. Shasun Chemicals and Drugs Ltd (supra)

Subsequently the Appellant approached the Supreme Court where the main question of law which arose was, "whether or not it was mandatory to send a notice to the directors to the company individually, despite having already sent a notice to the company in question, before a complaint could be filed against such directors along with the Company as per under Section 138 of the Negotiable Instruments Act, 1881"

The Supreme Court took into consideration the observations made by a Constitution Bench of this Court in Nathi Devi v. Radha Devi Gupta and observed that the interpretative function of the court is to discover the true legislative intent. It is trite that in interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. When the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself.

The Supreme Court, while allowing the appeal set aside the order passed by the Bombay High Court held that, Section 138 of the NI Act does not admit of any necessity or scope for reading into it the requirement that the directors of the company in question must also be issued individual notices under Section 138 of the NI Act. Such directors who are in charge of affairs of the company and are responsible for the affairs of the company would be aware of the receipt of notice by the company under Section 138 and hence there was no requirement of issuance of separate notice to the Directors of the company. Therefore, neither on literal construction nor on the touch stone of purposive construction such requirement could or ought to be read into Section 138 of the NI Act.

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