VOLUME 4, NOVEMBER 2014

Chir Amlit Legal LLP
Jaipur | Mumbai | Delhi
www.chiramritlaw.com

THE NEWSLETTER

CONSTITUTIONALITY OF RBI'S MASTER CIRCULAR ON WILFUL DEFAULTERS [1]

The Hon'ble Gujarat High Court has declared RBI's Master Circular dated 02.07.2012, as being violative of the fundamental right to carry on profession, occupation, trade or business, enshrined under Article 19(1)(g) of the Constitution of India, to the extent that the Circular has been made applicable to all the directors of a company. The said circular prescribes penal measures to be taken by the banks/financial institutions against the wilful defaulters which, *inter alia*, also imposes restriction on the promoters/ entrepreneurs/ directors in the form of debarring them from availing any additional facility for floating a new venture for a period of 5 years. The Hon'ble Court stated that this provision of the circular shatters the concept of identity of a company being different from its director without providing any safeguards. Further, it was held that the circular paints all the directors with the same brush and does not distinguish between a director who is involved in day-to-day functioning of the company as against those who are not. Therefore, the unreasonable restriction imposed by the circular upon all directors of the company has been held to be arbitrary.

DETERMINATION OF 'PLACE OF REMOVAL'

The Central Board of Excise and Customs vide its Circular No. 988/12/2014-CX, dated 20.10.2014 has provided further clarification with respect to the determination of 'place of removal' in matters involving CENVAT Credit Rules, 2004 (CCR).

The circular addresses two major issues. Firstly, under these rules there are provisions that the credit of input services is available upto the place of removal. As the definition is now provided in the CCR, wherever CENVAT credit is available upto the place of removal, this definition of place of removal would apply, irrespective of the nature of assessment of duty.

The second associated issue discussed in the circular was regarding ascertainment of place of removal. The circular mentioned that there have been instances in past where on the basis of the claims of the manufacturer regarding freight charges or who bore the risk of insurance, the place of removal was decided without ascertaining the place where transfer of property in goods has taken place. This is a deviation from the Board's circular and is also contrary to the legal position on the subject.

The place of removal needs to be ascertained in term of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. Payment of transport , inclusion of transport charges in value , payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal. The place where sale has taken place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal.

JURISDICTION IN E-COMMERCE IP DISPUTES

The Delhi High Court in the case of *World Wrestling Entertainment Inc.* v. *Reshma Collection*[3] examined the meaning of *"carries on business"* as set out in Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957 for the purpose of determining jurisdiction of courts for an e-commerce company. The Court observed that because of the advancement in technology and rapid growth of new models of conducting business over the internet, it is possible for an entity to have a virtual presence in a place which is located at a distance from the place where it has a physical presence. Therefore, despite the appellant not having any physical office in Delhi, the Court held that the appellant to a certain extent 'carries on business' in Delhi on account of (i) appellant's programmes being broadcasted in Delhi, (ii) its merchandise being available for sale in Delhi and (iii) its goods and service being sold to customers in Delhi through its website etc.

INSIDE THIS ISSUE:

[1] *Ionic Metalliks* v. *Union of India*, SCA No. 645 and 10120 of 2014

[2] *Circular No. 988/12/2014-CX, dated 20.10.2014*

PROVISIONS OF SICA TO PREVAIL OVER THE PROVISION FOR RECOVERY OF DEBTS UNDER RDDB ACT[4]

A three judge bench of The Supreme Court In the present judgment authored by Justice Bobde, the Court discussed the scheme and purpose of the Sick Industrial Companies (Special Provisions) Act, 1985 ("**SICA**") and Scheme And Purpose Of The Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 ("**RDDB Act**").

"the provisions of SICA , in particular Section 22, shall prevail over the provision for the recovery of debts in the RDDB Act"

"There is no doubt that both are special laws. SICA is a special law, which deals with the reconstruction of sick companies and matters incidental thereto, though it is general as regards other matters such as recovery of debts. The RDDB Act is also a special law, which deals with the recovery of money due to banks or financial institutions, through a special procedure, though it may be general as regards other matters such as the reconstruction of sick companies which it does not even specifically deal with. Thus the purpose of the two laws is different."

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

The Court decided that the provisions of SICA, in particular Section 22, shall prevail over the provision for the recovery of debts in the RDDB Act.

SEBI SLAPS FINE OF RS. 25 LAKH ON GLAXO GROUP LTD.[5]

The Securities and Exchange Board of India (SEBI) through its adjudication order dated 14th October, 2014, slapped a fine of Rs 25 lakh on Glaxo Group, a promoter entity of drug maker Glaxo SmithKline Pharmaceuticals, for failing to make timely disclosures about its aggregate shareholding to the company and the stock exchanges. The Adjudicating Officer held that Glaxo had neglected the duty of making timely disclosures in compliance with Regulations 8 (1) and 8(2) of the Takeovers Regulations, 1997 and Regulations 30(1), 30(2) read with Regulation 30(3) of the Takeover Regulations, 2011.

NO CLAIM IF VEHICLE DRIVER DOES NOT HAVE VALID LICENCE[6]

The National Consumer Disputes Redressal Commission (NCDRC) held while allowing a revision petition of insurance company New India Assurance Co Ltd.An insurance company is not liable to pay any claim if the insured transport vehicle, which met an accident, is driven by a person having a licence to drive only light vehicle, the apex consumer body has observed.

A person who does not hold licence to drive transport vehicle cannot drive transport vehicle and if he drives transport vehicle, insurance company cannot be fastened with any liability.

EXTENSION FOR FILING SERVICE TAX RETURN

The Central Board of Excise & Customs via its Order No. 20/2014 dated 24th October 2014 has extended the due date for filing service tax returns for the period from 1st April 2014 to 30th September 2014, from 25th October, 2014 to 14th November, 2014. The aforementioned extension has been granted due to natural calamities in certain parts of country

[4] *KSL & Industries Ltd.* v. *M/s. Arihant Threads Ltd. & Ors*. CA No. 5225 of 2008

[5] Adjudication Order No. EAD-2/DSR/VVK/251/2014 dated 14th October, 2014

[6] *New India Assurance Co. Ltd.* v. *Birendra Mishra* RP NO. 3737 of 2008 decided on 29th October 2014

RTI QUERIES AND REPLIES TO BE POSTED ONLINE[7]

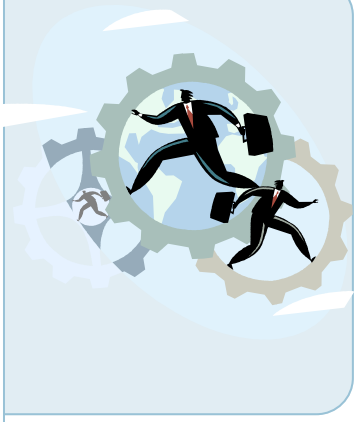
As a part of PM Narendra Modi's digital India plan, the Government has decided that all replies to the Right to Information Act ("**RTI Act**") and RTI queries sent over to various Ministries will be posted online.

According to an ET report, the Department of Personal and Training has issued an official memo to all ministries and departments to take "immediate action" to ensure that "the facility to upload the reply to RTI application and first appeal on the website of the respective ministry or department" may be started from October 31.

An exception has however been made for RTI appeals linked to personal information about an individual, which do not serve any public interest. An order issued to ministries on Tuesday said RTI queries and replies have to be posted online from October 31.

SEBI ISSUES NEW ESOP REGULATIONS

Acting in furtherance of its press release dated 19th June, 2014, SEBI has issued SEBI (Share Based Employee Benefits) Regulations, 2014[8] which repeal and replace the SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999. With the new regulations, SEBI has relaxed the prohibition imposed through the SEBI circular dated 17.10.2013 which barred the listed entities from framing any employee benefit schemes involving acquisition of own securities from the secondary market. However, apart from stricter disclosure and other regulatory obligations, the aforesaid relaxation has been subjected to certain conditions such as requirement of shareholders' approval through special resolution for undertaking secondary market acquisitions; restrictions on sale of shares by trusts; at least 6 month holding period for shares acquired from secondary market etc.



Further, SEBI has also put an end to the practice of classifying shares held by ESOP Trust in promoter category as the shareholding of ESOP Trust, now, has to be shown as 'non-promoter and non-public' shareholding. Subject to certain exceptions, SEBI has granted a transition period of 1 year to all the listed companies having existing schemes to which these new regulations apply.

TRUSTEE VIS-À-VIS LLP PARTNER

MCA, vide Circular No. 37/2014, dated 14.10.2014, has clarified that a trustee (being a body corporate) of Real Estate Investment Trusts or any other trust set up under the regulations prescribed under the SEBI Act, 1992, is not barred from holding partnership in an LLP in its name without the addition of the statement that it is a trustee.

CORPORATE SOCIAL RESPONSIBILITY : SCOPE OF ACTIVITIES[9]

The Ministry of Corporate Affairs (MCA) has enlarged the scope of the activities covered under the purview of Corporate Social Responsibility activites as included in Companies Act 2013 any contributions made by companies towards the Government of India's two key initiatives i.e. the Swachh Bharat Abhiyan and the Clean Ganga Scheme will now be considered as expenditures towards CSR activities.

GOOD DAYS FOR GOOD SAMARITANS: APEX COURT ON ROAD ACCIDENT VICTIMS[10]

In the matter of Savelife Foundation vs. Union of India, the hon'ble Supreme Court of India has directed, by its order dated 30.10.2014, the Ministry of Road Transport & Highways and Ministry of Law and Justice to issue necessary directions, in consultation with each other, with regard to the protection of Good Samaritans until appropriate legislation is made by the Union Legislature. The hon'ble Supreme Court has further vide its order has given three months time to formulate the directions to the aforementioned two ministries.

[7] Office Memorandum dated 21.10.14

[8] Notification No. LAD-NRO/GN/2014-15/16/1729 dated 28.10.2014

[9] NOTIFICATION [F.NO.1/18/2013-CL-V], DATED 24-10-2014

[10] Writ Petition (civil) no(s). 235/2012, Order dated 30.10.2014

FAQ'S ON CORPOATE SOCIAL RESPONSIBILITY: COMPANIES ACT, 2013 (PART 1)

RAGHAV BAJAJ AND RUCHIKA AGARWAL, SENIOR ASSOCIATES

A. *Whether Section 135 of the Act read with the Rules are applicable on the foreign companies? How shall the profits/net worth/ turnover of such companies be computed?*

Ans: In terms of Rule 3, a foreign company defined u/s 2(42) of the Act having its branch/project office in India which fulfils the criteria specified u/s 135(1) of the Act shall be required to comply with the CSR provisions mentioned in the Act as well as the Rules. Also, as per Rule 2(1)(f)(ii) and Rule 3(1), the net worth/turnover/ net profits of such foreign companies shall be calculated in accordance with the balance sheet and P&L account prepared in terms of Sec. 381(1)(a) read with Sec.198 of the Act.

B. *If the companies undertake certain activities for the benefits of the employees working in the Company, whether such activities would fall under CSR? Are the provisions of CSR applicable globally or within India?*

Ans: As per Rule 4(5), the CSR projects or programs or activities that benefit only the employees of the company and their families shall not be considered as CSR activities. Further, as per Rule 4(4), the CSR projects or programs or activities undertaken in India only shall amount to CSR expenditure.

C. *As per section 135(1) of the Act, the CSR Committee shall consist of 3 or more directors, out of which at least 1 director shall be an independent director. Is there any relaxation for private companies?*

Ans: As per Rule 5(1)(i), an unlisted public company or a private company covered u/s 135(1) which is not required to appoint an appoint an independent director pursuant to section 149(4) shall have its CSR Committee without such director. Further, as per Rule 5(1)(ii), a private company having only 2 directors on its Board shall constitute its CSR Committee with 2 such directors.

D. *While computing the average net profit of the company for the purpose of section 135, what shall be treatment of the losses of any previous year(s)?*

Ans: From the reading of the Act and the Rules, it appears that such losses have to be set off in the computation of the average net profits. However, the other view that is being taken is that such losses shall be ignored while computing the average net profits.

E. *As per the explanation below section 135(5), 'Average net profit' shall be calculated in accordance with the provisions of section 198. Is it required to re-calculate the net profits for earlier financial years when the Companies Act, 2013 was not in force?*

Ans: As per the proviso to Rule 2(1)(f)(ii), net profit in respect of a financial year for which the relevant financial statements were prepared in accordance with the provisions of the Companies Act, 1956 shall not be required to be re-calculated in accordance with the provisions of the Act.

F. *Can two or more companies join together for CSR?*

Ans: Yes, as per Rule 4(3), companies may collaborate for undertaking CSR projects or programs or activities in such a manner that the CSR Committee of respective companies are in a position to report separately on such projects or programs in accordance with the Rules.

G. *PQR Limited has earned Rs.20 lacs out of its CSR activities and wants to declare dividend out of the same. Is it permissible?*

Ans: As per Rule 6(2), the CSR Policy of the company shall specify that the surplus arising out of the CSR projects or programs or activities shall not form part of the business profits of A company. Thus, it will not be permissible for PQR Limited to declare dividend out of the Rs.20 lacs earned out of its CSR activities.

H. *Is it true that if the CSR provisions become applicable on a company for a financial year, they shall remain applicable on it forever?*

Ans: As per Rule 3(2), every company which ceases to be a company covered u/s 135(1) for 3 consecutive FY's shall not be required to: a) Constitute a CSR committee; and b) Comply with the provisions contained u/s 135(2) to 135(5) till such time it meets the criteria specified u/s 135(1).

Chir Amrit Legal LLP
Jaipur | Mumbai | Delhi
www.chiramritlaw.com

WE ARE ON THE WEB

www.chiramritlaw.com

For any queries regarding 'THE NEWSLETTER', please get in touch with us at:

newsletter@chiramritlaw.com

DISCLAIMER

The views expressed and the information provided in this newsletter are of general nature and are not intended to address the circumstances of any particular individual or entity. Further, the above content should neither be regarded as comprehensive nor sufficient for making decisions. No one should act on the information or views provided in this publication without appropriate professional advice. It should be noted that no assurance is given for any loss arising from any actions taken or to be taken or not taken by anyone based on this publication.

Jaipur- 6th Floor, 'Unique Destination', Opp. Times of India, Tonk Road, Jaipur - 302 015
Off: +91-141-4044500

Mumbai- 20E, 2nd Floor, Apeejay Business Centre, Apeejay House, 3, Dinshaw Vachha Road, Churchgate, Mumbai-20.
Off: 022-66364439

Delhi NCR- B-2/15, DLF Phase 1st, Near Qutub Plaza, Gurgaon-122001
Off: 0124-4016062