IMPERIAL LAW OFFICES

Legal Updates

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1. BANKING & FINANCE

PUNJAB NATIONAL BANK V. UNION OF INDIA AND OTHERS[1]

❖ Summary of the Case

A demand and penalty of a certain amount was confirmed against M/s Rathi Ispat Ltd. (RIL) along with confiscation of their movable and immovable properties by the Commissioner, Customs and Central Excise, Ghaziabad. This was set aside by the appellate authority as the rule under which the confiscation had been made had been omitted. RIL then availed credit services of Punjab National Bank mortgaging all its movable and immovable properties. The Commissioner, Customs and Central Excise, Ghaziabad then again imposed a demand and penalty of a certain amount against RIL along with confiscation of all its movable and immovable properties. Immediately thereafter, due to default in clearing loan amount and failure to liquidate outstanding dues, Punjab National Bank issued appropriate notices to RIL. Responding to these notices, the Office of the Assistant Commissioner, Customs and Central Excise Division informed Punjab National Bank about the nature of the properties to which the bank replied with the information about the mortgage. The bank then took symbolic possession of the properties and were then told by the Office of the Assistant Commissioner, Customs and Central Excise Division to not deal with the properties without their written consent. The bank then approached the Allahabad High Court who dismissed their petition. The bank appealed this dismissal before the Hon'ble Supreme Court which held that, "since there is no specific provision claiming, "first charge" in the Central Excise Act and the Customs Act, the claim of the Central Excise Department cannot have precedence over the claim of secured creditor, viz., the petitioner Bank."

❖ Brief Facts of the Case

The Commissioner, Customs and Central Excise, Ghaziabad issued a show cause notice in 1996 to RIL for evasion of excise duty and violation of the Central Excise Act, 1944. In 1997, the Commissioner confirmed an excise duty demand of Rs.6,97,62,102/- against RIL and imposed a penalty of Rs.7,98,03,000/-[2] and also confiscated the company's land, building, plant and machinery.[3] The sub rule under which confiscation was made, was omitted by the Government and thus the order was set aside by the Customs, Excise & Gold (Control) Appellate Tribunal (now known as the Customs Excise and Service Tax Appellate Tribunal or CESTAT). The order was found to be against the principles of natural justice and was sent back for fresh proceedings.

In 2005, RIL availed various credit facilities from the Punjab National Bank (appellant) and mortgaged all its movable and immovable properties for this purpose. RIL created a charge and block on the mortgaged assets in favour of the appellant. Then, in March 2007, the Commissioner, Customs and Central Excise, Ghaziabad confirmed the demand of excise duty of Rs.7,98,02,226/- and a penalty of Rs.7,98,03,000/- on RIL and further ordered for the confiscation of all the land, building, plant, machinery and materials used in connection with manufacture and storage.[4] Vide another order, the amounts of Rs.2,67,00,348- and Rs.74,24,332/- were confirmed as a demand of central excise duty.

In August 2007, due default in clearing loan amount and failure to liquidate outstanding dues, the appellant issued a notice to RIL under section 13(2) of the SARFAESI Act, 2002 and afterwards a notice under section 13(4) of SARFAESI Act, 2002. In November 2007, the bank was informed by the Office of the Assistant Commissioner, Customs and Central Excise Division that the properties were already confiscated under Rule 173Q (2) of the Central Excise Rules, 1944, where an appeal is pending and that the matter is thus sub-judice. The appellant replied informing that the said properties were mortgaged with the appellant and RIL is required to satisfy the debts. The appellant then took symbolic possession of the properties in question in December 2007, upon which the appellant was informed in January 2008 that the properties of RIL should not be dealt with,

[1] CIVIL APPEAL NO. 2196 of 2012; FEBRUARY 24, 2022

[2] Rule 173Q(1) of the Central Excise Rules, 1944.

[3] Rule 173Q(2) of the Central Excise Rules, 1944.

[4] Rule 173Q(2) of the Central Excise Rules, 1944.

without the written consent of the Customs and Central Excise.

The appellant then filed a writ petition before the Allahabad High Court which was dismissed observing that, "the question of first charge or second charge over the properties would not arise. The debt does not get extinguished, but it cannot be recovered from the confiscated property that being the position if in appeal preferred by Respondent no. 4 (RIL), the order of confiscation is set aside then the bank can proceed against the properties in question in accordance with law."

The appellant then filed a civil appeal from the judgement of the High Court of Allahabad before the Hon'Ble Supreme Court of India.

❖ **Contentions by the Appellant**

The significant issue was with regards to the absence of a provision regarding first charge in relation to the Central Excise dues in the Central Excise Act, 1944, would the dues pending to the Excise department by RIL have priority over secured creditors (for example, the appellant) or not?

Reliance was placed on section 2(zc) to (zf) of SARFAESI Act, 2002, read with provisions contained in Section 13 of the SARFAESI Act, 2002, to contend that the secured creditor will have a First Charge on the Secured Assets. Further reliance was placed on Section 35 of the SARFAESI Act, 2002 which gave the Act overriding effect on all other laws. On the basis of various judgments[5] of the court in similar matters, it was argued that there is a well settled principle of law that the crown's debts will have no priority over secured dues of secured creditors.

❖ **Contentions by the Respondent**

Disregarding the issue raised by the appellant, the respondents contended that the issue is not related to recovery of dues as the order imposed by the Commissioner, Customs and Central Excise, Ghaziabad is also a penalty. It was further contended that the confiscation proceedings by the Commissioner, Customs and Central Excise, Ghaziabad had started 9 years prior to the creation of charge and that the appellant should have verified the nature of the properties before creating a charge. It was argued that a security interest created on a property cannot defeat confiscation proceedings by a statutory body in a statutory manner. The respondent further placed reliance on a settled case law[6] and Section 13(4)(d) of the SARFAESI Act to claim that even after seizure of property by the Commissioner, Customs and Central Excise, Ghaziabad, the appellant can satisfy the debt.

❖ **Observation by the Court**

Quoting from the observations of the court in the judgement in the case *UTI Bank Ltd. Vs. Dy. Commissioner Central Excise*[7] the court decided the case in favour of the appellant observing that, "since there is no specific provision claiming "first charge" in the Central Excise Act and the Customs Act, the claim of the Central Excise Department cannot have precedence over the claim of secured creditor, viz., the petitioner Bank. In the absence of such specific provision in the Central Excise Act as well as in Customs Act, we hold that the claim of secured creditor will prevail over Crown's debts."

***I Law Views**: The same shall be the sigh of relief for the Lenders since the first charge over the assets may be claimed by the Lenders in priority over the outstanding statutory dues, unless the particular tax statute provides the specific provision for the first charge in favour of the tax department/authorities concerned. Accordingly, the*

[5] Bank of Bihar vs State of Bihar [(1972) 3 SCC 196]. Dena Bank vs Bhikhabhai Prabhu Dass Parikh & Anr. [(2000) 5 SCC 694]. Central Bank of India Vs. Siriguppa Sugurs & Chemicals Ltd. & Ors. [(2007) 8 SCC 353]. Union of India vs SICOM Ltd. & Anr. [(2009) 2 SCC 121]. Rana Girders Ltd. Vs Union of India & Ors. [(2012) 10 SCC 746]. Sitani Textiles and Fabrics (Pvt.) Ltd. Vs. Assistant Collector of Customs & Central Excise [1998 SCC Online Andhra Pradesh 416]. UTI Bank Ltd. Vs. Dy. Commissioner Central Excise [2006 SCC Online Madras 1182 (Full Bench)]. Krishna Lifestyle Technologies Ltd. Vs. Union of India & Ors. [2008 SCC Online Bombay 137].

[6] Bank of Bihar vs State of Bihar [(1972) 3 SCC 196].

[7] [2006 SCC Online Madras 1182].

Lenders may emphasize on structuring of Escrow Agreements and Trust & Retention Account Agreements accordingly, to reflect the priority of repayments to the Lenders in respect of debt due.

MASTER DIRECTION – RESERVE BANK OF INDIA (CREDIT DERIVATIVES) DIRECTIONS, 2022

On 10th February 2022, the Reserve Bank of India released a notification of Master Direction- Reserve Bank of India (Credit Derivatives) Directions 2022. This direction will come into effect from 9th May 2022 and will apply to transactions of credit derivatives that are undertaken in the Over the Counter **("OTC")** markets and recognized stock exchange in India. RBI released this notification after a year of the release of its draft guidelines[8].

Under the Foreign Exchange Management (Debt Instruments) Regulations 2019, eligibility to be a participant in the credit derivatives market depends upon the eligibility of residents and non-residents to invest in corporate bonds and debentures.

The following bodies are eligible to act as market makers in the credit derivatives market: -

1. Scheduled commercial banks, except for small finance banks, payment banks, local area banks, and regional rural banks.

2. Non-Banking Financial Companies having minimum net owned funds of ₹500 crore as per audited balance sheet on 31st March of the previous financial year including Standalone Primary Dealers and Housing Finance Companies and subject to specific approval of Department of Regulation, Reserve Bank.

3. Banks like Export-Import Bank of India, National Bank of Agriculture and Rural Development, National Housing Bank, and Small Industries Development Bank of India.

Any failure by NBFC, SPD, or HFC to meet the eligibility criteria following the approval for acting as a market maker shall restrict them to act as a market maker. Until the contract matures or terminates, the NBFC, SPD, or HFC will have to meet all the obligations under such contract. Any one of the parties to the credit derivatives market has to be a market maker or a central counterparty, recognized by the Reserve Bank for the same purpose.

Users will be classified either as retail or non-retail for the purpose of offering credit derivative contracts where the non-retail will include NBFCs, insurance companies, pension funds, mutual funds, alternative investment funds and resident companies with minimum net worth of ₹500 crore as per the latest audited balance sheet.

The reference entity has been restricted to resident entities and shall be eligible to be a reference obligation in a CDS contract where it can only be issued by the money market debt instruments, rated INR corporate bonds and debentures. Also, it has imposed restrictions on the market participants so that it cannot enter into CDS transactions if it's related to either buyer protection or seller protection and it will ensure the transactions will be carried out on an arm's length basis.

In instances where the reference entity is a related party to either the protection buyer or the protection seller, market participants shall not enter into CDS transactions, with the exception of two (or more) government entities. They are not to be considered related parties for the purpose of these directions. The market participants will themselves ensure that transactions with related parties are carried out on an arm's length basis.

The CDS contract should represent a direct claim on the protection seller. It cannot carry a clause that may:

1. allow the protection seller to unilaterally cancel the contract, except in case of a default by the protection buyer under the terms of the contract;

[8] https://legalitysimplified.com/2022/02/11/rbi-publishes-reserve-bank-of-india-credit-derivatives-directions-2022/

2. prevent the protection seller from making the credit event payment in a timely manner, after occurrence of the credit event and completion of necessary conditions and requirements under the terms of contract;

3. provide the protection seller any recourse to the protection buyer for credit event losses.

The CDS contracts traded on exchanges have the preference to settled through cash or auction and such procedure shall be determined by the Credit Derivatives Determinations Committee. These determinations shall be applicable to exchange-traded CDS contracts.

The Reserve Bank may call for any information or statement or seek any clarification from persons or agencies dealing in credit derivatives contracts, which in the opinion of the Reserve Bank is relevant, and such persons, agencies and participants shall furnish such information, statement or clarification in the manner, format and time limit specified by the Reserve Bank. The Reserve Bank, or an agency authorized by it, may in public interest, publish any anonymized data related to transactions in credit derivatives market.

In case of violation of these directions, the Reserve Bank of India, after providing reasonable opportunity to the person or agency to defend its actions, which shall be published, shall take any penal or regulatory action in accordance with law, disallow that person or agency from dealing in the credit derivatives market for a period not exceeding one month at a time.

TRANSACTIONS IN CREDIT DEFAULT SWAP (CDS) BY FOREIGN PORTFOLIO INVESTORS – OPERATIONAL INSTRUCTIONS

A credit default swap is a financial derivative allowing an investor to exchange the credit risk with another investor.

On 10th February 2022, the Reserve Bank of India issued operational instructions on transactions in credit default **("CDS")** by foreign portfolio investors **("FPI")**[9]. The FPIs are permitted to buy and sell credit default swaps under credit derivative directions. They are eligible to be categorized as non-retail users. The directions shall come into effect from May 09, 2022.

According to the direction, there shall be a limit by Reserve Bank of India **("RBI")** to the selling of CDS protection by FPIs. The limit for selling CDS shall be 5% of the outstanding stock of corporate bonds of its notional amount by FPIs. The utilization of this limit shall be circulated by the Clearing Corporation of India Limited based on the reporting by market makers for transactions in the over the counter **("OTC")** market and by stock exchanges for transactions on exchanges.

Selling of Credit Default Swap will not be done by FPI once the limit is utilized. Utilization of limit for CDS protection sold by FPI will be released when the CDS position by FPIs exits. Additionally, FPIs selling the conjectured amount of security and the debt instruments taken as a deliverable obligation as well as debt instruments bought for meeting deliverable obligation by FPIs in physical settlement of CDs contracts shall not be susceptible to minimum residual maturity requirement/short term limit, concentration limit or single/ group investor-wise limits applicable to FPI investment in corporate bonds.

REGISTRATION OF ASSIGNMENT OF RECEIVABLES (RESERVE BANK OF INDIA) REGULATIONS- 2022

[9] Please find the notification at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT155313449400B2E4ACB834FF9D5C9FEB917.PDF

On January 14, 2022, the Reserve Bank of India **("RBI")** notified the Registration of Assignment of Receivables Regulations, 2022, providing the framework for registration of assignments of receivables transactions[10]. The notification brings in the new regulations pertaining to the manner of filing of particulars of transaction with the Central Registry by a Trade Receivables Discounting System **("TReDS")** on behalf of factors. As per the regulations any trade receivables which are financed through a TReDS, the concerned TReDS on behalf of the factor must file with the Central Registry certain particulars within a period of ten days from the date of such assignment or satisfaction, as the case may be, in the prescribed forms.

❖ Framework

Reserve Bank of India, in 2014 introduced Guidelines for setting up of and operating the Trade Receivables Discounting System (TReDS), after public consultation of multiple rounds. TReDS is an institutional mechanism for facilitating the financing of trade receivables of Micro, Small and Medium Enterprises **("MSMEs")** from corporates, government departments and public sector undertaking **("PSU")**, through multiple financiers. The scheme aims to enable MSMEs to have access to adequate finance through converting their trade receivables into liquid funds. The factoring transactions taking place through TreDS were made eligible for classification under 'priority sector' upon operationalization of the platform in 2016 by the RBI. On January 2019, an expert committee was constituted on MSMEs by the RBI to suggest long-term measures for the economic and financial sustainability of the MSME sector. The Expert Committee put forth a recommendation for TReDS entities to be permitted to act as agents for financiers for filing of registration of charge with the Central Registry for gaining the operation efficiency. The committee also recommended that the time period for registration of invoice and satisfaction of charge should be reduced to keep a check on the possibility of dual financing. This was reiterated in 24th report by the Standing Committee on Finance in relation to the Factoring Regulation (Amendment) Bill, 2020. The definition of Trade Receivables Discounting System in Factoring Regulation Act, 2011 was amended in August, 2021 and required that where any trade receivables are financed through TReDS platform, the particulars stated in clause 19(1) and 19(3) of the Factoring Act shall be filed with the Central Registry on behalf of the factor by the concerned TReDS, in a manner specified by regulations.

❖ Modality, Timeframe and Fees of registration

Pursuant to the above-mentioned amendments, the RBI has notified that:

The particulars corresponding to an assignment of receivables in favour of a factor is to be provided in Form I prescribed in the notification, which shall be authenticated by the authorized person using a valid electronic signature. The particulars regarding the satisfaction on the realization of receivables are to be provided in Form II, prescribed in the notification. These fields in respective forms are important to be filed, but in case they have not been filed within the ten days period, the Central Registrar has a discretionary power to allow the said particulars to be filed within an additional time not exceeding ten days. This extension of time is necessary to make the regulation less rigid and allow the applicant to fulfil his compliance if he/she manages to convince the registrar through the application. It is mandatory to submit the fee while submitting the Forms for registration of any transaction relating to assignment of receivables or satisfaction of receivables on realization. The fees are prescribed by the Government of India in the Registration of Assignment of Receivables Rules, 2012. The fee payable for registration of particulars of assignment of receivables, within a period of 10 days from the date of such assignment, is INR 10 for assignment of receivables of less than INR 5,00,000, and INR 100 for assignment of receivables of INR 5,00,000 and above. For any application for condonation of delay up to ten days, the fees payable would be ten times of the basic fees, as applicable.

[10]Please find the notification at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI200120227CAF5FD1DBD8441EABF9ADDF36F2190C.PDF

RUPEE INTEREST RATE DERIVATIVES (RESERVE BANK OF INDIA) DIRECTIONS - REVIEW

On 10th February 2022, the Reserve Bank of India **("RBI")**, through a notification has updated the Rupee Interest Rate Derivative (Reserve Bank) Directions, 2019 and 2020 draft the purpose of which was to encourage more and more participation of non-residents and the domestic market makers in the offshore market, increase in transparency and achievement of an efficient regulatory framework[11]. The 2022 notification has allowed the banks in India, to offer Foreign Currency Settled Overnight Indexed Swaps **("FCS-OIS")**, having Authorized Dealer Category-I **("AD Cat-I")** license under FEMA 1999. This was done for the betterment of price discovery and to increase the interest rate derivative market.

An interest rate derivative is a financial instrument the value of which is based on some underlying interest rate or interest-bearing asset.

This announcement of the Reserve Bank of India was made by Governor Shaktikanta Das. According to him, this notification will help in reducing the segmentation between offshore and onshore markets and enabling more efficient price discovery. As per Anil Gupta Vice President & Co-Group Head at ICRA, permitting banks in India to offer interest rate derivatives like Overnight Index Swap to non-residents will improve the volatility in the interest rate derivative markets.

A 3-day monetary policy committee meeting began on 8th February which decided to leave the repo rate and reverse the repo rate unchanged for the 10th time in a row at 4% and 3.5% respectively. The decision of the committee was decided in favor of five members for it and one against it.

According to the notification dated 10th February 2022, Banks in India having Authorised Dealer Category-I (AD Cat-I) license under FEMA, 1999, shall be eligible to offer Foreign Currency Settled OIS (FCS-OIS) based on the Overnight Mumbai Interbank Outright Rate (MIBOR) benchmark published by Financial Benchmarks India Pvt. Ltd. (FBIL) to persons not resident in India as well as to other AD Cat-I banks. Banks can undertake these transactions through their branches in India, through their International Financial Services Centre (IFSC) Banking Units (IBUs) or through their foreign branches (in case of foreign banks operating in India, through any branch of the parent bank). Banks may undertake FCS-OIS transactions beyond onshore market hours.

Applicability of these directions covers rupee interest rate derivative transactions on recognized Over The Counter **("OTC")** markets and stock exchanges including Electronic Trading Platforms **("ETPs")**.

VOLUNTARY RETENTION ROUTE FOR FOREIGN PORTFOLIO INVESTORS INVESTMENT IN DEBT

A voluntary retention route was introduced by the Reserve Bank of India to help foreign portfolio investors invest in India's debt markets. Such investments are exempted from macro prudential and other regulatory prescriptions that cover FPI investments in the debt market.

The Reserve Bank of India in their notification dated February 10, 2022, has increased the limit for Foreign Portfolio Investors under Voluntary Retention Route to invest in the local debt market from Rs.1 lakh crore to Rs.2.5 lakh crore from 1st April 2022. The said FPIs shall be released in one or more tranches of VRR-Government, VRR-Corp, and VRR-Combined or as decided by the Reserve Bank of India. Allocation to such tranches shall be made on tap or through auction and amounts of investment shall be reckoned in terms of the face value of securities.

The minimum investment of FPI during the retention period shall be 75% of the CPS and the required investment shall be adhered to on an end-of-end basis and shall include cash holdings in the Rupee accounts used for this route. Also, it has imposed a restriction to maintain a certain percentage of their investments for a period of three

[11] Please find the notification at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/157FCSOIS00C5B235EF7043B7AD7F44B7C5DAD48E.PDF

years or as decided by RBI. This decision was made to lay down a separate channel to foreign portfolio investors' investments in both Government and corporate debt securities which will be free of macro prudential controls. After RBI hiked the cap on the voluntary retention route for FPI the bond yields are moderate but are expected to provide some benefits to the market. Since the Monetary Policy Committee (MPC) did not raise the reverse repo rate the yields on the benchmark 10-year paper remained at 6.73 % whereas the previous close was 6.79 %.[12]

Also, FPIs will qualify to participate in repos for their cash management, provided that the amount borrowed or lent under repo shall not exceed 10% of their investment under VRR. Further, it shall use any currency or interest rate derivate instrument, to manage their interest rate risk or currency risk.

Lastly, the custodians shall not permit any repatriation from the cash accounts of FPI, if the FPI's assets falls below the minimum stipulated level of 75% of CPS during the retention period and it may have to open a separate security account for holding debt securities under this route.

Benefits for debt funding

FPI investments are helpful in high yield segments with corporate debt and GSecs. It will be beneficial in the long run for capacity expansion and for corporates looking for debt funding.

The benefit of increased VRR limit

The increased VRR limit by Rs.1 lakh crore to Rs.2.5 lakh crore is a beneficial move as the current VRR limit is exhausted and investment of FPI in government securities and corporate bonds have decreased over the years. Therefore, the increase in the limit will attract additional funds during an increase in planned government borrowings.

Operational flexibility

An increase in the VRR limit can prevent risks of staxflows as higher operational flexibility is provided against the commitment of minimal holding time. It is considered as reducing the risk of rupee volatility[13].

[12]https://www.telegraphindia.com/business/reserve-bank-of-india-to-enhance-vrr-cap-for-foreign-investors-by-rs-1-lakh-from-april-1/cid/1851476

[13] https://newsonair.com/2022/02/11/rbi-increases-fpi-limit-in-debt-market-to-rs-2-5-lakh-crore/

2. INCOME TAX

- **SECTION 149 (1)(C) OF THE INCOME TAX ACT, 1961 ('THE ACT') IS RETROSPECTIVE IN EFFECT – MUMBAI ITAT[14]**

In a very interesting judgement, Mumbai ITAT has interpreted section 149(1)(c) of the IT Act and has held it to be retrospective in nature. Section 149 (1)(c) of the IT Act deals with the limitation for issuing reassessment notice under Section 148 of the IT Act. It provides for limitation period of sixteen years from the relevant assessment year, in case the income escaped is in relation to any asset located outside India. This sub-section was introduced with effect from 01st July 2012 by the Finance Act, 2012.

Hon'ble Tribunal while holding that the said provision is retrospective in nature, held that it is a settled position of law that "the Union Parliament and the State Legislature have plenary powers of legislation within the fields assigned to them and, subject to the certain constitutional and judicially recognized restrictions, can legislate prospectively as well as retrospectively" and that "It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly, or by necessary implication, made to have a retrospective operation".

Section 149 unambiguously provides that "the provisions of sub-sections (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012". Thus, it was held to be retrospective in nature. While holding so, the Hon'ble ITAT also distinguished the judgment of Delhi High Court in the case of *Braham Dutt*[15] on the issue on the ground that the said judgement do not take into account the above mentioned explanation to section 149 and also that it is a judgement of non-jurisdictional High Court.

Our Comments: This judgement will surely be used by the Income Tax Department in reopening cases based on retrospectivity of section 149 (1)(c) of the IT Act leading to multiple rounds of litigation.

- **EXPENSES INCURRED BY PHARMACEUTICAL AND ALLIED HEALTH SECTOR INDUSTRIES FOR DISTRIBUTION OF INCENTIVES (I.E., "FREEBIES") TO MEDICAL PRACTITIONERS ARE INELIGIBLE FOR THE BENEFIT OF EXPLANATION 1 TO SECTION 37(1), WHICH DENIES THE APPLICATION OF THE BENEFIT FOR ANY PURPOSE WHICH IS AN 'OFFENCE' OR 'PROHIBITED BY LAW' - SC[16]**

Hon'ble Supreme Court in its latest judgement has dismissed the appeal of M/s Apex Laboratories, a pharmaceutical company, claiming deduction of expenses made by it for distribution of incentives (i.e. freebies) to medical practitioners under section 37 of the IT Act. It was held that Explanation 1 was inserted in Section 37 of the IT Act in 1998 with retrospective effect from 1 April 1962 restricting the tax relief related to any expense incurred for 'any purpose which is an offence or which is prohibited by law'. The IT Act does not provide a definition for these terms. Section 2(38) of the General Clauses Act, 1897 defines 'offence' as "any act or omission made punishable by any law for the time being in force". Under the IPC, Section 40 defines it as "a thing punishable by this Code", read with Section 43 which defines 'illegal' as being applicable to "everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action". It is therefore clear that Explanation 1 contains within its ambit all such activities which are illegal/prohibited by law and/or punishable. It is but logical that when acceptance of freebies is punishable by the MCI (the range of penalties and sanction extending to ban imposed on the medical practitioner), pharmaceutical companies cannot be granted the tax benefit for providing such freebies, and thereby (actively and with full knowledge) enabling the commission of the act which attracts such opprobrium. A comprehensive view must be adopted, doctors and pharmacists are complementary and

[14] DCIT Vs. Dilip J Thakkar (ITA No. 966/Mum/2020 – order dated 16.02.2022)
[15] Braham Dutt Vs ACIT [(2018) 100 taxmann.com 324 (Del)]
[16] M/s Apex Laboratories Pvt. Ltd. Vs. DCIT – SLP (C) No. 23207 of 2019 order dated 22.02.2022

supplementary to each other in the medical profession. Therefore, its participation would be construed as an action prohibited by law, precluding the Assesse from claiming it as deductible expenditure. These freebies are technically not 'free' – the cost of supplying such freebies is usually factored into the drug, driving prices up, thus creating a perpetual publicly injurious cycle. One arm of the law cannot be utilized to defeat the other arm of the law – doing so would be opposed to public policy and bring the law into ridicule. It was further noted that the agreement between the pharma companies and the medical practitioners in gifting freebies for boosting sales of prescription drugs is also in violation of Section 23 of the Contract Act, 1872. Thus, pharma companies' gifting freebies to doctors, etc. is clearly 'prohibited by law', and cannot be allowed to be claimed as a deduction under Section 37(1) of the IT Act.

Our Comments: This is a landmark judgement on the issue and will put an end to all the litigation pending on this issue. This judgement will act as an deterrent factor to all the Pharmaceutical/ related companies from giving freebies to medical practitioners and thereby promote unethical practices.

3. CORPORATE (SEBI / RBI / MCA)

SEBI ISSUED CIRCULAR FOR ISSUANCE OF SECURITIES IN DEMATERIALIZED FORM FOR PROCESSING CERTAIN SERVICE REQUESTS BY THE INVESTORS

SEBI issued circular on January 25, 2022 ("**SEBI Circular 2022**[17]") mandating issuance of securities in dematerialized form for processing transactions including (a) issuance of duplicate securities certificate, (b) claim from unclaimed suspense account, (c) renewal / exchange of securities certificate, (d) endorsement, (e) sub-division / splitting of securities certificate, (f) consolidation of securities certificates/folios, (g) transmission, and (h) transposition, as requested by the investors. SEBI Circular 2022 prescribed the procedure and operational guidelines to be followed by the security holder/ claimant, Registrars to an Issue and Share Transfer Agents ("**RTA**") / Issuer Company ("**IC**") in this regard respectively.

A. Operational guidelines for dematerialization:

1) The security holder/ claimant ("**Applicant**") shall submit form (**Form ISR-4**) in the prescribed manner along with the relevant annexures. The said form shall be hosted on RTAs/IC's website.

2) RTAs /ICs shall obtain the original securities certificate for processing the service request, except in the case of issuance of duplicate securities certificate and claim for unclaimed suspense account.

3) Within 30 days of receipt of such request from the Applicant, RTAs/IC shall verify and process the service request and issue a *'Letter of Confirmation'* in the prescribed format, in lieu of physical securities certificate(s) post removing any objections, if any. The validity of this Letter of Confirmation is 120 days during which the Applicant shall make the request to the depository participant for dematerialization of his securities.

4) In case no demat request is received by RTAs/IC, RTAs/IC shall issue a reminder to the Applicant after end of 45 days and 90 days from the issuance of Letter of Confirmation to submit the demat request. Upon failure to submit any demat request within the stipulated timeline of 120 days by the Applicant, RTAs/IC shall credit the securities to the Suspense Escrow Demat Account of the company.

B. Advisory Guidelines for stock exchanges/depository:

1) Appropriate amendments to be made to the relevant bye-laws, rules and regulations, operational instructions, for the implementation of this circular; and

2) The provisions of this circular to be brought to the attention of their constituents and make them available on their website.

Our Comments: SEBI vide this circular aimed to put in place operational guidelines and a smooth procedure for dematerialization of the securities and further improve ease of dealing in the securities market. Further, to put these guidelines into effect, SEBI has made relevant changes in SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 as well. This circular provides an eased, safe and convenient procedure for dematerialization of securities for investors.

[17] SEBI Circular: SEBI/HO/MIRSD/MIRSD_RTAMB/P/CIR/2022/8, published on January 25, 2022, *accessible at* SEBI | Issuance of Securities in dematerialized form in case of Investor Service Requests

SEBI STREAMLINED THE PROCESS OF CHANGE IN CONTROL FOR AMCS INVOLVING SCHEME OF ARRANGEMENT

SEBI on January 31, 2022 issued a circular ("**SEBI Circular 2022**[18]") which is in continuation of its earlier circular dated March 4, 2021 ("**SEBI Circular 2021**[19]"). Through SEBI Circular 2022, SEBI has introduced the process of change in control for asset management company ("**AMC**") undertaking the scheme of arrangement. The said process is briefly described as under:

a) Application seeking approval for proposed change in control of AMC under Regulation 22(e) of the SEBI Mutual Fund Regulations, 1996, shall be filed first with the SEBI before filing the scheme with National Company Law Tribunal ("**NCLT**");

b) SEBI after satisfying the regulatory compliances, shall grant an in-principle approval with a validity of 3 months from its date of issuance within which duration application to NCLT for sanctioning of scheme shall be made;

c) After receiving approval of scheme by NCLT, the applicant shall submit following documents to SEBI for final approval within 15 days of the NCLT order:
- application for the final approval;
- copy of NCLT order approving scheme;
- statement explaining modifications, if any, in the approved scheme vis-à-vis draft scheme and the reasons for the same; and
- details of compliances with the conditions/observations mentioned in-principle approval.

Further, all other provisions mentioned in the para C(3) of SEBI Circular 2021 regarding the procedure for change in control of AMC shall remain unchanged.

The provisions of this circular shall be applicable to all applications filed for change in control of AMC for which scheme of arrangement are filed with NCLT on or after March 1, 2022.

Our Comments: SEBI vide aforesaid circular aims to streamline and speed-up the process of seeking approval for change in control of AMCs undertaking the schemes of arrangements through NCLT in terms of provisions of Companies Act, 2013.

SEBI PRESCRIBES NOC FROM MINIMUM 75% SECURED CREDITORS IN VALUE IN RELATION TO SCHEME OF ARRANGEMENT BY LISTED ENTITIES

SEBI vide its master circular on scheme of arrangement by listed entities ("**SEBI Master Circular 2020**[20]") has compiled the various requirements to be fulfilled by listed entities for undertaking a scheme of arrangement under one master document. One such requirement is to obtain a no objection certificate ("**NOC**") from the lending scheduled commercial banks/financial institutions/debenture trustees and submit with stock exchange along with other prescribed documents. This requirement is being introduced by SEBI through its circulars dated November 16, 2021 and November 18, 2021 (collectively referred as "**SEBI Circulars 2021**[21]") by amending the aforesaid master circular.

[18] SEBI Circular: SEBI/HO/IMD/IMD-I DOF5/P/CIR/2022/10, published on January 31, 2022, *accessible at* SEBI | Change in control of the asset management company involving scheme of arrangement under Companies Act, 2013

[19] SEBI Circular: SEBI/HO/IMD/DF2/CIR/P/2021/024, published on March 04, 2021, *accessible at* SEBI | Circular on Mutual Funds

[20] SEBI | Master Circular on Scheme of Arrangement (updated as of February 01, 2022)

[21] SEBI Circular: SEBI/HO/CFD/DIL2/CIR/P/2021/0000000657, published on November 16, 2021, *accessible at* SEBI | Scheme of Arrangement by Listed Entities and SEBI Circular: SEBI/HO/CFD/DIL2/CIR/P/2021/0000000659, published on November 18, 2021, *accessible at* SEBI | Addendum to SEBI Circular dated November 16, 2021 relating to Schemes of Arrangement by Listed Entities

Further, recently SEBI vide its circular dated February 01, 2022 ("**SEBI Circular 2022**[22]") amended the NOC requirement by prescribing that such NOC shall be obtained from lending scheduled commercial banks/financial institutions/debenture trustees representing minimum 75% of the secured creditors in value. The said amendment is reproduced below for reference:

"*No Objection Certificate (NOC) from the lending scheduled commercial banks/ financial institutions/ debenture trustees, from not less than 75% of the secured creditors in value*."

It may be noted that this circular shall be applicable for all the schemes filed with the stock exchanges after November 16, 2021.

Our Comments: SEBI by inserting a minimum threshold on the value of secured creditors for procurement of NOC, from lending scheduled commercial banks/ financial institutions/ debenture trustees, is aiming towards an effective, speedy and streamlined scheme approval process. This circular is released for further safeguarding the interests of shareholders of the listed entities and to promote the development of, and to regulate the securities market.

MCA ISSUES NOTIFICATION AMENDING COMPANIES (ACCOUNT) RULES, 2014

MCA with notification dated February 11, 2022 ("**Amendment Notification 2022**[23]") issued amendments in Companies (Account) Rules, 2014 ("**CA Rules, 2014**") by inserting sub rule (1B) after sub rule (1A) which stipulates the following:

(a) Every company covered under the provisions of sub-section (1) to section 135 of the Companies Act, 2013 shall furnish a report on Corporate Social Responsibility in Form CSR-2 to the Registrar; and
(b) The aforesaid form shall be filed as an addendum to Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS).
(c) Form CSR-2 is required to be filed for the preceding financial year (2020-2021) as well separately on or before 31st March 2022 after filing Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS).
(d) Form CSR-2 has been inserted after Form AOC-4 CFS.

Our Comments: MCA vide this notification aims to promote good corporate governance. The new form is in correspondence with the Corporate Social responsibility (CSR) which is aimed towards making an entity accountable to themselves and to its stakeholders.

MCA ISSUES AMENDMENT IN LLP RULES, 2009 AND PROVIDED CLARIFICATION ON DATE OF ENFORCEABILITY OF CERTAIN PROVISIONS OF THE LLP (AMENDMENT) ACT, 2021

The Ministry of Corporate Affairs ("**MCA**") with notification dated February 11, 2022 ("**Rules Amendment Notification 2022**[24]") issued certain amendments in Limited Liability Partnership Rules, 2009 ("**LLP Rules, 2009**") which shall come into effect from April 01, 2022. Furthermore, MCA with another notification dated February 11, 2022 ("**Notification 2022**[25]") provided the date of enforceability of certain provisions of the Limited Liability Partnership (Amendment) Act, 2021 ("**LLP(Amendment) Act, 2021**").

[22] SEBI Circular: SEBI/HO/CFD/DIL2/CIR/P/2022/11, published on February 01, 2022, *accessible at* SEBI | Schemes of Arrangement by Listed Entities
[23] CG-DL-E-12022022-233371, G.S.R. 107(E). Companies (Accounts) Amendment Rules, 2022, published on February 11, 2022, *accessible at* Notifications (mca.gov.in)
[24] CG-DL-E-12022022-233375: G.S.R. 109(E). LLP (Amendment) Rules, 2022, published on February 11, 2022, *accessible at* getdocument (mca.gov.in)
[25] CG-DL-E-12022022-233366: S.O. 621(E) Commencement notification for sections 1 to 29 of LLP (Amendment) Act, 2021, published on February 11, 2022, *accessible at* getdocument (mca.gov.in)

A. Provisions in the LLP Rules, 2009 are amended vide Rules Amendment Notification 2022:

1) In rule 5 under sub rule (2), provisos (i) and (ii) which laid down the provisions of payment of fees to the registrar through postal orders and bank drafts stands omitted.

2) In rule 5, sub rule (3) shall be inserted which has introduced the applicability of National Company Law Appellate Tribunal Rules, 2016 in case any aggrieved person prefers an appeal to the Appellate Tribunal in terms of section 72 of LLP (Amendment) Act, 2021.

3) In rule 18, sub rule (2), clause (xi) shall be substituted. Earlier where the proposed name of limited liability partnership ('**LLP**') should not be similar to firm/limited liability partnership/company incorporated outside India. Now with aforesaid substitution, the proposed name shall not be identical or too nearly resembles the name of any other limited liability partnership or a company.

4) Rule (19) sub rule (1) has been substituted whereby a proprietor of a registered trade mark under the Trade Marks Act, 1999 has also been empowered to apply to Regional Director in Form 23 to give direction to a LLP incorporated later to change its name or new name if it is similar to or resembles to their trade mark. Provided such an application has been made by the proprietor within 3 years from the date of incorporation or registration or change of name of LLP. Earlier a LLP or a body corporate or any other entity were empowered to make such an application in Form 23.

5) After rule 19, the rule 19A shall be inserted which provides that if any LLP fails to change its name or provide a new name in accordance with the direction issued under section 17 of LLP (Amendment) Act, 2021 with 3 months from the date of such direction, the letters "ORDNC" (which is an abbreviation of the words "Order of Regional Director Not Complied"), the year of passing of the direction, the serial number and the existing LLPIN of LLP shall become the new name without any further act or deed by LLP. Accordingly, the Registrar will issue a fresh certificate of incorporation in Form No. 16A after making necessary entries in the register of LLP.

   The aforesaid shall not be applicable in cases where e-form LLP Form No-5 pending for disposal at the expiry of aforesaid 3 months and not rejected subsequently.

6) After rule 37, the following rules has been inserted which will deal with the adjudication of penalty and appeal procedure, namely:
   (1) Rule 37(A) which is related to "*Adjudication of penalties*";
   (2) Rule 37(B) which is related to "*Appeal against order of adjudicating officer*";
   (3) Rule 37(C) which is related to "*Registration of appeal*";
   (4) Rule 37(D) which is related to *"Disposal of appeal by Regional Director".*[26]

7) In LLP Rules, 2009, *Annexure A* which prescribes fees payable under the said act and its rules shall be substituted with the revised *Annexure A.*

8) After Form 32, *Form 33 (LLP ADJ Memorandum of Appeal)* shall be inserted which is in pursuant to section 76A of LLP Act, 2008 and rule 37B of LLP Rules, 2009.

B. Provisions of the LLP (Amendment) Act, 2021 are enforced vide Notification 2022
Vide Notification 2022, the Central Government appoints April 01, 2022 as the date from which section 1 to 29 of the LLP (Amendment) Act, 2021 shall come into force.

Our Comments: MCA vide Notification 2022 followed the recommendations set forth by the Company Law Committee with respect to the enforceability of LLP (Amendment) Act, 2021. Further, besides introducing

[26] CG-DL-E-12022022-233375: G.S.R. 109(E). LLP (Amendment) Rules, 2022, published on February 11, 2022, *accessible at* getdocument (mca.gov.in)

several amendments in LLP Rules, 2009, Rules, Amendment Notification 2022 laid special focus to provide a proper procedure for appeal and adjudication.

- **MCA EXTENDS RELAXATION ON LEVYING OF ADDITIONAL FEES ON ANNUAL FILING FOR THE FINANCIAL YEAR ENDED ON 31.03.2021**

  In continuation of Ministry of Corporate Affairs ("**MCA**") general circular no. 22/2021 dated December 29, 2021[27], MCA vide circular dated February 14, 2022 ("**Circular 2022**[28]") notified that the relaxation on levying additional fees for e-forms AOC-4, AOC-4 (CFS), AOC-4 (XBRL) and AOC-4 Non-XBRL is extended up to March 15, 2022, and for filing of e-forms MGT-7/MGT-7A up to March 31, 2022, respectively. It has been further stated that only normal fees shall be payable for filing of the said e-forms.

  Our Comments: MCA vide Circular 2022 extended the relaxation of levying of additional fees since the stakeholders requested for the same after the company's finances took a hit because of the ongoing pandemic.

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[27] General Circular No. 22/2021, published on December 29, 2021, *accessible at* getdocument (mca.gov.in)
[28] General Circular No. 1/2022, published on February 14, 2022, *accessible at* getdocument (mca.gov.in)

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