VOLUME 33,MAY 2017

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THE NEWSLETTER

RERA: A Watchdog that Came into Full Force on 01.05.2017

The Ministry of Housing and Urban Poverty Alleviation ("**Ministry**") *vide* gazette notification no. F.No. O-17034/275/2017-H dated 19.04.2017 notified the remaining provisions of the Real Estate (Regulation and Development) Act, 2016 ("**Act**") which came into force from 01.05.2017. The notified sections of the Act are: (i) Section 3 to 19 which deals with registration of real estate project and registration of real estate agents, functions and duties of promoters and rights and duties of allottees; (ii) Section 40 which deals with recovery of interest or penalty or compensation and enforcement of order, etc.; (iii) Section 59 to 70 dealing with offences, penalties and adjudication and (iv) Section79 and 80 dealing with jurisdiction of the Act.

The implications of the Act on the real estate industry have been elucidated herein below:

- Now registration of new and ongoing commercial/residential real estate projects ("**Project**") with the Real Estate Regulatory Authority ("**Authority**") is mandatory. The new or proposed projects shall be required to be registered from the date the Act comes into force. However, the Act provides a window of three (3) months for registration of ongoing Projects;
- The promoters are prohibited from selling, advertising, marketing, booking or offering for sale or inviting persons to purchase any Project or indulging in any kind of publicity of the Project, unless the concerned promoter gets it's Project registered under the Act;
- The promoters shall not accept a sum more than ten per cent (10%) of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and getting the said agreement for sale registered under the law for the time being in force;
- The promoters shall not make any additions, alterations or any other deviation from the sanctioned plans, layout plans and specifications of the buildings or the common areas within the Project which have been approved by the Authority and disclosed to the allottees without obtaining written consent for such deviation from at least two-third ($2/3^{rd}$) of the allottees, other than the promoter, who have agreed to take apartments in such building;
- The Act excludes the jurisdiction of civil courts from entertaining any suit or proceeding in respect of any matter which the Authority or the adjudicating officer appointed under Section 71(1) of the Act or the Real Estate Appellate Tribunal is empowered by or under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act;

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- Any person whose complaint relating to: (i) breach of obligations by the promoter relating to veracity of advertisements or prospectus, adherence to sanction plans and Project specifications under Section 12 and Section 14 of the Act; (ii) failure on part of promoter to complete or give possession of an apartment/plot/building under Section 18 of the Act; and (iii) breach of obligations by an allottee under Section 19 of the Act, is pending before any consumer forum or commission under Consumer Protection Act, 1986 ("**Forum**"), on or before the commencement of the Act, then such person shall have an option to withdraw the said complaint pending before the Forum only after taking due permission from the Forum and file an application before the adjudicating officer under the Act;
- Now, no real estate agent shall facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of a Project or part of it, without obtaining registration as per the provisions of the Act;
- Agreement to sell in a particular state shall be made in accordance with the template provided under the rules notified by respective state under the Act;
- As per relevant provisions of the Act, in case of revocation of registration of a Project, the Authority shall debar the promoter of such Project from accessing its website in relation to that Project and specify his name in list of defaulters which shall be circulated to various state Authorities;
- The Act provides imprisonment upto three (3) years and/or penalty upto ten per cent (10%) of the estimated cost of the Project for any contravention of the provisions of the Act.

Usage of Prefix 'M/s' Before Company's Name is Incorrect

The Hon'ble Bombay High Court ("**Court**") has finally rectified the longstanding misconception relating to usage of prefix 'M/s' before the name of a company. The Court, on 03.04.2017, issued a circular numbered G-/176/2017 ("**Circular**") wherein the Court stated that the practitioners are habitual to affix the abbreviation 'M/s' ("**Prefix**") before the name of the company (both private limited or public), which is completely incorrect. The Court observed that a company is not a firm, and the Prefix is only used for a firm. Further, the Court stated that even in the title of the legal proceedings, prefixes are not permitted, and therefore, for the matter, the prefixes such as 'Mr/Ms/Mrs' are also not to be used.

At this point, it is important to mention that the practice of inserting the Prefix before a company's name is, sometimes, also followed while drafting agreements between the parties. Therefore, focusing on the Circular, the lawyers, drafting such agreements should abandon such practice.

Income earned by Formula One Racings shall be Taxable in India under Income Tax Act

The Supreme Court of India ("**Court**") on 24.04.2017 in the case of **Formula One World Championship Ltd *v.* Commissioner of Income Tax** [**Civil Appeal No. 3849 of 2017**] held that the business income attributable to the permanent establishment ("**PE**") of Formula One World Championship Ltd. ("**FOWC**") was taxable under Income Tax Act, 1961 ("**Act**"). The term "permanent establishment" is defined in Article 5 of Double Taxation Avoidance Agreement between India and UK. According to the said article, a permanent establishment is a fixed place of business through which business of an enterprise is wholly or partly carried on. In the instance case, FOWC was conducting its business of organizing the event of Formula One Grand Prix of India at Buddh International Circuit, Noida ("**BIC**"). The foremost question in dispute was whether BIC qualifies to be a PE in India for the purpose of income tax. FOWC contended that the tracks of BIC were constructed and maintained by Jaypee Sports International Limited ("**Jaypee**") because of this Jaypee was responsible for the event. The Court observed that not only BIC is a fixed place where the commercial activity i.e. conducting of Formula One championship is carried out, it is also a virtual projection of the foreign enterprise, namely, FOWC in India. Hence, after considering the characteristics of a PE, the Court held that BIC was a PE in India of FOWC. Further, the Court held that the requirements for participation of teams, viewers interested in witnessing the races, advertisement, media rights, etc. are other essentials for boosting up the earnings in such events. Thus, the Court found that FOWC and not Jaypee was responsible for the same and finally held that non-resident FOWC is liable to pay tax in India on the income earned in India.

However, the Court by accepting the argument of FOWC, held that only the portion of income, which is attributable to its PE i.e. BIC, shall be treated as business income of FOWC and the same shall be made taxable in India. Further, deduction of tax at source shall be made only for the portion of income which is attributable to the said PE under Section 195 of the Act.

Ministry of Corporate Affairs Notifies Cross Border Mergers

In order to kindle the flow in merger, the Central Government has notified Section 234 of the Companies Act, 2013, ("**Act**") *via* gazette notification dated 13.04.2017 [F. No. 1/37/2013 CL.V] ("**Notification**"), thereby enabling merger or amalgamation of Indian companies with foreign companies. Section 234 of the Act defines the term "Foreign Company" as any company or body corporate incorporated outside India whether having a place of business in India or not. Further, sub-Section 2 of Section 234 of the Act states that a foreign company may merge with a company registered under the Act with the prior approval of Reserve Bank of India and after due compliance with the provisions of Section 230 to 232 of the Act. It further states that the scheme of merger or amalgamation may provide for the payment of consideration to the shareholders of the merging company in cash, or in depository receipts or partly in cash and partly in depository receipts. Furthermore, *vide* the Notification, Rule 25A after Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("**Rules**") has been inserted through Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2017 ("**Amendment Rules**"). The Rule 25A of the Rules states that in case of merger of an Indian company with a foreign company, the transferee company has to make sure that valuation for such a merger is conducted by valuers who are members of a recognized professional body in its country and that this valuation is by internationally accepted accounting and valuation principles. And, the valuation declaration has to be filed.

Also, after Annexure A appended to the Rules, Annexure B has been inserted through the Amendment Rules which expressly states that an Indian company can only merger in the with a foreign company which is incorporated in the following jurisdiction:

- whose securities market regulator is signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding or a signatory to bilateral Memorandum of Understanding with SEBI; or
- whose central bank is a member of the Bank for International Settlements (BIS), and
- a jurisdiction which is not identified in the public statement of the Financial Action Task Force in regards to certain specified matters.

Hence, Section 234 of the Act is a welcome step as it will now allow merging of Indian companies with the foreign companies which was not allowed previously in the Companies Act, 1956. But, there seems a lack of clarity over the question of permissibility of a foreign company demerging its business undertaking to an Indian company or *vice versa* under the Act..

Clarification Regarding Arbitration Fees

Clause 34 of the Manual of Procedure for Alternative Dispute Resolution, 2009 ("**Manual**") which deals with 'Reasonable Cost of Arbitration' has been substituted by a new clause through Manual of Procedure for Alternative Dispute Resolution (Amendment), 2017 which has been notified *via* notification No. 01/ S.R.O./2017 dated 23.03.2017 issued by Hon'ble High Court of Rajasthan, Jodhpur while exercising its power given under Clause 53 of the Manual. According to the new Clause 34 of the Manual, if at the time of framing of time schedule and filing of the claim and counter claim, reasonable amount of arbitration fees has not been agreed by the parties and their nominee arbitrators, the same shall be fixed in consultation with the parties by explaining the parties about the method of determining the amount as per the Fourth Schedule appended to the Arbitration and Conciliation Act, 1996, with the provision of secretarial assistance allowance as follows:

- Rs.750/- per day upto the claim of Rs. 20,00,000/-;
- Rs.1,500/- per day above the claim of Rs. 20,00,000/- and upto Rs.10,00,00,000/-; and
- Rs.2,500/- per day above the claim of Rs. 10,00,00,000/ .

Sale of Entire Running Business should be Treated as Slump Sale

The Hon'ble Supreme Court of India ("**Court**") in the case of **Commissioner of Income-tax. Ahd *v.* Equinox Solution (P.) Ltd [[2017] 80 taxmann.com 277 (SC)**] held that sale of entire running business with all assets and liabilities in one go, amounts to slump sale of a long term capital asset and should be taxed accordingly. In this case, the assessee sold its entire running business comprising all assets and liabilities to another company for certain amount of consideration, in one go. In the income tax return, the assessee claimed deduction under Section 48(2) of the Income Tax Act, 1961 ("**Act**") by treating the sale to be in nature of 'Slump Sale' of the going concern being in the nature of long term capital gain. Assessing officer was of view that the said transaction was covered under Section 50(2) of the Act because it was in the nature of short term capital gain, accordingly, the assessing officer reworked the claim of deduction treating the same to be falling under Section 50(2) of the Act and passed the assessment order accordingly. On appeal before Commissioner of Income Tax (Appeals), the Commissioner held that the assessee has sold their entire running business in one go with its assets and liabilities at a slump price and, therefore, the provisions of Section 50 (2) of the Act could not be applied to such sale. Since the undertaking itself is a capital asset owned by the assessee nearly for six (6) years and being in the nature of long term capital asset and the same having been sold in one go as a running concerned, it cannot be termed as a short terms capital gain so as to attract the provisions of Section 50(2) of the Act. On dismissal of appeal filled before the Income Tax Appellate Tribuanl, the Revenue (Income Tax Department) filled an appeal before hon'ble High Court of Gujarat. The hon'ble High Court of Gujarat dismissed the appeal holding that the appeal does not involve any substantial question of law. The Revenue (Income Tax Department) appealed before the Court by way of special leave. The Court held that case of assessee does not fall within the four corners of the Section 50(2) of the Act. Section 50(2) of the Act applies to a case where any block of assets are transferred by the assessee but where entire running business with assets and liabilities is sold by the assessee in one go, such sale, in our view, cannot be considered as short-term capital asset.

Leave Travel Concession for Foreign Trips to Employees : No Exemption u/s 10(5) of the Income Tax Act

In recent ruling, Hon'ble ITAT Bangalore Bench ("**Tribunal**") in the matter of **Syndicate Bank *v.* ACIT** [**[2017] 80 taxmann.com 179 (Bangalore Trib.)**] examined as to whether leave travel concession ("**LTC**") granted for foreign trip to the employees is be eligible for benefit under Section 10(5) of the Income Tax Act, 1961 ("**Act**") or not.

The facts of the case are such that the assessee allowed LTC exemption under Section 10(5) of the Act to its employees where the travels also included a leg outside India and travel by long circuitous route. However as per the Department of Income Tax ("**Department**") same was not in accordance with the provision of Section 10(5) of the Act and accordingly, the assessee was treated as an assessee in default under Section 201(1) of the Act for not deducting tax on the amount of LTC under Section 192 of the Act. The assessee submitted that employees of the assessee bank proceeded on leave to a place in India as laid down in Section 10(5) of the Act and the amount that was reimbursed to them was not in excess of the economy fare of the notional carrier to that destination as laid down in applicable rules. Further, the assessee contented that the hon'ble CIT(A) failed to appreciate the fact that the assessee was under bona fide belief that LTC was exempt in the hands of the employees. On the other hand, the Department argued that Section 10(5) of the Act will be applicable only on reimbursement of those expenses which were incurred on travel to any place in India. Since the said employees have travelled to foreign countries, the benefit of exemption under Section 10(5) of the Act could not be granted. It was further argued by the Department that at the time of advancement of LTC amount, the assessee may not have been aware about the fact of foreign trip, but at the time of settlement of bills of LTC, assessee must have obtained the complete details of the same. Once the fact of foreign trip was noticed, the said employee was

not entitled for exemption of amount of LTC under Section 10(5) of the Act. Therefore, by treating the said amount of LTC as income of the employee, the assessee should have deducted tax under Section 192 of the Act on the amount of LTC. Accordingly, the assessing officer rightly held the assessee as 'assessee in default' for not deducting tax. The Department further argued that number of case laws was relied by the assessee for the argument that if belief was bona fide, any assessee can't be held to be in default, however, the assessee in the present case has made no effort to show how the belief was formed to exclude such allowance from salary of the employee. Further, nowhere in this clause, has it been stated that even if the employee travels to foreign countries, exemption would be limited to the expenditure incurred to the last destination in India. The Tribunal accepted the argument of the Department by taking a view that Section 10(5) was introduced in order to motivate the employees and also to encourage tourism in India. There was no intention of the legislature to allow the employees to travel abroad under the garb of benefit of LTC available by virtue of Section 10(5) of the Act. Further, under the facts and circumstances of the present case, the assessee can't plead that it was under bona fide belief that the amount claimed were exempt under Section 10(5) of the Act. Accordingly, the Tribunal held that authorities below were justified in treating the assessee as assessee in default.

No Time Limit Prescribed for Filing an Application for Compounding of an Offence under Income Tax Act

The Hon'ble Delhi High Court ("**Court**") in the case of **Vikram Singh** v. **Union of India [(W.P.(C).6825 of 2016]**, decided on 11.04.2017 held that the Income Tax Department ("**Department**") is not entitled to reject compounding application on the ground of inordinate delay as there is no time limit prescribed under Section 279 of the Income Tax Act,1961 ("**Act**") for filing an application for compounding of an offence. In the instant case, the prosecution complaint under Section 276C(1) and Section 276C(2) of the Act were filed before the criminal court on 12.04.2006 and a compounding application was filed by the accused before the Chief Commissioner of Income Tax, Delhi - I on 01.04.2016. The Department, on the basis of paragraph 8(vii) of guidelines for compounding of offence dated 23.12.2014, contended that the offences committed by a person for which complaint was filed with the competent court twelve (12) months prior to receipt of the application for compounding are generally not to be compounded. Therefore, in the present case, as the compounding application was filed by the accused nine (9) years after filing of the complaint by the prosecution, the said compounding application is liable to be rejected.

The Court held that said circular dated 23.12.2014 does not stipulate a limitation period for filing the application for compounding. What the said circular sets out in paragraph 8 are 'Offences generally not to be compounded' and sub-clause (vii) of the said paragraph states that offences committed by a person for which complaint was filed with the competent court twelve (12) months prior to receipt of the application for compounding. Thus, the above clause is not the one prescribing a period of limitation for filing an application for compounding. The Court observed that the said sub-clause gives discretion to the competent authority to reject an application for compounding on certain grounds. The grounds on which an application may be considered, should not be confused with the limitation for filing such an application. This has to be also understood in the context of the object of providing for compounding of offences. It provides an opportunity for some assessee, notwithstanding that their appeals as regards the assessments may be pending, to come forward to have their offences compounded. It does sub serve both public interest as well as the interest of the Income Tax Department itself that on some reasonable terms such offences, which may not be considered serious, are compounded. The said guidelines have to be understood only in that context. For the above reasons, the Court held that the application for compounding filed by the petitioner in the present case should not be rejected.

Foreign Direct Investment (“FDI”) in E-Commerce

- By Advocate Aditya Khandelwal, Associate

FDI policies in India are formulated under the Foreign Exchange Management Act, 1999 (“**FEMA**”) read withForeign Exchange Management (Transfer or Issue of Security by Persons Resident Outside India) Regulations, 2000. The Reserve Bank of India is the regulator to govern the FDI in India and the Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, Government of India is entrusted with the responsibility to publish Press Notes, Press Releases, Clarifications, etc. related to the FDI.

FDI in India is gradually growing with a rapid speed allowing foreign participants to take part in Indian business industry. In India, FDI is allowed in almost all sectors, which are either prudential in nature or growing business sectors. With the advent of time, the Government of India also allowed FDI in E-Commerce. In every sector there are several sectoral caps imposed with the required permission to allow FDI in India. There are two types of routes prescribed for FDI in India, i.e., Government and Automatic. FDI which are under Government route require prior permission of Foreign Investment Promotion Board, Department of Economic Affairs, Ministry of Finance before investigating in an Indian entity. Other than the Government route, FDI under the Automatic route requires no permission before making any investment in an Indian entity, however, the same needs to be informed to the RBI within thirty (30) days of receiving such FDI.

Current Position of FDI in E-Commerce

Presently, FDI in E-Commerce is allowed upto hundred percent (100%) in an Indian E-Commerce entity under Automatic route. Further, FDI in E-Commerce is allowed only in Business to Business (B2B) platform and not in Business to Consumer (B2C) platform. For the purpose of the FDI, the meaning of E-Commerce entity is defined, which means a company incorporated under the Companies Act, 1956/2013, foreign company defined under the Companies Act, 2013 or branch/ agency in India controlled by person resident outside India (as defined under the FEMA) conducting the E-Commerce business.

Marketplace versus Inventory Based Model

Generally there two (2) categories of models through which E-Commerce entities conduct their business, i.e., marketplace (“**Marketplace**”) and inventory (“**Inventory**”) based model. In the Marketplace model an E-Commerce entity provides the information technology platform on digital and electronic network to act as a facilitator between buyer and seller of the products. On the other hand, in Inventory the E-Commerce entity owns the inventory of goods and services and sell it to the consumers directly.

However, as per current FDI policy of India, 100% FDI through Automatic route is only permitted in the Marketplace.

Modus Operandi through Marketplace

The E-Commerce entity directly enters into agreements/ contracts with sellers, who are registered on such E-Commerce platform on a B2B basis. In the Marketplace E-Commerce entity may provide support services to sellers, such as, warehousing, logistics, payment collection, etc. Further, the E-Commerce entity in the Marketplace will not exercise ownership over the inventory to be sold, as the same would be construed as the Inventory from the Marketplace. In the Marketplace, the E-Commerce entity is not permitted to make more than twenty-five percent (25%) sales through one seller or its group companies in a financial year. Once the sales has been taken place, the seller shall be liable for delivery of goods and for satisfaction of customers (including warrantee/guarantee of goods and services) and the E-Commerce entity has no liability for the same. The websites of the E-Commerce entity should provide clearly about the name, address and other contact details of the seller with respect to the particular goods and services. Additionally, it is provided that the guidelines prescribed for FDI in cash and carry wholesale trading shall be applicable on B2B E-Commerce.

The Reserve Bank of India has prescribed some guidelines for the payment of goods and services purchased from the E-Commerce entity, in accordance to which all payments for sale of goods shall be facilitated. E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.

Majorly in the context of above, FDI in E-Commerce entity is allowed though B2B segment, however, in following certain scenarios FDI through B2C segment is also permitted:

- The manufacturer of the products is permitted to sell its products in India through E-Commerce retail.
- Entities operating under single brand retailing through brick and mortars stores are permitted for retail trading *via* E-Commerce.
- An Indian manufacturer is permitted to sell its own single brand products through E-Commerce. Indian manufacturer would be the investee company, which is the owner of Indian brand and which manufactures in India, in terms of value, at least seventy (70%) of its products in house, and sources, at thirty (30%) from Indian manufacturers.

Conclusion/Observations

FDI in E-Commerce was not initially permitted in India, however, with the change of trend and bulging of demand, FDI in E-Commerce has been also permitted in India. It is evidentiary from the above discussion that in order to give priority to local market and seller, FDI is permitted in B2C segment with some restrictions. As the business model of FDI in E-Commerce is currently emerging with the development of E-Commerce, FDI in different segments including B2C segment with less restrictions and compliances will also be allowed in future.

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