

SECURITY FOR EXTERNAL COMMERCIAL BORROWINGS ("ECB")¹

Reserve Bank of India, *vide* Circular dated 01.01.2015 has consolidated and liberalized the scope of creation of charge over securities for ECBs. Under the prevailing ECB guidelines, the choice of security for securing ECB was left to the borrower. Pursuant to this Circular coming into force AD Category-I banks may permit creation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees to secure the ECB, subject to the fulfillment of the following conditions:- (i) the ECB is in compliance with the ECB guidelines (ii) there exists a security clause in the loan agreement requiring the borrower to create charge on the abovementioned securities, and (iii) No Objection Certificate, if required, is obtained from the existing lenders in India. Further, the creation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees to secure the ECB also depends on fulfillment of conditions laid down in the Circular which are specified for each security.

INSIDE THIS ISSUE:

UNION CABINET ACCEPTS THE
BOMBAY HIGH COURT JUDGMENT
IN VODAFONE'S CASE 2

FINE AND SENTENCE FOR FILING
FALSE AFFIDAVIT AND PIL, IN
COURT 2

CENTRAL GOVERNMENT SIMPLI-
FIES LABOUR LAW COMPLIANCE
W.E.F. 01.01.2015 2

RETROSPECTIVE EFFECT OF
AMENDMENT IN SECTION 15Z,
SEBI ACT, 1992 3

LAW COMMISSION OF INDIA
SUGGESTS CREATION OF SPECIAL-
IZED COMMERCIAL COURTS 3

AMENDMENT IN INCOME TAX
RULES 3

EDITORIAL: PAYPAL: A PAL OF
INDIAN SERVICE EXPORTS 4

SUPREME COURT UPHOLDS CONSTITUTIONAL VALIDITY OF DEFINITION OF NON-PERFORMING ASSETS²

The Hon'ble Supreme Court has upheld the constitutional validity of the definition of Non-performing Assets ("NPA") as defined in Section 2(1)(o) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). As per Section 2(1)(o) the power of categorizing an asset/account as an NPA vests with different authorities. Rejecting the contentions raised against such manner of determining an asset as NPA by the petitioners on the ground that Section 2(1)(o) is violative of Article 14 of the Constitution of India and is a delegation of legislative power, the Supreme Court opined that by authorizing different regulators to prescribe different norms for identification of an NPA is not an unreasonable classification as all creditors do not form a uniform/homogenous class, and is therefore not violative of Article 14. On the issue of delegation of legislative power the Court held that laying down norms for classification of an asset/account is not an essential legislative function. The laying down of such norms require expertise in the areas of public finance, banking, etc. and subsequently may require periodic revision. The Hon'ble Apex court also held that it is not necessary that legislature should define each and every expression it employs in a statute as legislative activity and governance would reach a state of standstill.

STAY ON PROCEEDINGS INITIATED BY ESI CORPORATION AGAINST CHARTERED ACCOUNTANTS' FIRM³

The Hon'ble Rajasthan High Court, Jaipur bench, has granted stay order in the favour of Petitioner firm Kalani & Company in the writ petition in the matter of applicability of the provisions of the Employees' State Insurance Act, 1948 ("ESI Act") and notification dated 07.01.2011 ("Notification") issued there under on Chartered Accountants' firm ("CA Firm"). The petitioner has contended before the Hon'ble court that a CA Firm does not fall within the ambit of the term 'shop', therefore, the notice issued by the ESI Corporation to the Petitioner with reference to the Notification and granting *suo moto* registration to the Petitioner firm under the ESI Act categorizing it as a 'shop' is invalid. Hon'ble Judge Mohammad Rafiq relied upon the judgments cited by the Petitioner to grant a stay on the notices issued by the ESI Corporation to the Petitioner firm and further issued notices to the Respondents.

¹ RBI/2014-15/377- A.P. (DIR Series) Circular No. 55

² Writ Petition (Civil) No. 901 of 2014

³ Kalani & Company vs. Deputy Director, Regional office, ESIC and Ors., SBCW no. 1162/2015

UNION CABINET ACCEPTS THE BOMBAY HIGH COURT JUDGMENT IN VODAFONE'S CASE⁴

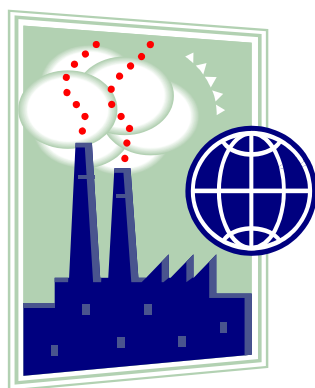
The Ministry of Finance *vide* the Press Information Bureau's release, dated 28.01.2015, put forth the decision of the Union Cabinet ("Cabinet"), chaired by the Prime Minister Shri Narendra Modi, to accept the order of the High Court of Bombay in the case of Vodafone India Services Private Limited (VISPL) dated 10.10.2014 and not to file a Special Leave Petition against the said order before the Hon'ble Supreme Court. Further, the Cabinet has decided to accept the orders of Courts/ITAT/DRP in cases of other taxpayers where similar transfer pricing adjustments have been made and the aforesaid authorities have decided. The reasoning adopted by the Cabinet for reaching to this decision is that since the amount received by VISPL on issue of shares at a premium is a transaction on the capital account and does not give rise to income which is chargeable to tax. The release also reiterates the relevant excerpt of the judgment rendered by the Hon'ble Bombay High Court that *"The tax can be charged only on income and in the absence of any income arising, the issue of applying the measure of Arm's Length Pricing to transactional value/ consideration itself does not arise."*

FINE AND SENTENCE FOR FILING FALSE AFFIDAVIT AND PIL, IN COURT⁵

The Hon'ble Delhi High Court sentenced a man (Ram Niwas Jain) to 3 days imprisonment and imposed fine of Rs. 10,000 after finding him guilty of criminal contempt of court for filing a false affidavit in a PIL. The matter in the present instance was a title dispute over a property, wherein to cover up the dispute, a PIL had been filed alleging that the officials in the Land & Building as well as Revenue Departments of the Delhi government had tampered with land records in Mehrauli. The Hon'ble Court issued notice to the Government, but then an intervention plea was filed by Waziran, claiming to be the owner of the property mentioned in the PIL and alleged that the land in question belonged to her husband and had been "illegally" sold to the wife of Ram Niwas Jain's cousin, V K Jain. The High Court had then ordered an inquiry by the CBI, which found that the parcel of land mentioned in the PIL was the subject of a dispute between V K Jain and Waziran, who had also filed an FIR against V. K. Jain and his wife. Hence, the court noted that Ram Niwas Jain had not mentioned any other parcel of land in his plea, even though he had claimed to have "unearthed a big land scam" in the area. The Hon'ble court said that filing of false affidavit by the petitioner, knowing the same to be false, in our view cannot be treated lightly. The law and the courts should not be seen to sit by limply, while those who defy it go free.

CENTRAL GOVERNMENT SIMPLIFIES LABOUR LAW COMPLIANCE w.e.f. 01.01.2015⁶

The Central Government has appointed 01.01.2015 as the date for the enforcement of the Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by certain Establishments) Amendment Act, 2014. The said Act amends the principal Act which provided exemption to very small establishments (employing up to 9 persons) and small establishments (employing not less than 10 and not more than 19 persons) from maintaining registers and furnishing returns under various labour laws mentioned in Schedule I of the principal Act and instead, very small establishments and small establishments were required to file consolidated returns and maintain consolidated registers as prescribed in the principal act. The said Act has widened the definition of small establishments to include establishments employing not less than 10 and not more than 40 persons. Further, 7 more labour legislations have been included in Schedule I of the principal Act and now the employers are allowed to maintain registers and annual returns in electronic form also.



⁴ <http://pib.nic.in/newsite/PrintRelease.aspx?relid=115027>, Press Information Bureau website dated 28.01.2015

⁵ *Ram Niwas Jain vs. Ministry of Home Affairs, High Court of Delhi, W.P. (C) 3673/2013, dated 20.01.2015*

⁶ *Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by certain Establishments) Act, 1988*

RETROSPECTIVE EFFECT OF AMENDMENT IN SECTION 15Z, SEBI ACT, 1992⁷

The question for determination before the Hon'ble Supreme Court was whether an order passed by SAT before 29.10.2002 would be appealable under the unamended provision of Section 15Z of the SEBI Act or under the amended provision. Section 15Z of the SEBI Act was amended with retrospective effect from 29-10-2002 to provide for appeal against SAT's order to the Supreme Court on questions of law. Prior to the said amendment, Section 15Z provided for appeal against SAT's order to the High Court on questions of law as well as questions of fact. The Court observed that the amendment took away right to appeal on questions of fact and therefore, the amendment is not a mere change of forum and it adversely affected the appellate right vested of the concerned litigant. Further, the Court relied on the general rule, enshrined under Section 6 of the General Clauses Act, 1897 that the repeal of a statute does not affect the pending cases which would continue to be concluded as if the enactment has not been repealed. Therefore, the Court concluded that the appellate remedy available to the respondent prior to the amendment of Section 15Z of the SEBI Act, must continue to be available to the respondent, despite the amendment. In the result, all the appeals preferred before the High Court, against orders of SAT passed before 29-10-2002 were held to be maintainable in law even if preferred after 29-10-2002.

LAW COMMISSION OF INDIA SUGGESTS CREATION OF SPECIALIZED COMMERCIAL COURTS.⁸

The Law Commission of India in its 253rd report has sought to revamp the commercial dispute resolution mechanism by suggesting the creation of specialized commercial courts across the country and by separating the commercial disputes from other civil disputes. The Commission has suggested 'The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015', in which it has defined "commercial dispute" to mean disputes arising out of ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, joint venture and partnership agreements, intellectual property rights, insurance and other such areas. The minimum pecuniary jurisdiction of such Commercial Courts shall also be Rs 1 crore or more. Pecuniary jurisdiction of the High Court's having original jurisdiction to be raised uniformly to Rs 1 Crore and commercial divisions should be set up only when the pecuniary jurisdiction has been so raised

The report also states that *"Not only does this benefit the litigant, other potential litigants (especially those engaged in trade and commerce) are also advantaged by the reduction in backlog caused by the quick resolution of commercial disputes leading to further economic growth, increased foreign investment and making India an attractive place to do business."*

AMENDMENT IN INCOME TAX RULES, 1962⁹

The Central Board of Direct Taxes has amended the Income Tax Rules, 1962 vide its Notification dated 19th January, 2015 and inserted Rule 12CA which provides for filing of statement of income distributed by business trusts to its unit holders with the Principle Commissioner or Commissioner of Income Tax within whose jurisdiction principle office of the business trust is situated, by 30th November of the financial year following the previous year during which such income is distributed, provided that the statement of income distributed shall also be furnished to the unit holder by the 30th June of the financial year following the previous year during which the income is distributed. The said statement should be prepared in Form 64A and shall be duly verified by an accountant before filing the same with Principle Commissioner or Commissioner of Income Tax.



⁷ Videocon International Limited vs. SEBI, Civil Appeal no. 11/2005, 13.01.2015 and SEBI (Amendment) Act, 2002

⁸ <http://www.livelaw.in/law-commission-submits-253rd-report-union-law-minister-suggests-exclusive-commercial-courts/>

⁹ Notification no. 03/2015/F.No.142/10/2014-TPL dated 19th January, 2015

PayPal: A pal of Indian Service Exports

(MR. RAHUL LAKHWANI, SENIOR ASSOCIATE AND MS. ADITI TANK, ASSOCIATE)

With the advent of e-commerce in India, various online trading and marketing platforms have developed and as a result of which more and more service providers are using online payment gateway services such as PayPal Pte. Ltd, Singapore ("**Paypal**"). Under this mechanism of use of online payment gateway, a service provider provides services to overseas client and the consideration for the said services is received by the service provider in its Paypal account in convertible foreign exchange. Paypal, upon receiving the consideration, transfers it to the bank account of the service provider in Indian currency after deducting the applicable charges.

The provision of a service provided or agreed to be provided is treated to be an export of service if conditions mentioned in Rule 6A (*Export of Services*) of the Service Tax Rules, 1994 are fulfilled. One of the conditions mentioned in Rule 6A is that the payment for such service has been received by the service provider in convertible foreign exchange. Hence, the moot question that arises is whether receipt of payment/consideration by the authorized dealer bank in Indian currency through PayPal would fulfill the conditions mentioned in Rule 6A?

At this instance, it is pertinent to mention that the RBI Master Circular on Export of Goods and Services ("**RBI Circular**") dated July 1, 2012¹⁰ prescribes the manner of receipt and payment under General Guidelines for Exports. Under the said heading, the processing of export related receipts through Online Payment Gateway Service Providers (OPGSPs) is permitted wherein AD Category- I banks have been allowed to offer the facility of repatriation of export related remittances by entering into standing arrangements with the OPGSPs, subject to the prescribed conditions. Moreover, *vide* A.P. (DIR Series) Circular No. 109 dated June 11, 2013¹¹, the value per transaction for export related remittances received through OPGSPs has been increased by the RBI to USD \$10,000 per transaction.

Furthermore, PayPal provides functions that are similar to a bank, wherein a person has a personal account for receipt and transfer of funds¹². In other words, receipt of funds by PayPal is considered to be receipt of funds by the concerned account holder. Hence, in the event, consideration for services is received in convertible foreign exchange in the PayPal account of a service provider then the same shall fulfill the conditions mentioned in Rule 6A.

Receipt of funds after conversion into the Indian bank account of the service provider is a recognized mode of receipt of remittance of export under the RBI Circular and shall not create a hindrance in fulfillment of the conditions mentioned in Rule 6A of the Service Tax Rules. On the fulfillment of the conditions mentioned in Rule 6A, the transaction would be construed as export of service and therefore the service provider using PayPal for remittance of export proceeds can claim rebate/refund of taxes and duties paid on input service and inputs and other benefits under the foreign trade policy.

¹⁰ RBI/2013-14/14: Master Circular No.14/2013-14 (Updated as on June 18, 2014)

¹¹ RBI/2012-13/52

¹² Terms and conditions available at <<https://www.paypal.com/IN/webapps/mpp/ua/useragreement-full>>

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 Busi-
ness Centre, Apeejay
House, 3, Dinshaw Va-
chha Road, Church-
gate, Mumbai-20.
Off: 022-66364439

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