VOLUME 53, JANUARY 2019

Chiramrit Legal LLP
Jaipur | Mumbai | Delhi
www.chiramritlaw.com

THE NEWSLETTER

Update Yourself

Electronic Uploading of Supporting Documents for Claiming GST Refund

Presently, for claiming refund under GST, a taxpayer is required to file FORM GST RFD-01A on the common portal, get the Application Reference Number (ARN) generated, take print-outs of the same and submit them physically in the office of the jurisdictional proper officer, along with all the supporting documents. As a relief to the taxpayers, in the 31st meeting of the GST Council held on 22.12.2018, recommendation was made to provide that all the supporting documents in relation to a claim for refund in FORM GST RFD-01A shall be uploaded electronically on the common portal at the time of filing of the refund application itself, thereby removing the need for a taxpayer to physically visit a tax office for submission of a refund application. In this regard, CBEC issued Circular No. 79/53/2018-GST dated 31.12.2018, wherein it has been clarified that all documents/undertaking/statements/invoices to be submitted along with the claim for refund in FORM GST RFD-01A shall be uploaded on the common portal at the time of filing of the refund application. Therefore, now neither the application in FORM GST RFD-01A, nor any of the supporting documents, shall be required to be submitted physically in the office of the jurisdictional proper officer. On complete uploading of all the supporting documents/undertaking/statements/invoices ARN will be generated and refund application along with all the supporting documents shall be transferred electronically to the jurisdictional proper officer. Deficiency memo, if any, shall continue to be issued manually on the basis of documents submitted electronically on the common portal. However, the taxpayers still have the option to physically submit the refund application to the jurisdictional proper officer. Further, a taxpayer who is still unallocated to the Central or State Tax Authority will necessarily have to submit the refund application physically before the jurisdictional proper officer of either the State or the Central tax authority as he thinks fit.

Foreign Direct Investment in E-Commerce Activities

The Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India ("**DIPP**") has issued Press Note No. 2 (2018 Series) on 26.12.2018 ("**Press Note**"), which has amended the Consolidated FDI Policy, 2017 ("**Policy**") in relation to e-commerce activities with effect from 01.02.2019. There are two models in e-commerce activities, i.e., inventory based and market based model. In India, 100% FDI is allowed through automatic route in entities engaged in marketplace based model and in inventory based FDI is totally prohibited. A marketplace based model of e-commerce is a model of providing an information technology platform by an e-commerce entity on a digital and electronic network to act as a facilitator between buyer and seller. Whereas, an inventory-based model of

Inside this issue:

UPDATE YOURSELF

Stamp Duty Value as per Section 50C Cannot be Adopted If the Sale Consideration was Earlier Approved u/s 269UL	2
Maintenance Right cannot be Waived Off by an Agreement	3
Section 56(2)(vii) is not Applicable if the Shares are not Allotted Disproportionately	4
Promoters Ineligible for Submitting Resolution	4
Insulting by Using Abusive Language will not by itself Constitute	5
NAA Confirms Charges of Profiteering on Distributor of Johnson & Johnson	5
Quick Takeaways	6
Knowledge Centre	7
Editorial	8-10

e-commerce is a model where inventory of goods and services is owned by an e-commerce entity and is sold to the consumers directly. As FDI is only allowed in marketplace based model in India, the Press Note stipulates four criterions which differentiate between marketplace based and inventory based model. These criterions are: (i) control over inventory by the provider of the marketplace platform, (b) equity participation by the provider of the marketplace platform in the sellers that are selling on such platform, (c) fair and non-discriminatory dealings by the marketplace platform with such sellers, and (d) exclusivity arrangements between such platform and sellers. As per the mandate of law given in the Policy, a marketplace based entity is restricted from exercising actual ownership over the inventory. Accordingly, a marketplace based entity is restricted from having ownership in over the inventory. However, as per the Press Note, the market place based entity now should also not have control in the inventory of the vendor. The control is defined as '*Inventory of the vendor will be deemed to be controlled by marketplace entity if more than 25% of purchases of such vendor are from the marketplace based entity or its group companies in a financial year*'. At present, the Policy does not prohibit equity participation by marketplace based entity in any seller entities, however, as per the Press Note sellers having equity participation from the marketplace based entity or its group companies, are not allowed to permit to sell their products on platforms run by marketplace based entity. Further, the market place based entity now as per the Press Note have to ensure that any service provided by them to the sellers carrying out e-commerce activities on their platforms are fair and non-discriminatory and on an arms-length basis. Additionally, now in the light of the Press Note, the marketplace based entity is restricted from having exclusive agreement with the sellers, which require the sellers to exclusively sell their products on the platform.

Accordingly, in the light of above discussed, any marketplace entity is not adhering to any requirement, the said entity would be construed to include in inventory based model, which would prohibit it to have FDI.

Stamp Duty Value as per Section 50C cannot be Adopted if the Sale Consideration was Earlier Approved u/s 269UL

In the case of **PCIT *v.* The Executor of Estate of Late Smt. Manjula A. Shah [ITA No.859 of 2016]** decided on 11.12.2016, the moot question of law before the Hon'ble High Court of Bombay ("**Court**") was whether under the facts and circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal ("**ITAT**") was justified in dismissing the appeal filed by the Revenue by accepting the sale consideration recognized as per order under Section 269UL(3) of the Income-tax Act, 1961 ("**Act**") in place of valuation made by the stamp duty authority. The brief facts of the case are that the assessee entered into a memorandum of understanding ("**MOU**") with Mahavir Builders, agreeing to assign them development rights in respect of the immovable property for a consideration of Rs. 2.51 crores. This was done after obtaining necessary no objection certificate under Section 269UL of the Act from the competent authority. However, the MOU could not be converted into a formal development agreement till September, 2004. At the time of execution of the agreement, the stamp duty authority assessed the value of the property for the purpose of stamp duty collection at Rs. 4.63 crores. The Assessing Officer invoked Section 50C of the Act and computed capital gains in the hands of the assessee on the basis of the stamp duty value. The assessee carried the matter in appeal. After passing of the appellate orders by the CIT(A) and the ITAT, now the Income Tax Department ("**Department**") was in appeal before the Court. After hearing both the parties, the Court observed that the MOU was entered in the year 2001 after obtaining no objection certificate from the stamp authorities, whereas the formal development agreement was executed in September, 2004 which was on the same terms and conditions as the MOU. It was also observed that the Department in order Section 269UL(3) of

the Act accepted the transaction value as mentioned in the agreement/MOU. No evidence has been produced by the Department at any stage that the assessee actually received the value which was adopted by the stamp valuation authority. After analysing all the facts, the Court held that the ITAT was correct in saying that the assessee can be taxed only on the gain which is oozing out from the sale consideration, thus, no adverse inference can be drawn while invoking the provision of Section 50C of the Act. Thus, the capital gain has to be computed on the amount which was actually received by the assessee, and thus, no addition can be made in the assessee's hands on the basis of deeming provision of Section 50C of the Act.

Maintenance Right cannot be Waived Off by an Agreement

In the case of **Ramchandra Laxman Kamble *v.* Shobha Ramchandra Kamble And Anr. [Writ Petition No. 3439 of 2016]** decided on 21.12.2018**,** the issue dealt by the Hon'ble High Court of Bombay ("**Court**") was whether the consent decree made by the court wherein the term about the parties giving up their rights to claim maintenance from against each other was recorded, can be considered as a base to reject the application filed by the respondent (wife) seeking maintenance under Section 125 of Code of Criminal Procedure, 1973 ("**Cr.P.C.**"). In the instant case, the Court observed that: (a) the consent decrees made by the courts are in effect of nothing but contracts with the seal of the court superadded to them. Accordingly, if the term of the contract is itself opposed to public policy then, such term, is void and unenforceable; and (b) even if it is assumed that the parties had voluntarily agreed to give up their time to claim maintenance from each other, such agreement is opposed to public policy and, therefore, the same is not enforceable, or the same does not bar the maintainability of an application under Section 125 of Cr.P.C. The Court further discussed the scope of Section 125 of Cr.P.C. and Section 23 (what considerations and objects are lawful, and what not) of the Indian Contracts Act, 1872 ("**Contracts Act**") and observed that the statutory liability under Section 125 of Cr.P.C. is distinct from the liability under any other law. The statutory right of a wife of a maintenance cannot be bartered, done away with or negativated by the husband by setting up an agreement to the contrary. Such an agreement being against public policy would also be against the clear intendment of Section 125 of Cr.P.C. Therefore, giving effect to an agreement, which overrides Section 125 of Cr.P.C. would tantamount to not only giving recognition to something, which is opposed to public policy, but would also amount to negation of it. The law makes a clear distinction between a void and illegal agreement and void but legal agreement. In the former case, the legislature penalizes it or prohibits it. In the latter case, it merely refuses to give effect to it. This is what exactly Section 23 of the Contracts Act provides for. Thus, the agreement, whereby the statutory right of wife to maintenance under Section 125 of Cr.P.C. is relinquished, may not per se be illegal, but it cannot be given effect to being a negation of the statutory right as provided under said section as it is against the public policy. Thus, based upon the aforementioned observations, the Court held that respondent's application seeking maintenance under Section 125 of Cr.P.C. cannot be dismissed or cannot be proceeded with just because the said respondent has specifically waived her right to claim any maintenance from her husband.

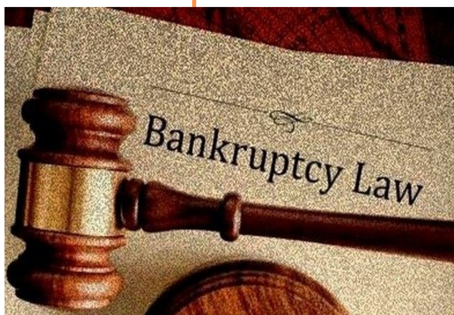
Section 56(2)(vii) is not Applicable if the Shares are not Allotted Disproportionately

The Hon'ble ITAT, Mumbai ("**Tribunal**") in the case of **ACIT *v.* Subodh Menon [ITA No. 676/Mum/2015]** decided on 07.12.2018, held that the provisions of Section 56(2)(vii) of the Income-tax Act, 1961 ("**Act**") are applicable only in case of 'disproportionate allotment' of shares to the existing shareholders and 'disproportionate allotment' means disproportionate to the extent the allotment is higher than the proportion offered to the shareholders. The facts of this case

are that the assessee is an individual who is a promoter of the company Dorf Ketal Chemicals India Private Limited ("**Company**"). On 01.04.2009, he held 34.57% of the total issued share capital of the Company. On account of certain terms and conditions of a loan agreement, in order to increase the share capital, the Company passed a resolution to issue shares to the existing shareholders in proportion of their existing holding. Based on the existing holding, the assessee was offered shares but he only accepted a part of the offer and accordingly, his shareholding came down from 34.57% to 33.30%. Now, the department by relying on the case of **Sudhir Menon HUF *v.* ACIT [[2014] 148 ITD 260]** argued that the provisions of Section 56(2)(vii) of the Act are applicable in case of disproportionate allotment of shares and as in the case of the assessee, his shareholding got reduced after the offer of shares, the same amounts to disproportionate allotment. In this regard, the Tribunal held that only when a higher than a proportionate allotment is received by a shareholder, the provisions of Section 56(2)(vii) of the Act would get attracted. In the instant case, as the shareholding of the Assessee reduced from 34.57% to 33.30%, no property can be said to be received by him as he became poorer in terms of his shareholding. It was further observed by the Tribunal that Section 56(2)(vii) of the Act does not apply to bonafide business transaction as the intention of the said section was not to tax transactions carried out in the normal course of business or trade. Hence, in light of the said observations, it was held by the Hon'ble Tribunal that Section 56 (2)(vii)(c) of the Act is not applicable to the facts and circumstances of the assessee's case.

Promoters Ineligible for Submitting Resolution Plan

In the matter of **Lalit Mishra & Ors. *v.* Sharon Bio Medicine Limited [Company Appeal (AT) (Insolvency) No. 164 of 2018]** before the Hon'ble National Company Law Appellate Tribunal, New Delhi ("**NCLAT**"), the appellants challenged the Hon'ble National Company Law Tribunal, Mumbai ("**NCLT**") order dated 28.02.2018, wherein NCLT had approved the resolution plan ("**Plan**") submitted by the respondent under the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). The appellants who were the promoters of Sharon Bio Medicine Ltd. ("**Company**") challenged the Order on the basis of following grounds: (i) Plan extinguished their entire shareholding in the Company; and (ii) Plan also extinguished their right as sureties to recover claims from the Company. While dealing with the issues involved in the case, NCLAT stated that the object of the IBC is, *inter alia*, maximization of value of the assets of the corporate debtor and then, to balance all the creditors and make availability of credit. Further, NCLAT expressed that while considering the Plan, the creditors should focus on the resolution of the borrower (i.e., the corporate debtor), in line with the spirit of IBC. Additionally, NCLAT also expressed that IBC prohibits direct or indirect control of the promoters over the corporate debtor, benefiting from the 'resolution process' or its outcome and also suspends the power of the promoters as the members of the board of directors. Thus, for these reasons, the appellants are ineligible for submitting the resolution plan to regain the control or takeover the management of the Company. Therefore, NCLAT, for the above mentioned reasons, declined to interfere with the Order and upheld the Plan.



Insulting by Using Abusive Language will not by itself Constitute Abetment of Suicide

The Hon'ble Supreme Court ("**Court**") in the case of **M. Arjunan *v.* The State represented by its Inspector of Police [Criminal Appeal No. 1550 of 2018]** has held that mere utterance of certain abusive words is not sufficient to constitute an offence under Section 306 of Indian Penal Code, 1860 ("**IPC**") i.e. abetment to suicide. In the instant case, the accused Arjunan

had advanced a sum of Rs. 80,000/- by way of debt to the deceased, Rajagopal. However, due to the alleged torture by the accused, Rajagopal committed suicide leaving a suicide note stating that he was unable to repay the loan and was taking the extreme step. The trial court convicted the accused and sentenced him to undergo rigorous imprisonment for three years. Aggrieved by the decision of the trial court, the accused filed an appeal against his conviction before the Hon'ble High Court of Madras ("**HC**") which affirmed the decision of the trial court. Finally, the accused filed an appeal against the decision of HC before the Court. The Court in order to ascertain the issue referred to Section 306 of the IPC and observed that there are two essential ingredients of the offence under Section 306 IPC: (i) the abetment; (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide. In the present case, the act of the accused, however, insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of instigation/abetment to commit suicide are satisfied, accused cannot be convicted under Section 306 of IPC. The Court also stated that it would not be sufficient to establish that the suicide by the deceased was directly linked to the instigation or abetment by the accused since the accused had advanced money, he might have uttered some abusive words, however, that by itself is not sufficient to constitute the offence under Section 306 of IPC, as uttering abusive words is quite a common thing.

NAA Confirms Charges of Profiteering on Distributor of Johnson & Johnson

As per Section 171 of the Central Goods and Services Tax Act, 2017 (**"CGST Act"**) the suppliers are required to pass on the benefit of any reduction in rate of tax on supply of goods or services or both to the recipient by way of commensurate reduction in prices. To examine the said reduction in prices, the central government has been empowered under the CGST Act to constitute an authority on recommendation of the GST Council. In this regard, the central government has constituted the National Anti-profiteering Authority (**"NAA"**). Recently, the NAA received a complaint No. 16/2018 decided on 06.12.2018 against M/s J.P. and Sons, a distributor of Johnson & Johnson (**"J&J"**) on the ground that they had not passed on the benefit of GST rate reduction from 28% to 18% from 15.11.2017. It was alleged that the distributor was maintaining the same maximum retail price (**"MRP"**), which he was charging before the said date. Accordingly, complainant alleged that instead of reduction, the base prices of the products were increased on 15.11.2017, and thus the said distributor was indulged in profiteering. The distributor in his defense contended that the prices of the product is entirely in the control of J&J and he has no right to modify the same. Therefore, he is not liable for profiteering. However, J&J told the authority that it had in fact lowered the base prices after a reduction in the rate of tax from 28% to 18%. The NAA in the said matter held that the distributor had increased the base prices of the products from 15.11.2017, which implies that he is indulged in profiteering. The NAA also observed that no initiative was taken by the distributor to inform J&J about his legal responsibilities of reduction in prices due to reduction in rate of tax. This implies that it deliberately charged the enhanced prices with the intention to earn higher profits. Accordingly, the distributor was asked by the NAA to deposit the profiteering amount of over Rs. 5 lakhs, along with interest, with the consumer welfare fund.

Quick Takeaways

- In the case of **Smt. Ramilaben B. Patel *v.* Income Tax Officer [2018] 100 taxmann.com 325 (Ahmedabad - Trib.)** decided on 11.12.2018, the hon'ble Ahmadabad bench of Income tax Appellate Tribunal held that where certain credit entries were reflecting cash deposit in bank account of assessee, but assessee failed to substantiate her claim for source of such cash deposit then the same was treated as undisclosed income. Further, it was held that since bank statement is not considered as books of account, therefore any sum found credited in bank passbook cannot be treated as an unexplained cash credit.
- The Hon'ble High Court of Bombay in the case of the **State of Maharashtra *v.* Macchindra [Criminal Appeal No. 713 of 1997]** decided on 22.12.2018**,** has overturned a 21-year-old trial court verdict and has convicted a 41-year-old man in a rape case of a girl in 1996. The Hon'ble Bombay High Court observed that in the event of absence of any injury on the body of the victim cannot lead to a conclusion that she had given her consent and all that it indicates is that she did not put up resistance.
- In the case of **ACIT *v.* Dharmnath Shares & Services (P.) Ltd. [[2018] 100 taxmann.com 416 (SC)]** decided on 10.12.2018**,** the Hon'ble Supreme Court dismissed SLP filed against the High Court ruling wherein the Assessing Officer issued notice under Section 148 of the Income Tax Act, 1961, to assessee on ground that it had received certain accommodation entries from a bogus company, in view of fact that by time of issuance of notice, assessee had already merged with another company. In this case, assessee company lost its legal existence and therefore, notice issued in name of assessee became invalid and the impugned reassessment proceedings deserves to be quashed.
- The Hon'ble High Court of Bombay in the case of **Ramchandra Laxman Kamble *v.* Shobha Ramchandra Kamble and Anr. [Writ Petition No. 3439 of 2016]** decided on 21.12.2018 held that even when a wife enters into an agreement with her husband waiving off her right to maintenance, her statutory right to maintenance cannot be bartered, done away with or negatived by the husband by setting up an agreement to the contrary.
- In the case of **Brahm Datt *v.* Assistant Commissioner of Income-tax [[2018] 100 taxmann.com 324 (Delhi)]** decided on 06.12.2018, the Hon'ble High Court of Delhi held that amendment to Section 149 of the Income Tax Act, 1961 bought by the Finance Act, 2012, extended limitation for reopening assessment to sixteen years. The said power cannot be resorted for reopening proceedings concluded before the amendment became effective as such cases are barred by limitation under Section 149 of the Income Tax Act, 1961.
- The Hon'ble High Court of Gujarat in the case of **Gaurang Balvantilal Shah *v.* Union of India [R/Special Civil Application No. 22435 of 2017]** decided on 18.12.2018 has quashed the list of disqualified directors, who have failed to file their annual return and statements for a period of three (3) consecutive years as per Section 164(2) of the Companies Act, 2013 ("**Act**"), issued on 12.09.2017. The Court observed that the Section 164(2) of the Act being prospective in nature will come into effect from its date of notification i.e. 01.04.2014 and thus, the period for which disqualification has to be ascertained should be financial year 2014-15 and not the financial year 2013-14.
- In the case of **Smt. A. Sridevi *v.* Income-tax Officer [[2018] 100 taxmann.com 434 (Madras)]** decided on 03.12.2018, it was held by Hon'ble High Court of Madras that where reassessment proceedings were initiated against assessee on ground that assessee had advanced several crores of rupees to a party. Source of such amount was not explained by the assessee and also the assessee did not file balance sheet or statement of affairs related to such advance. In view of the said, impugned reassessment proceedings were justified.
- The Hon'ble High Court of Bombay in the case of **Saurabh Jalinder Nangre *v.* State of Maharashtra [Criminal Writ Petition No. 4044 of 2018]** decided on 10.12.2018*,* recently held that a 'child', as is defined under Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2000, who has not committed a heinous offence, cannot be tried at a Children's Court.

Knowledge Centre

Frequently Asked Questions on Labour Laws

Q. 1. What is the intent behind introducing different labour laws?
Ans. Labour laws are social and economic legislation, with intent to protect and safeguard the interests of workers in general along with a healthy work environment for the workers.

Q. 2. Who has the power to frame labour laws?
Ans. Under Entry 22, 23 and 24 of List III (Concurrent List) of Seventh Schedule of the Indian Constitution, both Central and State governments have power to frame labour laws. However, there are certain subject matters under Entry 55, 61 and 65 List of I (Union List) of Seventh Schedule of the Indian Constitution, where the Central Government has exclusive power to frame labour laws.

Q. 3. What are the different areas covered by Indian labour laws?
Ans. Indian labour laws cover different areas for the protection of the workers. Such areas include industrial dispute and relation, wages, bonus, gratuity, provident fund, conditions of service, working hours, insurance of workers, equal remuneration, bonded labour, child labour and sexual harassment.

Q. 4. What is the salary threshold for the payment of bonus, provident fund and employees' state insurance?
Ans. As per the Payment of Bonus Act, 1965 and the Employees State Insurance Act, 1948, the employees having salary or wage not exceeding Rs. 21,000/- per month will be entitled for the benefit of bonus and employees' state insurance. Moreover, as per the Employees' Provident Funds & Miscellaneous Provisions Act, 1952, it is mandatory to pay provident fund for the employees having salary having less than Rs. 15,000/- per month.

Q. 5. What is the daily working hours limit under the Factories Act, 1948?
Ans. The daily working hours limit for an adult worker is 9 hours with a weekly hour limit of 48 hours.

Q. 6. What is the minimum rate of wages to be paid under the Minimum Wages Act, 1948?
Ans. Minimum wage rates in India are fixed under the Minimum Wages Act, 1948. Since labour is a concurrent subject under the Indian Constitution, minimum wage rates are determined both by the Central and State governments. Under the Minimum Wages Act 1948, both the Central and State Governments may notify the scheduled employments and fix/revise minimum wage rates for these scheduled employments.

Q. 7. What is the minimum amount of bonus payable under the Payment of Bonus Act, 1965?
Ans. Under the Payment of Bonus Act, 1965, the employer is liable to pay a minimum bonus which is higher of 8.33% of the salary of wage earned by the employee during the accounting year, or Rs. 100/- (which is Rs. 60/- where an employee at the beginning of the accounting year has not completed age of 15 years).

Q. 8. Whether the Factories Act, 1948 and the Rajasthan Shops and Commercial Establishments Act, 1958 are applicable simultaneously?
Ans. Rajasthan Shops and Commercial Establishments Act, 1958 ("**Shops Act**") is applicable for the benefit of an employee who is working either in shop or commercial establishment. However, as per definition of 'employee' under the Shops Act, the employees who are covered under the Factories Act, 1948 are not covered under the Shops Act. Hence, the Shops Act and the Factories Act, 1948 do not apply simultaneously.

Q. 9. What kinds of factories are governed by the Factories Act, 1948?
Ans. The Factories Act, 1948 lays down provisions for the health, safety, welfare and service conditions of workmen working in factories. It applies to all factories employing more than 10 people and working with the aid of power, or employing 20 people and working without the aid of power.

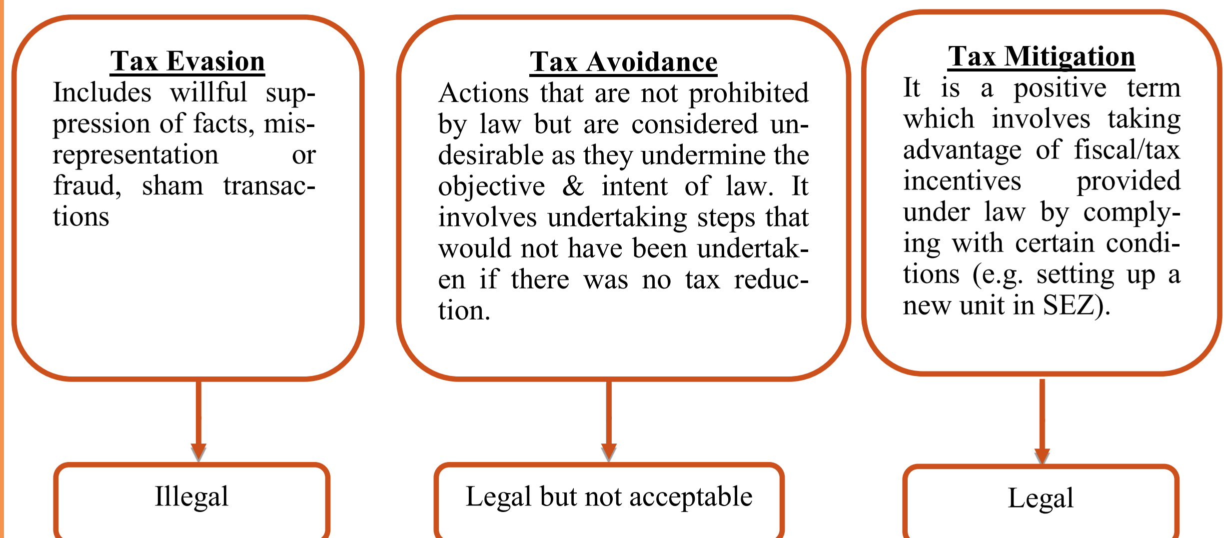
Q. 10. How much overtime work is allowed under the Factories Act, 1948?
Ans. Not more than 50 hours over time on weekly limits in a quarter should be allowed under the Factories Act, 1948. The total number of hours of work in a week, including overtime, should not exceed 60 hours.

Editorial

GAAR: Revolutionary Development in Income Tax Law - By Vidhi Garg, Chartered Accountant

General Anti-Avoidance Rules ("**GAAR**") as the name suggests aims towards combating the issue relating to 'tax avoidance' which has been plaguing the economies all around the world. The countries are grappling to achieve a balance in mitigating tax avoidance without being called a police state and interfering in day to day business operations of the taxpayer. Leading nations such as Australia, Netherlands, New Zealand, China, France have enacted and implemented GAAR over the years as a tool to combat tax avoidance. In the Indian tax regime, the provisions of GAAR have been made effective from 1 April 2017 (A.Y. 2018-19) to curb the issue of 'tax avoidance'.

'Tax avoidance' however, should not to be confused with 'Tax evasion' which is out rightly illegal or 'Tax Mitigation' which is perfectly legal. It is essential to understand the fine line between these 3 categories, before delving into the provisions and implications of GAAR.



In order to curb the menace of tax avoidance there arose a need to restraint those actions and transaction which were undertaken within the four boundaries of law but did not carry any commercial substance and were primarily entered into for the purpose of obtaining tax benefit. However, in India, the Income Tax Act, 1961 ("**Act**") contained only Specific Anti-Avoidance Rules ("**SAAR**") to prevent tax avoidance. Transfer pricing regulations are a classic example of SAAR. Further, the evolution of jurisprudence relating to GAAR in India has been witnessed in various leading cases including that of the Vodafone case, wherein the check on the aggressive tax planning and business arrangement was made with the object to prevent tax avoidance. However, SAAR and Judicial GAAR were limited to peculiar cases only and did not cover the general principles of tax avoidance. Hence, the concept of 'legislative GAAR' was introduced in the form of Chapter X-A (Section 95 to 102 read with Rules 10U to 10UC of the Income Tax Rules, 1962) by Finance Act 2012 (*the applicability of which was deferred till 01.04.2017*) which became a watershed event in the evolution of India's tax policy and legislation on this issue of tax avoidance. The introduction of GAAR through the aforesaid sections empowers authority to look into the substance of a transaction rather than its legal form. It is worthwhile to note that GAAR targets the transactions that result in tax avoidance, however tax mitigation as explained above is acceptable even after GAAR has come into force. With this, we need to understand those transactions on which GAAR would be applicable and the implications of GAAR on such transactions.

Applicability of GAAR

As enunciated under Section 95 of the Act, GAAR is made applicable to the arrangements which are regarded as impermissible avoidance agreements ("**IAA**"). It is worthwhile to note that any arrangement or transaction (whether entered between related parties or unrelated parties in India or in two different jurisdictions) can be considered as an IAA if it is entered into with the main purpose of obtaining a tax benefit and which also satisfies at least one of the following four tests:

i. The arrangement creates rights and obligations that are not at arm's length,
ii. It results in misuse or abuse of provisions of tax laws,
iii. It lacks commercial substance or is deemed to lack commercial substance in accordance with Section 97 of the Act, or
iv. It is not carried out in a bona fide manner.

The primary condition for an arrangement to be considered as an IAA is that the 'main purpose' of such arrangement must be to obtain a 'tax benefit'. The term 'tax benefit, has been defined under Section 102(10) of the Act to *inter alia* include a reduction or avoidance or deferral of tax or other amount payable under the Act or a reduction in total income. It also includes increase in refund or increase in loss in a particular year. It is observed that the definition of 'tax benefit' is very wide and it would cover practically every transaction which results in lesser tax to the assessee. Further, while considering whether the tax benefit exists or not, the connected persons may be treated as one or the corporate structure may be disregarded. Thereafter, the secondary tests as indicated above (i to iv) needs to be checked.

Therefore, it is pertinent that in order to invoke GAAR, obtaining tax benefit must be the 'main purpose' and not just an ancillary result of a prudent business transaction. If the assessee proves the business rationale and commercial substance behind entering into a transaction, it is likely that obtaining tax benefit may not be considered as the 'main purpose' of entering into a transaction and the arrangement may not be considered as an IAA. However, if the department is of the opinion that the transaction has been entered upon by the assessee mainly for the purpose of obtaining tax benefits and it fulfils any of the abovementioned tests, then it may invoke GAAR. It is pertinent to reiterate here that GAAR is not only restricted to cross-border transactions but also applies to domestic arrangements.

Non-Applicability of GAAR

The provisions of GAAR do not apply to:

- An arrangement if the tax benefit to all the parties to the arrangement does not exceed Rs. 3 crores in the relevant assessment year.
- Foreign Institutional Investors who have not taken benefit under DTAA, subject to certain conditions.
- The income from the transfer of investment which were made upto 31.03.2017 as they are grandfathered/exempted from the applicability of GAAR. Therefore, if the investments that were made prior to 31.03.2017 are transferred by the assessee even after 31.03.2017, then the provisions of GAAR would not apply to such transfer. However, it is to be noted that the said exemption is merely in relation to the income from the transfer of investment and not in relation to the continuing income from such investment, i.e. any continuing income from an investment made prior to 31.03.2017 will be covered under the ambit of GAAR.
- Further, the said exemption is for specific investments that includes assets, that are held (whether in India or outside India) by an enterprise to earn an income by way of dividends, interest, rentals as well as capital appreciation. Any transfer of investment other than the ones described above would not be exempted from the applicability of GAAR. In this regard, it is imperative for the assessee to review their existing inter-company loan arrangements, lease contracts, royalty or service fees and pay-out transactions from the perspective of GAAR as they do not constitute "investment" by themselves and the above exemption does not apply to them. Another issue re

-volves around investments which have been made in the grandfathered period (prior to 31.03.2017) but have resulted in a different or new instrument post 01.04.2017. Instruments compulsorily convertible from one form to another, shares brought into existence by way of split or consolidation of holdings are some of the examples to the same. A Circular issued by CBDT seeks to clarify that the grandfathering benefits would be made available to such investments with the pre-requisite that the conversion happens at the terms finalized at the time of issue of such instruments.

Thus, it can be observed that GAAR applies to a wide ambit of transactions as the above definition of IAA is very broad and can easily be applied to most tax-saving arrangements, until a commercial substance behind a transaction is proved.

Consequences of GAAR being invoked

Once an arrangement has been regarded as IAA, it would provide unfettered power to the authorities to re-characterize the entire transaction in a manner that there is no tax avoidance. It includes the following:

- Denial of tax benefit (under treaty or Act).
- Disregarding corporate structure (in India or internationally) or disregarding any accommodating party or connected persons and treating them as one.
- Treating the arrangement as if it had not been entered into.
- Reallocating income, expenses, deduction, relief amongst the parties.
- Re-characterizing equity-debt, capital receipt-revenue receipt or expenses.
- Reassigning of place of residence or site of assets or transaction.

It is to be noted that in the event of a particular consequence being applied in the hands of one of the participants of IAA, a corresponding adjustment in the hands of another participant is not allowed. This may lead to double taxation of income.

Uncertainties with GAAR: Concluding Remarks

As discussed above, GAAR aims to codify the principles of substance over form by empowering Revenue Authorities to disregard transactions/arrangements that are designed with the main purpose of obtaining tax benefit or the transactions lacking commercial substance. With the implementation of GAAR, it is apprehended that it shall put too much discretionary powers in the hands of tax administration in the name of plugging tax avoidance. However, the burden would be on the Tax Department to prove that tax avoidance was the "main purpose" with which a transaction was effected. In order to prove before the tax authorities that the main object behind entering into a transaction/ arrangement is not for obtaining tax benefit, the assessee will have to maintain proper business rationale and document the evidences to avoid litigation. The assessee and tax practitioners need to realign their approach and take a closer look from several perspectives on nearly all the transactions relevant for business, encompassing:

- Structuring involving low tax jurisdictions
- Cash repatriation structure including inter-group transactions involving royalty, service fees etc
- Restructuring of transactions such as merger, demerger, slump sale, selective buy-back, conversion to LLP, gift of shares etc
- Transfer of land using partnership structure

To conclude, in today's context, any discussion on structuring of a transaction would be incomplete without evaluating it through the prism of GAAR. The uncertainties with the interpretation and implementation of GAAR is expected to result in significantly increased litigation. As it is rightly said by Benjamin Franklin that '*An ounce of prevention is worth a pound of cure*', it is crucial that the assessee pays close attention to commercial purpose, substance and documentation of transactions before undertaking a transaction to ring fence it from the potential exposure to GAAR. Alternatively, the assessee may choose to obtain an Advance Ruling, to seek an assurance whether the provisions of GAAR are applicable or not, before entering into any transaction which leads to a tax benefit to the assessee.

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

Surat– 202, 2nd Floor, SNS Square, Opp. Reliance Market, Vesu Main Road, Vesu, Surat—395007