VOLUME 30,FEBRUARY 2017

Chir Amrit Legal LLP
Jaipur | Mumbai | Delhi
www.chiramritlaw.com

THE NEWSLETTER

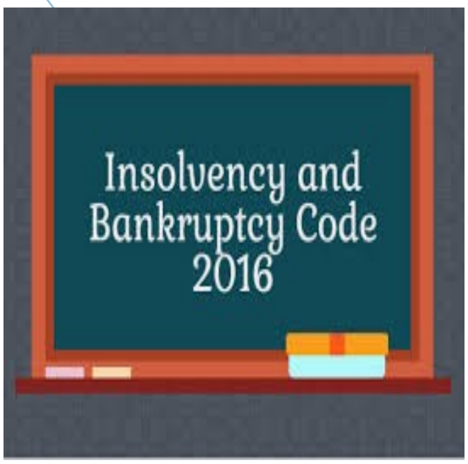
Inside this issue:

No Stamp Duty on Change in Land Use

The Division Bench of the Hon'ble Rajasthan High Court at Jaipur ("Court") in ***Kalani Infrastructures Pvt. Ltd.*** v. ***State of Rajasthan*** [**D.B. Writ Petition (Civil) No. 14094/2010**] quashed two State Government Notifications bearing notification no. F5 (15)/Tax/2014-50 dated 14.07.2014 and notification no. F 12 (15) FD/ TAX 2008-97 dated 25.02.2008 ("Notifications"). The Notifications empowered the State Government to charge stamp duty on the instrument of immovable property executed by the prescribed authorities after change in its land use without excluding from its ambit, the supplementary/modified lease agreement executed for amending/modifying the terms of the previously registered lease agreement in order to provide for the change of land use without cancelling the said registered lease agreement. The counsel for the petitioner, Mr. Sanjay Jhanwar, argued that the impugned Notifications, so far as it does not exclude from its ambit levying of stamp duty on the said supplementary/ additional/modified agreement, are violative of Article 14 and Article 265 of the Constitution of India as being arbitrary and without the authority of law in as much as there is no transferring of the right in the property involved in the supplementary/additional lease agreement and the same is executed merely to provide for the "change in land use" in the previously registered lease agreement. In other words, since no transfer of property takes place by virtue of the said supplementary/additional agreement as the lease rights are already with the lessee by virtue of the existing lease agreement and thus a right which is already with the lessee cannot be said to be conferred once again upon the lessee by the execution of supplementary lease agreement for charging stamp duty once again. The Court, after appreciating the contentions made by the counsel for the petitioner, quashed the Notifications and directed the stamp department to refund the already collected stamp duty under the Notifications, within two (2) months along with interest @ 6% per annum and failing to which, the said interest shall be increased to 12% per annum.

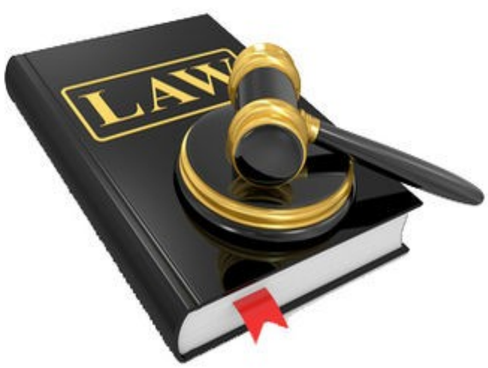
First Bankruptcy Case Admitted

The National Company Law Tribunal ("**NCLT**"), Mumbai has admitted its first insolvency proceedings filed by ICICI Bank Ltd. against Innoventive Industries Ltd. ("**Company**"). The proceeding has been initiated under The Insolvency and Bankruptcy Code, 2016 ("**Code**") which offers an uniform, comprehensive insolvency legislation encompassing all companies, partnerships and individuals (other than financial firms). The Code proposes two independent stages of insolvency and bankruptcy. During the first stage, a financial creditor, who for the purpose of Code means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred, assess whether the debtor's business is viable to continue and the options available for its revival. Failure of the said first stage, triggers the second stage of liquidation. In the instant case, the Company was declared as "relief undertaking" by the Maharashtra Government under Maharashtra Relief Undertakings (Special Provisions) Act, 1958 ("MRU"). The effect of the declaration was that, no action for recovery of debts can be taken against the Company and the Company can continue its business activity. However, the counsel representing ICICI Bank Ltd., pointed out that the Code contains within itself an identical non-obstante clause as that in the SARFAESI and therefore, the Code shall override the provisions of MRU. The said contention was supported by Bombay High Court judgment in the matter of ***JM Financial Asset Reconstruction*** v. ***The State of Maharashtra & Ors.*** [**Writ Petition No. 4948/2013**] wherein the court had pointed out that, the Parliament has expressly stated that the provisions of the SARFESI Act, which is a later enactment to the MRU, will have effect in so far as there is any inconsistency between the provisions of the SARFESI Act and any other law for time being in force. As a result, the NCLT admitted the plea to commence insolvency proceedings against the Company. Aggrieved by the order of NCLT, the Company has approached Hon'ble High Court of Bombay challenging the constitutional validity of the law that allows banks to liquidate assets of a company whose debts are not recast within 180 days. The Company has also stated that, that the Code has come to force in May 2016 and therefore should be applicable only on those cases where the default had taken place thereafter.



Re– promulgation of Ordinance is a Fraud on the Constitution

Recently, a constitutional bench of Hon'ble Supreme Court of India ("**Court**") in ***Krishna Kumar Singh*** v. ***State of Bihar*** [**Civil Appeal No. 5875/1994**] had an occasion to deal with the question of re-promulgation of ordinance in the exercise of Article 213 of Constitution of India ("Constitution"). The ordinance which was in issue in the instant matter provided for taking over of 429 Sanskrit schools by the Bihar State Government. The first ordinance was followed by successive ordinances and none of them were placed before the State Legislature. The staff of the Sanskrit schools filed writ petition before the Hon'ble Patna High Court ("**High Court**"), claiming payment of their salaries due at the of their transfer by virtue of the ordinance. The judgment of the High Court was challenged before a two-judge bench of the Court where both the judges shared a different view in relation to the constitutional validity of the ordinance. Consequently, the case was at first referred to a larger bench of five judges of the Court, and later to a seven judge bench of the Court. The seven judge bench of the Court in a majority opinion held that re-promulgation of ordinances is a fraud on the Constitution and is a sub-version of democratic legislative processes, as it defeats the constitutional scheme under which a limited power to frame ordinance has been conferred upon the President and the Governors. On the question as to whether



the rights, privileges, liabilities, obligations would survive an ordinance that ceases to operate, the Court held that this question would be determined as a matter of construction. The appropriate test would be that of constitutional necessity and public interest. Therefore, the Court concluded that, each of the ordinances in issue were a fraud on the democratic power and did not create any rights or confer the status of government employees on the employees of the Sanskrit schools. However, the Court keeping in mind public interest held that no recoveries shall be made from the employees of the salaries which have been paid in pursuance of the ordinances.

NCLT, itself Denies the Power to Dispense with Meetings in the Scheme of Amalgamation

With the notification of provisions of merger and amalgamation under the Companies Act, 2013 ("**Act**") (i.e., Section 230-233 and Section 235-240), the National Company Law Tribunal ("**NCLT**") is now empowered to hear the application for merger and amalgamation in the place of respective high court. The first and foremost application in relation to merger and amalgamation was filed before and considered by the Principal Bench of NCLT Delhi ("**Delhi NCLT**") in the matter of ***JVA Trading Pvt. Ltd. and CS Electric Ltd.*** [**Company Application No. A.1./PB/2017**]. One of the ground to file the said application before the Delhi NCLT was to dispense with the meeting of equity shareholders and to dispense with requirement of issue of and publication of notice for the same. The Delhi NCLT in its order dated 13.01.2017 held that pursuant to provisions of the Act, the NCLT is not empowered to dispense with the meetings of members/ shareholders of the company. Additionally, the Delhi NCLT said that the Section 230(9) of the Act, upon which the applicant relied is related to power of NCLT to dispense with the meeting of creditors or class of creditors, having at least 90% value, agree and confirm, by way of affidavit, to the scheme of the compromise and arrangement and does not provide for the dispensation of the meeting of members/shareholders. After this order and analysis of Section 230(9) of the Act, the position is substantially changed from the Companies Act, 1956, where under the Companies Act, 1956, the respective high court had power to dispense with creditors and members meetings both.

Trade Discount Determined Subsequent to Original Sale: Allowable for VAT Purposes

The Hon'ble Supreme Court ("**Court**") in the matter of ***M/s Southern Motors*** v. ***State of Karnataka*** [(**2017) 77 taxmann.com 251 (SC)**] held that the trade discount which is not determinable at the time of original sale but determined subsequently, is an allowable deduction in computation of taxable turnover. The judgment was rendered in the context of Karnataka VAT Act, 2003 ("**Act**") and Karnataka VAT Rules, 2005 ("**Rules**"). In the said case, the seller raised tax invoices on the purchasers. After completion of the sales, credit notes were issued to the purchasers granting discounts. Consequentially, the seller received only the net amount i.e. invoice amount less discount. However, the amount of trade discount was not mentioned in the original sales invoice. The department contended that as per the Rule 3(2)(c) of Rules, discount will be deducted from taxable turnover, if the said discount is reflected in tax invoice. Section 30 of the Act and Rule 31 of the Rules deal with a situation where the tax charged after issuance of invoice has either exceeded or has fallen short of the tax payable for which a credit/debit note has been issued. Further, effect of credit/debit note can be given in the sales tax return of purchaser/seller. As these two provisions do not regulate the computation of a taxable turnover, therefore, these provisions cannot be co-related with Rule 3(2)(c) of the Rules, which has been assigned an independent role to determine the tax liability. In absence of any specific provision in Rule 3(2)(c) of the Rules which grants tax exemption based on deduction found on post sale trade discount, therefore, Section 30 of the Act and Rule 31 of the Rules are of no avail to the assesses. The Court comprehended that Sections 29 and Section 30 of the Act and Rule 3 of the Rules are the constituents of the same scheme to determine the taxable turnover. Where Sections 29 and Section 30 of the Act, deal with the issuance of tax invoice and thereafter credit notes to be in accord with the tax actually payable, Rule 3 ascertains the taxable turnover by enumerating the permissible deductions from the total turnover. The interplay of these three provisions is directed to ensure correct computation of the taxable turnover for an accurate computation of the tax liability. Therefore, these provisions for all practical purposes complement each other. Practically, if taxable turnover is to be comprised of sale/purchase price, it is beyond one's comprehension as to why the trade discount should be disallowed, subject to the proof thereof, only because it was effectuated subsequent to the original sale but evidenced by contemporaneous documents and reflected in the relevant accounts. For the above reasons, the Court held in favour of the assessee.

Taxability of Service of Transportation of Goods by Vessel from a Place outside India up to the Custom Stations of Clearances in India

Presently, the entry 34 ("**Entry**") of the Exemptions Notification No. 25/2012, exempts the services provided by a person located in a non-taxable territory to a person in another non-taxable territory. The proviso to the Entry has been substituted *vide* Notification No. 1/2017– Service Tax dated January, 2017, as a result of which the exemption provided in the exemption provided in the Entry, w.e.f. 22nd January, 2017 will not be applicable on the services wherein the goods are transported by a vessel from a place outside India to the customs station of clearance in India ("**Service**") and therefore, service tax shall be levied on these Services. Further, as the service provider with respect to the Service is located in a non-taxable territory, the Service has been inserted in Reverse Charge Notification No.30/2012-Service Tax *vide* Notification No. 3/2017-Service Tax issued on 12th January, 2017,through a new sub-clause (vii) along with an Explanation IV which provides that the person who is liable to pay service tax shall be a person in India who complies with Section 29, Section 30 or Section 38 read with Section 148 of the Customs Act, 1962 with respect to the Service. However, the duty to comply with Section 29,Section 30 or Section 38 of the Customs Act, 1962 is on the person in-charge of the conveyance and as in the case of vessel, the person in-charge is the master of the vessel, therefore, the master shall be liable to pay the service tax on the Service. Further, Section 148 of the Customs Act, 1962 provides that the person in-charge of the vessel i.e. the master of the vessel can appoint an agent to perform the functions of the master. Therefore, the said agent, if appointed, can be held liable to pay service tax on the Service on behalf of the master of the vessel.

Deemed Dividend u/s 2(22)(e) of the Income Tax Act,1961 having HUF as a Registered Shareholder

In the case of ***Gopal And Sons (HUF)*** v. ***CIT*** **[[2017] 77 taxmann.com 71 (SC)],** the Supreme Court of India held that considering the provision of explanation3 of Section2(22)(e) of the Income tax Act,1961("**Act**"), even if HUF is not a registered shareholder of a closely held company, once the payment is received by the HUF and shareholder (karta) is a member of the said HUF and he has substantial interest in the HUF, the loan/advance made by the company to such HUF shall constitute deemed dividend in hands of the HUF as per the provisions of Section 2(22)(e) of the Act. The question that arose was that since the HUF cannot be a registered shareholder in law, can provisions of Section 2(22)(e) of the Act can be attracted. As per Section2(22)(e) of the Act, any loan or advance made by a closely held company to a shareholder who is a beneficial owner of the shares, holding voting power of more than 10% or to any concern in which such shareholder is a member and in which he has a substantial interest or any payment by such company for the individual benefit of such shareholder, to the extent to which the company in either case possesses accumulated profits, will be deemed as dividend.

In the present case, the HUF, assessee, received during the previous year certain Loans and Advances from a private limited company in which 37.12% of the total shareholding was held by karta of the HUF who had substantial interest in the HUF. As per audited annual return of the company filed with RoC, money towards share holding in the company was given by the assessee i.e. the HUF. Though, the share certificates were issued in the name of the Karta, but in the annual returns, it was the HUF which was shown as registered and beneficial shareholder. From this fact, the AO concluded that the HUF was both the registered shareholder of the Company and also the beneficial owner of the shares, as it was holding more than 10% of voting power. The AO included the balance of Rs.1,20,10,988/- of "Reserve & Surplus" in the income of the HUF as deemed dividend. ITAT rejected the claim of the revenue by relying upon the judgment of ***Binal Savantilal (HUF)** v. **Department of Income Tax*** **[IT Appeal No. 2900 (Mum.)]** in which ITAT held that the HUF cannot be a registered shareholder or a beneficial shareholder of a company. The concerned high court and the Court, sustained the addition made by AO with one line observation, that 'the assessee did not dispute that the Karta is a member of HUF which has taken the loan from the company and, therefore, the case is squarely within the provisions of Section 2(22)(e) of the Income Tax Act'.

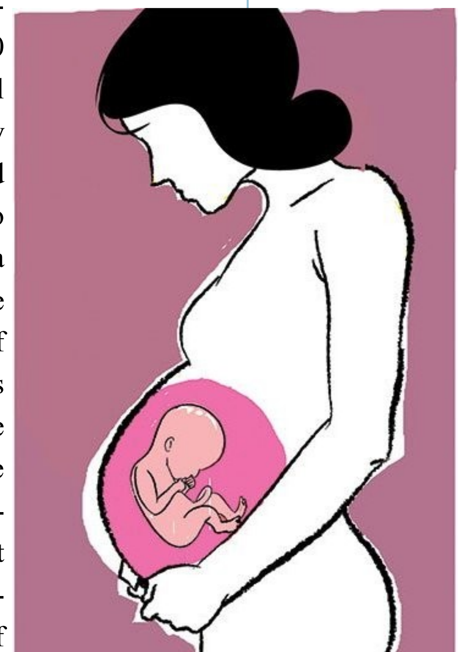
Interim Order holding Entry Tax on E-Commerce sites prima facie Unconstitutional

The Hon'ble Allahabad High Court ("**Court**") in the matter of ***Instakart Services Pvt. Ltd Thru. Its Authorized Signatory*** v. ***State of U.P. Thru Special Secy. Institutional Finance & Ors.*** **[Case No. MISC Bench No. 29277/2016]** held that the levy of entry tax by the State Government on e-commerce websites is prima facie unconstitutional being outside their authority and legislative competence. The aforesaid petition challenged the legality of the imposition of tax on entry on goods as inserted by way of an amendment in the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 and Uttar Pradesh Tax on Entry of Goods into Local Areas (Amendment) Act, 2016 (UP Act No.18 of 2016) notified on 16th September, 2016, contending that this levy would create unlawful fiscal barriers that would result in unprecedented price hike and would be an additional burden not only on the traders, but also on public at large. The state relied on Clause 19 of the Constitution of India (One Hundred and First Amendment) Act, 2016, to contend that the State Legislature was competent to introduce the amendment. It further submitted before the Court that the state had to replenish its revenue and the said levy cannot be said to be unjustified. The Court observed that the amendment introduced is completely beyond the authority and legislative competence of the State Legislature as it ex facie introduces the levy of tax, which was not existing under the old act and therefore, could not be introduced by way of an amendment.The Court while providing an interim relief, observed that "Clause 19 of Constitution of India (One Hundred and First Amendment) Act, 2016 does not in any way prima facie saves the imposition of the tax through Online Purchase or E-Commerce particularly for personal use. Thus, there is a complete lack of legislative competence as such the impugned provisions are rendered unconstitutional."

Termination of Pregnancy is Allowed After 24 Weeks

The Hon'ble Supreme Court ("**Court**") in the case of ***Meera Santosh Paland ors***. v. ***Union of India and ors***. [**Writ Petition (Civil). No. 17 of 2017**], allowed the writ petition filed by the petitioner under Article 32 of the Constitution of India (**"Constitution"**).

The petitioner contended that there is danger to her life as the fetus was diagnosed with Anencephaly, an untreatable defect that prevents normal development of brain and bones of the skull and which ultimately leads to death of the infant. The petitioner further contended that she was informed about the abnormality of the fetus after 20 weeks of her pregnancy and because of the Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971(“**Act**”), no hospital was ready to carry out the abortion and thus, the petitioner challenged the said provision and pleaded before the Court to allow her to terminate her pregnancy. In order to evaluate the medical condition of the petitioner, the Court constituted a medical board (“**Board**”). Based on the report submitted by the Board, the Court observed that if the pregnancy of the petitioner is continued, the life of the petitioner will be at risk. Further, it can affect the physical as well as mental health of the petitioner. Therefore, the Court, instead of analyzing the medico-legal aspect of the identity of the fetus, gave priority to right to life of the petitioner and thus, observed that a woman’s right to make reproductive choices comes under the dimension of personal liberty which forms part of right to life under Article 21 of the Constitution. Further, the Court observed that, under the Act, abortion is legal in India only up to 20 weeks of pregnancy provided it involves a risk to the life of the pregnant woman or poses a threat of grave injury to physical or mental health, or involves a substantial risk that if the child were born it would suffer from such physical or mental abnormalities. Thus, the Court held as the fetus cannot survive outside the uterus due to Anencephaly and continuance of pregnancy will cause danger to petitioner’s life, therefore, inspite of being in 24th week of her pregnancy, the petitioner is allowed to terminate her pregnancy.



Union Budget 2017-18: A Brief Analysis

- By CA Nikhil Totuka, Senior Associate

The Hon’ble Finance Minister of India presented the Union Budget 2017 on February 01, 2017. Under the Budget, the Finance Minister presents the estimated receipts and expenditures for the fiscal year along with the Finance Bill for proposed amendments to the taxation laws and other laws. After the Finance Bill is passed by the Lok Sabha, it is sent to the Rajya Sabha for concurrence under Article 109 of the Constitution. Since the Finance Bill is a Money Bill, the Rajya Sabha may only recommend amendments to the same, however it is at the discretion of Lok Sabha to accept or reject such amendments. Once the bill is passed by both the Houses, it is presented before the President under Article 111 of the Constitution. The Bill becomes an Act once the President gives assent to it and the same is published in the Gazette of India. Currently, the Finance Bill 2017 is pending for the recommendations of the Rajya Sabha. As an annual exercise the Chir Amrit team critically analyses the Finance Bill, the Memorandum and the budget speech to understand the overall implications of the budget. Our publication “Analysis of Union Budget 2017-2018” which presents the analysis of the budget in detail is available on our website: www.chiramritlaw.com In this article, we are trying to discuss certain critical issues in brief, for the convenience of our readers.

Taxation for Individuals:

Tax rates for individuals earning income upto Rs 5 lakhs reduced from 10% to 5%

Surcharge rate of 10% proposed to be introduced in case of individuals, HUF, AOP, BOI having total income exceeding Rs 50 lakhs upto Rs 1 crore

Corporate Taxation:

Corporate Tax reduced to 25% for domestic companies having turnover upto Rs. 50 crores in previous year 2015-16.

TDS on rent by individuals and HUF: Sec 194I;

Individual and HUF not liable to tax audit have to deduct tax @ 5% on payment of rent if such rent exceeds Rs. 50,000 per month. Such TDS for entire year is to be deducted in the last month of previous year or the last month of tenancy, as the case may be. However, the deductor shall not be required to obtain tax deduction number as required u/s 203A.

Dividend Double taxation extended to all: Sec 115BBDA:

Additional tax on dividend above Rs. 10 lakhs currently payable by resident individual and HUF proposed to be levied on all resident assesse except Domestic Company and Certain Funds and Charitable trusts.

Capital Gain bonanza: shifting of base year;

The base year for computation of indexed cost of acquisition for assets purchased prior to 01.04.2001 has been shifted from 01.04.1981 to 01.04.2001 which would result in completely excluding and exempting the capital gain in respect of appreciation in value of assets upto 01.04.2001

MAT & AMT: extension of credit period:

Credit for MAT and AMT allowed to be carried forward upto 15 assessment years as against existing ten assessment years

Cash transaction in excess of Rs. 3 lakhs: sec 269ST:

A penalty equivalent to amount received to be levied if a person receives an amount of Rs. 3 lakhs or more:

- In aggregate from a person in a day
- In respect of a single transaction
- In respect of transactions relating to one event or occasion from a person

Otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account.

Restriction on cash donations:

Deduction u/s 80G not available if donation of any sums exceeding Rs. 2,000 paid in cash.

Other deterrents for cash transactions:

1. No deduction u/s 40A if Payment made to a person in cash in a single day exceed Rs. 10,000/-.
2. No Depreciation u/s 32 if Assets purchased otherwise than by an account payee cheque drawn on a bank or account payee bank draft or use of electronic clearing system through a bank account, exceed Rs. 10,000/- in a day.
3. No Deduction u/s 35AD for expenditure made to a person otherwise than by an account

payee cheque drawn on a bank or account payee bank draft or use of electronic clearing system through a bank account, exceed Rs. 10,000/- in a day

New restrictions for exemption u/s 10(38):

Exemption u/s 10(38) on long term gains shall be available only if the acquisition of said shares or units was also chargeable to securities transaction tax. However, government may notify certain transaction to which this proviso may apply

Fair market value of shares: Sec 50CA:

If unquoted shares of a company are transfer for consideration less than fair market value, the fair market value will be deemed to full value of consideration for the purpose of capital gains.

Tax on gifts extended to all persons: Sec 56:

Earlier the tax on gift was extended mainly to individuals or HUF and on firm and company for certain specific transactions. Now new section 56(2)(x) has been inserted to extend the scope of the aforesaid existing provisions to all persons wherein any sum of money or any property, received by any person from another person, without consideration or for an inadequate consideration in excess of Rs. 50,000 shall be taxed under the head income from other sources. Further, a list of exceptions to such taxable transactions has also been prescribed.

Non allowability of expenditures on which tax not deducted at source: Sec 58:

No deduction of expenditures under income from other sources allowed on amount paid to residents on which no tax has been deducted at source.

Rationalization of time limit for completion of assessment:

The time limit for completion of assessment u/s 143/144 has been reduced to 18 months from existing 21 months for AY 2018-19. The time limit to be further reduced to 12 months for AY 2019-20 and onwards.

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

Mumbai– 16-17E, 2nd Floor, Apeejay Business Centre, Apeejay House, 3, Dinshaw Vachha Road, Churchgate, Mumbai-20.
Off: +91-022-66364439

Delhi NCR- B-2/15, DLF Phase 1st, Near Qutub Plaza, Gurgaon-122001
Off: 0124-4016062

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