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Jaipur | Mumbai | Delhi
www.chiramritlaw.com

THE NEWSLETTER

Curtailment of Competition Commission's Penalty Imposing Power

The Hon'ble Supreme Court ("**Court**") in ***Excel Crop Care Limited v. Competition Commission of India and another*** [Civil Appeal No. 2480 of 2104 decided on 8th May, 2017], held that the penalties imposed by the Competition Commission of India ("**CCI**") on companies should be only on the turnover relevant to as case in dispute, and not on overall turnover. In the instant case, CCI had imposed penalties of nine per cent (9%) of the average turnover of the last three (3) years of each of the companies, who were found to have indulged in bid rigging while participating in the tenders issued by the Food Corporation of India ("**FCI**"). In the first appeal, the Competition Appellate Tribunal ("**COMPAT**") rejected appellants' case on merits. However, relying on Section 27 of the Competition Act, 2002 ("**Act**"), the COMPAT observed that the reference to the term 'turnover' in the said section would, in the facts and in circumstances of the case, mean relevant turnover, i.e. turnover derived from the sales of goods or services, which are found to be the subject of contravention. Therefore, the COMPAT revised the penalties to nine per cent (9%) of the average relevant turnover, as a result of which the said penalty got reduced from Rs. 317.91 crores to Rs. 10.02 crores. Against the decision of the COMPAT, parties to the case went for second appeal before the Court. The appellants' challenged the case on merits, while CCI's appeal was limited to the quantum of penalties. It was argued by the appellants that the alleged bid rigging took place in March 2009, i.e., prior to the date of enforcement of Section 3 of the Act, i.e.. 20th May, 2009 and therefore the Act is not applicable on the acts of the appellants. The Court while rejecting the appellants' argument held that even though the bids were submitted before 20th May, 2009, the bid was not completed by 20th May, 2009 and since the effects of the violation continued post the enforcement of the Act, the Act becomes applicable on the appellants. While deciding the issue of quantum of penalties, the Court held that the correct parameter for imposing the penalty should be the relevant turnover rather than the total turnover. The Court found the interpretation limiting the penalty to relevant turnover to be '*more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties*'. The Court further observed that Section 27 of the Act is aimed at achieving the objective of punishing the offender and act as deterrent to others. Such a purpose can adequately be served by taking into consideration the relevant turnover. It is in the public interest as well as in the interest of national economy that industries thrive in this country leading to maximum production. Therefore, it cannot be said that purpose of the Act is to 'finish' those industries altogether by imposing those kinds of penalties which are beyond their means. Thus, the penalties modified by the COMPAT on the basis of relevant turnover were upheld by the Court.

Inside this issue:

Mere Assurance from the Doctor does not Attract Liability for Medical Negligence

The Hon'ble High Court of Allahabad ("**Court**"), recently in the case of ***Dr. Meera Malik vs. State of UP*** [Case No. 4194 of 2015, delivered on 29th May, 2017], quashed the complaint filed against a practicing surgeon ("**Surgeon**") who was accused of medical negligence while conducting operation, which caused excessive bleeding and blood clotting, resulting ultimately into the death of the patient. In the instance case, it was alleged by the relatives of the deceased patient that only upon the assurance given by the Surgeon that post operation everything would be normal, the consent papers for conducting the operation were signed by the deceased patient and its relatives. Upon examining the matter and all the material available on record, the Court observed that '*a simple lack of care, and error of judgment or an accident cannot be said to be proof of negligence on the part of the petitioner. It is not the case of prosecution that the petitioner did not possess requisite skill, which she professed to have possessed or she did not exercise of reasonable competence in the given case, the skill which she did possess*'. Further, the Court observed that the element of cheating cannot be made out merely on the ground that the Surgeon had given assurance to control the condition of deceased patient and there is nothing on record to show that the Surgeon concealed any fact regarding treatment or that the Surgeon did not possess the qualification which she professed. She had exercised the skill expected from a man of ordinary competence of medical profession. Also, on technical grounds, the Court observed that the submission of charge-sheet was also not in accordance with the guidelines prescribed by the Hon'ble Supreme Court in ***Jacob Mathew v. State of Punjab and another*** [AIR 2005 SC 3180] on the premise that firstly, no independent opinion of government doctor was obtained regarding negligence of the petitioner before submission of the charge-sheet. Though opinion of a government doctor was not compulsory, there should have been opinion of independent doctor and secondly, applying BOLAM's Test laid down in ***Bolam v. Friern Hospital Management Committee*** [(1957) 1 WLR 582] and which states that '*A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art*'. The Court held that the Surgeon cannot be made liable as she exercised sufficient skills expected from a man of ordinary competence of medical, required to perform the operation.

Goods and Services Tax ("GST") Rates and Rules

As the Goods and Services Tax Act, 2017 ("**Act**") is on the verge of its implementation, the fitment committee has announced the GST rates in the 14th meeting of the GST council which was held on 18th and 19th May, 2017 in Srinagar. Four (4) slabs of rates under the GST has been decided, which are: 5%, 12% 18% and 28% ("**Rates**"). Rates of more than one thousand and two hundred (1,200) items have been announced. The GST is likely to have a minimal impact on the inflation. Important highlights of the said meeting with respect to the Rates are as follows:

1. More than fifty percent (50%) of the products of the Consumer Price Index Basket are exempt from tax under the GST, whereas remaining items have been classified under 5% slab rate.

2. Common use products like hair oil, soaps and toothpaste will be charged with a single national sales tax or GST of eighteen percent (18%) instead of present twenty-two to twenty-four percent (22%-24%) tax incidence through a combination of Central and State Government levies.

3. Air conditioners and refrigerators will fall in the twenty eight percent (28%) tax slab while life-saving drugs have been kept at five percent (5%) rate.
4. All capital goods and all industrial intermediaries would attract eighteen percent (18%) tax instead of twenty-eight percent (28%).
5. Milk and curd will continue to be exempt from taxation under the GST. 'Mithai' or sweets will attract five percent (5%) levy.
6. Daily-use items like sugar, tea, coffee (barring instant coffee) and edible oil will attract the lowest tax rate of five percent (5%), almost the same as current incidence.
7. Prices of food grains, especially wheat and rice, will come down as they will be exempt from levy under the GST.

Apart from fixing the Rates, the GST council meeting also cleared seven (7) rules pertaining to different aspects of the GST. These rules are related to registration, input tax credit, payment, refund, invoice, valuation and composition.

Dividend Income on Shares and Units of Mutual Funds are Exempt Income for the Purpose of Section 14A of Income Tax Act

The Hon'ble Supreme Court of India ("**Court**") in its recent case of ***Godrej & Boyce Manufacturing Company Ltd. v. Deputy Commissioner of Income-tax*** [[2017] 81 taxmann.com 111 (SC)**]** held that the provisions of Section 14A of the Income Tax Act, 1961 ("**Act**") would be applicable to income earned by way of dividends and units of mutual funds under Section 115-O and Section 115-R of the Act respectively which has already been subject to dividend distribution tax (DDT). The issue involved in the instant case was that whether the phrase 'income which does not form part of total income under this Act' appearing in Section 14A of the Act includes within its scope the dividend income on shares and on units of mutual fund in respect of which tax is payable under Section 115-O and Section 115-R of the Act respectively. The appellants argued that Section 14A should not be applied to the dividend income as taxes have already been paid on the said income by the domestic company and thus, this income cannot be said to be tax free. The mere fact that the amount is not included in the total income of the recipient assessee would not attract the provisions of Section 14A of the Act as the cardinal test is whether the dividend income is tax free or not. The person paying the tax is irrelevant for the aforesaid purpose. The Court, however, gave its judgment in favor of the revenue and held that the disallowances under Section 14A of the Act would be applicable to the dividend income. The Court observed that Section 14A of the Act does not contemplate a situation where even though the income is taxable in the hands of the dividend paying company the same to be treated as not includible in the total income of the recipient assessee, yet, the expenditure incurred to earn that income must be allowed on the basis that no tax on such income has been paid by the assessee.

Noticing the objects and reasons behind the introduction of Section 14A of the Act, the Court held that '*expenses allowed can only be in respect of earning of taxable income*'. Thus, expenditure to earn dividend income on shares is not deductible. However, the Court further observed that the requirement to prove that the expenditure which is to be disallowed under Section 14A of the Act is actually incurred in relation to earning of exempt income, cannot be done away with. Thus, the Court held that the assessing officer is required to establish a reasonable nexus between the exempt income and expenditure sought to be disallowed under Section 14A of the Act.

Chargeability of CVD on Import of Cut Pieces of Old Tyres or Tubes

In the case of Tinna Rubber & Infrastructure Ltd. v. Union of India [(2017) 81 taxmann.com 242 (Delhi)] decided on 3th May, 2017, the petitioner filed a petition under the Article 226 of the Constitution of India before Hon'ble High Court of Delhi ("High Court"), questioning the validity of a clarification dated 2nd January, 2015 ("**Clarification**") issued by the Tax Research Unit ("**TRU**"). The Clarification stated that there was no exemption from payment of excise duty in respect of tyre scrap cut into two (2) or three (3) pieces, produced from used and old

tyres, therefore the said goods are chargeable to countervailing duty ("**CVD**") under Section 3(1) Custom Tariff Act,1975 ("**CTA**"). The CVD is chargeable on the import of goods which are liable to excise duty in India. The High Court framed the issue, '*Whether the process to which old tyres are subject to produce two or more pieces of cut tyre can be construed as 'manufacture' within the meaning of Section 2(f) of the Central Excise Act, 1944 ("**Act**")?*' The Court found the facts of the present case similar to ***Servo-Med Industries (P.) Ltd. v. CCE*** [[2015] 57 taxmann.com 314/51 GST 12 (SC)]. The High Court held that the said process cannot be considered as manufacture because the original article continues to be same despite of carrying out the process of cutting and incorporating changes in the said article. The cutting of the used and old tyres and tubes into two (2) or three (3) pieces facilitates their accommodation in the ships that transport them which lowers the cost of transportation. Thus, the essential character of the used and old tyres remains the same as they do not undergo any transformation so as to amount to 'manufacture' within the meaning of Section under Section 2 (f) of the Act. Therefore, the High Court held that the Clarification is unsustainable in law and imposition of twelve (12%) CVD under Section 3(1) of the CTA on cut pieces of used tyres and used tubes is unlawful and ultra vires.

Interpretation of Word 'Payable' Occurring in Section 40(a)(ia) of Income Tax Act

The Hon'ble Supreme Court of India ("**Court**") on 3rd May, 2017, in the case of **Palam Gas Service vs. Commissioner of Income Tax** [(Civil Appeal No.5512 of 2017)] held that the word 'payable' occurring in Section 40(a)(ia) of the Income Tax Act, 1961 ("**Act**") not only covers cases where amount is yet to be paid but also cover those cases where amount has actually been paid. In the instant case, the assessee was engaged in the business of purchase and sale of LPG cylinders. During the assessment proceedings, the assessing officer ("**AO**") noticed that the main contract of the assessee for carriage of LPG was with the Indian Oil Corporation from whom he had received total freight payments of Rs. 32.04 lacs. Further, he got the transportation of LPG done through three persons and made the freight payment of Rs. 20.97 lacs. The AO was of the opinion that the assessee had entered into subcontract with the three (3) persons within the meaning of Section 194C of the Act and was liable to deduct tax at source from the payment made to the persons. Therefore, the freight expenses were disallowed by the AO per the provisions of Section 40(a)(ia) of the Act. The view taken by the AO was upheld by the Income Tax Appellate Tribunal and the Hon'ble High Court of Himachal Pradesh The question before the Court for consideration was, when the word used in Section 40(a)(ia) of the Act is 'payable', whether this section would cover only those contingencies where the amount is due and still payable or it would also cover the situations where the amount is actually paid but no advance tax was deducted thereupon. The Court was of the view that when the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word 'payable' occurring in Section 40(a)(ia) of the Act refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid. If the provision is interpreted in the manner suggested by the assessee, then even when it is found that a person, like the assessee, has violated the provisions of Chapter XVIIB of the Act (or specifically Sections 194C and Section 200 of the Act in the instant case), he would still go scot-free, without suffering the consequences of such monetary default in spite of specific provisions laying down these consequences.

Relevance of Exclusive Jurisdiction Clause in An Agreement

In ***Zuberi Engineering Company v. M/s Tar Products* & Ors**. [WPC No. 312/2016], the petitioner was a partnership firm duly registered under the Indian Partnership Act, 1932, having at its registered office at Jaipur (Rajasthan). The petitioner was awarded a contract for laying down a pipeline for a power plant at village Nariyana in Champa District. The contract stated that the outer surface of the pipelines was to be coated with coal tar tape in order to prevent corrosion. For the said work, the petitioner issued two work orders to M/s Tar Products and an agreement to this effect was executed between the parties containing an arbitration clause ("**Agreement**"). The said arbitration clause provided for exclusive jurisdiction to civil courts at Jaipur. The respondent i.e. M/s Tar Products failed to complete the work within time and raised a claim with the second respondent Micro Small and Medium Enterprises Facilitation Council ("**MSEFC**") for refund of the performance security without submitting the final bill with the petitioner. In order to resolve the dispute, the respondent relied on the provisions of the Micro, Small and Medium Enterprise Development Act, 2006 ("**Act**") and filed an application before MSEFC, which passed an order in favour of MSEFC. The petitioner objected the, said order on the ground that the jurisdiction for resolving any dispute arising from the Agreement had to be settled at Jaipur (Rajasthan) and not at any other place. The dispute was bought before Hon'ble High Court of Chhattisgarh ("**High Court**"). The issue raised before the High Court was whether a dispute could be raised before any forum when there existed an exclusive jurisdiction clause in the contract ousting the jurisdiction of every other place. The High Court relied on the judgement of the Hon'ble Supreme Court of India ("**Court**") given in ***Swastik Gases Private***

Limited* v. *Indian Oil Corporation Limited [(2015) 12 SCC 225] wherein the Court held that when there is an exclusive jurisdiction clause in an arbitration agreement it would oust all other courts' jurisdiction in respect of disputes arising under the agreement, even in a case where no part of cause of action arises at that place. The High Court further, relied on the recent judgment of the Court given in the case of ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited*** **[**Civil Appeal No. 5370-5371 of 2017], wherein the Court held that, that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. In light of the abovementioned judgments, the High Court quashed the order of MSEFC and held that, in the instant case, the parties had submitted to jurisdiction to settle the dispute at Jaipur, therefore MSEFC had no jurisdiction to entertain the application. The judgment of the High Court supports the already settled judicial principle that when the exclusive jurisdiction clause is available in a contract/agreement, the jurisdiction of courts and tribunals at their places is excluded and the places mentioned in the agreement/contract will only have the jurisdiction over the matter.

TO PROVE OR NOT TO PROVE THE DAMAGES

- By Advocate Ritu Soni (Partner)

- Co Authored by Tanvi S. Dudeja (Associate)

The claim for damages has forever been the most litigated subject matter in Indian jurisprudence. Every commercial or non-commercial transaction that does not go down as desired by the parties will lead to the inevitable outcome of claim for damages. It is therefore important to understand when a claim for damages ensues and whether the damages need to be proved. It is with respect to proof of damages that the legal pandora needs to be examined.

A claim for damages arises out of breach of a contract. Every claim for damages is governed by Sections 73 & 74 of the Indian Contract Act, 1872 ("**Contract Act**"*).*

As per Section 73 of the Contract Act, the party who suffers by the breach of contract is entitled to receive from the defaulting party, compensation for any loss or damage caused to him by such breach, which naturally arose in the course of things from such breach, or which the parties knew when they made the contract to be likely the result of the breach of contract. Loss or damage suffered by breach of contract is to be proved and only then compensation is awarded to the extent of such loss or damage.

On the other hand, Section 74 of the Contract Act emphasizes that in case of breach of contract, the party complaining of breach is entitled to receive reasonable compensation, *whether or not actual loss is proved* to have been caused by such breach. The said section entitles a party to claim reasonable compensation from the party who has broken the contract which can be a pre-determined compensation stipulated at the time of entering into the contract, i.e. *liquidated damages*. It is in regard whether proof of loss is a *sine qua non* for claiming liquidated damages under Section 74 of the Contract Act that the anomaly in judicial pronouncements appears to have arisen.

If one was to infer that Section 74 of the Contract Act dispenses with proof of loss when a pre-determined compensation is stipulated in the contract, does it mean that the parties can treat the liquidated amount in the contract as sacrosanct even if the party claiming damages has not proved *any loss or injury resulting from the breach of contract?*

In contra-distinction the Division Bench of the Delhi High Court in ***Vishal Engineers & Builders v. Indian Oil Corporation Ltd.*** [2012(1)ARBLR 253 (Delhi)] held that the recovery of liquidated damages by the respondent in the absence of any proof of loss whatsoever cannot be permissible, as observed in paras 26 & 37 which are reproduced herein below:

> *"26. We have, thus, no hesitation in concluding that if there was absence of any loss whatsoever, an aggrieved party cannot claim that it is still entitled to liquidated damages, without at least, proving a semblance of loss.*
>
> *37. ...Merely because there is a clause of liquidated damages does not mean that the amount of liquidated damages has to be recovered even when no loss has been caused. The respondent had to establish that loss was caused.*"

On a bare perusal, it would appear that the respective high courts have given a paradoxical interpretation with respect to proof of loss under Section 74 of the Contract Act. Both the judgments have referred to the Division Bench judgment of the Supreme Court in ***O.N.G.C. v. Saw Pipes Ltd.*** [(2003) 5 SCC 705]. The relevant portion of the judgment in ***O.N.G.C. v, Saw Pipes Ltd.*** *(Supra)* which deals with proof of loss under Section 74 of the Contract Act, at para 67, is reproduced herein below:

> "*67. ...(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.*
> *(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.*"

The Hon'ble Bench of Delhi High Court in ***Vishal Engineers & Builders v. Indian Oil Corporation Ltd.*** *(Supra)* has conclusively distinguished the ratio in ***O.N.G.C. v. Saw Pipes Ltd.*** *(Supra)* in context of the pronouncement of the Constitutional Bench judgment in the case of ***Fateh Chand v. Balkishan Da*s** [(1964) 1 SCR 515], as observed in para 23 of the judgment which is reproduced herein below:

> "*23. In our view these observations have to be read in the context of the pronouncement of the Constitution Bench pronouncement in Fateh Chand case (supra). If it is so, all that it implies is that where it is impossible to assess the compensation arising from breach and that factor is coupled with the parties having agreed to a pre-determined compensation amount not by way of penalty or unreasonable compensation then that amount can be awarded as a genuine pre- estimate of the loss suffered by a party. It cannot be read to mean that even if no loss whatsoever is caused to party it can still recover amounts merely by reason of the opposite party being in breach.*"

The paradox in the aforementioned pronouncements is a superficial one and on a careful and meticulous reading, it can be seen that the Courts have in fact distinguished the cases for the purpose of proving loss under Section 74 of the Contract Act on the following grounds:

1. If loss is suffered & it is possible to prove the loss – the party complaining of breach will have to prove a semblance of loss (if not actual loss) & the Court will award reasonable compensation, the stipulated amount being the outer limit;
2. If loss is suffered & it is possible to prove the loss & the party in breach proves that the stipulated amount in the contract is by way of penalty or is not a genuine pre-estimate of damages – the Court will award only reasonable compensation as determined on the basis of loss suffered;
3. If it is possible to prove the loss & the party in breach proves that in fact no loss was suffered in consequence of the breach – the Court will not award damages;
4. If loss is suffered but it is a case wherein it is impossible to prove loss – as it would be impossible to assess compensation, the Court will award the liquidated damages, the agreement between the parties being the evidence of pre-determined compensation.

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Jaipur | Mumbai | Delhi
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newsletter@chiramritlaw.com

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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