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THE NEWSLETTER

UPDATE YOURSELF

No Moratorium for Personal Guarantors u/s 14 of the Insolvency and Bankruptcy Code, 2016

The Hon'ble Supreme Court of India ("**Court**") in the case of ***State of Bank of India vs. Ramakrishnan & Anr [Civil Appeal No. 3595 of 2018, decided on 14.08.2018]*** held that the period of moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") would not apply to the personal guarantors of a corporate debtor. In the instant case, Respondent signed a personal guarantee in favour of State Bank of India ("**Bank**") with respect to certain credit facilities availed by Veesons Energy Systems Private Limited ("**Veesons**"). Veesons, however, failed to pay its debts in time, pursuant to which the Bank initiated proceedings against Veesons under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**Sarfaesi Act**"). Meanwhile, an application was filed by Veesons under Section 10 of the Code for the initiation of voluntary corporate insolvency resolution proceedings ("**CIRP**"). This application was admitted, following which a period of moratorium under Section 14 of the Code was imposed. During the pendency of the CIRP, an interim application was also filed by the Respondent, wherein it was argued that Section 14 of the Code would also apply to the personal guarantors of a corporate debtor and therefore, any proceedings against him and his property would have to be stayed. The Hon'ble National Company Law Tribunal ("**NCLT**") allowing the application, restrained the Bank from moving against the Respondent until the period of moratorium was over. An appeal was preferred by the Bank before the Hon'ble National Company Law Appellate Tribunal ("**NCLAT**"), which refused to interfere with the NCLT's order. The order of the NCLAT was challenged by the Bank before the Court. While the appeal filed by the Bank was pending, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 ("**Ordinance**") was promulgated in June 2018. By this amendment, Section 14(3) of the Code was substituted to read that Section 14(1) would not apply to a surety in a contract of guarantee to a corporate debtor. The Court noted that the said amendment being clarificatory in nature would have a retrospective effect. The Court also observed that Section 14 of the Code did not make any reference to personal guarantors and it was only the corporate debtor, which was referred to therein. Thus, it can be concluded that the period of moratorium would have no application to the personal guarantors of a corporate debtor.

No Work No Pay Policy to be Implemented in the State of Uttrakhand

The Division Bench of the Hon'ble High Court of Uttarakhand ("**Court**") presided over by Hon'ble Acting Chief Justice Rajiv Sharma and Hon'ble Justice Manoj Tiwari

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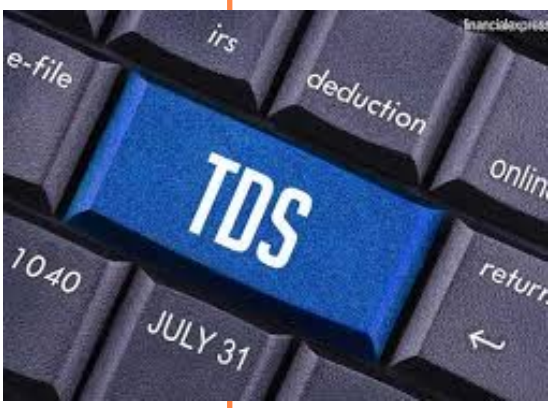
in the matter of ***Prevention of Recurrent Strikes Organized by various Government/ Non-Government Unions/Organizations vs. State of Uttarakhand and Anr. [W. P. (PIL) No. 115/2018, decided on 29.08.2018]***, passed certain directions with respect to unwarranted strikes by employees of the state of Uttarakhand. The Court, while taking suo moto cognizance of a letter highlighting the tendency of the employees of the state to resort to strikes without any genuine cause took a tough stance against the indiscriminate strikes in the state and directed the State Government to prohibit such strikes in certain departments like education, public health, transportation services public works department, irrigation and revenue. The Court while referring to the Uttar Pradesh (Recognition of Service Association) Rules, 1979 observed that since the employees of the state have been given the right to form federation and confederations, they also have a corresponding duty to maintain the essential services to general public. Attention of the Court was also drawn towards Uttar Pradesh Essential Services Maintenance Act, 1966 whereby a duty has been casted over the State Government to ensure that the state employees and employees that of the PSUs owned and controlled by the State Government do not go on any indiscriminate strike while disturbing calmness and peace within the state. The Court while observing the aforesaid rules and regulations, passed necessary directions to the state that in case if the unwarranted and unjustified strikes do not come to a halt, the state may also consider implementing *"No work, No pay Policy"* in all its departments and further suggested the State Government to withdraw recognition of those service associations which resort to illegal strikes.

Payment to be Grossed Up u/s 195A for TDS Purpose

In the case of ***TVS Motor Co. Ltd. Vs. Income Tax Officer [[2018] 96 taxmann.com 567 (Madras-HC), decided on 24.08.2018]***, the question of law before the Hon'ble High Court of Madras ("***Court***") was where resident assessee company ("***assessee***") had entered into an agreement with a foreign university for providing technical services, for which it agreed to bear Indian taxes, whether grossing up is required to be done or not to arrive at an amount on which tax is to be deducted at source by it. The brief facts of the case are that the assessee entered into an agreement with the University of Warwick, UK ("***University***") for providing technical services. As per the said agreement, any taxes on the payment made to the University, will be borne by the assessee. The assessee paid taxes at the rate of 15% on the amount paid to the University, by adopting the provisions of the Double Taxation Avoidance Agreement between India and UK ("***DTAA***"). During assessment proceedings, the Assessing Officer held that as per Section 195A of the Income Tax Act, 1961 ("***Act***"), where tax chargeable on any income is borne by the person by whom income is payable, then for the purpose of deduction of tax on such income, it should be increased to such amount as it could be equal to the net amount payable. It was pointed out that the assessee had made remittance without grossing up therefore, it was held that there was short deduction of tax and as per Section 201(1) of the Act, the assessee shall be deemed to be assessee in default. Later, the matter went into litigation and now the matter lies before the Court. After hearing both the parties, the Court observed that taxes which have been borne by the assessee, is also income of the University and since such income is covered by the expression 'gross amount', as mentioned in the treaty, the Revenue was justified in grossing up by applying the provisions of Section 195A of the Act. Thus, the contention advanced by the assessee that, no grossing up is provided under DTAA and therefore, it was liable to pay tax at the



rate of 15% on the amounts specified in the agreement only, was rejected by the Court.

Changes in Procedure of Private Placement of Securities under Companies Act, 2013

Private placement is recognised as painless and effective tool for the companies to raise money easily from different persons in lieu of issue of securities. The Companies Amendment Act, 2017 ("**Amendment Act**") had proposed to introduce a whole new Section 42 of the Companies Act, 2013 ("**Act**") in regarding private placement of securities of by a company in substitution of old Section 42. Thereafter, the Ministry of Corporate Affairs ("**MCA**") *vide* its notification no. S.O. 3921(E) dated 07.08.2018 has notified new Section 42 of the Amendment Act in substitution of old Section 42 of the Act. Additionally, to bring an overall clear picture in new procedure of private placement, MCA has notified new Rule 14 of the of Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2018, in the place of old Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014. Subsequently to the notification of new Section 42 and new Rule 14, following major changes have been brought in private placement procedure:

1. As per old Rule 14, for issuance of non-convertible debentures ("**NCDs**"), a company was required to pass a single special resolution for the whole year. However, as per new Rule 14, now a special resolution is required to be passed only when the limit of issue of NCDs exceeds the limit given under Section 180(1)(c) of the Act, otherwise a board resolution is sufficient.
2. Earlier there was no requirement to file any resolution before circulation of approved offer letter (Form PAS-4) to the allottees. Conversely, as per new Rule 14, a company can circulate the approved offer letter (Form PAS-4), once it has filed board resolution or special resolution with registrar of companies in which such offer letter (Form PAS-4) has been approved.
3. Pursuant to new Rule 14, the offer letter is required to circulate within 30 days of recording the name of such allottee, whereas, no such requirement was there in old Rule 14.
4. As per old Section 42, a company was authorized to use the security/share application money without filing return of allotment (Form PAS-3) with effect from the allotment of securities. However, as per new Section 42, a company cannot use security/share application money without filing return of allotment (Form PAS-3).
5. Under new Section 42, the period of filing return of allotment (Form PAS-3) has been brought down to 15 days of allotment of securities from 30 days of allotment of securities.
6. The minimum invitation per allottee of Rs. 20,000/- of face value of securities has been deleted under new Rule 14.
7. Earlier it was not allowed to make more than one private placement offer at one point of time. However, as per new Section 42 and Rule 14, a company may make two private placements offer simultaneously provided that such offer can be made the persons who are already identified by the company.

Accordingly, a company has to keep in its mind the abovementioned major changes while issuing securities through private placement procedure, otherwise non-compliance of the same attracts the penal liability mentioned in new Section 42 of the Act.

Amendments in CGST Act

After almost an year of passing of GST laws (CGST Act, IGST Act and respective SGST Act), the Central Government has came up with amendment in CGST Act and IGST Act. The said Amendments will be effective on such date as the Central Government may appoint by notification in the Official Gazette. Here is insight into the amendments under CGST Act :-

- S. 2 (102) of CGST Act: Prior to amendment the definition of term 'services' excluded securities and there were views that the transactions related to securities were also deemed to be excluded. Now, by way of inserting an explanation, it has been clarified that expression 'services' includes facilitating or arranging transactions in securities. Thus, although 'securities' has been excluded from the definition of 'goods' and 'services' in the CGST Act, facilitating or arranging transactions in securities is liable to GST.

- S. 7 of CGST Act: Prior to amendment the scope of the term 'supply' included the activities referred to in Schedule II to be treated as supply of goods or supply of services under clause (d) of sub-section (1). This lead to a situation where an activity listed in Schedule II would be deemed to be a supply even if it does not constitute a supply as per clauses (a), (b) and (c) of sub-section (1). Now, the said clause (d) has been omitted and a new sub-section (1A) has been inserted. As an effect, first the activities should qualify the definition of 'supply' as per sub-section (1) and then be treated as either supply of goods or supply of services as per Schedule II. Thus, the ambiguity which was previously prevailing is now removed.
- S.10 of CGST Act: Prior to amendment the person engaged in the supply of services other than restaurant services could not opt for Composition scheme. Now, new proviso is inserted whereby the Composition dealer is allowed to make supply of services of value not exceeding 10% of turnover in a State or Union territory in the preceding financial year or 5 lakh rupees, whichever is higher. Also, the threshold limit for Composition Scheme has been increased from Rs 1 Crore to Rs 1.5 Crore under the CGST Act.
- S.17(5)(a) of CGST Act: Prior to amendment – ITC is blocked for all motor vehicles and conveyances except when used for specified purposes such as (a) further supply of such vehicles or conveyances; (b) transportation of passengers; (c) imparting training on driving, flying, navigating such vehicles or conveyances and (d) for transportation of goods. Now, scope of ITC has been increased as ITC can be availed on motor vehicles, having seating capacity of more than 13 persons (including driver), when used for transportation of persons. If seating capacity (including driver) is less than 13 persons, ITC can be availed when motor vehicle is used for specified purposes. The amendment is sought to make it clear that input tax credit would now be available in respect of dumpers, work-trucks, fork-lift trucks and other special purpose motor vehicles.
- S.17(5) (aa) of CGST Act: New clause inserted: ITC is blocked in respect of vessels and aircraft except when they are used for specified purposes such as (a) further supply of such vessels or aircraft; (b) transportation of passengers; (c) imparting training on navigating such vessels; (d) imparting training on flying such aircraft and (e) for transportation of goods.
- S.17(5) (ab) of CGST Act: New clause inserted: If ITC is blocked in respect of motor vehicles, vessels and aircraft referred to in clause (a) or clause (aa) then ITC of GST paid on services of general insurance, servicing, repair and maintenance in respect of said motor vehicle, vessel and aircraft is also blocked except in below two situations- (i) If the said services are received by a taxable person engaged in the manufacture of such motor vehicles, vessels or aircraft; (ii) If the said services are received by a taxable person engaged in the supply of general insurance services

in respect of such motor vehicles, vessels or aircraft insured by him.

- S.17(5)(b) of CGST Act: Prior to amendment: (i) ITC on rent-a-cab service is blocked except in certain situation. (ii) ITC on service of rent-a-cab, life insurance and health insurance is available if the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force. Now, the word 'rent-a-cab' has been omitted and after amendment ITC is blocked for GST paid on leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (*a*) or clause (*aa*) except when used for the purposes specified therein. Thus, the credit is specifically blocked on leasing, renting or hiring of motor vehicles, vessels or aircraft instead of only rent-a-cab. (ii) The requirement of Government notification is done away with and scope of ITC has been extended in respect of all goods or services or both referred in clause (b) of Section 17(5), where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.
- S.24 of CGST Act: Prior to amendment, every Electronic Commerce Operator was required to take compulsory registration. Now, every Electronic Commerce Operator who is required to collect tax at source under section 52 is required to take compulsory registration.
- S.25 of CGST Act: Prior to amendment: (i) SEZ unit within a State or Union territory is registered under same GSTIN as per the CGST Act but CGST Rules provide for separate registration. (ii) A person can apply for separate registration only for different business verticals within the State or Union territory. Now, new proviso inserted under sub-section (1) whereby any person having unit in Special Economic Zone or being a Special Economic Zone Developer have to apply for separate registration, as distinct from his place of business located outside the SEZ in the same State or Union territory. Thus, the provision regarding separate registration is specifically provided in the CGST Act itself. (ii) Definition of 'business verticals' is omitted and a proviso is substituted to provide separate registration for multiple places of business in a State or Union territory.
- S.140 of the CGST Act: Prior to amendment, the said section specifies that the registered person shall be entitled to carry forward the balance of the CENVAT credit. Thus, as per the said language, the Assessee were claiming that they can carry forward the credit of EC, SHEC and KKC as the same falls in the definition of CENVAT credit. Now, after amendment it has been specified that the Assessee is entitled to claim only CENVAT credit of eligible duties. The 'eligible duties' are defined under Explanation 1 which does not include service tax. This has brought new ambiguity into the GST law. Also, now the Assessee cannot carry forward credit of EC, SHEC and KKC.
- Schedule III of CGST Act: Prior to the amendment there was ambiguity in respect of levy of GST on High Sea Sales and sale of warehoused goods and CBEC issued various circular in this respect. It was observed that in case of supply of goods as high seas sales and sale of warehoused goods, before being cleared for home consumption, IGST was being levied twice: once on supply before clearance for home consumption under the IGST Act and second time under the Customs Tariff Act, 1975 (read with the IGST Act) at the time of clearance for home consumption. Now, after amendment, two new entries have been inserted in the Schedule III. Thus, following transactions will neither be considered as supply of goods nor supply of services, and thus GST will not be leviable on the same: (i) Transaction, which involve movement of goods, caused by a registered person, from one non-taxable territory to another non-taxable territory. (ii) Supply of warehoused goods or High sea sales to any person before clearance for home consumption so that there is no double taxation in such transactions.

QUICK TAKEAWAYS

- In the case of **Income Tax Officer *v.* Sky View Consultants (P.) Ltd. [2018] 96 taxmann.com 424 (SC) dated 17.08.2018,** the Hon'ble Supreme Court held that tax evasion petitions received for previous years could not have formed basis for reopening of assessment for relevant assessment year, as Assessing Officer had not referred to the orders passed at time of recording reasons for reopening assessment for current year.
- In the case of **Commissioner of Income Tax *v.* Classic Binding Industries [2018] 96 taxmann.com 405 (SC) dated 20.08.2018,** the Hon'ble Supreme Court held that where assessee had availed deduction under Section 80-IC of the Act for a period of 5 years at rate of 100 per cent then he would be entitled to deduction on substantial expansion for remaining 5 assessment years at rate of 25 per cent (or 30 per cent where assessee is a company), as the case may be, and not at rate of 100 per cent.
- In the case of **Commissioner of Income Tax *v.* Hapur Pilkhuwa Development Authority [2018] 97 taxmann.com 23 (SC) dated 27.08.2018,** the Hon'ble Supreme Court held that where there is an inadequate explanation for delay of 596 days in filing Special Leave Petition and a misleading statement about pendency of a similar civil appeal was filed, petition should be dismissed and penalty of Rs. 10 lacs is to be paid to Supreme Court Legal Services Committee.
- In the case of **Union of India v. Dr. L. Subramanian [2018] 96 taxmann.com 386 (Madras) dated 06.08.2018**, the Hon'ble High Court of Madras held that in case of settlement, there is no case for waiver of interest leviable under section 234B of the Income Tax Act, 1961 ("***Act***"). The said interest shall be charged up to date of order under Section 245D(4) of the Act.
- The benefit of deeming provision in case of bill-to, ship-to model for availing ITC u/s 16(b) of the CGST Act has been extended for services also.
- The provision of reverse charge u/s 9(4) of the CGST Act was applicable in case of supply by unregistered person to registered person, which was deferred till 30.09.2019. Now, the amended Section 9(4) provides that such provisions shall be applicable in case of supply by unregistered persons to notified registered persons in respect of specified goods or services only.
- The threshold exemption limit for registration under CGST Act has been increased from Rs 10 lakh to Rs 20 lakh for a supplier making taxable supplies of goods or services from 6 specified states, namely Arunachal Pradesh, Assam, Himachal Pradesh, Meghalaya, Sikkim and Uttarakhand.
- Changes in cross utilisation of ITC have been made by inserting proviso under Section 49(5) of the CGST Act to provide that the credit of input SGST or input UTGST can be utilised for payment of Output IGST, only if balance of Input CGST is not available for payment of Output IGST. This amendment has been made to bring the law in sync with the GST portal.
- New Section 49A is inserted in the CGST Act for providing that first the credit available on account of IGST shall be utilized fully towards payment of any tax and then the other credits shall be used.
- The time period under Section 129 of the CGST Act for payment of tax and penalty for release of seized goods and deemed conclusion of proceedings has been increased from 7 days to 14 days from the date of seizure of goods.
- The explanation under Section 54 of the CGST Act has been amended to provide that the payment for export of services can be received in Indian rupees wherever permitted by the Reserve Bank of India. Earlier, such payment had to be received in convertible foreign exchange only.
- Place of supply in case of transportation of goods from a place in India to a place outside India by a transporter located in India would not be chargeable to GST, as place of supply will be outside India. This is done in order to In order to provide a level playing field to the domestic transportation companies and promote export of goods.

KNOWLEDGE CENTRE

MCQs on Insolvency and Bankruptcy Code, 2016 ("IBC")

Q1: Person against whom proceedings under IBC cannot be initiated?

a. Company
b. Limited liability partnership
c. Individual
d. Banking companies

Q2: What kind of debt is covered in IBC?

a. Financial debt
b. Operational debt
c. Both (a) and (b) above
d. None of the above

Q3: What is the minimum default amount to initiate proceedings against corporate debtor?

a. Rs. 1000/-
b. Rs. 1,00,000/-
c. Rs. 10,000/-
d. Rs. 5,00,000/-

Q4: What is the meaning of corporate debtor under IBC?

a. Company only
b. Limited liability partnership only
c. Both (a) and (b) above
d. Corporate person owning debt to any person

Q5: Who is the adjudicating authority for corporate debtor under IBC?

a. High court
b. Company law board
c. National company law tribunal
d. None of the above

Q6: Who can initiate proceedings against corporate debtor?

a. Financial creditor
b. Operational creditor
c. Corporate debtor itself
d. All of the above

Q7: Time in which adjudicating authority may admit/ reject the application of corporate insolvency resolution proceedings ("CIRP")?

a. 10 days of receipt of application
b. 15 days of receipt of application
c. 14 days of receipt of application
d. 20 days of receipt of application

Q8: What is the time-limit to complete CIRP?

a. 180 days of admission of application
b. 120 days of admission of application
c. 200 days of admission of application
d. 160 days of admission of application

Q9: What is the time period by which completion of CIRP may extend?

a. 90 days
b. 100 days
c. 180 days
d. 120 days

Q10: Who appoints resolution professional?

a. Committee of creditors
b. Shareholders
c. Corporate debtor itself
d. Adjudicating authority

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

EDITORIAL

A Bill to Ensure the Return of the Prodigal Sons?

- By Tanvi Dudeja, Advocate

In the face of dwindling economic stability and its cascading effects, the Parliament has passed the **Fugitive Economic Offenders Bill 2018 ("Bill")** in its efforts to curb the prodigal sons (like the Vijay Mallaya's and the Nirav Modi's) from fleeing the country to avoid prosecution and at the same time guarding their '*proceeds of crime'*.

The authorities appointed for the purposes of Prevention of Money Laundering Act 2002 **("PMLA")** shall exercise the powers under the Bill. The Bill lays down the procedure to be followed by the authorities for getting an individual to be declared as a *'fugitive economic offender'* by the special court **(**designated under PMLA**) ("Special Court")** and the consequences that will follow upon such declaration. However, if, at any point of time in the course of the proceedings prior to declaration, the individual returns to India and submits to the appropriate jurisdictional court, the proceedings initiated under the Bill would cease by law.

An individual may be declared as a '*fugitive economic offender'***("FEO")** by the Special Court upon satisfaction that:

1. a warrant of arrest in relation to an offence listed in the schedule to the Bill, has been issued by any court in India against the individual**;** and
2. the total value involved in such scheduled offence is Rs.100 Crore or more; and
3. the individual has left India to avoid criminal prosecution or refuses to return to India to face criminal prosecution.

Upon declaration as an FEO, the Special Court may order confiscation of the following properties:

1. *'proceeds of crime'* in India or abroad, whether or not such property is owned by the FEO; and
2. any *other* property or benami property in India or abroad, owned by the FEO.

The Bill defines '*proceeds of crime'* to mean any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a schedule offence, or the value of any such property, or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad **("Proceeds of Crime").**

What is interesting is that the properties available for confiscation also include such properties that are not result of Proceeds of Crime but are owned by the FEO i.e. personal properties of the FEO, whether in India or abroad. To illustrate, in case certain Proceeds of Crime are untraceable or cannot be identified or have been parked outside the country, the Special Court may quantify the value of such unavailable property, and against such value, the personal properties of the FEO can be made available for confiscation.

While passing the confiscation order, the Special Court may exempt any property, which is Proceeds of Crime in which any other person (other than the FEO) has an interest, if satisfied that such interest was acquired bona fide and without knowledge of the fact that the property was Proceeds of Crime; however the burden of proof rests on the interested parties to prove that they had no knowledge of such property being acquired through Proceeds of Crime.

The confiscated properties, shall, from the date of confiscation order, vest in the Central Government, free from all encumbrances. The Central Government shall appoint an administrator to receive and manage the confiscated properties in the manner prescribed and the administrator shall be entitled to dispose of the confiscated properties as directed by the Central Government after a period of 90 (Ninety) days from the confiscation order.

In contradistinction to the existing laws dealing with economic offences, the Bill thus endorses non-conviction based confiscation of the properties, to the exclusion of exempted properties.

It is to be noted that there are certain voids in the Bill that need to be addressed/clarified such as the manner in which the administrator shall dispose the confiscated properties. Whereas the secured creditors can seek relief by proving that they have a bona fide interest in the exempted properties and therefore such properties shall not be confiscated; however there is no clarity whether a person, other than a secured creditor viz. operational creditors, unsecured creditors, workmen and employees, having a bona fide claim against the FEO, will be entitled to relief against the sale proceeds of the confiscated properties under the disposal of the administrator. In contrast, the Insolvency and Bankruptcy Code 2016 **("IBC")** specifies that sale proceeds from the property of defaulter will be distributed amongst claimant according to order of priority prescribed.

Further, an important consequence of declaration as an FEO, is that any court or tribunal in India, in any civil proceeding, may disallow the following persons from putting forward or defending any civil claim:

1. an individual declared as an FEO; or
2. any company or limited liability partnership, if the promoter or key managerial personnel or majority shareholder/individual having controlling interest, has been declared as an FEO.

Such bar on civil claims may be argued to infringe upon the constitutional right of a person to access justice duly recognized as part of Article 14 and Article 21of the Constitution and violative of the basic tenets of natural justice. Further, such bar on civil claims may have unintended consequences upon the right of associated/interested persons in the company or the limited liability partnership who will have to bear the brunt of the criminal acts of the FEO without having been an accomplice.

In conclusion, although there are plentiful of laws that deal with economic offences such as PMLA, IBC, the Indian Penal Code and the Code of Criminal Procedure, etc., however such laws are either time consuming or inadequate in case of high value economic offenders fleeing the country to defy the legal process. The Bill, thus, seems to be a step in the right direction to deter the prodigal sons from undermining the rule of law and to ensure their return to the country to face action in accordance with law, although certain clarifications are much awaited to gage the effective implementation of the Bill.

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