IMPERIAL LAW OFFICES

Legal Updates

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1. REAL ESTATE

Mutation entry to be effected only after crystallization of rights of the parties.

The Hon'ble Supreme Court on 06, September 2021, in the case of Jitendra Singh v. State of Madhya Pradesh & Or.[1]reiterated the settled proposition of law on mutation entry, that if there is any dispute with respect to the title and more particularly when the mutation entry is sought to be made on the basis of the will, the party who is claiming title/right on the basis of the will has to approach the appropriate civil court/court and get his rights crystallized and only thereafter on the basis of the decision before the civil court necessary mutation entry can be made.

The petitioner in the instant case submitted an application to mutate his name on the basis of the will. From the record, it was observed that the application before the Naib Tehsildar was made before the death of the testator. Dismissing the appeal the Court observed that the High Court has committed no error in setting aside the order passed by the revenue authorities directing to mutate the name of the petitioner in the revenue records on the basis of the alleged will and relegating the petitioner to approach the appropriate court to crystalise his rights on the basis of the alleged will.

The Court further reiterated the position of law regarding mutation, by referring to its decision in Suraj Bhan v. Financial Commissioner[2], wherein it has observed and held that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. Entries in the revenue records or jamabandi have only "fiscal purpose", i.e., payment of land revenue, and no ownership is conferred on the basis of such entries. So far as the title of the property is concerned, it can only be decided by a competent civil court.

Our Comments: The decision of the Hon'ble Supreme Court has reiterated the existing position of law on mutation and the authority mutation holds. Mutation shall not ipso facto result in conferring, an otherwise disputed title, and is only for recording of title for the collection of land revenues.

2. INSOLVENCY AND BANKRUPTCY

NCLAT'S power to condone delay cannot over-ride the period permitted by the statute.

In the recent case of ***National Spot Exchange Limited v. Mr. Anil Kohli, Resolution Professional for Dunar Foods Limited***[3], Hon'ble Supreme Court on September 14, 2021, held that Adjudicating Authority cannot condone the delay further to the period prescribed by the statute. In the instant case, the Appellant challenged the order passed by NCLAT refusing condonation of delay application of 44 days. Section 61 of the Insolvency and Bankruptcy Code, 2016 **("Act")** provides that the appeal before NCLAT is required to be filed within a maximum period of 30 days. Section 61(2) of the Act permits the Appellate Tribunal to condone the delay of only 15 days which it can condone over the period of 30 days, if there is a sufficient cause.

[1] SLP No. 13146 of 2021
[2] (2007) 6 SCC 186
[3] CIVIL APPEAL NO. 6187 OF 2019

Rejecting the appeal, the Hon'ble Court held that under the statute, unless the Parliament has carved out any exception by a provision of law, the period of limitation has to be given effect to. Further, the courts have no jurisdiction and/or authority to carve out any exception. If the courts carve out an exception, it would amount to legislation which would in turn might be insertion of the provision to the statute, which is not permissible.

Our Comments: Hence, as per the current position of law, no condonation may be allowed, except to the extent permitted by the statute. Further, the restriction on condonation of delay provided under any statute (viz Electricity Act, Arbitration and Conciliation Act, IBC, Consumer Protection Act etc.) shall override the discretionary power of the court under Article 142 of the Indian Constitution, 1950 and general limitation under Article 5 of the Limitation Act, 1963.

3. INFRASTRUCTURE & ENERGY

Power Developers to receive dues even if the PPA is silent on "payment of deemed generation charges".

The Appellant Tribunal for Electricity ("**Tribunal**") has, *vide* its recent decision in National Solar Energy Federation of India ("**NSEFI**") v. Tamil Nadu Electricity Regulatory Commission("**TNERC**")[4], ordered Tamil Nadu Generation and Distribution Corporation Limited ("**TANGEDCO**") and Tamil Nadu State Load Despatch Centre ("**TNSLDC**") to pay the deemed generation charges at the tariff contained in the Power Purchase Agreement ("**PPA**") for the solar power backed down during the period March 01, 2017 to June 30, 2017 for the entire backed down energy. Further they are ought to pay carrying cost on the compensation above at the rate as applicable for deferred payments under the PPA.

TANGEDCO and TNSLDC had issued frequent backing down instructions to the solar power developers in the State of Tamil Nadu citing grid security as the reason for backing down of generation.

Aggrieved by this curtailment of generation of solar power, the NSEFI had filed a petition before TNERC, *inter alia*, seeking directions to the Respondents to observe the "Must Run" status of solar power plants and payment of deemed generation charges for the capacity which could not be generated and supplied due to backing down instructions issued by the Respondents.

TNERC *vide* its order dated March 25, 2019 observed that "*the SLDC may resort to backing down in rare occasions in order to ensure the grid safety as stipulated in the Grid Code and to ensure reliable 24 x 7 power supply to the State. It is necessary to log each event of backing down whenever such instructions are issued with the reason(s) which lead(s) to that unavoidable decision. A quarterly return on the curtailments with the reasons shall be sent to the Commission*." With respect to the issue raised by NSEFI on the payment of charges for the capacity which could not be generated and supplied, the Commission observed that "*there is no provision in the agreement signed with the Utility for payment of deemed generation charges, we find it not possible to accede to the prayer of the petitioner.*"

[4] Appeal No. 197 of 2019 (dated August 02, 2021)

Settling aside this order, the Tribunal held that to establish misfeasance on the part of SLDC, it is enough to show that SLDC is guilty of legal mala fide by knowingly breaching its statutory duty and with knowledge that its action is likely to cause losses to the generating company. Further, it is also settled law that once misfeasance by SLDC with its knowledge has been established, the party aggrieved is entitled to claim compensation from SLDC. Further, TNERC failed to appreciate the submissions made on law and facts by the Respondents. The findings of Commission that there is no provision in the PPA to claim compensation was wrong and deserves to be rejected. The ability to claim compensation, in the facts of this case, is not dependent on existence or non-existence deemed generation clause in the PPA. The Tribunal had relied on its decision in TATA Power Company Limited v. Maharashtra Electricity Regulatory Commission & Ors[5]

4. INCOME TAX

For the purpose of disallowance under section 14A where the assessee has made investments from common funds for earning tax free income, the investments must be considered to be made out of interest free funds –Supreme Court in South Indian Bank Ltd Vs. CIT[6]

The issue of disallowance under section 14A has been one of the most contentious issue of Income tax litigation. In the facts of the case under consideration, the Assessee had made investment from common fund (made up partly of interest free funds and partly of interest- bearing funds) for earning tax free income. The Assessee also did not maintain separate accounts for the investments and expenditure for earning this tax-free income. The Assessing Officer, in absence of separate accounts for investments which earned the tax-free income, made proportionate disallowance of interest attributable to the funds invested to earn this tax-free income. The matter ultimately reached the Supreme Court.

The Supreme Court after analyzing the section and the available jurisprudence on the same has held that where the Assessee has common fund (made up partly of interest free funds and partly of interest- bearing funds) and payment is made out of that common fund, the investment must be considered to have been made out of the interest free fund. To put it another way, in respect of payment made out of common funds, it is the Assessee who has such right of appropriation and also the right to assert from what part of the fund a particular investment is made and it may not be permissible for the Income Tax department to make an estimation of a proportionate figure. Hon'ble Supreme court also clarified that the law does not require the Assessee to maintain separate accounts for the earning of exempt and non-exempt income and therefore it cannot be the basis of disallowance.

Our Comments: This judgement will put an end to one of the most contentious issues of disallowance under section 14A of the Income Tax Act, 1961 of the expenditure made to earn tax free income made from common funds as defined above.

[5] Appeal No. 175 of 2012 (dated November 14, 2013)
[6] Civil Appeal no 9606 of 2011 judgement dated 09.09.2021

5. GST

The GST Council in 45th Meeting of the GST Council in Lucknow, on 17th September, 2021 has inter-alia made several recommendations[7] relating to changes in GST rates on supply of goods and services and changes related to GST law and procedure. The major recommendation are as follows:

Major Recommendations: -

A. COVID-19 relief measure in form of GST rate concessions: -

Extension of existing concessional GST rates (currently valid till 30th September, 2021) on certain Covid-19 treatment drugs, up to 31st December, 2021.

B. Reduction of GST rate to 5% on certain more Covid-19 treatment drugs, up to 31st December, 2021. Details of Covid 19 drugs may please be referred to in Para I(A)1 and 2 and recommendations on GST rate changes in relation to Goods [w.e.f 1.10.2021) in Para I(B) of the Press Release.

C. Supply of mentha oil from unregistered person brought under reverse charge. Further, exports of Mentha oil would be allowed only against LUT.

D. Special composition scheme for Brick kilns with threshold limit of Rs. 20 lakhs, with effect from 1.4.2022. GST applicable @ 6% without ITC under the scheme. GST rate of 12% with ITC would otherwise apply to bricks.

E. Correction in Inverted Duty structure in Footwear and Textiles sector - GST rate changes to correct inverted duty structure, in footwear and textiles sector, will be implemented with effect from 01.01.2022.

F. The issue of bringing specified petroleum products within the ambit of GST- After due deliberation, the Council was of the view that it is not appropriate to do so at this stage.

G. Major GST changes in relation to rates and scope of exemption on Services [w.e.f 1.10.2021 unless otherwise stated]. Please refer to the table below Para F of the Press Release.

H. Clarification in relation to GST rate of Goods are referred to in Para I(G) of the Press Release.

I. Clarification in relation to GST rate on services are referred to in Para I(H) of the Press Release.

J. Measures for Trade facilitation:

1) Relaxation in the requirement of filing FORM GST ITC-04: -Requirement of filing FORM GST ITC-04 under rule 45 (3) of the CGST Rules has been relaxed as under:

[7] https://www.cbic.gov.in/resources//htdocs-cbec/press-release/PRESS_RELEASE_45.pdf;jsessionid=852385A768B2FBD8542A31CF894B5AC4

i. Taxpayers whose annual aggregate turnover in preceding financial year is above Rs. 5 crores shall furnish ITC-04 once in six months;

ii. Taxpayers whose annual aggregate turnover in preceding financial year is upto Rs. 5 crores shall furnish ITC-04 annually.

2) In the spirit of earlier Council decision that interest is to be charged only in respect of net cash liability, section 50 (3) of the CGST Act to be amended retrospectively, w.e.f. 01.07.2017, to provide that interest is to be paid by a taxpayer on "ineligible ITC availed and utilized" and not on "ineligible ITC availed". It has also been decided that interest in such cases should be charged on ineligible ITC availed and utilized at 18% w.e.f. 01.07.2017.

Our Comments: -

The expression used in the Cenvat Credit rules, 2004 was "availed and utilised". That means penalty can be imposed and interest can be charged if only there are both the activities viz. availment and utilisation. In the GST regime, the expression is "availed or utilised". Therefore, demand of penalty and interest was being raised by Revenue for "availment" itself, even if there is no "utilisation".

Retrospective amendment to Section 50(3), to provide that interest is to be paid by a taxpayer on "ineligible ITC availed and utilized" is welcome measure and a great relief to taxpayer.

3) Unutilized balance in CGST and IGST cash ledger may be allowed to be transferred between distinct persons (entities having same PAN but registered in different states), without going through the refund procedure, subject to certain safeguards.

Our Comments: -

Transfer of unutilized balance in CGST and IGST cash ledger between distinct persons (entities having same PAN but registered in different states) is of course a tax friendly measure. However, unutilized balance in CGST and IGST credit ledger may, also, be allowed to be transferred between distinct persons (entities having same PAN but registered in different states). Although it's not a new idea, rather, a similar facility was available under LTU scheme in the erstwhile Central Excise regime. Where tax liability of a unit was allowed to be discharged by credit accumulated in any other unit, registered under LTU scheme, under the same PAN. It will really help GST establish its credentials of One Nation One Tax. We recommend Trade and Industry to take up the issue at appropriate level.

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