VOLUME 40, DECEMBER 2017

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

THE NEWSLETTER

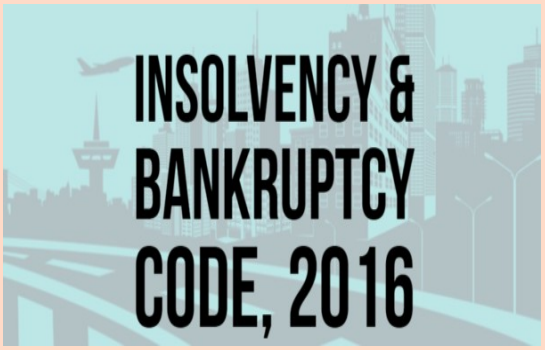
Inside this issue:

UPDATE YOURSELF

Introduction of Eligibility Criteria for Resolution Applicant to Submit Resolution Plan under IBC, 2016

The Ministry of Law and Justice has passed an ordinance namely The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 dated 23.11. 2017 ("**Ordinance**") to amend Insolvency Bankruptcy Code, 2016 ("**IBC, 2016**"). The highlights of the major amendments in IBC, 2016 by the Ordinance are as follows:

1. The applicability of IBC, 2016 has been extended to personal guarantors of corporate debtor, partnership firms and proprietorship firms and individuals other than personal guarantors to corporate debtors;
2. The definition of "resolution applicant" under Section 5(25) of the IBC, Code has been substituted to mean a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under Section 25(2)(h) of IBC, 2016. Further, Section 25(2)(h) of IBC, 2016 has also been amended.
3. A new section, Section 29A has been inserted in IBC, 2016 which lay down a list of persons who are not eligible to submit a resolution plan i.e. who cannot be considered as resolution applicant for the purpose of Section 5(25) of the IBC, Code. Such persons are: (i) an un-discharged insolvent; (ii) who has been identified as a willful defaulter; (iii) a person whose account has been classified as non-performing asset ("**NPA**") and who has failed to make payment of all the overdue amounts relating to such NPA; (iv) who has been convicted for an offence punishable with imprisonment for two (2) years; (v) a disqualified director; (vi) a person prohibited by SEBI from trading in securities or accessing securities markets; (vii) who has indulged in preferential transaction or undervalued transaction or fraudulent transaction in respect of which an order has been passed by the Adjudicating Authority under IBC, 2016; (viii) who has executed enforceable guarantee in respect of corporate debtor under IBC, 2016; (ix) a person who is a connected person in respect of a person who meets any of the criteria mentioned above in point (i) to (viii); and (x) any disability corresponding to points (i) to (ix) under any law in a jurisdiction outside India;
4. Further, the liquidator cannot sell the immovable property and movable property or actionable claims of a corporate debtor to a person who is not eligible to be resolution application as per Section 29A of IBC, 2016.
5. Lastly a new section, Section 235A has been inserted which lays down that, where specific penalty/punishment is not defined under the IBC, 2016, a penalty/punishment in terms of fine which shall not be less than Rs.1,00,000/- but which may extend to Rs. 2 crores, can be imposed on any person who contravenes the provisions of the IBC, 2016 or the rules and regulations made thereunder.



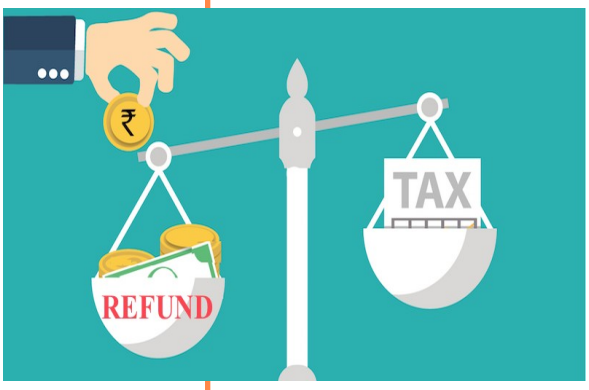
Introduction of Offline Facility for Filing GST Refund Claim

As per Section 16 of the Integrated Goods and Services Tax Act, 2017 ("**IGST Act**"), (i) export of goods or services or both; and (ii) supply of goods or services or both to a SEZ unit or developer, shall be treated as zero rated supply i.e. even though these supplies are taxable at specified rates, however, effectively there will be NIL tax effect on these supplies. For giving effect to this, a registered person can make zero-rated supplies of goods or services or both under two options namely:

(I) either on payment of integrated tax and claim refund of the tax so paid; or

(II) under bond or letter of undertaking without payment of integrated tax and claim refund of unutilized input tax credit.

As far as refund of integrated tax paid on **goods** exported out of India under option (I) is concerned, same is governed by Rule 96 of the Central Goods and Services Tax Rules, 2017 ("**CGST Rules**").



According to the said rule, the shipping bill filed by an exporter while exporting the goods shall be deemed to be an application for refund. At present, the exporters who have opted for option (I) have received refund as per aforementioned Rule 96. However, the persons: (a) making export of services; or (b) making supply of goods or services or both to a SEZ unit or developer; or (c) opting for zero rated supply of goods or services without payment of IGST under option (II) ("**Scenarios**"), were facing problem of blockage of working capital, as they were unable to file refund claim due to non-availability of refund module on the GSTN portal. Therefore, to bring this problem to an end, CBEC *vide* Circular No. 27/2017 dated 03.11.2017 has come up with a manual filing facility for refund claims under the Scenarios. Thus, the effect of the circular is that, as per Rule 97A CGST Rules, the application for refund under the Scenarios can be filed in FORM GST RFD- 01A on the GSTN portal and a print out of the said form shall be submitted before jurisdictional proper officer along with all necessary documentary evidences as applicable. Further, in Scenario (c), the amount claimed as refund shall get debited in, accordance with Rule 86(3) of the CGST Rules, from the amount of input tax credit in the electronic credit ledger and the GSTN portal will generate a proof of such debit (ARN- Acknowledgement Receipt Number). The ARN generated shall also be mentioned in the said FORM GST RFD-01A.

Remedy under Consumer Protection Act is An Alternative Remedy

The National Consumer Disputes Redressal Commission ("**NCDRC**") in the matter of ***Yashwant Rama Jadhav & ors. vs. Shaukat Hussain Shaikh & Ors.*** decided on 10.11.2017, while hearing a bunch of appeals against the orders of the State Commission ("**Commission**") dated 05.05.2017, held that the jurisdiction of the consumer forum to entertain a complaint is not ousted on account of a civil suit having been instituted by the opposite party, even if the subject matter of the said civil suit is related to the same agreement executed between the parties which is the foundation of the consumer complaint. In the instant matter, the appellants had entered into agreements with the respondents for purchase of residential flats to be constructed by the respondents. The appellants approached the Commission for redressal of their grievance which arose due to non-completion of the construction of flats even after payment of substantial amount and requested the Commission to direct the respondent to deliver possession of the respective flats along with compensation, etc. The respondents contended before the Commission that respondents have already filed civil suits for cancellation of agreements executed with the appellants and thus, requested the Commission to dismiss the said complaints because the same is not maintainable. The Commission after

hearing the plea of respondents dismissed the complaints filed by appellants. Aggrieved by the order of the Commission, the appellants appealed before NCDRC. While hearing the appeals, NCDRC analysed Section 3 of the Consumer Protection Act, 1986 ("**Act**") and held that the provisions of the Act are in addition and not in derogation of provisions of any other law. Additionally, NCDRC held that the remedy available under the Act is an additional remedy, which Parliament has made available to a consumer and even if two remedies, one before the civil court and the other before the consumer forum are available, it is for the aggrieved person to decide as to which remedy he wants to avail. Regarding the cancellation of the above mentioned agreements, NCDRC stated that the relationship of consumer and service provider came into existence as soon as the transaction was entered between them and mere cancellation of agreement by one party will not end the said relationship. NCDRC further held that if deficiency on part of the respondents in rendering services is proved, then the complainants/appellants will be entitled to get appropriate relief under the Act.

Regulation of Bitcoin in India

The Hon'ble Supreme Court of India ("**Court**") in a public interest litigation of ***Dwaipayan Bhowmick vs. Union of India and Ors. [Writ Petition (Civil) No. 1076/2017 dated 13.11.2017]*** which was filed for issuance of appropriate directions to regulate the flow of Bitcoin and to ensure that it is made accountable to the exchequer. Bitcoin is a form of digital currency that allows people to buy goods and services and exchange money without involving banks, credit card issuers or other third parties and has been raising eyebrows all across the world for the contentious issue of its treatment either as a commodity or currency. In the instant case, the petitioner has raised his claim on the following grounds:

1. Lack of concreate mechanism for regulating 'Bitcoin' has resulted in total unaccountability and unregulated Bitcoin trading and transactions.
2. Such a scenario where Bitcoin is left entirely unregulated may lead to grave financial implications on the sovereignty of India and imposes a threat to exchequer's money.
3. Global trends reveal that certain countries have made 'Bitcoin' subject to their tax implications while others have designated it as a commodity thereby in either way making it accountable and subject to government regulation. However, in India no such mechanism exists to regulate Bitcoin.
4. The money used to purchase Bitcoins stays completely untraceable and may be used for trading and other financial activities directly from such crypto currency accounts without any accountability.
5. Currently none of the financial regulators in India namely SEBI, authorities under the Prevention of Money Laundering Act, 2002 or foreign exchange law or the income tax official, possess any power to track, monitor and regulate crypto money and related transactions.
6. Bitcoin could be very easily used to finance anti-national activities like terror funding, money laundering, etc.
7. Bitcoin does not fall under the definitions of money/currency/share/debenture/commodity, but it is an entity with financial value and hence liable to be made subject some kind of regulations.

Based on the above enumerated grounds, the petitioner approached the Court to: (i) issue urgent

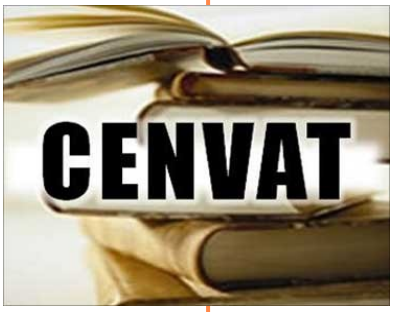
directions and to constitute a committee for framing appropriate mechanism, to regulate the flow of Bitcoin and to make the same accountable to exchequer; and (ii) constitute a committee of experts titioner has issued notice to the ministries of Finance, Law and Justice, Information Technology, market regulator SEBI and the Reserve Bank of India to seek their response with respect to regulating of Bitcoin.

Applicability of I.T. Circular No. 3 of 2011 on Pending Cases involving Income Tax Impact less than Rs. 10 Lakhs

The Hon'ble Supreme Court ("**Court**") in the case of **Director of Income Tax, Circle 26(1) New Delhi *vs.* S.R.M.B. Dairy Farming (P) Ltd**. [**Civil Appeal No. 19651 of 2017 dated 23.11.2017]** had the occasion to adjudicate the issue related to prospective or retrospective effect of Income Tax Circular No.3 of 2011 dated 09.02.2011 ("**Circular**"). The Circular provided that appeals where tax impact was less than Rs.10,00,000/- cannot be filed before the High Court. While dealing with the said issue, the Court observed that there has been a divergence of legal opinion on this aspect amongst the High Courts and thus it is imperative to examine the issue in detail. Further, the Court took note of the view taken by Hon'ble High Court of Karnataka ("**High Court**") in **Commissioner of Income Tax, Bangalore *vs*. Ranka and Ranka** i.e. the Circular will apply to pending appeals as well. The High Court in the said case was of the view that the issuance of the Circular was in line with the National Litigation Policy ("**NLP**"), which aims to transform the government into an efficient and responsible litigant. Describing the objective behind NLP, the High Court further observed that NLP states that appeal in revenue matters should not be filed in cases where the stakes are not high and are less than the amount to be fixed by the revenue authorities. Considering the same, the High Court opined that a beneficial circular has to be applied retrospectively, whereas an oppressive circular has to be applied prospectively. As the Circular is more beneficial than the previous circular covering the same issue where the limit was Rs.4,00,000/- therefore, the Circular should be made applicable to pending appeals, as it would grant relief to the assessee. Thus, the Court, while dealing with the applicability of the Circular, held that the Circular would apply to pending litigation also and shall be subject to following two caveats provided in an earlier decision of the Court in the case of **CIT Central-III *vs*. Surya Herbal Ltd.** i.e. Circular should not be applied *ipso facto*: (i) when the matter had a cascading effect; and (ii) where common principles may be involved in subsequent group of matters or a large number of matters.

CENVAT Credit Allowed on the Basis of Debit Note

In the case of **Commissioner of Central Excise, Jaipur-I vs. BhartiHexacom [DB Excise Appeal No. 8/2016]** dated 15.11.2017, the Hon'ble High Court of Rajasthan (Jaipur Bench) analyzed the scope of Rule 9(1) of CENVAT Credit Rules, 2004 ("**CENVAT Rules**") and held that debit note is a proper duty paying document for the purpose of Rule 9(1) of CENVAT Rules and therefore, input tax credit can be claimed on basis of such debit note. In the present case, the Department appealed against the Central Excise and Service Tax Appellate Tribunal ("**CESTAT**") order which set aside demand of Rs.30,83,728/- for the period of 2006 to 2007. The issue involved was that Bharti Hexacom ("**Assessee**") has availed CENVAT credit on basis of debit note issued by Gail (I) Ltd. However, the Ld. Commissioner consequently raised the demand for wrongful availment of CENVAT credit on the basis that debit note/demand note because such debit note is not a prescribed document for availment of CENVAT credit as per Rule 9(1) of CENVAT Rules. In appeal, Hon'ble CESTAT held that the debit notes contain all the required details for availment of CENVAT credit as per rule 9(1) of CENVAT credit Rules, 2004 and thus, Assessee is entitled to take



to take CENVAT credit.

The Hon'ble Court in the present case affirmed the CESTAT order and held that since the debit note contains all the details as required under the CENVAT credit rules, therefore, credit can be availed on the basis of such debit note.

Clarification on Cash Sale of Agricultural Produce by Cultivator/ Agriculturist

The Ministry of Finance *vide* Circular No. 27/2017 dated 03.11.2017 ("**Circular**") has rendered clarification with regards to the issue of applicability of the exception to Section 40A (3) of the Income Tax Act, 1961 ("**Act**") laid out under Rule 6DD of the Income Tax Rules, 1962 ("**Rules**"), relating to cash sale of agricultural produce by cultivators/agriculturists to traders. The said issue arose because of conflict between Section 40A (3) and Section 269ST of the Act. Section 40A (3) of the Act provides for disallowances of expenditure exceeding Rs. 10,000/- made to a person in a day, through the modes other than by an account payee cheque/draft or use of electronic clearing system through a bank account. However, Rule 6DD of the Rules carves out certain exceptions to Section 40A (3) of the Act, which *inter alia* include payments made for purchase of agricultural produce to the cultivators of such produce. Therefore, if the trader makes cash purchases of agricultural produce from the cultivator such purchase are an allowable expenditure under the Act. Ambiguity was created after insertion of Section 269ST by Finance Act 2017, which places a prohibition on receipt of Rs. 200,000/- or more otherwise than by an account payee cheque/draft or by use of electronic clearing system through a bank account from a person in a day or in respect of a single transaction or in respect of transactions relating to an event or occasion. So, it was unclear as to what would happen if cash sale exceeding Rs. 200,000/- was made for agricultural produce.

The Circular has brought clarity over the same, as it states that cash sale of agricultural produce for less than Rs. 200,000/- by cultivator to the trader would not result in disallowance under Section 40A (3) and will not attract prohibition under Section 269ST. Further, in case of such sales, the cultivator will not be required to quote his PAN/Form 60 under Rule 114B of the Rules.

Income Tax Return cannot be Filed without Aadhaar Number

In the case of **Thiagarajan Kumararaja vs. Union of India [2017] 87 taxmann.com 125 (Madras)** before the Hon'ble High Court of Madras, the petitioner filed a writ petition seeking permission to file income tax returns for the assessment year 2017-18 without producing his aadhaar card or enrollment ID as provided under Section 139AA of the Income Tax Act, 1961 ("**Act**"). In support to his contention, the petitioner relied upon the decision of the Hon'ble Supreme Court in the case of ***Binoy Viswam vs. Union of India [(2017) 396 ITR 66]*** ("**Case**") wherein the Hon'ble Supreme Court held that since Section 139AA of the Act is yet to be considered on the touchstone of Article 21 of Constitution of India ("**Constitution**") including the other limbs of Article 21 of the Constitution such as right to privacy and human dignity, etc.. Therefore, till the constitutionality of Section 139AA of the Act is decided by the Constitution Bench, a partial stay on the aforesaid proviso is necessary. Therefore, the Hon'ble High Court of Madras held that taking benefit of partial stay for filing income tax returns by the petitioner is not sustainable.

QUICK TAKEAWAYS

- India's civil aviation regulator, the Ministry of Civil Aviation, Government of India (GOI) released the draft norms / civil aviation requirements (CARs) for permitting operation of civil remotely piloted aircraft (RPA) systems, commonly known as 'drones'.
- Reserve Bank of India has issued Foreign Exchange Management (Transfer and Issue of Security by a Person Resident Outside India) Regulations, 2017 (to replace the Foreign Exchange Management (Transfer and Issue of Security by a Person Resident Outside India) Regulations, 2000.
- SEBI has revised the block deal framework with effect from 01.01.2018 in a circular (CIR/MRD/DP/118/2017) issued on 26.10.2017 (SEBI Circular).
- The Telecom Regulatory Authority of India (TRAI) issued the recommendations on Net Neutrality (Recommendations) to the Department of Telecommunications, Government of India (DoT) on 28.11.2017.
- In one of the first few cases of adjudication under the Benami Transactions (Prohibition) Amendment Act, 2016, the division bench of the authority held that an amount of Rs. 15.93 crores, deposited in Rs. 500 and Rs. 1000 denominations, in bank A/cs of three firms held and controlled by Mr. Ramesh Chandra Sharma were Benami in nature.
- In order to prohibit certain persons from submitting resolution plan in the insolvency resolution process, the President has promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017.
- The Hon'ble High Court of Karnataka in the case of ***Sharavathy Conductors (P.) Ltd. vs. Chief Commissioner of Income-tax, Bengaluru-2 [2017 87 taxmann.com 244 (Karnataka)]*** held that a return of Income could not be revised to claim debatable benefit or deduction.
- The Hon'ble ITAT Mumbai, in the case of ***Late Shri Gordhandas S. Garodia vs. DCIT [ITA no.5097/Mum./2015]*** held that the term 'Accrue' used u/s 45 of the Income Tax Act denotes to real income and not hypothetical income.
- CBEC *vide* Circular No.46/2017-Customs, dated 24.11.2017 has clarified that the transaction of sale / transfer etc. of the warehoused goods between the importer and any other person shall squarely falls under the purview of the definition of supply and liable to IGST.
- The Hon'ble Supreme Court, in the case of ***Agarwal Tracom Pvt Ltd vs Punjab National Bank [CIVIL APPEAL No. 19847 OF 2017]*** has held that Auction Purchaser can approach DRT against the Secured Creditor for forfeiting deposit made.
- CBDT has issued directions to departmental officers vide letter bearing no. F.No. 225/391/2017/ITA.II dated 24.11.2017 for scrutiny assessments of revised return filed post demonetization.
- The Hon'ble Calcutta High Court in the case of ***Shabnam Praveen vs. The State of West Bengal and Ors [CRR No. 979 of 2017]*** held that the Muslim Father-in-law who was handling the family business after the death of the his son is under no obligation to maintain the wife of deceased son under the Protection of Women from Domestic Violence Act, 2005.
- The Supreme Court, ***Karam Chand (Dead) by LRS. & ANR. vs. State of Himachal Pradesh & ANR. [Civil Appeal No. 17323 of 2017],*** ruled that delay in seeking compensation from land acquisition authorities can be condoned in appropriate cases.
- The Delhi High Court in the case of ***Sukhjinder Singh Saini vs. Harvinder Kaur [CRL.REV.P. 494/2015***] recently reiterated the principle that a spouse cannot be exempted from contributing towards maintenance of a minor child even if the other spouse, with whom the child stays, earns sufficiently well.
- RBI has introduced Legal Entity Identifier Code (**LEI Code**) for the large corporate borrowers having total exposure of Rs. 50 crores and above. LEI is a 20 digit unique code to identify the parties to financial transactions worldwide.

KNOWLEDGE CENTRE

MCQs on Stamp and Registration of Documents

Q. 1. What is the purpose behind stamping and registration of a document?

a. To generate revenue for Government
b. To create evidentiary value of document
c. To show proper consent from parties
d. For proper transfer of property

Q. 2. What is the time limit for stamping a document?

a. Immediate within next working day of execution of document
b. Within 4 months from the date of execution of document
c. Within 10 days from the date of execution of document
d. Within 1 year from the date of execution of document

Q. 3. What is the time limit for registration of a document?

a. Immediate within next working day of execution of document
b. Within 4 months from the date of execution of document
c. Within 10 days from the date of execution of document
d. Within 1 year from the date of execution of document

Q. 4. Under which entry of Schedule 7 of Indian Constitution, the Central and State Government have power to levy stamp duty?

a. Entry 91 of List I and Entry 63 of List II
b. Entry 81 of List I and Entry 93 of List II
c. Entry 71 of List I and Entry 53 of List II
d. Entry 51 of List I and Entry 43 of List II

Q.5 At which place a document related to immovable property must be stamped and registered?

a. At any place in India
b. Place of residence of buyer
c. Place where immovable property situated
d. Place of residence of seller

Q. 6. What kind of document is compulsorily to be registered?

a. All documents
b. Documents related to movable property
c. Testamentary document of immovable property having value of Rs. 100 or more
d. No-testamentary document

Q. 7. Should both parties personally present before Sub-Registrar office at the time of registration of documents?

a. Yes, personal presence is required
b. No, personal presence is not required
c. Parties can present through their representatives/ assigns or their agents
d. Only presence of one party is required

Q.8. Stamp paper used for one transaction can be used again?

a. Yes, for all transactions
b. No, cannot be used for any transaction
c. Yes, can be used for some transactions
d. Can be used with prior permission of Govt.

Q.9. Is it required to incorporate full description of immovable property in the document?

a. Yes, for all immovable properties
b. Not required for any immovable property
c. Yes, for some immovable properties
d. Immovable properties for which parties deem necessary

Q.10 Document falling in 2 or more entries in the schedule, how much stamp duty is payable?

a. Highest of the stamp duty given in
b. Lowest of the stamp duty given in entries
c. All amounts given in entries should be paid
d. Any of the amounts can be paid

Ans: 1-b, 2-a, 3-b, 4-a, 5-c, 6-c, 7-c, 8-b, 9-a, 10-a.

EDITORIAL

SURRENDERING TRADE NAME – KEY TO CONCESSION UNDER GST?

- By *Adv. Divyasha Mathur, Associate*

The famous Shakespeare quote, *"What's in a name?"* has lost its' relevance in the present day scenario with a highly competitive environment. The new game of name- *Trademark* has gained significance. Trademark is one of the most important intellectual property which protects a brand. The goodwill attached to brands has now become the guiding factor for consumer's decision to purchase such branded products. IP rights, though in an intangible form, substantially increases the value of products and also provides various rights and remedies for protecting its' position in a competitive market. If a brand name is registered, the person gets exclusive rights to use such brand name and can file a suit for infringement of his registered trademark/brand name. However, there are certain equitable rights attached to unregistered brand names as well that can be enforced in a court of law like that of *passing off,* which prevents one person from misrepresenting his goods or services as that of another.

Gradually, due importance of the value of such IP is being recognized under the GST regime as well. However, the GST regime has ushered perplexity regarding the difference in the rates of tax levied on the supply of branded and unbranded goods. It is also to be noted that no such distinction has been created between branded and unbranded services even though a brand name for services can be registered as a trademark.

Erstwhile Position under GST

As per Notification No. 01/2017-Central Tax (Rate) dated 28.06.2017, various goods such as *paneer, honey, wheat, rye, barley, oats, rice, maize, etc* were categorized in the 5% rate slab if the following conditions were satisfied –

- Products were packed in a unit container; **and**
- Products were bearing a registered brand name.

On the other hand, as per Notification No. 02/2017- Central Tax (Rate) dated 28.06.2017, if these products were not packed in a unit container or were not bearing a registered brand name, these products were exempted from tax.

As per the abovementioned notifications, a registered brand name was described to mean-

> *A brand name or trade name, that is to say, a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person, and which is registered under the Trade Marks Act, 1999.*

Further, a press release dated 05.07.2017 clarified that Section 2(w) read with Section 2(t) of the Trade Marks Act, 1999 provides that a registered trademark which is actually on the Register of Trade Marks and is remaining in force. It was reiterated that only if the brand name or trade name is actually on the Register of Trade Marks and is in force under the Trade Marks Act, 1999, the exemption benefit will be applicable on the supply of such goods.

Post-Mortem of Exemption Benefit – Current Position

It was being reported that all the businesses selling branded food were deregistering their brands to get the exemption benefit, thereby surrendering their registered brand names without giving due weightage to the value of their IP rights. Consequently, when the GST Council met on 09.09.2017 to discuss the issues persisting after GST implementation, tax rates applicable on 134 products were reviewed and certain changes were made to the rate notifications with respect to branded and unbranded products. As a result, *vide* Notifications No. 27/2017 and 28/2017-Central Tax (Rate) dated 22.09.2017, the condition of the product bearing a registered brand name was amended to the following –

- *Should bear a **registered brand name**; or*

- *Bear a **brand name** on which an actionable claim or enforceable right in a court of law is available (other than those where any actionable claim or any enforceable right in respect of such brand name has been voluntarily foregone, subject to the conditions mentioned at Annexure to Notification No. 27/2017-Central Tax (Rate) dated 22.09.2017.*

Moreover, the following meaning of brand name was added –

The phrase brand name means brand name or trade name, that is to say, a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person.

The Fitment Committee also proposed to the GST Council to consider May 15, 2017, as the cut-off date for considering a brand as registered for the purpose of levy of GST, irrespective of whether or not the brand is subsequently deregistered. Hence, the meaning of the phrase "registered brand name" was amended to mean –

(A) A brand registered as on the 15th May, 2017 under the Trade Marks Act, 1999 irrespective of whether or not the brand is subsequently deregistered;
(B) A brand registered on the 15th May, 2017 under the Copyright Act, 1957 (14 of 1957);
(C) A brand registered as on the 15th May, 2017 under any law for the time being in force in any other country.

Therefore, now, the person availing exemption from GST will have to file an affidavit before the jurisdictional Commissioner and print with indelible ink on the unit container, that he is voluntarily foregoing his actionable claim or enforceable right on such brand name. It is relevant to highlight here that even if the brand is not registered, a enforceable right or remedy in the nature of passing off right is available to a prior user of such brand. However, clarification on the validity of the affidavit and for opting out of the exemption by cancelling the effect of the affidavit needs to be given by the GST Council.

Saving GST or Surrendering Registered Brandname?

Making only those goods taxable which bear a registered brand name had led to various small traders and companies apply for deregistration of their brands to the Trademark Registry Offices. For many traders, the decision to be taken was whether to save taxes or to retain the rights attached to its' brand name. To an extent, this loophole was plugged by the GST Council by providing that the traders can escape the 5% GST only if they choose to forgo any actionable clam or their brand name by filing an affidavit. But the problem still persists for traders to weigh the options of saving 5% GST or to forego its' rights relating to the brand name. Further, the Commerce Ministry is also concerned that deregistering trademarks may lead to promotion of counterfeit products in the market that could create health hazards in the industry. The benefit of exemption of unbranded products also benefits those companies which have a boosting revenue but their brands are not registered. On the contrary, the benefit could be provided on the basis of packaged and loose food items irrespective of ownership to avoid any such glitches.

End to the Confusion

Despite the public perception and the existing chaos regarding branded goods, to an extent, the situation is clearer that using reputed brands will attract taxes since the purchase of branded products by consumers gives them confidence and provides consistency of quality. By widening the definition of registered brand name, now, the benefit of exemption cannot be granted to a number of packaged food sellers who have a brand name but have yet not applied for a trademark by making them submit the affidavit. Moreover, big companies may not be willing to risk a brand by abandoning all rights attached to it to save 5% GST. On this account, the intent of law to provide level playing field to all the participants in the market is pretty clear. Having said that, the Finance Ministry still needs to resolve ancillary issues connected with this issue. Importantly, all the small scale traders who are claiming the exemption for their products can submit the affidavit as a precautionary measure in the format as prescribed.

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