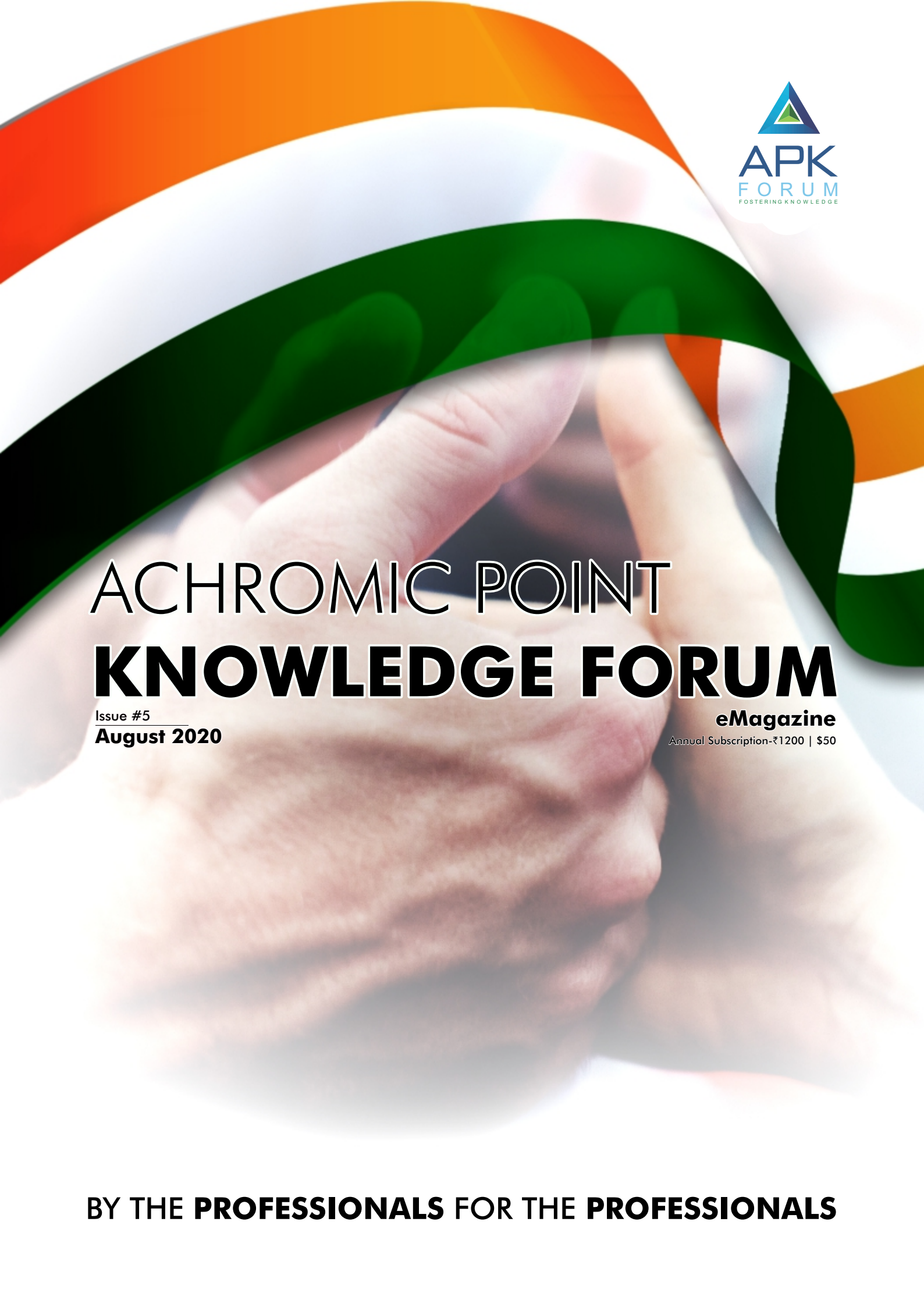

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ACHROMIC POINT
KNOWLEDGE FORUM

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BY THE **PROFESSIONALS** FOR THE **PROFESSIONALS**

Virtual Training on Mergers and Acquisitions

In this webinar conducted with Vaish Associates Advocates as our knowledge partner on 1st – 3rd July 2020 where Fundamentals of Mergers & Acquisitions and Corporate restructuring were scrutinized by Manish Tyagi Partner at MHA Legal, Yatin Narang Principal Associate, Priyanka Jain Principal Associate, Satwinder Singh at Vaish Associates Advocates whereas Rajashree Rastogi from Aarna Law discussed some important terms used during the transaction at the last day.

Certificate Course on White Collar Crimes & Cyber Crime

In virtual Certificate Course on White Collar Crimes & Cyber Crime conducted in association with Cyril Amarchand Mangaldas and BDO India LLP as our knowledge partner from July 7th – July 10th , 2020 , Srinivasa Rao Partner & Leader/ Forensics at BDO India LLP and Ankoosh Mehta Partner at Cyril Amarchand Mangaldas had a indepth discussion on Fraud schemes and controls and White collar crime investigations. During the last day , Panel discussion on Steering White Collar Crimes and Investigations was conducted anchored by Hardik Sheth Head - Internal Audit & Risk Management at Tech Mahindra Business Services along with Anirban Banerjee Global Head - Business Advocacy & Excellence at TCS BFSI Operations, Surath Mukherjee Executive Director - Head - Internal Audit & Risk Assurance at Dalmia Bharat Ltd., Rajkumar Shriwastav, Srinivasa Rao & Ankoosh Mehta.

Virtual Training on Contract Drafting & Negotiating An Advanced Level Workshop

Our Virtual Training on Contract Drafting & Negotiating-along with our knowledge partner "Kochhar & Co." conducted on July 8th – 10th ,2020 provided the hands on experience to the participants with strategies, tactics, and a deeper understanding of contracts to improve their contract negotiating skills and be fully prepared to engage in contract negotiations

In this highly interactive webinar, participants learned the tactics and tricks of negotiating terms, conditions, extensions etc from our experts Savitha Jagadeesan & Gaurav Chatterjee.

Digital Course on Prevention of Oppression & Mismanagement: A way forward to effective Corporate Governance

Achromic point academy outlined a Digital Course on Prevention of Oppression & Mismanagement with the aim of paving a way forward to effective corporate governance with the support of Cyril Amarchand Mangaldas as Knowledge Partner where Mr Ankoosh Mehta Partner at Cyril Amarchand Mangaldas, Manita Joshi Partner at Cyril Amarchand Mangaldas shared their experiences in battle from boardroom to courtroom and expertise in key aspects of corporate governance and a lot more.

GST Summit and Awards

Achromic Point brought its 3rd Annual GST Summit and Awards on 28th July, 2020 virtually along with the support of "Chilana & Chilana Law Offices as Litigation Partner, "Avinav Consulting" and "TMSL - Tax Technology Managed Services" as Corporate Partners, "The Facility Hub" and "Tally" as Associate Partners, "Legal N Tax Advisory Firm" as Tax Partner.

The programme commenced with a very warm welcome from the Director of Achromic point - Aashish Verma and inviting NV Raman from Novello Advisors LLP to share his insights on the effect of Pandemic on Indirect Taxation. Himanshu Goel-Associate Partner at TR Chadha & Co LLP as a moderator & Pushpendra Dixit-General Manager-Taxation, PVR Group, Umang Dhingra Head of Tax at GlaxoSmithKline Asia, Mahesh Jain-Tax Head at Corteva as fellow panelists contributed in the discussion on the challenges, be it GST Annual Return and Audit certification or E-invoicing Challenges and opportunities or GST Audits- Steps and the Clean-up Act.

Anti- Profiteering dilemma & Issues in GST like centralized registration for service sector, or the supply of services were discussed by Yogesh Gaba-Managing Partner at Gaba & Co. & Nidhi Goyal-Managing Director at Avinav Consulting respectively.

During the day, Spike in ARA & GST based litigations were discussed in a panel discussion anchored by Sandeep Chilana, Managing Partner at Chilana & Chilana Law Offices along with Ankita Bhasin-Principal Associate at Shardul Amarchand Mangaldas & Co, CA Sarthak Garg , Shikha Bhardwaj Advocate, Nirmal Singh-Partner at Nangia Andersen Consulting Pvt. Ltd.

Session on Role of Technology in GST was taken by Jigar Doshi-Founding Partner at TTMS LLP, Pugal. T-Senior Consultant at Tally Solutions Pvt. Ltd that received a good response from the audience.

The phrase 'caveat emptor', which in English translates to 'let the buyer beware' is a well-known principle embedded in common law requiring buyers to perform necessary due diligence before making a purchase, potentially excusing the manufacturers or sellers from any liability. It assumes that buyers will inspect and otherwise ensure that they are confident with the integrity of the product before completing a transaction. Many a consumer was subjected to exploitation by unscrupulous traders and service providers who used this legal maxim to their advantage much to the chagrin of the helpless consumer.

One such law that was enacted as an urgent need to tilt the balance in favour of the consumer was the Consumer Protection Act 1986 ("**CPA, 1986**"). However, as the relationship between the customer and product & service providers grew in complexity, the need to upgrade the consumer protection regime became imminent. With the Digital Age ushering in a new era of commerce and digital branding, a new set of customer expectations came to the fore. Therefore, to enable a more holistic and stringent consumer protection framework, the Consumer Protection Act, 2019 ("**CPA, 2019**") was introduced in Parliament.

Introducing product liability

A key concept introduced under the CPA, 2019 is that of 'product liability, defined as '*the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto.*'

Prior to the enactment of CPA, 2019, there was no specific product liability concept under Indian law. In the absence of a statutory law, courts were guided by the common law principles of justice, equity, and good conscience. Earlier, a consumer may have lodged a claim arising from deficiencies in a product by invoking relevant provisions of the Sale of Goods Act, 1930, Consumer Protection Act, 1986 and the Indian Contract Act, 1872. The CPA, 2019 has now sought to codify the principle of product liability by clearly defining the same.

The CPA, 2019 sets out specific occurrences under which an action can be initiated by a complainant against the product manufacturer, service provider or

product seller. Moreover, the three may be held jointly or severally liable as well. For instance, a product manufacturer may be held liable if the impugned product contains a manufacturing defect or the product does not confirm to the express warranty. While a product seller, who must not be the product manufacturer, may be liable if he has exercised substantial control over the designing, testing, manufacturing, packaging and labelling of a product or has altered or modified the product in such a way that it resulted in causing the harm. As for a product service provider, liability will be imposed if the services so provided were deficient in quality or if there was any act of omission or commission or negligence or conscious withholding of information which caused the harm to the consumer.

The grounds for an action pertaining to product liability are as follows:

(a) The goods supplied are defective,

(b) The consumer has been charged excessively for the goods,

(c) Goods which are hazardous to life and safety being offered by a trader who is aware of the unsafe nature of the goods and offers goods in contravention of prescribed standards, and

(d) Any unfair or restrictive trade practices adopted by the trader.

Exceptions to the rule

While the CPA, 2019 has introduced vital changes to the scheme of consumer protection, it has also introduced exceptions to ensure that its scope does not extend beyond that which is envisaged. Product liability cannot lie if the product was misused or altered at the time of sale, although it may continue to lie against the service provided. Product liability will not lie if the product was required to be used only by or under the supervision of an expert, or if the complainant, while using the product, was under the influence of alcohol. Further, a product manufacturer will not be liable for failure to instruct or warn about a danger which is obvious or commonly known to the user of such product.

Conclusion

When compared to the erstwhile 1986 Act, the CPA, 2019 is much more in line with the consumer protection schemes around the world. In fact, the CPA, 2019 places liability on all people who, directly or indirectly, have been involved in the process of manufacture or sale of a product, including e-commerce websites and endorsers, and in a way simplifies the process of ascertaining product liability. Without a doubt, the CPA, 2019 is a welcome change for consumers. However, from the perspective of a manufacturer or service provider, it is pertinent that they take all possible measures to mitigate the liability that may be placed upon them through the wide ambit of the CPA, 2019.

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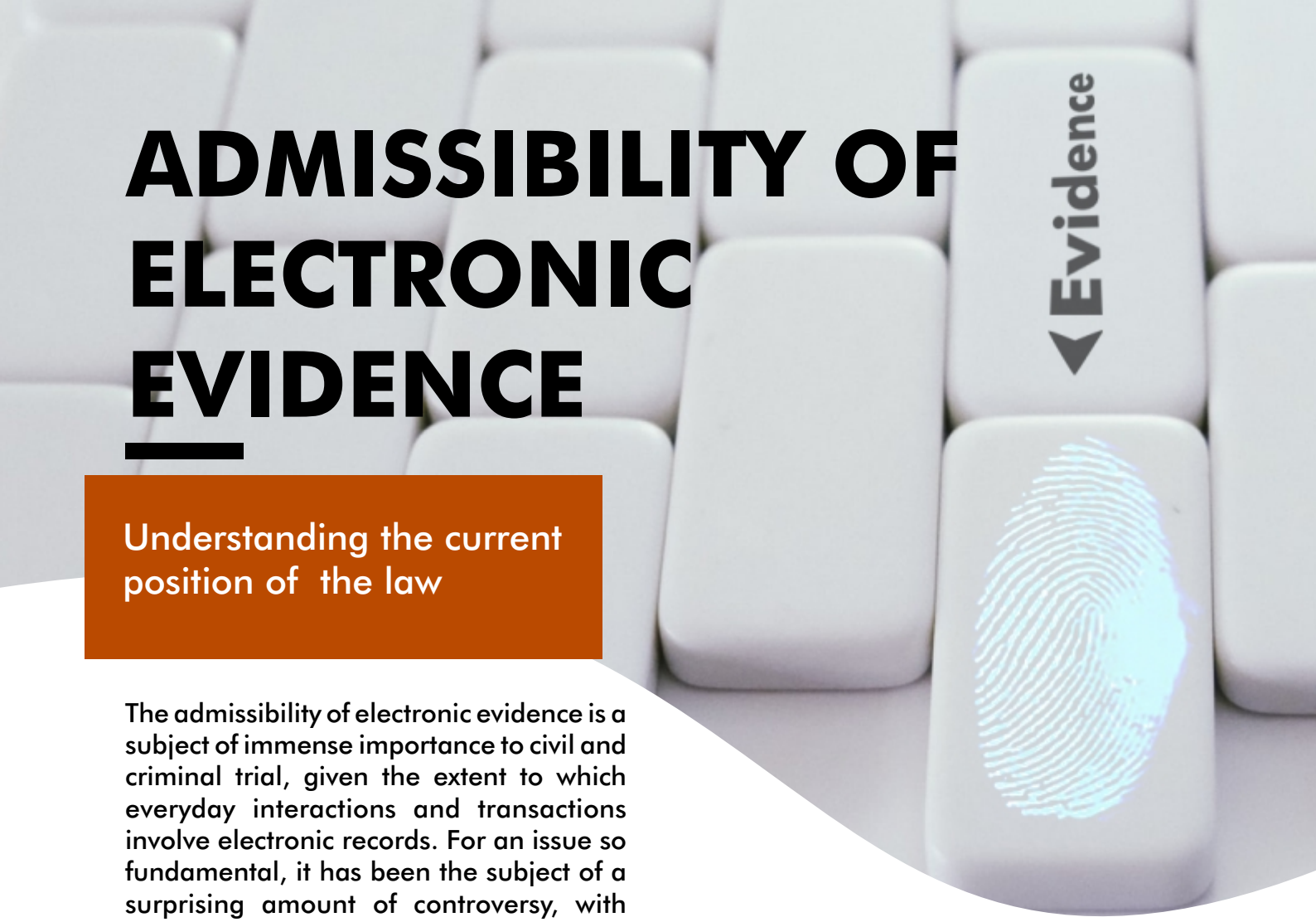

ADMISSIBILITY OF ELECTRONIC EVIDENCE

Understanding the current position of the law

The admissibility of electronic evidence is a subject of immense importance to civil and criminal trial, given the extent to which everyday interactions and transactions involve electronic records. For an issue so fundamental, it has been the subject of a surprising amount of controversy, with different judgments leading to varied and contradictory positions on various aspects of the issue.

The present article analyzes the recent judgment of a 3 judge bench of the Hon'ble Supreme Court in Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal & Ors[1], which arises out of a reference made by a 2 judge bench to resolve the divergent decisions of a 2 judge bench in Shafhi Mohammad v. State of Himachal Pradesh[2] ("Shafhi Mohammad") and that of a 3 judge bench in Anvar P. V. v. B. K. Basheer[3] ("Anvar") on the question whether certificate under Section 65B(4) is mandatory or may it be waived in certain circumstances.

To understand the controversy surrounding the judgment it is crucial to delve into the development of the jurisprudence regarding electronic evidence. Before the introduction of Section 65A and 65B into the Act in 2000, there were no specific provisions governing admissibility of electronic evidence, and recourse was made to Sections 61 to 65 by extending the rules of admissibility of primary and secondary evidence to electronic evidence.

Section 65B creates a deeming fiction by which electronic evidence "shall be deemed to be also a document" if the conditions mentioned are satisfied and shall be admissible without production of the original. Sub-section deals with production of a certificate stating certain information and disclosing whether the requirements of sub-section (2) are met. It is the requirement of a certificate under Section 65B(4) that had led to the greater part of the controversy regarding electronic evidence.

To appreciate the legal quandary, majorly relating to the question of mandatory production of certificate as a condition for

[1] C.A. NOS. 20825-20826 OF 2017
[2] (2018) 2 SCC 801
[3] (2014) 10 SCC 473
[4] (2005) 11 SCC 600

regarding any computer output as a primary evidence, let us look at the judicial trend leading to the present judgment. In the landmark case of Anvar it was held that the production of certificate under Section 65B (4) is a mandatory pre-condition for admissibility of electronic evidence. Anvar effectively overruled State (NCT of Delhi) v. Navjot Sandhu[4] ("Navjot Sandhu") wherein it was held that non-production of certificate does not render the electronic evidence inadmissible.

Thereafter, a different note was struck by the three judge bench in Tomaso Bruno v.

State of U.P.[5] ("Tomaso Bruno"), which held that electronic evidence may also be treated as secondary evidence and proved under Section 65 of the Act. This position was relied upon in the recent case of Shafhi Mohammad, wherein it was held that the production of certificate under Section 64B (4) of the Act was a procedural requirement and could be relaxed in the interest of justice.

The judgment in Arjun Panditrao has overruled both the judgments in the case of Tomaso Bruno and Shafhi Mohammad. Tomaso Bruno was held to be per incuriam as being in direct contradiction with the law laid down in Anvar and Shafhi Mohammad was held to be bad in law for its divergence from the decision of a larger bench in Anvar.

The Supreme Court in Arjun Panditrao has held that the law laid down in Anvar is the correct position regarding admissibility of electronic evidence. It was also held that the production of certificate as set out in Section 65B (4) is 'condition precedent' to the admissibility of secondary evidence of the contents of an electronic record, and that Sections 65A and 65B are a complete code for proving electronic records and must be followed when the content of electronic records are sought to be proved. Most importantly, it was held that at the stage of trial if a person is not able to procure the certificate from the concerned person, he must file an application in court to give direction to the concerned person to furnish the certificate. If all efforts have been made to procure the certificate and still the certificate cannot be produced, then the requirement of certificate can be waived off.

While Arjun Panditrao was expected to and is widely credited with clearing the confusion created by different decisions of the Supreme Court, a scrutiny into the judgment reveals many controversies still unresolved and the creation of a few new issues as well.

The following are some issues that arise from the judgment –

1. Reading the scheme of primary and secondary into Sections 65A and B

The court has held that the certificate under Section 65B(4) is required to be prove the electronic record as a secondary evidence, and need not be followed if the computer system and electronic record can themselves be produced as primary evidence before the court. If the computer

[5] (2015) 7 SCC 178

system however cannot be brought before the court, then it is only possible to tender the computer output and prove it in the manner under Sections 65A and B.

The difficulty that arises from this position is one of contradiction- whereas in the present judgment the courts have accepted the position from Anvar that Sections 65A and B are a complete code, they have also read into it the foreign scheme of primary and secondary evidence, which are captured in Section 62 & 63 of the Evidence Act.

While it is clear that the court has relied upon the reference in Section 65B itself to proving documents without "production of the original" to import the scheme of primary and secondary evidence into the "complete code" of Sections 65A and B, it is undeniable that the said inclusion is otherwise incongruous to the concept of the sections operating as a code unto themselves.

2. Summoning for certificate- practical difficulties

The Hon'ble Supreme Court while holding that the requirements of Sections 65A and B are mandatory for proving the contents of an electronic record as secondary evidence has provided that where a party has been unable to produce the certificate due to the refusal of a person in position to issue such certificate, such party may apply to the court to issue summons to the person to produce the certificate.

However, undoubtedly the said position will result in practical difficulties. It has been directed that the parties must file an application in court in case where the concerned person/authority refuses to furnish a certificate. In such a situation, what would be the procedure when the concerned person disputes that he is the authorized person to give the certificate? Would the court delve into the question, and if so, would it also determine who the correct concerned person/authority is? If so, it is forseeable that the production of electronic evidence might itself become subject of a complicated adjudication which would take up considerable time and introduce delay into the trial process, especially considering the proliferation of electronic evidence in modern trials. Indisputably, this entire process will result in unnecessary delay in the progress of the trial.

3. May one be compelled to certify the contents of an electronic record which leads to their own incrimination?

Article 20 of the Constitution of India houses a fundamental safeguard that no person may be forced to be a witness against themselves. A question that may arise from the instant judgment of the Hon'ble Supreme Court is- may a person be summoned and compelled to produce a certificate verifying the secondary evidence of an electronic record against himself? If so, this would certainly seem to

[6] (2019) 7 SCC 515

militate against the constitutional safeguard.

While it may very well be that such a situation would not arise, as in ordinary circumstances the appropriate person who has extracted the output from the accused's computer system may be a police personnel rather than the accused himself, it can be forseen that there may be complications in the trial process due to the refusal of a person to produce a certificate against himself.

4. At what stage may a certificate be produced?

While ruling that the certificate under Section 65B (4) can be produced at any stage prior to the completion of the trial and by providing that the court may entertain applications in cases where the certificate cannot be procured through the concerned authority, the court has left open some questions.

It has been clarified that in cases where a party is unable to procure the certificate from the concerned person, the judge conducting the trial must summon the concerned person and compel him to furnish the certificate. Interestingly, the Court has held that the direction to produce the certificate can be given by the Court at any stage of the trial.

However, an inquiry into the Criminal Procedure Code reveals that Section 207 of the Code mandates that all relevant documents should be furnished with the charge sheet in a criminal trial. Recently in State of Karnataka v. M.R. Hiremath[6] the Supreme Court held that the certificate under Section 65B (4) need not be produced with the chargesheet and can be furnished at the later stage of production of evidence. In the immediate case the Supreme Court has gone a step ahead by holding that the certificate can be produced at any stage prior to the completion of the trial.

The said position militates against the cardinal principal recognized by Section 207 and creates uncertainty on the subject.

Conclusion

While Arjun Panditrao is certainly a welcome step towards bringing a cohesive and clear position on admissibility of electronic evidence and clearing up the various conflicting decisions of the Hon'ble Supreme Court, it is equally certain that there remain several controversies which go to the roots of the subject and have grave importance in civil and criminal trials. It can be expected that these issues may themselves lead to contrary decisions by different courts and once again create the requirement for the issues to be tackled in a judgment of the Hon'ble Supreme Court.

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Is the Section 65B Certificate a Mandatory Requirement for Electronic Evidence?:

The Supreme Court Clarifies the Law

The issue regarding admissibility of electronic records as evidence, and the requirement of certificate under Section 65B of the Indian **Evidence Act**, 1872 (Evidence Act) had been in muddied waters because of 2 conflicting decisions of the Supreme Court in Anvar P.V. v. P.K. Basheer & Ors., (2014) 10 SCC 473 ('**Anvar P.V.**') and Shafhi Mohammad v. State of Himachal Pradesh, (2018) 2 SCC 801 ('**Shafhi Mohammad**').

The larger bench of 3 judges of the Supreme Court in the case of Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors., 2020 SCC OnLine SC 571 ('**Arjun Panditrao**') has attempted to clear the air regarding several issues on the treatment of electronic records as evidence under the Evidence Act.

Legal Framework under the Evidence Act:

The general framework for proof of documentary evidence under Sections 61 to 65 the Evidence Act. The provisions provide the circumstances where documents may be proved by secondary evidence (i.e. by producing copy of the original document, made by recognised means, including copy by mechanical processes, or certified copy, or by producing first person oral accounts of the contents of the document), and, except for such circumstances, the documents are to be proved by primary evidence (i.e. by production of the document itself or in original before court).

The proof of such documents relate to their existence, condition or contents: the "existence" relates to the admissibility of the document, while "contents" of a document are to be proved after it becomes admissible.

The special framework for proof of electronic records as evidence is provided under Sections 65A and 65B of the Evidence Act. The provisions deem any

information in an electronic record which is printed on paper, or recorded or copied in optical or magnetic media, as a 'computer output', to be also a "document" under the Evidence Act, provided the conditions in Section 65B are satisfied. This would cover printouts of emails, scanned documents, photos, screenshots, etc.

The primary issue of conflict between *Anvar P.V.* and *Shafhi Mohammad* was whether the requirement of certificate under Section 65B(4) of the Evidence Act was mandatory or not: *Anvar P.V.* held that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B(4) are satisfied, and that the Evidence Act does not contemplate proof of an electronic record by oral evidence if the said requirements are not satisfied.

On the other hand, *Shafhi Mohammad* held that if the electronic evidence is authentic and relevant, the same may be admitted as evidence subject to satisfaction of the court about its authenticity. Shafhi Mohammad held that the requirements of certificate under Section 65B would apply only when such electronic evidence is produced by a person who is in a position to produce the certificate (i.e. being in control of the concerned device).

Takeaways from Arjun Panditrao:

In *Arjun Panditrao,* the decision in *Anvar P.V.* has been affirmed and declared to be the correct law and the view taken in *Shafhi Mohammad* has been overruled. The key takeaways from the Arjun Panditrao judgment are as follows:

- The requirement of a written certificate under Section 65B(4) is mandatory for admissibility of information contained in electronic records as evidence. It was held that Sections 65A and 65B of the Evidence Act are a complete code in themselves for admissibility of electronic records, and general provisions relating to documents (i.e. Section 62 to 65 of the Evidence Act) do not apply.

  Where the certificate is to be produced by a person or authority other than the person adducing such evidence or seeking to rely on such evidence, the requirement of producing the certificate is discharged when the party asking for the certificate has done "all that he can possibly do to obtain" the certificate.

  However, the impact of such discharge on the admissibility of the concerned electronic record, is not clear from the judgement. It may appear that once the requirement is discharged in a case, the concerned electronic record is deemed to be admissible as evidence. The other possibility is that the general provisions relating to documents (i.e. Section 62 to 65 of the Evidence Act) become applicable for proof.
- In criminal cases, it has been clarified that the certificate under Section 65B may not be produced at the time of

production of electronic records as evidence. The certificate in such cases may be produced or directed to be produced by the Court at any time before the trial is over, provided the rights of the accused are not prejudiced.

- In civil cases, where the certificate under Section 65B is issued by a person other than the party relying on such evidence, the Court may direct such person to produce a proper certificate (in case of a defective certificate or where no certificate has been produced) after the electronic records are produced as evidence.
- The certificate under Section 65B is not necessary when the original document itself as primary evidence has been produced.
  For instance, this can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. However, this option is not available where the computer forms part of a system or network and it becomes impossible to physically bring the same to court.
- It was clarified that the person issuing the certificate under Section 65B of the Evidence Act can be any one out of several persons occupying a responsible official position or in the management of relevant activities with respect to the concerned devices.
- General directions have been issued to the cellular operators and internet service providers to maintain Call Detail Records and other records (including logs of internet users), for any such record seized during investigation in criminal matters. These directions shall be in effect till appropriate directions are issued by the concerned authority under the Information Technology Act, 2000.

Kaustav Som
Associate
Samvad Partners

CREATING UNICORNS

STARTUP IDEA TO IPO

FUNDS RAISING & MULTIPLYING WEALTH CREATION AND VALUATION FOR COMPANIES BY STOCK EXCHANGE LISTING.

Looking to take your company to next level?

Listing on Stock Exchange--A new source of raising equity capital, maximizing value & wealth creation for Startups and SME companies.

Forward & Executive Summary:
For growing Startups and SME companies seeking to raise capital, listing on the India's premier stock exchanges can be a superior route to growth. Since 2014, India's premier stock exchange platforms known as NSE and BSE have provided small and mid size companies a great opportunity to raise equity capital for the growth and expansion. The stock exchange listing will help unleash the valuation of companies and in the process create wealth for all the stakeholders, besides enormous benefits. SME companies have the potential to grow into big companies, provided they get adequate capital support. Startups and SME companies now have the great opportunity to grow into big public listed companies by getting themselves listed on a India's premier stock exchanges. We hope that this concise article will help companies to be well prepared to transform into a successful and wealthy public listed company that continually delivers maximum value and creates wealth for its shareholders.

There are enormous benefits to Startups and SMEs. The Top 10 key advantages to get your company listed on the stock exchange platforms are stated below:

1. Easier access to equity capital and better funding opportunities:
Going for IPO and public listing provides companies with the equity financing opportunities to grow their business from operations to expansion to inorganic acquisitions. Access to equity financing lowers the debt burden leading to lower financing costs and healthier and wealthier balance sheets.

2. Enhanced Value creation:
Valuation of a company is determined by many factors, one of which is class of company-whether public listed or private limited. Going for a public issue of capital will enhance the company's visibility. Greater public awareness gained through media coverage, publicly filed documents and coverage of stock by sector investment analysts will provide the listed companies with greater profile and credibility.

3. Balanced Risk Management for promoters:
The stock exchange listing will help companies to distribute the risk of business efficiently. Listing the company would facilitate expansion of the investor's base,

which in turn help company get secondary market for equity financing, including private placement.

long term capital gains is 10% and short term capital gains is 15%, provided the transaction has been subjected to

4. Easier and efficient entry and exit platforms for Private Equity and other strategic investors leading to increased participation from private equity investors:

The presence of a market-driven transparent trading platform provides with a ready and easy entry and exit for strategic investors. Listing not only offers the investors flexibility for entry and exit, but also the confidence required for any such transactions. The listing would result in an increased participation by venture capital players as they would have a ready, transparent and tax-efficient exit route.

5. Minimum capital gain tax:
Normally, transfer of unlisted shares attracts long term capital gains tax of 20% and short term capital gains of up to 30%. Whereas in case of listed shares, tax on securities transaction tax (STT). This preferential tax treatment on transfer of listed shares is also available to shares listed on SME category on the Stock Exchange. Listing on SME Exchange is a valid tax-planning tool and could, thus, lead to enormous tax saving for entrepreneurs & investors.

6. No tax on fresh equity infusion in the company:
Recently the Finance Act, 2012 imposed a tax liability on fresh issuance of equity shares by an unlisted company to investors other than "Registered Venture Fund", if the issuance is made at a value more than the fair value. This could make companies subject to heavy tax outgo, since they often go for fund raising through equity issuance to investors. Such a tax liability, however, does not attract if the shares of the company are listed on recognize stock exchanges, including SME stock Exchange.

7. Corporate image creation, better visibility and strong national as well as international Brand Building:
Going for a public issue is most likely to enhance the company's visibility. Greater public awareness gained through media coverage, and research coverage by sector investment analysts provide the companies with greater visibility and help brand building which otherwise may remain a dream for most companies.

8. Listing on stock exchange can facilitate growth through strategic investments and Mergers and Acquisitions:
The companies in their effort to have forward or backward integration for growth and expansion may take a strategic stake in other companies. Domestic & International investors repose faith in listed companies. Listed companies are likely to get strategic investments from both, domestic and international investors as well as from private equity and strategic investors. Instead of a direct cash offering, using shares for an acquisition can be a tax-efficient and cost- effective vehicle to finance such a transaction.

9. Incentive mechanism for employees:
ESOPs and any other share-based compensation plan of listed company have an immediate and tangible value to employees. This, in turn, serves as a talent retention tool. This can serve to ensure stronger employee commitment to the company's performance and success

10. Strong Corporate governance & financial controls:
Though the requirements for a company listed on SME category on the Stock Exchange are not as stringent as that for Main Board listed companies, nevertheless stock exchange listing ensures that the company has drawn up the internal control systems and set up minimum required framework of corporate governance. This, in turn, lends sustainability to the business.

If you want your company to achieve financial success, create value and wealth and raise funds or for more in depth professional expert advice or to consult Mr. Rajan Bhatia, one of India's premier IPO Advisor, he can be reached at :

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Supreme Court decision of **Samsung Heavy Industries Ltd**

UNDERSTANDING THE LAW

In a yet another recent and a welcoming judgment, the Hon'ble Apex Court in the case of DIT (International Taxation) vs. Samsung Heavy Industries Ltd., vide order dated 22.07.2020 has held that the Project Office of Samsung Heavy Industries Ltd. ("the Assessee") did not amount to establishment of a "Permanent Establishment" ("PE") of the Assessee in India and thus the Assessee shall not be subjected to tax under the India-Korea Double Taxation Avoidance Agreement ("DTAA"). The Hon'ble Apex Court, has yet again re-iterated the basic principles for constitution of a PE under the DTAA and has held that-

1. For constitution of "fixed place" permanent establishment under the DTAA, the condition precedent for applicability of Article 5(1) of the DTAA and the ascertainment of a "permanent establishment" is that there should be an establishment "through which the business of an enterprise" is wholly or partly carried on.

2. The profits are taxable only where the said enterprise carries on its core business through a PE.

3. The maintenance of a fixed place of business which is of a preparatory or auxiliary character in the trade or business of the enterprise would not be considered to be a PE under Article 5.

What I find more important is the principle of burden of proof re-iterated by the Court. It is important to note that burden of proof to allege existence of PE lies on the Income Tax Department and not on the Assessee as stated by Supreme Court in ADIT vs. E-funds IT Solutions Inc. (Supreme Court - 399 ITR 34). At para 10 of the said judgment, somewhere in the middle of the paragraph, the Court said that *"The burden of proving the fact that a foreign assessee has a PE in India and must, therefore, suffer tax from the business generated from such PE is initially on the Revenue"*.

This principle has been re-iterated in the present judgment and the Court has said that the finding that the onus is on the Assessee and not on the Income Tax Department to first show that the project office at Mumbai is a permanent establishment is in the teeth of the judgment in E-Funds IT Solution Inc. (supra).

This principle gains importance because whenever a Taxpayer is disputing the existence of the PE, it is rather logical to take this view as an Assessee cannot be expected to prove a negative in law. The burden of proof should lies on the party who alleges the existence of something and not on the party which denies it. To expect someone to prove the non-existence of something pretty much falls within the domain of 'doctrine of impossibility of performance' and thus this view should be avoided. It is a welcoming

judgment for the Hon'ble Apex Court has clarified this position on burden of proof and has re-iterated the dictum of the Court as highlighted above (para 10) of in E-Funds IT Solution Inc. (supra).

Why this principle gains further importance is because irrespective of the relevant DTAA and irrespective of the exact language used in Article 5 of the relevant DTAA, this interpretational rule will be a binding precedent available for all to apply. Very recently, on 06.07.2020, we saw yet another Delhi ITAT decision wherein this principle has been re-iterated. In DDIT vs. Yum! Restaurants (Asia) Pte. Ltd., the Court, while interpreting and applying Article 5 of India-Singapore DTAA, held that-

"The evidences need to be seen in their entirety as the burden of proving that the foreign assessee has a PE in India and consequently it has to be taxed on the business generated by such PE is initially on the Revenue. Such is the proposition laid down by Hon'ble Supreme Court in ADIT vs E-funds IT Solutions Inc. 399 ITR 34 (SC)".

While I had the benefit of arguing this decision, it is welcoming to see Hon'ble Apex Court re-iterate the same in the present case, for such re-iteration will provide for clarity, certainty and pave way for reduction of un-necessary litigation arising on such issues.

Another reason why I find this judgment important is because core business activities which lead to revenue generation and which are the main operational activities, are given precedence in this regard. For a businessman, usually the auxiliary and ancillary services and activities are often a time-waste for they do not lead to any revenue generation and are more in the nature of coordinating activities to facilitate the core business activities. Yet such coordination/ancillary services and activities sometimes become important because they ensure smooth and efficient functioning of the core business activities. Thus, viewed from the position of a taxpayer, he/she will be more comfortable in paying taxes on activities which yield revenue generation as oppose to activities which though important for running of the business, yet per say, are not 'money-making' in nature.

A judgment like this re-ensures the faith of the taxpayers into the legal system and while it provides guidance on important legal principles which can be universally used and applied in other DTAAs also, the MNCs coming into India are also in a better position to plan and take benefit of such judgments which are short, concise, yet elucidate the law and provide clarity to those similarly placed. During these tough COVID-19 times, taxes will be considered as an additional financial burden, hence, this judgment is indeed a blessing in disguise for it provides clarity on many interpretational issues and will positively impact many other taxpayers.

Ananya Kapoor
Advocate

By- Author- Ananya Kapoor is an Advocate, Delhi High Court and specializes in tax litigation and tax advisory. She has completed her BCL from University of Oxford, UK on a full scholarship awarded by Mr. Harish Salve and graduated with a Distinction.

Outbreak of **COVID-19** — Financial Reporting Implications

A rapid and an alarming outbreak of the Novel Coronavirus (COVID-19) has affected the health of people around the globe. This crisis has affected most of the companies in India either directly or indirectly belonging to sectors such as healthcare, finance, real estate, motor vehicles, pharmaceuticals, etc. The economic uncertainty has caused a significant impact on Financial reporting due to increased market risks including overall reduction in demand and production shutdown post mid – March 2020.

For the preparation of financial statements as at 31 March 2020 as well as interim financial statements for the quarter ending June 2020, companies need to evaluate the impact of COVID-19 on Accounting and Financial reporting as well, depending upon the facts and circumstances and the extent of exposure to the crisis.

Key impacts on Financial Reporting:

1. Going Concern
2. Inventories Measurement
3. Income Taxes
4. Provisions
5. Property, Plant and Equipment (PPE) and Impairment thereof
6. Revenue
7. Leases – Modifications/Terminations
8. Fair Value Assessment
9. Financial Instruments – Impairment losses
10. Post Balance Sheet Events
11. Government Grants
12. Impact on Auditors' Report

Going Concern

The entity's management needs to evaluate the impact of COVID-19 in the light of the entity's ability to continue as a going concern as required by Ind AS 1 – Presentation of Financial Statements and AS 1 – Disclosure of Accounting policies. This assessment should be done basis the current conditions as well as information post the Balance sheet date by applying Ind AS 10 - Events After The Reporting Period (to entities with Ind AS applicability) and AS 4 – Contingencies and Events Occurring After the Balance Sheet Date (revised 2016) (to entities with Non-Ind AS applicability). The assessment of impact on the entity's operations and forecasted cash flows as well as the determination of liquidity to meet its obligations, relates to a period of at least the first twelve months after the balance sheet date, or post the date of signing the financial statements. However, this timeframe might need to be extended. Events occurring after the balance sheet date may indicate that the entity ceases to be a going concern, and hence the entity needs to assess whether it is appropriate to use the fundamental accounting assumption of going concern for the preparation of its financial statements.

Disclosure of material uncertainties that cast significant doubt on the company's ability to operate under the going concern basis needs to be considered. Given the significant uncertainty, disclosures should include the significant assumptions and judgments applied in making going concern assessments. In such cases auditor may, also draw attention of users to these notes in the financial statements.

Inventories Measurement

In the current scenario, the entities need to assess whether there is a decline in their future estimated selling prices and accordingly, the carrying amount of the inventories need to be written down to the net realizable value as on the Balance sheet date. Also, where the finished goods inventories are expected to be sold below cost, materials, and other supplies held for use in production (as well as any work-in-progress) may also require a write-down.

Entities also need to evaluate the impact of lockdown measures on fixed overhead absorption rate.

Income Taxes

Entities with Deferred Tax Assets (DTAs) should consider reassessing forecasted profits and in turn the recoverability of DTAs as well as the possibility of creation of DTAs due to additional deductible temporary differences resulting from various factors (e.g., asset impairment) in accordance with AS – 22 / Ind AS 12 - Income Taxes. Change in future profits may also reduce the number of deferred tax liabilities. Management should disclose any significant judgments and estimates made in assessing the recoverability of deferred tax assets in accordance with Ind AS 1.

Provisions

Due to COVID-19 there is a need to exercise judgment in making provisions for losses and claims as demonstrated below:

- **Onerous contracts:** Certain contracts might become onerous wherein the cost of fulfilling the obligations exceed the economic benefits due to conditions such as reduced production, increase in the costs/unavailability of labor/raw material, etc. Delays in completion of the contract may also result in penalties. Such contracts need to be accounted as per Ind AS 37 / AS 29 - Provisions, Contingent Liabilities, and Contingent Assets. Management needs to disclose whether the assessment of executory contracts being onerous is made due to the impact of COVID-19. In case the management is unable to assess whether some of the executory contracts have become onerous due to inadequate information, the same needs to be disclosed.
- **Insurance claims:** Where the entities have insurance policies covering losses due to events such as COVID-19, the entity must recognize the claims only if its recovery is virtually certain as per Ind AS 37 / AS 29.

Property, Plant, and Equipment (PPE) and Impairment thereof

Many entities might face a problem of under utilization/ non utilization of PPE due to low demand for their products/ services/closure of the production units owing to the lockdown. It may affect the expected useful life and residual value of the assets. Hence, the management needs to review the estimate of the useful life and residual value and changes, if any in the estimates, need to be accounted for in accordance with Ind AS 8 - Accounting Policies, Changes in Accounting Estimates and Errors and AS 5 – Net Profit or Loss for the Period, Prior Period Items and Changes in Accounting Policies.

Impairment may be triggered due to the changed circumstances requiring impairment test as per Ind AS 36/ AS 28 – Impairment of Assets. Many entities might face challenges in estimating future cash flows due to economic uncertainties. Disclosures need to be provided as per Ind AS 36/AS 28 regarding risk associated with assumptions and sensitivities used for forecasting future profits in estimating recovery amount.

In respect of goodwill, there might be significant changes with an adverse effect in operations of a cash-generating unit to which goodwill is allocated, and thus, testing of Impairment of goodwill needs special attention as of 31st March 2020.

Revenue

There would generally be cases for decrease in the sales, increase in sales returns, higher price discounts, etc. Due to COVID-19, these factors should be considered while measuring the variable consideration as per Ind AS 115 – Revenue from Contracts with Customers. Since Ind AS 115 requires disclosure of information that allows users to understand the nature, amount, timing and uncertainty of cash flows arising from revenue, entities need to consider the disclosure of the impact of COVID-19 on the revenue. Entities to whom AS – 9 – Revenue Recognition is applicable, required to disclose the circumstances in which revenue recognition has been postponed pending the resolution of significant uncertainty.

Leases

- *Modifications to the contract/arrangement:* While accounting for leases in the financial statements, the impact of the modifications in the lease arrangements due to changes in the terms of lease arrangements need to be considered, wherein the lessor might give concessions for rent payment/rent free periods etc. Anticipations in the terms should not be accounted for.
- *Variable lease payments:* Variable lease payments to be accounted for as per Ind AS 116 - Leases might get impacted, where the payments are linked to the revenues from the use of the underlying assets, due to reduced financial activity of the lessee.
- *Discount rate:* Risks associated with the discount rate to determine the present value of the new lease liabilities need to be taken into consideration.
- *Reassessment:* Entities need to assess whether any lease arrangement has become onerous due to the COVID-19 situation as per Ind AS 37 / AS 29.

Fair Value Measurement

Fair values of assets/liabilities as prescribed by certain standards such as Ind AS 109 – Financial Instruments and Ind AS 16 – Property Plant and Equipment are required to be determined as per Ind AS 113 – Fair Value Measurement. As per Ind AS 113, the determination of fair values depend on observable market price or application of valuation techniques. Due to COVID-19, there has been a substantial decline in the market prices of financial instruments as well as a reduction in the level of activity in the current capital and financial market leading to a change in the assumptions used to measure the fair values such as discount rates, credit – spread/counterparty credit risks, etc.

Sensitivity disclosures along with disclosures in respect of the key assumptions and judgments made by the management need to be provided under the Ind AS 1 – Presentation of Financial Statements and Ind AS 113.

Financial Instruments – Impairment Losses

Due to the significant decline in the economic activity across the globe, estimation of Expected Credit Losses (ECL) would be a challenging task for the management, which requires the incorporation of forward-looking information relating to the impact of COVID-19. Relevant disclosures such as methods, assumptions, and data used in estimating ECL are required as per Ind AS 107 – Financial Instruments Disclosures. If the entity is unable to assess the impact of COVID-19 in estimating the impairment loss due to inadequate information, the same needs to be disclosed appropriately.

Government Grants

The management needs to monitor the government legislations to assess whether the assistance provided amid COVID– 19 outbreak meets the definition of government grants. Entities need to consider the disclosures on accounting policies for government grants and its impact and other assistance on the entity's financials.

Grants in respect of lease agreements: Where any compensation is provided/declared to the lessor for providing concession to the lessee, assessment is needed to conclude whether the assistance is to be accounted for as a lease modification as per Ind AS 116 / AS – 19 - Leases or to be accounted as per Ind AS 20 / AS 12 – Government Grants.

The uncertainty and challenges posed by the COVID-19 situation require the management to carefully evaluate the impact of the subsequent events and latest developments occurring post the balance sheet date and before the date of Auditor's report, which provides more information about the circumstances that existed during the reporting date. The effect of such events on the financials should be considered in accordance with Ind AS 10 – Events After The Reporting Period and as per AS – 4 Contingencies and Events Occurring After The Balance Sheet Date.

Impact on Auditors' Report

Many challenges would be faced by the Auditors in obtaining appropriate and reliable evidences e.g. difficulty in attending the inventory count conducted by the management/difficulty in conducting physical verification of assets post the balance sheet date. Also, on evaluation of the impact of the disruption on entity operations, the Auditor's report may include the following depending upon the requirement:

- Emphasis of Matter (EOM) paragraph relating to the uncertainty arising due to the COVID situation
- Key Audit Matter (KAM) due to additional audit work needed to be carried out by the auditor
- Inclusion of Material uncertainty related to going concern assessment paragraph

The entity should focus on providing robust disclosures about the potential impact of the pandemic on the entity's operations, liquidity, and capital resources and the steps taken by the management to cope with the situation. One needs to ensure that the Auditors and the Senior Management are well updated about the developments/changes so that the effect is well captured in the company's financial statements.

Krunal Jogani
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Nexdigm (SKP)

ITC Reversal on Sale of Securities or Immovable Property

Opportunity in Disguise

"We are so accustomed to disguise ourselves to others, that in the end, we become disguised to ourselves"

-François de La Rochefoucauld

INTRODUCTION

Given the COVID-19 situation and its impact on the liquidity, many organisations must be thinking of selling their investments in securities including Mutual Funds or land or building. Although it may fill the liquidity gap for some time yet the resultant reversal of Input Tax Credit ('ITC') from the common ITC pool will surely create a little gap again.

This write-up explains how one may determine the amount of ITC reversal required in such case.

TAXPAYERS ARE DOING IT THE WRONG WAY

For the sake of their convenience, the taxpayers are generally segregating the entire ITC into following three buckets:

(i) ITC on goods or services used exclusively for making taxable supplies

(ii) ITC on goods or services used exclusively for making exempted supplies

(iii) Balance ITC to be treated as common ITC pool

Taxpayers avail full ITC for (i) bucket, reject full ITC for (ii) bucket and reverse proportionate ITC in the ratio of exempt supplies to taxable supplies (including zero-rated) for (iii) bucket.

Is it the right way? Let us find out in the ensuing paragraphs.

LOOKING AT THE PROVISIONS

Section 17(2) of The Central Goods and Services Tax Act, 2017 ('CGST Act') provides that where the goods or services are used partly for effecting taxable supplies and partly for effecting exempt supplies, the available ITC shall be the amount as is attributable to the taxable supplies. Section 17(3) provides for the inclusions in the value of exempt supplies. Section 17(6) provides that the credit referred to in Section 17(2) shall be distributed in the manner provided by the Central Government ('CG') by Rules.

As a corollary, following inferences can clearly be made:

- CGST Act does not provide the clear scope or definition of what is to be taken as common ITC. Analysis of Section 17(2) would imply that ITC relating to goods or services which are used both for effecting taxable and

exempt supplies, is to be taken as common ITC.

- Further, Section 17(6) only empowers the CG to frame rules for attributing the common ITC and not for defining or determining common ITC.

Therefore, what will go under the common ITC pool is a pure question of facts and the basis for such determination would be 'whether goods or services are used for effecting both taxable as well as exempt supplies or not?'. It is interesting to note that the entire CGST Act uses the words 'making the outward supplies' but here it chose to use 'effecting'. It is, therefore, imperative to interpret the words 'for effecting' with due care considering the intention of the Act and rules made thereunder.

Black's Law Dictionary defines the word 'effect (noun)' as a cause, a result, an outcome or a consequence and the word 'effect (verb)' as to bring about or to make happen. **Oxford Dictionary** defines 'effect' as to cause, to make something happen. If the dictionary meanings are to be given effect, it would mean that the intention of the legislature is to include only such ITC into the common pool where the related goods or services are actually used or **intended** to be used for effecting both taxable and exempt supplies.

This interpretation is totally endorsed by Rule 42(1)(f) and 43(1)(b) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') which ask to exclude, from the scope of common ITC, the ITC attributable to goods or services intended to be used exclusively for taxable supplies. Thus, if an expense is incurred with an intention to use it in the taxable supplies (including zero-rated), the ITC pertaining to such expense would not form part of the common ITC pool for the purpose of reversal.

In the erstwhile regime, the similar question came before CESTAT in the case of **Space Matrix Design Consultants Pvt. Ltd. v. Commissioner of Central Tax 2019 (4) TMI 1599- CESTAT Bangalore** where it was dealing with the question on reversal of cenvat credit on works contract, design services and architect services on account of selling of investment in mutual funds. The Tribunal held that these services are not used for selling of mutual funds. It was also well established under the erstwhile law that common actual use must be proved before applying Rule 6(3) of the Cenvat Credit Rules, 2004

THE RIGHT WAY

Segregating the entire ITC into following three buckets:

(i) ITC on goods or services used or intended to be used exclusively for making taxable supplies

(ii) ITC on goods or services used exclusively for making exempted supplies

(iii) Balance ITC to be treated as common ITC pool

Taxpayers avail full ITC for (i) bucket, reject full ITC for (ii) bucket and reverse proportionate ITC in the ratio of exempt supplies to taxable supplies (including zero-rated) for (iii) bucket.

THE BIG PROBLEM & ANOMALY IN THE RULES

The above interpretation applies only when sale of securities or / and immovable property are the only exempt supplies in a year.

Rule 42 of the CGST Rules would not help where there is multiple nature of exempt supplies because the rule does not provide a mechanism to reverse the proportionate ITC on each exempt supply basis. In simple words, there is no mechanism to have a separate common pool of ITC for every exempt supply.

For example, apart from sale of securities or land in one year, your business also provides a small amount of services which

are exempt from Goods and Services Tax ('GST'). In such a case, rent of a building would form part of common ITC though it was never used or intended to be used for effecting sale of securities or land. Since, value of exempt supply would include sale of securities and land, the ITC on rent of the building would bear the proportionate reversal. Similarly, an expense incurred in the month of May 2020 for business purpose would get into the common ITC pool if some securities or land are sold in the month of March 2021. This is because Rule 42 first asks for month-wise reversal and then requires it to be recomputed on financial year basis.

Here, it is pertinent to quote the Hon'ble Supreme Court judgement in the case of **Wipro Limited v. ACC 2015 (4) TMI 643-SC.** It was held by the Court that where actual loading and unloading charges are available, notional value equal to 1 percent of FOB cannot be added. The Court observed that the only justification for stipulating such notional percentage is to help customs authorities to apply the rate uniformly. This can be a justification only if the said charges are not ascertainable. Where such charges are known and determinable, there is no reason to have such a yardstick.
Further, as provided above, Section 17(6) does not empower the Government to provides rules for determination of common ITC pool. It only provides for manner of attribution of common ITC. Therefore, where the common ITC pool for an exempt supply is ascertainable, the formula given under Rule 42 and 43 may not apply.

GABA & CO. | COMMENTS
The taxpayer having sale of securities and/or immovable property as the only transaction(s) of exempt supply(ies) may determine the common ITC pool on the basis of 'intention to use' as explained above. In that case, even Rule 42 and 43 of the CGST Rules would not be violated.

In other cases, in our view, where the separate common ITC pool for each exempt supply is ascertainable and worthwhile, the taxpayer may challenge the formula of reversal given under Rule 42 and 43 of the CGST Rules. Reversal of ITC, by using a formula under Rule 42 & 43, on an expense which is not incurred or intended to be incurred for the sale of security or immovable property would amount to collection of tax on account of such sale. This would imply an indirect charge of tax on such sale when it is specifically prohibited by the CGST Act. In that case, the Doctrine of Colourable Legislation would come into picture and CGST Rules or even the Act (if it is presumed that CGST Rules comply the Act) may be considered as a mere pretence or disguise to levy tax on sale of securities or immovable property.

Please note that Entry 90 of List 1 to Schedule VII of The Constitution of India empowers the Parliament to levy 'taxes other than stamp duties on transaction in stock exchanges and future markets'. Such an entry has been protected even after the inception of GST. Thus, reversal of ITC in respect to SGST part (under respective State GST Law) is clearly unconstitutional.

Yogesh Gaba
Managing Partner- Indirect Tax
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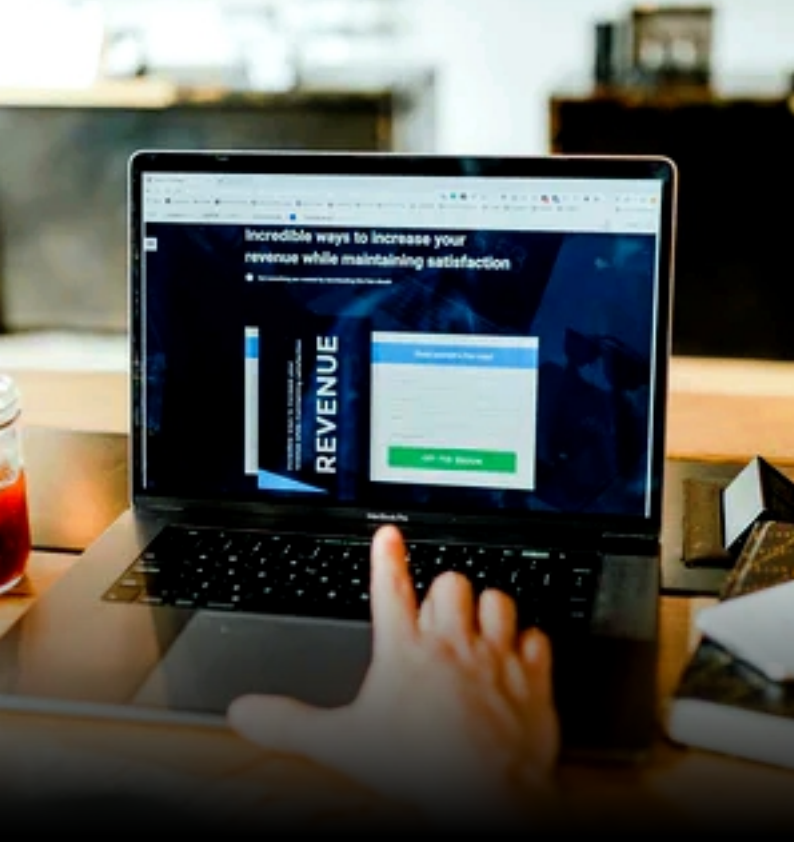

ARTICLE ON THIRD PARTY FUNDING (TPF) IN INDIA

Part II of III

1. Introduction to Part II:

Part I, dealt with the What? Who? and How? of TPF and Is it legal? In Part 2, we will examine the position of TPF in each of the dispute resolution spheres in India – Litigation, Arbitration and Mediation.

2. TPF in the three channels of dispute resolution:

Writings and dialogue are aplenty on the matter of TPF in arbitration – but not so much when it comes to litigation. The authors have therefore consciously chosen to keep the focus of this Part primarily on the use of TPF in litigation before the Indian judiciary.

2.1 TPF in Litigation:

It has been reported that amongst the various asset classes, TPF (litigation financing) has outperformed private equity, real estate, credit and hedge funds the world over. Despite this, TPF is yet to be perceived as an "asset class" in India. Contrary to popular belief, TPF is not entirely alien to litigation in India. The unorganized market has for decades (or perhaps more) seen suits bought and sold by investors and litigants. However, TPF in the formal sense as we now see it, has been slow to make its headway into the limelight.

In India, third-party funding is expressly recognised in the context of civil suits in Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh by way of amendments brought to the Civil Procedure Code, 1908 ("Code"). For those unaware, this Code governs the procedures to be followed when litigating a civil action before a Court of law in India. The amendments to Order XXV Rule 1 of the Code provides Courts the power to secure costs for litigation by asking the financier to become a party and deposit security for the costs.

The lack of uniformity (with only 4 States expressly recognizing TPF in litigation

while others remain silent) is a challenge in itself and exacerbates pre-existing issues. These State amendments, albeit a progressive step toward accepting TPF in litigation, brings with it a worrisome predicament: forum shopping. If you were a plaintiff looking for justice while in desperate need for funding and with no prospective investor from the unorganised sector, wouldn't you rather take your chances with a formal TPF arrangement even if it meant having to do some forum shopping to initiate proceedings in one of the four States that expressly recognise the arrangement? Whether a plaintiff is successful in convincing a Court of having sufficient jurisdiction is another matter altogether.

The insertion of Rule 3 to Order XXV vide the Bombay, Dadra and Nagar Haveli, Goa, Daman and Diu, and Madhya Pradesh High Court amendments provides: Where a plaintiff, for the purpose of being financed in the suit, has transferred or agreed to transfer any share or interest in the property that is the subject matter of the suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents. Further, the Court may order the financier to within a certain period of time give security for the payment of all costs incurred and likely to be incurred by any defendant. Should, the financier fail to provide such security within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in the property in suit is concerned, or declaring that he shall be debarred from claiming any right to or interest in the property in suit.

On the other hand, if the financier declines to be made a plaintiff, the Court may implead him as a defendant and may order him to give security for the payment of all costs incurred and likely to be incurred by any other defendant. Failure to do so could warrant an order declaring that he shall be debarred from claiming any right to or interest in the property in suit.

This means that it would be well within the scope of its procedure for a Court to: (i) implead a financier into the array of parties; (ii) order him to provide security for costs of the defendant; and (ii) essentially invalidate the financing agreement by debarring the financier from receiving the very consideration that his contract with the plaintiff was based on. It therefore begs the question would a financier be willing to subject himself to such risks by entering into a formal arrangement of funding? Would this not then impact the risk to reward ratio dissuading financiers?

Another aspect of the amendment that might pose fresh challenges with its implementation is that it refers only to persons financing the "plaintiff" with no reference whatsoever to the financier of a "defendant". Although TPF for plaintiffs are more prevalent seeing as the underlying contract between the financier and the party to the lis is for a share in the outcome, it is possible that a defendant might have a counterclaim of equal (if not more) value. It is the authors' view that while the amendment to the Code crystallised the recognition of such an opportunity for the plaintiffs in law - the same courtesy could have been extended to a counterclaiming defendant to place both parties on an even footing.

Apart from the numerous other misconceptions that plague TPF, including but most certainly not limited to a lack of awareness; one of the reasons potential litigants might hesitate to consider TPF as a viable option that bolsters access to justice is a preconceived notion that the financier might gain a certain degree of control over the proceedings. A plaintiff is burdened enough by the litigation itself and would not want to find himself in a situation of

having to also deal with a meddlesome financier (with his own agenda!).

2.2 TPF in arbitration:

In essence, TPF in litigation and arbitration are based on similar arrangements. There is no express bar on TPF in arbitration but it does however lack the certainty that the codification in the Code brings to litigation to some extent.

The costs that a funder ultimately contracts to bear is a matter of negotiation between him and the client – some of the costs that are likely to be incurred in an arbitration are: counsel's fees and expenses, deposits and costs payable to the administrative institution, tribunal's fees and expenses, costs incurred in engaging expert witnesses, etc. TPF in arbitration is however more prevalent than its poorer cousins in litigation – a deliberate choice of words – seeing as most commercial contracts have a dispute resolution clause that refers the parties to arbitration, on the premise that the "stakes" (i.e. the "claims" and proportionately the "reward") are often higher.

The issues that plague TPF in arbitration are differentiable on account of the nuances that are inherent in this form of dispute resolution. Confidentiality and impartiality seem more synonymous with arbitration – and correctly so. An arbitrator is required to make disclosures of any reason or relation that might be construed as having an effect on his ability to adjudicate without bias. This would require the claimant to make the relevant disclosures to the Tribunal and the respondent, concerning the identity of the funder.

Counsels are no exception to the strict regimes of confidentiality. Funders often request and require regular updates concerning the progress of the case. It therefore begs the question; how much can counsel divulge without breaching the limits of the confidentiality regime? While the option of carving out an exception in the regime for disclosure to the funder is open, in practice it is very unlikely that the respondent would consent. Without such consent, it is even more unlikely that an arbitral tribunal would dare to extend such privileges to a third-party. The fear that unfair influence or unlawful use of relevant information may affect the parties adversely or render the TPF agreement invalid on the grounds of a violation of public policy is real and justified.

2.3 TPF in mediation

Owing to the strict rules of confidentiality that apply in a mediation, it is no surprise that instances where TPF is employed in mediation are not available on the public record. Singapore on the other hand appears to have taken to it rather easily: Sources say that when a party is funded in a mediation, the party seems to take the mediation more seriously as its bargaining power improves. In its own way, TPF helps strike a balance between parties therefore allowing robust discussion towards finding the right solution.

3. Going forward (once more)

From the above, the position of TPF in each of the three spheres of dispute resolution is abundantly clear. In the third and final part of this series, the authors will examine the future of TPF in India; the regulatory landscape surrounding this issue as well as the socio-cultural aspects of TPF in the country.

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* The views expressed here are personal to the authors and do not constitute legal advice.

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PRANSHU G

F.C.A, LL.B

COMPLIANCE CALENDAR

AUGUST 2020

S	M	T	W	T	F	S
						1
2	3 - GSTR-1 Qtr April to June, 2020	4	5 - GSTR-1 June, 2020	6	7 - Deposit of TDS/TCS for July - Filing of ECB-2	8
9	10	11 - GSTR-1 July, 2020 (Likely to be extended)	12	13	14	15 - Payment of PF and ESIC for July, 2020 - Issuance of Form 16/16A for FY 19-20
16	17	18	19	20 - GSTR-3B for July, 2020 for turnover > 5 crores (Likely to be extended)	21	22
23	24	25	26	27	28	28
30	31 - GSTR-4 FY 19-20 - GSTR-5, GSTR-6, GSTR-7 and GSTR-8 for June, 2020					

Reference

- GSTR - Goods and Services tax return
- TDS - Tax deduction at source
- TCS - Tax collection at source
- Form 16/Form 16A - Certificates for deduction of TDS
- PF - Provident Fund
- ESI - Employee State Insurance
- ECB-2 - Extrenal Commercial Borrowing Return

Add the above compliance calendar in Outlook Calendar

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COMPLIANCE CALENDAR

SEPTEMBER 2020

S	M	T	W	T	F	S
		1	2	3	4	5
6	7 - Deposit of TDS/TCS for August - Filing of ECB-2	8	9	10	11 GSTR-1 August, 2020	12 GSTR-3B for the month of May, 2020 for some states*
13	14	15 - GSTR-3B for the month of May, 2020 for some states* - Payment of PF and ESIC for August, '20	16	17	18	19
20 GSTR-3B for August, 2020 for turnover > 5 crores	21	22	23 GSTR-3B for the month of June, 2020 for some states*	24	25 GSTR-3B for the month of June, 2020 for some states*	26
27 GSTR-3B for the month of July, 2020 for some states*	28	29 GSTR-3B for the month of July, 2020 for some states*	30 - ITR for FY 18-19 - GSTR-3B for July, 2017 to Jan 2020** - GSTR-9, 9A & 9C FY 18-19	- Director KYC with ROC - Companies/LLP fresh start scheme 2020 ***		

Notes

* For taxpayers having aggregate turnover upto INR 5 Crores in preceding financial year.

For the states of Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana or Andhra Pradesh or the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands and Lakshadweep the due date for filing of GSTR-3B for the month of May, 2020 is **September 12, 2020,** for June, 2020 is **September 23, 2020** and for July, 2020 is **September 27, 2020**.

For the states of Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha or the Union territories of Jammu and Kashmir, Ladakh, Chandigarh and Delhi due date for filing of GSTR 3B for the month of May, 2020 is **September 15, 2020**, for June, 2020 is **September 25, 2020** and for July, 2020 is **September 29, 2020**.

** If no liability than no late fees. However, if having GST liability in any of the month than late fees capped at maximum Rs.500 per return.

*** Last date to make good any filing related defaults, irrespective of duration of default, and make a fresh start as a fully compliant entity under the Companies Fresh Start Scheme, 2020 and LLP Settlement Scheme 2020. The USP of both the schemes is a one-time waiver of additional filing fees for delayed filings by the companies or LLPs with the Registrar of Companies during the currency of the Schemes, i.e. during the period starting from April 1, 2020 and ending on September 30, 2020.

Reference

- GSTR - Goods and Services tax return
- TDS - Tax deduction at source
- TCS - Tax collection at source
- PF - Provident Fund
- ESI - Employee State Insurance
- ECB-2 - Extrenal Commercial Borrowing Return

Add the above compliance calendar in Outlook Calendar

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Tax Court Speaks!

An insight into the recent key judicial rulings

S No	Tax Issue	Legal take away	Judicial Body	In the case of
1	Section 44ADA – Presumptive Tax Scheme for Professionals	Benefit of 50% expenditure u/s 44ADA is just and reasonable and thus granted retrospectively, even before the provision had come into play.	ITAT Bangalore	Amitabh Verma Vs DCIT ITA No. 209/Hyd/2018
2	Section 281B – Provisional attachment of bank account	Section 281 cannot be invoked only for the reason of high demand of tax in a case Sec.281B is to be used only in rare situations where the bona fide of the assessee was in question or there had been a clear case of evasion of tax.	High Court of Calcutta	Abul Kalam Vs ACIT WP 25 of 2020
3	Section 254(2A) – Mandatory deposit of 20% of tax demand with ITAT for seeking stay on recovery	Being case disposed off on merits, reference to larger bench withdrawn - The issue arising out of the amendment in first proviso to Sec. 254(2A)	ITAT Mumbai	Tata Education and Development Trust Vs ACIT SA Nos. 147 and 148/Mum/2020 Arising out of ITA Nos 1423 and 1424/Mum/2018
4	Section 40(a)(ia) – Disallowance of 30% expenditure on non deduction of tax	Disallowance u/s. 40(a)(ia) extends to amounts 'paid' and is not restricted to only amounts 'payable'	Supreme Court	Shree Choudhary Transport Company Vs ITO CIVIL APPEAL No. 7865 OF 2009

S No	Tax Issue	Legal take away	Judicial Body	In the case of
5	Section 14A - Disallowance of expenditure incurred in relation to exempt income	When procedure specified u/s 14A is followed. AO can invoke Rule 8D	High Court of Madras	CIT Vs M/s. Tamilnadu Industrial Development Corporation Limited Tax Case Appeal Nos.509 & 510 of 2018
6	Deprecation on asset for succeeding years being already part of block of asset and user test	Once the asset has entered into "block of assets and depreciation has been allowed in the succeeding year, the depreciation is to be allowed on WDV of such asset. Subsequent user test is not relevant. The asset loses its identity on addition to block of asset. User test is relevant only in the first year of purchase and not thereafter.	ITAT Delhi	Kay Jay Auto Ltd Vs ACIT ITA No.264/Del/2009
7	Assessment in name of nonexistent entity – Void Ab Initio	When on the date of conducting assessment proceedings as well as on the date of passing of order, amalgamating company is not in existence. Assessment is void ab initio. Its not a procedural irregularity of the nature which could be cured u/s.292B	ITAT Delhi	Genpact India Pvt. Ltd. Vs DCIT ITA No. 583/DEL/2020 (A.Y 2014-15)
8	Infrastructure & Data Centre Hosting Services (IDC) whether Royalty? Management services taxable as FTS?	Consideration received for rendering IDC services is not Royalty under India-Singapore DTAA: • Usage only of hardware/security devices/personnel • No use of any software / any embedded software has been developed Management services in the nature of consultancy, legal, financial and HR not taxable as FTS under Article 12(4) of India-Singapore DTAA absent make available of any technical knowledge, skill etc.	ITAT Mumbai	Edenred Pte Ltd Vs DCIT ITA No. 1718/MUM/2014 & 254/MUM/2015
9	Section 254(2A) – Grant of stay	Stay extension granted beyond 365 days where delay not attributable to assessee Basis principle laid down by Delhi HC relied - 3rd proviso to Sec.254(2A) was violative of Article 14 of the Constitution of India being element of hostile discrimination against the assessee to whom the delay is not attributable vis-a-vis assessee who had cause delay in adjudication of appeal	ITAT Bangalore	M/s Infosys Ltd Vs ACIT S.P No.139/Bang/2020 IT(TP)A No.718/Bang/2017

S No	Tax Issue	Legal take away	Judicial Body	In the case of
10	Nature of subsidy and its taxation	Taxation of subsidy is determined by the purpose for which the subsidy is granted and not the form / mode / manner in which the subsidy is received / disbursed Subsidy received as a percentage of fixed capital investment being capital receipt determined basis the purpose, the same not to be reduced from cost of fixed assets	ITAT Delhi	DCIT Vs Nestle India Ltd. ITA No.2020/Del/2014
11	Payment for software license to access database whether Royalty?	Fact that when database access by itself does not result in taxation as royalty, such database access being coupled with software licence cannot be taxed as royalty	ITAT Mumbai	Reliance Corporate It Park Ltd Vs DCIT ITA No. 7300/Mum/2016
12	Activities essential to constitute PE under Article 5(1)	Conditions to establish PE under Article 5(1): • Establishment through which the business of an enterprise" is wholly or partly carried on • • 'core business' is to be carried out of the said establishment	Supreme Court	DIT Vs Samsung Heavy Industries Civil Appeal No. 12183 Of 2016
13	Section 35 D - Amortisation of certain preliminary expenses	Issue of shares to Qualified Institutional Buyers (QIB) constitutes constitutes QIB for the purpose section 35D on amortisation of certain preliminary expenses	ITAT Mumbai	Yes Bank Limited Vs ACIT ITA No. 3497/MUM/2018
14	Web Hosting Charges - Article 12 of India-USA DTAA	Web hosting** charges does not involve sharing of knowledge know-how or any technology so as to attract taxability as FIS under Article 12 of India-USA DTAA **web promotion, social media management, web content development, search engine optimization to increase the site traffic, hiring of space for domain hosting and display of advertisement on the server located worldwide		Esm Sys Pvt. Ltd. Vs ITO ITA No. 350/Ahd/2018
15	Assessment in name of deceased	Assessment initiated vide issue of notice in name of dead person is void. No statutory obligation on the legal representative to intimate the death of the assessee to the Revenue	High Court of Delhi	Savita Kapila Vs ACIT W.P.(C) 3258/2020
16	Consideration for database access is Royalty?	Fees received for granting access to database is not royalty under Article 12(3) of Indo-Swiss DTAA	ITAT Mumbai	IMS AG Vs DCIT ITA No.6445/Mum/2016

S No	Tax Issue	Legal take away	Judicial Body	In the case of
17	Addition under section 68, cash credits	When it has been categorically proved that there is no physical existence of the company, section 68 addition is inevitable	ITAT Mumbai	Akansha Ispat Pvt. Ltd Vs ITO I.T.A. No. 1229/Mum/2017
18	Deduction of home loan interest – Income from house property and Capital Gains	No double deduction allowed of interest paid on acquiring house property When interest expenditure was allowed as a deduction to the assessee while computing its income under the head 'Income from house property', "it would not be eligible to once again claim deduction of such interest expenditure in the garb of cost of acquisition of the property while computing the income under the head Capital gains	ITAT Mumbai	Shree Bal Properties & Finance P. Ltd Vs PrCIT ITA No. 2848/Mum/2019
19	Deputation of expat and tax issues	When taxes have been paid in India on the salary payments to expat, same cannot be again taxed as FTS as would lead to double taxation Important to see for attribution of profit to PE – In case of service PE, salary costs sets off income of PE Service PE and FTS cannot coexist Difference in service provided through employees and deputation of employee	ITAT Delhi	Yum! Restaurants (Asia) Pte. Ltd Vs DDIT ITA No.6018/Del/2012
20	Section 14A - Expenditure incurred in relation to income not includible in total income	Indirect expenditure to be disallowed - Managing of investments by father does not tantamount to absence of indirect expenditure	ITAT Mumbai	S. Ganesh Vs ACIT ITA No.2024, 2025, 2032, 6384, 6745/Mum/2017
21	CSR expenditure and allowability u/s 80G	CSR donations made under corporate law could be eligible for deduction section 80G When section 80G specifically provides for certain exclusions for amount spent as CSR under corporate law, same hints towards allowability of other donations made as part of CSR activity	ITAT Bangalore	Goldman Sachs Services Pvt. Ltd. Vs JCIT IT(TP)A No.2355/Bang/2019

S No	Tax Issue	Legal take away	Judicial Body	In the case of
22	Seeking refund of excess TDS deposited by deductor	The 6 step process laid down by CPC-TDS to be followed as a measure of temporary arrangements to claim excess TDS refund	High Court of Delhi	Clean Wind Power Kurnool Private Limited Vs DCIT W.P.(C) 3902/2020 & CM APPL. 13961/2020
23	GAAR	GAAR provisions cannot be applied for the years before the same come into effect High Court approved merger cannot be challenged under GAAR	ITAT Kolkata	JCT Limited Vs DCIT I.T.A. No. 84/Kol/2019
24	Reopening of assessment basis report of investigation wing	Reopening of assessment basis report of investigation wing is valid. The same is sufficient ground for reason to believe escapement of income and also application of mind by AO to form such reason	ITAT Delhi	Suresh Kumar Agarwal Vs ACIT ITA No 8703/Del/2019
25	Refund determined u/s 245	Refund once determined u/s 245 is to be granted. The same cannot be withheld on the ground that the respondents may have a future demand against the petitioner arising out of the pending assessment orders	High Court of Bombay	Vodafone Idea Limited Vs ACIT, PrCIT, UOI WP-LD-VC NO. 81 OF 2020
26	Threshold u/s 194I on rent payment to co-owners of property	Where rent is paid to individual co-owners of property, threshold limit u/s 194I to apply for each such individuals	ITAT Indore	M.P. Warehousing & Logistics Corporation Vs ACIT ITA No.491/Ind/2019

GST cases

S No	Tax Issue	Legal take away	Judicial Body	In the case of
1	Transition of input tax credit into GST	Madras High Court joins Bombay High Court and goes against various other High Court decisions to hold that input tax credit (ITC) is merely a concession and not a vested right. This is the first judgment that examined validity of Rule 117 prescribing time limit for filing TRAN-1 form after the recent retrospective amendment (wherein the words "within such time" was inserted in Section 140) and upheld the same.	Madras High Court	P.R. Mani Electronics
2	Non-payment of refund because GST Appellate tribunal	GST refund arising out of zero-rated supplies to SEZ, allowed by the Commissioner (Appeals), was being withheld for more than a year on the pretext that department wanted to file appeal but there was no appellate authority. Delhi High Court rejected such arguments from the department and ordered for refund.	Delhi High Court	Zones Corporate Solutions
3	ITC vis a vis lifts in a hotel building	Lift is a part of a building and doesn't have a separate identity – accordingly, cannot qualify as 'plant & machinery' [under section 17(5)(d)]. Thus, it is akin to the building and accordingly, being an immoveable property, inputs/input services used in its construction would not be eligible for ITC. A very conservative ruling which will surely lead to a lot more litigation on the subject.	Madhya Pradesh Advance Ruling Authority	Jabalpur Hotels Private Limited
4	ITC vis a vis slides in amusement parks	Water slides used by amusement park, including the steel and civil supporting structure used to fasten the slides to earth, will qualify under 'plant and machinery' and thus, eligible for ITC. However, goods and services used for the pool where the water slides terminate would not be eligible for ITC since such pool is a civil structure and cannot qualify as a support structure for plant and machinery. ITC has also been denied for things like transformer, lifts, DG sets, sewage treatment plant, etc., which have been held as inseparable from building and thus ineligible (not being plant and machinery).	Madhya Pradesh Advance Ruling Authority	Atriwal Amusement Park
5	Applicable GST rate on sanitizers	Alcohol-based hand sanitizers are classifiable under HSN 3808 with applicable GST rate of 18%, being 'disinfectants' [and not at 12% by classifying under Chapter 30 (as medicaments)]	Goa Advance Ruling Authority	Springfields (India) Distilleries

S No	Tax Issue	Legal take away	Judicial Body	In the case of
6	Renting of residential property at a large scale liable to GST	A building with 73 rooms was leased by the owner to an entity which in turn was sub-leasing it to various people on a long-stay basis besides providing catering and other services to such residents. The underlying agreements were reviewed and it was concluded that this was in the nature of a lodging/boarding house and hence not eligible for the GST exemption for renting of a residential property for residential purposes.	Andhra Pradesh Advance Ruling Authority	Lakshmi Tulasi Quality Fuels
7	Foreclosure charges, being 'damages', not liable to service tax – relevant for GST too	Distinction between 'consideration' and 'condition of a contract' has been recognized and it has been held that foreclosure charges for pre-mature termination of loan taken from a bank or NBFC would not be liable to service tax since they represent compensation and not consideration. This is relevant for GST since it clarifies that damages/compensation under a contract cannot qualify as a consideration for any implied service.	CESTAT Larger bench, Chennai	CST Vs Repco Home Finance Ltd.
8	Allowance to make tax/other payments in installments in light of COVID	Permission granted By Delhi High Court to Samsonite to deposit the amount of Rs. 25.73 crores held as profiteered by National Anti-profiteering Authority (NAA), in instalments - after considering the present pandemic situation. Similar concession granted by Madras High Court too, for deposit of admitted tax liability over 6 months.	Delhi High Court Madras High Court	Samsonite South Asia Pvt. Ltd. Shree M. Revathi Printers
9	Refund of accumulated ITC on account of inverted duty structure to include refund of ITC of input services too	Explanation (a) to Rule 89(5) of CGST Rules, which defines “Net Input Tax Credit' to mean input tax credit on inputs only held to be ultra vires Section 54(3). Court read down explanation (a) and held that Net ITC should mean “input tax credit” availed on “inputs” and “input services” as defined under the CGST Act. However, the term 'inputs' in second proviso to Section 54(3) has not been explicitly held by Gujarat High Court to include 'input services' as per the specific argument raised in this regard	Gujarat High Court	VKC Footsteps India Pvt. Ltd
10	Constitutional validity upheld of place of supply provisions for 'intermediary services'	Gujarat High Court has rejected arguments challenging the constitutional validity of Section 13(8)(b) of IGST Act as ultra vires Article 286(1) of the Constitution. As per this section, apropos intermediary services, location of supplier i.e. intermediary is treated as the place of supply (POS) – thus for intermediaries located in India serving foreign clients, 'export' benefits would not be available. The High Court upheld this as a valid exercise of legislative power, consistent since the pre-GST service tax regime.	Gujarat High Court	Material Recycling Association of India

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2020 Upcoming Events |

S. No	Topic	Date
1.	3rd Annual Fraud, Risk and Compliance Virtual Conference and Awards	13th August
2.	Master the art of family business dynamics – Wills, Probate & Charters Session 1 & Session 2	18th August – Session 1 19th August – Session 2
3.	Certificate Course on Detecting and Preventing Internal and External Fraud Session 1 to Session 5	24th August – Session 1 25th August – Session 2 26th August – Session 3 27th August – Session 4 28th August – Session 5
4.	Digital Symposium on Goods & Services Tax - An Advanced Training Course Session 1 to Session 8	25th August – Session 1 27th August – Session 2 1st September – Session 3 3rd September – Session 4 8th September – Session 5 10th September – Session 6 15th September – Session 7 17th September – Session 8
5.	Certificate Course on International Tax Session 1 to Session 8	2nd September – Session 1 4th September – Session 2 9th September – Session 3 11th September – Session 4 16th September – Session 5 18th September – Session 6 23rd September – Session 7 25th September – Session 8
6.	2nd Annual Digital Payments Summit – Driving Digital Payments post Pandemic	4th September
7.	Certificate Course on FEMA and Related Compliances Session 1 to Session 5	7th September – Session 1 8th September – Session 2 9th September – Session 3 10th September - Session 4 11th September - Session 5
8.	Certificate course on Negotiating Contracts Session 1 to Session 3	22nd September – Session 1 23rd September - Session 2 24th September - Session 3
9.	Certificate Course on Practical Knowledge of Arbitration and Dispute Resolution - Session 1 to Session 4	6th October – Session 1 7th October – Session 2 8th October – Session 3 9th October – Session 4
10.	Direct Tax Summit- Virtual Conference Session 1 & Session 2	9th October – Session 1 10th October – Session 2
11.	Certificate Course on how to prevent White Collar Crimes & Cyber Crime Session 1 to Session 4	13th October – Session 1 14th October – Session 2 15th October – Session 3 16th October – Session 4
12.	Virtual Training on Mergers and Acquisitions Session 1 to Session 4	19th October – Session 1 20th October – Session 2 21st October – Session 3 22nd October – Session 4

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