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EDITORIAL

Manoj K. Singh
Founding Partner

Singh & Associates, Founder-Manoj K. Singh, Advocates & Solicitors is thankful to all its readers who have always bestowed overwhelming support to us as a result of which we have been successful enough to bring July 2016 editions of our Newsletter "Indian Legal Impetus" by covering the latest legal developments in India.

Starting with an article covering constitution of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT), an insight into the comprehensive analysis relating to NCLT and NCLAT has been presented. The constitution of NCLT and NCLAT is a long standing need of the industry which finally has been consented upon with the dissolution of Company Law Board and notification of various sections of the Companies Act, 2013. Undoubtedly the establishment of NCLT and NCLAT opens a new era in dealing with company law matters in India.

We have also included an article on the growth of India as a famous economic destination for FDI investment where the benefits to various sectors for FDI have been scaled out give a bird's eye view about the prerequisites, benefits and norms which are to be complied with by companies willing to invest enroute FDI. In further advancements a brief analysis has also been presented upon the exemption of angel tax for a specified set of startups which acts as a boon for various startups processing the same. Furthermore the article on Section 65 (105) (ZZZH) of the Finance Act, 1994 speaks about the relaxation and benefit given to the buyers in the real estate sector which desperately is in search of a detonation.

The concept of Intellectual Property Insurance has also been discussed in detail to give the reader insights into the futuristic concept which shall help assimilate various check and prerequisites against IP Litigation and claims. The concept of Protection of literal characters has also been discussed in detail in light of various incidents which give an idea as to the legal benefits and advantages of a developing a fictional character.

In a crisp analysis of equalization levy which was aimed at e-commerce transactions taking place irrespective of national territorial boundaries, which were intended at providing a level-playing field to e-commerce players of domestic and foreign origin wherein Indian e-commerce companies are expected to benefit from it but rather seems that a larger impact would be on start-ups and mid-sized businesses bearing the tax burden in practical sense. In furtherance, the article on stressed assets focuses mostly on the guidelines issued by the RBI for conversion of a stressed asset to a recoverable asset by restructuring the structural and functional framework of the institution where the asset is dependent and functional upon and how borrower companies would get benefits therefrom.

Lastly, the Newsbytes Section of this edition also summarizes the latest developments in relation to employment laws and various notifications/ guidelines/ circulars issued by Government Authorities viz. Reserve Bank of India, Securities and Exchange Board of India, Central Board of Direct Taxes, Indian Patent Office, Central Board of Excise and Customs to cover up recent legal updates in corporate, taxation, securities law and other field of law. I hope that our esteemed readers find this information useful and it also enables them to understand and interpret the recent legal developments. I welcome all kinds of suggestions, opinion, queries or comments from all our readers. You can also send in your valuable insights and thoughts at newsletter@singhassociates.in.

Thank you.

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CONSTITUTION OF NATIONAL COMPANY LAW TRIBUNAL (NCLT) AND NATIONAL COMPANY LAW APPELLATE TRIBUNAL (NCLAT): COMPREHENSIVE ANALYSIS-

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*Kumar Deep and Aravind K. **

INTRODUCTION

The Ministry of Corporate Affairs ("**MCA**") *vide* notification dated June 01, 2016 ("**Effective Date**") has constituted the National Company Law Tribunal ("**NCLT**") and its appellate authority, the National Company Law Appellate Tribunal ("**NCLAT**") with effect from such date. The NCLT and NCLAT, the quasi judicial bodies, shall adjudicate and decide all issues relating to company law in India. With the constitution of much awaited NCLT and NCLAT, the Company Law Board ("**CLB**") constituted under the Companies Act, 1956 ("**1956 Act**") has been dissolved from the effective date and all existing matters, proceedings or cases before CLB have been transferred to the NCLT. The NCLT has been constituted by the Central Government i.e. MCA under the powers conferred by section 408 and 410 of the Companies Act, 2013 ("**2013 Act**").

There are three Notifications dated June 1, 2016 issued by the MCA for the following purposes:

i) Constitution of NCLT and NCLAT[1];

ii) Dissolution of CLB as per section 466 of the 2013 Act[2];

iii) Notifying various sections of the 2013 Act; and Location of NCLT Benches[3].

The constitution of NCLT and NCLAT is a step towards improving the ease of doing business by bringing all aspects of company law matters under a single jurisdiction.

BACKGROUND

The idea of setting up NCLT was proposed for the first time by the Justice Eradi Committee constituted in 1999 to examine the laws relating to Insolvency and Winding up of Companies. The committee recommended the setting up of a national tribunal.

In furtherance to the recommendations of Justice Eradi Committee, the Companies (Second Amendment) Act, 2002 (2002 Amendment Act) vide insertion of new Parts IB and IC provided the provisions for setting up of NCLT and NCLAT to replace the existing CLB and for transfer of all matters or proceedings or cases pending before the CLB to the NCLT and to dispose of such cases in accordance with the provisions of the Companies Act, 1956 and this 2002 Amendment Act.

The said 2002 Amendment Act was never notified as it was challenged in the High Court at Madras by the Madras Bar Association and the constitutional validity of the same was decided by the constitution Bench of the Hon'ble Supreme Court in ***Union of* India v. R. Gandhi, President, Madras Bar Association [(2010) 11 SCC 1]**[4] on May 11, 2010**.** The Hon'ble Supreme Court upheld the legislative competence of Parliament to create the NCLT and the NCLAT, but the particular structure of the NCLT and NCLAT proposed by the 2002 Amendment Act was held to be unconstitutional. The Government was required to make amendments to the 2002 Amendment Act including but not limited to the selection of members, tenure of members, and qualification of the judicial and technical members of the Tribunal before it could set up actual and functional Tribunals.

However, even after passing of Hon'ble Supreme Court judgment in May 2010 with respect to constitutional validity of setting up of NCLT and NCLAT, the same could not be established. Time passed and the Parliament of India notified the Companies Act, 2013 ("**2013 Act**") which replaced the 1956 Act and included sub-

1 http://www.mca.gov.in/Ministry/pdf/Notification_02062016_II.pdf

2 http://mca.gov.in/Ministry/pdf/Notification_02062016_III.pdf

3 http://mca.gov.in/Ministry/pdf/Notification_02062016_I.pdf

4 https://indiankanoon.org/doc/748977/

stantial provisions with respect to the establishment, powers, operations and jurisdiction of the NCLT and NCLAT in line with the necessary changes required by the Hon'ble Supreme Court in May 2010 judgement. However, the corresponding provisions relating to NCLT and NCLAT prescribed under 2013 Act was again challenged by the Madras Bar Association with respect to inconsistency in the provisions of the 2013 Act with the directions of the Hon'ble Supreme Court in the previous judgment of May, 2010. The issue has finally been decided by the Constitution Bench of the Apex Court on May 14, 2015 in ***Madras Bar Association vs Union of India & Anr [(2015) 8 SCC 583]***[5] whereby the Apex Court held that constitution of both NCLT and NCLAT is constitutionally valid, as has been held in the Supreme Court judgment of May, 2010. The Apex Court further held that, in Indian Constitution, it is open for the legislature to provide for set up of tribunals as alternatives to the Courts as a forum for adjudication on specialized matters, provided the tribunal in question has all qualitative trappings and competence of the Court sought to be replaced. However, the Hon'ble Supreme Court had ordered some corrections to be made with respect to the eligibility of technical members in consonance with the previous judgment. Thus, the Hon'ble Supreme Court paved the way for the constitution of the NCLT and NCLAT under the 2013 Act.

COMPOSITION AND FUNCTIONING

The NCLT shall consist of a President and such number of Judicial and Technical Members as may be required. As per MCA circular[6] dated June 7, 2016 notified that the principal bench of the NCLT is to be located at New Delhi and it would have ten other benches at New Delhi, Mumbai, Kolkata, Chennai, Bengaluru, Chandigarh, Allahabad, Ahmedabad, Hyderabad and Guwahati. The Hon'ble Justice M.M. Kumar, retired judge of the Punjab and Haryana High Court and the current Chairman of the CLB has been appointed as the President of the NCLT and Hon'ble Justice S.J. Mukhopadhaya (Retd.), Supreme Court of India has been appointed as the Chairperson of NCLAT. The existing members and staff of the CLB shall be the members and staff of the NCLT as well.

5 http://judis.nic.in/supremecourt/imgs1.aspx?filename=42690

6 http://www.clb.nic.in/NewOrder/Circular_add.pdf

The NCLT will now deal with the provisions relating to the call for general meeting, oppression and mismanagement, investigation into the company's affairs, class action suits, conversion of a public company to a private company, inspection of books and minutes, compounding of offences etc. Further, the provisions relating to compromise, amalgamation, winding up and capital reduction will continue to be governed by the High Courts. Therefore, the MCA is yet to notify provisions regarding:

- compromises, arrangements and amalgamations including reduction of share capital;
- revival and rehabilitation of sick companies; and
- winding up of companies

Hence, the MCA has planned to transfer the jurisdiction of High Courts in a phased manner in order to provide a smooth transition. Meanwhile, the provisions relating to compromise, mergers, and reduction of share capital and winding up proceedings shall continue to be under the jurisdiction of the High Court and of sick companies shall continue to be under BIFR until further notification.

The appeal from any order of the NCLT would be made with the NCLAT instead of High Court. However, appeals from the NCLAT orders will be heard by the Hon'ble Supreme Court of India.

NCLT vide Order[7] dated 29th June, 2016 laid down the following criteria for listing of the matters before the NCLT, Principal Bench and the NCLT, New Delhi Bench with effect from July 1, 2016:

S. No	Bench	Matters pertaining to
1	NCLT, Principal Bench	• Companies having paid up capital more than INR 50 Lakhs; and • As per special order of the Hon'ble President,, NCLT
2	NCLT, New Delhi Bench	Companies having paid up capital upto INR 50 Lakhs

7 http://www.clb.nic.in/orders/order_dated_29.06.2016_NCLT.pdf

IMPACT OF CONSTITUTION OF NCLT AND NCLAT

A) NOTIFICATION OF VARIOUS SECTIONS OF 2013 ACT

With the constitution of NCLT and NCLAT certain sections of the 2013 Act have became effective as per below:

Section	Provision
Section 7(7) except clause "c" and "d"	incorporation of Company
Section 14 (1) & (2)	Article of Association
Section 55 (3)	Issue and redemption of Preference Shares
Section 61(4)(5)& (6)	Power of limited company to alter its share capital
Section 62(4),(5) and (6)	Further issue of share capital
Section 71(9) to (11)	Debentures
Section 75	Damages for Fraud
Section 97, 98 and 99	Power of the Tribunal to call annual general meetings and meetings of Members
Section 119(4)	Inspection of minute books of general meetings
Section 130	Reopening of Accounts
Section 131	Voluntary revision of financial statements or Boards' report
Section 140 Second proviso to sub-section (4) and sub -section (5)	Removal, resignation of auditor and giving of special notice
Section 169(4)	Removal of Directors
Section 213	Investigation into company's affairs in other cases
Section 216(2)	Investigation of ownership of company
Section 218	Protection of employees during investigation
Section 221	Freezing of assets of company on inquiry and investigation
Section 222	Imposition of restriction upon securities
Section 224(5)	Action to be taken in pursuance of inspector's report
Sections 241, 242 [except clause (b) of sub -section (1), clause (c) & (g) of sub -section (2)], 243, 244, and 245	Prevention of Oppression and Mismanagement
Reference of word 'Tribunal' in sub-section (2) of section 399	Inspection, production and evidence of documents kept by Registrar
Sections 415 to 433 (both inclusive)	Related to NCLT and NCLAT
Section 434(1)(a), (b) and (2)	Transfer of certain pending proceedings
Section 441	Compounding of certain offences
Section 466	Dissolution of Company Law Board and consequential provisions

B) BANKRUPTCY CODE AND NCLT

The impending implementation of the Bankruptcy and Insolvency Code will be facilitated by the constitution of NCLT. The adjudicating authority under the code would be the NCLT for companies and limited liability partnerships, and the Debt Recovery Tribunal (DRT) for individuals and partnership firms.

C) OPPORTUNITIES TO PROFESSIONALS

The establishment of NCLT and NCLAT shall offer wider opportunities to Practicing Professionals viz. Chartered Accountants, Company Secretaries, Cost and Work Accountants as they have been now authorized to appear before the NCLT and NCLAT under the 2013 Act. Under the 1956 Act, eligibility of practicing professionals to appear on behalf of clients was limited to matters with CLB only whereas advocates had the exclusive authority to appear in the matters before High Court and Supreme Court. Thus, now practicing professionals would, for the first time be eligible for arguments and representation in the matters which were hitherto dealt with by the High Courts which would eventually be transferred to the NCLT. The practicing professionals would now be considered at par with advocates in corporate litigation going forward.

CONCLUSIONARY REMARKS

The constitution of the NCLT and NCLAT is a long awaited requirement of the Companies law which has been materialized now to deal with company law matters. It is a welcome move to various stakeholders in the industry. The industry expects a speedy and efficient disposal of the company law matters through NCLT and NCLAT. In addition, it will also relive the various High Courts from burden of dealing with company law matters once the NCLT will be fully operational. Most likely on the notification of the provisions of Bankrupcy and Insolvency Code which is on the cards, the corporate insolvency matters will be shifted from Courts/DRTs to the NCLT. Although some provisions of the Companies Act, 2013 relating to the NCLT have not been notified yet, it is expected that the MCA will expand the NCLT to its full capacity at the earliest over a period of time

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**CS Intern*

INDIA NOW TO BE FAMOUS ECONOMIC DESTINATION FOR FDI INVESTMENT

Arpita Karmakar

INTRODUCTION:

The Union Government has further liberalized the Foreign Direct Investment (FDI) regime on June 20, 2016, by bringing most of the sectors under approval route except a small negative list and augmenting the FDI inflows in the country.

In last two years, Government has brought major FDI policy reforms in a number of sectors viz. Defence, Construction Development, Insurance, Pension Sector, Broadcasting Sector, Tea, Coffee, Rubber, Cardamom, Palm Oil Tree and Olive Oil Tree Plantations, Single Brand Retail Trading, Manufacturing Sector, Limited Liability Partnerships, Civil Aviation, Credit Information Companies, Satellites- establishment/operation and Asset Reconstruction Companies.

The Government has felt that the country has potential to attract far more foreign investment which can be achieved by further liberalizing and simplifying the FDI regime. This would further augment the employment and job creation in India.

Accordingly, the Government has now introduced a number of amendments in the FDI Policy by making India the most open economy in the world. The amendments introduced in the policy include increase in sectoral caps, bringing more activities under automatic route and easing of compliances for foreign investment. These changes have been discussed in brief in the following paragraphs:

RADICAL CHANGES FOR PROMOTING FOOD PRODUCTS MANUFACTURED/PRODUCED IN INDIA

It has now been decided to permit 100% FDI under government approval route for trading, including through e-commerce, in respect of food products manufactured or produced in India.

The government had in its Union Budget-2016 this year announced that 100 per cent FDI would be allowed through Foreign Investment Promotion Board (FIPB) route in marketing of food products produced and manufactured in India.

FOREIGN INVESTMENT IN DEFENCE SECTOR UP TO 100%

As per present FDI regime,

- FDI in Defence sector is 49% participation in the equity of a company under automatic route.
- FDI above 49% was permitted through Government approval on case to case basis, wherever it is likely to result in access to modern and 'state-of-art' technology in the country.

In this regard, the following changes have inter-alia been brought in the FDI policy on this sector:

i. Foreign investment beyond 49% has now been permitted through government approval route, in cases resulting in access to modern technology in the country or for other reasons to be recorded. The condition of access to 'state-of-art' technology in the country has been done away with.

ii. FDI limit for defence sector has also been made applicable to Manufacturing of Small Arms and Ammunitions covered under Arms Act 1959.

REVIEW OF ENTRY ROUTES IN BROADCASTING CARRIAGE SERVICES

FDI policy on Broadcasting carriage services has also been amended. New sectoral caps and entry routes are as under:

Sector/Activity	New Cap and Route
5.2.7.1.1 (1)**Teleports**(setting up of up-linking HUBs/Teleports); (2)**Direct to Home** (DTH); (3)**Cable Networks** (Multi System operators (MSOs) operating at National or State or District level and undertaking upgradation of networks towards digitalization and addressability); (4)**Mobile TV**; (5)**Headend-in-the Sky Broadcasting Service**(HITS)	**100%** **Automatic**
5.2.7.1.2 Cable Networks (Other MSOs not undertaking upgradation of networks towards digitalization and addressability and Local Cable Operators (LCOs))	
Infusion of fresh foreign investment, beyond 49% in a company not seeking license/permission from sectoral Ministry, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, will require FIPB approval	

PHARMACEUTICAL

The present extant FDI policy on pharmaceutical sector provides for 100% FDI under automatic route in greenfield pharma and FDI up to 100% under government approval in brownfield pharma.

As per these amendments, with the objective of promoting the development of this sector, it has been decided to permit up to 74% FDI under automatic route in brownfield pharmaceuticals and government approval route beyond 74% will continue.

CIVIL AVIATION SECTOR

With the objective of promoting the development in the Civil Aviation sector, the government has laid the following:

i. The extant FDI policy on Airports permits 100% FDI under automatic route in Greenfield Projects and 74% FDI in Brownfield Projects under automatic route. FDI beyond 74% for Brownfield Projects is under government route.

ii. With a view to aid in modernization of the existing airports to establish a high standard and help ease the pressure on the existing airports, it has been decided to permit 100% FDI under automatic route in Brownfield Airport projects.

iii. As per the present FDI policy, foreign investment up to 49% is allowed under automatic route in Scheduled Air Transport Service/ Domestic Scheduled Passenger Airline and regional Air Transport Service. It has now been decided to raise this limit to 100%, with FDI up to 49% permitted under automatic route and FDI beyond 49% through Government approval. For NRIs, 100% FDI will continue to be allowed under automatic route. However, foreign airlines would continue to be allowed to invest in capital of Indian companies operating scheduled and non-scheduled air-transport services up to the limit of 49% of their paid up capital and subject to the laid down conditions in the existing policy.

PRIVATE SECURITY AGENCIES

Presently, the extant policy permits 49% FDI under government approval route in Private Security Agencies.

FDI up to 49% is now permitted under automatic route in this sector and FDI beyond 49% and up to 74% would be permitted with government approval route.

ESTABLISHMENT OF BRANCH OFFICE, LIAISON OFFICE OR PROJECT OFFICE

For establishment of branch office, liaison office or project office or any other place of business in India if the principal business of the applicant is

- Defence,
- Telecom,
- Private Security or
- Information and Broadcasting,

it has been decided that approval of Reserve Bank of India or separate security clearance would not be required in cases where FIPB approval or license/permission by the concerned Ministry/Regulator has already been granted.

ANIMAL HUSBANDRY

As per FDI Policy 2016, FDI in Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture and Apiculture is allowed 100% under Automatic Route under controlled conditions. It has been decided to do away with this requirement of 'controlled conditions' for FDI in these activities.

SINGLE BRAND RETAIL TRADING

It has now been decided to relax local sourcing norms up to three years and a relaxed sourcing regime for another five years for entities undertaking Single Brand Retail Trading of products having 'state-of-art' and 'cutting edge' technology.

CONCLUSION

Apart from liberalizing and simplifying the FDI Policy, the amendments are meant to provide ease of doing business in the country leading to larger FDI inflows contributing to growth of investment, incomes and employment and job creation in India

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UNPAID SELLER'S LIEN

*Gunita Pahwa And Priya Dhankhar**

The Sale of Goods Act, 1930 (hereinafter referred to as the "***Act***") defines an unpaid seller as a seller that has not been paid the full price of the goods that have been sold or that has received a bill of exchange or other negotiable instrument as conditional payment, and the condition on which it was received has not been fulfilled.[1]

Interestingly, the position of the seller's agent may sometimes be akin to that of the seller insofar as exercising the rights of an unpaid seller are concerned. For instance, an agent of the seller to whom the bill of lading has been endorsed or who has paid the price of the goods or is directly responsible to the seller for the price of the goods is also deemed to be an unpaid seller.[2]

The rights provided to an unpaid seller, under the Act, are dependent on whether the property in the goods has passed to the buyer or not. An unpaid seller of the goods, the property in which has passed to the buyer, in entitled to exercise the following rights: [3]

a) Right of lien on the goods for the price while he is in possession of them;

b) Right to stop the goods in transit after he has parted with the possession of the goods (incase the buyer becomes insolvent); and

c) Right to re-sell the goods (subject to the goods being of a perishable nature or the unpaid seller exercising its right of lien or stoppage in transit[4]).

1 Section 45(1) of the Act
2 Section 45(2) of the Act
3 Section 46(1) of the Act
4 Section 54(2) of the Act

An unpaid seller of the goods, who is in possession of them, is entitled to retain possession, i.e. exercise a right of lien over the goods, in the following cases:

a) Where the goods have been sold without any stipulation of credit;

b) Where the goods have been sold on credit but the term of credit has expired;

c) Where the buyer becomes insolvent.[5]

Further, an unpaid seller is also entitled to exercise its right of lien if he is in the possession of the goods as an agent of the buyer or the bailee for the buyer.[6]

The Black's Law Dictionary defines lien as "a legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied". Vendor's Lien has also been defined under the Black's Law Dictionary as a lien held by a seller of goods, who retains possession of the goods until the buyer has paid in full.

The term lien implies that the property in the goods has vested in the buyer, because no man can have a lien on his own goods. A lien necessarily presupposes that the property in the goods has passed, as the seller cannot be said to possess a right of lien on his own property, which is in the nature of a right of distress over the property of another.

It is settled law that the question of lien in respect of the goods, it is apparent that an unpaid seller has a lien on the goods for the price "while he is in possession of them". Therefore, if the unpaid seller does not have possession of the goods, he cannot have lien on such goods. This view has also been upheld by the Hon'ble

5 Section 47(1) of the Act
6 Section 47(2) of the Act

High Court of Delhi in the judgment titled as "**Pawan Hans Helicopters Ltd. vs. Aes Aerospace Ltd**."[7]

In addition to an unpaid seller losing the possession of the goods, the Act also provides for the following specific situations, in which an unpaid seller loses its right of lien, i.e. when:

a) The unpaid seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

b) The buyer or his agent lawfully obtains possession of the goods;

c) The unpaid seller has waived its right of lien over the goods.[8]

However, in the presence of a contractual stipulation, an unpaid seller's lien, recognized in terms of Section 46 and 47 of the Act, may not stand terminated upon delivery of the goods to the carrier.

The Hon'ble Supreme Court of India has in the judgment titled as "**Suchetan Exports Pvt. Ltd. vs. Gupta Coal Ltd. and Ors**."[9] held that wherein the contract for sale provided that the seller would retain its lien over the goods and title would pass to the buyer on payment of the full price of the goods, then the unpaid seller of the goods is entitled to exercise lien over the goods, notwithstanding that the possession of the goods may not be with the unpaid seller.[10]

CONCLUSION

Unpaid seller who pas possession of the goods in which the property has passed to the buyer, can exercise the right of lien only in the following cases:

a) where the goods have been sold without any stipulation of credit;

b) where the goods have been sold on credit but the term of credit has expired;

c) where the buyer becomes insolvent.

Further, unpaid seller loses his right of lien as per Section 49 of the Act.

However, in case the parties enter into a contractual stipulation to retain the right of lien and transfer of title upon payment, then notwithstanding that the possession of the goods may have transferred to the buyer, the unpaid seller would have the right of exercising lien over the goods.

***

*Law Intern

7 2008 (2) ARBLR 63 Delhi
8 Section 49 of the Act
9 Special Leave Petition (Civil) No. 20100 of 2011
10 Suchetan Exports P. Ltd vs. Gupta Coal India Limited & Ors.; Special Leave Petition (Civil) No.20100 of 2011

HON'BLE DELHI HIGH COURT SET ASIDE THE EXPLANATION TO SECTION 65(105)(ZZZH) OF THE FINANCE ACT, 1994

*Nilava Bandyopadhyay & Manish Tyagi**

The Hon'ble Division Bench of the Hon'ble Delhi High Court on 03.06.2016 has set aside the explanation to Section 65(105)(zzzh) of the Finance Act, 1994, which creates a legal fiction relating to imposition of service tax. This interesting question came before this Hon'ble Delhi High Court in Suresh Kumar Bansal vs. Union of India and Others [W.P. (C) No. 2235/2011] and Anuj Goyal and Others vs. Union of India and Others [W.P. (C) No. 2971/2011].

FACT OF THE CASE:

The Petitioners herein entered into separate agreements with a builder to buy flats in a multi-storey group housing project in Sector 76, Noida, Uttar Pradesh. The builder has in addition to the consideration for the flats also recovered service tax from the Petitioners, which was payable by the Petitioners for services in relation to construction of complex and on preferential location charges.

The Petitioners being aggrieved by the levy of service tax on services 'in relation to construction of complex' as defined under Section 65(105)(zzzh) of the Finance Act, 1994 (hereafter 'the Act') and inter alia impugning the explanation to Section 65(105)(zzzh) of the Act (hereafter "the impugned explanation") introduced by virtue of Finance Act 2010, approached the Hon'ble delhi High Court as being ultra vires of the Constitution of India. The Petitioners also impugn Section 65(105)(zzzzu) of the Act which seeks to subject preferential location charges charged by a builder to service tax.

The controversy involved in these petitions relates to the question whether the consideration paid by flat buyers to a builder/promoter/developer for acquiring a flat in a complex, which under construction/development, could be subjected to levy of service tax.

SUBMISSIONS OF THE PARTIES:

In nutshell, the main argument of the Petitioners was that the agreements entered into by them with the builder were for purchase of immovable property and the Parliament does not have the legislative competence to levy service tax on such transaction. The Petitioners further claimed that the Act and the rules made thereunder do not provide any machinery for computation of value of services, if any, involved in construction of a complex and, therefore, no such tax can be imposed.

It was urged by the Ld Counsel of the Petitioners that the entries relating to taxation in List I and List II of the Seventh Schedule to the Constitution of India were mutually exclusive and the Parliament did not have the power to levy tax on immovable property; thus, the levy of service tax on agreements for purchase of flats was beyond the legislative competence of the Parliament.

By relying upon the decision of the Hon'ble Supreme Court in ***Larsen & Toubro Ltd. and Anr. v. State of Karnataka and Anr.: (2014) 1 SCC 708*** it was contended that 'works contracts' have been interpreted in an expansive manner and would include an agreement entered into by a flat buyer with a builder. Consequently, the power of Parliament to levy tax would be limited to only on the service component after excluding the value of goods as well as the value of land from such contracts.

It was also argued by placing reliance on the recent decision of the Hon'ble Supreme Court in ***Commissioner Central Excise and Customs, Kerala and Ors. v. Larsen & Toubro Ltd. and Ors.: (2016) 1 SCC 170*** that in order to levy tax, the Statute must clearly specify the three elements of taxation, namely, (i) the subject of tax; (ii) the person who is liable to tax; and (iii) the rate and measure of tax. Since Section 65(105)(zzzh) read with Section 66 of the Act did not restrict the levy of service tax only to the service element of composite contracts, the said provisions could be applied only for imposition of service tax on service contracts simplicitor and their application to composite contracts would render the said provisions unconstitutional.

It was also argued that there was no service element in preferential location charges which were levied by a builder and the same related only to the location of the

immovable property and, therefore, such charges were not eligible to service tax.

On the other hand, by relying on the decisions of the Hon'ble Karnataka High Court rendered on ***12th December, 2012*** in ***W.P.(C) 24050-51/2010*** (***Confederation of Real Estate Developers' Association and Anr. v. Union of India & Ors)*** and the Hon'ble Bombay High Court delivered on ***20th January, 2012*** in ***W.P.(C) 1456/2010 (Maharashtra Chamber of Housing Industry and Anr. v. Unoin of India and Ors)*** wherein the challenge to the explanation to Section 65(105)(zzzh) and Section 65(105)(zzzzu) introduced by virtue of the Finance Act, 2010 was rejected. On the strength of the aforesaid decisions, it was contended that the concerned legislative amendment introduced by the Finance Act, 2010, namely, insertion of explanation to Section 65(105)(zzzh) and clause (zzzzu), were valid and enforceable.

It was contended by the Revenue that development of a project results in the substantial value addition on bare land and includes various services such as consulting services, engineering services, management services, architectural services etc. These services are subsumed in the taxable service as contemplated under Section 65(105)(zzzh) of the Act. It was further submitted that as the gross charges include value of land and construction material, only 25% of the Base Selling Price (BSP) charged by a builder from the ultimate consumer is subjected to levy of service tax. However in case of preferential location charges, the entire amount charged by a developer is for value addition and, therefore, the gross amount charged for such services is chargeable to service tax under Section 66 read with Section 65(105)(zzzzu) of the Act.

FINDINGS OF THE HON'BLE COURT:

While adjudicating the present dispute, the Hon'ble Delhi High Court not only took a pragmatic view of the matter, but also considered the historical development of Service Tax in India.

Service tax was introduced for the first time in India in 1994 by virtue of the Finance Act, 1994. In his Budget speech, the then Finance Minister explained that the service tax was being introduced on the recommendation of the Tax Reforms Committee, which had recommended imposition of tax on services as a measure for broadening the base of indirect taxes. The Constitution (88th Amendment) Bill, 2003 was introduced pursuant to which the Constitution was amended by, inter alia, insertion of Article 268A as well as Entry 92C in List-I of the Seventh Schedule to the Constitution of India. Article 268A(1) provided that taxes on services shall be levied by the Government of India and such tax shall be collected in a manner as provided in Article 268A(2) of the Constitution of India.

However, Finance Act, 1994 continues to be the legislative enactment by virtue of which service tax is levied. The said Act has been amended extensively since its enactment in 1994. Over a period of time, various services were brought within the scope of the levy of service tax by expanding the definition of "taxable services" under Section 65(105) of the Act. The Finance Act, 2012 brought about a paradigm shift in the service tax regime; with effect from 1st July, 2012, Section 65(105) of the Act was deleted and all services as defined under Section 65B (44) except as specified under Section 66D of the Finance Act, 2012 (negative list) were chargeable to service tax.

The circular bearing Circular No.108/02/2009 - ST dated 29th January, 2009 issued by the Central Board of Excise and Customs (CBEC) clarifies that the taxable service under clause (zzzh) did not cover builders who were developing and selling immovable property. However, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.

The counter affidavit filed on behalf of the Respondents also affirms the above Circular as clarifying that service tax was not applicable in respect of construction/development by a developer/builder engaged in the business of developing real estate for selling units to prospective buyers.

The Hon'ble Court observed that the Respondents are not seeking to levy tax for taxable service under Section 65(105)(zzzza) of the Act (which was introduced by virtue of the Finance Act, 2007) as according to them builders engaged in constructing complexes and selling units are liable to pay service tax on the transaction with the purchaser only with effect from 1st July, 2010 by virtue of the impugned explanation to Section 65(105)(zzzh) of the Act.

Insofar as the impugned explanation is concerned, the Hon'ble Court observed that it is apparent that the same expands the scope of the taxable service as

envisaged in clause (zzzh) of the Act. By a legal fiction, construction of a complex which is intended for sale by a builder or any person authorised by him before, during or after construction is deemed to be a service provided by the builder to the buyer. The only exception contemplated is where no sum is received from the prospective buyer prior to grant of the completion certificate. The grant of completion certificate implies that the project is complete and at that stage all services and goods used for construction are subsumed in the immovable property; thus at that stage sale of a complex or a part thereof to a buyer constitutes an outright sale of immovable property, which admittedly is not chargeable to service tax.

The Hon'ble Court further observed that service tax is essentially a tax on the value created by services as distinct from a tax on the value added by manufacturing goods. Construction of a complex essentially has three broad components, namely, (i) land on which the complex is constructed; (ii) goods which are used in construction; and (iii) various activities which are undertaken by the builder directly or through other contractors. The object of taxing services in relation to construction of complex is essentially to tax the various activities that are involved in the construction of a complex and the resultant value created by such activities.

It is a usual practice for builders/developers to sell their project at its launch. Builders accept bookings from prospective buyers and in many cases provide multiple options for making payment for the purchase of the constructed unit. In some cases, prospective buyers make the payment upfront while in other cases, the buyers may opt for construction linked payment plans, where the agreed consideration is paid in installments linked to the builder achieving certain specified milestones. However, but for the legal fiction introduced by the impugned explanation, such value add would be outside the scope of services because sensu strict no services, as commonly understood, are rendered in a contract to sell immovable property.

The imposition of service tax by virtue of the impugned explanation is not a levy on immovable property as contended on behalf of the Petitioner. The clear object of imposing the levy of service tax in relation to a construction of a complex is essentially to tax the aspect of services involved in construction of a complex the benefit of which is available to a prospective buyer who enters into an arrangement - whether by way of an agreement of sale or otherwise - for acquiring a unit in a project prior to its completion/development.

In ***Union of India v. H.S. Dhillon: (1972) 83 ITR 582(SC)***, the Hon'ble Constitution Bench of the Hon'ble Supreme Court applied the doctrine of pith and substance while in considering the question whether the levy of Wealth Tax Act on immovable property would retrench upon the legislative field reserved for the states under Entry 49 of List II of the Seventh Schedule of the Constitution of India.

Considering all the above, the Hon'ble Court do not find any merit in the contention that the imposition of service tax in relation to a transaction between a developer of a complex and a prospective buyer impinges on the legislative field reserved for the States under Entry-49 of List-II of the Seventh Schedule to the Constitution of India.

Therefore, it became essential for the Hon'ble Court to examine the measure of tax used for the levy. The measure of tax must have a nexus with the object of tax and it would be impermissible to expand the measure of service tax to include elements such as the value of goods because that would result in extending the levy of service tax beyond its object and would impinge on the legislative fields reserved for the State Legislatures.

In ***BSNL v. Union of India*: *(2006) 3 SCC 1***, the Hon'ble Supreme Court explained the question whether value of SIM Cards could be included in the cost of services. The Hon'ble Supreme Court referred to its earlier decision in ***Gujarat Ambuja Cements Ltd. v. Union of India: (2005) 4 SCC 214*** and quoted the following passage from the said judgment:-"This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field."

The Hon'ble Court further observed that the contract between a buyer and a builder/promoter/developer in development and sale of a complex is a composite one. The arrangement between the buyer and the developer is not for procurement of services simplicitor. An agreement between a flat buyer and a builder/de-

veloper of a complex – who is developing the complex for sale is, essentially, one of purchase and sale of developed property.

The Hon'ble also held that in the present case, neither the Act nor the Rules framed therein provide for a machinery provision for excluding all components other than service components for ascertaining the measure of service tax. The abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract.

Therefore, the Hon'ble Court ultimately held that insofar as the challenge to the levy of service tax on taxable services as defined under Section 65(105)(zzzzu) is concerned, the same is also without any merit. In view of the above, the Hon'ble Court negates the challenge to insertion of clause (zzzzu) in Sub-section 105 of Section 65 of the Act.

However, the Hon'ble Court was pleased to accept the Petitioners contention that no service tax under section 66 of the Act read with Section 65(105)(zzzh) of the Act could be charged in respect of composite contracts such as the ones entered into by the Petitioners with the builder. Therefore, the impugned explanation to the extent that it seeks to include composite contracts for purchase of units in a complex within the scope of taxable service was set aside, by the Hon'ble Court. Additionally, the Hon'ble court also passed direction for refund along with interest.

CONCLUSION:

In the present situation, where the real estate market in India needs a desperate boom, this Judgment of the Hon'ble Court, which is in favour of the Buyer, may be lucrative towards the buyers. Whatever, it may be, this judgment will give certain relief to the buyers, who are otherwise faced with so many taxes, duties and fees. Although, it would be far stretched to suggest that this will alone impact the property market, however, it is needless to say that it will definitely have persuasive value to the prospective buyers to fulfill their wish list.

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**Law Intern*

EQUALISATION LEVY: RE-SHAPING BUSINESS MODELS IN DIGITAL ECONOMY.

Shivam Hargunani

INTRODUCTION:

Equalisation Levy was introduced in Union Budget 2016-17 of India. The Finance Act 2016 envisages a separate Chapter VIII titled 'Equalisation Levy' in accordance with the Organisation for Economic Co-operation and Development (OECD)'s view as part of the global Base Erosion and Profit Shifting (BEPS) recommendation to tax e-commerce transactions.

One of the salient features of the Equalisation Levy is that the tax is aimed at the e-commerce business transactions which are conducted without regard to national territorial boundaries. Further, the equalization levy would be 6% of the amount of consideration for specified services received or receivable by a non-resident not having permanent establishment in India, from a resident in India who carries out business or profession, or from a non-resident having permanent establishment in India. And there would be no levy, if aggregate amount of consideration does not exceed Rs. 1 lakh in any previous year.

The tax is largely applicable on the income of technology companies incorporated outside India and not having permanent establishment in India. The impact of the levy, however, would not be solely on the business of internet e-commerce giants. It is leading to re-shaping of business models to escape the levy. This article focuses on the newly introduced tax, its impact due to raising the cost of marketing and its future expectations.

TAX DEDUCTION TO BE MADE BEFORE MAKING THE PAYMENT FOR SPECIFIED SERVICES:

As per the Finance Act 2016, payments exceeding Rs. 1 lakh in a previous year[1], received or receivable by a person, being a non-resident from

1) a person resident in India and carrying on business or profession;

2) or a non-resident having a permanent establishment in India

will be subject to tax at the rate of 6 per cent as equalisation levy[2] from gross amount paid for the specified services. A specified service means online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf.[3]

The equalisation levy shall not be charged in the following scenarios:

(a) the non-resident providing the specified service has a permanent establishment in India and the specified service is effectively connected with such permanent establishment;

(b) the aggregate amount of consideration for specified service received or receivable in a previous year by the non-resident from a person resident in India and carrying on business or profession, or from a non-resident having a permanent establishment in India, does not exceed one lakh rupees; or

(c) where the payment for the specified service by the person resident in India, or the permanent establishment in India is not for the purposes of carrying out business or profession.[4]

The Central Board of Direct Taxes (CBDT), Ministry of Finance has notified the rules for equalisation levy and has also informed that the tax will come into effect from June 1, 2016.[5] The Equalisation Levy Rules, 2016 lays the procedural framework for the compliances to be undertaken and the procedure for appeals to be followed for such levy.

1 Section 166 of Finance Act, 2016.

2 Section 165(1) of Finance Act, 2016.

3 Section 164 (i) of the Finance Act, 2016.

4 Section 165 (2) of the Finance Act, 2016.

5 Notification No. PB-6(2)/2015-Fin/IT-Misc/453-73, dated 6th June, 2016. Available at: http://prasarbharati.gov.in/Information/Documents/Circular%20-%20dt%2006.06.2016%20-%20Reg.%20Introduction%20of%20Equalisation%20Levy.pdf

Business owners, whether permanently resident or not, will have to withhold 6% of the payments they make to foreign technology companies for advertising. Online business startups which use Facebook, Google etc for advertisement and promotion purposes will also have to withhold such tax from the payment amount to the foreign technology company and deposit it with the government along with relevant tax statements. This will make the business owners to rebuild their business plans and strategy.

THE FAR-REACHING IMPACTS OF THE LEVY ORIGINALLY INTENDED FOR THE PURPOSE OF EQUALISATION:

The services at which this tax, also gaining popularity and dubbed as Google Tax, is levied include online advertising or providing digital advertising space with the primary aim of levying tax on the income generated by internet giants from Indian advertisers. The Equalization levy is imposed on the payment of the advertisers and has introduced India e-commerce industry to a new kind of tax. It will affect the business of e-commerce giants which do not have permanent establishment in India. Internet giants like Facebook and online start-ups which receive payments from Indian advertisers will also be largely affected. The tax has come into effect from 1st June, 2016 along with Equalisation Levy Rules, 2016 notified[6] by Central Board of Direct taxes.

Google tax or Equalisation levy, as the name suggests, is aimed at leveling the play field between e-commerce players of domestic and foreign origin. In fact, Indian companies, especially the e-commerce companies are expected to benefit from it. This tax is expected to change the schematics of online advertisement. This tax is separate from the service tax. It is not a tax on service but a tax on the business for online advertisements.

"Looking at the global scenario regarding imposition of similar kind of levy, it should be noted that India is not the only country to have imposed a tax to address the concerns arising from the ability of digital multi-national enterprises to avoid paying taxes in the jurisdiction from where they are earning their income. UK has imposed a 'Diverted Profit Tax' from 1.4.2015 to address these concerns. Australia has imposed a 'Multinational Anti Avoidance Law' from 1.1.2016. Italy is reported to be considering a new 'Digital Tax' consisting of 25% withholding tax on payments. Some countries, like Brazil already impose withholding tax on such payments. These instances, along with the fact that the G-20 and OECD countries now agree on the rights of every country to impose any of the actions identified in the BEPS Report on Action 1, is a clear indication that countries across the World are thinking about it. Compared to the taxes being imposed in other countries, the Equalization Levy proposed by the Committee is completely in accordance with the international consensus and suggestions."[7]

In practice, the equalisation levy burden is being passed on to the businesses seeking advertisement services by non-resident companies providing advertisement services. If the foreign company refuses to take the burden of this levy and the business still want to advertise on the foreign company's platform then it will have to shell out the extra amount for tax to be deposited to the government for availing the advertisement services from the non-resident.

The levy of tax can hugely impact the business decisions of the business owners. A new start-up or a business which does not have a significant share in the market needs advertising to reach to the consumers. The decisions regarding how much is to be invested for advertising and decisions for new business initiatives may be influenced as the cost of advertising has now increased for the businesses. Hence, while government may benefit from extra inflow in the form of tax revenue, Indian businesses, especially the start-ups and the small and medium-sized enterprises would be more significantly impacted with practically an increase in their marketing cost.

The resultant adverse impact on the profitability of enterprises paying taxes in India can lead to significant detrimental impact on the fiscal health of Indian economy and consequently, on its growth.[8] Challenges also exist in respect of valuation of user data and contribu-

6 Equalisation Levy Rules, 2016 as notified by CBDT in Notification No. 38/2016, Ministry of Finance, Government of India on 27th May, 2016. Available at: http://www.incometaxindia.gov.in/communications/notification/notification382016.pdf.

7 Proposal for Equalization levy on Specified transactions, February, 2016, Prepared by the Committee on Taxation of E-Commerce formed by the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India.

8 Para 169, Id.

tions, that are relied upon by enterprises for earning profits from a jurisdiction and which need to be taken into account for determining taxable nexus and attribution of profits to the jurisdiction.[9]

The levy of such tax increases the cost of doing business by adding to the marketing cost. Indian start-ups are major users of digital advertising platforms as they usually refrain from utilizing costlier forms of advertising.

"The Internet and Mobile Association of India (IAMAI) is of the view that this levy will severely raise the cost of doing business of Indian tech start-ups and the SMEs that are primary users of the digital ad platforms. The tech start-ups are already paying 14.5% service tax to use these ad platforms which amounts to an estimated INR 906 crores of taxes to the government. With the implementation of GST, the tax rate is likely to move to 18% bringing more taxes to the government from this segment. Considering that the incidence of 6% levy will be passed on to the advertisers by the ad platforms, the total burden to SMEs and Tech Start-ups on account of Equalization Levy would be an additional burden of INR 429 crores, a massive hike of nearly 50%. This will raise the cost of operations substantially. Prima Facie it looks impractical and unreasonable, that to collect additional revenues of INR 400 crores, the government is ready to hurt the start-ups. This will turn out to be a levy on Indian start-ups. India will stand out like a sore thumb, if the government doesn't withdraw this proposal or figure out a clear mechanism whereby the asessee will not pass it on to the users of the platforms."[10]

A clear mechanism is indeed required to direct the ultimate impact of levy on those entities at which it was originally aimed at.

CONCLUSION:

Equalisation levy was aimed at e-commerce transactions taking place irrespective of national territorial boundaries. It intended to provide level-playing field between e-commerce players of domestic and foreign origin wherein Indian e-commerce companies are expected to benefit from it but it rather seems that a larger impact would be on start-ups and mid-sized businesses bearing the tax burden in practical sense. The equalisation levy or Google Tax is making businesses reshape their business strategies. The business which require marketing its products by digital advertising is shifting its marketing business to online digital space providers which are either Indian or non-resident service providers having permanent establishments in India. Many e-commerce giants will now be forced to establish their permanent establishments in India if they want to escape the levy to continue to retain their customers seeking advertising services from them.

A clear and well-directed mechanism is desired to be in place to save the online start-ups and small to medium sized businesses from being hit by extra cost of advertising. The law needs to be clearly laid out that the assessee non-residents receiving payments are not allowed to pass the tax-burden to the end-user of services. The boundaries and restrictions of physical presence based taxation of income of non-resident services providers in digital economy. There are many challenges which equilisation levy is bound to face apart from the passing of tax burden to the customers of advertisement services like the up-coming implementation of the Goods and Services Tax, valuation of user data and contributions of non-resident service providers, attribution of profits to a jurisdiction by the non-resident service providers etc.

Equalisation levy is new step in the tax regime. The law requires further clarifications towards disallowing the passing of tax burden to Indian service receivers. Such a clarification, if provided, can be expected to direct the levy of tax where it was originally aimed at.

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9 Para 168, Id.

10 IAMAI president Dr Subho Ray's comments as per press release dated April 26, 2016, Available at: http://www.iamai.in/media/details/4695.

CLINICAL TRIAL FOR ACADEMIC PURPOSE – NOT REQUIRED REGULATORY APPROVAL

Rajdutt S Singh

The regulatory framework relating to clinical trial of drugs is governed under the Drugs and Cosmetics Act, 1940 ("Act") and the Drugs and Cosmetics Rules, 1945 ("Rules"). Further, Part X-A and Schedule Y of the Rules deal with the statutory provisions applicable for clinical trial of drugs in India. Clinical Trial is defined as a systematic study of new drug(s) in human subject(s) to generate data for discovering and/or verifying the clinical, pharmacological (including pharmacodynamic and pharmacokinetic) and/or adverse effects with the objective of determining safety and/or efficacy of the new drug[1].

The term new drug is defined under Rule 122-E of the Rules, which inter alia includes a drug already approved by the licensing authority (Central Drugs Standard Control Organisation) for certain claims, which is proposed to be marketed with modified or new claims, namely, indications, dosage, dosage form (including sustained release dose form) and route of administration. Therefore, if already approved drug is marketed with modified or new claims or dosage etc. such drug would be considered a new drug and thus require clinical trial of such drug by obtaining permission from the licensing authority under the Act.

Prior to 16 March 2016, all the clinical trial of new drugs were required permission from the licensing authority and accordingly researchers were required to seek approval from the licensing authority for clinical trials for academic purposes, in the same manner as pharmaceutical companies' application for approval of new drugs. However as per Ministry of Health and Family Welfare Notification G.S.R. 313 (E) dated 16 March 2016, no permission for conduct of clinical trial intended for academic purposes in respect of approved drug formulation shall be required for any new indication or new route of administration or new dose or new dosage form where,-

(a) the trial is approved by the Ethics Committee; and

(b) the data generated is not intended for submission to licensing authority.

However, the Ethics Committee is required to inform the licensing authority about the cases approved by it and also about cases where there could be an overlap between the clinical trial for academic and regulatory purposes. It is further provided that if the licensing authority does not convey its comments to the Ethics Committee within a period of thirty days from the date of receipt of communication from the Ethics Committee, it shall be presumed that no permission from the licensing authority is required.

The aforesaid exemption from obtaining permission from the regulatory authorities to conduct clinical trial would definitely boost clinical trials of already approved drugs for academic purpose which could not see light of the day due to existence of red tape. It has been seen that various medical institutions/hospitals are willing to conduct clinical trials/studies in collaboration with pharmaceutical companies and this recent move from the Government will pave the way for future clinical studies/trials of drugs for academic purpose and reduce start up timelines due to exemption from the licensing authority while maintaining vigilance through Ethics Committee.

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1 *Rule 122 DAA – (Definition of Clinical Trial) of the Drugs and Cosmetics Rules, 1945.*

INTELLECTUAL PROPERTY INSURANCE: A FUTURE GAMECHANGER?

Martand Nemana

An investment in knowledge pays the best interest. – Benjamin Franklin

INTRODUCTION

In the instant generation where every aspiring students aims to setup a million dollar valuation startup to start soaring high from the very next day out of academics, reality may prove to be a bit harsh in the scenario. Developing an industry in form of a startup is no less than an actual rat race, innovative and unique ideas are martyred for drawing attention of investors. Slowly but not steadily have the norms guiding the world changed and this change demands thinking out of the box for protection, from each and everything which the company or any individual of the company may ever interact.

The interest may solely be in generation of profits and pumping up turnover to join the big league of who's who, but what really matters is how secured is the entity from an attempt of breach. Let's assume the startup/company to be a single person, in such scenario the person always will want to have wider client base, uninterrupted global presence, complete rights over the original content, more revenues from all possible sectors of business and the list goes on and becomes endless only with a sole criterion which revolves around the interest of the person in the company to evolve and enrich.

Half of the harm that is done in this world is due to people who want to feel important. They don't mean to do harm. But the harm does not interest them. As dangerous as it is to have half knowledge of a subject, it's even more dangerous to not secure your interests in the business before thinking to elucidate it to the world. Given the screaming demand of intellectual property protection, turning a dead isn't a wise mans way of dealing with it, especially when all you have to lose is 'everything'.

NEED FOR INTELLETUAL PROPERTY

The most underrated element in a company is the intellectual property; however the power it has speaks the contrary. It may be insightful to note that registering for an intellectual property becomes a mandatory obligation right from the very next moment of incorporation of the company / business. Even the smallest of elements like the logo or even the tagline used are matters of intellectual property of the organization, which over the period of time may become a synonym of the commodity.

Though technology has a varied and complex industry base; protection to invention is given in form of patents on the grounds of "first to file", whereas for copyright and trademark the protection is based on grounds of "first to use". It is noteworthy to be emphasized that seeking registration for the desired intellectual property is a time consuming process but the interest and intent of protection can be used as a cumulative tool to judge the value of inclination of the applicant.

Intellectual property gets associated with the commodity right from the moment of inception but it needs to be recognized by the owner in order to embark and encash the value. Potential of the interest is a major element which gives protection to the applicant, it also needs to be understood that the person developing the IP, should apart from registration take counter steps for protection in form of insurance. The interest which the person has in the commodity which drove the process of registration of intellectual property can be assumed to be a refection to safeguard the same interest and act as insurable interest of the applicant. Insurance can be exercised to secure any interest which may be vulnerable to the malafide acts of infringers.

INTELLECTUAL PROPERTY & INSURANCE

Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce. IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.[1]

1 *http://www.wipo.int/about-ip/en/*

Insurance can simple be put as an arrangement by which a company or the state undertakes to provide a guarantee of compensation for specified loss, damage, illness, or death in return for payment of a specified premium.

The concept of Intellectual Property and Insurance is a relatively new concept which functions in the similar manner as in any other insurance policy, but it comes with its own unique set of terms and conditions. The main coverage provided under the ambit of intellectual property is in relation to the costs of legal proceeding and charges only. Given the volatile nature of intellectual property and the time take for procuring registration leaves the claim to be only about the costs for the legal proceedings. Intellectual property is gaining prevalence and pace in the market and industry and given the growing field like India, the scope of development is very promising.

The major reason for safeguarding the intellectual property is the immense economic benefit which it carries with it, which later turns out to the most valuable asset to the company. It is now a well-accepted business valuation maxim that intangible assets such as brands, copyrights, patents, and trade secrets are often valued greater than tangible assets consisting of buildings, inventory, and equipment. Despite this, a vast majority of businesses fail to carry stand-alone intellectual property insurance coverage. Intellectual Property insurance has always been considered to be an alien concept its ambiguity and uncertainty of admissibility and protection.

Until recently the claims related to Intellectual Property Insurance were cumulatively encompassed under the umbrella of General Liability Insurance; however the rising numbers of instances have made the insurance agencies create a divide as to what shall / shall not be protected under the cover. Given the vide arena of operational branches under the genus of Intellectual Property such as Patent, Copyright, Trademark, Trade Secret, Design and Geographical Indication; it becomes difficult to envisage a single applicable mechanism to ensure protection and deducing a single framework to ensure protection for the same still remains as a challenge.

The present policies offered are strictly limited to the following patterns:

1. **BLE – Before Litigation Expenses**:

The insurance can cover the applicant with their own legal costs or the costs of the complete legal proceedings in the dispute.

2. **LEI – Legal Expenses Insurance**:

It will only cover the risk before a claim is made, the applicant can get BLE cover if the (alleged) infringement has not yet occurred.

Protection to cyber attack and cyber liability is given but presently when the concept of Intellectual Property insurance is going through its period of waxing and waning, concept of cyber liability seems far ahead of times, however the imminent threat may never be neglected. Loss of revenue, indemnity of damages which have been ordered after the suit can never be contended under the umbrella of claim of insurance policy.

Though having its relative amount of anchors the advantages of having an IP Insurance are:

1. **It acts as a safeguard to protect the cash flow**:

Irrespective of the challenges faced or the threats posed the industry involved in the commodity manufacture can work in an uninterrupted manner as it has an added leverage of monetary security in form on compensation from insurance policy which shall ensure uninterrupted cash flow to the possible engagements.

2. **It acts as a deterrent to others before filling for a suit**:

IP Insurance acts a safeguard from petty suits of infringement or baseless claims as irrespective of the claims the proprietor of the mark shall not be under any kind of financial burden in light of the insurance, on the contrary it might act as a relief and beneficial mechanism if the damages are allotted for suffering from intangible losses due to such baseless claims.

3.

4. **It improves the position while negotiating any deal or licensing or tech transfer**:

IP Insurance acts as complete safeguard in terms to the financial sector of the company being involved in tech transfer. It acts in increasing the reliability score of the parties involved in the process by acting as an escrow to the transaction.

5. **It facilitates for the IP to be used as collateral**:

Insurance facilitates and improves the value of mortgaging or seeking loan against the same property as guarantee. Being considered as collateral enhances the significance of the company and speaks about the credibility of the organization.

All set and done the most important element of consideration for eligibility for insurance of IP is the "reasonable prospect of success test", whereby; any party to the suit whether insured or not shall have to completely understand the compliance of the dispute and has to assess before going to the court from a qualified expert in the field as to the prospects of having a favorable decision, if the chances are above 50%, it is only then that the same may be allowed for a legal suit. This rule was devised to curb intentional trademark infringement which may prove a viable threat to the entire prospective setup of insurance. So in order to keep a check over the misuse of insurance policy, the major cover provided is only in forms of:

1. **Opinion Costs**:

The costs incurred while seeking opinion from a legal establishment regarding the alleged claim.

2. **Enforcements and Defense**:

Protection can be given to the costs arising from the opposite party strictly and solely in relation to the orders which are passed by the competent authority limited to the applicant.
As has been seen in several instances that the intellectual property claims have mostly been sheltered under the cover of General Liability Insurance, without any success other than a few exceptions; this clearly signifies that the impact of intellectual property claims is to be well bound about and planned rather than just to be swept under the existing blanket.

CONCLUSION

The past decade has witnessed a steep rise in the growth and formation of what is known as the next-gen entrepreneurships called as the start-ups. Given the nature and challenges these companies face right from the moment of incorporation it should be worth emphasizing that given the nature of businesses which find similarities with established business houses vulnerability plays a crucial role. In the Indian scenario, intellectual property is somewhat still in a nascent stage which needs active reforms. A major bulk of the filings in Trademark, Copyright and Patents are of foreign entities who wish to seek protection for their rights in India. Despite having given many informative schedules and policies to seek protection and also been lucrative tax exemptions to garner demand, the lukewarm approach shown towards intellectual property registrations raises serious concerns regarding the stability and overall sustainability of the goods and services provided under the brand name.

The important element which the companies fail to appreciate and harness is the fact that creating a power results is being accountable for a greater responsibility and without proper safeguard it all leads to being valued for nothing. General liability insurance may protect the company from risks and perils against tangible elements but fails to safeguard against the superior intangible elements which carry greater liability.

Having given due emphasis and importance to the value of insurance and protection of intellectual property it also has to be understood that the aforesaid can only be put into enactment based on the accuracy and performance of the IP enforcement agencies. In the present scenario given the limited scope and awareness amongst people regarding intellectual property itself, the concept of intellectual property insurance seems completely alien.
However, nevertheless it surely can be seen as the future and the next big step in the era of intellectual property. Facilitation of development shall always be a keen aspect of the development given the changing times.
Thought the startup and established industries need to understand the value of Intellectual property and its insurance they very well also should understand the vulnerability of the situation due to lack of prescribed forums and practices when it comes to disputes regarding the same; also the notion of having favorable pronouncements in interest of the big companies, there is still a lot of trekking to be done to reach the summit of reasonable solution and until then in light of the challenges and adversities in process it should be understood that intellectual property is a volatile asset and protection and maintenance demands paramount attention.

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ANGEL TAX EXEMPTION TO SPECIFIED STARTUPS

- Kumar Deep

ANGEL INVESTMENT:

Angel Investment means investment in equity shares of startup companies by investors. Such investors who invest in the equity shares of startup companies are called Angel Investors. Angel investors are essentially the well-heeled individuals/firms/companies who used to form a group of investors for investment in startup companies or small entrepreneurs.

PROVISION OF ANGEL TAX

The provision of Angel Investment Tax was introduced in the Union Budget of 2012. Under existing rules, funds raised by an unlisted company through equity issuance are covered under this tax to the extent the amount raised is in excess of the fair market value. Such extra inflow was taxable as "income from other sources" under Section 56(2) of the Income-Tax Act, 1961 (IT Act) and charged the corporate tax rate, resulting in an effective tax of over 30%.

Section 56 of the IT Act, 1961 confers on tax authorities the power to levy excess consideration, more than the fair value, against issue of shares. Section 56 (2) (viib) of the Income Tax Act states:

"Any consideration received by a company (startup) from a resident, against issue of shares, exceeds the fair market value of such shares; such excess consideration is taxable in the hands of the startup, as an income."

Therefore, under Indian tax law, if an Indian company receives share subscription amount from an Indian resident which exceeds the fair value of shares, then the excess amount is taxed as income of such Indian company.

EXEMPTION OF ANGEL TAX

The Government of India had, now as an initiative to promote start ups, scrapped the so-called 'Angel Investment Tax' on investors providing funding to startups.

The Central Board of Direct Taxes vide Notification[1] dated June 14, 2016 (CBDT Notification) had made the required changes in Section 56(2)(viib) of the Income-Tax Act, 1961 exempting startups raising funds from angel investors.

It may be noted here that for the purpose of this CBDT Notification, "startup" shall mean a company in which the public are not substantially interested and which fulfills the conditions specified in the Notification[2] of the Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion ("DIPP"), number G.S.R. 180(E), dated the 17th February, 2016, published in the Gazette of India, Extraordinary, part II, section 3, sub-section (i), dated the 18th February, 2016.

As per Notification of DIPP dated February 17, 2016 an entity is considered as a 'startup'-

a) Up to five years from the date of its incorporation/registration;

b) If its turnover for any of the financial years has not exceeded Rupees 25 crore; and

c) It is working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property;

Provided that any such entity formed by splitting up or reconstruction of a business already in existence shall not be considered a 'startup'. It is to be noted that under the said Notification of DIPP, clarity has been given as to what will qualify as innovation, development, deployment or commercialization.

1 http://startupindia.gov.in/notification.php

2 http://dipp.nic.in/English/Investor/startupindia/Definition_Startup_GazetteNotification.pdf

Accordingly, a firm/company would be considered a start-up if it is incorporated or registered in India not prior to five years, with an annual turnover not exceeding INR 25 Crore in any preceding financial year and at the same time, it should be working towards development, deployment or commercialization of new products, processes or services driven by technology or intellectual property. Further, Startups would need to get a certificate from the Inter-ministerial Board of Certification to get the status of startup.

Therefore, investment in every startup is not eligible for the exemption and only such startups which fulfill the conditions specified by the DIPP, as mentioned herein above, are eligible for exemption from Angel Investment Tax. Further, the said exemption will not apply to retrospective investments.

CONCLUSION

The exemption of Angel Investment Tax for specified startups is a step forwards in implementation of Startup India programme initiated by the Government of India. Due to high tax rate on Angel Investment in India the investors usually hesitate in making investment in such startup companies. This affects the economic growth rate of the country as well. Now the eligible startup companies need not have to pay Angel Tax even if it exceeds the fair value of shares. This will benefit the resident angel investors as well which are not registered as venture capital funds with Securities and Exchange Board of India. Although removal of Angel Tax will not benefit all the startups because of the stipulation attached in the Notification of DIPP i.e. only those start ups which have a certificate from the Inter-ministerial Board, fulfill criteria like not being more than 5 years old, turnover not exceeding INR 25 Crore, working towards innovation & commercialization of new products or services and driven by technology or intellectual property, will have the benefit and accordingly, such exemption would be welcomed by the investors as well as by the startup companies which needs such investment. This will promote the investment in India and definitely provide a huge relief to angel investors and eligible startup companies.

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SUSTAINABLE STRUCTURING OF STRESSED ASSETS

Shivam Hargunani

INTRODUCTION:

The Reserve Bank of India ("**RBI**"), from time to time, had issued various Guidelines with the objective of stimulating the stressed assets in the economy. Such Guidelines provide framework for Strategic Debt Restructuring (SDR) Mechanism, revitalizing the distressed assets in the economy, restructuring of advances, flexible structuring of long term project loans etc. To provide further flexibility to deal with stressed assets in the Country, the RBI had introduced SDR Mechanism for the purpose of ensuring more stakes of promoters in reviving stressed accounts and providing banks an option to initiate change of ownership, in cases where borrower companies fail to meet the critical conditions and viability milestones in the loan account. The Guideline on SDR provides that banks should consider revival plan using SDR only in cases where change in ownership is likely to improve the economic value of the loan asset and the prospects of recovery of their dues. As a step forward to deal with stressed assets, recently, the RBI, had issued Guidelines on the Scheme for Sustainable Structuring of Stressed Assets on June 13, 2016 (hereinafter referred as "**Scheme**") in order to strengthen the lenders' ability to deal with stressed assets.[1] The stressed assets comprise of Non Performing Assets (NPAs), restructured loans and written off assets.

The Scheme is one step forward to the SDR Mechanism as under this Scheme the existing promoter may be allowed to continue in the management even being a minority shareholder. Further under this Scheme, the lenders have an option to hold optionally convertible debentures in addition to equity or preference shares, which would not be available under SDR.

RBI had recently asked banks to clean up their balance sheets by March 2017 and make provision for those losses before the end of March 2016. A large part of the write-off, however, is technical and more of a balance sheet management issue. Allaying fears on the system-wide bad loan stress ailing the banking system, prevention is better than cure.[2] This scheme would provide an optional framework for the resolution of large stressed accounts.

ELIGIBILITY CRITERIA FOR THE APPLICABILITY OF THE SCHEME:

In order for the Scheme to apply, the account has to necessarily meet all the following conditions[3]:

(i) The project has commenced commercial operations;

(ii) The aggregate exposure (including accrued interest) of all institutional lenders in the account is more than INR 500 crores (including Rupee loans, Foreign Currency loans/External Commercial Borrowings,);

(iii) The debt should be sustainable and should not be less than 50 percent of current funded liabilities.

TEST OF SUSTAINABILITY FOR RESTRUCTURING UNDER THE SCHEME:

This is one of the eligibility conditions that in order to be eligible for restructuring under this Scheme, the debt should meet the test of sustainability. A debt will be said to be sustainable if on the basis of independent Techno-Economic Viability (TEV), the Joint Lenders Forum (JLF)/Consortium of lenders/bank have opinion that the current outstanding debt i.e. funded and non-funded owed to banks/institutional lenders can be served by the current cash flows of the company over the same tenor as that of the existing facilities even if the future cash flows remain at their current level. Therefore, the valuation of cash flow is an important element in this Scheme.

1 Press Release by RBI to introduce a 'Scheme for Sustainable Structuring of Stressed Assets' dated Jun 13, 2016. Available at: https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=37210.

2 Asset quality problem more of a governance issue: RBI Deputy Governor S S Mundra. Available at: http://articles.economictimes.indiatimes.com/2016-02-12/news/70568833_1_governor-ss-mundra-gross-npas-private-banks.

3 RBI notification for Scheme for Sustainable Structuring of Stressed Assets, dated June 13, 2016. Available at: https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10446&Mode=0.

BIFURCATION OF THE OUTSTANDING DEBT:

The Scheme provides bifurcation of the outstanding de

Part A	Part B
Under Part A, the level of debt (including new funds required to be sanctioned within next six months and non-funded credit facilities that will be crystallized within the next 6 months) is determined which may be serviced within the respective residual maturities of existing debt through the current cash flows of the company as well as expected cash flows from the prospective level of operations, within the next 6 (six) months. The level of debt so determined as per above would be referred as Part A under this Scheme. However, for the purposes of this Scheme such Part A debt should not be lower than 50% of the current funded facilities of the company.	The difference between the aggregate current outstanding debt from all sources and Part A would be referred as Part B under this Scheme. The debt under Part B would be converted into equity/ redeemable cumulative optionally convertible preference shares/ optionally convertible debentures. All such instruments would be referred as Part B instrument for the purpose of this Scheme.

debt into sustainable debt and equity/quasi-equity instruments which are expected to provide upside to the lenders when the borrower turns around. Accordingly, the JLF/consortium/bank on the basis of an independent TEV report, divide the current dues into Part A and Part B as per below:

THE RESOLUTION PLAN

The Resolution Plan as per Scheme provides for restriction on grant of any fresh moratorium on interest or principal repayment for servicing of Part A debt. It also provides restriction on any extension of the repayment schedule or reduction in the interest rate for servicing of Part A, as compared to repayment schedule and interest rate prior to this resolution.

In addition the resolution plan provides that Part B debt shall be converted into equity/redeemable cumulative optionally convertible preference shares and in case where the resolution plan does not involve change in the existing promoters such Part B debt may be converted into optionally convertible debentures.

Further, under the Scheme, the resolution plan may involve any one of 3 options with regard to the post-resolution ownership of the borrowing entity which are as following:

The current promoter of the borrower may continues to hold majority of the shares or controlling interest;

The current promoter may be replaced with a new promoter either through conversion of a part of the debt into equity under SDR mechanism (which is thereafter sold to a new promoter) or in the manner contemplated as per Prudential Norms on Change in Ownership of Borrowing Entities (Outside SDR Scheme);

The majority of shareholding in the entity may be acquired by lenders through conversion of debt into equity either under SDR or otherwise and the lender may allow the current management to continue or hand over management to another agency/ professionals under an operate and manage contract.

It may be noted here that in case any malfeasance on the part of the promoters has been established through a forensic audit or otherwise, then this Scheme shall not be applicable if there is no change in promoter or the management is vested in such delinquent promoter.

The resolution plan under this Scheme must be agreed by a minimum of 75% of lenders by value and 50% of lenders by number in the JLF/consortium/banks.

Further, the resolution plan shall be submitted by the JLF/consortium/bank to an Overseeing Committee (OC), an advisory body to be constituted by the Indian Banks Association, comprising of eminent experts, in consultation with RBI for purpose of review of the resolution plan prepared under this Scheme, its reasonableness and adherence to the provisions of this Scheme.

It is worth mentioning here that once the resolution plan prepared and presented by the lenders is ratified by the OC, it will be binding on all lenders. They will, however, have the option to exit as per the extant guidelines on Joint Lenders' Forum (JLF) and Corrective Action Plan (CAP).

CHALLENGES FOR THE IMPLEMENTATION OF THE SCHEME:

While the scheme will be applicable only to projects which have commenced commercial operations, the projects which have not been able to achieve commercial operations due to some issues would not get benefit under this Scheme.

Further, under this Scheme, the RBI requires that for a debt to be sustainable in nature, the Joint Lenders Forum (JLF)/Consortium of lenders/bank should conclude through independent TEV that debt of that principal value amongst the current funded/non-funded liabilities owed to institutional lenders can be serviced over the same tenor as that of the existing facilities even if the future cash flows remain at their current level. Accordingly, to apply this Scheme, the borrower should have ability to repay atleast 50% of its funded liabilities.

CONCLUSION:

The RBI has introduced this Scheme with the objective of providing banks a greater flexibility to structure the stressed assets in the Indian economy. The ultimate purpose of this Scheme is to reduce the number of non-performing assets which is rising extensively.

It is expected that this move would allow banks to manage dreadful loans and clean up their books more efficiently and effectively. In order to make sure that such an exercise is carried out in a transparent and prudent manner, the Scheme also envisages that the resolution plan will be prepared by credible professional agencies. It would require a substantial write down of debt and/or making large provisions for the same.

However, such Scheme is also not free from flaw. The major concerns under this Scheme that may be considered are that of its applicability for completed projects only. That means the projects which are under construction are not eligible for this Scheme. Furthermore, the determination of sustainable debt is also a cumbersome exercise that needs to be evaluated under this Scheme as such determination of debt should be accurately ascertained. In addition to these, another major concern under this Scheme is valuation of cash flow to ascertain the level of sustainable debt. Notwithstanding such flaws or demerits, the Scheme is a well attempt to alleviate the situation of distress assets in the Country that should be welcomed by the banks as well as corporate in India. A large number of borrowers may be take benefit under this Scheme in order to restructure their stressed assets.

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PROTECTION OF LITERARY CHARACTERS

*Martand Nemana & Rahul Gupta**

INTRODUCTION

The information age has made traditional IP protection for literary characters inadequate. Creators now find their characters dominating the cultural space as never before, faced with the challenge of protecting their work from infringement and controlling the depiction of their creations, the regular copy right regime seems inadequate to give these creators their due. This lacuna is partly filled by the expansion of trademark law and as a subset of that, the common law remedy of passing off.

This note will deal with a few distinct questions in the context of the IP regime in India. The *first*, whether a copyright can subsist in character by itself, outside the bounds of the form it's depicted, the answer to which and *second*, what is the extent of the protection one can expect when faced with a third-party's unlawful depiction of a character. And *finally* a proposed way forward.

COPYRIGHTS

Copyrights subsist in the original work of any author. It is of note to remember that a copyright does not exist in the idea per se but rather the mode of expression of that particular idea. Further copyrights cannot be said to exist in ideas which are common place or generic. With this in mind, reference should be made to the "*modicum of creativity doctrine*" and the "*sweat of the brow doctrine*" these tests postulate that a copyright would exist in work which involves conscious effort on part of the creator. It follows that a simple depiction a character that exists in the public mind would by itself not in the regular course be eligible for copyright protection.

WELL-DELINEATED TEST

Reference may also be made to the *Scène à faire doctrine*. This doctrine posits that any genre specific trope, theme or character cannot be made a subject matter of a copyright. In the context of literary characters this doctrine would suggest a vague collection of qualities, such as a character that drinks too much or a character that shows integrity would in absence of any other factors not be subject to any copyright protection. This doctrine disqualifies stock characters from copyright protection.

A character can be defined as an aggregation of qualities specified by the creator. It seems reasonable to assert as the court in **DC v. Bruns Publication Inc (1940)** did that characters which have greater elements of unique expression have a higher likelihood to receive copyright protection, in as much as they have physical as well as conceptual features.

It follows as was held in **Nichols v. Universal (1930)** *"The less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinctly."*

The standard that emerges on the collective analysis of these authorities is whether or not the character is sufficiently delineated or rather sufficiently unique in its essence. It could be argued as was that **Nichols v. Universal (Supra)** that a story which involves characters which are simple stereotypes such as Jew's and Irishmen are not worthy of copyright protection as they do not distinguish themselves sufficiently.

STORY BEING TOLD TEST

The above test had a few inherent limitations the uniqueness of a character is highly subjective and would depend greatly person to person. This lacuna was filled by the story being told test.

It was first stated in **WB v. Columbia Broadcasting System (1954)** The test postulates that a character may copyrightable if it in a meaningful way constitutes the *"vehicle of the story"* as opposed to a simple "chessman" a chessman refers simply to the pieces on the chess board. This implies that the story must be centered on the character in order for it to be copyrightable.

A recent interpretation of this test in **DC v. Towel (2015)** alluded to in this regard the court found that the "Bat-mobile" from the Batman comics was a sufficiently distinct element from the original works and accordingly a copyrightable interest lay in it. The court reasoned that the existence of persistent qualities and traits had

given the Bat mobile a distinctive and iconic identity so as to warrant copyright protection.

INDIAN PERSPECTIVE

The judicial recognition of copyright existing in literary characters was highlighted in **Arbaaz Khan v. North Star entertainment Pvt. ltd (2016)** by the Bombay HC. The court while examining whether a copyright would subsist in one "Chulbul Pandey" from the Dhabang franchise opined *"As to the general principal that the character* is unique and the portrayal of that *character, as also the "writing up" of that character* in an underlying *literary work is capable of protection* is something that I think I can safely accept"

The 2016 Bombay HC decision examines **WB v. Columbia Broadcasting systems (supra)**, in a sense importing the essential distinctiveness standard.
The question of what makes a character capable of protection under the copyright regime was discussed in **Start India Pvt. Ltd v. Leo Burnett (2002)** the court opined *"The characters to be merchandised must have gained some public recognition, that is, achieved a form of independent life and public recognition for itself independently of the original product or independently of the milieu/area in which it appears"*

From the above discussion it seems sufficient to note that copyrights can subsist in characters outside the scope of the story if the characters are in a sense unique. Though the exact parameters required in conclusively determining whether a character deserves copyright protection or not is not clear, an amalgamation of both tests would seem appropriate to establish the copyrightability.

PROTECTION FROM PASSING OFF

Moving to the second leg of analysis, what is the extent of protection that can be given to such works against a third party who is passing off his products under the guise of the literary character? This can also be called unlawful character merchandising.

Recently the Delhi HC in **WWE v. Savio Fernandes (2016)** granted a permanent injunction to the plaintiffs where the defendant was found to not only be infringing in the WWE trademark but also was found to be using the likeness of the wrestlers themselves in their products. The court found the defendant guilty of passing off. The court found that the goods were bound to cause confusion in the mind of the public

The court held *"The misrepresentation by the defendants is done in a manner that in all probability any visitor to the defendant's web page or stores will be induced to believe that the defendants have a direct nexus or affiliation with the plaintiff; and/or the plaintiff has licensed its trademark "WWE" to the defendants… (Words omitted) In view thereof the defendants are passing off their goods as those of the plaintiff."*

The court also specifically recognized the copyright subsisting in the wrestlers, the personas of whom can be perhaps akin to literary character

"7. All the wrestling events of the plaintiff feature professional wrestlers having distinctive appearances and carrying fictitious and unique names which are evocative of the same image sought to be projected by the characters. The combination of both name and image, have the effect of making an indelible impression in the mind of the viewer. Thus, for instance, there are wrestlers with names such as JOHN CENA, RANDY ORTON, THE ROCK, CM PUNK, UNDERTAKER, SHAWN MICHAELS, THE GREAT KHALI, REY MYSTERIO, HHH, and EDGE... (Words omitted). Plaintiff being the creator of the said characters holds United States copyright registrations in the talent images of these characters.

8.… (Words omitted) Some of the fictitious names of the wrestlers have also been registered as trademarks by the plaintiff in relation to various goods in different classes in the USA and India."
In **Chorion Rights Ltd v. Ishan Apparel (2010)** while examining a case where the defendants were producing and selling Noddy apparel despite Chorion holding the worldwide trademark to the name and character. The defendants contested that they had been using the mark since earlier than the defendant. The court noted that the despite the copyright persisting in character sufficient material to prove prior use by the plaintiffs was not got on record.

"It is settled law in India, that when contesting parties hold trademark registrations, their rights are to be determined on the basis of principles applicable for passing off, the most important component of which is establishing prior use of the mark. The plaintiff has not adduced any evidence to show prior user in India, it is even not the prior registered owner of the said

trademark in India….(words omitted) .In this case the defendant has not only established prior user, at least from 1995, but also prior registration of the mark. …(words omitted) the Court is not unmindful of the fact that there is not even a shred of evidence disclosing sales figures, as to importation of such books, authorized stock lists, periodicity of such sales, advertisements, areas where such sales took place, and their volume,….(words omitted) NODDY could be copyrightable, yet the plaintiff has desisted from claiming copyright infringement. In these circumstances, the Court's subjective perceptions - in the absence of objective materials, or even pleadings, cannot metamorphosis into "judicial notice"; such inferences would be dangerous, and undermine the process of judicial decision making".

This decision serves to highlight one of the things creators should be mindful of while pursuing an action of passing off.

THE WAY FORWARD

These recent cases on character merchandising are a litmus test to the extent of protection one can expect when faced with the issue of unlawful usage by a third party. These decisions while showcasing the existence of protection are tied down by the conventional standards and tests for a regular action of passing off. These standards are stringent are liable to not be met due to technical considerations as evidenced b the case above. The right of publicity, a unique strain of IP, in this author's opinion shows the way forward.

It is proposed that in a very direct sense literary characters have attained celebrity status. This argument takes up special relevance in a world where "The Avengers" and its hosts of characters are not only one of the biggest films of all time but the characters enjoy a unprecedented popularity .The owners of those characters should be afforded the same degree of protections which are made available to celebrities.

CONCLUSION

If the character is unique and distinct both within the context of the story and outside of it, either by virtue of repeated depictions or iconic status , then it is safe to presume that such a character would be eligible for copyright protection

Trademarks can subsist in characters and are eligible to bring suits of passing off where there likeness has been unlawfully appropriated

The current regime though not perfect does afford some protection to the creators of literary characters but the development of this protection is by no means complete. Finally, the right of publicity given to prominent performers perhaps illuminates the way forward for the development of a strong IP protection regime for both creators and characters.

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EMPLOYMENT LAW – UPDATES

This write-up provides brief insights to recent updates regarding employment laws in India. So, relevant judgments, amendments, policies, regulations that impact how various entities employ, manage and terminate its employees have been included herein.

FORMING OF TRADE UNIONS – IT SECTOR

(W*HETHER PROFESSIONALS FROM IT SECTOR BE TERMED AS "WORKMEN" UNDER INDUSTRIAL DISPUTES ACT 1947?***)**

A circular[1] recently issued by the Department of Labor, Government of Tamil Nadu clarified that employees of the IT Sector are covered under the Industrial Disputes Act 1947 (IDA) and have the right to form trade unions. Alarming as it sounds, this development has caused consternation in industry circles which believed that the IT Sector was outside the ambit of this Act. Obviously, for some reason, the IT Sector has been misinformed of the correct position under the law[2].

The instigating point is Tata Consultancy Services dismissing hundreds of employees last year leading to the formation of the IT Employees Wing supported by the New Democratic Labour Front (NDLF or Puthiya Jananayaga Thozilalar Munnani). Since no response was received from the state government, NDLF had approached the Hon'ble Madras High Court seeking a direction to the administration to clarify whether the IT sector was covered by the IDA, following which this note has been issued.

Now, whether IT professionals are workmen or not finds it clarification in the judgment of H.R Adyanthaya Vs. Sandoz (India) Ltd.[3] by Hon'ble Supreme Court. The apex court held that "*a person to be workman under ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by any of the four exceptions to the definition. We reiterate the said interpretation.*" Meaning thereby, except for supervisory or managerial level employees, all other employees are considered as workmen under the IDA if they perform any manual, skilled, unskilled, technical, operational and clerical work. This ratio was recently reiterated by the Supreme Court in its judgment in Raj Kumar Vs Director of Education[4].

Effect of this move by the Tamil Nadu State Government is to clarify that no exemption from the law is available to the IT sector. Hence, in order to avoid litigation and hostility with employees, lay-offs, retrenchments and terminations of employees ought to be done in compliance with the provisions of the IDA.

THE PAYMENT OF BONUS (AMENDMENT) ACT, 2015 – STAY ON RETROSPECTIVE OPERATION

The Payment of Bonus Act, 1965 (PBA) provides for payment of bonus to persons employed in certain establishments on the basis of profit or on the basis of production or productivity and for matters connected therewith. The PBA provides for the mandatory annual payment of bonus, calculated on the basis of the gross-profits which are determined at the close of the accounting year, to eligible employees of establishments which employ 20 or more persons. Under PBA, every employee who draws a salary of INR 10,000 or below per month and who has worked for not less than 30 days in an accounting year, is eligible for bonus (calculated as per the methodology provided under the Principal Act) with the floor of 8.33% of the salary payable to him/her and a cap on the maximum bonus statutorily payable (20% of the salary).

The much talked about Payment of Bonus (Amendment) Act, 2015 (the Amendment Act) made following amendments to PBA:

1. *Not available in public domain*
2. *http://smartinvestor.business-standard.com/market/story-389114-storydet-Tamil_Nadu_allows_unions_in_information_technology_sector.htm#.V2zLTtJ97IU // http://economictimes.indiatimes.com/tech/ites/tamil-nadus-decision-to-allow-it-workers-to-form-unions-unlikely-to-hurt-industry-in-short-term/articleshow/52680507.cms*
3. *(1994) 5 SCC 737*
4. *http://judis.nic.in/supremecourt/imgs1.aspx?filename=43544 // This judgment has also been discussed later on different issue in this write up.*

(i) Retrospective Applicability of Amendments: The amendments relating to eligibility of employees entitled to receive bonus and the ceiling on salary or wages for calculation of such bonus payments, are to be effective retrospectively from 1 April 2014.

(ii) Eligibility Limit of Employees: Section 2(13) of PBA was amended to increase the ceiling on salary or wage limit for eligible employees from INR 10,000 per month to INR 21,000 per month.

(iii) Ceiling on Salary or Wages for Calculation of Bonus: The amended section[5] now provides that where the salary or wage of an employee exceeds INR 7,000 per month or the minimum wage for the scheduled employment, the bonus payable to such employee shall be calculated as if his salary or wage were INR 7,000 per month or the minimum wage for the scheduled employment, whichever is higher.

It has been a general industry view that the retrospective nature of the amendments must be done away with an order to give time to the employers to plan for such increase in costs towards salaries. The main concern was that employers would not have budgeted for this expense in the previous financial year (2014-15) for which the books of accounts were already finalized and income tax returns filed.

In fact organizations such as Confederation of Indian Industries (CII), Micro, Small and Medium Enterprises (MSME) chamber, Indian Industries Association (IIA), and FICCI had approached the Labour Ministry urging and suggesting various options to apply the amendments specifically seeking prospective application of the amendments.

Likewise many entities took the more formal route and approached Courts challenging the retrospective effect of the amendments from FY 2014-15. And that few High Courts (Kerala High Court, Karnataka High Court, Madhya Pradesh Labour Office, Allahabad High Court (Uttar Pradesh), Gujarat High Court, and Punjab & Haryana High Court) have earlier been pleased to stay the retrospective operation temporarily since its introduction.

Recently, the Division Bench of the Hon'ble Bombay High Court passed an ad interim order staying the retrospective operation of the Amendment Act. In this case[6] the petitioners filed a writ petition in the Hon'ble Bombay High Court challenging inter alia retrospective operation of the Amendment Act. It was contended before the Court that since Amendment Act was introduced and passed much after the financial statements for the financial year 2014-15 were already closed, along with income tax / bonus computation and payments and statutory filings under various laws and regulations; therefore, the Petitioners, for no fault of theirs, may be constrained to get its financial statements re-audited. This requirement by the Amendment Act is impractical and burdensome as it will result in re-preparation/filing of tax audit and filing of income tax returns. The Hon'ble Court while granting temporary stay on the retrospective operation of the Amendment Act observed that the Amendment Act imposes harsh burden on the employers since there is no specified timeframe to factor in the increased costs of compliance in their financial statements.

TERMINATION OF EMPLOYEES BY SCHOOLS

Hon'ble Supreme Court of India in its recent judgment passed in the matter of Raj Kumar vs. Director of Education & Others[7], explicitly instructed the schools in Delhi regarding compliance to be followed before terminating services of their employees. While considering in detail the provisions of the Industrial Disputes Act, 1947 (IDA) and the Delhi School Education Act, 1973 (DSEA) relating to termination of services of employees by schools, the Hon'ble Supreme Court interpreted Section 8(2) of the DSEA which requires obtaining prior approval of the Director of Education (DoE) before passing any order of dismissal or termination of services of its employees by school.

A perusal of the Statement of objects and reasons of the DSEA clearly shows that the intent of the legislature while enacting the same was to provide security of

5. Section 12

6. WPL/1548/2016

7. http://judis.nic.in/supremecourt/imgs1.aspx?filename=43544

tenure to the employees of the school and to regulate the terms and conditions of their employment. The Hon'ble Apex Court in its judgment has, inter alia, observed that Section 8(2)[8] of the DSEA is a procedural safeguard in favor of an employee to ensure that an order of termination or dismissal is not passed without the prior approval of DoE.

The Hon'ble Apex Court observed that while the functioning of both aided and unaided educational institutions must be free from unnecessary governmental interference, the same needs to be reconciled with the conditions of employment of the employees of these institutions and provision of adequate precautions to safeguard their interests. Section 8(2) of the DSEA is one such precautionary safeguard which needs to be followed to ensure that employees of educational institutions do not suffer unfair treatment at the hands of the management. The Hon'ble Apex Court had earlier[9] held that the regulation of the service conditions of the employees of private recognized schools is required to be controlled by educational authorities and the state legislature is empowered to legislate such provision in the DSEA. In other words, Section 8(2) of the DSEA is a procedural safeguard in favor of an employee to ensure that an order of termination or dismissal is not passed without the prior approval of the Director of Education. This is to avoid arbitrary or unreasonable termination or dismissal of an employee of a recognized private school.

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8. *Subject to any rule that may be made in this behalf, no employee of a recognized private school shall be dismissed, removed or reduced in rank nor shall his service be otherwise terminated excepted with the prior approval of the Director*
9. *TMA PAI Foundation vs. State of Karnataka ((2002) 8 SCC 481)*

REFINANCING OF PROJECT LOANS BY THE NBFCS

The Reserve Bank of India (RBI), on June 2, 2016, issued circular no. DNBR.CC.PD.No. 082/03.10.001/2015-16, allowing Non-Banking Financial Companies (NBFCs) to offer take-out financing to Infra Projects.

What is take-out financing? Takeout financing is a route of refinance wherein new lenders take over project loans of existing lenders and thereby stretch the loan's repayment over a longer period. Through this route, existing lenders get relief on their capital to pursue new lending opportunities and infrastructure projects get the benefit of a longer repayment period. Prior to this notification, this option so far available only to banks.

The provisions under the present notifications are laid down in brief:

1. Accordingly, via this notification, the NBFCs may refinance any existing infrastructure and other project loans by way of take-out financing, without a pre-determined agreement with other lenders, and fix a longer repayment period and the same would not be considered as restructuring if the following conditions are satisfied:

    i. Such loans should be 'standard' in the books of the existing lenders, and should have not been restructured in the past;

    ii. Such loans should be substantially taken over (more than 50% of the outstanding loan by value) from the existing financing lenders; and

    iii. The repayment period should be fixed by taking into account the life cycle of the project and cash flows from the project.

2. For existing project loans where the aggregate exposure of all institutional lenders is minimum Rs. 1,000 crore, NBFCs may refinance such loans by way of full or partial take-out financing, even without a pre-determined agreement with other lenders, and fix a longer repayment period, and the same would not be considered as restructuring in the books of the existing as well as taking over lenders, if the following conditions are satisfied:

    i. The project should have started commercial operation after achieving Date of Commencement of Commercial Operation (DCCO);

    ii. The repayment period should be fixed by taking into account the life cycle of and cash flows from the project, and, Boards of the existing and new lenders should be satisfied with the viability of the project. Further, the total repayment period should not exceed 85% of the initial economic life of the project / concession period in the case of PPP projects;

    iii. Such loans should be 'standard' in the books of the existing lenders at the time of the refinancing;

    iv. In case of partial take-out, a significant amount of the loan (a minimum 25% of the outstanding loan by value) should be taken over by a new set of lenders from the existing financing lenders; and

    v. The promoters should bring in additional equity, if required, so as to reduce the debt to make the current debt-equity ratio and Debt Service Coverage Ratio (DSCR) of the project loan acceptable to the NBFCs.

3. A lender who has extended only working capital finance for a project may be treated as 'new lender' for taking over a part of the project term loan as required under the guidelines.

4. The above facility will be available only once during the life of the existing project loans.

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FOREIGN CURRENCY ACCOUNTS FOR STARTUPS

Reserve Bank of India vide its notification dated June 23, 2016 allowed Startups with an overseas subsidiary to open foreign currency accounts with a bank abroad to credit to the account foreign exchange earnings from exports and sales made by the startup or its subsidiary. The notification is part of series of incentives granted by the Central Government to the Indian Startups under the "Start up India, Stand up India" Scheme. RBI had earlier in February, 2016 clarified the issue regarding opening of foreign currency accounts for startups. As per the present notification, the balance in the accounts representing exports from India shall be repatriated to India within the period prescribed for realization of exports in Foreign Exchange management regulations, 2016. Payments received in foreign exchange by an Indian Startup out of sales or exports made by the startup or its subsidiaries will be a permissible credit to the Exchange Earners Foreign Currency (EEFC) account maintained in India by the Startup. An Exchange Earners' Foreign Currency Account (EEFC) is an account maintained in foreign currency with an Authorized Dealer i.e. a bank dealing in foreign exchange. It is a facility provided to the foreign exchange earners, including exporters, to credit 100 per cent of their foreign exchange earnings to the account, so that the account holders do not have to convert foreign exchange into Rupees and vice versa, thereby minimizing the transaction costs.

SEBI NOTIFIES WINDING DOWN POLICY FOR DEPOSITORIES

The Securities and Exchange Board of India issued notification no. SEBI/ LAD-NRO/GN/2016-17/007, dated 27th May, 2016 to notify the Securities and Exchange Board of India (Depositories and Participants) (Third Amendment) Regulations, 2016. The said amendment inserts a new regulation 35B after regulation 35A of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996. The new regulation lays down that every depository shall devise and maintain a wind-down plan in accordance with guidelines specified by the Board.
The regulation further states the meaning of wind-down plan as a process or plan of action employed, for transfer of the beneficial owner accounts and other operational powers of the depository to an alternative institution that would take over the operations of the depository in scenarios such as erosion of networth of the depository or its insolvency or its inability to provide critical depository operations or services. Thus, a new framework has been put in place by SEBI for orderly winding down of depositories in the events like depository's voluntary closure of business.

SEBI EASES REDEMPTION NORMS FOR MUTUAL FUND INVESTORS

Securities and Exchange Board of India vide it circular dated 31st May, 2016 eased the redemption norms for mutual fund investors by allowing them to redeem their investment partially even if the asset management company imposes restriction on redemption.

As per the earlier circular, Board of Directors of the Asset Management Company (AMC) and the Trustees could impose restriction on redemption under any scheme of the mutual fund. Due to the general nature of provisions in the earlier circular giving discretionary powers to AMC's and in light of recent incidents of companies imposing unreasonable restrictions, SEBI recognised the need to have a re-look at the circumstance under which such restriction on redemption could be imposed.

GENERAL MARKET LIQUIDITY

The circular states that circumstances calling for restriction on redemption should be such that illiquidity is caused in almost all securities affecting the market at large, rather than in any issuer specific securities. Therefore, restrictions can be imposed in case of systematic crisis or events that severely constrict market liquidity or the efficient functioning of market.

- AMC's cannot use restriction as a tool for managing liquidity in schemes and must have proper internal liquidity management tools in place. If a fund takes a poor investment decision and is not able to sell a specific security in the portfolio of a scheme that leads to a liquidity issue, it cannot restrict withdrawals.
- If the market is hit by unexpected events related to political, economic, military, monetary or other emergencies, which impact the functioning of exchanges or the regular course of transactions, AMCs can impose restriction or

limits on redemptions.

- Restriction in case of exceptional circumstances caused by force majeure, unpredictable operational problems and technical failures can only be considered if they are reasonably unpredictable and occur in spite of appropriate diligence.

LIMITS ON RESTRICTION

- Time

  Restriction may be imposed only for a specified period of time not exceeding 10 working days in any 90 day period

- Amount

  Under the new rules, no redemption requests of up to Rs.2 lakh will be subject to restrictions. For redemption requests above Rs.2 lakh, AMCs will redeem the first Rs.2 lakh without restriction while the remaining money can be subject to any restriction imposed by the AMC.

The new rules require information of all restrictions imposed to be given to the SEBI. The norms would be effective from 1st july, 2016 on all existing schemes. It is an investment friendly decision and addresses the liquidity risk involved in mutual fund investment for retail investors.

GOVERNMENT RELAXES OBLIGATIONS ON ASSESSEE TO PROVE "IRRECOVERABILITY OF BAD DEBTS"

The Central Board of Direct Taxes, Ministry of Finance issued Circular No. 12/2016, dated 30th May 2016, wherein the government has relaxed obligations on assessee to prove 'irrecoverability of Bad Debts'.

CBDT clarified that the legislative intent behind the Direct tax Laws (Amendment) Act, 1987 was to eliminate litigation on the issue of allowability of bad debt by doing away with the requirement for the assessee to establish that the debt, has in fact, become irrecoverable. CBDT in this regard, referred to the Hon'ble Supreme Court's judgment in the case of TRF Ltd., dated 09.02.2010 wherein it was stated that *"After 1.4.1989, for allowing deduction for the amount of any bad debt or part thereof under section 36(1)(vii) of the Income Tax Act, it is not necessary for assessee to establish that the debt , in fact has become irrecoverable; it is enugh if the bad debt is written off as irrecoverable in the books of accounts of assessee."*

Further, CBDT stated that in view of the said judgment, claim for any debt or part thereof in any previous year, shall be admissible under section 36(1)(vii) of the Income Tax Act, 1961 if it is written off as irrecoverable in the books of accounts of the assessee for that previous year and it fulfills the conditions stipulated in the section 36(2) of the Income tax Act, 1961 which deals with deductions from the total income.

TDS EXEMPTED ON 7 TYPES OF TRANSACTIONS

The Central Board of Direct Taxes(CBDT), on June 17, 2016, vide notification no. 47/2016/ **F. No. 275/53/2012 – IT(B)**, notified that no deduction of tax under Chapter XVII of the Income tax Act, 1961 shall be made on the payments of the nature specified below, in case such payment is made by a person to a bank listed in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934), excluding a foreign bank, or to any payment systems company authorized by the Reserve Bank of India under Sub-section (2) of Section 4 of the Payment and Settlement Systems Act, 2007 (51 of 2007):

i. Bank guarantee commission;

ii. Cash management service charges;

iii. Depository charges on maintenance of demat accounts;

iv. Charges for warehousing services for commodities;

v. Underwriting service charges;

vi. Clearing charges (micr charges) including interchange fee or any other similar charges by whatever name called charged at the time of settlement or for clearing activities under the payment and settlement systems act,

2007;

vii. Credit card or debit card commission for transaction between merchant establishment and acquirer bank.

EFFECT:

After the above notification, apart from making payments to the banks, the entities making payments to the Payment System Companies, such as electronic wallet providers, etc., registered under Payment and Settlement Systems Act, 2007, need not deduct tax at source (TDS) in respect of the aforementioned seven transactions.

This would reduce the compliance burden and improve the cash flows of the companies making and also encourage them to use the channel of payment system companies.

GUIDELINES FOR STARTUPS – SIPP SCHEME

The Indian Patent Office (IPO) has issued guidelines for startups to file patent, trademark and design application under Start-Ups Intellectual Property Protection (SIPP). This move is aimed at increasing awareness about IP rights and their exploitation by the upcoming businesses and also to encourage innovation and creativity amongst them. It provides the procedure to be adopted for filing/processing their applications for patents, designs, trademarks and fees to be paid to the facilitators thereof.

PATENT APPLICATION

As per the new guidelines, a startup willing to file patent application can directly contact any of the facilitators available on the official website of Indian Patent Office for preparing the patent application. In case the startup is unable to select a facilitator, the head of the respective patent office as per jurisdiction shall provide names of 3 facilitators to choose from.

The facilitator shall draft the patent specification in consultation with the start up subject to the patentability of the invention and the provisions of the Patent Act and Rules. The facilitator shall then file a complete patent specification at the appropriate office.

FEE

The SSIP scheme provided that the facilitator shall not charge anything from the startups or entrepreneurs. The facilitators shall be paid the fees directly by the Central government through the office of the controller. However, the fee for filing patent application and other statutory fees shall be borne by the Startups themselves.

The facilitator shall submit the claim of fees as per the fee schedule given in SIPP scheme once the patent application is received by the patent office. The invoice shall be submitted along with a letter addressed to the Head of Office of the respective Patent Office, giving details of claimed fees for drafting of application and ID proof of the Registered Patent Agent. The Head of office shall arrange for the payment of the fee to the facilitator after verification of the facilitator and suitability of payment and intimate to the controller the details of the application and payment made to facilitator.

FURTHER PROCEDURES

The facilitator shall also perform the following steps in furtherance of the patent application:

- Prepare reply to any query from patent office;
- Attend the hearings as fixed by the Patent Office with relation to the Patent Application.
- Find relevant documents in the patent office on time pursuant to hearing or otherwise as per Patent Act like Form 3, etc.

TRADEMARK AND DESIGN

Application for Design and Trademark registration shall be filed and processed in the same manner as that of patents. The list of facilitators for patents shall be applicable to design applications as well. A separate list of facilitators for trademarks is available on the website of Trademark Office for trademark applications.

CONCLUSION

With a vision to promote entrepreneurship among the youth and generating new lines of employment, the Government of India has been relentless in its approach to provide a level playing field to the start ups in India. The ambitious Scheme of “StartUp India, StandUp India” has seen many beneficial policies and action

plans by the government to foster creativity and innovation. The new guidelines shall enable the Startups to protect and exploit their innovations. It further discharges them of the financial and procedural requirements of filing and processing of IP registration by fulfilling the payment obligation on behalf of the applicant and providing a ready list of facilitators at their disposal.

CBEC REDUCES REQUIREMENTS FOR REGISTERING AS FIRST STAGE DEALER AND IMPORTER

The Ministry of Finance, Government of India issued Notification no. 30/2016 [F. No. 201/04/2016-CX-6], dated 28th June 2016, wherein it has specified the following:

1. A person who is registered as a first stage dealer shall not be required to take registration as an importer; or

2. A person who is registered as an importer shall not be required to take registration as a first stage dealer.

As per Rule 2 of Cenvat Credit Rules, 2004, "first stage dealer" means a dealer, who purchases the goods directly from,-

(i) the manufacturer under the cover of an invoice issued in terms of the provisions of Central Excise Rules, 2002 or from the depot of the said manufacturer, or from premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer, under cover of an invoice; or

(ii) an importer or from the depot of an importer or from the premises of the consignment agent of the importer, under cover of an invoice;

Further, the Central Board of Excise and Customs (CBEC) has also issued Circular No. 1032/20/2016-CX in this regard, dated 28th June, 2016, wherein it has clarified the following three points:

1. An assessee who conducts business both as an importer and a First Stage Dealer may take only one registration as he is exempted from taking a second registration. CBEC also clarified here that that the facility is optional and any assessee needing separate registration for his own business, may so register.

2. Further, such assessee who conducts business both as a First stage Dealer and an Importer, henceforth shall also have the option of filing a single quarterly return giving details of transactions as a first stage dealer and an importer, one after the other in the same table of the return, viz. all transactions as first stage dealer during the return period shall be followed by transactions as an importer during the same return period

3. Finally, CBEC also mentioned that any difficulty experienced in the implementation of the circular should be brought to the notice of the Board.

NOTES

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