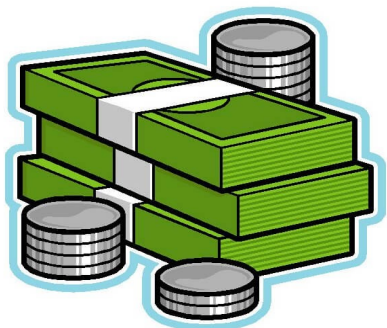


THE NEWSLETTER

Amendments to Finance Bill, 2017

Being a money bill, the Finance Bill, 2017 (“**Bill**”) requires only Lok Sabha’s approval. The Rajya Sabha may recommend changes but it’s the discretion of Lok Sabha to act upon such recommendations. The Bill was introduced in the Lok Sabha on 1st February, 2017 and on 22nd March, 2017, the Lok Sabha, after introducing as many as forty (40) amendments to the Bill (“**Amendment Bill**”), presented the Amendment Bill to Rajya Sabha for its recommendations. On 30th March, 2017, the Lok Sabha rejected the recommendations made by the Rajya Sabha with respect to the Amendment Bill and passed the Amendment Bill. The key changes under the Amendment Bill are as follows:



- The Bill introduced insertion of a new Section 269ST in the Income Tax Act, 1949 (“**Act**”) wherein cash transactions above Rs.3,00,000/- will not be permitted: (i) to a single person in one day; (ii) for a single transaction (irrespective of number of payments); and (iii) for any transaction relating to a single event. The Amendment Bill has reduced the aforesaid monetary limit for cash transactions from Rs.3,00,000/- to Rs.2,00,000/-.

- Section 206C of the Act provided that a seller, who received any amount in cash as consideration for sale of bullion or jewellery or any other goods or for providing any service, shall at the time of receipt of such amount, collect from the buyer 1% of the sale consideration. This provision has now been done away with by virtue of Amendment Bill. So, any cash receipt of Rs.2,00,000/- or above would only invite penalty on seller as per provisions of Section 269ST of the Act.
- Regarding donations by companies to political parties, the Amendment Bill has removed the (i) existing limit of contribution that a company may make to political parties which currently is 7.5% of net profit of the last three financial years; and (ii) requirement of a company to disclose the name of the political parties to which a contribution has been made. In addition, the Amendment Bill also states that any contribution to the political parties will have to be made only through a cheque, bank draft, electronic means, or any other instrument notified by the central government with respect to the same.
- The Amendment Bill makes it mandatory for every person to quote their Aadhaar number after 1st July, 2017 when: (i) applying for a Permanent Account Number (PAN); or (ii) filing their Income Tax returns.
- A number of tribunals, which oversee disputes related to taxation and company balance sheets, as well as company wars over items such as telecom spectrum, etc., will be replaced and taken over by existing tribunals under other acts as stated in the Amendment Bill.

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- To oversee the payments systems in light of increase in digital payments, a Payments Regulatory Board chaired by the RBI Governor and including members nominated by the central government shall be created. This Board will replace the existing Board for Regulation and Supervision of Payment and Settlement Systems.

Trusts cannot File Consumer Complaints under the Consumer Protection Act, 1986

The Hon'ble Supreme Court ("Supreme Court") in the case of *Pratibha Pratisthan v. Manager, Canara Bank* (Civil Appeal No. 3560 OF 2008 decided on 7th March, 2017) examined the issue as to whether a complaint can be filed by a trust before the consumer disputes redressal agencies ("CDRA") established under the provisions of the Consumer Protection Act, 1986 ("Act"). CDRA includes the 'District Forum', the 'State Commission' and the 'National Consumer Disputes redressal Commission'.



For determining the aforesaid issue, SC observed that examination of the definition of 'complainant', 'consumer' and 'person' as provided under Section 2(b), Section 2(d) and Section 2(m) respectively of the Act is indispensable. After examination and analysis of the definitions of 'complainant' and 'consumer', Supreme Court held that trust is not covered under any of the definitions. Further, in order to remove all doubts, Supreme Court examined the definition of 'person' and held that trust is not covered under the ambit of 'person' as well and therefore trust is not a consumer. Therefore, not being a consumer under the Act, the trust

cannot be considered as a complainant under Section 2(b) of the Act and therefore, the trust cannot file a consumer dispute before CDRA under the provisions of the Act.

Rajasthan Budget 2017-2018: Indirect Tax Highlights

The Rajasthan State Budget 2017-2018 was presented on 8th March, 2017. No substantial change has been made in the indirect tax regime prevailing in State of Rajasthan owing to the upcoming onset of GST pan India. However, some material highlights related to indirect tax are as follows:

- Composition scheme for manufacturers having turnover up to Rs.50,00,000/- with the rate of 2% composition fee has been introduced.
- Now, revised VAT-11 for the FY 2015-16 can be filed till 15th April, 2017.
- Also, time limit for correction of online generated declaration forms has been extended.
- Dealers of saraffa, gems and stone, petroleum retail outlet and tent, who have opted for composition scheme but failed to deposit the composition amount, interest or late fee, are now exempted from payment of tax after complying with certain conditions.
- Hard copies of the appeals shall be accepted by Appellate Authority for the period during which the dealers were unable to file the appeal online.



- In case of award of additional work or receipt of additional payment, period of sixty (60) days extended to avail the benefit of the exemption certificate already issued under the Rajasthan VAT Act, 2003.
- Amnesty Schemes for VAT, Entry Tax (Goods) and Entry Tax (Motor Vehicles) has been introduced which shall be effective from 8th March, 2017 upto 30th April, 2017. VAT on cigarettes hiked to 15% as an initiative to curb tobacco and cigarettes use.

Other than the above indirect tax amendments, the Rajasthan State Budget 2017-2018 has brought important changes, including but not limited to, to tourism, animal husbandry, infrastructure, solar power, MSME sectors and recruitment in government jobs.

Plea to set aside Arbitral Award passed in Abroad is Not Maintainable in India

The Hon'ble Supreme Court of India ("Supreme Court") in the case of *IMAX Corporation v. M/s E-City Entertainment (I) Pvt. Ltd.* (Civil Appeal No. 3885 of 2017 (arising out of SLP (c) No 34009 of 2013), decided on 10th March, 2017) held that the plea to set aside an arbitral award passed in the arbitral proceedings held abroad, shall not be maintainable in India as the Part-I of the Arbitration and Conciliation Act, 1996 ("Act") has no application where the parties have expressly agreed in the arbitration agreement that the arbitration proceedings shall be conducted according to the International Chamber of Commerce Rules ("ICC Rules"). In the instant case, an appeal was preferred against the order passed by the Hon'ble High Court of Bombay ("High Court") wherein the High Court held that the petition under Section 34 of the Act, filed by the Respondent to set aside the arbitral award passed by the arbitral tribunal in London, is maintainable. While discussing the maintainability of such petition, Supreme Court observed that the parties in the instant case have expressly agreed in their arbitration agreement that the arbitration proceedings will be conducted according to the ICC Rules and the place of arbitration shall be decided by the International Chamber of Commerce ("ICC"). ICC in fact, chose London as the seat of arbitration after consulting the concerned parties. The arbitration was held in London and no objection with respect to the same was raised by any of the concerned parties. All the awards i.e. the two partial final awards and the third final award were passed in the arbitration proceedings held in London and the same was communicated to the concerned parties. Therefore, relying upon the judgment passed by this court in the case of *Bhatia International vs. Bulk Trading S.A. and Anr* ((2002) 4 SCC 105), it is clear that Part- I of the Act does not apply to the case. Therefore, in view of the above, the SC set aside the order of the High Court on the ground that the High Court committed an error in observing that the seat of arbitration itself is not a decisive factor to exclude application of Part-I of the Act. Thus, SC held that the petition under Section 34 of the Act is not maintainable because the arbitration proceedings can only be governed by the laws of that country in which such arbitration took place or is conducted.



New Trade Mark Rules

The Government of India has notified, the new Trade Mark Rules 2017 (“**Rules 2017**”) with effect from 6th March 2017 and as a result of the same the Trade Mark Rules 2002 stand repealed. The Rules 2017 focuses on simplification and speeding up of the entire process of trade mark administration by laying down rules for online filling, quick and hassle free trademark registration, etc. The major highlights of the Rules 2017 have been summarized here-under:

- Number of Trade Mark (“**TM**”) Forms have been reduced from 74 to 8.
- Facility for registration of sound marks has been introduced.
- The Rules 2017 has specified the applicants for the purpose of the TM application in two categories: (i) Individuals/ Startups/ Small Enterprises; and (ii) Others. The term “Startup” and “Small Enterprises” has been defined under the definition clause of the Rules, 2017. It applies to both Indian and Foreign entities.
- Substantial increase in the official fees for filing forms and applications wherever applicable. The fees further differs for physical and e-filing of applications for registration of trademarks to encourage digitization. However, a considerable rebate for individuals/ startups and small enterprises has been provided to encourage and facilitate them in protecting their brands.
 - In order to promote e-filing of the TM applications, the fees for online filing has been kept at 10% lower than that for physical filing of the TM application.
 - As per Rule 124 of the Rules 2017, any person may request the TM Registrar to enlist a mark as well-known along with statement of case, evidences and requisite documents and fees amounting to Rs.1,00,000/-. After inviting objections, in case the said trademark is determined as well-known, the same shall be published in the trademark journal and included in the list of well-known trademarks.
- Hearing through video conferencing or any other audio visual communication on request, has been introduced.
- Number of adjournments in opposition proceedings has been restricted to a maximum of two by each party, which will help in timely disposal of matters.
- Modalities for service of documents from applicants to the TM Registry and vice-versa through electronic means have been introduced to expedite the process.
- Procedures relating to registration as Registered User of TM have also been simplified.
- The Rules, 2017 provide for filing of an application for renewal, within one year before the expiration rather than six months prior to the expiration, of the registration of the trademark.
- The Rules, 2017 have made it mandatory for the applicant to file an affidavit along with the supporting evidence to claim use of the mark.
- On an application for expedited examination, the examination stage as well as subsequent stages including oppositions will be expedited.



Thus, the core objective of the Rules, 2017 is to streamline the trademark procedures in India and promote e-filing. However looking at the fee hike on one side and the other benefits streamlined, simplified and quicker trademark prosecutions at the other side, one could say that the benefits have come at a substantially higher cost.

Statutory Payments Made Towards Business Expediency cannot be Disallowed

An appeal was filed by Commissioner of Income Tax (“**Appellant**”) against Karnataka State Beverages Corporation Ltd. (“**Respondent**”) in the Division Bench of Karnataka High Court (“**D.B.**”), in the case *Commissioner of Income-tax Bang. vs. Karnataka State Beverages Corporation Ltd.* (WRIT APPEAL NOS. 853 TO 856 OF 2016, 3rd March, 2017), against order passed by the Single Judge Bench of Karnataka High Court (“**S.B.**”) in favor of the Respondent. The S.B. allowed the expenses of ‘Privilege Fee’ paid by the Respondent to the State Government in respect of Assessment Year 2009-10, 2010-11, 2011-12 and 2012-13 and remanded the matter back to the Assessing Officer (“**AO**”). In the instant case, the Respondent is an undertaking of State Government engaged in the business of canalization of liquor, beer and rectified spirit and is liable to pay ‘Privilege Fee’ to the State Government in accordance with the Karnataka Excise Act, 1965. During the assessment proceeding, the AO disallowed the ‘Privilege Fee’, against which the writ was filed by the Respondent before the S.B. The disallowance was made on the grounds that (i) it is not an expenditure incurred towards business expediency; (ii) the Respondent is parting with the income in the name of ‘Privilege Fee’ for which there is no fixed rate; and (iii) neither the percentage of ‘Privilege Fee’ is known to a company in advance nor at the beginning of the year and therefore, payment of the ‘Privilege Fee’ done by the Respondent at the end of the year was just to part with the income and thus the Respondent acted against the provisions of Companies Act, Income Tax Act and the Accounting Standards. The counsel appearing for the Appellant in D.B. argued that the AO has the power under Section 37 of the Income Tax Act, 1961 to disallow a particular expense if he finds that such expense is not wholly or exclusively for the purpose of business or profession. He further argued that whether a particular expense is allowed or not is a matter of fact and Ld. Single Judge ought not to have interfered by entertaining the writ petition when the alternative remedy of filing an appeal was already available. However, the D.B. held that in exceptional cases, the High Court is entitled to entertain a writ petition under Article 226 of the Constitution of India. Further, the D.B. observed that in plethora of cases it has been held that if the expenses are incurred to get the direct and immediate benefit for business or profession then such expenses shall be allowed. In the present case, the Respondent is legally bound to pay the State Government the ‘Privilege Fee’ for granting of distributor license to sell foreign liquor. Further, the State Government, in exercise of its delegated statutory power has to notify the ‘Privilege Fee’ for every financial year and on the basis of which the Respondent is liable to pay the said ‘Privilege Fee’. Therefore, in the present case the expenses incurred by way of ‘Privilege Fee’ is in the nature of statutory obligation for doing business and has direct nexus with the business of the Respondent. Hence, D.B. allowed the expenses by way of ‘Privilege Fee’ to the Respondent and further, stated that AO has no right to disallow such statutory payments.



Stay on Rs.330 Crores Demand

In the matter of *State Bank of Bikaner and Jaipur vs. Assistant Commissioner of Income tax and others*, Hon'ble High Court of Rajasthan (“**High Court**”), on 23rd, March, 2017, stayed the demand of Rs.329,77,81,830/- i.e. approx Rs.330 crores (“**Demand**”), raised by

Income Tax Department against the assessee, the State Bank of Bikaner and Jaipur (“SBBJ”). The Income Tax Department while passing the assessment order for the year 2014-2015, raised the Demand against SBBJ. Being aggrieved by the aforesaid assessment order, SBBJ filed an application for the stay of Demand before the appellate authority but the same was rejected and SBBJ was asked to deposit 100% of the Demand amount on or before 24th March, 2017. Against such arbitrary action, SBBJ preferred a writ before the High Court and prayed for the staying of Demand.

The Counsel for SBBJ, Mr. Sanjay Jhanwar argued the matter at stretch and stated that such actions of Income Tax Department are against the spirit of the circulars issued by Central Board of Direct Taxes (“CBDT”). While referring to the circular number

F.NO.404/72/93-ITCC dated 29th February, 2016 which amended the instruction No. 1914 dated 21th March, 1996 containing guidelines issued to CBDT regarding the procedure to be followed to recover the outstanding demand, Mr. Jhanwar stated that the said amendment provides an opportunity to an assessee, to pay 15% of the amount demanded or in certain cases direct the assessing officer to stay the complete demand. The High Court while acknowledging the binding nature of the circular on the Income Tax Authorities stayed the whole demand.

Drastic Changes in Advocates Act, 1961

In *Mahipal Singh Rana vs. State of Uttar Pradesh* (Criminal Appeal No. 63 of 2006 , decided on 5th July, 2016), the Hon’ble Supreme Court observed that there is an urgent need to review the provisions of the Advocates Act, 1961 (“Act”) dealing with regulatory mechanism for the legal profession and thus, requested the Law Commission and Government of India to take appropriate steps in this regard. Acting upon the same, the Law Commission of India, in its 266th Law Com-

mission Report has suggested some substantial changes in the Act and has also submitted a draft of Advocates (Amendment) Bill, 2017 (“Bill”). Some of the key highlights of the Bill are as follows:

- Advocates shall also mean and include the advocates carrying on practice in law with a law firm and a foreign lawyer;
- Definition of ‘law firm’ has been suggested. According to the said definition a law firm shall mean a firm, formed and registered under the Indian Partnership Act or Limited Liability Partnership Act, 2008 or private or public company under Companies Act, 2013 comprising of an advocate(s) carrying on practice in law;
- Definition of term ‘misconduct’ has been suggested. At present, the term ‘misconduct’ is not defined in the Act;
- Representation of High Court and Hon’ble Supreme Court in State Bar Council and Bar Council of India respectively;

- New functions of Bar Council of India has been suggested such as: (a) to provide not more than one (1) year pre –enrollment training to a person who has obtained law degree; (b) to make rules for verification of certificates of advocates; (c) to make rules for identifying the non-practicing advocates and barring their voting rights in elections; (d) to make rules to deal with strikes,



boycotts or abstentions from courts by the advocates.

- More type of punishments for misconduct by advocates has been added such as: (a) fine upto Rs.3,00,000/- ; (b) compensation upto Rs.5,00,000/- to the person aggrieved by the misconduct of an advocate; (c) imposition of cost up Rs.2,00,000/-, if advocates does not cooperate with the disciplinary proceedings under the Act.
- Advocate convicted of contempt of court shall be deemed guilty of professional misconduct and can be suspended from practicing unless operation of such conviction is stayed by a competent court.

Board Evaluation under the Companies Act, 2013 and SEBI

- By Harpreet Singh Muchhal, C.S., Associate

Corporate Governance is a set of management practices, systems, processes, etc. which ensures that a company is governed for the best interest of all stakeholders. The Board of Directors (“**Board**”) of a company are at the core of the corporate governance practices which supervise how the management serves and protects the long term interests of all the stakeholders. The position of the Board in a company is that of trust, as it is entrusted with the responsibility to act in the best interests of the company and its stakeholders. The Companies Act, 2013 (“**Act**”) codifies the duties of directors, and specifies that the director of a company shall act in accordance with the articles of association of a company. It is further provided that a director of a company shall act in good faith in order to promote the objects of the company for the benefit and interest of the company, its members, its employees, its shareholders and other stakeholders.

The stakeholders and investors are interested to know whether members of the Board are effectively functioning individually and collectively. Through the concept of ‘Board evaluation’ a company can measure the performance of the Board and other allied persons, which helps to enhance the effectiveness, maximises strength, tackles weaknesses and improves corporate relationships of the Board.

NECESSITY OF BOARD EVALUATION

The SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015, (“**Regulations**”) mandates a listed company to conduct Board’s evaluation. The evaluation of the Board can increase the performance of the Board at three levels i.e. organizational, Board and individual Board members. Additionally, as per the Guidance Note dated 15.04.2015 issued by the Institute of Company Secretaries of India, the purpose of evaluation is for (i) improving the performance of Board towards corporate goals and objectives; (ii) assessing the balance of skills, knowledge and experience on the Board; (iii) identifying the areas of concern and areas to be focused for improvement; etc.

LEGAL FRAMEWORK IN INDIA

In India, the concept of the Board evaluation was firstly introduced in Clause 49 of the Listing Agreement, where it was voluntary for the companies to evaluate performance of non-executive director. However, now under the Act it is mandatory to conduct formal annual evaluation of the Board, its committees and individual directors. In accordance to Section 134(3)(p) of the Act read with Rule 8(4) of the Companies (Accounts) Rules, 2014, every listed and every public company with paid-up share capital of Rs. 250,000,000/- or more at the end of the preceding financial year shall include in its Board report, a statement signifying the manner in which

formal annual evaluation has been made by the Board with respect to its own performance and the performance of different committees of the Board and individual directors.

Under Section 178 of the Act it is mentioned that the nomination and remuneration committee (“**Committee**”) shall carry out the performance evaluation of every director. Additionally, under ‘Code for Independent Directors’ mentioned in Schedule IV of the Act it is given that the independent directors shall objectively evaluate the performance of the Board and management of the company. Moreover, under Schedule IV of the Act it is also provided that the re-appointment of independent director shall be made on the basis of performance evaluation report.

For listed companies, under the Regulations it is stated that one of the key functions of the Board is to monitor and review the evaluation framework of directors and the performance evaluation of the independent directors. Further, it is stated in the Regulations that the criteria for performance evaluation of the Board and independent directors shall be formulated by the Committee and based upon the same the re-appointment of the independent director is decided.

STEPS OF BOARD EVALUATION

- **Identification of Objectives**

Identification of the objectives of evaluation is the first step towards Board’s evaluation. Since it is critical to design an appropriate evaluation framework, it is important to determine objectives of the Board’s evaluation, including, review the performance of the employees, judge the gap between the actual and the desired performance, etc.

- **Things to be evaluated**

The Board evaluation is divided into two main factors; people factors (knowledge, personal characteristics, Board size, etc.) and process factors (planning and managing Board meetings, information flow, etc.)

- **Important Steps for Evaluation Process**

The Board shall determine the steps while making the evaluation, such as, develop a methodology for evaluation, evaluation process should commence each year during last quarter, a company may also develop a policy for Board evaluation, etc.

- **Review**

The evaluation approach of a company may be reviewed once in a year by the nomination and remuneration committee, based on the recommendation of the Board.

- **Post Evaluation**

On completion of evaluation by a company, the next step would be follow up, which should include developing a plan of action for addressing points that arise from the discussion and assignment of follow-up responsibilities to the governance committee (if any) or to the Board’s chairman.

CONCLUSION

So, in light of the above, it can be stated that the evaluation of the Board is a powerful tool available with a company in order to evaluate the performance of its Board and individual directors. As a good practice, the class of companies which do not fall under the ambit of statutory requirement for conducting the evaluation of the Board, may on voluntary basis evaluate its Board. The evaluation must be done in such manner that it covers each and every aspect of an individual’s personality. The Board if evaluated time to time in an effective manner will serve a company and its stakeholders beyond expectations.

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