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THE NEWSLETTER

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Power to Nominate An Arbitrator is Independent of Choice of Nominee

The Commercial Division of Hon'ble Bombay High Court ("**Court**") *in* ***DBM Geo Technics & Constructions Pvt. Ltd*** ("**DBM**") ***v. Bharat Petroleum Corporation Ltd.***("**BPCL**") (Arbitration Application No. 65 OF 2016, decided on 26th May, 2017), held that power to nominate an arbitrator and choice of nominee to be appointed as an arbitrator are different. In the instant case, the parties entered into an agreement for certain construction work at BPCL's plant at Irimpanam. Due to some germane disputes, BPCL invoked the arbitration clause under the agreement which provided that Director (Marketing) of BPCL ("**DM**") shall serve as an arbitrator or appoint any BPCL's employee as an arbitrator. Pursuant to the same, BPCL via letter informed DBM regarding appointment of DM as the sole arbitrator as per the said agreement. DBM refused to consent the appointment of DM of BPCL as a sole arbitrator and suggested three names to DM out of which any one can be nominated as the arbitrator to which BPCL responded in negative. Later, DBM filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Act**") for the appointment of arbitrator challenging DM's power to nominate an arbitrator among the employees of BPCL as under Section 12(5) of Arbitration and Conciliation Act, 1996 Amendment Act, 2016 ("**Section**"), the said power has been curbed. The Court held that entering into the said agreement per se was consent of DBM to grant power to nominate the arbitrator to DM of BPCL. Also, as per Section, the consent of the second party was required for nomination of first party's employee as arbitrator, and refusal of such consent was to the appointment of the nominee as an arbitrator and not to the person authorized and empowered by the contract to make such nomination. The power to make the nomination never required second party's consent. The 'power to nominate' clause will not be ineffective even after the amendment and such power shall be exercised by the authorized person in the manner prescribed by the law by appointing an independent and neutral arbitrator. The power to nominate itself would survive, notwithstanding the limitations on the choice of the nominee as per the Section and refusal of consent by the second party would not divest the right of the first party to nominate the arbitrator.

When Can Royalty Paid for Technical Know-How be Treated As Capital Expenditure Under Income Tax Act, 1961

The Hon'ble Supreme Court of India ("**Court**") in the case of **Honda Seil Cars India Ltd. v. Commissioner of Income tax [[2017] [82 taxmann.com 212] dated 9th June, 2017]** held that the payments made by Honda SEIL Cars India Ltd., Japan ("**HSCIL**") to Honda Motors Company Ltd. ("**HMCL**") for technical know-how is a capital expenditure as such payment leads to creation of assets and hence, not allowable as deduction under the Income Tax Act, 1961("**Act**"). In the pres-

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ent case, HMCL entered into a joint venture with SEIL Ltd. on 12th September, 1995 and formed the company named HSCIL. On 21st May, 1996, HSCIL and HMCL entered into a Technical Collaboration Agreement ("**TCA**") wherein HMCL agreed to give license, technical know-how and technical assistance to HSCIL ("**Technical Know-How**") for a royalty amounting to USD 30.5 million ("**Consideration**") payable to HMCL in five (5) equal installments. The issue that arose was whether the Consideration payable to HMCL for providing Technical Know-How should be considered as a capital expenditure or revenue expenditure. HSCIL contended that the Consideration did not lead to creation of an asset of enduring nature. On the other hand, the department contended that the Consideration was of enduring nature and therefore, should be considered as payment of capital nature. The Court after analyzing the terms of the TCA, observed that the Technical Know-How included not only transfer of technical information, but, complete assistance, actual, factual and on the spot, for establishment of plant, machinery etc. so as to bring in existence a new manufacturing unit for the products and therefore, a new business will be set up with the Technical Know-How provided by HMCL The Court further, stated that in case of termination of the TCA, joint venture itself would come to an end and there may not be any further continuation of manufacture of product with the Technical Know-How. Therefore, the Court held that the Consideration and the Technical Know-How was of enduring nature and hence, the Consideration qualifies to be a capital expenditure.

Tax Structure for Real Estate Business under GST

The Central Government and Rajasthan State Government has issued following notifications with respect to tax structure of real estate business: (i) Notification No. 11/2017-Central Tax (Rate) dated 28th June, 2017 issued by Central Government; (ii) Notification No. 8/2017-Integrated Tax (Rate) dated 28th June, 2017 issued by CBEC; and (iii) Notification dated 29th June, 2017 numbered as No.F.12(56)FD/Tax/2017-Pt.-I-49 issued by Government of Rajasthan Finance Department (Tax Division). The said notifications have notified the central tax, integrated tax and state tax to be levied on the following at the rate specified below:

1. Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier shall be taxable at the rate of 18%;

2. Composite supply of works contract as defined in Section 2(119) of Central Goods and Services Tax Act, 2017 shall be taxable at the rate of 18%; and

3. Construction services other than specified in point (1) and (2) herein above, shall be taxable at the rate of 18%.

Further, value of services of Point (1), involving transfer of property in land or undivided share of land, as the case may be, shall be equivalent to the total amount charged for such supply less the value of land or undivided share of land, as the case may be. The value of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply. The term "total amount" means the sum total of: (a) consideration charged for afore-

said service; and (b) amount charged for transfer of land or undivided share of land, as the case may be. Apart from the above notifications, the Central Government issued another notification bearing no. 15/2017-Central Tax (Rate) dated 28th June, 2017 wherein it is stated that no refund of unutilised input tax credit shall be allowed for entry at point no.(1), where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.

Fast Track Insolvency Resolution Process for Corporate Persons

The Central Government *vide* notification F.N. 30/4/2017-Insolvency, dated 14th June, 2017 notified Section 55 to Section 58 of the Insolvency and Bankruptcy Code, 2016 ("**Act**") pertaining to fast track insolvency resolution process for corporate persons. As per said notification, fast track insolvency resolution process can be initiated for following categories of corporate persons:

1. a small company as defined under Section 2(85) of Companies Act, 2013; or
2. a Start-up (other than the partnership firm) as defined in the notification of the Government of India in the Ministry of Commerce and Industry number G.S.R. 501(E), dated the 23rd May, 2017; or
3. an unlisted company with total assets not exceeding rupees one crore in the immediately preceding financial year.

Under the fast track resolution scheme either the creditor or corporate debtor can file an application for fast track insolvency resolution process and the insolvency process once initiated should be completed within ninety (90) days from the insolvency process commencement date. Also, the Central Government by gazette notification no. IBBI/2017-18/GN/REG 012 has passed the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Debtors) Regulations, 2017. As per the said regulations, a insolvency resolution plan should provide:

1. the term of the plan and its implementation schedule;
2. the management and control of the business of the corporate debtor during its term; and
3. adequate means for supervising its implementation.

Once the said insolvency resolution plan is approved by the adjudicating authority, a person in charge of the management or operations of the company may make an application to the adjudicating authority for an order seeking the assistance of the local district administration in implementing the terms of the said insolvency resolution plan.

Free Services to Mobile Operators Are Not Anti-Competitive

The Competition Commission of India ("**CCI**") in its recent order in **Bharti Airtel Limited vs. Reliance Industries Limited and others** [Case No. 03 of 2017 dated 9th June, 2017] held that the free services provided by Jio to its consumers does not amount to predatory pricing and thus is not anti-competitive under Section 4 of the Competition Act, 2002 ("**Act**"). In the instant case, Bharti Airtel had submitted that Reliance Jio had been offering free services since the inception of its business, through several offers and thus, contended that such practice of Reliance Jio amounted to predatory pricing, in contravention of the provisions of Section 4 (2)(a) of the Act as it had allegedly used its financial strength in other markets to enter into the telecom market and to eliminate competition. Reliance Jio on the other hand contented that merely making investments into a telecom start-up cannot construed as leverage of dominant position and as Reliance Jio is not holding a dominant position in the

Competition Commission of India

telecom sector, question of abuse of dominant position does not arise. After considering the submission of the parties, CCI held that providing free services cannot by itself raise competition concerns unless the same is offered by a dominant enterprise and shown to be tainted with an anti-competitive objective of excluding competition/ competitors, which does not seem to be the case in the instant matter as the relevant market is characterized by the presence of entrenched players with sustained business presence and financial strength. In a competitive market scenario, where there are already big players operating in n the market, it would not be anticompetitive for an entrant to incentivize customers towards its own services by giving attractive offers and schemes. Such short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered to be anti -competitive in nature and as such cannot be a subject matter of investigation under the Act.

Section 9 and Section 13-A of Hindu Marriage Act, 1955 and Principle of Res Judicata

The Hon'ble High Court of Uttarakhand at Nainital ("**Court**"), in ***BalveerSingh vs.Harjeet Kaur*** (Appeal from order number 552 of 2015 dated 22nd June, 2017) held that the proceedings for judicial separation under Section 13-A of the Hindu Marriage Act, 1955 ("**Act**") will not be barred by the principle of red judicata, due to prior proceedings for restitution of conjugal rights under Section 9 of the Act. In the present case, the appellant contented that as relief under Section 9 of the Act has been declared by the family court, therefore, the relief under Section 13-A would be barred under Section 11 of the Code of Civil Procedure, 1908 ("**CPC**"). The Court observed that under no set of circumstances or reasonableness, Section 9 deals or touches the issue, which is either covered by Section 13 or by Section 13-A of the Act. Thus, both the provisions are divergent to one another as one aims to bring family together and the other is a judicial process to separate the family for the grounds provided under Section 13 of the Act and to meet a different purpose. Thus, the Court held that adjudication under any of the aforesaid provisions, would not attract section 11 of the CPC to create a bar in filing of a subsequent suit under either of the provisions of Section 9 or 13-A of the Act. The Court further held that even if Section 9 of the Act was decreed prior to file Section 13-A of the Act, it will not have any effect on Section 13-A of the Act, for the simple reason because if Section 9 is either decreed or dismissed, it will not take away a right of a party to file Section 13 of the Act for dissolution of marriage at any subsequent stage. Hence also, from this view point, Section 11 of CPC will not be attracted and both the proceedings either under Section 9 and Section 13-A of the Act is to be decided independently.

Capital Gains: Transfer of Shares by A Company in Pursuance of Family Settlement

In case of **B.A. Mohota Textiles Traders (P.) Ltd. v. Deputy Commissioner of Income-tax, Maharashtra [2017] 82 taxmann.com 397 (Bombay),** the issue of capital gains on transfer of shares by a limited company controlled by Mohota family to group entities in pursuance of family arrangement/settlement was under question before the Bombay High Court. In this case, the AO charged the income earned from transfer of shares to group entities to capital gains tax by stating that the Company being a separate legal entity distinct from it's shareholders, cannot be a part of the family settlement/arrangement. Therefore, notwithstanding the fact that the Appellant/assessee was under control and management of the members of Mohota family, who were part of family settlement, yet the transfer of shares by the Company would be covered within the meaning of Section 2(47) of the

Act so as to be assessable to Capital Gains Tax.

The aforesaid order passed by the AO bringing the income from transfer of shares chargeable to capital gains tax was upheld by the Ld. CIT(A) and the Hon'ble ITAT.

Being aggrieved, the Assessee filed an appeal before the Hon'ble High Court. In this regard, the Hon'ble High Court held that there is no dispute before us that a family arrangement/settlement would not amount to a transfer. In fact, all the three Authorities under the Act have not disputed the aforesaid position in law. So far as the members of Mohota family are concerned, who are parties to the family settlement, any transfer inter se between them on account of family settlement would not result in a transfer so as to attract the provisions of the Capital gain tax under the Act. However, in the present case, we are not concerned with the members of Mohota family who were parties to the family settlement, but with transfer of shares done by the Company incorporated under the Companies Act having separate/ independent corporate existence, perpetual succession and common seal. This Company is independent and distinct from it's members. Therefore, the Tribunal was correct in holding that the transaction of transfer of shares by the independent corporate entity was assessable to capital gain tax irrespective of the fact that the Company was wholly owned by the members of a family.

European Commission Slams 2.4 Billion Euros Fine on Google

On the 27th June 2017, the European Commission's Anti-Trust Chief Margrethe Vestager slapped the tech-giant and the largest search engine in the world, Google with a fine amounting to 2.4 billion Euros. The allegation against Google was of indulging into anti-competitive practices by using its dominant position as foremost search engine to favour its own shopping platform over those of its competitors in products related searches. The fine itself is the largest imposed in an anti-trust matter overtaking the previous one imposed on Intel amounting 1.4 billion Euros. The verdict is of significant importance when it comes to competition law. Keeping aside the repeated allegations against Google regarding its handling of users' search data, the verdict is especially crucial for enterprises providing intellectual property based services. In simpler words, entities which are engaged in providing services that are based on some technical knowledge or know-how of the field will have to be cautious since in the case of Google, the search engine was using highly guarded search algorithms to display results for the companies which were subscribing for the Google ad services for a price. The questions which arose was whether it is anti-competitive to use a specially developed knowledge (read algorithm) to generate revenue from subscribers who are willing to pay for the services and whether it is fair to prohibit an enterprise from using its specially developed knowledge from using it in a commercial manner. The verdict can be expected to lay down a defining precedent for intellectual property and knowledge based businesses especially ranging from those based on technological and internet advancement to including trade secrets.

QUICK TAKEAWAYS

- The Supreme Court has put a partial stay on the implementation of the provisions of the Income Tax Act making Aadhaar number mandatory for allotment of PAN card and filing of income tax returns on its implementation till a Constitution bench addressed the issue of right to privacy;
- The Central Board of Direct Taxes (CBDT) has constituted a special task force to chart the road map for its ambitious proposal of a jurisdiction free income-tax assessment system and e-scrutiny of taxpayers;
- Govt. has notified the turnover limit of Rs. 75 lakh under GST for composition levy applicable on all states exempting nine (9) north eastern states;
- The Himachal Pradesh High Court held that right to sanitation is a fundamental right and directed the state to provide public toilets on all the highways. Bare necessities of life includes proper sanitation facilities as the practice of open defecation or a life with polluted drinking water source and environment cannot be considered as a life of dignity as understood in the context of Right to life under Article 21 of the Constitution of India;
- The Ministry of Social Justice and Empowerment notified the Rights of Persons with Disabilities Rules, 2017;
- The Central Board of Direct Taxes has notified a new safe harbor regime in order to reduce transfer pricing disputes and to align safe harbor margins with industry standards;
- Dr. Neeru Chadha has been elected as the judge of the International Tribunal for the Law of the Sea (ITLOS) thereby becoming the first Indian woman to be elected to ITLOS;
- The Union Cabinet has approved the proposal to introduce the Financial Resolution and Deposit Insurance Bill, 2017. The Bill shall be paving way for a comprehensive resolution framework for specified financial sector entities to deal with bankruptcy situation in banks, insurance companies and financial sector entities;
- Mumbai's Taj Mahal palace has become the first Indian building to get a trademarkfor its architectural design implying that those using pictures of the Taj Mahal Palace will now have to pay a licencing fee;
- The Government of India, in order to make legal aid easily accessible to the marginalized communities and citizens living in rural areas, has announced the launch of 'Tele-Law' pilot project. Under the scheme, a portal called 'Tele-Law' will be launched, which will be available across the Common Service Centre (CSC) network;
- RBI and 19 public sector banks recently revealed under the Right to Information Act, 2005, that they have no liability for the things/ goods kept in their lockers by customers as the relationship between bank and customer is that of a lessee and lessor;
- The Ministry of Corporate Affairs via notification dated 29th June 2017 stated that parties to a combination are now exempted from filing a notification within 30 days of the execution of the relevant trigger document;
- The Maternity Benefit (Amendment) Act 2017 has made it mandatory for every establishment having fifty or more employees to provide for a crèche facility;
- Ministry of Environment Affairs, Forest and Climate Change has notified new Rules, for the ban on sale of cattle for the purpose of slaughter in animal markets;
- The division bench of the Kerala High Court, ruled that a person cannot be denied his/her property rights on the mere fact of being a priest or nun.
- RBI has widened the scope of its Banking Ombudsman Scheme 2006, to include, deficiencies arising out of sale of insurance/ mutual fund/ other third party investment products by banks. Also, now a customer will be able to lodge a complaint against the bank for its non-adherence to RBI instructions with regard to Mobile Banking/ Electronic Banking services in India.

KNOWLEDGE CENTRE

FAQs on FEMA

Q. 1. What is the purpose of introducing the Foreign Exchnage Management Act, 1999 ("FEMA")?

The purpose is to facilitate the foreign trade & payments and to develop & maintain foreign exchange market in India.

Q. 2. What are the general categories of transactions under the FEMA?

The FEMA as per the nature of transactions bifurcates the transactions into two categories, i.e., Capital Account Transactions and Current Account Transactions.

Q. 3. What do you mean by Capital Account Transactions?

Capital account transaction means a transaction which alters the: (i) Assets or liabilities outside India, including contingent liabilities, of a person resident in India; or (ii) Assets or liabilities in India, of a person resident outside India.

Q. 4. What do you mean by Current Account Transactions?

Current account transaction means transaction other than the capital account transaction and includes, (i) Payments due in connection with foreign trade, other current business, service & short term banking and credit facilities in the ordinary course of business; (ii) Payments due as interest on loan and as net income from investments; (iii) Remittances for living expenses of parents, spouse and children residing abroad; and (iv) Expenses in connection with foreign travel, education & medical care of parents, spouse and children.

Q. 5. What are the restrictions imposed by the FEMA to deal in foreign exchange?

Section 3 of FEMA restricts that no person, unless authorised by Reserve Bank of India ("**RBI**") shall, (i) Deal in or transfer any foreign exchange/ foreign security to any person not being an authorised person; (ii) Make any payment to or for the credit of any person resident outside India in any manner; (iii) Receive otherwise through an authorised person, any payment by order or behalf of any person resident outside India in any manner; and (iv) Enter into financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire any assets outside India by any person.

Q. 6. Who issues directions to the bank and other authorised persons under FEMA?

Reserve Bank of India

Q. 7. Who is an authorized person?

Persons authorised by RBI to deal in foreign exchange or in foreign securities

Q. 8. Who is a person resident outside India?

Section 2(v) of the FEMA defines the '**person resident in India**' and the person who does not falls under the defintion of the '**person resident in India**' are considered as '**person resident outside India**'. Following is the definition of '**person resident in India**'-

1. Person residing in India for more than 182 days during the preceding financial year, but does not include certain persons;
2. Person or body corporate regsitered or incorporated in India.;
3. Office, branch and agency in India owned and controlled by a person resident outside India.;
4. Office, branch and agency outside India owned and controlled by a person resident in India.

Q. 9. What are general kinds of investments that FEMA governs?

Foreign Direct Investment ("**FDI**") and Overseas Direct Investment ("**ODI**").

Q. 10. What is meaning of FDI and ODI?

(i) ODI means investment by way of contribution to the capital or subscription to the Memorandum of Association of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, but does not include portfolio investment.

(ii) FDI means investment by non-resident entity/ person resident outside India in the capital of an Indian company/ or equity of an Limited Liability Partnership, Partnership Firm, etc. in India.

EDITORIAL

PARADIGM SHIFT IN EMPLOYMENT GENERATION INCENTIVE: SECTION 80JJAA

- By *CA Nikky Jhamtani, Senior Associate*

In order to provide momentum to employers to create more employment opportunities, Section 80JJAA was introduced in the Income Tax Act, 1961 ("**the Act**"). Earlier, the deduction which was allowed for three (3) assessment years of an amount equivalent to 30% of the additional wages paid to the new regular workmen. However, with the span of time Section 80JJAA underwent into changes and the Finance Act, 2016 has brought an exemplary change for availing the benefit under this Section.

Amendment under Finance Act, 2016

In order to generate more employment opportunities, Section 80JJAA of the Act, was revised and enlarged by the Finance Act, 2016 with effect from 1st April, 2017 to provide an incentive in the form of an additional deduction of 30% of additional employee cost, in computing business profits of an assessee to whom Section 44AB of the Act applies. The nature and quantum of deduction, terms and conditions, etc., are as follows:

- The deduction is allowed to any assessee.
- Gross total income of such assessee shall include profits and gains derived from business.
- The books of account are audited under section 44AB of the Act.
- Additional employee cost is incurred in course of such business.
- An additional employee means an employee who is employed during the year (in addition to the existing employees) but does not include an employee:
  1. whose total emoluments are more than Rs. 25,000/- per month;
  2. for whom the entire contribution is paid by the Government under the notified Employees' Pension Scheme;
  3. who is employed for less than 240 days during the previous year; or
  4. who does not participate in the recognised provident fund.
- The deduction is 30% of the amount of employee cost incurred in the previous year, for three (3) years including the year in which such employment is provided.
- The assessee furnishes along with the return of income a report of an accountant.
- The provision of this Section prior to amendment will continue to apply up to assessment year 2016-17 and accordingly, the new provision will take effect from assessment year 2017-18 and thereafter.

Issues in Relation to Section 80JJAA

Issue I: Mode of computation of ceiling limit of Rs. 25,000/- per month

An employee would not be considered as an additional employee, if his total emoluments are more than Rs. 25,000/- per month. For computing the limit of Rs. 25,000/- per month, the total emoluments paid or payable to an employee during the year in which he is employed should be aggregated and then, the total emoluments so computed should be divided by twelve (12) months to arrive at the ceiling limit. If the resulting amount is less than Rs. 25,000/- per month, then the employee would be considered as an additional employee for the purpose of computation of deduction under Section 80JJAA of the Act. The said mode of computation of the deduction under Section 80JJAA of the Act. The said mode of compu-

tation of the ceiling limit of Rs. 25,000/- per month is explained hereunder with the help of an example:

To illustrate, Mr. X, being an additional employee is entitled to the following benefits during the year. In view of the definition, the emolument can be worked out as under:

Nature of payment (per month)	Amount due to employee (in Rs.)
Basic salary/wages	1,20,000/-
Dearness allowances	50,000/-
Bonus	35,000/-
Other allowances	12,000/-
Total emolument	**2,17,000/-**
Total emolument per month	**18,083/-**

As the total emolument paid or payable to Mr. X is Rs. 18,083/- per month, which is less than the ceiling limit of Rs. 25,000/- per month, therefore Mr. X would be considered as an additional employee for the purpose of Section 80JJAA of the Act.

Issue II: Quantum of deduction if the emoluments paid/payable are above Rs. 25,000/- per month in subsequent years of employment

It is provided under Section 80JJAA of the Act, that the employee whose total emolument exceeds Rs. 25,000/- per month, will not qualify as an additional employee. In other words, this Section denies the deduction of employee's cost in respect of highly paid employees. Consider a case where the total emolument payable to additional employee is:

- Rs. 24,000/- per month in first year;
- it increases to Rs. 30,000/- per month in second year; and
- it further increases to Rs. 35,000/- per month in third year

In such circumstance, it can be said that such employee will qualify as an additional employee. The section puts a condition only for limited purpose to test whether in first year there is increase in total number of employees. Once the employee is qualified as an additional employee, the deduction can be claimed in three (3) years in accordance with provision of the Section 80JJAA of the Act. The deduction under Section 80JJAA of the Act for employing the additional employee will be calculated in accordance with the total emoluments paid/payable to the additional employee in the first year in which he was employed i.e. Rs 24,000/- per month and the same deduction will be available to the assessee for the next two (2) years irrespective of increase in the total emoluments paid to him in the subsequent years.

Key Takeaways

1. The newly inserted Section 80 JJAA is advantageous to all assessees having income from businesses (subject to tax audit) and will aid hiring decisions and boost employment.
2. Additional Deduction shall help the organisations reduce their employee's cost and thereby achieve better profitability.

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