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THE NEWSLETTER

UPDATE YOURSELF

Establishments includes Educational Institutions u/s 1(5) of ESI Act, 1948

The Division bench of High Court of Calcutta in ***The Principal Secretary, Department of Labour vs. Om Dayal Educational & Research Society & Ors*** *[A.P.O. No. 47 of 2019]* as decided on 24.12.2019 clarified that organizations and institutions by definition are institutions either of charitable nature or educational institution, which are bound to be employing teachers and staff for imparting education and therefore they fall within the meaning of term "establishment" used under section 1(5) of the Employees' State Insurance Act, 1948 ("**Act**"). The Hon'ble Court upheld the validity of notification issued by the State Government to extend the provisions of the Act to, *inter alia*, educational institutions (including public, private, aided or partially aided) run by individuals, trusts, societies or other organizations. The Hon'ble Court while interpreting the word "establishment" and also "institution" concluded that an establishment is not only a place of business but also includes a wider class entries that can be described as institution and which in turn includes organizations that are religious, charitable or educational in nature. The word 'otherwise' placed in the provision clearly specify that the genus of 'establishments' is not restricted to those organization which are industrial, commercial or agricultural only but also includes organizations which can otherwise fall within the broad definition of the word "establishment or class of establishment"- which, as explained, includes institutions of charitable nature or educational institutions. Hence, the abovementioned judgment clears the path for inclusion of charitable and educational society that runs schools etc. within the purview of the Act which upon notification issued in this regard by the respective state government would be liable of comply with the provisions of the Act.

Interest on refund claimed by deductor on amount erroneously deducted under Income Tax

In the case of ***Universal Cables Ltd vs. CIT*** *[Appeal No. 3826 OF 2012]* before the Supreme Court, the facts were that Assessee erroneously deducted tax at source ("**TDS**") out of interest payments made to the deductee wherein the payment made to the deductee was not liable to TDS under the provisions of the Income Tax Act, 1961 ("**IT Act**"). On objections raised by the deductee, the Assessee requested for the refund of the amount erroneously deducted and paid by it to the government, which was duly granted by the ITO to the assessee. However, no interest was granted to the assessee by ITO on said TDS refund. The appeal in relation to the issue that, whether the Assessee is entitled to receive interest on the TDS amount erroneously deposited by assessee and later refunded by the ITO, travelled before the Hon'ble Supreme Court. In relation to the appeal, the Hon'ble Supreme Court, relied on the judgment of ***Union of India vs. Tata Chemicals Ltd.*** *[(2014) 6 SCC 335]* wherein

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it was observed that, the intention behind section 244-A of the IT Act was that, the assessee is entitled to the interest along with the amount of refund as awarded by the department; as awarding of interest is a kind of compensation given by the department for use and retention of the money collected by it without any authorization. Accordingly, when the collection is illegal & amount is refunded, it should carry interest in the matter of course. Thus, on the basis of the said observations, the Hon'ble Supreme Court held in the present case, that there was no reason to deny payment of interest to the deductor who had deducted TDS and deposited the same to the department. Therefore, the income tax department was directed to make payment of interest to the assessee on the TDS Refund similar to the refund as prescribed under Section 244-A of the IT Act.

Levy of GST on Supply of Voucher

In the recent advance ruling by Tamil Nadu Advance Ruling Authority ("**AAR**") in the matter of ***M/s. Kalyan Jewellers India Limited*** *[Order No.52/ARA/2019 dtd. 28.11.2019]* the authority held that 'vouchers' are not actionable claim and supply of same will qualify as supply of goods. As per the facts of the case, M/s Kalyan Jewellers India Limited ("**Applicant**"), as part of sales promotion, introduced the facility of issuing different types of Gift Voucher/ Gift Card as Pre-Paid Instruments ("***PPIs***") to their customers through their retail outlets as well as engaging third party online portal. The PPIs are subject to Payment and Settlement Act, 2007 and Master Directions and other relevant notifications/ circulars/ communications issued by Reserve Bank of India. The issue before the AAR was whether issue of PPI by the Applicant to their Customers through their retail outlet or through third party online portal are classified as goods (PPI), if so, the time and value of supply of goods and determination of liability to pay tax for their PPI's. The AAR held that in case of **closed** PPI (issued by Company to Customer directly), the gift voucher/card cannot be used if the same is expired. Thus, the said gift voucher/card is not 'actionable claim'.

Further, gift voucher/card issued by Applicant are 'payment instrument' as per Settlement Act and will qualify as 'Voucher' as per GST law. Moreover, the definition of 'goods' includes all movable property. Thus, the same will include gift voucher/card issued by Applicant. The AAR also held that 'the time of supply of such gift vouchers / gift cards by the applicant to the customers shall be the date of issue of vouchers if the vouchers are specific to any particular goods specified against the voucher'. If the gift vouchers/gift cards are redeemable against any goods bought, the time of supply is the date of redemption of voucher. The AAR didn't comment on semi closed PPI issued by third party to customers as the third party was registered outside its jurisdiction.

No GST Exemption to Agricultural Produce from Foreign Markets

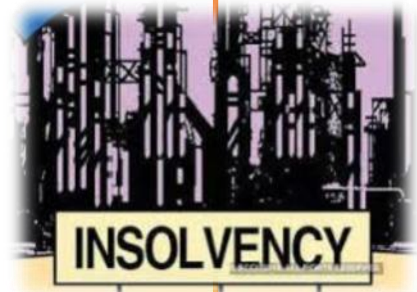
In the present case, the Appellate Authority of Advance Ruling ("**AAAR**") upheld the ruling of Advance Ruling Authority in the case of ***T. P. Roy Chowdhury & Company Pvt. Ltd.*** *[Appeal No. 13/WBAAAR/APPEAL/2019 decided on 23.12.2019].* As per the facts of the case, the Appellant provided loading and unloading services for imported raw whole yellow peas. Thus, the issue before the AAAR was whether the Appellant's service is eligible for exemption under Sl. No. 54(e) of the Notification No. 12/2017-CT(R) dated 28.06.2017 ("**Exemption Notification**"). Here the AAAR observed that there is no dispute that raw whole yellow peas are agricultural produce and are exempted goods. However, the particular consignment of raw whole yellow peas in the present case was harvested in foreign land and the concerned primary market or the farmers' market is located in that foreign land. Accordingly, from a combined reading of said entry 54(e) and definition of 'agriculture

produce' under the Exemption Notification, it can be construed that all services and processes are excluded beyond the primary market. The term primary market in common parlance refers to farmers' market like "mandi" or "arhat" being a place where the farmers directly sell their product to the buyers like wholesalers, millers, food processing units, etc. Thus, the spirit of the legislature was intended to boost the agricultural sector of the home country and not that of a foreign land. The primary market in the instant case being located in foreign shores does not conform to the definition of 'agriculture produce'. Further there is no evidence that the grains have not undergone any type of treatment before leaving the foreign country from where they have been imported into India. Hence, the services of the Appellant are not exempted.

Management & Advisory Services by Asset Management Companies to Foreign Portfolio Investors

Securities Exchange Board of India *via* **Circular SEBI/HO/IMD/DF2/CIR/P/2019/155 dated 16.12.2019** has given permission to Asset Management Companies ("**AMCs**") to provide management and advisory services to appropriately regulated Foreign Portfolio Investors ("**FPIs**") in terms of Regulation 24 (b) of Securities Exchange Board of India (Mutual Funds) Regulations, 1996 to FPIs falling under the categories of FPIs as specified in the Securities Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019:

a. Government and Government related investors such as central banks, sovereign wealth funds, international or multilateral organizations or agencies including entities controlled or at least 75% directly or indirectly owned by such Government and Government related investor (s);
b. Appropriately regulated entities such as pension funds, insurance or reinsurance entities, banks and mutual funds;
c. The appropriately regulated FPIS wherein (a) and (b) above hold more than 50% of the shares/units.



Further, the said Circular also provided that the agreements entered into by the AMCs on or before the date of this Circular, to provide management and advisory services to FPIs which do not fall under these categories, the AMCs may continue to provide the services for the period as mentioned in the agreement or one year from the date of the said circular, whichever is earlier.

Amendments to Insolvency and Bankruptcy Code 2016

The President of India promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 ("**IBC Ordinance**") on 28.12.2019 effecting various key amendments to IBC. These amendments pave way for a more facilitative resolution process and further strengthens the protection of assets acquired by any person pursuant to the process under IBC. The key amendments brought in by the IBC Ordinance are as below:

1. **Requirement of Joint Application by Homebuyers**: As opposed to the earlier position whereby a single homebuyer could initiate IBC process against a defaulting real estate company, the amendment brings in a requirement of joint application by a minimum of 10% of the 'allottees' or 100 'allottees' of a real estate project, whichever is less, to initiate IBC process against a real estate company;
2. **Embargo on Termination of Licenses and Government Concessions**: IBC Ordinance clarifies that licenses and governments concessions already granted to a compa-

ny at the time of commencement of IBC process cannot be terminated during the moratorium period when the said company is undergoing the process under IBC;

3. **Supply of Critical Goods and Services cannot be suspended, terminated or interrupted**: During the moratorium period under the IBC, apart from embargo on termination of licenses and government concessions, the IBC Ordinance further casts a positive obligation on third party vendors/suppliers of critical goods and services to a company undergoing IBC process to not stop or interrupt the supply of such critical goods and services as long as their current dues are being cleared by the Resolution Professional. The determination of criticality of goods and services shall be done by the Resolution Professional;

4. **No impact of past criminal proceedings on the assets of the Company**: In many cases including JSW-Bhushan Steel, the successful resolution applicants/buyers had sought protection of the newly acquired assets from enquiry or attachment or alienation pursuant to proceedings for any offences committed prior to insolvency commencement of the said company. The IBC Ordinance by way of introduction of a new Section 32A whitewashes the liability of the corporate debtor/company from any offence committed prior to commencement of IBC process provided there is a change of control and management under the resolution plan and that the resolution applicant/buyer is not someone who is believed to be an abettor of such offence.

The above discussed amendments are significant in streamlining the corporate insolvency resolution process in as much as the amendments facilitate the running of the operations of the companies undergoing IBC process smoothly by ensuring supply of critical goods and services and also provide more certainty to the resolution applicant by ensuring acquisition of a clean company devoid of its past criminal liabilities.

Proviso to Section 167(1)(A) of the Companies Act 2013 held constitutional

A division bench of the High Court of Madras ("**Court**") in the case of ***Yashodhara Shroff vs. Union of India [Writ Petition No. 32763 of 2019, decided on 02.12.2019]***, examined the constitutional validity of the newly added 'proviso' to Section 167(1)(a) of the Companies Act 2013 ("**Act**") *vide* the Companies (Amendment) Act, 2017. The petitioner challenging the said proviso contended that the said 'proviso' was arbitrary in nature and violated Article 14 of the Constitution of India, 1950 as director of the defaulting company would have to vacate his directorship in other companies while he can still remain on his position in the defaulting company. The Court while examining the issue at hand analyzed the Section 167 (1) (a) of the Act which provides for directors to vacate their office in a company upon incurring disqualification as per Section 164 of the Act and Section 164 which deals with the various circumstances in which a person would be disqualified from being appointed a director of a company. The Court observed that proviso to Section 167(1)(a) carves out that when a director is disqualified on account of the company's defaults on dues prescribed under Section 164 (2) of the Act, such person would have to vacate from director's office in all other companies (in which he is director) but not the company in which default was committed. The Court further observed that such directors had only been rendered incapable of becoming directors in other companies. The said amendment did not create any unreasonable classification and was merely a penal measure in cases where a director fails to carry out his duties.

KEY TAKE AWAYS

- The Ministry of Corporate Affairs vide its **General Circular No. 17/2019 dated 30.12.2019** has extended the last date of filing of CRA-4 (cost audit report) for all eligible companies for the Financial Year 2018-19, without payment of additional fee, till 29.02.2020.

- The CBIC vide **Notification 75/2019-CT dated 26.12.2019** has made amendments in the Central Goods and Service Tax Rules, 2017 by substituting 10% in place of 20% in rule 36, sub-rule(4) w.e.f. 01.01.2020 and by inserting rule 86(A) (i.e. Conditions of use of amount available in electronic credit ledger).

- As per **Notification No. 72/2019-CT dated 13.12.2019** issued by CBIC, it has been notified that an invoice issued by a registered person, whose aggregate turnover in a financial year exceeds five hundred crore rupees, to an unregistered person (hereinafter referred to as B2C invoice), shall have Quick Response (QR) code. This notification shall come into force from the 01.04.2020.

- As per **Notification No. 71/2019-CT dated 13.12.2019** issued by CBIC, the provisions of the Central Goods and Services Tax (Fourth Amendment) Rules, 2019, made vide notification No. 31/2019 – Central Tax, dated the 28.06.2019 shall come into force from 01.04.2020.

- The CBIC vide **Notification 74/2019-CT dated 26.12.19** has waived the late fee payable under section 47 of the Central Goods and Services Tax Act, 2017 for the registered persons who failed to furnish the details of outward supplies in FORM GSTR-1 for the months/quarters from July, 2017 to November, 2019 by the due date but furnishes the said details between the period from 19.01.2019 to 10.01.2020.

- The CBIC has vide **Notification No. 06/2019-CE-NT dated 04.12.2019** specified the enactments to which the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 shall be applicable and they are- Cine-Workers Welfare Cess Act, 1981; Industries (Development and Regulation) Act, 1951; Sugar Export Promotion Act, 1958; Sugar (Regulation of Production) Act, 1961; Tea Act, 1953; Finance Act, 2001; Finance Act, 2005 and Finance Act, 2010.

- As per **Notification No. 70/2019-CT dated 13.12.2019** issued by CBIC, the class of registered persons whose aggregate turnover in a financial year exceeds one hundred crore rupees shall prepare an invoice of the goods or services supplied to a registered person in terms of sub-rule (4) of rule 48 of the Central Goods and Services Tax Rules, 2017.

- Ministry of Finance Department *vide* **notification no. F. No. S.33013/3/2019 ST-I, DoR dated December 10, 2019** has appointed January 09, 2020 as the effective date of amendments brought in Indian Stamp Act, 1899 *vide* the Finance Act, 2019 (7 of 2019). The effective has been further deferred to deferred to April 01, 2020 *vide* notification no. S.33013/3/2019 ST-I, DoR Part 3 dated January 08, 2020.

Knowledge Centre

FAQs on Section 269SU of the IT Act

Q. Who is required to provide electronic modes for accepting payments under Section 269SU of the IT Act?

A. Every person carrying on business and having sales/turnover/gross receipts exceeding Rs. 50 Crore in business during the immediately preceding previous year must provide the prescribed electronic modes for payment.

Q. Whether receipts from other than business source shall also be considered in the limit of Rs. 50 crore for ascertaining the applicability of Section 269SU of the IT Act?

A. No, as per Section 269SU of the IT Act only the business receipts are to be considered in the limit of Rs. 50 crore.

Q. What is the effective date from which the prescribed electronic modes are to be provided?

A. Section 269SU of the IT Act is effective from 01.11.2019, however, CBDT has prescribed the electronic modes for the purpose of the said section by inserting new Rule 119AA under Income-tax Rules, 1962 w.e.f. 01.01.2020. Thus, effective date for providing prescribed electronic modes is 01.01.2020.

Q. What are the penal consequences of non-compliance of Section 269SU of the IT Act?

A. Penalty of Rs. 5,000/- per day shall be levied under section 271DB of the IT Act for non-compliance of Section 269SU of the IT Act. However, no penalty shall be levied if the specified person installs and operationalizes the facilities on or before 31.01.2020. Thereafter, w.e.f. 01.02.2020 penalty under section 271 DB of the Act shall be levied in case of any non-compliance with Section 269SU.

Q. What are the prescribed modes for accepting payment?

A. CBDT vide Notification No. 105/2019 dated 30.12.2019 has prescribed following modes: (i) Debit Card powered by RuPay; (ii) Unified Payments Interface (UPI) (BHIM-UPI); and (iii) Unified Payments Interface Quick Response Code (UPI QR Code) (BHIM-UPI QR Code).

Q. What if a business enterprise already has NEFT, RTGS or any other electronic modes for payment?

A. The prescribed electronic modes are in addition to the other existing electronic modes for payment. Thus, irrespective of the existing payment modes, specified businesses must maintain the prescribed modes for accepting payment.

Q. Whether all the three prescribed modes are mandatory?

A. Yes, by perusal of the language of the law it is evident that all the three prescribed modes are mandatory and should be available while accepting payment.

Q. What are the bank charges for using prescribed payment modes?

A. As per newly inserted Section 10A of Payment and Settlement Systems Act, 2007 bank will not impose any charges for using the electronic modes of payment prescribed under Section 269SU of the IT Act.

Editorial

No automatic stay on challenge to arbitral award, Supreme Court struck down Section 87 of The Arbitration Act

-By Adv. Rajat Sharma

The legislature by way of the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendment Act**") had introduced Section 87 in the Arbitration and Conciliation Act, 1996 ("**Act**"), which stipulated that the amendments made by the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**") shall not apply to any: (a) arbitral proceedings commenced before the commencement of 2015 Arbitration Act, (b) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the 2015 Amendment Act.

Section 87 made it clear that the 2015 Amendment Act would only apply to arbitral proceedings commenced on or after the commencement of the 2015 Amendment Act and to court proceedings arising out of or in relation to such arbitral proceedings, meaning thereby the newly inserted Section 87 contemplated that there would be an automatic stay on arbitral awards the moment they are challenged under Section 34 of the 1996 Act, if they pertained to arbitral proceedings commenced before October 23, 2015, that is, the date of enactment of the 2015 Amendment Act. This was irrespective of the fact that the said court proceedings under Section 34 (application for setting aside arbitral award) of the 1996 Act has commenced prior to or after October 23, 2015, Section 34 application only had to relate to an arbitral proceeding commenced prior to October 23, 2015. The only scenario where Section 87 would not be applicable would be if the parties have otherwise jointly agreed to have the 2015 Amendment Act applicable to the arbitral proceedings.

However, the Hon'ble Supreme Court ("**Court**") while hearing the case of ***Hindustan Construction Company Limited and Anr vs. Union of India and Ors.*** on the issues pertaining to the constitutional validity of Section 87 of the Act and the challenge to the repeal to Section 26 of the Act (inserted by 2015 Amendment Act) amongst other issues, struck down Section 87 being manifestly arbitrary and thus, contrary to the scheme of Article 14 of the Constitution of India.

The petitioner, Hindustan Construction Company Limited ("**HCC/ Petitioner**") had submitted that as a contractor, it had undertaken projects for several government companies such as NTPC Limited, IRCON International Limited, NHPC Limited, in addition to National Highways Authority of India ("**NHAI**") (collectively "**Respondents**"). All of the aforesaid parties were made Respondents to the writ petition. In respect of these projects, cost overrun was always a matter of dispute between HCC and the Respondents. The only way for HCC to receive its dues was by instituting either a civil proceeding or an arbitration proceeding. Even in the scenario that an arbitral award was passed in the favour of HCC, it was invariably challenged by the Respondents by filing an application under Section 34 of the 1996 Act. A Section 34 application resulted in imposition of an automatic stay on the operation of arbitral awards. Consequently, on one hand, HCC's pending dues would be stuck until the application could be adjudicated upon and on the other hand, HCC's pending dues would

become 'disputed debt' as per the provisions of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). Therefore, any proceeding that could have been initiated by HCC under the IBC against the respondent government companies would come to be dismissed. In any case, HCC could not initiate any proceeding against a statutory body like NHAI under the IBC.
It was also pertinent that HCC already owed large sums of money to its own operational creditors. In fact, demand notices had already been issued to HCC by these operational creditors for sums amounting to over a hundred crores. Therefore, even if HCC was financially sound, it would be unable to repay its operational creditors because of money being stuck under the automatic stay rule.

Appreciating the arguments, the Court agreed with the contentions of the Petitioner that mischief of the old Section 36 of the 1996 Act as regards automatic stay had been remedied after a period of more than 19 years by way of the 2015 Amendment Act, and now enactment of Section 87 to the 1996 Act would be a complete turnaround. Moreover, payments already made under the amended Section 36 of the 1996 Act to award-holders in a situation of 'no stay' or 'conditional stay' would be sought to be refunded. It was observed by the Court that the Srikrishna Committee Report did not refer to the impact of provisions of the IBC. As a result of an automatic stay, the award holder may become insolvent by defaulting on payments to its creditors, when such payments would have been ordinarily forthcoming from the arbitral awards. Therefore, deletion of Section 26 of the 2015 Amendment Act and insertion of Section 87 to the 1996 Act were struck down as being manifestly arbitrary under Article 14 of the Constitution of India.

It is seen that the 2019 Amendment Act has been subject to much of a criticism one amongst all is introduction of Section 87, without having considered the judgment of the Hon'ble Supreme Court which had resolved certain issues relating to the applicability of 2015 Amendment Act. However, despite the judgment, the legislature amended the law in a manner that already identified shortcoming in the previous amendment was given a new life. Nevertheless such amendment has now been found to be arbitrary and it is looked forward that government does not take any further action on this, more so when the endeavor is to make India a hub of Arbitration and on contrary such moves in the applicable law does not settle well for the arbitrations in India.

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

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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

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

New Delhi– The Executive Centre– DLF Cyber City,
Level 18, DLF Building No. 5, Tower A, Phase III, DLF Cyber City, Gurgaon-122002

Mumbai– The Executive Centre, The Capital, Level 7, B– Wing, The Capital, Bandra Kurla Complex, Bandra (East), Mumbai–400051