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THE NEWSLETTER

ESI Corporation raises wage threshold to Rs. 21,000 for coverage

The Employees' State Insurance Act, 1948 ("**Act**") was enacted with an objective to provide certain benefits to the employees in case of sickness, maternity, injury, etc. and accordingly an employer is required to make contribution towards the insurance amount for benefit of the employees. The Ministry of Labour and Employment *vide* Notification G.S.R. 1166(E) dated 22.12.2016 has amended Rule 50 of the Employees' State Insurance (Central) Rules, 1950 ("**Rules**"), as a result of which employees having wages upto Rs. 21,000/- per month will now be covered under Act and therefore, are entitled to receive benefits provided under the Act. Rule 50 of the Rules prescribes for the wage limit of the employees to be covered under the Act. Accordingly, the wage limit which was previously Rs.15,000/- per month has now been increased to Rs. 21,000/-. The effective date of the amendment in Rule 50 of the Rules is 01.01.2017, pursuant to which every entity or institution covered under the Act would be required to comply with the requirements of the Act from 01.01.2017.

Applicability of Section 23(1)(a) and Section 23(1)(c) of the Income Tax Act in case of Vacant House Properties

In the matter of ***Susham Singla* v. *Commissioner of Income-tax, Patiala*** [[2016] 76 taxmann. com 349], the issue of applicability of Section 23(1)(a) and Section 23(1)(c) of the Income Tax Act, 1961 ("**Act**") was under consideration before the Hon'ble Punjab and Haryana High Court ("**High Court**"). In the instant case, the assessee was the owner of more than one house property and the same remained vacant throughout the previous year. The assessee by invoking Section 23(1)(c) of the Act, contended that the annual value of the properties were required to be taken as NIL. The High Court while interpreting Section 23(1)(a) and 23(1)(c) of the Act observed that Section 23(1)(a) of the Act deals with the determination of annual value in case of a property remaining vacant and expected to be let out from year to year and Section 23(1)(c) of the Act deals with the determination of annual value in case of a property which is first let out but further remains vacant during the year or part of the year. The High Court observed that the properties of the assessee were not actually let out even for a single day but remained vacant for the entire previous year, thus, the High Court held that where the property of the assessee remained vacant for the whole year then the annual value of such property shall be determined by invoking provision of Section 23(1)(a) of the Act and not by Section 23(1)(c) of the Act.

Inside this issue:

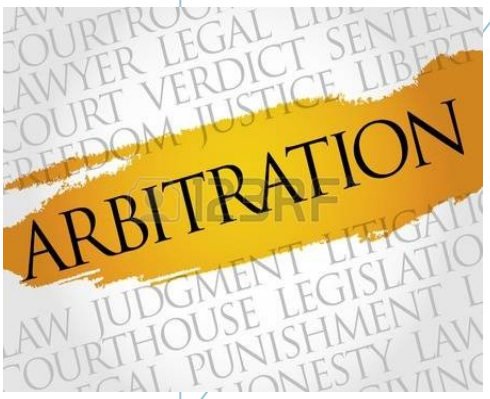
Mobile Towers comes within the scope of Term 'Land and Building' for the purpose of Levying Property Tax

In the case of ***Ahmedabad Municipal Corporation* v. *GTL Infrastructure Ltd. & Ors***. [Civil Appeal No. 5360-5363 of 2013] dated 16.12.2016, a two judge bench of the Hon'ble Supreme Court of India ("**Supreme Court**") held that the mobile towers can be termed as 'building' as they come within the ambit of the term 'land and building' appearing in Entry 49, List II of the Seventh Schedule of the Constitution of India, for the purpose of levying property tax on mobile towers. In the instant case, several writ petitions and appeals from various high courts of India were made to the Supreme Court. Firstly, the appeal raised before the Supreme Court against the judgment passed by the Hon'ble Gujarat High Court declaring Section 145 of the Gujarat Provincial Municipal Corporations Act, 1949 ("**Act**") as *ultra vires* to the Constitution of India and on this basis prohibited the levy of property tax on 'mobile towers'. Secondly, the appeal arose from the order passed by the Hon'ble Bombay High Court in which the similar view was taken by the Bombay High Court and held that the writ petitions challenging the levy of property tax on mobile towers should not be entertained and the aggrieved writ petitioners (cellular operators) should be left within the option of exhausting the alternate remedies provided by the Bombay Provincial Municipal Corporations Act, 1949. The rests are the writ petitions filed before the Supreme Court by the cellular operators under Article 32 of the Constitution of India. The Supreme Court agreed with the opinion of Hon'ble Gujarat High Court that the meaning and scope of Entry 49 of List II i.e. 'Taxes on lands and buildings' should not be understood by the reference of the definition of the expressions 'land' and 'building' appearing in the definition clause of the Act. In addition, the Supreme Court noted that in order to understand whether the mobile towers comes within the ambit of 'land and building', it is pertinent to take note of the meaning of the two expressions as appearing in the leading judicial and English dictionaries. Therefore, after discussing the meaning of the terms 'land' and 'building' from the judicial pronouncements and dictionaries, the Supreme Court was of the view that as far as the expression 'building' is concerned it is difficult to confine the meaning of the same to a residential building as commonly understood or a structure raised for the purpose of habitation. The Supreme Court also relied upon certain judicial precedents in which it was held that while interpreting the provisions of the Constitution of India, particularly the legislative entry, a broad, liberal and expansive interpretation is to be preferred as the meaning of an entry is always inclusive and therefore, mobile towers shall come within the ambit of 'land and building'.

Two-Tier Arbitration Clause Permissible Under Indian Law

The Hon'ble Supreme Court of India ("**Supreme Court**") in ***Centrotrade Minerals & Metals Inc* v. *Hindustan Copper Ltd.*** [Civil Appeal No. 2562/2006] held that a two-tier arbitration procedure is permissible under

Indian law. In the instant case, appellant was a USA firm dealing in non-precious metals like copper and the respondent, a company owned by the Government, bought copper concentrates from appellant under an agreement that provided for a two-tier arbitration mechanism. The Supreme Court was to decide upon the validity and legality of this two-tier arbitration agreement under the Arbitration and Conciliation Act, 1996 ("**Act**"), wherein the first clause was for arbitration in domestic forum and that the second clause was for dispute resolution in an international forum. When the dispute arose, the appellant moved to the Indian forum but received a NIL award. Thereafter, the appellant approached the International Chamber of Commerce, London by invoking the second clause of the arbitration agreement. The award was granted in favour of the appellant, which caused the respondent to file a suit in the Hon'ble Calcutta High Court where the suit was decided in favour of the respondent. Thereafter, in 2006, an appeal against the order of the Calcutta High Court, the appellant preferred an appeal in the Supreme Court wherein the division bench of the Supreme Court failed to come to a consensus and due to dissenting opinions, the matter was referred to a three judge bench. The respondent contended that the Act did not envisage a right to appeal and the same can only be created by statute and not by an agreement between the parties and therefore, the appellate arbitration is contrary to the Indian laws. Further, reliance was placed on Section 34, Section 35 and Section 36 of the Act with respect to the binding nature and finality of the award. The Supreme Court finally decided in favour of the appellant and recognized the importance of party autonomy. Supreme Court held that the two-tier arbitration clause in the said agreement was very clear as to the intention of the parties to provide two opportunities for resolving a dispute and therefore, the said clause is not contrary to any Indian law. This landmark judgment is a huge success for foreign players indulging in business in India and it will act as a catalyst for out of court settlements.

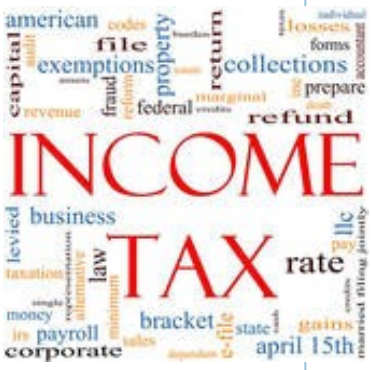


No Gratuity if Termination is on Account of Misconduct

The Hon'ble Supreme Court of India ("**SC**") in ***Jorsingh Govind Vanjari* v. *Divisional Controller Maharashtra, State Road Transport Corporation*** [S.L.P.(C) No. 26366 of 2016)] held that the gratuity payable to an employee after termination of his employment can be denied if such termination is due to the misconduct on the part of the employee. In the instant case, a complaint was filed by the respondent against the appellant stating that the appellant being a bus conductor collected bus fare from six (6) passengers and failed to issue tickets to them and also there was shortage of cash in his collection bag. On the basis of the complaint, inquiry was conducted by an inquiry officer and it was found that the appellant was guilty and therefore, the service of the appellant was terminated by the respondent on the ground of misconduct. Aggrieved by such termination, the appellant raised an industrial dispute before the concerned labour court ("**Labour Court**") against the respondent. The Labour Court set aside the termination order on

on account of insufficiency of evidences proving misconduct on part of the appellant. The Labour Court further held that since the appellant had crossed the age of superannuation, therefore, he cannot be reinstated but is entitled to receive all service benefits including gratuity and compensation in form of 50% of the back wages from the date of termination till the date of superannuation. The respondent challenged the order of the Labour Court before the Hon'ble Bombay High Court ("**High Court**"). High Court rendered the impugned award of the Labour Court unsustainable and therefore, modified the award and held that the appellant was only entitled to receive 50% of the back wages as awarded by the Labour Court and shall be deprived of gratuity amount since the charge proved against the appellant in the enquiry involves moral turpitude. Being aggrieved by the order of the High Court, the appellant filed an appeal before the SC. SC held that High Court itself had granted compensation since the said court felt that the termination was unjustified and reinstatement was not possible on account of superannuation. Further, the SC stated that in order to deny gratuity to an employee, it is not enough that the alleged misconduct of the employee constitutes an offence involving moral turpitude as per the report of the domestic inquiry. There must be termination on account of the alleged misconduct, which constitutes an offence involving moral turpitude. As both the Labour Court and the High Court, held that the termination of employment of the appellant was because of attainment of age of superannuation by the appellant and not because of moral turpitude therefore, the appellant was entitled to gratuity in respect of his continuous service from his original appointment till the date of his superannuation.

Time Limit for Issuance of a Show Cause Notice u/s 201 of the Income Tax Act in case of Payments Made to a Non-Resident



Section 201(3) of the Income Tax Act, 1961 ("**Act**"), as inserted by the Finance (No.2) Act 2009, provides a time limit for passing an order under Section 201(1) of the Act to deem a person as assessee in default on failure to deduct tax at source ("**Default**"). However, Section 201(3) of the Act only covers a situation of Default on part of payer, where the payee is a person resident in India. The said section doesn't provide any time limit for passing an order under Section 201(1) of the Act against the Default on part of the payer, where the payee is a non-resident. The Hon'ble Delhi High Court ("**High Court**") in case of ***Bharti Airtel Ltd. v. Union of India*** [[2016] 76 taxmann.com 256 (Delhi)] dated 19.12.2016 clarified the said position and held that in case of non-resident payee, the time limit to issue show cause notice to the payer on account of Default shall be a reasonable time period. In the present case, show cause notices for the period starting from financial year 2001-02 to 2010-11, dated 31.03.2011 and 05.03.2012 was served on the assessee for failure to deduct tax at source on the payments made to the non-residents.

The High Court relying upon the judgment of ***Vodafone Essar Mobile Services Ltd. v Union of India*** [[2016] (385) ITR 436 (Del)] quashed the said show cause notices because the time limit to pass an order under Section 201(3) of the Act on the basis of such show cause notices expired before the date of issue of such notices. The Revenue Department contented that the Parliament made a conscious distinction between resident and non-resident assesses under Section 201(3) of the Act for the purpose of administrative convenience. The High Court rejected the said contention stating that such distinction can expose the assessees to the burdensome obligation of maintaining books and documents for an uncertain period of time where the payee is a non-resident.

Land of Religious Bodies can be Acquired for Public Purpose

The Hon'ble Allahabad High Court ("**High Court**") in ***Church Of North India Trust Association* v. *Union of India and ors.*** [Civil Writ Petition 56316 of 2016] held that the properties held by religious bodies can be acquired by the Government for public convenience or interest. In the instant case, the petitioner through a writ petition challenged the gazette notification dated 17.08.2012 issued by the Government of India under the National Highways Act, 1956, to acquire the land of church and Christian graveyard belonging to the petitioner for broadening the passage of highway, on the ground of violation of Article 25 (Right to Freedom of Religion) and Article 26 (Freedom to Manage Religious Affairs) of the Constitution of India. Further, it was also contended by the petitioner that the place of worship cannot be acquired, as the conversion of the same is prohibited under Section 3 of the Places of Worship (Special Provisions) Act, 1991 ("**Act**"). The High Court while referring to the case of ***Yusuf Ajij Shaikh and others* v. *Special Land Acquisition Officer No.2, Pune and ors.*** [1995(1) Mh. L.J.483] held that under the Act, conversion of any place of worship and religious denomination into place of worship of a different section of the same religious denomination or of different religious denomination is prohibited and the Act does not bar the acquisition of land in the interest of public. The High Court also examined the contention made by the petitioner under Article 25 of the Constitution of India and held that right of profession, practice and propagation of religion is a personal right related to the individual and has no nexus with the place or territory where it has to be exercised. A person may go to a particular place to offer prayers if it exists and he may go to another place if the one in which he offered prayer earlier ceased to exist or he may offer prayers even in his house or elsewhere, so, the acquisition of land on which such church exists cannot be held to deprive him of his right to freely practice the religion as free practice of religion is related with the idea of practicing it anywhere and not its practice in any particular place.

In relation to Article 26 of the Constitution of India, the High Court held that said Article 26 provides that religious denominations have the right to own and acquire movable and immovable property and administer such property in accordance with law but that does not mean that the property owned by them cannot be acquired by the State for public interest or convenience.

A Brief Introduction to The Benami Property (Prohibition) Amendment Act,2016

- By Samay Maheshwari, Senior Associate

INTRODUCTION

The number of benami transactions in the real estate sector had increased astronomically and in absence of an effective regulation, the black or ill-gotten money was easily parked in the opaque real estate industry. The old law i.e. the Benami Transactions Prohibition Act, 1988 ("**Old Act**")was inadequate to meet the needs of changing times, therefore, a strong mechanism to combat such activities became inevitable.

The Benami Transactions (Prohibition) Amendment Act came into force on 1st November 2016. With this the existing Benami Transactions (Prohibition) Act has been renamed as The Prohibition of Benami Property Transactions Act ("**The PBPT Act**" or the "**new Act**"). The PBPT Act defines benami transactions, prohibits them and further provides that violation of the Act is punishable with imprisonment and fine. The Act also prohibits recovery of the property held benami from benamidar by real owner. Properties held benami are liable for confiscation by the Government without payment of compensation.

WHAT IS BENAMI

Benami property has been defined in Section 2(8) and Benami transaction has been defined in Section 2(9) of The Prohibition of Benami Property Transactions Act, 1988.

The benami (without a name) property refers to property purchased by a person in the name of some other person. The person in whose name the property has been purchased is called the benamdar and the property so purchased is called the benami property.

BENAMI property may include assets of any kind including movable, immovable, tangible, intangible, any right or assets or legal documents. It also includes gold and financial securities.

A transaction is considered as benami (meaning nameless) where a property is transferred to or is held by a person and the consideration for such property has been provided or paid by another person; and the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration. The definition also includes property transactions where i) a transaction has been made under a fictitious name; ii) the owner is not aware or denies knowledge of the ownership of the property; iii) the person providing the property is not traceable.

WHAT IS NOT BENAMI

1. When a Karta or a member of Hindu Undivided Family purchases property for the benefit of members of its family from the known sources of income; or
2. A property that is held in the name of spouse or child for which the amount is paid out of known sources of income; or
3. Joint property of brothers or sisters or lineal ascendant or descendant for which amount is paid out of known sources of income and is treated as joint owner in the legal documents of such property; or
4. When a person holds property for the benefit of another person based on fiduciary relationship; or

EARLIER POSITION AND MAJOR AMENDMENTS

The old Act had only seven sections and was inadequate. The New Act has 72 sections. Further additional chapters in the old act pertaining to powers of the Central Government to appoint one or more adjudicating authorities to exercise powers (Chapter III), provisions for attachment, adjudication and confiscation of a benami property (Chapter IV), power of the Central Government to establish Appellate Tribunals to hear appeals raised against orders of the Adjudicating Authorities (Chapter V), establishment of special courts in consultation of Chief Justice if the High Court of a particular state in area or areas as may be specified (Chapter VI), penalties for holding Benami Property, giving false information to the authorities and other penal provisions (Chapter VII) are added.

CONFISCATION OF THE BENAMI PROPERTY AND PUNISHMENTS

According to the New Act, people caught with benami properties shall be punishable with rigorous imprisonment of a term which shall not be less than one (1) year but may extend up to seven (7) years and a fine up to 25% of the fair market value of the property. Furthermore, the properties held benami are liable for confiscation by the government without payment of any compensation. Also, a person could face rigorous imprisonment for a term not less than six (6) months but which may extend upto five (5) years for knowingly giving false information and will have to pay a fine of upto 10 percent of the fair market value of the property.

ADJUDICATION PROCESS

The Act authorises the government to designate an assistant or deputy income tax commissioner as Initiating Officer to start proceedings into a Benami transaction. Initiating Officer will refer case to Adjudicating Authority. Appeal against the decision of Adjudicating Authority shall lie before Appellate Tribunal and High Court is entitled to hear appeals against orders of Appellate Tribunal.

CONCLUSION

To conclude, the recent amendments are welcome move in the direction to keep a check on and unearth domestic black money, however, its proper implementation coupled with institutional reforms is required to achieve the intended objectives.

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