Highlights of the BUDGET 2015-2016

Corporate Tax Rate of 30% reduced to 25% from 2016 over a period of 4 years

The basic rate of Corporate Tax has been proposed to be reduced from 30% to 25% over the next four years. That said the various exemptions and rebates for corporations have also been removed. Also noteworthy is an additional surcharge of 2% on domestic corporations.
Though a welcome change, the reduction in the basic rate coupled with the additional surcharge and the removal of exemptions and rebatesis not expected to affect the existing **effective** corporate tax rate.

Relief for REITs

Capital gains on transfer of property from a developer's main company to a listed entity (a Special Purpose Vehicle created for the purpose of launching an REIT) will no more be taxed in the hands of the sponsor in ordinary cases.

Further, the rental income of REITs from their own property will have a 'pass-through' status. The tenants paying the rent to the REITs are also not required to withhold tax at their end.

'Pass through' status for Category I and Category II AIFs

Income of an investment fund other than income chargeable under the head 'Profits and gains of business or profession' is now exempt. Further, the proportion of **income accruing or arising to, or received by a unit-holder of an investment fund** which is of the same nature as income chargeable under the head 'Profits and gains of business or profession' is also exempted.

An investment fund has been defined as a fund that has been granted a certificate of registration as a Category I or a Category II AIF.

Effectively, a '**Pass through' status is now available to all sub categories of Category I AIFs and Category II AIFs**. It may be noted that under the extant rules 'pass through' status was available only to category I AIFs under the Venture Capital Fund sub category and Venture Capital Funds registered under the SEBI (Venture Capital Funds) Regulations, 1996.

Amendments in the 'Indirect Transfer' tax provisions

Under the extant laws/rules, an asset or capital asset, being any share or interest in a company or entity registered or incorporated outside India was deemed to be situated in India if the share or interest, derived its value, directly or indirectly, from the assets located in India.

Accordingly, Capital Gains derived from the transfer of such assets were subject to taxation.
An explanation has been provided that the share or interest of a foreign company or entity shall be deemed to derive its value substantially from the assets located in India, **if on the specified date, the value of Indian assets, (a) exceeds the amount of INR 10 Crores; and (b) represents at least 50% of the value of all the assets owned by such company or entity.**

Applicability of GAAR deferred

The implementation of General Anti-Avoidance Rules (GAAR) has been deferred from April 1, 2015 to April 1, 2017. The rules will apply **prospectively** to investments made on or after April 1, 2017.

Interestingly, this comes in the wake of the short expectancy of the OECD-Base Erosion and Profit Shifting (BEPS) project report. It may be noted that India is an active participant in the project and it would only be fair to implement the GAAR provisions once the report is out.

Fund Managers in India not to constitute Permanent Establishment of off-shore funds

Under the extant rules, the profits made by an off-shore fund could be taxed in India on the basis of the location of the fund manager in India and further on the basis of the fact thatthe profits are consequential of the activities of the fund manager. In other words, the presence of an Indian fund manager led to the constitution of a Permanent Establishment (tax presence) of such funds in India.

However, **SUBJECT TO CERTAIN CONDITIONS** now the appointment of a fund manager in India would not create a Permanent Establishment in India.

The conditions include: (a) *the fund shall not carry on or control and manage, directly and indirectly, any business in India*(b) *the fund is required to have a minimum of 25 members who are directly/ indirectly unconnected persons* (c) *any member of the fund, along with connected persons should not have a participation interest exceeding 10%.The aggregate participation of ten or less people should be less than 50%* and (d) f*und manager cannot be an employee of the fund.*

The conditions imposed have brought the ball back to square one. It would be safe to conclude that not much will change especially in the context of Private Equity funds and Venture Capital Funds.

MAT –Long Term Capital Gains of FIIs exempted

Minimum Alternate Tax (MAT) was traditionally (*as per judicial decisions*) not applicable to non-residents not having a Permanent Establishment (tax connection)

in India, since such non-residents do not maintain their books of accounts as per the Indian Companies Act.
However, the current Finance Bill specifically exempts the payment of MAT on long term capital gains of FIIs, leaving question marks over the applicability of MAT provisions to the other non-resident investors.

Wealth Tax abolished

Wealth Tax has been proposed to be abolished with effect from April 1, 2016. However, an additional surcharge of 2% would be levied on individuals and corporations having an earning of INR 1 Crore or more annually.

Implementation of GST regime

The Goods and Service Tax regime has been proposed to be made effective from April 1, 2016.

Greater control of employees over their salary structures

Employees now have the option to choose between the Employee Provident Fund (EPF) Scheme and the New Pension Scheme (NPS). Further, for employees below a certain threshold of monthly income, contribution to EPF would be optional; however, the same would not affect the employer's contribution.

Further, employees would also have an option to choose between Employee State Insurance (ESI) and any other health insurance recognized by the Insurance Regulatory and Development Authority (IRDA).

Service Tax rates hiked

The rate of Service Tax has been proposed to be increased from 12.36% to 14%.

Central Excise Duty rates hiked

The rate of Central Excise Duty has been proposed to be increased from 12.36% to 12.50%.

"Managing Director and Manager" -An overview

Unlike the erstwhile Act of 1956, the Companies Act 2013 **("New Act"),** under section 196(1) specifically prohibits the companies in India to appoint, at the same time, Managing Director and Manager**.** However, this leads to a discussion whether a 'Manager' and a 'Managing Director' are entrusted with similar powers, responsibilities and liabilities under the New Act.

As per section 2(54) of the New Act, the 'Managing Director', has, inter-alia, 'substantial powers' of management of the affairs of the company. Further, the term 'substantial powers' has not been defined under the New Act, however, in ordinary

parlance such powers are understood to be vested with such a person who controls overall affairs of an entity. The New Act however, stipulates that a Managing Director shall be a director of the company. Moreover, such director can be appointed as Managing Director by way of an agreement with the company or by way of a resolution passed in the shareholders meeting.

During his appointment in any manner as discussed above, the 'substantial powers' can be assigned to the Managing director either by articles, his employment agreement or by a shareholders resolution. Therefore, it is apparent that in the event if a Managing Director is appointed vide an employment agreement with the company, such agreement will determine the powers, roles and responsibilities of the Managing Director.

Section 2 (53) of the New Act defines a 'Manager' as the one who acts under the direction of the board of directors and who is under the control of the board. As per the definition, a Manager has the function of managing the whole or substantially the whole of the affairs of the company. Such functions of managing the affairs of the company are not defined under the New Act. However, such functions can be assigned to the Manager under his employment agreement with the company.

From the above discussions, the following differences between Managing Director and a Manager can be inferred :

- One needs to be a director of the company to be appointed as Managing Director, however, a Manager may or may not be a director of the company;
- In case of a Manager who is also appointed as a director, if for any reason his office of director is vacated the office of Manager held by him is not affected; in case of Managing Director if he ceases to be a Director for any reason whatever his office of Managing Director also will cease along with it.
- A Managing Director enjoys the 'substantial powers' as may be assigned to him during his appointment, however, the Manager has functions limited to managing the affairs of the company.
- Under the Act, Managing Director may with the approval of the Board be a Managing Director of more than one Company; however a Manager shall not hold office in more than one company except in its subsidiary company at the same time.

It appears that the Act intends to entrust the power of managing the affairs of a company only upon one single officer. After analysing the powers and functions of a Manager and a Managing Director, it can be said that a Managing Director also performs the functions of a Manager.

Therefore, for the purpose of entrusting the management of the company to a single officer, the Act has prohibited the appointment of both Manager and

Managing Director at the same time. The companies can either appoint a Manager or a Managing Director. This discretion can be exercised by the board of directors depending upon the requirements of the company.

Thinking Projects? The time is now!

Over the years, the investment projects in India, both in the public and private sector have been facing two major implementation bottlenecks:

- Land Acquisition; &
- Environmental Clearances.

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015 (“Bill”) is a response to the issue of difficulty in acquiring lands.

The previous legislation, The Land Acquisition, Rehabilitation and Resettlement Act, 2013(“LARR”)had introduced five concepts:

(a) Social Impact Assessment (“SIA”);
(b) Mandatory Consent of the affected people;
(c) Food security;
(d)Punishment to Government Officials; and
(e) Returning of unutilized lands to original land owners,

most of which had increased the difficulty level, insofar as acquiring land was concerned.

Under LARR,conducting SIA was mandatory for acquiring lands for any project whatsoever. Further, the consent of 70% of the affected population was required to acquire lands for Public Private Partnership projects, as also the consent of 80% of the affected population was required to acquire lands for private projects.

The requirement of conducting SIAs and obtaining consentis no more required for projects concerning (i) National Security and Defense Production, (ii) Rural Infrastructure and Rural Electrification, (iii) Infrastructure (iv) Industrial Corridors and (v) Housing for Poor. It may be noted that the requirement of conducting SIA has been completely done awaywith for Public Private Partnership (“PPP”) projectswhere the government owns the land. It may also be noted that an exemption with respect to obtaining consent from the affected parties was also made for Social Infrastructure projects under the 2014 Ordinance, however, amidst fears that the exemption would be used by private individuals to open schools and colleges, which would in reality be in sync and in furtheranceof their business models, the exemption had to be scrapped.

Insofar as food security is concerned, under LARR, whenever a multi crop irrigation land was acquired for any project, an equivalent area of cultivable wasteland was to be developed for agricultural purposesby the acquirer or an amount equivalent to the value of the land acquired was to be deposited by the acquirer with the appropriate Government for investment in agriculture for enhancing food-security. This financially taxing requirement has been done away with under the Bill.

Furthermore, under LARR, for any offence committed or for any errors on the Government's part, the Head of the Department was held responsible.Consequently, bureaucrats would often sit on files fearing judicial activism and media trials. This has now been changed, the Head of the Department can't be prosecuted without the prior sanction of the government (Central or State, as the case may be).

Lastly, under LARR whenever any land acquired for a project remained unutilized for a period of five years from the date of taking over possession, the same was to be returned to the original land owners. This was completely done away with under the Ordinance. However, after the Bill was tabled, the provision for return of unutilized lands had to reinserted. However, the significant change is the fact that while calculating the period of five years, the time consumed by court cases/litigation will not be counted.

These changes would definitely ensure that acquiring lands and managing them no more remains a burden for those intending to invest in land intensive projects.

Insofar as Environmental Clearances are concerned, a step towardsprocedural simplicityhas been taken. An attempt to move towards a no-hitch regulatory mechanism is evident. Some of the key changes include:

- Granting combined environmental clearances to Coal Mines that are in close proximity to each otherrather than requiring each one of them to approach the concerned Departments for approval.
- Permitting Coal Mines to expand their capacity without convening a Public Meeting to discuss the same with the affected parties. However, the said change is subject to the condition that the expansion is not beyond 50% of the existing capacity of such coal mines. That said, coal mines with an output of 16 million tonnes per annum may increase their capacity only by 5 million tonnes per annum.
- Permitting Irrigation Projects of less than 2000 hectares to operate without requiring any environmental clearances.
- Permitting Irrigation Projects between 2000 hectares to 10000 hectares to operate with a State Govt. approval instead of the earlier requirement of approvals from both the Centre and the State.

- Lifting the ban on new industries in critically polluted areas.
- Empowering the district administration to determine the rights to forest land instead of the tribal village leaders.
- Permitting prospecting of minerals for projects up to 100 hectares without requiring any tribal consent for the same or requiring any compulsory afforestation in exchange.
- Removing the requirement of seeking approval for Infrastructure Projects from Environment Impact Assessment (EIA) authorities at the State Level.
- Allowing land to be used for industrial purposes without having to obtain approval under the Forest Right Act unless the area proposed to be used was declared a forest before 1930 and a tribal group lived there as per previous two census surveys.
- Creating an online portal for tracking environmental and forest clearances.

Critics have labelled these changes as 'Anti-Poor' and 'Anti-Farmers'. Their concerns are debatable, however what cannot be denied is the fact the industry is benefitting. 88 infrastructure and industrial projects involving investments of upto 3 lakh crores have become operational between June 2014 and October 2014. Quite certainly, if you are thinking Projects, the time is now!

"PUBLIC POLICY" REDEFINED BY THE SUPREME COURT OF INDIA

The Supreme Court of India in the Judgment of ***Associate Builders v Delhi Development Authority***[1]**,** has elucidated the interpretation of the term "Public Policy" to set aside an award under Section 34 of the Arbitration Act.

The much abused ground for setting aside the Award in India has finally been clarified and narrowed down by the Supreme Court of India. The Supreme Court analyzed the Judgment rendered in *Renusagar*[2]*, Saw Pipes*[3]*, McDermott International*[4]*, Western Geco International Ltd*[5] and held that an award can be set aside on the ground of Public Policy only based upon the following:-

- Award is contrary to the Fundamental Policy of India. The instances of fundamental policy would include binding orders of courts not being followed by the Arbitrator(s), breach of natural justice, foreign exchange violation,decision not based upon extraneous factors and the award is perverse.
- Award is contrary to the Interests of India. The Supreme Court has not shed light on the example covering this ground.
- Award is against Justice and Morality. The Supreme Court concluded that the award can be set aside only on the ground of justice only when the award shocks the conscience of the Court. Setting aside the Award on the ground of Morality would include if the award furthers sexual immorality and in arbitration if the agreement is illegal and is against the mores of the day.
- Award is Patently Illegal. The instances of Award being patently illegal are if the

Award is based upon fraud or corruption, contravenes the prevalent substantive law of India, there is no reasoning in the award, the award is contrary to the provisions of the arbitration act or the agreement and where the arbitrator has failed to consider Section 28 (3) of the Arbitration & Conciliation Act 1996 i.e "the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This judgment has clarified the position on public policy and would rectify the challenge of the award under part I of the Arbitration Act to a large extent. The Judgment is in the positive direction and will reduce the grounds for challenging the Award and result in faster execution of the domestic awards.

1. 2014 (4) ARBLR 307(SC)
2. 1994 Supp(1)SCC 644
3. (2003)5 SCC 705
4. (2006)11SCC181
5. (2014)9 SCC 263

News 10 @ a glance

Companies (Removal of Difficulties) Order, 2015.

Ministry of Corporate Affairs vide the Companies (Removal of Difficulties) Order, 2015 has amended the definition of 'small company', whereby a company (other than a public company) would need to satisfy both the conditions (i.e. having a paid up capital is up to Rs. 50 Lakhs and having a turnover upto Rs. 2 Crore) in order to qualify as a small company. Previously, such companies were required to meet only one of the said conditions to fall within the ambit of 'small company' definition. Further, the acquisitions to be made by banks, insurance and housing finance companies have been exempted from the procedural restrictions laid down under Section 186 (except sub-section 1) of the Companies Act, 2013.

RBI's prior approval for change in shareholding of Securitisation Company/Reconstruction Company.

In terms of Section 3(6) of the SARFAESI Act, 2002, every Securitisation Company / Reconstruction Company (SC / RC) is required to obtain prior approval of the Reserve Bank of India (RBI) for any substantial change in its management. With a view to smoothen the functioning of these companies, the RBI vide notification DNBR(PD-SC/RC).No.01/CGM(CDS)/2014-2015 dated February 24, 2015has restricted the said requirement (of obtaining RBI's prior approval) only in case involving (a) any transfer of shares by which the transferee becomes a sponsor, (b) any transfer of shares by which the transferor ceases to be a sponsor, or (c) an aggregate transfer of ten percent or more of the total paid up share capital of such company by a sponsor during the period of five years commencing from the date of certificate of registration.

Reporting under FDI through the e-Biz platform.

With a view to promoting the ease of reporting transactions, the RBI issued Circular No.77 dated February 12, 2015, allowing filing of Advance Remittance Form (ARF – for reporting of the FDI inflow) and FCGPR Form (for reporting the issue of eligible instruments to the

overseas investor) through the e-Biz Portal.

FDI policy for pharmaceutical sector amended.

The RBI vide its notification No. 'FEMA.334/2015-RB' has amended Schedule I of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, thereby making a special carve out for manufacturing of medical devices in the pharmaceutical sector. The said amendments allow FDI upto 100% under the automatic route for manufacturing of medical devices in both greenfield and brownfield segments with effect from 21st January 2015.

Proposed amendments in the Employees' Provident Fund & Miscellaneous Provisions Act' 1952.

The Government aims to amend the Employees' Provident Fund & Miscellaneous Provisions Act' 1952 by bringing the threshold of coverage from 20 employees to 10 employees in order to ensure wider coverage and extension to social security coverage to uncovered areas. It has also been proposed to do away with the 'Schedule of Industries' and come up with a 'Negative List'. It has further been proposed to include provisions of compounding off offences in order to avoid excessive litigation. The

Government of India proposes to bring about uniformity in regard definition of wages in line with the ESI Act. A comprehensive Labour Code on Social Security to bring together all legislations relating to social security is also on the list.

RBI issues revised guidelines for raising money through private placement of Non-Convertible Debentures (NCDs) by NBFCs.

RBI vide its notification 'DNBR (PD) CC No.021/03.10.001/2014-15' has reviewed the existing guidelines on private placement of securities by NBFCs. The revised guidelines has been issued with an intent to align the said provisions with the Companies Act, 2013 to the extent possible and wherever not contradictory. The guidelines majorly focus on issuance of private placement of Non-Convertible Debentures (NCDs) of 2 categories i.e. with a maximum subscription of less than Rs. 1 crore and with a maximum subscription of 1 crore and above. The salient parameters around which the revised guidelines revolve relate to minimum subscription per investor, limit of subscribers, security creation, nature of security to be created, restriction on deployment of funds, loans against security of debentures issued, etc. It is further clarified that these new rules, however, will not be applicable on tax exempt bonds offered by NBFCs.

RBI simplifies procedure for

making payments toward import in India.

With an intent to liberalise and simplify the procedure, RBI vide 'Circular Number 76' dated February 12, 2015 has decided to dispense with the requirement of submitting request in Form A-1 to the AD Category –I Banks for making payments towards imports into India. Earlier applications by persons, firms and companies for making payments, exceeding USD 5,000 or its equivalent towards imports into India was to be made in Form A-1.

Foreign investment in India by Foreign Portfolio Investors.

RBI vide 'RBI/2014-15/448 A.P.(DIR Series) Circular No. 71' dated February 03, 2015has amended Schedule 5 to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000. In view of the said changes, all future investment by FPIs in the debt market in India will be required to be made with a minimum residual maturity of three years. Accordingly, all future investments by an FPI within the limit for investment in corporate bonds shall be required to be made in corporate bonds with a minimum residual maturity of three years. Further, all future investments against the limits vacated when the current investment runs off either through sale or redemption, shall be

required to be made in corporate bonds with a minimum residual maturity of three years.

Companies (Corporate Social Responsibility Policy), 2015 amended.

The latest amendment to Corporate Social Responsibility (CSR) Policy provides that entities established by the company, "either singly or along with its holding or subsidiary or associate company, or along with any other company or holding or subsidiary or associate company of such other company' or otherwise" can carry out CSR works. This is a big leap towards achieving an overall positive impact on the communities, cultures, societies and environments in which such entities operate since they are equally responsible to social issues as well.

Reserve Bank of India relaxes security norms in External Commercial Borrowing.

The Reserve Bank of India (RBI) has relaxed the norms of security and put a more organized set of instructions in respect of securities provided by the borrowers while accessing External Commercial Borrowings (ECBs). At present, as per the extant ECB guidelines, the choice of security to be provided to the overseas lender / supplier for securing ECB is left to the borrower. The new guidelines aim at expanding the options of securities and consolidate various provisions

related to creation of charge over securities for ECB at one place. It has allowed borrowers to access ECBs against charge on immovable assets, movable assets, financial securities and issue of corporate and / or personal guarantees in favour of overseas lender / security trustee, subject to satisfying the prescribed conditions.