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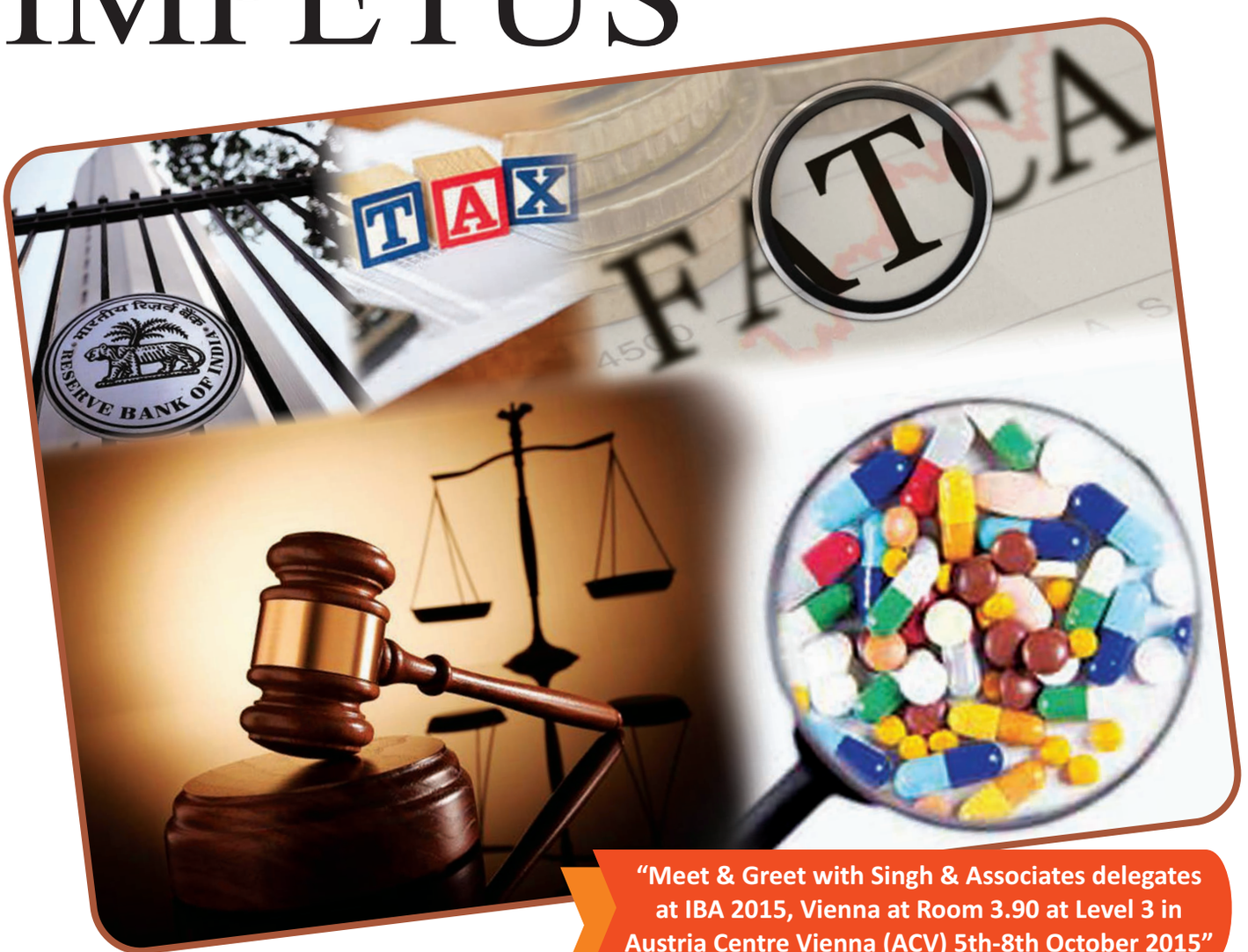
INDIAN LEGAL IMPETUS



"Meet & Greet with Singh & Associates delegates at IBA 2015, Vienna at Room 3.90 at Level 3 in Austria Centre Vienna (ACV) 5th-8th October 2015"

EDITORIAL

Manoj K. Singh
Founding Partner

It gives me immense pleasure to bring forth the IBA edition of our Newsletter "Indian Legal Impetus." I on behalf of the entire family of *"Singh & Associates"* thank our readers who have always bestowed overwhelming support to us as a result of which we have been successful enough to bring new editions of our newsletter to enlighten the legal fraternity around the world by covering the latest legal developments in India.

The present edition has dwelled into some of the latest legal issues that have surfaced from the business law to that of the world of IPR. The cover article of the current edition deals with effective and efficient implementation of the intergovernmental agreement between India and US under the Foreign Account Tax Compliance Act.

The edition throws light on the "SEBI-Sahara" issue that has been surfacing since long by portraying how the SEBI still continues to wield control over Sahara Companies by cancelling the Mutual fund license of Sahara Mutual Fund.

This edition also brings forth clarity to the supervisory jurisdiction of Indian courts where the parties are free to agree to any place or seat within India in case of Domestic Arbitration. Further, this edition gives insight into the latest interpretation given by the Hon'ble Supreme Court of India with respect to Sections 138 and 141 of the Negotiable Instrument Act, 1881 pertaining to service of notice on Directors vis. a vis. the Company. The article also deals with some of the recent happenings on the area of Negotiable Instruments Act in light of the judgment of the Apex Court in *Dashrath Rupsingh Rathod v. State of Maharashtra and Another* and also the subsequent ordinance promulgated by the President of India.

In the IPR section, the present edition covers the recent controversy with respect to Geographical Indications tussle for Pahala Rasagola between State of Orissa and C K Das Pvt. Ltd. The article succinctly deals with legal framework with respect to Geographical Indications, ingredients required to fulfill in order to be eligible for Geographical Indications. Moving forward, the recent issue of Compulsorily License in particular the review of Lee Pharma vs. AstraZeneca's 'Saxagliptin' has been vividly dealt in this edition. This article aptly describes why the Compulsorily License was not granted to Lee by appreciating the legal provision of Indian Patents Act, 1970. Further, we also discussed guidelines of various provisions relating to patentability of computer related inventions.

We enlighten our readers with the Strategic Debt Restructuring Scheme announced by Reserve Bank of India on 8th June, 2015 allowing Banks and Term-lending and Refinancing Institutions to convert their loans into equity stake. Then our edition also endeavors to pen down the press release on 1st September, 2015 of Information Bureau of Ministry of Finance, Government of India regarding applicability of Minimum Alternate Tax (MAT) to Foreign Institutional Investors (FIIs) and Foreign Portfolio Investors (FPIs).

Last but not the least, the edition also provides the latest case law in addition to the case laws in the past holding that excise duty is an incidence of manufacture.

I hope that the latest edition of Indian Legal Impetus would help in satisfying the thirst of knowledge of the readers. The comments and queries on the concepts are welcome.

You may send your valuable suggestions, opinions, queries or comments to **newsletter@singhassociates.in**

Thank you.

"Indian Legal Impetus"

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GOVERNMENT AMENDS INCOME TAX RULES TO COMPLY WITH REQUIREMENTS UNDER FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA)

*Corporate Team**

The Government of India, Ministry of Finance had on August 7, 2015, in order to comply with the information reporting requirements of the US' Foreign Account Tax Compliance Act (hereinafter referred to as 'FATCA'), made amendments in the Income-tax Rules, 1962.

WHAT IS FATCA'S BACKGROUND?

FATCA is a broad set of rules designed by the Government of US to increase tax compliance by Americans with financial assets held outside the United States. FATCA legislation defines foreign financial institutions in such a way, that it includes every conceivable kind of financial institution outside the U.S. This includes banks, brokerage firms, insurance companies, trust companies, retirement plan administrators, mutual fund companies, etc.

U.S. financial institutions (USFIs) and other types of U.S. withholding agents are required to withhold 30% on certain U.S. source payments made to foreign entities, if they are unable to document such entities for purposes of FATCA. Also, the Foreign Financial Institutions (FFIs) that enter into an agreement with the US' Internal Revenue Service (IRS) to report on their account holders may be required to withhold 30% on certain payments to foreign payees if such payees do not comply with FATCA.

Reporting is mandated on "U.S. Persons." This broad category includes U.S. citizens, U.S. residents, green card holders as well as trusts controlled by U.S. Persons. The United States collaborated with other governments to develop two model intergovernmental agreements (IGAs) to implement FATCA. All IGAs contemplate that a partner government will require all Foreign Financial Institutions (FFIs) located in its jurisdiction (that are not otherwise exempt) to identify U.S. Accounts and report information about U.S. Accounts.

PROVISIONS UNDER INDIAN LAWS

1. On July 9, 2015, the two countries (India and US) have signed an agreement to share financial information about their residents to avoid tax evasion. The agreement, signed between India's Income tax Department and US' Internal Revenue Service (IRS), will be operational from September 30;

2. On August 7, the Central Board of Direct Taxes (CBDT), framed rules for the Indian financial Institutions to ensure that the disclosures and maintenance of information are implemented in a systematic form. The Central Government with respect to registration of persons, due diligence, maintenance of information and for matters relating to statement of reportable accounts, amended Income tax Rules, 1962, by inserting Rules 114F, 114G and 114H. The rules so framed are called the Income tax (11th Amendment) Rules, 2015.

SOME PROVISIONS OF THE RULES HAVE BEEN OUTLINED IN BRIEF:

3. The 'Reporting Financial Institutions (RFIs)' are required to maintain and report certain informations regarding reportable account. A RFI means-

   (a) a financial institution (other than a non-reporting financial institution) which is resident in India, but excludes any branch of such institution, that is located outside India; and

   (b) any branch, of a financial institution (other than a non-reporting financial institution) which is not resident in India, if that branch is located in India;

   A reportable account shall mean a financial account as identified pursuant to the due diligence procedures provided under the Rules.

4. "non-reporting financial institution" means any financial institution that is,-

(a) a Governmental entity, International Organisation or Central Bank, other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a specified insurance company, custodial institution, or depository institution;

(b) a Treaty Qualified Retirement Fund; a Broad Participation Retirement Fund; a Narrow Participation Retirement Fund; or a Pension Fund of a Governmental entity, International Organization or Central Bank;

(c) a non-public fund of the armed forces, Employees' State Insurance Fund, a gratuity fund or a provident fund;

(d) an entity that is an Indian financial institution only because it is an investment entity, provided that each direct holder of an equity interest in the entity is a financial institution referred to in sub-clauses (a) to (c), and each direct holder of a debt interest in such entity is either a depository institution (with respect to a loan made to such entity) or a financial institution referred to in sub-clauses (a) to (c);

(e) a qualified credit card issuer;

(f) an investment entity established in India that is a financial institution only because it,-
  (I) renders investment advice to, and acts on behalf of; or
  (II) manages portfolios for, and acts on behalf of; or
  (III) executes trades on behalf of, a customer for the purposes of investing, managing, or administering funds or securities deposited in the name of the customer with a financial institution other than a non-participating financial institution;

(g) an exempt collective investment vehicle;

(h) a trust established under any law for the time being in force to the extent that the trustee of the trust is a reporting financial institution and reports all information required to be reported under rule 114G with respect to all reportable accounts of the trust;

(i) a financial institution with a local client base;

(j) a local bank;

(k) a financial institution with only low-value accounts;

(l) sponsored investment entity and controlled foreign corporation, in case of any U.S. reportable account; or

(m) sponsored closely held investment vehicle, in case of any U.S. reportable account.

[Note: *The above terms defining non-reporting financial institutions are further explained in the Rules for better understanding.*]

5. The informations to be maintained and reported by a reporting financial institution regarding reportable accounts are as follows:

a) the name, address, taxpayer identification number and date and place of birth (in the case of an individual) of each reportable person, that is an account holder of the account;

b) in the case of any entity which is an account holder and which, after application of due diligence procedures prescribed under rules, is identified as having one or more controlling persons that is a reportable person,-

  i) the name and address of the entity, taxpayer identification number assigned to the entity by the country or territory of its residence; and

  ii) the name, address, date and place of birth of each such controlling person and taxpayer identification number assigned to such controlling person by the country or territory of his residence;

c) the account number (or functional equivalent in the absence of an account number);

d) the account balance or value (including, in the case of a cash value insurance contract or

annuity contract, the cash value or surrender value) at the end of relevant calendar year or, if the account was closed during such year, immediately before closure;

e) prescribed information in the case of any custodial account or depository account;

f) in the case of any account held by a non-participating financial institution (as defined under the rules), for calendar year 2015 and 2016, the name of each non-participating financial institution to which payments have been made and aggregate amount such payments.

6. The statement of reportable account is required to be furnished by a reporting financial institution in Form No. 61B for every calendar year by the 31st day of May following that year. The statement pertaining to calendar year 2014 shall be furnished by the 31st day of August, 2015.

   The statement shall be furnished to the Director of Income-tax (Intelligence and Criminal Investigation) or the Joint Director of Income-tax (Intelligence and Criminal Investigation) through online transmission of electronic data to a server designated for this purpose under the digital signature.

7. Every reporting financial institution shall communicate to the Principal Director General of Income-tax (Systems) the name, designation and communication details of the Designated Director (person designated by reporting FI to ensure overall compliance) and the Principal Officer (an officer designated by the reporting FI) and obtain a registration number.

8. The due diligence procedure for the purposes of identifying reportable accounts among pre-existing individual accounts has been prescribed thoroughly. Also, pre-existing individual account is not required to be reviewed, identified or reported, if the balance or value as on the 30th June, 2014, does not exceed an amount equivalent to $50,000. This limit is $250,000 in case of entities.

9. The procedure for purpose of identifying reportable accounts among new individual accounts and new entity accounts are also laid under the rules.

10. In case of a U.S. reportable account opened on or after the 1st July, 2014 but before the date of entry into force of FATCA agreement, notwithstanding the due diligence procedures specified in sub-rules for new accounts, the reporting financial institution may, in lieu of the procedures specified in the said sub-rules, apply the certain specified alternative procedures given under the Rules.

CONCLUSION

These Rules would facilitate the effective and efficient implementation of the intergovernmental agreement between India and US under the FATCA. They will remove domestic legal impediments to compliances by the Financial Institutions. Apart from this, the Government of India, on reciprocal basis, shall receive information about the Indian tax residents withholding the assets abroad. This will help to eradicate tax evasions and ensure the Government its share of revenue.

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GOVERNMENT ACCEPTS RECOMMENDATION OF JUSTICE A.P SHAH COMMITTEE ON INAPPLICABILITY OF MAT TO FIIS/FPIS

-Corporate Team*

On September 1, 2015, through a press release, Information Bureau of Ministry of Finance, Government of India had declared its acceptance to the recommendations of Justice A.P. Shah Committee on applicability of Minimum Alternate Tax (MAT) to Foreign Institutional Investors (FIIs) and Foreign Portfolio Investors (FPIs). The Committee had recommended that section 115JB of the Income Tax Act, 1961, will not be applicable to FIIs/FPIs not having place of business/permanent establishment in India, for the period prior to 01.04.2015.

BACKGROUND

The concept of MAT was introduced in India vide insertion of Section 115J in the Income Tax Act, 1961, in the year 1987 to facilitate the taxation of "zero tax companies". While introducing this concept, the lacuna which the government wanted to fill was the avoidance of tax by many companies who despite showing high profits in their books of accounts and paying substantial dividends, were paying marginal or no tax, by taking advantage of various tax concessions and other incentives. MAT was thus envisaged as levying a minimum tax on such companies deeming a certain percentage of their book profits computed under the Companies Act, as taxable income.

For few years, the MAT was made inoperative. In the year 1996 it was reintroduced and by Finance Act, 2000, it was replaced by Section 115JB.

A controversy, however, has recently arisen with respect to the applicability of MAT on FIIs due to the inconsistent rulings of the Authority for Advance Rulings (AAR) on the issue. Most pertinently, in 2012, in *Castleton Investment Limited*[1] *(*hereinafter referred to as Castleton), the AAR departed from its previous ruling in *The Timken Company*[2] and held that Section 115JB is applicable to foreign companies, even if they have no Permanent Establishment (PE) or place of business in India. The effect and implication of this ruling was that FIIs will be liable to pay MAT. The Supreme Court admitted a Special Leave Petition filed by Castleton Investment Limited in May 2013, where the company challenged the correctness of the AAR ruling. Based on the AAR ruling in *Castleton*, the Income-Tax Department, from December 2014 finalised assessments and raised MAT demand on various FIIs on capital gains made by them in the previous years. These notices raised an alarm amongst FIIs, some of which approached the courts.

For removal of such discrepancies, the Government of India had amended the MAT provisions, under Section 115JB *vide* the Finance Act of 2015, by excluding the income of foreign companies earned in relation to capital gains arising on transactions in securities, interest, royalty or fees for technical services etc. from the chargeability of MAT. However, the 2015 amendments were only intended to apply prospectively from 1st April 2015 (the financial year 2015-16), which is the assessment year 2016-17. Therefore, vagueness as to the applicability of MAT provisions on such foreign companies prior to the period of amendment was still persisting, until now.

FORMATION OF THE COMMITTEE

As the controversy, was exaggerating w.r.t. applicability of MAT to FIIs, the Finance Ministry announced the constitution of a committee to look into direct tax matters. The committee after discussing in detail with stakeholders, Industry representatives, various Association's representatives, Chartered Accountants and lawyers, and rounds of discussion with Central Board of Direct Taxes (CBDT), has finally submitted its Final report on 25th August 2015. Before discussing the recommendations and basis of those recommendations of Committee it would also be important to refer to various judicial decision on the issue of applicability of MAT on Foreign Companies including FII.

JUDICIAL DECISIONS

Many judicial decisions on MAT provisions have been construed through various AAR and Tribunal rulings. Few of them are *P. No. 14*, [1998] 234 ITR 335 (AAR) , *Niko Resources Ltd.* [1998] 234 ITR 828 (AAR) , *Dresdner Bank AG v ACIT*, [2006] 108 ITD 375 (Mumbai) , *The Timken Company,* [2010] 326 ITR 193 (AAR) , *Praxair Pacific Limited,* [2010] 326 ITR 276 (AAR) , *ZD,* [2012] 348

ITR 351 (AAR) , *Castleton Investment Ltd,* [2012] 348 ITR 537 (AAR) , etc. These cases have also been discussed by Committee in its final report.

After the Castleton Ruling, the Income Tax Department was constrained to issue MAT notices to FIIs/FPIs. The *Castleton* ruling and subsequent Department action has raised significant concerns in the foreign investment community. The Ruling in brief is as follows:

Castleton Investment Ltd, *[2012] 348 ITR 537 (AAR)*

1) The applicant (*Castleton Investment Limited*) was a company incorporated in, and a tax resident of, Mauritius, and was part of the Glaxo Smithkline group (GSK group). The applicant had held shares in GSK Pharma Ltd (GSKPL), a listed Indian company and a member of the GSK group, since 1993 as investment. This holding was shown as non-current assets in the books of accounts of the applicant and not as stock in trade. Thus, the shares were a capital asset of the company. Also, the applicant had no office, employees or agents in India and hence, no Permanent Establishment (PE) in India.

2) As part of the re-organization of the GSK group, GSK and the applicant (*the Mauritius Company*) proposed to transfer GSKPL shares (of the Indian company) to GSK Pte, a Singapore company and part of the same group. It thus sought an advance ruling on the taxability of the proposed transaction of sale of shares of GSKPL, the Indian company, to GSK Pte. Singapore and whether Section 115JB would be applicable to it.

3) On the relevant question of the applicability of Section 115JB, the single judge bench ruling of the AAR held that MAT would be "equally" applicable to foreign companies even without their physical or taxable presence in India. In reaching its conclusion, the AAR found it "difficult to agree" with the *Timken* approach and instead relied upon *P. No. 14 of 1997*. In reaching its conclusion, the AAR completely relied on its prior ruling in *ZD*, decided by the same judge just a few days prior to *Castleton*.

4) It adopted a strictly literal approach to Section 115JB, holding that the charging provision in sub-section (1) would also extend to foreign companies, since the IT Act did not distinguish between Indian and foreign companies.

5) Finally, the AAR emphasised the overriding nature of Section 115JB (referred to in *ZD* above) to reason that confining its scope to domestic companies alone may be "*doing violence to the special scheme of taxation adopted for taxing certain companies*", especially since no compelling reasons existed.

In 2013, Castleton filed a Special Leave Petition before the Supreme Court, challenging the AAR ruling, which was admitted in May 2013. The case is still pending. Meanwhile, as discussed, the requirement of MAT for FIIs was removed prospectively by the 2015 amendment, while tax recovery notices for MAT against FIIs for previous years continued.

VIEW OF THE COMMITTEE AND ITS RECOMMENDATIONS

The brief view of the committee and its recommendations is as follows:

1) A self-contained code for FIIs/FPIs

As per the Committee, Section 115AD of the Income Tax Act, introduced in 1993 (when FIIs entered the Indian market) provides for a separate scheme for taxing the income of FIIs/FPIs, arising from Indian securities at a concessional rate. A perusal of this scheme clearly indicates that applying the MAT provisions under Section 115JB would render this separate scheme under Section 115AD otiose in as much as FIIs/FPIs will be taxed at a higher rate under Section 115JB and will not be able to avail of the benefits of the set off provisions and MAT credit. This indicates that Section 115AD, not Section 115JB, would apply to FIIs/FPIs.

2) No business/permanent establishment in India

The Committee disagrees with the Revenue's argument that Section 115JB merely prescribes a general standard for preparation of accounts. In the absence of guidance on the segregation of domestic and global accounts, a foreign

company having no established place of business or PE in India (i.e. an FII/FPI) cannot be taxed under Section 115JB.

3) Overriding effect of Double Taxation Avoidance Agreement (DTAA)

Section 90(2) of the IT Act provides that the DTAA provisions will override the provisions of the IT Act (including Section 115JB) if they contain more beneficial provisions for the assessee-company. Thus, regardless of the interpretation given to Section 115JB, it will not be applicable where a beneficial DTAA exemption is available. *Castleton's* interpretation to the contrary, based on the *non-obstante* clause in Section 115JB, is incorrect.

4) Measure by Registrar of Companies

In 19 years since MAT was introduced (in 1996), it had never been levied on FIIs/FPIs, which were instead governed by the beneficial tax scheme under Section 115AD. Significantly, the Department also accepted the *Timken* ruling and did not file an appeal. Even after the 2012 ruling in *Castleton*, the Registrar of Companies, under the Companies Act, never called upon FIIs/FPIs to file their global accounts, evidencing that FIIs/FPIs were not intended to be taxed under the MAT provision. A change in this settled position in August 2014 is extremely late in the day. While this may be a consequence of the *Castleton* ruling, the Committee believes the ruling to be completely wrong.

Based on above views the committee recommended:

In view of the findings and upon a considered deliberation, the committee had made following recommendations to the Government:

(i) To bring an amendment to Section 115JB of the Income Tax Act, 1961 clarifying the complete inapplicability of the MAT provisions to FIIs/FPIs; or

(ii) Central Board of Direct Taxes (CBDT) may issue a circular clarifying the complete inapplicability of the MAT provisions to FIIs/FPIs.

PRESENT SCENARIO

As mentioned above, the Government vide Press Release dated 01.09.2015 has accepted the recommendations of the Committee to clarify the inapplicability of MAT to FIIs/FPIs and has decided that an appropriate amendment to the Income-tax Act will be carried out. Through the amendment in the Act, the Government propose to clarify that MAT provisions will not be applicable to FIIs/FPIs not having a place of business/ permanent establishment in India, for the period prior to 01.04.2015.

Pending such amendment, CBDT has issued an Instruction Note (No. 9/2015) on September 2, 2015, advising the field authorities to take into consideration the above position and keep in abeyance, for the time being, the pending assessment proceedings in cases of FIIs/FPIs involving the above issue. They are also advised not to pursue the recovery of outstanding demands, if any, in such cases.

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STRATEGIC DEBT RESTRUCTURING SCHEME

*Corporate Team**

The Reserve Bank of India (RBI) on 8 June 2015 announced **Strategic Debt Restructuring (SDR) Scheme** which allows banks and Term-lending and Refinancing Institutions to convert their loans into equity stake. SDR will provide banks with enhanced capabilities to initiate change of ownership in cases of restructuring of accounts where borrower companies are not able to come out of stress due to operational/ managerial inefficiencies despite substantial sacrifices made by the lending banks. RBI announced the scheme against the backdrop of huge surge in bad loans or Non Performing Assets (NPAs) in the banking system. As per ICRA estimate, the Gross NPAs may rise to 5.9 percent of total advances during 2015-16 against 4.4 percent during 2014-15.

The scheme is in furtherance to the framework for revitalizing distressed assets in the economy that was notified in February, 2014 which states that the general principle of restructuring should be that the shareholders bear the first loss rather than the debt holders.

JOINT LENDERS FORUM AND CORRECTIVE ACTION PLAN

At the time of initial restructuring, the Joint Lenders' Forum (JLF) must incorporate, in the terms and conditions attached to the restructured loan/s agreed with the borrower, an option to convert the entire loan (including unpaid interest), or part thereof, into shares in the company in the event the borrower is not able to achieve the viability milestones and/or adhere to 'critical conditions' as stipulated in the restructuring package. This should be supported by necessary approvals/authorisations (including special resolution by the shareholders) from the borrower company, as required under extant laws/regulations, to enable the lenders to exercise the option effectively. Restructuring of loans without the required approvals/authorisations for SDR is not permitted. On default on the part of borrower, the JLF must immediately review the account and examine its viability under the SDR scheme. The decision on invoking the SDR should be taken by the JLF as early as possible but within 30 days from the above review of the account. Such decision 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);

CHANGE IN OWNERSHIP

In order to achieve the change in ownership, the lenders under the JLF should collectively become the majority shareholder by conversion of their dues from the borrower into equity. However, the conversion by JLF lenders of their outstanding debt (principal as well as unpaid interest) into equity instruments shall be subject to the member banks' respective total holdings in shares of the company conforming to the statutory limit in terms of Section 19(2) of Banking Regulation Act, 1949[1]. Post the conversion, all lenders under the JLF must collectively hold 51% or more of the equity shares issued by the company. The share price for such conversion of debt into equity will be determined as per a formula prescribed by the RBI. The formula for conversion of debt into equity will be different from existing norms laid down by the Securities & Exchange Board of India (SEBI) for banks. The conversion price of the equity is the fair value which shall be:

- The lower of:
    - If there's a market value (listed companies), then at the 10 day average price in the market.
    - Book value after ignoring any revaluation reserves.
- The price can't be lower than the face value of the share.

The above Fair Value will be decided at a 'reference date' which is the date of JLF's decision to undertake SDR.

1 *No banking company shall hold shares in any company, whether as pledgee, mortgagee or absolute owner, of an amount exceeding thirty per cent. of the paid-up share capital of that company or thirty per cent. of its own paid-up share capital and reserves, whichever is less: Provided that any banking company which is on the date of the commencement of this Act holding any shares in contravention of the provisions of this sub-section shall not be liable to any penalty therefore if it reports the matter without delay to the Reserve Bank and if it brings its holding of shares into conformity with the said provisions within such period, not exceeding two years, as the Reserve Bank may think fit to allow.*

DISINVESTMENT

According to the notification, JLF and lenders should divest their holdings in the equity of the company as soon as possible. The new management should not have any links to the old promoters. The New promoter should not be a person/entity/subsidiary/ associate, etc (domestic as well as overseas), from the existing promoter/promoter group. Banks should clearly establish that the acquirer does not belong to the existing promoter group. The new promoter has to acquire the entire 51%. In case where the acquirer is a non resident and the sectoral cap is less than 51%, the new promoter should own at least 26% of the paid-up equity capital or up to the applicable foreign investment limit whichever is higher, provided banks are satisfied with this equity stake the new non resident promoter controls the management of the Company..

On divestment of banks' holding in favour of a new promoter, the asset classification of the account may be upgraded to 'standard' At the time of divestment of their holdings to a 'new promoter', banks may refinance an existing debt of the company considering the changed risk profile of the company without treating the exercise as 'restructuring' subject to banks making provision for any diminution in fair value of the existing debt on account of the refinance.

The acquisition of shares under the notification is exempted from regulatory ceilings/restrictions on Capital Market Exposures, investment in Para-Banking activities and intra group exposure. However, the banks are required to disclose in their Notes to Accounts in Annual Financial Statements. Equity Shares of entities acquired by the banks under SDR are assigned a 150% risk weight for 18 months from the 'reference date' indicated in paragraph 4(ii). After 18 months from the 'reference date', these shares will be assigned risk weight as per the extant capital adequacy regulations. Further, it is important to note that the equity shares acquired and held by banks under the scheme are exempt from the requirement of a periodic mark to market (stipulated vide Prudential Norms for Classification, Valuation and Operation of Investment Portfolio by Banks) for the 18 month period. Similarly, conversion of debt into equity in an enterprise by a bank may result in the bank holding more than 20% of voting power, which otherwise result in an investor-associate relationship under applicable accounting standards. However under the present notification where the lender acquires more than 20% of voting power in the borrower entity in satisfaction of its advance under the SDR, and the rights exercised by the lenders are more protective in nature and not participative, such investment is not treated as investment in associate.

CONCLUSION

The new rules are a welcome step as it made the circular dated Feb 26, 2014 issued by RBI "Framework for Revitalizing Distressed Assets in the Economy" more near to the reality, wherein it was mentioned that the "general principle of restructuring should be that the shareholder bear the first loss rather than the debt holders" as the present scheme (SDR will ensure that the promoters are more involved in turning around a company and will help the banks reduce bad loans. It may help banks lessen their load of high provisioning as once banks manage to sell their stake fully in the defaulting company, the money set aside by the lenders to cover bad loans can be written back.

Like any other innovation, the implementation of the scheme is a challenge due to the legal and procedural complications. Firstly, Lenders may choose to use their powers of conversion subject to the approval of 75% of lenders in value and 60% in number. This appears to be a difficult threshold to meet in a distressed debt situation with multiple lenders. Secondly, the scheme requires the banks to sell the equity as soon as possible while putting a bar on the promoter group(i.e. should not be a person/entity/subsidiary/associate etc-domestic as well as overseas) to purchase such stake from Banks. Banks will find it very difficult to find buyers for companies incurring perpetual losses.

It will be useful in cases of willful defaulters and inefficient management, where change in management can overturn the fortunes of company securing the interest of lenders and other stakeholders. In other cases, where the default in payment is owing to reasons independent of the management of the company, the scheme would be ineffective as even after takeover, the company may continue to flounder and finding new promoters for the company would be a distant dream.

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EXCISE DUTY IS AN INCIDENCE OF MANUFACTURE- YET AGAIN HELD BY THE HON'BLE HIGH COURT

Shipra Makkar

To be subjected to levy of excise duty "excisable goods" must be produced or manufactured in India. For being produced and manufactured in India, the raw material should have gone through the process of transformation into a new product by skillful manipulation. Excise duty is an incidence of manufacture and, therefore, it is essential that the product sought to be subjected to excise duty should have gone through the process of manufacture.

The said rule which was already laid by the Hon'ble Apex Court of India in UOI v Ahmadabad Electricity Company Limited reported in (2001) 11 SC 129 has once again been relied upon by the Hon'ble High Court of Madras, in whose considered view the ratio in the case above was squarely applicable in the case of "Fly ash" since it cannot be said to have gone through any manufacturing process.

In the case of M/s Mettur Thermal Power Station v CBEC and Anr. reported in 2015-TIOL-1948-HC-MAD-CX which relates to a writ petition filed by the petitioner, one of the various thermal stations of TANGEDCO, a Public Sector Undertaking owned by the Government of Tamil Nadu, engaged in generation and distribution of electricity and manufacture of 'Fly Ash' and 'Fly Ash Bricks' falling under Chapter 26219000 and 68159910 respectively, of the central excise Tariff Act.

As both the said products were cleared by the petitioner without payment of excise duty, a show cause notice was issued by the Respondents proposing to impose CENVAT duty along with interest and penalty under the Rules. Challenging the said show cause notice (hereinafter referred to as SCN), the present petition was filed wherein the main issue before the Hon'ble High Court was "whether the 'fly ash' and fly ash bricks' included as items in the entries to the first schedule to the Central Excise Tariff Act, per se make the same eligible to excise duty?"

The department took a view that during the process of production of electricity, 'Fly Ash' emerges as a by-product and generated during the burning of pulverized coal for power generation, which is marketable and has also an intrinsic value in the commercial market. The department was also of the view that electricity is not an exempted product and it finds a place in the first schedule to the Act and thereby it is classified as tariff item. Being non-excisable goods, electricity cannot be regarded as exempted goods and as the 'Fly Ash' arising during the production of electricity is not covered by the Notification No.89/95-CE dated 18.05.1995, duty is to be paid on the 'Fly Ash'. The petitioner has not paid duty on the 'Fly Ash' in lieu of the levy of duty on the clearance of 'Fly Ash' with effect from 01.03.2011 with an intent to evade payment of duty which was detected during the investigation carried out by the department. The extended period of limitation is applicable.

Apart from the above various other issues were discussed regarding applicability of notification No. 89/95-CE dated 18.05.1995 with regards exemption to be provided/ not to be provided on 'fly ash' as a waste arising out of manufacture of 'electricity' which is exempted good or not along with difference between by-product and waste.

However, the court concentrating on the judgment of Ahmadabad Electricity, was of the view that 'fly ash' is produced during combustion of coal. The difference between 'cinder' (which was the subject matter in Ahmadabad Electricity case) and 'fly ash' was only that, when coal is not burnt fully and leaves pieces behind, is called 'cinder' whereas, when it is fully burnt and reduced to ash, is called 'fly ash'. Therefore ratio decided in the above said decision would squarely apply in the case of 'fly ash'. Also since the product 'fly ash' also cannot be said to have gone through any manufacturing process. The Hon'ble Court did not find it necessary to deal with other related issues and very categorically held that "Fly Ash' cannot be subjected to levy of excise duty because it is not an item of good which has been subjected to process of manufacture.

On the contrary, with regards "fly ash bricks", the Hon'ble High Court was of the view that since fly ash does not itself get shaped as bricks unless some manufacturing activity is involved. Since the raw material fly ash undergoes a change since an operation performed on it, resulting into fly ash brick, such operation would certainly amount to processing of the commodity and

such commodity is recognized as a new and distinct article, i.e. 'fly ash brick' and therefore, it can be said that the good fly ash brick does involve manufacturing activity, which is admittedly, has marketability also being sold on a considerable price. Therefore, the good 'fly ash brick', having satisfied the test of being manufactured in India and also marketability, would be leviable to excise duty.

At this juncture, it shall be pertinent to mention that with effect from 01.03.2011, central excise duty at the rate of 1% was imposed on many goods which are hitherto exempted. 'Fly Ash' is found at Sl. No, 27 of the Notification.

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DISCLOSURES UNDER SEBI (LISTING AND DISCLOSURE) REGULATIONS, 2015

Corporate Team

The Securities Exchange Board of India (SEBI), on September 2, 2015, issued SEBI (Listing and Disclosure) Regulations, 2015 (hereinafter referred to as 'Regulations') on listing of different segments of the capital market and disclosure norms in relation thereto. These regulations have been structured into one single document consolidating various types of securities listed on the stock exchanges.
The latest set of norms provides broad principles for periodic disclosures by listed entities, apart from incorporating corporate governance principles.

These regulations shall apply to the listed entity who has listed any of the following designated securities on recognized stock exchange(s):

a) Specified securities listed on main board or SME Exchange or Institutional trading platform;
b) Non-convertible debt securities, non-convertible redeemable preference Shares, perpetual debt instrument, perpetual non-cumulative preference Shares;
c) Indian depository receipts;
d) Securitized debt instruments;
e) Units issued by mutual funds;
f) Any other securities as may be specified by the Board.

The Disclosure aspect as in the framework of these Regulations has been discussed below in brief:

PRINCIPALS GOVERNING DISCLOSURES

The listed entities which have listed securities shall make disclosures and abide by certain obligations under these regulations, in accordance with the following principles:

i. Information shall be prepared and disclosed in accordance with applicable standards of accounting and financial disclosure.
ii. The listed entity shall implement the prescribed accounting standards in letter and spirit in the preparation of financial statements taking into consideration the interest of all stakeholders and shall also ensure that the annual audit is conducted by an independent, competent and qualified auditor.
iii. The listed entity shall refrain from misrepresentation and ensure that the information provided to recognised stock exchange(s) and investors is not misleading.
iv. The listed entity shall provide adequate and timely information to recognised stock exchange(s) and investors.
v. The listed entity shall ensure that disseminations made under provisions of these regulations and circulars made there under, are adequate, accurate, explicit, timely and presented in a simple language.
vi. Channels for disseminating information shall provide for equal, timely and cost efficient access to relevant information by investors.
vii. The listed entity shall abide by all the provisions of the applicable laws including the securities laws and also such other guidelines as may be issued from time to time by the Board and the recognized stock exchange(s) in this regard and as may be applicable.
viii. The listed entity shall make the specified disclosures and follow its obligations in letter and spirit taking into consideration the interest of all stakeholders.
ix. Filings, reports, statements, documents and information which are event based or are filed periodically shall contain relevant information.
x. Periodic filings, reports, statements, documents and information reports shall contain information that shall enable investors to track the performance of a listed entity over regular intervals of time and shall provide sufficient information to enable investors to assess the current status of a listed entity.

DISCLOSURE IN CORPORATE GOVERNANCE REPORT:

The following disclosures shall be made in the section on the corporate governance of the annual report of the listed entities:

i. A brief statement on listed entity's philosophy on code of governance.
ii. Information, as prescribed in the Regulations, about the following:

a) Board of directors,
b) Audit committee,
c) Nomination and Remuneration Committee,
d) Remuneration of Directors,
e) Stakeholders' grievance committee,
f) General body meetings,
g) Means of communication,
h) General shareholder information,

iii. Other Disclosures:
a) Disclosures on materially significant related party transactions that may have potential conflict with the interests of listed entity at large;
b) Details of non-compliance by the listed entity, penalties imposed on the listed entity by stock exchange(s) or the board or any statutory authority, on any matter related to capital markets, during the last three years;
c) Details of establishment of vigil mechanism, whistle blower policy, and affirmation that no personnel has been denied access to the audit committee;
d) Details of compliance with mandatory requirements and adoption of the non-mandatory requirements;
e) Web link where policy for determining 'material' subsidiaries is disclosed;
f) Web link where policy on dealing with related party transactions;
g) Disclosure of commodity price risks and commodity hedging activities.

Where there is any non-compliance of any requirement of corporate governance report, reasons thereof also needs to be disclosed.

DISCLOSURE OF EVENTS OR INFORMATION

1. Every listed entity shall make disclosures of any events or information which, in the opinion of the board of directors of the listed company, is material. Events specified in Para (A) of Part (A) of Schedule III of the Regulations are deemed to be material events and listed entity shall make disclosure of such events. The listed entity shall make disclosure of events specified in Para (B) of Part (A) of Schedule III, based on application of the guidelines for materiality, as specified.

2. The listed entity shall consider the following criteria for determination of materiality of events/ information:
a) the omission of an event or information, which is likely to result in discontinuity or alteration of event or information already available publicly; or
b) the omission of an event or information is likely to result in significant market reaction if the said omission came to light at a later date;
c) In case where the criteria specified in sub-clauses a) and b) are not applicable, an event/information may be treated as being material if in the opinion of the Board of Directors of listed entity, the event / information is considered material.

The listed entity shall frame a policy for determination of materiality, based on criteria specified above, duly approved by its board of directors, which shall be disclosed on its website.

3. The board of directors of the listed entity shall authorize one or more Key Managerial Personnel for the purpose of determining materiality of an event or information and for the purpose of making disclosures to stock exchange(s) under this regulation and the contact details of such personnel shall be also disclosed to the stock exchange(s) and as well as on the listed entity's website.

4. The listed entity shall first disclose to stock exchange(s) of all events, as specified in Part A of Schedule III, or information as soon as reasonably possible and not later than 24 hours from the occurrence of event or information.

In case the disclosure is made after 24 hours of occurrence of the event or information, the listed entity shall, along with such disclosures provide explanation for delay. Disclosure with respect to the outcome of board meeting shall be made within 30 minutes of the conclusion of such board meeting.

5. The listed entity shall, with respect to disclosures referred to in these regulations, make disclosures updating material developments on a regular basis, till such time the event is resolved/closed, with relevant explanations.

6. The listed entity shall disclose on its website all such events or information which has been disclosed to stock exchange(s) under this regulation, and such disclosures shall be hosted on the website of the listed entity for a minimum period of 5 years and thereafter as per the archival policy of the listed entity, as disclosed on its website.

LISTING AGREEMENT UNDER THE REGULATIONS

"Listing agreement" shall mean an agreement that is entered into between a recognised stock exchange and an entity, on the application of that entity to the recognised stock exchange, undertaking to comply with conditions for listing of designated securities;

On and from the commencement of these Regulations, all previous circulars stipulating or modifying the provisions of the listing agreements including those specified in theses Regulations, shall stand rescinded.

Accordingly, as per these Regulations, every issuer or the issuing company desirous of listing its securities on a recognised stock exchange shall execute a listing agreement with such stock exchange.

Where issuer or the issuing company has previously entered into agreement(s) with a recognised stock exchange to list its securities shall execute a fresh listing agreement with such stock exchange within 6 months of the date of notification of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

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SEAT IS NOT THE CENTRE OF GRAVITY- ARBITRATION AND CONCILIATION ACT, 1996

Lakshay Dhamija

The term "subject matter of arbitration" cannot be confused with "subject matter of suit". The term "subject matter" in Section 2(1) (e) is confined to Part-I of the Arbitration and Conciliation Act, 1996 (herein after referred to as "Indian Arbitration Act"). It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process.

Section 2(1) (e) of the Indian Arbitration Act provides for the definition of the term "Court"-

(e) "Court" *means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*

The definition of Section 2(1) (e) includes "subject matter of the arbitration" to give jurisdiction to the courts where the arbitration takes places, which otherwise would not exist. On the other hand, Section 47 which is in Part-II of the Indian Arbitration Act dealing with enforcement of certain foreign award has denied the term "court" as a court having jurisdiction over the subject-matter of the award. This has clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. Therefore, the provisions contained in Section 2(1) (e) being purely jurisdictional in nature can have no relevance to the question whether Part-I applies to arbitrations which take place outside India.

The provision in Section 2(1) (e) has to be construed keeping in view the provisions in Section 20 of the Indian Arbitration Act, which gives recognition to party autonomy.

Section 20 of the Indian Arbitration Act, 1908 defines "Place of Arbitration" which is as under-

"SECTION 20: PLACE OF ARBITRATION

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai, etc. In the absence of the parties agreement thereto, Section 20(2) authorizes the arbitration tribunal to determine the place/seat of such arbitration. Section 20(3) enables the arbitration tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

In light of the BALCO1 judgment passed by Hon'ble Supreme Court of India it is no more res integra that Part-I of the Indian Arbitration Act is applicable only to all the arbitrations which take place within the territory of India and hence will have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to enforced in India in accordance with the provisions contained in Part-II of the Indian Arbitration Act.

The Hon'ble Supreme Court India in BALCO judgment (supra) has taken the view that the legislature has intentionally given jurisdiction to two courts i.e. the

1 *(2012) 9 SCC 552*

court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Hence, the courts where the arbitration takes place would be required to exercise the supervisory control over the arbitral process.

For instance, if the arbitration is held in Mumbai, where neither of the parties from Mumbai and Mumbai having been chosen as a neutral place as between a party from Bengaluru and the other from Kolkata and the tribunal sitting in Mumbai passes an interim order under Section 17 of the Indian Arbitration Act, the appeal against interim order under Section 37 must lie to the Courts of Mumbai being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Bengaluru or at Kolkata, and only arbitration is to take place at Mumbai. In such circumstances, both the Courts would have jurisdiction i.e. the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which dispute resolution i.e. arbitration is located.

The Hon'ble Delhi High Court in *M/s Sai Consulting Engineers Pvt. Ltd. Vs. Rail Vikas Nigam Ltd. & Ors.*[2] decided one of the issue raised by the Respondents as to the territorial jurisdiction of the Hon'ble Delhi High Court wherein the contract was awarded by the Respondent to the Petitioner from its Mumbai office and the work was to be executed in the State of Chhattisgarh and the same was managed from the office of Chhattisgarh. Thereby the Respondent alleged that since no cause of action has arisen in Delhi and also earlier the Petitioner had withdrawn the writ petition filed in Delhi High Court on the ground of no territorial jurisdiction and thereafter filed writ petition in the High court of Chhattisgarh. The Hon'ble High Court of Delhi on taking into consideration the averments in the petition more particularly the arbitration proceedings having been held in Delhi pursuant to Clause 16.01 of the contract followed the BALCO judgment and did not find any merit in the submission of the Respondent with regard to territorial jurisdiction of Hon'ble Delhi High court and proceeded further in deciding the case.

Recently, the Division Bench of Hon'ble High Court of Delhi in *NHPC Vs. Hindustan Construction Company Ltd.*[3] has overruled the decision passed by one of the Ld. Single Judge in *Apparel Export Promotion Council Vs. Prabhati Patni, Proprietor Comfort Furnishers*[4] wherein view was taken that the situs or seat of arbitration or the fact that the award was made at a particular place, would not be relevant for conferring jurisdiction. But, that decision was rendered prior to the Supreme Court decision in BALCO (supra). So, after BALCO (supra), the AEPC (supra) decision, even for persuasive value, would not come to the aid of the appellant. In fact, after the BALCO (supra) decision, this question of jurisdiction has been considered by a division bench in *Ion Exchange (India) Ltd. Vs. Panasonic Electic Works Co.*[5] This court, inter alia, held as under:-

"12. We are unable to agree with the view taken by the learned single Judge in his order dated 04.02.2014. Section 2(1)(e) of the Act defines the meaning of "Court" as, inter alia, the High Court exercising original civil jurisdiction to decide questions forming the subject matter of arbitration if the same had been the subject matter of a suit. As per Section 2(2) of the said Act, Part I is applicable where the arbitration is held in India. Further, Section 9 of the said Act, which falls in Part I of the said Act, sets out the various interim measures that the "Court" may direct either before, during or at any time after the making of the arbitral award. Section 20 of the Act gives the parties to the arbitration, the freedom to choose not only the seat of arbitration but also gives the parties the right to choose the venue of the arbitration. Section 42 of the said Act, which starts with a non obstante clause, states that where any application under Part I has been made to a Court, that Court alone will have jurisdiction over the arbitration proceedings and subsequent applications arising out of the Agreement.

13. In this backdrop, let us take an example where the cause of action has arisen in place 'A' and the place of arbitration is place 'B'. If a party to the arbitration agreement were to move an application under Section 9 of the said Act, he could not file it in place 'B',

2 *198 (2013) DLT 507*

3 *2015 (4) ABLR 297 (Delhi)*

4 *(2006) 86 DRJ 48*

5 *(2014) 208 DLT 597*

if the view of the learned single Judge were to be accepted as, according to him, an application under Section 9 does not invoke the 'supervisory jurisdiction'. And, because of Section 42, no other application under the said Act could ever be filed in place 'B' (i.e. the place of arbitration). So, the occasion to exercise supervisory jurisdiction would never accrue to the Courts at place 'B'. This would run counter to the decision of the Supreme Court in Bharat Aluminium (supra) where, at the cost of repetition, it was observed that-

"The legislature has intentionally given jurisdiction to two courts, i.e., the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place."

14. In these circumstances, we find ourselves unable to agree with the view of the learned single Judge expressed in his order dated 04.02.2014. We agree with the view taken in Sai Consulting (supra) and hold that the Courts at the seat or place of arbitration would have territorial jurisdiction to entertain an application under the said Act subject to the provisions of Section 42 thereof irrespective of the fact that the cause of action arose elsewhere and/or the respondent resides elsewhere.

In Hon'ble Supreme Court of India view, the correct depiction of the practical consideration and the distinction between "seat" (Section 20(1) and 20(2)) and "venue" (Section 20(3)) would be quite crucial in the event, the arbitration agreement designates a foreign country as the "seat"/ "place" of the arbitration and also select the Indian Arbitration Act as the curial law/ law governing the arbitration proceedings.

CONCLUSION:

The fixation of the most convenient "venue" is taken care by Section 20(3) of the Indian Arbitration Act. Section 20, has to be read in the context of Section 2(2) of the Indian Arbitration Act, which places a threshold limitation on the applicability of Part-I, where the place of arbitration is in India. Therefore, Section 20 would also not support the extra-territorial applicability of Part-I, as far as domestic arbitration is concerned and only if the agreement of the parties is construed to provide for the seat /place of arbitration being in India the Part-I of the Indian Arbitration Act would be applicable.

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

SEBI- SAHARA DISPUTE- THE LONG BATTLE STILL CONTINUES

Abhishek Kumar

OVERVIEW:-

The tug of War between Sebi- Sahara has now reached the pinnacle and the raising of deposits by two group companies of Sahara viz. *Sahara India Real Estate Corporation Ltd.* (hereinafter referred to as SIRECL) and *Sahara Housing Investment Corporation Ltd.* (hereinafter referred to as SHCL) by way of issuance of OFCD which spotted the limelight since year 2010 has apparently rattled the world's largest Family i.e. Sahara India Parivar, to the extent that the Group had to shut down some of its companies in order to refund the amount of Rs. 17, 400 crore with interest as directed by the Hon'ble Supreme Court in its judgment dated 31.08.2012 passed in Civil Appeal 9813 of 2011 and Civil Appeal 9833 of 2011[1]. The article will shed light with respect to Sebi- Sahara dispute in particular the issuance of OFCD, briefly outlining of SEBI (WT) Member order, affirmation of SEBI order by SAT, Hon'ble Apex Court judgments and the recent updates on the controversy including the arrest of Subrata Rai and two Sahara directors as a result of NBWs issued against them by Hon'ble Supreme Court vide order dated 27.02.2014 as well as cancellation of Sahara Mutual fund licence by SEBI vide its recent order dated 28.07.2015.

II. SEBI- SAHARA DISPUTE :- FACTUAL MATRIX

- Sahara India Real Estate Corporation Limited (hereinafter referred to as "SIRECL") and Sahara Housing Investment Corporation Limited (hereinafter referred to as "SHCL"). The companies will be referred to as Sahara Companies and these two Sahara companies were offering Optionally Fully Convertible Debentures ("OFCD") to all the people who were associated with the SAHARA group and thereby placing their argument of this being a private placement as they have approached only those who are associated with the Sahara Group in any manner.[2]

- The proposal of issuance of OFCD was approved by way of special resolution passed in terms of Section 81 (1A) of the Companies Act in its EGM held on 3.3.2008.

- It was specifically indicated in the RHP by the SIRECL that did not intend to get their securities listed on any recognized stock exchange. Further, it was also stated in the RHP that only those persons to whom the Information Memorandum (for short 'IM') was circulated and/or approached privately who were associated/affiliated or connected in any manner with Sahara Group, would be eligible to apply.

- SIRECL filed RHP was under Section 60B of the Companies Act, before the RoC, Uttar Pradesh on 13.3.2008, which came to registered on 18.3.2008.[3]

- Subsequently, Information Memorandum (hereinafter referred to as "IM") was circulated by SIRECL in April 2008, along with the application forms to its so called friends, associated group companies, workers/ employees and other individuals associated with Sahara Group for subscribing to the OFCDs by way of private placement. Then IM carried a recital that it was private and confidential and not for circulation.

- The same strategy was adopted by SHICL and the approval of issuance of OFCD was approved in AGM dated 16.09.2009. SHICL filed RHP on 6.10.2009 with ROC, Mumbai, Maharashtra under Section 60 B of the Companies Act, which subsequently came to be registered on 15.10.2009.

1 *(2013)1 SCC 1*

2 *SEBI (WTM) Order dated 23.06.2011*

3 *Refer Para 3 of Judgment dated 31.08. 2012 passed in Civil Appeal 9813 of 201; Sahara India Real Estate Corporation Limited & Ors vs. Securities and Exchange Board of India*

INITIAL CONTROVERSY AND THE CORRESPONDENCES MADE :-

A) Initial Correspondences

- Sensing unusual and fishy with respect to entire transaction, series of correspondences were made by SEBI. Vide letter dated 12.1.2010 addressed to *M/s. Enam Securities*, SEBI inquired about the complaint received from one Roshan Lal alleging that Sahara Group was issuing Housing bonds without complying with Rules/ Regulations/Guidelines issued by RBI/MCA/ NHB.

B) Reply of the letter by Merchant Banker

- The above letter was replied by Merchant Banker dated 29.1.2010 stating that the Sahara companies were not registered with any stock exchange and therefore SEBI had no jurisdiction. The issuance of OFCDs were in compliance with the applicable laws.

- Merchant banker to the issue defended the action on the right that OFCD was issued in compliance with Section 81 (1) (A) of the Act which was passed on passed on 3.3.2008 and 16.06.2009 respectively. Furthermore, it was also brought to the notice that IM was circulated prior to the opening of the offer.

C) SEBI correspondences calling for various details from Sahara

- Another communication dated 12.5.2010 was sent by SEBI to Saharas calling for various details including the details regarding the number of application forms circulated after filing of RHP with RoC, details regarding the number of applications received and subscription amount received, date of opening and closing of subscription list of OFCDs, number and list of allotees etc.

- Sahara did not comply with the said summon and did not furnish the desired information.

D) Summon dated 30.08.2010 issued by SEBI

- Inspite of repeated correspondences when SEBI failed to provide relevant and pertinent information. SEBI issued summons dated 30.8.2010, Under Section 11C of the SEBI Act, directing the company to furnish the requisite information by 15.9.2010.

E) Saharas Companies defence and reply to the SEBI's allegation

- Detailed reply dated 13.9.2010 was sent by SIRECL to SEBI, wherein it was stated that the company had followed the procedure prescribed under Section 60B of the Companies Act pursuant to the special resolution passed Under Section 81(1A) in its meeting held on 3.3.2008 .

- Company has filed RHPs under Section 60B with the concerned RoC.

- Saharas in their defence stated that SEBI does not have jurisdiction in the instant case since SIRECL was not a listed company and it did not intend to get its securities listed on any recognized stock exchange in India.

- OFCDs issued by the company would not fall under Sections 55A (a)[4] and/or (b) and hence the issue and/or transfer of securities and/or non payment of dividend or administration of either the company or its issuance of OFCDs, were not to be administered by SEBI and all matters pertaining to the unlisted company would fall under the administration of the Central Government or RoC[5].

- Saharas in their defence contended that OFCDs were restricted to a select group (as distinguished from general public), however large they might be and hence the issuance of OFCDs was not a public offer to attract the provisions of Regulations 3 and/or 6 of ICDR 2009.

- Company had stated that issuance of OFCDs of 2008 was also not covered by the SEBI (Issue and Listing Securities) Regulations, 2008, since it would apply to non-convertible debt securities, whereas the OFCDs issued by SIRECL

4 *"55A. Refer Section 55 A of the Companies Act, 1956."*
5 *Refer Para 11 of the Judgment dt. 31.08.2012*

were convertible securities. SIRECL, therefore, requested SEBI to withdraw the summons issued Under Section 11C of the SEBI Act. Summons dated 23.9.2010 was also issued to SHICL, for which also an identical reply was sent to SEBI.

IV. SEBI Proceedings

- Notice dated 24.11.2010 was issued by SEBI inter alia stating that OFCDs issued by SIRECL and SHICL was a public issue and, therefore, securities were liable to be listed on a recognized stock exchange Under Section 73 of the Companies Act.

- Based on its preliminary enquiry, SEBI found out that the issuance of OFCDs by Saharas was prima facie in violation of Sections 56 and 73 of the Act.

- Further the said issuance of OFCD also violated various clauses of DIP Guidelines Regulations namely 4(2), 5(1), 6, 7, 16(1), 20(1), 25, 26, 36, 37, 46 and 57 of ICDR 2009.

- Subsequently, SEBI directed both the companies to show cause why action should not be initiated against the company including issuance of direction to refund the money solicited and mobilized through the prospectus issued with respect to the OFCDs, on the ground that the Companies have violated the various provisions of the Companies Act, SEBI Act, erstwhile DIP Guidelines and ICDR 2009.

Notice dated 20.05.2011 issued by SEBI

- SEBI issued fresh notice dated 20.5.2011 inter alia stating that the companies have not complied with earlier notices and has even failed to provide any information to SEBI regarding details of its investor in order to show cause that the offer of OFCD is made to less than 50 persons. Further, it was stated by the SEBI that arguendo issuance of OFCD was made as private placement, nevertheless any offer/issue to fifty or more persons would be treated as public issue in terms of first proviso to Section 67 (3) of the Companies Act.

- Sahara along with SIRECL were also guilty of making false statement in RHP along with letter dated 15.1.2011 and hence the Company stands liable under Section 62 and 63 of the Act for making untrue statement.

- Notice also alleged that Saharas had violated the provisions of Section 73 of the Companies Act, by non-listing of their debentures in a recognized stock exchange.

- The detailed notice of SEBI also cast serious aspersions with regard to credibility of information furnished by Sahara for the reason that the CD that was sent by Sahara to SEBI was secured in such a manner that no analysis was possible and the addresses of the OFCDs holders were incomplete or ambiguous.

- Serious doubts were also raised with regard to the identity and genuineness of the investors and the intention of the companies to repay the debenture holders upon redemption.

- The Notice, stated that the companies had prima facie violated the provisions of the Companies Act, SEBI Act, 1992, DIP Guidelines and ICDR 2009 and hence the offer/issue of OFCDs to public was illegal, and imperiled the interest of investors in such OFCDs and was detrimental to the interest of the securities market.

Response of Sahara to the SEBI notice

- In its detailed reply Sahara once again questioned the jurisdiction of SEBI with respect to monitoring of OFCD on the ground that OFCD being hybrid instrument SEBI has no Further, it was reiterated that the company had raised funds by way of private placement to friends, associates, group companies, workers/ employees and other individuals associated/ affiliated with Sahara Group, without giving any advertisement to the public.

SEBI (WTM) Order dated 23.06.2011

- On detail appreciation of various contention raised in the notices, reply furnished by Sahara

Companies, SEBI found Sahara contravening various provisions of companies Act inter alia Sections 56, 73, 117A, 117B and 117C as well as various clauses of DIP guidelines as well as various ICDR Regulations.

- Consequently, Sahara was directed to refund the money collected under the Prospectus dated 13.3.2008 and 6.10.2009 to all such investors who had subscribed to their OFCDs, with interest.

V) Proceedings in Securities Appellate Tribunal (SAT)

Aggrieved by the above order of SEBI (WTM) asking Sahara to refund the money collected under the prospectus dated 13.03.2008 and 06.10.2009, Sahara went to SAT in appeal bearing no. 131 of 2011 and 132 of 2011.

SAT vide its order dated October 18, 2011[6] upheld the order of SEBI The Ld. Tribunal took the view that SEBI had jurisdiction over the Saharas since OFCDs issued were in the nature of securities and should have been listed on any of the recognized exchanges within the Country.

VI) Statutory Appeal u/s 15 Z of SEBI Act before the Hon'ble Supreme Court and the proceedings before the Hon'ble Supreme Court

- Aggrieved by the above captioned order, SIRECL preferred statutory C.A. No. 9813 of 2011 and SHICL filed C.A. No. 9833 of 2011 before the Hon'ble Apex Court.

A) Contention of the Parties in the Statutory Appeal before the Apex Court

I.

I. Contention of Sahara Companies Jurisdiction of SEBI-

- It was contended that since both the company were unlisted company therefore SEBI cannot have its jurisdiction under section 55 A of the SEBI Act to administer the provisions of Sections 56, 62, 63 and 73 of the Companies Act on an unlisted company without framing any Regulations u/s Section 642 (4) of the Companies Act[7].

- SEBI exercises the power with respect to listed companies and the public companies which intend to get their securities listed on any recognized stock exchange.

- Furthermore, it is the Central Government which is competent to administration of sections 56, 62, 63 and 73 with respect to OFCDs.

2) ***Repeal of Companies cannot be compelled to list the shares or debentures on stock exchange:-***

It was further urged on behalf of the company that the companies cannot be compelled to list their shares stocks on recognized stock exchange as the same will tantamount to invasion of corporate autonomy[8].

3) Section 67 of the Companies Act would not necessarily imply that company's offer of shares or debentures to fifty or more persons would ipso facto become a 'public issue' or a 'private offer':-

Intention of the offeror is a material factor and not the numbers as it has been stated by the SEBI in its orderare irrelevant.

4) SEBI cannot approbate and or reprobate regarding the jurisdiction of unlisted public companies:

The Appellant contended that the SEBI has stated on oath before various forum that an unlisted public company was not within its jurisdiction if the company did not intend to list their shares on stock exchange. Therefore, SEBI cannot now take contrary its stand when it comes to the case of the appellant. The Appellant in its defense has cited one Bombay High Court judgment ***Kalpana Bhandari vs. SEBI; MANU/MH/1065/2003*** and Delhi High Court judgment in ***Society for Consumers & Investment v. UOI;*** passed in W.P. 15467 of 2006.

6 Refer Para 42 of the Judgement and order passed by SAT in Appeal No. 131 of 2011

7 Refer Para 26 of the Judgment bearing C.A 9813 of 2011 and 9833 of 2011 dated 31.08.2012

8 Refer Para 34 of the Judgment bearing C.A 9813 of 2011 and 9833 of 2011 dated

II. Contention of SEBI and SAT

1) *SEBI had jurisdiction to administer the Saharas debentures*-

As per Section 55 A of the Act, proviso to Section 67 (3) and 73 of the Act and related provisions clearly bring out the intention of the Parliament i.e. even if an unlisted public company makes an offer of shares or debentures to 50 or more persons in that case, it becomes mandatory to follow all the statutory provisions that would culminate in the listing of those securities.

Further, in case once the number reaches fifty, in that case proviso to Section 67(3) applies and it is an issue to the public, attracting Section 73(1) and an application for listing becomes mandatory and, thereafter the jurisdiction vests with SEBI.

Section 55 A of the Act is applicable even for the cases where the company "*intend to" get their securities listed.*

Further on combined reading of the proviso to section 67 (3) and Section 73 (1), the offer was made by the Sahara to more than forty nine persons and hence the requirement to make application and that on a combined reading of the proviso to Section 67(3) and Section 73(1), since Saharas had made an offer of OFCDs to more than forty nine persons, the requirement to make application for listing became mandatory and SEBI has the necessary jurisdiction even though Saharas had not got their securities listed on a stock exchange.

Further, Mr. Arvind Datar, Learned Senior Counsel appearing on behalf of the SEBI vehemently stated that *Saharas should be judged by what they did, not what they* intended.

VII) Hon'ble Supreme Court findings

The Hon'ble Apex Court dismissed the appeal preferred by the Sahara Company and in its detailed judgment stated that SEBI has the power to administer the provisions referred to in the opening part of Section 55 which relates to issue and transfer of securities and non-payment of dividend by public companies like Saharas, which have issued securities to fifty persons or more, though not listed on a recognized stock exchange, whether they intended to list their securities or not and they were directed to refund the amount so collected through OFCD.

VIII) Analysis of The SEBI-Sahara Case

A) ***DID SEBI ENCROACH BEYOND ITS POWER***

Yes, there was encroachment

In the instant case the Company being unlisted company, it is the prerogative of Registrar to Call for information or explanation.[9] The underlining provision is contained in Section 234 (1) which deals with Power of Registrar to call for information or explanation. On pursuing through the affidavit which has been filed by the petitioner in the HC it has been stated by the Company that the petitioner company has communicated necessary information to Registrar of Companies which has been duly verified and was found satisfactory by the ROC.

No, there was no encroachment

As per SEBI the issue was to more than 50 persons so it has become a public issue and thereby there was a requirement of listing which was not complied and thereby SEBI derives its power. Taking the que from Bombay HC decision in the case of *PWC and Ors.* v *SEBI & Ors.*[10]wherein it was said that powers conferred to SEBI to regulate capital markets is of wide amplitude and SEBI's general domain extends to protecting investors of listed companies and the securities markets it can be said that SEBI in order to safeguard the interest of investors of listed companies of Sahara has taken this step and thereby it is within its jurisdiction.

B) Was SEBI justified in initiating Action against the Petitioner Company?

There have being instances reported[11] according to which investors who had given money to Sahara for booking flats in its proposed projects in 2003 have still not heard of even land being acquired for the project

9 *S. 234, The Companies Act, 1956.*

10 *Writ Petition No. 5249 of 2010, Bombay High Court*

11 *John Samuel Raja D, Sahara Stuck In Sand Much-Delayed Housing Projects And A Lack Of Transparency In Group Dealings Mar Sahara's Attempts To Raise Money From The Public, Outlook Business, Aug 21, 2010, available at: http://business.outlookindia.com/article.aspx?266568, (visited on 1st march,2011)*

and they are left with no remedy with their money stuck with Sahara. Sahara invests the investor money in numerous ventures like sponsoring of Indian Cricket Team, investment in Production houses so an accusation has often being levelled against Sahara that it invests the investor money without any accountability to investors thereby SEBI order barring Sahara from raising the money if seen in the holistic line can be considered to be justified.

IX) Recent Updates on SEBI- Sahara dispute and the arrest of Suborto Roy and Sahara directors for wilful non-compliance of Hon'ble Apex Court order

After having noticed and witnessed that Sahara companies including its directors were not complying with the direction and order dated 31.08.2012, The Hon'ble Apex Court in rare and exceptional case issued NBW vide order dated 26th February, 2014 against Sahara Chief Mr. Subrata Roy in the contempt proceedings initiated by SEBI. The Hon'ble Court in its strong worded order asked the Sahara Chief to be produced on the next date of hearing. Some of the media reports published stated that the Court went on to the extent stating that *"The arms of this court are very long. We will get him here if he does not want to come on his own. If other directors can come, why can't he? Yesterday only we had refused your plea for exemption from personal appearance. All this is going on for last two years. We are issuing non-bailable warrant now*[12]*"*

Since then, Sahara Chief is in Tihar Jail even though he has been granted bail by the Hon'ble Apex Court vide its order dated 18th June, 2015. He is still not enlarged on bail because as per the order granting bail, Sahara group has to furnish Rs. 1000 crore half in cash and half in guarantee which the company has failed to do so till date and therefore, the Group MD has not been released on bail.

In a recent crackdown, SEBI has cancelled the Certificate of Registration of the Sahara Mutual Fund license[13] and has also debarred Sahara Mutual fund/ Sahara Asset Management Company from taking any new subscriptions from the investors. Further, the Sahara Mutual Fund shall not levy any penalties/ loads on the SIP/ STP investors for not depositing the instalments.

CONCLUSION

From the happening around the world be it Facebook or Sahara it is clear that going Public to raise money is becoming out of fashion. In the wake of these corporate horses getting more enthusiastic it becomes even more onerous for regulatory bodies to match up with their enthusiasm. Laws in US were practical enough to deter Goldman Sachs from including US investor in their offering whereas in the case of SAHARA such a happening fell into a jurisdictional conflict.

Pertinently, the order of the Hon'ble Supreme Court issuing NBWs against once upon a time giant company clearly goes on to state that defaulter cannot take law for a ride and dupe the investor of their hard earned money. It was primarily why the SEBI was established by the Parliament after the infamous Harshad Mehta and Ketan Parikh scam in order to protect the interest of the investor which were blatantly dumped by unscrupulous investor by offering them attractive return. Subrato Rai and two directors of Sahara still continues to be in jail even though they have been granted bail by the Apex Court for the obvious reason that the Hon'ble Apex Court has placed stringent terms and conditions for the release of Saharashri.

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12 *SC orders arrest of Sahara chief Subrata Roy, says 'arms of court very long' : http://indianexpress.com/article/india/india-others/sc-orders-arrest-of-sahara-chief-subrata-roy-says-arms-of-court-very-long*

13 *http://www.sebi.gov.in/cms/sebi_data/attachdocs/1438083387013.pdf*

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NECESSITY IS THE MOTHER OF ALL INTERPRETATION

Rahul Pandey

INTRODUCTION:

The basic Principle of Interpretation of Statutes is to remove the ambiguity and enlarge the scope of legislation and intention of the legislature. It is well settled that the real intention of the legislation must be carved out from the language used. Any ambiguity in the statute should be dealt by way of construction on the ground that such construction is more consistent with the alleged object and policy of the Act. Recently the Hon'ble Apex Court in the matter of ***Kirshna Texport & Capital Markets ltd.v.Ila A. Agrawal & Ors***[1] while interpreting the provision of Section 138 and 141 of Negotiable Instrument Act, 1881 (hereinafter N.I Act) has held that the notice of dishonour of cheques to the company is sufficient, and there is no need to serve separate notices on the directors.

BACKGROUND:

The Appellant herein issued a notice on 14.09.1996 u/s 138 of N.I Act, 1881to M/s Indo French Bio Tech Enterprises Ltd. No reply was sent to the aforesaid notice thus the Appellant filed Complaint Case No. 243/S/1996 before the Additional Chief Metropolitan Magistrate, 5th Court at Dadar, Mumbai against the Company, Mr. K.J. Bodiwala, the Chairman and Managing Director of the Company and 11 other directors including Respondent Nos. 1 and 2. In so far as the directors are concerned, it was averred that they were in-charge of the business of the Company and its day to day affairs and were liable. During trial it was found that no individual notices were given to the directors. The Metropolitan Magistrate by his judgment and order dated 30.4.2007 convicted the Company but acquitted Respondent Nos. 1 and 2 of the offence punishable under Section 138 of the Act. Relying on the judgment of the Division Bench of Madras High Court in *B. Raman & Ors. Vs. M/s.Shasun Chemicals and Drugs Ltd*[2], it was observed that statutory notice under Section 138 of the Act was required to be issued to every Director and for non- compliance of such mandatory requirement respondents 1 and 2 could not be proceeded against. Thereafter the Appellant being aggrieved preferred a Criminal Application No. 2174 of 2007 in the High Court seeking leave to prefer an appeal against the judgment acquitting Respondent Nos. 1 & 2. The Hon'ble High Court of Bombay also relied on the judgment of the Division Bench of Madras High Court B. Raman & Ors. (supra) observed that it was mandatory
to have issued separate notices to the directors. The High Court held that without service of notice to individual directors, vicarious liability of the offence u/s 138 of N.I Act cannot be fastened on them.

1 *Criminal Appeal No. 1220 of 2009*
2 *2006 Cril. L.J. Page 4552*

HELD:

The most significant issue to be adjudicated upon by the Hon'ble Apex Court was ***whether notice under Section 138 of the Act is mandatorily required to be sent to the directors of a Company before a complaint could be filed against such directors along with the Company***. After measuring all the aspects of the arguments advanced from both the sides, the Hon'ble Court duly observed the ratio held by the Apex Court in the judgment of ***Kanai La Sur vs. Paramnidhi Sadhukhan***[3] on the principles concerning interpretative function of the Court and thus held that Section 141 again does not lay down any requirement that in such eventuality the directors must individually be issued separate notices under Section 138. The persons who are in charge of the affairs of the Company and running its affairs must naturally be aware of the notice of demand under Section 138 of the Act issued to such Company. It is precisely for this reason that no notice is additionally contemplated to be given to such directors. The opportunity to the 'drawer' Company is considered good enough for those who are in charge of the affairs of such Company. If it is their case that the offence was committed without their knowledge or that they had exercised due diligence to prevent such commission, it would be a matter of defense to be considered at the appropriate stage in the trial and certainly not at the stage of notice under Section 138.

ANALYSIS:

Recently N.I Act, 1888 has witnessed various modifications and interpretations in the arena of Hon'ble Supreme Court of India. A Three-judge bench

3 *(1958) SCR 360*

of the Apex Court vide *Dashrath Rupsingh Rathod v. State of Maharashtra and Another*[4], of India held that the territorial jurisdiction *qua* dishonour of cheques is restricted to the court within whose local jurisdiction the offence was committed, i.e. the bank on which it is drawn. The observations of the Apex Court in *Dashrath Rupsingh* totally changed the whole picture depicted by Apex Court's observations and findings in, *inter alia*, *K. Bhaskaran v. Sankaran Vaidhyan Balan*[5] and *Harman Electronics Pvt. Ltd. v. National Panasonic India Pvt. Ltd.*[6]. Subsequent to the Ordinance, the jurisdiction to hear complaints under Section 138 of the Act now vests with the court within whose jurisdiction the bank branch of the payee is situated. Further, in terms of Section 142A of the Act, all subsequent complaints under Section 138 of the Act against the same drawer shall be filed before the same court, regardless of the place where the cheques were presented for payment. This position is a clear departure from the position laid down by the Apex Court in the *Dashrath Singh*. Thereafter on 15.06.2015, the President of India promulgated the Negotiable Instruments (Amendment) Ordinance, 2015, thus the jurisdiction to entertain the complaint again shifted to the courts within whose jurisdiction the cheque gets dishonored but now the same ordinance has lapsed and till now neither the legislature nor the judiciary has come out with an unambiguous mandate. Now vide the recent judgment the Apex Court has out rightly held that Section 138 of the 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 Act. Such directors who are in charge of affairs of the Company and responsible for the affairs of the Company would be aware of the receipt of notice by the Company under Section 138. 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 Act.

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4 *Criminal Appeal No. 2287 of 2009*
5 *(1999)7SCC510*
6 *(2009) 1 SCC 720*

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WHO OWNS THE RASOGULLA OR ROSSOGULLAS?

Himanshu Sharma & Mansha[1]

INTRODUCTION:

The concept of intellectual property rights while gaining importance in the society is also creator of many disputes which in most near past nobody had heard about. The things which we thought are only for enjoyment of masses nowadays are the subject of legal disputes although it does not mean that the right holder should not get it dues and should not be allowed to reap the benefits out of its intellect he puts in to create something which is not only unique but also an integral part of life of the masses.

The recent row over who invented the mouth watering "Rasogulla" compels us to look into the legal position of Geographical Indications in India. The battle between the two neighbours West Bengal and Odisha over the flavorsome sweet developed after the Micro, Small and Medium Enterprises (MSME) department of the Odisha government started off a move to get Geographical Indication (GI) status, (which identifies a product as originating from a certain location and assures its distinctive quality) for the famous Pahala Rasagola, the **stuff** made at Pahala village located midway between Bhubaneswar and Cuttack on the National Highway No 5. On the other hand, the great grandson of legendary Nobin Chandra Das, Mr. Dhiman who is also the executive director of renowned KC Das Pvt. Ltd claimed that the heavenly sweet "Rasogullas" was invented by his ancestors. He further said that he would welcome any move by the Odisha government to find out the truth as he has all the documents to substantiate his assertion. However, whether this fact that the department of Odisha government has in reality moved to get this sweetmeat registered is still in clouds. The answer to this question that which state will be able to register delectable "Rasogullas" with Geographical Indication Registry of India that only time will tell. Meanwhile, let us try to see whether one of the common sweet of India can be monopolized by either of these states.

WILL RASOGULLA BE ABLE TO SATISFY THE CRITERIA FOR REGISTRATION?

According to the *Section 2(e) of The Geographical Indications of Goods (Registration & Protection) Act, 1999 "geographical indication"* in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned take place in such territory, region or locality, as the case may be. As per the explanation, any name which is not the name of the country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that country, region or locality, as the case may be.[2]

Section 2(f) The Geographical Indications of Goods (Registration & Protection) Act, 1999 defines "goods" as any agricultural, natural or manufactured goods or any goods of handicraft or of industry and includes food stuff.[1] For registration of Rasogulla as a GI will require certain things. Now let us ask this question to ourselves, whenever we enjoy this sweetmeat do we get connected to Odisha, or for that matter West Bengal. The Rasogullas which are available at almost every confectionary or *halwai* shop of Delhi have become so common that we don't really get associated with the place from where it is claimed to be invented. Like for example when we talk about other GIs, like *Nagpur Oranges, Pashmeena Shawls, Kolhapuri Chappals, Madhubani painting* etc., we are able to connect ourselves to the place from where it belongs. In fact that is what one of the functions of GI Laws is. If we ask the same question about Rasogullas, the answer will not be one, as some people may say Bengali Rasogullas while others may take the name of *Haldiram*, *Nathus*,

1. *Student of Campus Law Centre, Faculty of Law New Delhi Final year*

2 Section 2(f) of The Geographical Indications of Goods (Registration & Protection) Act, 1999

Bikanerwala or sweetshops of *Chandni Chowk*. It shows that the word Rasogulla has become generic. An Indian consumer or a sweet lover identifies this delicious sweet as something which is available at every Halwai's shop. So if the public perception cannot connect this sweet to any of these states then how can it be registered under the GI Act? It is going to be really difficult for both the states to establish that how a person living in India or abroad gets connected to their state as soon as they see Rasogullas. The word Rasogullas has become very common like *halwa, jalebi and ladoo*. It is going to be really tedious to prove the geographical indication of Rasogulla before the GI Registry because of its common/generic nature. Any application to register the a generic word would be hit by Section 9(f) of *The Geographical Indications of Goods (Registration & Protection) Act, 1999* Act, which prohibits registration of generic names or indications of goods that are not protected or ceased to be protected, or which have fallen into disuse.

WHETHER THE CONTROVERSY IS ABOUT BENGALI RASOGULLA OR PAHALA RASOGULLA?

If the controversy is about the Pahala Rasogulla of Odisha, then the matter can be more comforting as these are different from the common Rasogulla which we find in every sweet shop of India. To be honest I have not tasted it yet but like some reports suggest that the Pahala Rasogullas are brown in colour, soft (not spongy) and not very sweet. And also due to their thin syrup they don't have a long shelf life and have to be consumed in Pahala shops itself. So if this is the matter, then there is not much into it which has to be debated. Off course the concerning department of Odisha Government have to comply with the provisions of *The Geographical Indications of Goods (Registration & Protection) Act, 1999* Act to prove that the Pahala Rasogullas satisfies the necessary requirement for registration.

CONCLUSION

While concluding, we can say that why this move by Odisha government is a cause of concern for other confectionaries including renowned K C Das Pvt. Ltd. is precisely because of the fact that according to some news papers have reported that the Odisha Government has already moved the GI Registry of India for registration of "White Rasogullas". And as we know the effect of registration that if Odisha government is successful in getting Rasogullas's GI registered as belonging to their state no other confectionary will be able to call their sweetmeat as Rasogullas! Yes, that will be the case. So, the Rasogullas which are available at our arm's length will be shifted to Odisha! And only the registered proprietors and authorised users will be able to use the word "Rasogullas" for their product. In this regard I can only suggest one thing that by the time the controversy grows further and the authorities decides, let us relish our taste buds with two-three rasogullas as the victory or defeat of one over the other is not at all going to reduce the taste of the heavenly dessert.

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COMPULSORY LICENSE: THE MOST HAPPENING SECTION OF THE PATENTS ACT, 1970

Case review: Lee Pharma vs. AstraZeneca's *'Saxagliptin'*

Aayush

In a year 2012, when Patent office issued India's first Compulsory license (CL) to Natco for Nexavar - sorafenib tosylate, Indian Patent law has gained lot of importance worldwide. Some countries are against the decision of granting of CL and some are in their favour. Pertinently, at the stage of grant of CL, India has faced lot of challenges among Pharma industry mainly on the issues of Intellectual Property. Grant of Natco compulsory license has brought a new hope in the Pharma industry and in the country where high prices of life saving drugs are just meant for few wealthy patients and not to the poor and needy.

The article will throw light on the laws prevailing with respect to the Compulsory license in Patents Act, 1970 and the reasons stated by the Controller in light of Section 84 of the Patent Act, 1970 for holding the CL application made by the Lee Pharma.

INTRODUCTION TO COMPULSORY LICENSES

Compulsory licenses are generally defined as "authorizations permitting a third party to make, use, or sell a patented invention without the patent owner's consent." Under Indian Patent Act, 1970, the provision with regard to compulsory licensing is specifically given under Chapter XVI. The conditions which need to be fulfilled in order for a compulsory licence to be granted are laid down under Sections 84 and 92 of the Act. As per Section 84, any person who is interested or already the holder of the licence under the patent can make a request to the Controller for grant of Compulsory Licence on patent after three years from the date of grant of that patent on the existence of conditions mentioned in the Section 84 of the Patents Act, 1970. While granting the compulsory licence, the Patent office will take into account few measures such as the nature of the invention, any measures already taken by the patentees or any licencee to make full use of the invention, ability of the applicant to work the invention to the public advantage and time elapsed since the grant of the patent i.e. worked or not worked.

SECTION PERTAINING TO THE COMPULSORY LICENSE IN INDIA:

Section 84[1]:

(1) At any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent on any of the following grounds, namely:—

(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or

(b) that the patented invention is not available to the public at a reasonably affordable price, or

(c) that the patented invention is not worked in the territory of India.

CASE REVIEW: LEE PHARMA LTD. VERSUS ASTRAZENECA[2]

After the successful grant of CL to Natco, many Pharma companies are now trying to grab the benefit of Compulsory licenses in order to make highly expensive drugs at a very low price and easily accessible to public.

Recently, Lee Pharma, a Hyderabad based Indian Pharma Company, filed a Compulsory Licensing (CL) Application for selling and manufacturing the compound on June 29, 2015 at the Patent office, Mumbai. The CL was filed against one of the patented drug 'Saxagliptin' protected under the Patent number 206543 in the name of AstraZeneca with tile as *"A CYCLOPROPYL-FUSED PYRROLIDINE-BASED COMPOUND"*. As informed the 'Saxagliptin' was used for treating Type II Diabetes Mellitus.

1 *http://ipindia.nic.in/ipr/patent/eVersion_ActRules/sections/ps84.html*

2 *http://spicyip.com/wp-content/uploads/2015/08/Lee-prima-facie-notice1.pdf*

Section 84(1) of Patents Act 1970 states that after the expiration of three years from the date of grant of patent any person may make an application for grant of compulsory licence on three grounds - the reasonable requirements of the public have not been satisfied or the patented invention is not available to the public at an affordable price or the patented invention is not worked in the territory of India[3]. According to the notice issued by the Patent office in August, 2015 the Controller has informed that the Lee Pharma failed to make out prima facie case for the CL application. Various reasons have been mentioned by the Controller where the Lee Pharma has failed to be as *prima facie* in the said CL application.

Earlier in the year 2014 Lee pharma has requested the AstraZeneca for license of the patented drug 'Saxagliptin'. The AstraZeneca then replied in response to the Lee pharma letter and provide the clarification for not giving any license along with the details of the availability of said drug. Further for not receiving the appropriate reply from the AstraZeneca, despite of the fact that AstraZeneca has send the email reply to Lee and Lee pharma was in fact that no reply has been received from AstraZeneca, the Lee pharma send many reminders to AstraZeneca and later approached to the Patent office for seeking the grant of compulsory license.

As per the Controller's decision in holding the application, the first request for license made by the Lee pharma to the AstraZeneca, was more than 13 months prior to the filing of the application at the Patent office. As per the time frame mentioned in section 84(4) of the Patents Act, 1970 is 06 months which has elapsed in the subject case without any efforts being successful. This is the first reason for holding the CL application of Lee pharma and denied the request.

As per the Section **84(1)(a)** where reasonable requirements of the Public with respect of Patented invention has not been satisfied, in view of this, the Controller stated that the *Prima facie* case has not been made out by the Applicant to the effect that Lee pharma was unable to make out the reasonable requirements of the Public with respect of Patented invention. The Controller has noted the presence of equally efficacious DPP-4 inhibitors that can be substituted for Saxagliptin in treating Type II Diabetes Mellitus, and found that it was impossible for Lee to make assumptions about the demand for Saxagliptin without accounting for these substitutes[4]. This is the second reason for holding the CL application of Lee pharma and denied the request for CL.

Further the Lee pharma has also failed to *Prima facie* show that the patented invention is not available to the Public at a reasonable affordable price and thus no case has been made in such respect. This reason of Controller has been guided by the Bayer vs. UOI[5] where the price difference quoted by the applicant and respondent was very high. i.e. Rs. 2,84,000 and Rs. 8,800 whereas in the present case, the price quoted by the Lee pharma was marginally cheaper than AstraZeneca's and thus the Controller has been unable to find that the patented product is not available at an affordable price as per **Section 84(1)(b)** of the Patents Act, 1970.
Lastly as per **Section 84(1) (c)** of the Patents Act, the Lee pharma again failed to *Prima facie* show that the Patented invention is not worked in the territory of India and thus the reason for upheld the CL application for 'Saxagliptin' in India. In this section the Controller cited Bayer CL case where it was mentioned that local working does not entail local manufacturing in all cases. According to Controller, the patentee is only obligated to furnish reasons that make it prohibitive to manufacture the product locally, and that even this requirement holds particularly in those situations where the patentee possesses manufacturing capabilities in India. The Controller also held that in the absence of any data concerning AstraZeneca's local manufacturing capability provided by Lee pharma, they cannot accept that a prima facie case under this provision has been made out.

IMPORTANT DISCLOSURE MANDATED BY THE PATENT OFFICE TO FOLLOW:

In reviewing the compulsory license case, there is one more section which is very important for the CL in India. Section 146(2) of the Patents Act, 1970 read with Rule 131 of the Patent Rules, 2003 compels every patentee and her licensee to make an annual disclosure as to how far and to what extent they have commercially

3 *http://health.economictimes.indiatimes.com/news/pharma/india-rejects-lee-pharmas-compulsory-licence-plea/48521691*

4 *http://spicyip.com/2015/08/saxagliptin-cl-round-1-controller-shoots-down-lee-pharma.html*

5 *https://indiancaselaws.wordpress.com/2013/12/14/bayer-corporation-and-ors-vs-union-of-india-uoi-and-ors/*

worked their patent[6]. In this respect recently Delhi High Court issued notice to the Government of India in a PIL (Public Interest Litigation) filed by the petitioner[7]. This notice has been issued because most of the major pharma MNC's routinely violate patent working norms and the Indian Patent office has not taken any step in violating such norms to these companies. Before going further, there is a need to understand how section 146 related to the compulsory license. As per section 146(2) of the Patents Act, 1970 every patentee and her licensee has to make an annual disclosure as to how far and to what extent they have commercially worked their patent in India or abroad.

SECTION 146: POWER OF CONTROLLER TO CALL FOR INFORMATION FROM PATENTEES

(1) The Controller may, at any time during the continuance of the patent, by notice in writing, require a patentee or a licensee, exclusive or otherwise, to furnish to him within two months from the date of such notice or within such further time as the Controller may allow, such information or such periodical statements as to the extent to which the patented invention has been commercially worked in India as may be specified in the notice.

(2)Without prejudice to the provisions of sub-section (1), every patentee and every licensee (whether exclusive or otherwise) shall furnish in such manner and form and at such intervals (not being less than six months) as may be prescribed statements as to the extent to which the patented invention has been worked on a commercial scale in India.

(3)The Controller may publish the information received by him under subsection (1) or sub-section (2) in such manner as may be prescribed.

In our Patent laws section 146 i.e. working statement plays an important role at the time of compulsory licensing cases. With the help of working statement [which are required to be filed before the expiration of 31st March of every year] the details provided by the Patentee or their licensee one can estimate whether the patentee has fulfilled the reasonable requirements of the public by *interalia* selling the patented product at an affordable price or at higher price violating the section 84 (1)(b) of the Patents Act. This information played a critical role in the *Lee Pharma Ltd. Versus AstraZeneca* and *Bayer vs. Natco* compulsory licensing dispute, where these details helped the Controller in getting the decision related to grant or rejection of Compulsory license when applied. In the first grant of CL application, Natco obtained the details from the working statement filed by the Bayer that its super expensive patented drug for kidney/liver cancer was reaching just about 2% of the patient population and sold at a very high price violating the section 84 norms of the Patents Act.

In this way, if the patentee fails to fulfil this important statutory information, the penalty in the form of compulsory licensing and revocation of Patent will come and this will take such companies in loss of Patent and also it is impossible to determine whether a patentee has satisfied the reasonable requirements of the public, an important precondition for compulsory licensing in India.

CONCLUSION

It is believed that this era will bring more challenges in terms of grant/ rejection of CL for more patented drugs. More rivalry is yet to be seen between Indian pharma giants and larger MNCs. The functioning of Indian Patent office in dealing with CL case will also bring more clarity about the future of CL in India and the rules prevailed such laws in India.

In the present case, it is to be understood that the Controller has not fully denied the CL application of Lee pharma rather the Controller has only inform the Lee pharma that they have not made out the prima facie case for the order under Section 84. As per the notice issued by the Controller, under Rule 97 (1), Lee pharma has one month from the date of notification to request for the hearing, if it wants to proceed with the application and if request for hearing is not made, Controller shall refuse the application.

Now it's time to watch how Lee Pharma prepare them for Grant of India's 2nd CL, the Controller's final decision in grant or rejection of such compulsory license and the impact of petition filed in respect of non submission of working statement details to those companies who are not following the proper submission of working disclosures.

6 *http://spicyip.com/2011/04/drug-firms-and-patent-working-extent-of.html*

7 *http://spicyip.com/wp-content/uploads/2015/05/FORM-27-WP-1R-copy.pdf*

INDIAN PATENT OFFICE ISSUED GUIDELINES FOR EXAMINATION OF COMPUTER RELATED INVENTIONS (CRIS)

Priyanka Rastogi & Saipriya Balasubramanian

The Office of Controller General of Patents, Designs and Trademarks issued the finalized **Guidelines for examination of Computer Related Inventions (CRIs)**[1] with effect from 21st August 2015. The basic aim of the draft guidelines is to bring uniformity and consistency in the examination procedure. The said Guidelines discusses in detail about the legal provisions relating to CRIs, different terminologies used, procedure to be adopted by examiners for examination of such patent applications and jurisprudence involved in granting or rejecting patents in the field of technology. The finalized guidelines also includes illustrative example of inventions which are Patentable and which are non-patentable. The following is some important points as mentioned in the finalized guidelines.

TERMS AND DEFINITIONS:

The terms and definitions used in CRIs are summarized as follows;

Algorithm	a set of rules that must be followed when solving a particular problem
"computer" Is defined in The Information Technology Act, 2000 (No. 21 of 2000)	any electronic, magnetic, optical or other high- speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network.
computer network	the interconnection of one or more computers through -(i)the use of satellite, microwave, terrestrial line or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained
Computer programme (Copyright Act 1957 u/s 2(ffc)	computer programme means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result
Computer System	a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions

1 *http://www.ipindia.nic.in/iponew/CRI_Guidelines_21August2015.pdf*

Data	a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer
Firmware	type of computer software that is stored in such a way that it cannot be changed or lost
Function	function", in relation to a computer, includes logic, control arithmetical process, deletion, storage and retrieval and communication or telecommunication from or within a computer
Hardware	the physical and electronic parts of a computer, rather than the instructions it follows
Information	information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche
Manual	"Manual of Patent Office Practice and Procedure" issued by CGPDTM, as may be amended from time to time, unless there is anything repugnant in the subject or context
Per se	"by itself"- to show that you are referring to something on its own, rather than in connection with other things
Software	the programs, etc. used to operate a computer

EXAMINATION PROCEDURE:

The determination that the subject matter relates to one of the excluded categories requires greater skill on the part of the examiner and the following focus more on this aspect in consideration of novelty, inventive step, industrial applicability, sufficiency of disclosure and other requirements under the Patents Act and the rules made there under.

DETERMINATION OF EXCLUDED SUBJECT MATTER RELATING TO CRIS:

The sub-section 3(k) excludes mathematical methods or business methods or computer programme per se or algorithms from patentability. Computer programmes are often claimed in the form of algorithms as method claims with some 'means' indicating the functions of flow charts or process steps. It is well-established that in patentability cases, the focus should be on underlying substance of the invention not the particular form in which it is claimed.

1. Claims directed at "Mathematical Method": Mathematical methods are a particular example of the principle that purely abstract or intellectual methods are not patentable. Mathematical methods like method of calculation, formulation of equations, finding square roots, cube roots and all other methods directly involving mathematical methods are therefore not patentable. With the development in computer technology, mathematical methods are used for writing algorithms and computer programs for different applications and the invention is claimed as one relating to the technological development rather than the mathematical method itself. However, mere use of a mathematical formula in a claim, to clearly specify the scope of protection being sought, would not necessarily render the claim to be mathematical method.

Examples which may not fall under category of "mathematical method" exclusion	**Examples which will attract "mathematical method" exclusion**

Any computing/ calculating machine constructed to carry out a method	Acts of mental skill. e.g. A method of calculation, formulation of equations, finding square roots, cube roots and all other methods directly involving mathematical methods like solving advanced equations of mathematics.
Method of encoding/decoding, method of encrypting/ decrypting, method of simulation though employing mathematical formulae for their operations may not fall under these exclusions	merely manipulates abstract idea or solves a purely mathematical problem without specifying a practical application

2. Claims directed at "Business Method": The claims drafted not directly as "business methods" but apparently with some unspecified means are held un-patentable. However, if the claimed subject matter specifies an apparatus and/or a technical process for carrying out the invention even partly, the claims shall be examined as a whole. Only when in substance the claims relate to "business methods", they are not considered to be a patentable subject matter.

However, mere the guidelines further states that usage of the words such as "enterprise", "business", "business rules", "supply-chain", "order", "sales", "transactions", "commerce", "payment" etc. in the claims should not lead to conclusion of a Computer Related Invention being just a "Business Method", but if the subject matter is essentially about carrying out business/ trade/ financial transaction and/or a method of selling goods through web (e.g. providing web service functionality), should be treated as business method.

3. Claims directed at algorithm: The guidelines specifies that algorithms in all forms including but not limited to, a set of rules or procedures or any sequence of steps or any method expressed by way of a finite list of defined instructions, whether for solving a problem or otherwise, and whether employing a logical, arithmetical or computational method, recursive or otherwise, are excluded from patentability.

4. Claims directed at *computer Programme per se*: The guidelines states that the claims which are directed towards computer programs per se are excluded from patentability like,

i. Claims directed at Computer Programmes/set of instructions/ routines and or Sub-routines written in specific language

ii. Claims directed at "Computer Programme products"/"storage medium having instructions"/"Database"/" computer memory with instruction" i.e computer programmes per se stored in a computer readable medium.

Note: The legislative intent to attach the suffix per se to computer programme is due to the view expressed by Joint Parliamentary Committee while introducing Patents Amendments Act, 2002:"*In the new proposed clause (k) the words "per se" have been inserted. This change has been proposed because sometimes the computer programme may include certain other things, ancillary thereto or developed thereon. The intention here is not to reject them for grant of patent if they are inventions. However, the computer programmes as such are not intended to be granted patent. This amendment has been proposed to clarify the purpose.*"

DETERMINANTS FOR PATENTABILITY:

The guidelines state that for being patentable, the subject matter should involve either;

i. A novel hardware or

ii. A novel hardware with a novel computer programme or

iii. A novel computer programme with a known hardware which goes beyond the normal interaction with such hardware and affects a change in the functionality and/or performance of the existing hardware.

A computer Program, when running on or loaded into a computer, going beyond the "normal" physical interactions between the software and the hardware on which it is run and is capable of bringing further technical effect may not be considered as exclusions under these provisions.

INDICATORS TO DETERMINE TECHNICAL ADVANCEMENT:

While examining CRI applications, the examiner should confirm that the claims have the requisite technical advancement. The following questions are addressed by the examiner in determining the technical advancement:

(i) whether the claimed technical feature has a technical contribution on a process which is carried on outside the computer;

(ii) Whether the claimed technical feature operates at the level of the architecture of the computer;

(iii) whether the technical contribution is by way of change in the hardware or the functionality of hardware

(iv) whether the claimed technical contribution results in the computer being made to operate in a new way;

(v) in case of a computer programme linked with hardware, whether the programme makes the computer a better computer in the sense of running more efficiently and effectively as a computer;

(vi) Whether the change in the hardware or the functionality of hardware amounts to technical advancement.

If answer to ANY of the above questions is in affirmative, the invention may not be considered as exclusion under section 3 (k) of the Patents Act, 1970.

Note: Certain provisions of Manual were deleted by the office of CGPDTM. Chapter 08.03.05.10 of the Manual, containing provisions pertaining to section 3(k) of the Patents Act, 1970 shall stand deleted with coming into force of these Guidelines for examination of CRIs.

EXAMPLES OF CLAIMS WHICH ARE PATENTABLE:

The draft guidelines provide some illustrative examples of some of the granted claims by Indian Patent Office:

1. An apparatus (610, 650) for eigen value decomposition and singular value decomposition of matrices in wireless communications comprising: plurality of transmitters (622a; 622ap);plurality of receivers (622a; 622ap);

a controller (630) configured to receive traffic data and generating data symbols;

a transmit (TX) data processor (614) coupled to said controller (630);

a receive (RX) data processor (642) coupled to said controller (630);

a channel processor (628) coupled to said controller (630);

wherein said channel processor (628) and said controller (630) performs a plurality of iterations of Jacobi rotation on a first matrix of complex values with a plurality of Jacobi rotation matrices of complex values, wherein, for each of the plurality of iterations, said channel processor (628) and said controller (630) is configured to form a sub matrix based on the first matrix, to decompose the sub matrix to obtain eigenvectors for the sub matrix, to form a Jacobi rotation matrix with the eigenvectors, and to update the first matrix with the Jacobi rotation matrix, and to derive a second matrix of complex values based on the plurality of Jacobi rotation matrices, the second matrix comprising orthogonal vectors; and a memory (632) coupled to the said channel processor (628, 630) and said controller (678, 680)

2. IPAB Decision relating to CRI

While dealing with a patent application having title "**Method for controlling a wind turbine and a wind turbine"**, IPAB observed that this is normally a computer operated or computer controlled technical instrumentation processing of the utilities to achieve the target in an automatic fashion and this technical process control associated with or directed to a computer set up to operate in accordance with a specified program (whether by means of hardware or software) for controlling or carrying out a technical process control such as the above, cannot be regarded as relating to a computer program per se or a set of rules of procedure like algorithms and thus are not objectionable from the point of view of patentability, more so when the claims do not claim, or contain any algorithm or its set of rules as such, but only comprise of some process steps to carry out a technical process or achieve a technical effect finally the maximum

power output by controlling the wind turbine. Hence the objection that invention is not patentable under section 3(k) fails or not valid

The guidelines further include numerous illustrated examples of granted patents on CRIs by the Indian Patent office

Examples of Claims which are not Patentable

The following example exhibit excluded categories and claims refused by the Indian Patent Office:

1. A patent application was filed with the following main claim:

A method of scoring compatibility between members of a social network, said method comprising the steps of: preparing interest compatibility scores based on expressed Interests of the members of the social network; and computing a compatibility score between a first member of the social network and a second member of the social network based on expressed interests of the first member, expressed interests of the second member, and the interest compatibility scores between the expressed interests of the first member and the expressed interests of the second member.

In the above case the Controller held the said method for scoring compatibility between the social network users is nothing but a business method which shall be used commercially. Thus the subject matter of the instant invention cannot be allowed u/s 3(k) of The Patents Act, 1970. Further, the said method for scoring compatibility between the social network users, say estimating the probability and dividing the estimated probabilities from the resultant product, is a mere a mathematical method which cannot be allowed u/s 3(k) of The Patents Act, 1970. The subject matter of the instant invention, say the method for computing compatibility score, is based on a scheme/predefined set of rules which cannot be allowed u/s 3(m) of The Patents Act, 1970.Hence, in view of the above pending objections, this application was refused u/s 15 of the Patents Act, 1970".

CONCLUSION:

The above guidelines discussed various provisions relating to the patentability of computer related inventions. The guidelines further provide various examples and case laws relating to CRIs for better understanding of the issues involved from the perspective of the Patent Office. Therefore, the guidelines for the examination of patent applications in the field of CRIs by the Indian Patent Office serve as ready reckoner for the examiners so as to foster uniformity and consistency in the examination of such applications.

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NEWSBYTE

GUIDELINES FOR COMPOUNDING OF OFFENCES OF PERSONS HOLDING UNDISCLOSED FOREIGN BANK ACCOUNTS/ ASSETS

The Central Board of Direct Taxes (CBDT), Government of India, issued guidelines on September 4, 2015, for Compounding of Offences under Income Tax Act, 1961 (hereinafter referred as 'IT Act')/Wealth tax Act, 1957 in cases of persons holding undisclosed foreign bank accounts/assets.

As per Section 279(2) of the IT Act, any offence under chapter XXII of the Act may, either before or after the institution of proceedings, be compounded by the CCIT/DGIT. As per section 2(15A) and 2(21) of the IT Act, Chief Commissioner of Income Tax includes Principal CCIT and Director General of Income tax includes Principal DGIT. Accordingly, the CBDT issued guidelines *vide* F. No.-285/35/2013-IT (Inv.V) dated 23.12.2014.

These guidelines came into effect from 01.01.2015 and are applicable to all applications for compounding received on or after the aforesaid date. The applications received before 01.01.2015 shall continue to be dealt with in accordance with the guidelines dated 16.05.2008.

Doubts have been expressed by the field formation as to whether offences relating to undisclosed foreign bank accounts/assets could be compounded as per the extant guidelines of the Board dated 23.12.2014. The matter has been examined in consultation with the Special Investigation Team (SIT).

In this regard, the following clarification is issued in continuation to the Board's guidelines for compounding of offences dated 23.12.2014:

Offences relating to undisclosed foreign bank accounts/ assets can be compounded only after filing the Prosecution complaint(s) and shall not be compounded at the stage of show cause notice and/or without filing the complaint in the court;

The cases in which the assessee has not admitted the foreign bank account(s)/assets and/or has not cooperated with the Department in the assessment, penalty & recovery proceedings shall not be compounded;

The cases in which the assessee has admitted accounts/ assets either fully (all accounts with which he is associated) or partially (only a few account out of all accounts with which he is associated), paid taxes and penalty and cooperated with the Department may be considered for compounding as per the guidelines dated 23.12.2014, only after filing the complaints;

It has been further clarified that there is no provision for compounding of offences under the newly enacted Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015. Consequently, the above clarifications will not apply to cases coming under the purview of this Act.

CONTROLLER GENERAL OF PATENTS, DESIGNS & TRADEMARKS DECLARED A CLARIFICATION ON SECTION 5(3) OF DESIGNS ACT, 2000.

Controller General of Patents, Designs & Trademarks, via circular No. 1 of 2015 dated 18.08.2015 declared a clarification on Section 5(3) of the Designs Act, 2000. As per Section 5 (3) of the Act, "a design may be registered in not more than one class". Section 6(1) of the Act, reads as "A design may be registered in respect of any or all of the articles comprised in a prescribed class of articles"

Rule 11(2) of the Design Rules 2001 reads as "The application shall state the class in which the design is to be registered, and the article or articles to which the design is to be applied." The Third Schedule of the Design Rules, 2001 provides for the classification of goods in which classes and sub-classes are listed.

Upon reading of above mentioned Section and Rules, it clearly shows that one application can be made for any one or more or all of the articles comprised in a class. Thus, these articles may come under any one or more sub-classes under the same class.

It is clarified by Controller that an application under Section 5 of the Act for Registration of Design can be made for any one or all the articles in that particular class, irrespective of the sub-classes therein.

It was further clarified, as provided for in Rule 11(3), that "If it is desired to register the same design in more than one class of article, a separate application shall be made in each class of article and the application shall contain the number or numbers of the registration or registrations already effected".

As regards above clarification, applicants can apply for design registration in one class or more class, or in respect of one article or more articles of single class or more than one class.

ONLINE FILING OF FC-TRS RETURN VIA E-BIZ PORTAL

The Reserve Bank of India (RBI), vide its Notification dated August 21, 2015, has launched a module for reporting of the form FC-TRS (Foreign Currency Transfer of Shares) (required under Foreign Direct Investment) through eBiz portal of the Ministry of Commerce & Industry, Government of India. The form is for the reporting of transfer of shares, convertible debentures, partly paid shares and warrants from a person resident in India to a person resident outside India or vice versa.

This is the third service of its reporting service relating to Foreign Direct Investment (FDI) that the RBI has launched on eBiz portal of the Ministry. Other online filing of forms was launched on the eBiz portal of the Ministry in February 2015.

The highlights of the particulars of the service are as follows:

a) The service provided is for three types of users: Business User, AD Bank User and the Department User;
b) The platform enables the customer to login into the eBiz portal, download the reporting form (FCTRS), complete and then upload the same onto the portal using their digitally signed certificate;.
c) RBI has also issued the User Manual for the service in form of Annexure for the convenience. Steps for submission of FC-TRS, online payment, offline payment, etc., are provided in detail in the user manual;
d) There are no payments to be made to RBI for submission of FC-TRS. Applicant is required to pay a nominal eBiz transaction fee (Rs.30/- as per the Manual) while submitting the application form online through eBiz portal.;
e) Applicant can apply for Submission of FC-TRS at any time of the year;
f) Authorised Dealer Banks (ADs) will be required to download the completed forms, verify the contents from the available documents and if necessary, call for additional information from the customer and then upload the same for RBI to process and allot the Unique Identification Number (UIN) for the submission of such return;
g) FC-TRS services of RBI have been made operational on the e-Biz platform from August 24, 2015.
h) The manual system of reporting as prescribed in terms of A.P. (DIR Series) Circular No.6 dated July 18, 2014 would continue in parallel with the online reporting facility up to three months from August 24, 2015 as per the press release of the RBI. The physical filing of returns will be discontinued thereafter.

RELATIVES OF THE DIRECTORS OF THE PRIVATE COMPANIES SPARED UNDER DEPOSIT RULES

The Ministry of Corporate Affairs (MCA), vide its Notification dated September 15, 2015, has amended the Companies (Acceptance of Deposits) Rules, 2014 (hereinafter referred to as 'Rules'). By the amendment, MCA has excluded from the definition of '*Deposits*' (as provided under Rule 2 of the Rules) the amount of money received from a person who, at the time of the receipt of the amount, was a relative of the Director of the Private Company.

This exclusion is subject to the following two conditions:

a. The relative from whom the money is received, furnishes to the company at the time of giving money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others, and

b. The company shall disclose the details of money so accepted in the Board's report.

Prior to this amendment, the amount received from the director of any company was only excluded from the definition of *'Deposits'.* Meaning thereby, the amount received from any relative of a director of the private company, was taken under the loop of the Deposits and subsequently these Rules applied on such amount. As of now, via this amendment by the MCA, the private companies may accept money from the directors as well as their relatives, without complying with the deposit Rules in respect of such amount.

PERMISSION TO RAISE FDI BY ISSUE OF PARTLY PAID SHARES AND WARRANTS

The Department of Industrial Policy & Promotion Board (DIPP), Government of India, via Press note No. 9 (2015 Series), dated September 15, 2015, reviewed the existing Foreign Direct Investment (FDI) policy on partly paid shares and warrants.

The Government after reviewing the provisions of the extant FDI policy, has decided to allow partly paid shares and warrants as eligible capital instruments for the purposes of FDI policy. Accordingly, the following amendments are made in the 'Consolidated FDI Policy Circular of 2015', effective from May 12, 2015:

a. The definition of 'Capital' under FDI Policy shall now mean equity shares; fully, compulsorily & mandatorily convertible preference shares; fully, compulsorily & mandatorily convertible debentures and warrants.

   The equity shares issued in accordance with the provisions of the Companies Act, as applicable, will include equity shares that have been partly paid. Preference shares and convertible debentures are required to be fully paid, and are mandatorily and fully convertible. Further, 'warrant' includes Share Warrant issued by an Indian Company in accordance to provisions of the Companies Act, as applicable.

b. Insertion of a new para under the heading of *Types of Instruments* of Consolidated FDI Policy Circular of 2015 is made as follows:

   "Acquisition of Warrants and Partly Paid Shares – An Indian company may issue warrants and partly paid shares to a person resident outside India subject to terms and conditions as stipulated by the Reserve Bank of India in this behalf, from time to time."

Prior to this Policy review, the warrants and partly paid shares were issued to person/(s) resident outside India only after approval through the Government route. Accordingly, now permission will not be required for raising money through these instruments in sectors where FDI is allowed under the automatic route.

GOVERNMENT PERMITS LEASING/SUB-LEASING WITHIN GROUP COMPANIES HAVING FDI

The Department of Industrial Policy & Promotion (DIPP), Government of India, on September 15, 2015, issued a clarification wherein it has allowed leasing/ sub-leasing arrangements between the group companies by taking out such activity from the ambit of 'real estate businesses' under Consolidated Foreign Direct Investment Policy Circular of 2015.

Real estate is among the sectors where Foreign Direct Investment (FDI) is not permitted. Real estate business, as per Foreign Exchange Management Act, means dealing in land and immovable property with a view to earning profit or earning income there from (excluding certain activities as specified). Accordingly, leasing/sub-letting of land or immovable property was considered as real estate business and barred for the companies having FDI in them.

The Department of Industrial Policy and Promotion (DIPP) received certain references on the issue as to whether entering into Facility-sharing agreements through leasing or sub-leasing arrangements within group companies for the larger purpose of business activities will be considered as real estate business.

In this regard, the Department clarified that the Facility-sharing agreements between group companies through leasing/sub-leasing arrangements for the larger interest of business will not be treated as 'real estate business' within the provisions of the consolidated FDI policy circular 2015.

This permission shall be subject to the following conditions:

a. Such arrangements are at arm's length price in accordance with Income Tax Act 1961, and

b. The annual lease rent earned by the lessor company does not exceed 5% of its total revenue.

Accordingly, companies with foreign direct investment (FDI) in them are now free to lease out surplus real estate to other companies within the group, without violating the FDI policy on real estate.

INCREASE IN THE LIMITS OF DEPOSITS ACCEPTED/RENEWED

The Ministry of Corporate Affairs (MCA), vide its Notification dated September 15, 2015, has amended the Companies (Acceptance of Deposits) Rules, 2014 (hereinafter referred to as 'Rules'). By amendment, now the companies (as specified under Rule 3 of the Rules) accepting or renewing its deposits subject to the limits as provided under the Rules, shall include the amount representing *'securities premium account'* apart from paid up share capital and free reserves.

Accordingly, following amendments in the sub-rules shall take place:

a. No company referred to in sub-section (2) of section 73 of the Companies Act, 2013 (hereinafter referred to as the 'Act') and no eligible company (as defined under the Rules) shall accept or renew any deposit, whether secured or unsecured, which is repayable on demand or upon receiving a notice within a period of less than six months or more than thirty-six months from the date of acceptance or renewal of such deposit:

Provided that a company may, for the purpose of meeting any of its short-term requirements of funds, accept or renew such deposits for repayment earlier than six months from the date of deposit or renewal, as the case may be, subject to the condition that-

i. Such deposits shall not exceed 10% of the aggregate of the paid up share capital, free reserves and *'securities premium account'* of the company, and

ii. Such deposits are repayable not earlier than three months from the date of such deposits or renewal thereof.

b. No company referred to in sub-section (2) of section 73 of the Act shall accept or renew any deposit from its members, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits exceeds 25% of the aggregate of the paid-up share capital, free reserves and *'securities premium account'* of the company.

c. No eligible company shall accept or renew-

i. Any deposit from its members, if the amount of such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits from members exceeds ten per cent. of the aggregate of the paid-up share capital free reserves and *'securities premium account'* of the company;

ii. Any other deposit, if the amount of such deposit together with the amount of such other deposits, other than the deposit referred to in clause (a), outstanding on the date of acceptance or renewal exceeds twenty-five percent of aggregate of the paid-up share capital, free reserves and *'securities premium account'* of the company.

d. No Government company eligible to accept deposits under section 76 shall accept or renew any deposit, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal exceeds thirty five percent of the aggregate of its paid up share capital, free reserves and *'securities premium account'* of the company.

Prior to this amendment, amount of such deposits was subject to the specified limits of the aggregate of the paid up share capital and free reserves only. As of now, these limits will stand increased because of the inclusion of the amount representing *'Securities Premium Account'*.

APPROVAL TO PROMULGATE THE NEGOTIABLE INSTRUMENTS (AMENDMENT) ORDINANCE, 2015.

The Union Cabinet, chaired by the Prime Minister Shri Narendra Modi, has given its approval for the proposal to promulgate the Negotiable Instruments (Amendment) Ordinance, 2015.

The proposed amendments to the Negotiable Instruments Act, 1881 ("The NI Act") are focused on clarifying the jurisdiction related issues for filing cases for offence committed under section 138 of the NI Act.

The clarity on jurisdictional issues for trying cases of cheque bouncing would increase the credibility of the cheque as a financial instrument. This would help trade and commerce in general and allow the lending institution, including banks, to continue to extend financing to the economy, without the apprehension of loan default on account of bouncing of a cheque.

In view of the urgency to create a suitable legal framework for determination of the place of jurisdiction for trying cases of dishonour of cheques under section 138 of the NI Act, the Government has decided to amend the law through the Negotiable instruments (Amendment) Ordinance, 2015.

The objective is to ensure that a fair trial is conducted keeping in view the interests of the complainant by clarifying the territorial jurisdiction for trying the cases for dishonour of cheques. The Ordinance is similar to the Bill in the sense that the substantive principle for determination of the jurisdiction of cases under section 138 of the NI Act remains the same, except that that two distinct situations of payment of cheque (i) by submitting the same for collection through an account or (ii) payment of a cheque otherwise through an account, that is, when cheques are presented across the counter of any branch of drawee bank for payment, are covered under the Ordinance.

Background:

Section 138 of the NI Act deals with the offence pertaining to dishonour of cheque for insufficiency, etc., of funds in the drawer's account on which the cheque is drawn for the discharge of any legally enforceable debt or other liability. The object of the NI Act is to encourage the usage of cheques and enhancing the credibility of the instrument so that the normal business transactions and settlement of liabilities can be ensured.

Various financial institutions and industry associations have expressed difficulties, arising out of the recent legal interpretation of the place of jurisdiction for filing cases under Section 138 to be the place of drawers' bank by the Supreme Court. To address the difficulties faced by the payee or the lender of the money in filing the cases under Section 138 of the NI Act, because of which, large number of cases were stuck, the jurisdiction for offence under Section 138 has been proposed to be clearly defined. Accordingly, the Negotiable Instruments (Amendment) Bill, 2015 ("the Bill") in Parliament was introduced in Lok Sabha on 6th May, 2015 and considered and passed by Lok Sabha on 13th May, 2015. However, since the Rajya Sabha was adjourned sine die on 13th May, 2015, the Bill could not be discussed and passed by that House and the Bill could not be enacted.

The Bill provides for filing of cases only by a court within whose local jurisdiction the bank branch of the payee, where the payee delivers the cheque for payment is situated. Further, where a complaint has been filed against the drawer of a cheque in the court having jurisdiction under the new scheme of jurisdiction, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court, irrespective of whether those cheques were presented for payment within the territorial jurisdiction of that court.

Further, it has been provided that if more than one prosecution is filed against the same drawer of cheques before different courts, upon this fact having been brought to the notice of the court, the court shall transfer the case to the court having jurisdiction as per the new scheme of jurisdiction.

LOANS & ADVANCES BY BANKS TO THEIR CEO/WTDS

The Reserve Bank of India (RBI), vide circular DBR.Dir. BC.No.38/13.03.00/2015-16, dated September 16, 2015, allowed commercial banks to grant loans and advances to its Chief Executive Officer (CEO)/ Whole Time Directors (WTDs), without seeking prior approval of RBI, subject to certain conditions.

Section 20 of Banking Regulation Act, 1949 (B.R.

Act, 1949) prohibits banks from granting any loan or advance to any of its Directors. However, RBI has specified that for the purposes of the said Section, the following loans/advances granted to the CEO / WTDs will not be considered as 'loans and advances':

i. Loan for purchasing of car

ii. Loan for purchasing of personal computer

iii. Loan for purchasing of furniture

iv. Loan for constructing/acquiring a house for personal use

v. Festival advance

vi. Credit limit under credit card facility

As per this circular, apart from the types of loans mentioned in this circular (specified loans/advances), no other loan can be sanctioned by the banks to its Directors.

Prior to this circular, for availing this exemption, banks were required to approach RBI for prior approval, except in case of loans granted to a Director who was an employee of the bank immediately prior to his/her appointment as a Director.

In order to obviate the need to approach RBI, the Regulator, vide this circular, allowed commercial banks to grant loans and advances to the CEO/WTDs, without seeking prior approval of RBI, subject to the following conditions:

a) The loans and advances shall form part of the compensation /remuneration policy approved by the Board of Directors or any committee of the Board to which powers have been delegated or the Appointments Committee, as the case may be.

b) The guidelines on Base Rate will not be applicable on the interest charged on such loans. However, the interest rate charged on such loans cannot be lower than the rate charged on loans to the bank's own employees.

It has also been clarified that the banks, at its own discretion, review the terms and conditions of currently outstanding loans granted to the CEO /WTDs in order to address transition issues.

RBI GIVES BANKS FLEXIBILITY FOR EQUITY INVESTMENT

To give more operational freedom and flexibility in decision making, the Reserve Bank of India (RBI), on September 16, 2015, issued a circular stating that the banks need not approach RBI for prior approval for equity investments.

As per previous circulars of RBI, banks were not allowed to participate in the equity of financial services ventures including stock exchanges, depositories, etc., without obtaining the prior specific approval of RBI, notwithstanding the fact that such investments may be within the ceiling prescribed under Section 19(2) of the Banking Regulation Act.

Such investments are already subject to prudential limits as per Master Circular on 'Para Banking Activities', dated July 1, 2015, viz.,

i. Equity investments by a bank in a subsidiary company, or a financial services company, including financial institutions, stock and other exchanges, depositories, etc., which is not a subsidiary should not exceed 10 per cent of the bank's paid-up share capital and reserves and

ii. The total investments made in all subsidiaries and other entities that are engaged in financial services activities together with equity investments in entities engaged in non- financial services activities should not exceed 20 per cent of the bank's paid-up share capital and reserves.

Note: The cap of 20 per cent does not apply, nor prior approval of RBI required, if investments in financial services companies are held under 'Held for Trading' category, and are not held beyond 90 days as envisaged in the Master Circular on 'Prudential Norms for Classification, Valuation and Operation of Investment Portfolio by Banks'.

As per this Circular, banks which have CRAR of 10 per cent or more and have also made net profit as of March 31 of the previous year need not approach RBI for prior approval for equity investments in cases where after such investment, the holding of the bank remains less than 10 per cent of the investee company's paid up capital, and the holding of the bank, along with its subsidiaries or joint ventures or entities continues to remain less than 20 per cent of the investee company's paid up capital.

DEFINITION OF 'EMPLOYEE' UNDER SEBI (SHARE BASED EMPLOYEE BENEFITS) REGULATIONS: AMENDED

The Securities Exchange Board of India (SEBI), on September 18, 2015, issued SEBI (Share Based Employee Benefits) (Amendment) Regulations, 2015, thereby amending the definition of 'employee'.

As per SEBI (Share Based Employee Benefits) Regulations, 2014, only an employee shall be eligible to participate in the employee benefit schemes of the company. 'Employee' as defined under SEBI (Share Based Employee Benefits) Regulations, 2014, meant, —

i. a permanent employee of the company who has been working in India or outside India; or

ii. a director of the company, whether a whole time director or not but excluding an independent director; or

iii. an employee as defined in clauses (i) or (ii) of a subsidiary, in India or outside India, or of a holding company of the company or of an associate company but does not include—

    a) an employee who is a promoter or a person belonging to the promoter group; or

    b) a director who either himself or through his relative or through any body corporate, directly or indirectly, holds more than ten percent of the outstanding equity shares of the company;

SEBI (Share Based Employee Benefits) (Amendment) Regulations, 2015, via amendment, has removed 'associate company' from the definition. Meaning thereby, an employee of an associate company shall now not be eligible for such schemes.

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