VOLUME 57, MAY 2019

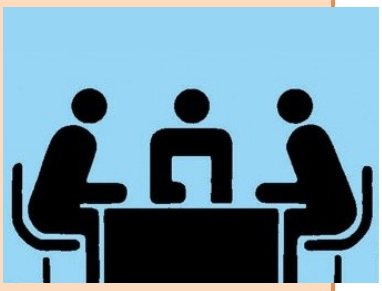
Chir Amlit Legal LLP
Jaipur | Mumbai | Delhi
www.chiramritlaw.com

THE NEWSLETTER

UPDATE YOURSELF

Impact of Insufficiently Stamped Arbitration Clause

The Hon'ble Supreme Court of India in a recent case of ***Garware Wall Ropes vs. Coastal Marine Constructions & Engineering Ltd.*** *[2019 (6) SCALE 250 as decided on 10.04.2019]* held that an arbitration agreement in an unstamped instrument is not enforceable in law, thus, it cannot be acted upon by courts for the appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). Brief facts leading to this controversy are that Coastal Marine Construction and Engineering Limited ("**CMCEL**") had approached the Hon'ble Bombay High Court under Section 11 of the Arbitration Act for appointment of an arbitrator. The Hon'ble Bombay High Court took note of the fact that the after the amendment in the Arbitration Act, the scope of Section 11 has been narrowed and hence the court's role post amendment is limited only to examining the existence of an arbitration agreement between the parties. Accordingly, the Hon'ble Bombay High Court had ruled that an unstamped instrument is not a bar to refer the parties to arbitration under the Arbitration Act. Being dissatisfied, Garware Wall Ropes Limited ("**GRL**") assailed this order of Hon'ble Bombay High Court before Hon'ble Supreme Court. The question considered by the Hon'ble Supreme Court was whether the court can proceed to appoint an arbitrator on the basis of an unstamped instrument, and whether it is the arbitrator who later can impound the instrument. The Supreme Court held that an analysis of Section 11(6A) of the Arbitration Act would show that when the court considers an application under Sections 11(4) to 11(6) of the Arbitration Act, and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Indian Stamp Act to first impound the agreement or conveyance and then see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Indian Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance to give it an independent existence. In view thereof, the Hon'ble Supreme Court has clarified the position that unstamped or insufficiently stamped documents cannot be acted upon to appoint an arbitrator.



After Expiry of an Agreement, a Party cannot Use Trade Mark of Another Party

The Hon'ble Delhi High Court ("**Court**") in the case of ***PVR Limited vs. Just Dial Limited*** *[CS (COMM) 187 of 2019, decided on 10.04.2019]* has granted permanent injunction against defendant restraining infringement of trademark as well as copyright. In this case, the plaintiff and the defendant had entered into a non-exclusive ticketing agreement for the period of one year under which the defendant company

INSIDE THIS ISSUE:

UPDATE YOURSELF

Interest under GST is leviable on the gross tax liability not net tax liabil- 2

Amount reimbursed to the service provider not part of aggregate amount referred to in Section 44BB(2)(a) and 44BB(2) 3

Personal Information Exemption from RTI not Available to Corporate 3

Dynamic Injunction for Protection of Intellectual 4

Amendment in Form 16: TDS Certificate issued by 4

Validity of Reopening Notice u/s 148 if Information/Material was already available with the 5

Quick Takeaways 6

Knowledge Centre 7

Editorial 8

was allowed access to PVR's ticketing software to book tickets for the PVR cinema halls ("**Agreement**"). After the expiry of the Agreement, the defendant continued providing online ticket bookings of movies shown at PVR cinema halls by providing deep links of the Book-MyShow platform. The plaintiff restrained the defendant from indulging in such unlawful and unauthorized activities contending that the defendant does not have any official right to continue offering links to the viewers on its website or any other site. Despite several warnings, the defendant continued the said unlawful and unauthorized activities. Aggrieved by the acts of the defendant, the plaintiff moved the Court. The Court referring to the provisions of the Trade Marks Act, 1999 ("**Act**") observed that the defendant had the *mala fide* intension of earning more profits and to popularise its platform at the expense of the immense reputation and goodwill earned and achieved by the plaintiff. The Court held that such unauthorized and illegal activities undertaken by the defendant is a *prima facie* case of infringement and passing off and in order to protect the trademark rights of the plaintiff under the provisions of the Act and the Copyright Act, 1957, the Court restrained the defendant, its owners, directors, officers, servants, employees and its affiliates, from using the registered mark 'PVR' or any deceptive variant thereof which is identical and/or similar to the plaintiff's trademark 'PVR' in any manner whatsoever.

Interest under GST is leviable on the gross tax liability not net tax liability

The High Court of Telangana in the matter of ***Megha Engineering & Infrastructures Ltd. vs. Commissioner of Central Tax*** *[[2019] 104 taxmann.com 393]* held that interest for the delayed payment of GST shall be leviable on the Gross tax liability including a portion of which is liable to be set-off against ITC (including ITC). In the said facts of case, department made demand for payment in interest @ rate of 18% on the ITC complete portion of the tax paid payable for the month of July, 2017 to May,2018 i.e. on Rs. 1014 Crore without giving set off of ITC available of Rs. 969 Crore. The Appellant filed delayed GST 3B monthly returns for the said periods. The Petitioner assessee contended that interest should be calculated only on the net tax liability i.e. 45 Crore after deducting the ITC from the total tax liability. However, the Hon'ble High Court analyzed section 50 of the Central Goods and Service Tax Act, 2017 (**'CGST Act'**) along-with provision related to returns and held that, till a return is filed, no credit becomes available to Assessee's electronic credit ledger only when an assessee file his GST return, ITC becomes available in the electronic credit ledger and thereafter available for, the utilization of the same for payment of self-assessed out-put tax arises. In other words, until a return is filed as self-assessed, no entitlement to credit and no actual entry of credit in the electronic credit ledger takes place. As a consequence, no payment can be made from out of such a credit entry. The tax already paid on the inputs is available in the cloud only. Such tax becomes an ITC only when a claim is made in the returns filed as self-assessed. It is only after a claim is made in the return that the same gets credited in the electronic credit ledger. It is only after a credit is entered in the electronic credit ledger that payment could be made, even though the payment is only by way of paper entries. Thus, the ownership of amount of ITC is not in the hands of Government till the actual payment is made. Since ownership of such money is with the dealer till the time of actual payment, the Government become entitled to interest up to the date of their entitlement to appropriate it.

The Hon'ble High Court in its order also observed highlighted that in the 31st GST Council meeting, one of the proposals recommended to amend Section 50 of the CGST Act, so that interest is charged only on net tax liability of the taxpayer after taking into account the admissible ITC. However, since the recommendation was not acted upon, the effect of the same cannot be given to the present section.

Amount reimbursed to the service provider not part of aggregate amount referred to in Section 44BB(2)(a) and 44BB(2)(b) of the IT Act.

The Hon'ble High Court of Uttarakhand in the case of ***Director of Income-tax International Taxation v. Schlumberger Asia Services Ltd.*** *[[2019] 104 taxmann.com 353 (Uttarakhand)] vide* an Order dated 12.04.2019 held that the amount reimbursed to the assessee-service provider by the service recipient, representing the service tax paid earlier by the assessee-service provider to the Government of India, would not form part of the aggregate amount referred to in clauses (a) and (b) of Section 44BB(2) of the Income Tax Act ("**Act**"). The assesses were non-residents and executed contracts in India, in connection with exploration and production of mineral oils with the Oil and Natural Gas Corporation ('**ONGC**') and gave them rigs on hire. The assessees filed their returns and offered to pay tax under Section 44 BB (1) r/w Section 44 BB (2) of the Act. However, the assessees did not include the amounts of service tax reimbursed to them by the ONGC in their gross revenues for computing their income. The assessing authority included the said amount in the assessees' gross receipts and subjected it to tax under Section 44BB of the Act. The matter was challenged before the Hon'ble High Court, where the court did not accept the contentions of the Assessing Authority. As per the court, service tax is a tax levied on provision of services and cannot be treated as a part of the consideration for the service itself. Further, it is not the case that every amount paid on account of provision of services and facilities must be deemed to be the income of the assessee under Section 44BB. Only such amounts which are paid to the assessee on account of the services and facilities provided by them would be deemed to be the income of the assessee. The court further added that on a plain and literal reading of clauses (a) and (b) of Section 44BB of the Act, it was clear that reimbursement of service tax ought not to be included in the aggregate of the amounts specified in clauses (a) and (b) of Section 44BB(2), as it was not an amount received by the assessee on account of services provided by them.

Personal Information Exemption from RTI not Available to Corporate Entities

The Hon'ble Central Information Commission ("**Commission** ") in the case of ***Mr. Subramanian K Ansari vs. CPIO, Dy. Commissioner of Income Tax*** *[CIC/CCITM/A/2017/182415-BJ decided on 18.04.2019]* has held that an employee is entitled to know, under the under Right to Information Act, 2005 ("**RTI Act**"), about the financial status of the employer-company that has been defaulting in payment of salaries. In the present case, the appellant had sought information from Income tax Department ("**IT Department**") regarding M/s Cambata Aviation Pvt. Ltd. ("**Company**"), its balance sheet and P/L account for the last 10 years, and certified copies of any correspondence the IT Department had received, regarding the closure of the Company, owing to the fact that the Company had deprived salary/wages to more than 2100 employees from 2016 on the pretext of extreme financial hardships and had wilfully defaulted in payment of statutory dues of Provident Fund/Life Insurance Corporation/Employee State Insurance Cor-

poration and Credit Society, etc. The Public Information Officer denied the disclosure of the information citing Section 8(1)(j) of the RTI Act, which exempts disclosure of personal information. The appellant approached the Commission, contending that the information sought was incorrectly denied to appellant without considering the larger public interest. The Commission held that the exemption of 'personal information' under Section 8 (1)(j) was not applicable to corporate entities. The Commission also noted that the information was being sought by the appellant for the larger public interest of the employees of the Company. Hence, the disclosure of the information sought was justified by the larger public interest, especially in the wake of the turmoil and hardships faced by the employees of civil aviation giants like Kingfisher Airlines and Jet Airways. Following the decision of the Hon'ble Delhi High Court in ***Naresh Kumar Trehan vs. Rakesh Kumar Gupta*** *[216 (2015) DLT 156],* the Commission observed that the expression 'personal information' under Section 8(1) (j) of the RTI Act, should be construed as information relating to an individual and not a corporate entity.

RIGHT TO INFORMATION

Amendment in Form 16: TDS Certificate issued by Employer to Employee

In exercise of powers conferred by sections 200 and 203 read with section 295 of the Income tax Act, 1961, the CBDT via notification no. 36/2019 dated 12th April 2019 has amended Form 16 (the TDS Certificate issued by Employer to his employee). In new form, "Notes" occurring after "Part A" shall be omitted now. Further, "Part B (Annexure)" will require a detailed break up of tax-exempt allowances paid to the employee and all section-wise tax deductions claimed by the employee. The earlier format allowed companies to give consolidated figures or break-up in different formats -, thereby leaving some ambiguity regarding their individual composition. The new format in Part B lists details of: (a) Detailed breakup of salary of employee (b) Detailed breakup of exempted allowances under section 10 (c) Details regarding deductions allowed under the income tax act (under chapter VIA) (d) Deduction under any other provision of Chapter VI-A (other than mentioned above) must be mentioned quoting the respective section. (e) Amount of relief under section 89 along with the details. (f) Details of Rebate and Surcharge, if applicable must be reported. Further, similar changes in line of amended form 16 have also been made in the format of the TDS return i.e. Form 24Q filed by employers, to allow the department to cross check an employee's ITR, Form 16 and the company's TDS return so as to ultimately put a check on tax evasion and create more transparency in the overall tax collection mechanism.

Dynamic Injunction for Protection of Intellectual Property Rights

In ***UTV Software Communications Limited and Ors. vs. 1337x.to and Ors. [****(CS(COMM) 724/2017 & I.As. 12269/2017, 12271/2017, 6985/2018, 8949/2018 and 16781/2018]*, decided on 10.04.2019), the plaintiffs were companies, engaged in the business of creating, producing and distributing cinematographic films and the defendants, *inter alia*, thirty (30) websites which provided unauthorized access to plaintiff's copyrighted works, thereby violating the plaintiff's rights under the Indian Copyright Act, 1957. The Hon'ble Delhi High Court, in its judgement, in order to provide relief to the plaintiff, has crafted the new remedy of '**dynamic injunction'**. Under a dynamic injunction, the rights-holders i.e. the plaintiff do not need to go through the cumbersome process of a judicial order in order to extend an injunction order already granted against a website, for blocking a similar '*mirror/redirect/alphanumeric*' website which contains the same con-

tent as the original website against which the injunction was issued. Instead, the plaintiffs can approach the Joint Registrar of the Hon'ble Delhi High Court for seeking such an extension of injunction on such similar '*mirror/redirect/ alphanumeric*' website. In addition to the aforesaid, on the issue that whether an infringer of copyright on the internet has to be treated differently from an infringer in the physical world, the Hon'ble High Court has ruled that "*there is no logical reason why a crime in the physical world is not a crime in the digital world especially when the Copyright Act does not make any such distinction.*"

Validity of Reopening Notice u/s 148 if Information/Material was already available with the AO

The Bombay High Court ("**Court**") in the case of ***Rajbhushan Omprakash Dixit V. Deputy Commissioner of Income Tax, Mumbai*** *[WP No. 3546 of 2018 decided on 05.04.2019],* held that reopening notice beyond the period of 4 years from the end of the relevant assessment year can only be issued if an assessee has not fully and truly disclosed the material facts. If the AO had the information during the assessment proceeding, irrespective of the source, but chooses not to utilize it, he cannot allege that the assessee failed to disclose truly and fully all material facts & reopen the assessment after issuing reopening notice u/s 148 of the Act. The fact that the assessee did not disclose the material is not relevant if the AO was otherwise aware of it. The facts in this case were that the Petitioner was subject to search and seizure action u/s 132(1) of the Income-tax Act, 1961 ("**Act**"). Subsequent to the search, the Petitioner filed his return of income which was accepted by the AO and assessment in his case was completed under the provisions of Section 153A r.w. 143(3) of the Act. Thereafter, the AO issued notice u/s 148 of the Act by recording the requisite reasons. The documents as referred to in the reasons recorded were those documents which were seized during the course of search proceedings and were already available with the AO at the time of assessment u/s 153A r.w. 143(3) of the Act. The Petitioner filed objections to the notice of reopening of assessment by contending that as the documents which have been used for reopening the case u/s 148 were already available with the AO at the time of assessment u/s 153A r.w. 143(3) of the Act, reopening the case u/s 148 is only difference of opinion and change of view. The AO rejected the objections of the Petitioner vide an order contending that the AO did not form opinion on this issue and thus there is no question of difference of opinion and change of view. Thereafter, the Petitioner filed this Petition before the Court to challenge the notice of reopening of assessment. After considering the facts on record and the reasons recorded, the Hon'ble Court held that when we are examining the validity of the notice of reopening issued beyond the period of 4 years from the end of relevant assessment year, the question of lack of true and full disclosure by the Assessee becomes relevant. In this context, once the Department i.e. the AO had certain information, material, or document before him during the assessment proceeding, irrespective of the source of such information, material, or document, the Assessee cannot be blamed for non-disclosure thereof. If the AO did not, for some reason, advert to such material or did not utilize the same, he surely cannot allege that the Assessee failed to disclose truly and fully all material facts.

KEY TAKE AWAYS

- The CBIC vide **Circular No. 98/17/2019** dated 23.04.2019, has now clarified that the taxpayers can utilize excess credit of IGST towards payment of CGST and SGST in any sequence and proportion provided that IGST liability is fully discharged first.
- The CBIC vide **Circular No. 22/2019** dated 23.04.2019, has made Rule 138E of CGST Rules effective from 21.06.2019 thus the taxpayers who could not furnish their GST returns for two consecutive tax periods can file them before such date.
- The Supreme Court in ***JK Jute Mill Mazdoor Morcha vs. Juggilal Kamlapat Jute Mills Company Ltd. through its Director Ors.*** *[Civil Appeal No. 20978 of 2017 vide order dated 30.04.2019]* has held that a Registered Trade Union can file Insolvency Petition as operational creditor on behalf of its members and registered Trade Unions, would thus fall within the definition of 'person' under Sections 3(23) of the Code.
- The Supreme Court in ***Dharani Sugars & Chemicals Ltd. vs. Union of India*** *[Writ Petition (CIVIL) No.1206 OF 2018 vide order dated 02.04.2019]* has held that authorization from Central Government is necessary for RBI to direct insolvency process against stressed assets after the insertion of Section 35AA in 2017 with a specific condition of authorization from central government, recourse cannot be made to general powers under Section 35A for issuing directions to take insolvency action in respect of bad debts by RBI.
- The Supreme Court in ***Bharat Broadband Network Ltd. vs. United Telecoms Limited*** *[Civil Appeal No.3973 OF 2019 decided on 16.04.2019]* has held that the appointment of arbitrator by a person who himself is ineligible to be an arbitrator as per Section 12(5) of the Arbitration and Conciliation Act 1996 is *void ab initio.*
- The Supreme Court in ***Nagar Ayukt Nagar Nigam, Kanpur vs. Sri. Mujib Ullah Khan*** *[Civil Appeal No. 2628 of 2017 decided on 02.04.2019]* has held that employees of 'Local Bodies' like Municipalities are entitled to gratuity under Payment Of Gratuity Act.
- CBDT has notified a new format for Form 16 (The Salary TDS Certificate), which will allow the tax department to view a detailed break-up of the income and tax breaks claimed by a salaried person. Also, the employer will have to specify the nature of tax-exempt allowances paid to the employee.
- Recently, a committee was formed to examine the existing scheme of profit attribution to Permanent Establishments under Article 7 of Double Tax Avoidance Agreements and recommend changes in Rule 10 of the Income Tax Rules, this was done to bring greater clarity and predictability in the existing tax regime. Now, the committee has submitted its report and the CBDT has decided to seek stakeholders' and general public's comment on the report of the committee. Comments need to be sent at usfttr-1@gov.in (in word format only) within 30 days of the publication on the website of Income Tax Department.
- A Mumbai bench of Income Tax Appellate Tribunal, in the case of ***Assistant Commissioner of Income vs Keyur Hemant Shah, Mumbai*** *[ITA No.6710/Mum/2017 decided on 02.04.2019]* recently held that that the date of allotment of a house shall be treated as the date of acquisition. The holding period will be counted from this date and not from the date of registration.

KNOWLEDGE CENTRE

Multiple Choice Questions on GST

1. **The decision of the GST Council should be taken based on majority voter not less than:**
   a. 1/2 of the weighted votes
   b. 2/3rd of the weighted votes
   c. 1/3rd of the votes
   d. 3/4th of the weighted votes

2. **What percentage of outstanding voting stock or shares or both of a person if directly or indirectly owned, controlled or held by another person makes them related persons?**
   a. 25%
   b. 20%
   c. 50%
   d. 51%

3. **Temporary transfer or permitting the use or enjoyment of any intellectual property right is.**
   a. Supply of goods
   b. Neither as a supply of goods nor a supply of services
   c. Supply of services
   d. Either as a supply of goods or as a supply of services.

4. **Who is not eligible to opt for composition scheme?**
   a. Cotton Manufacturer
   b. Ice cream Manufacturer
   c. Restaurant service provider
   d. Ice cream trader

5. **In which case shall the requirement of TDS not be applicable?**
   a. Where total value of taxable supply is equal to or less than Rs. 2.5 Lakhs under a contract.
   b. Where the payment relates to a tax invoice that has been issued before 01.10.2018.
   c. Where the payment is made to an unregistered supplier.
   d. All of the above

6. **When an e-commerce operator is required to register under GST?**
   a. When he is required to collect tax at source under section 52
   b. When his aggregate turnover exceeds the threshold limit
   c. When he is required to discharge tax on the taxable supplies made by the supplier through him under section 9(5)
   d. It is mandatory to register irrespective of the threshold limit.

7. **An appeal from any advance ruling has to be made within what duration from the date on which the order is communicated to the Appellant?**
   a. 30 days
   b. 60 days
   c. 3 months
   d. 45 days

8. **Who is authorized to conduct the audit including books of accounts under section 66?**
   a. Chartered or cost accountant as may be nominated by the commissioner
   b. Chartered or cost accountant as may be nominated by the assistant commissioner
   c. (a) or (b)
   d. Chartered or cost accountant as may be nominated by the additional Director

9. **The time limit to pay the value of supply with taxes to avail the input tax credit is?**
   a. 90 days from the date of invoice
   b. 30 days from the date of invoice
   c. 180 days from the date of invoice
   d. Till the date of filling of annual return

10. **Unadjusted ITC credit at the & of a financial year is carried forwarded to next financial year except in the case of**
    a. Zero–rated supply
    b. Both (a) & (b) above
    c. Inverted tax structure
    d. All ITC is carried forward without any refund

Questions	1	2	3	4	5	6	7	8	9	10
Answers	D	A	C	B	D	D	A	A	C	B

EDITORIAL

THE BANNING OF UNREGULATED DEPOSIT SCHEMES ORDINANCE, 2019; THE MAJOR CONTROVERSY

-By CA Abhishek Pandya

On 21st February 2019, the Government by way of President's assent passed an Ordinance naming it as "**THE BANNING OF UNREGULATED DEPOSIT SCHEMES ORDINANCE, 2019**" (hereinafter referred to as '**Ordinance**'). As per the preamble of the notification, the said Ordinance is to cover two aspects. Firstly, to provide for a comprehensive mechanism to ban the unregulated deposit schemes (hereinafter referred to as '**UDS**') and secondly, to protect the interest of depositors and for the matters connected therewith or incidental thereto. The second objective being very broad in nature and reading it in line of the definition of UDS as per Section 2(17) and other provisions of the ordinance, created a havoc in the entire financial as well as the business sector of the country as the UDS was banned with immediate effect. Before considering the major point of controversy, one needs to consider few other aspects of the ordinance as discussed below. The first point to be noted is that, the same was passed as an Ordinance and not as a proper act passed by both the houses of parliament. The first question that ponders upon is why the said law was promulgated as an ordinance? To answer this one has to refer to the Constitution of India. Under the Constitution, the power to make laws rests with the legislature. However, in cases when Parliament is not in session, and 'immediate action' is needed, the President can issue an ordinance under Article 123. An ordinance is a law and can introduce legislative changes. The promulgation of an ordinance is not necessarily connected with an 'emergency' but issued by the president in case he is convinced that it is not possible to have the parliament enact on same subject immediately and the circumstance render it necessary for him to take "immediate action". However, such an ordinance must receive parliamentary approval within six weeks of the next session of the parliament, otherwise it shall become invalid.

Background and History

Now, comes the second question. What was the situation that needed immediate action? To answer this question, one needs to dwell upon the legislative history of the ordinance. The said ordinance before being promulgated as an ordinance of 2019 was introduced in Lok Sabha in 2018 as "The Banning Of Unregulated Deposit Schemes Bill, 2018" based on the recommendations of the **21st Report of Standing Committee on Finance** which discussed representations received from various regulatory authorities and stakeholders on the following aspects i) Collection of monies , ii) Acceptance of deposits by the financial institutions, iii) Regulation of chit funds iv) Ponzi schemes v) Collective investment schemes vi) Direct selling schemes etc. The committee after hearing representations from various stakeholders realized that there are various laws in India which regulate the entire financial sector in India. A few to name are i) Prize Chits and Money Circulation Scheme (Banning) Act 1978, ii) Chit Funds Act 1982 iii) SEBI Act, iv) Companies Act 2013 v) RBI Act vi) Multi State Cooperative Society Act 2002 vii) National Housing Bank Act 1987 etc. The committee noted that with various laws come various regulators, thus, resulting into conflicts of who shall administer the particular scheme or arrangement carried on by an entity. The committee also noted that there are loopholes in various definitions of various laws which a common man tries to exploit to the disadvantage of the large chunk of financial illiterate persons in the country and ultimately results into Ponzi schemes and scams (such as Saradha Scam in West Bengal) and large number of investors losing their hard earned savings. Thus, the committee recommended in public interest a common law for the protection of investors in the entire country and a comprehensive ban on unregulated deposit schemes which forms the basis of the bill of 2018. Since, the Bill of 2018 could not be passed in both the houses of parliament due to procedural delays, thus, the president considering the public interest

at large passed the same as an Ordinance as an immediate action. Now, comes the third question. What is an unregulated deposit scheme that has been banned under the ordinance with immediate effect? Before understanding the definition of UDS, one shall refer to Section 3 of the ordinance which says that '*the UDS shall be banned; and no deposit taker shall, directly or indirectly, promote, operate, issue any advertisement soliciting participation or enrolment in or accept deposits in pursuance of an UDS'*. Thus, what has been banned is what has been defined as an UDS as per Section 2(17) of the ordinance and the same has been discussed below.

Unregulated Deposit Scheme: '*It means a **scheme or an arrangement** under which **deposits** are accepted or solicited by any deposit taker **by way of business** and which is not a Regulated Deposit Scheme, as specified under column (3) of the First Schedule*'

Scheme or Arrangement?

The words 'schemes' or 'an arrangement' have not been defined under the ordinance and the meaning of same have to be inferred from various dictionaries. The word **Scheme** has been defined in Black's Law dictionary as follows "*A design or plan formed to accomplish some purpose ; a system* and the word 'Arrangement' has been defined in The Lax Lexicon as " *The word 'arrangement' is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons ; Word 'Arrangement' implies some idea of give and take* ". Thus, it can be inferred that the word 'arrangement' covers a wide range of transaction between two or more persons and is very broad in nature.

The Major Controversy – By way of Business vs Deposits

The words 'By way of business' are also not defined under the ordinance and the major controversy that arose in the economy was whether the UDS covers all sorts of deposits as defined under the ordinance (i.e. to say deposits accepted by a small businessman from his relative or unrelated parties in his regular course of other business) or whether the words 'by way of business' as coined in the definition have some significance. One view that cropped up in the market was that only those deposits that were accepted as by way of business were only covered under definition of UDS i.e. deposits accepted as a business to advance loans is only covered under UDS and the deposits accepted by a businessman from his relative or unrelated parties in his regular course of business i.e. for the purpose of business is not covered. The other contrary view, countered the argument of the first, saying that had the intention of legislature was only to ban deposits accepted by way of business, then what was the purpose of specific exclusions mentioned in the definition of deposits as defined under Section 2(4) and particularly the clause L exclusion that specifically relates to business. Department of Financial Service intervened in the controversy and clarified by way of Tweets that "*Banning of Unregulated Deposit Ordinance-2019, exempts Individual, Firm, Companies & LLP etc. for taking any loan and deposit for their course of business as per section 2(4) e,f,l and other provisions*."

Considering the background and history of the ordinance, in my opinion the intention of the legislature was to ban the practice of acceptance of deposits as a business and put a comprehensive check on the promoters of such unregulated schemes or arrangements. However, the way the ordinance has been promulgated, one can say that the same has not been happily drafted and has farfetched implications. Even the clarification issued by DFS relates to the exclusion portion of definition of 'Deposits' and no way clarifies the words 'By way of business' as mentioned in definition of UDS. In my view, the controversy still persists and a better clarification shall be required from the Government on the issue whether the definition of UDS covers only deposits by way of business or whether the same also covers deposits accepted for the purpose of business?

Chir Amlit 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