

eMagazine



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Dear Readers,

Warm greetings from the Mysore Chapter of ICSI!

I am happy to interact with you again through the monthly e-Magazine. During the month Mysore was drenched with 10 days long Dussera celebrations and witnessed the spectacular jambu savari on the day of Vijaya Dashami.

The MCA already relaxed the time limit up to 30th November 2015 for the additional fee payable on forms AOC-4 and AOC-4 XBRL. The members can plan well and utilize the time extension properly. During the month of October the Chapter conducted a Career Awareness Program at St. Joseph's PU College, Mysore & also arranged an Industrial Visit to Oral Coaching Students to RBI Note Mudran Pvt. Ltd., Mysore. This was a rare opportunity for the students to learn about printing of currencies. The Chapter has planned to conduct seminar on the Companies Act, 2013 in the coming months.

On behalf of Mysore Chapter of ICSI, I wish you all a happy Deepavali. May the Divine Light of Deepavali Spread into your Life Peace, Prosperity, Happiness and Good Health.

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Career Awareness Programme

On 29.10.2015 Mysore Chapter of ICSI had organised Career Counselling Program at St. Joseph's PU College, Mysore. Around 50 students from Commerce Department attended the programme. CS Pani Datta, Member of the Mysore Chapter explained in detail about the course offered by the Institute and the criteria for eligibility for the course, examination and requirements of training. He also highlighted the importance of making the right career choice so as to be successful in life. He then spoke about the role of a Company Secretary and importance of the profession of Company Secretary in the changing economic scenario. Brochures containing brief details of the Company Secretaryship Course were distributed to the participants. CS Manjunath S also clarified the various doubts and issues raised by the participants and thanked the management for providing the Institute this opportunity.



Visit to RBI's Note Mudran

The Mysore Chapter of ICSI arranged an industrial visit to Bharatiya Reserve Bank Note Mudran Private Limited (BRBNMPL), Mysore on 27.10.2015 for students of Oral Coaching. The main objective of the visit was to know about various aspects relating to the printing of Indian Currencies. Mr. Ajit Kumar Karn, Manager, explained the students about the basis on which the currencies are printed, various materials used for printing, and other processes involved. All the students of Oral coaching classes attended the session and made use of a rare opportunity to learn about printing of currencies.

Decode the Code: drop by drop

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Communication with your Professional Colleague is Must!

Clause 8 of Part I of the First Schedule of the Company Secretaries Act, 1980 states that: "A *Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he accepts a position as a Company Secretary in practice previously held by another Company Secretary in practice without first communicating with him in writing.*" Let's decode this clause.

- i. **Accepts a position as a Company Secretary in Practice (PCS):** A practicing company secretary has to certify various documents and records under the Companies Act, 2013, Foreign Exchange Management Act, 1999, Foreign Trade Policy, SEBI Act, Rules and Regulations, where the statute specifically provides the documents need to be certified or audit to be conducted by a PCS. At every appointment, irrespective of whether the PCS is formally appointment or not, or whether the engagement letter for the assignment executed or not, wherever the statute specifically required engagement of PCS, this clause shall be applicable.
- ii. **'Previously held by another PCS':** Previous PCS shall mean the last PCS who was engaged by the entity to the same assignment, which the new PCS is proposed to be engaged for.

iii. **Communicating with him in writing:** An oxford meaning of the word communicate is, 'to share or exchange information, news, or ideas'. The information regarding appointment of new PCS shall be sent to the earlier PCS by a formal letter.

Looking at the increasing disciplinary complaints in the institute, with respect to the discussed clause, it shall be good a practice to follow below checklist while making the communication;

- i. Make the communication in paper mode at the registered address available with the ICSI even if communicated through email;
- ii. Mention the entity name, board resolution no. or reference to letter of appointment and nature of appointment in the letter;
- iii. Give an opportunity of at least 7 days to the other PCS to reply;
- iv. Make sure that you get an acknowledgement of your communication;
- v. Wait for the 7 days to pass and then only go ahead with the assignment.



Enforceability of Contractual Restrictions and Share Transferability in Public Companies

The Issue as to *whether two or more shareholders of a company can in a valid manner restrict the transferability of their shares by entering into private contracts* has hitherto remained in a state of uncertainty in India. Such contractual clauses confer pre-emption rights on parties as and when a shareholders intends to sell his shareholding in a company held by him, the said party is required to offer such shares to the other party, i.e. the party holding the pre-emption rights. The pre-emption rights are popularly known as “Right of First Refusal” (ROFR) clauses which have no statutory recognition and are generally contractual in nature.

Any issue with relation to enforceability of ROFR clause, has to be commenced by looking back at the Supreme court decision in *V.B. Rangaraj v. V.B. Gopalakrishnan and others.*, wherein the court taking in mind common law decisions held that shares are freely transferable and a private agreement that imposes restrictions not stipulated in the articles of association is nether binding on the company nor on the shareholders.

The division bench of the High Court of Bombay by its judgment dated 8-05-2015 has clarified the position of law relating to the enforceability of the ROFR Clauses. The present Article seeks to analyze the relevant statutory provisions in relation to the subject. The analysis is based on the judicial pronouncements in *Western Maharashtra Development Corpn. Ltd. Vs. Bajaj Auto Limited*

Analysis of Western Maharashtra Development Corpn. Ltd. Vs. Bajaj Auto Limited

The Parties had entered into a protocol agreement and Clause 7 of the Protocol Agreement stated: “If either party desires to part with or transfer its shareholding or any part thereof in the equity share capital of Maharashtra Scooters Ltd., such party shall give first option to the other party for the purchase of such shares at such rates as may be agreed to between the parties or decided upon by arbitration.” (i.e. ROFR)

In direct contrast is Section 22-A (2) of SCRA which states that, “Subject to the provisions of this section, securities of companies shall be freely transferable” Section 111 A (2) of the Companies Act, 1956 states that, “Subject to the provisions of this section, the shares or debentures and any interest therein of a company shall be freely transferable.

By virtue of a protocol agreement entered into on October 2, 1974, Bajaj and Western Maharashtra Development Corpn. Ltd (WMDCL) incorporated Maharashtra Scooters Limited (“MSL”), a public listed company and a wholly owned undertaking of the State of Maharashtra. Bajaj and WMDCL respectively held 24% and 27% shares in MSL respectively, while the remaining 49% of the equity shareholding was held by the public. Clause 7 of the Protocol Agreement provided for a right of pre-emption to Bajaj and WMDCL.

In 2003, WMDCL considered selling and transferring its 27% shareholding in Maharashtra Scooters Limited (MSL), to Bajaj at a price of INR 232.20 per share. Bajaj confirmed its interest in buying WMDCL's shareholding in MSL, but did not find the price offered per share as acceptable and therefore, requested a meeting by High Level Committee to reach a settlement. After failure of several communications between the Parties to come to consensus as regards rate at which the shares of WMDCL would be sold, a joint reference was made to the Arbitrator on December 29, 2003. The Arbitrator passed an award wherein it was held that the equity shares of WMDCL in MCL are to be sold at a price of INR 151.63 per share to Bajaj ("Award"). WMDCL challenged the Award of the Arbitrator under Section 34 of the Arbitration and Conciliation Act, 1996 before the Bombay High Court.

The Single Judge of the Bombay High Court negated all the contentions made by WMDCL except the one challenging the legality of Clause 7 of the said Protocol Agreement. The Single Judge of the Bombay High Court upheld WMDCL's contention regarding Clause 7 being invalid and held this to be the sole ground to set aside the Award. The order of the Single Judge of the Bombay High Court was challenged before the division bench of the Bombay High Court by Bajaj and one of the main contentions by Bajaj was:

"In today's globalized world, joint ventures are common and clauses similar to Clause 7 are necessary to ensure that a joint promoter of a public company do not sell his shareholding to a competitor who then would turn and would get control of his rival".

Hence, clause 7 of the Protocol Agreement should be held to be valid and not impinge upon the principle of free transferability of shares as contemplated under Section 111 A of the Act. However, the court firmly establishes the fact that a public company in India cannot provide for restrictions on the transferability of its shares.

The Supreme Court in the Vodafone International Holdings case, once again held that ROFR clauses have no statutory recognition and are generally contractual in nature thus not subscribing to the view expressed in VB. Rangarajan case.

However, had the court reconsidered the decision keeping in mind the decision in V.B. Rangaraj case, it would have been a welcome step for companies as the supreme court will have to expressly consider whether the ROFR clauses can be enforced only when it is incorporated in the articles of the company.

Conclusion

With the current market scenario, where joint ventures are on the rise, there is a dire need for clarity with regard to the ROFR clause in order to protect the promoter of such ventures.

It is thus, important that the Supreme Court sets a binding precedent on the issue after weighing all the issues and jurisprudence with regard to the same.

The Companies Act, 2013 recognizing these anomalies & confusions & diverse practices has inserted a new proviso in Section 58 "Contracts or arrangements between two or more persons in respect of securities shall be enforceable as a contract" which inter alia recognises the Share Holders agreement & Private Contracts between the shareholders and gives it legal force, this again only merely codifies and clarifies the existing legal position regarding pre-emption agreements, hence what was implicit in Section 111A of the 1956 Act has now been made explicit in Section 58 of the Companies Act, 2013.

With The SLP (Special Leave Petition) in Messer Holdings pending adjudication before the Supreme Court, it is hoped that the court will clarify & consider the ROFR Clause in agreements which is common in today's globalized world.





The Arbitration and Conciliation (Amendment) Ordinance, 2015

The purpose of Arbitration and Conciliation Act, 1996 incorporating the UNCITRAL Model is partly autonomy and limited scope for judicial intervention. Arbitration requires the prior existence of an arbitration agreement or an arbitration clause in the contract which is the subject of the dispute in question. Whereas, Conciliation can be both independent and court-annexed. Part XXXIIA of the Code of Civil Procedure, 1908, allows courts to facilitate the resolution of disputes through conciliation in specific matters such as litigation by or against Government officials and family court. Unlike arbitration, conciliation does not require the existence of any prior agreement, Conciliation can therefore be initiated by any party requesting the appointment of a Conciliator.

On 23rd October 2015, Government of India has promulgated an Ordinance which aims for the amendment to the Arbitration Act of 1996 to function in conjunction with other legislation and policies namely litigation policy focusing on transparency and setting up of specialised commercial courts and benches. Key highlights of the Ordinance are:

- The motivation of the Government in amending the Arbitration Act, and in bringing changes thereto, is to make India a more attractive destination for commercial arbitration, as well as to compete with the likes of Singapore and London as hubs of International Commercial arbitration.
- These amendments seek to make commercial disputes more user-friendly and cost effective which in turn will lead to expeditious disposal of cases. It is Mandatory for arbitrators to settle dispute within 12 months. This period can be extended by 6 months only by a court on sufficient cause. It also means slashing the fees of arbitrators by not exceeding 5%, for each month of such delay, if the court finds that the delay has been caused due to arbitrators and even rewarding arbitrators with extra fees in case the matter is disposed of within 6 months, if parties agree to pay more.
- The amendment empowers arbitration tribunals to grant all kinds of interim measures that courts provide. Provision for fast track procedure of conducting arbitration is introduced. Parties to the dispute should agree that their dispute be resolved through fast track procedure. Award in such cases shall be given in six months period.
- There is a ground for challenge of arbitral award under 'Public Policy of India'. Where making of award was induced or affected by fraud or corruption, or is in contravention of the fundamental policy of Indian Law or is in conflict with the most basic notions of morality or justice, the award shall be treated as being against the Public Policy of India.
- A new provision states that application to challenge the award is to be disposed of by the court within one year.
- Amendment is basically committed to improve its legal framework relating to arbitration, where the Law Commission of India in its 246th Report has recommended various amendments in the Act, in order to pave way for India to become a Hub of International Commercial Arbitration.



Evolution and impact of differentiated bank licensing Payment Banks & Small Finance Banks

Part
1

Traditionally banking means, a business of borrowing and lending money and making a difference in interest rates between the two, which are considered as eventual profits. As time evolved in India, banking business turned competitive. This prompted, a strict licensed regimen, imposing rules for conduct of banking business, including the cap on interest rates. Banks realized that growth of topline in such competitive and licensed regimen would not be possible, unless other sources of income were tapped and focused.

Hence in line with this thinking, Banks both private sector and public sector started competing in sale of third party Insurance, mutual funds and making huge treasury income. However banking business being a regulated business, cannot do the sale of Insurance or Mutual Funds directly. Hence banks started incorporating subsidiaries like ICICI Prudential Life Insurance, ICICI Lombard, SBI Life, SBI General Insurance, HDFC Bank coming up with HDFC Life, etc. Banks by virtue of already having customer data base through the CASA deposits, started cross selling Insurance and Mutual fund products along with their Savings Bank and Current Account products. Banks were earning income, in form of commission for sale of these other products. This became part of other income in a Bank's Profit and loss account apart from the normal treasury income, which these banks earn.

The direct Interest income of SBI was about 81,394 Crores for period ending 31.3.2011 against 1,52,397/- Crores for period ending 31.3.2015. The other income was 14,930/- Crores for period ending 31.3.2011 against 22,575/- Crores for the period ending 31.3.2015. (<http://www.moneycontrol.com/financials/statebankindia/balance-sheet/SBI#SBI>)

The direct Interest income of ICICI Bank was about 25,974 Crores for period ending 31.3.2011 against 49,091 Crores for period ending 31.3.2015. The other income was 6,647 Crores for period ending 31.3.2011 against 12,176 Crores for the period ending 31.3.2015. (<http://www.moneycontrol.com/india/stockpricequote/banks-private-sector/icicibank/ICIO2>)

Increase in Non-Performing Assets (NPAs), caused the much erosion of capital and reduction in achieving of their desired profits. Banks were caught in between the requirement of better performance and rising NPA's and risky, regulatory environment. Banks were required to increase their capital to cushion the effect of constantly increasing NPA's. Capital being one of the scarcest resource, banks was not able to find sufficient funds, to be adequately capitalized. Hence they were seeking RBI guidance for the same. With Basel III norms stipulating cap, on the capacity of conducting direct business as a percentage of Bank's Capital, the capacity to lend is likely to get restricted. RBI contemplation on mergers of major banks to harness synergies was also not paying off.

With the many statutory restrictions, increasing requirement of capital, growing NPAs and increasing competition, the Central Government and RBI agenda of Financial Inclusion was getting stuck. Under the Prime Minister Jan Dhan Yojana (PMJDY), a total of 17.56 Crores accounts have been opened with a balance of 22,393.98 Crores. It is also stated that 45.76% of the accounts are with zero balance. Any attempt at financial inclusion was only a shot at bank's own arm, and was not in any position to improve the situation.

RBI had to intervene to bring about a change in the way of performance or functioning of the banks and also achieve its objective of Financial Inclusion. This paved way to the bringing of Payment License and Small Bank Licenses. The partial success of PMJDY gave impetus to RBI and the Central government to begin a big-bang programme, by way of Payment Bank and Small Bank Licenses to harness the untapped resources of finances by the existing banking system and reduce cost of banking. The large number of accounts opened under PMJDY had lowered the potential for business for payment banks. The payment banks are expected to improve the last mile connectivity, enable penetration of payment points and service outlets in significant way through business correspondent structure and use of technology.

RBI has stated the following conditions/requirement for a Payment Bank:

➤ **Scope of activities:**

- a. Acceptance of demand deposits. Payments bank will initially be restricted to holding a maximum balance of Rs. 100,000 per individual customer.
- b. Issuance of ATM/debit cards. Payments banks, however, cannot issue credit cards.
- c. Payments and remittance services through various channels.
- d. Can act as, Banking Correspondent of another bank, subject to the Reserve Bank guidelines on Banking Correspondent.
- e. Distribution of non-risk sharing simple financial products, like mutual fund units and insurance products, etc.

➤ **Deployment of funds:**

- a. The payments bank **cannot undertake lending activities.**
- b. Apart from amounts maintained as Cash Reserve Ratio (CRR) with the Reserve Bank on its outside demand and time liabilities, it will be required to invest minimum 75 per cent of its "demand deposit balances" in Statutory Liquidity Ratio (SLR) eligible Government securities/treasury bills with maturity up to one year and hold maximum 25 per cent in current and time/fixed deposits with other scheduled commercial banks for operational purposes and liquidity management.

➤ **Capital requirement:**

- a. The minimum paid-up equity capital for payments banks shall be Rs.100 crore.
- b. The payments bank should have a leverage ratio of not less than 3 per cent, i.e., its outside liabilities should not exceed 33.33 times its net worth (paid-up capital and reserves).

➤ **Promoter's contribution:** The promoter's minimum initial contribution to the paid-up equity capital of such payments bank shall at least be 40 per cent for the first five years from the commencement of its business.

➤ **Foreign shareholding:** The foreign shareholding in the payments bank would be as per the Foreign Direct Investment (FDI) policy for private sector banks as amended from time to time.

➤ **Other Conditions :**

- a. The operations of the bank should be fully networked and technology driven from the beginning, conforming to generally accepted standards and norms.
- b. The bank should have a high powered Customer Grievances Cell to handle customer complaints.

Reserve Bank of India has provided in-principle approval for 11 entities in India on 18th of August 2015 out of 42 applications received. The in-principle approval is valid for 18 months from date of providing the approval for starting the payment banks.

The entities which have received the approval are: Adithya Birla Nuvo, Airtel M Commerce, Cholamandalam Distribution, Department of Posts, Fino Paytech, National Securities Depository Limited, Reliance Industries, Tech Mahindra, Vodafone m-pesa, Dilip Shantilal Shanghavi and Vijay Shekhar Sharma (Paytm).

[Read about Small Finance Banks in the next edition](#)



Deciphering ‘Associate Company’ under Companies Act, 2013

For the first time in the Indian Company Law, there is a reference of ‘Associate Company’ in relation to another company and there are applicable provisions for necessary compliances in the Companies Act, 2013 (“Act”). The reference of ‘associate company’ in the Act, is in the definition of Related Party (sub-section (76) of Section 2), Financial Statements (Section 129), eligibility, qualifications and disqualifications of auditors (Section 141), Statutory Auditor not to render certain services (Section 144), Appointment of independent directors (Section 149), Related Party Transactions (Section 188), Restriction on non-cash transactions involving directors (Section 192), Merger or amalgamation of certain companies (Section 233), etc.

Discussion:

‘Associate Company’ has been defined in sub-section (6) of Section 2 of the Companies Act, 2013 as in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company. The explanation to sub-section (6) of Section 2 of the Act elaborates ‘significant influence’ as it means control of at least 20% of total share capital, or of business decisions under an agreement.

The essence of determining whether a company is an associate company of another company is to determine whether there is a ‘significant influence’ by such other company. However, it is important to note that the ‘associate company’ is not a ‘subsidiary company’, though it includes joint-venture company. For determining ‘significant influence’, any one of the following conditions needs to be complied with:

- (i) Control of at least 20% of total share capital by another company,
- (ii) Control of business decisions under an agreement.

With respect to (i), the total share capital means equity share capital and convertible preference share capital. It is however necessary that non-convertible preference share capital is excluded as contemplated by clause (r) of Rule 2 of Companies (Specification of definitions details) Rules, 2014. Sub-section (27) of Section 2 of Companies Act, 2013 defines ‘control’. It includes right to appoint majority of the directors or right to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner. Therefore, broadly, one can say that a company in which the other company holds more than 20% but less than 50% of the total share capital, can be termed as ‘associate company’.

With respect to (ii) i.e. “control of business decisions under an agreement”, this phrase has created enormous conundrum amongst corporates and practicing professionals. It is essential to note here, that if this condition is satisfied then a company will be an ‘associate company’, even if there is no control of even 20% of total share capital. The clause is applicable even when the control of business decision is under an oral agreement or a written agreement. With respect to considering the applicability of clause (ii), the essence is in understanding the meaning of “control of business decisions”.

A practical example will help us to understand the applicability of the clause. Suppose, A Ltd. is having a business agreement which relates to the manufacturing of products for a leading automobile company i.e. B Ltd. The former company's 100% turnover arises from this activity only. There are no common directors / shareholders between A Ltd and B Ltd. B Ltd is not holding any shares of A Ltd, however, A Ltd. is bound by the agreement and there is no other relation between the companies. Whether this agreement will make A Ltd an Associate Company of B Ltd.? In my view, such agreement will not fall under clause (ii) for determining the relationship of 'associate company', because there is no control over the business decisions under the agreement. Also, to control the business decisions, it is necessary that the business decisions are taken by board of directors or one level below the board.

Accounting perspective of 'significant influence':

For the purpose of understanding 'significant influence', we can refer the definitions in Accounting Standards. Accounting Standard – 18 (relating to 'related party disclosures') defines 'significant influence' as participation in the financial and/or operating policy decisions of an enterprise, but not control of those policies. The Indian Accounting Standard – 24 (relating to 'related party disclosures') defines 'significant influence' as the power to participate in the financial and operating policy decisions of an entity, but has no control over those policies. Significant influence may be gained by share ownership, statute or agreement. It can be said that the Indian Accounting Standard – 24 is an extension of Accounting Standard– 18, wherein the mode of obtaining 'significant influence' is defined.

Conclusion:

It is extremely essential to comprehend and apply the meaning of 'associate company' as the definition has a very wider impact on the compliance of key provisions of Companies Act, 2013 which includes, determination of related party, preparation of the financial statements, eligibility, qualifications and disqualifications of auditors, appointment of independent directors, Related Party Transactions and restriction on non-cash transactions involving directors.

Tax Info

Exemption in Long Term Capital Gain arising on Transfer of Residential House

Section 54 of the Income Tax Act, 1961 provides the exemption to assessee in respect of long term capital gain arising from the transfer of a residential house. It lays down certain conditions to enjoy the exemption;

1. The capital gain should arise from the transfer of long term capital asset being buildings or lands appurtenant thereto, being a residential house.
2. The income from such residential house shall be assessable under the head of 'Income from house property'.
3. The transferor shall be an individual or Hindu Undivided Family.
4. The transferor assessee should have purchased a residential house within a period of one year before or two years after the date of transfer; or, in the alternative, the assessee should construct the residential house within a period of three years from the date of the transfer of the original house.
5. The amount invested in the purchase or construction of the new residential house should either be equal to or more than the gain, or where it is less than the amount of capital gain, the shortfall shall be taxable under section 45 (1) of the Act.

Trivia: Paying advance to the extend/more than of capital gain for purchase of new flat is good compliance of Section 54/54F (Hasmukh N. Gala v. ITO ITA No. 7512/MUM/2012 dt. 19.08.2015 (Mumbai Tribunal)).

I want to...

I remember the night in Miami when our son, Ian, was just five years old.

We were staying with relatives and it was his bedtime. When I looked at the living room floor, I knew we had a problem. Toys were all over the place. "Ian," I said, "you need to pick up all those toys before you go to bed." "Daddy," he said, "I'm too tired to pick up my toys."

My immediate inclination was to force him to clean up the room.

Instead, I went into the bedroom, laid down, and said, "Ian, come here. Let's play Humpty Dumpty." He climbed up on my knees and I said, "Humpty Dumpty sat on a wall. Humpty Dumpty had a great fall." And he fell. Ian laughed and said, "Let's do it again." Well, after the third "fall," I said, "Okay, but first go pick up those toys."

Without thinking, he ran into the living room and in ninety seconds he finished a job that could have taken half an hour. Then he jumped back on my knees and repeated, "Daddy, let's do it again." "Ian, I thought you were too tired to pick up those toys."

He answered, "I was, daddy, but I just wanted to do this!"

We can finish any job when we have the "Want to!"

[Author: Neil Eskelin]

Words Worth Millions

"Victory has a hundred fathers and defeat is an orphan.

-John F. Kennedy

"Management is doing things right; leadership is doing the right things."

-Peter F. Drucker

"Always remember, the best boss is the one who bosses the least. Whether it's cattle, or horses, or men; the least government is the best government."

-Ralph Moody





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Employer's Liability Act, 1938

Object: The Employer's Liability Act was passed with the primary object of prohibiting certain defenses as pleaded in suits for damages in respect of injuries sustained by workmen under Common Law.

Extension of Applicability: The said act is extends to the whole of India.

Close proximity with ESI & ECA Act: Chapter IV, V & VA of the ESI Act, 1948 and Section 3 of the Employees Compensation Act, 1923

Definitions:

Workman: A workman is person who has viz.,

- Entered into or works under a contract of service; or
- Apprenticeship with an employer;
- Such contract of service or apprenticeship is for Manual, Clerical or Labour work or for any other purpose.
- Such contract may be express or implied or oral or in writing.

Employer: Employer is generally a person who gives employment and directs the manner in which the work is to be done and exercise control and supervision over the work done or to be done.

The definition of employer includes;

- Any body of persons, whether incorporated or not;
- The legal representatives of a deceased employer;
- Contract of service or apprenticeship.

Defenses for Employers in liability suits:

A. **The Doctrine of Common Employment:** By this doctrine an employer is not normally liable to pay damages to a workman for an injury resulting from the default of another workman.

B. **The Doctrine of assumed risk:** By this doctrine an employee is presumed to have accepted a risk if it is such that he ought to have known it to be part of the risks of his occupation.

Bar on Contracting out:

In a suit for damages, the strong presumption shall be that the workman has undertaken any risk attaching to the employment without full knowledge. But this presumption may be rebutted only when the employer proves that the risk was fully explained to and understood by the workman and that the workman voluntarily undertook the same with full knowledge. The doctrine of contracting out has been inserted in the Act so as to exclude the provision of the Contract Act, 1872.

Saving: This Act shall not affect the validity of any decree or order of a civil court passed before the commencement of this Act in any such suit for damages.



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e-Tools for the Professionals



Invoice2go pro

An Android application for Smart Phones and Tabs:

Invoice2go is an Android based application for Smart Phones and Tabs to create and send professional invoices using variety of formats from your Android device. Available real time charts provide us the visual representation of your business performance. Application is available in two variants that are “Starter” and “Pro”. You can create Invoices, Estimates, Credit Memos and purchase orders with more than twenty template styles. Application allows its users to preview your invoices before you mail them as PDF. Also it will calculate taxes and totals for you.

Specification: 1. Price- Free | 2. Required Android- 2.2 or above

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Web Yatra



True intuitive expertise is learned from prolonged experience with good feedback on mistakes...!!!

Expertise is the outcome of the experience in a particular field. In today’s world, a person with immense knowledge in his field is held in high esteem. I discovered a website called <http://www.mondaq.com/> that promises you knowledge in the field of legal, financial and regulatory from over 70 countries. Our kind of a profession requires more and more knowledge and logic to interpret and convey the real meaning behind the law and any rules made there under. This site provides an opportunity to update ourselves in the said field. The site broadly covers the following topics:

Regions, Contributors, Advice Centre, Corporate and commercial law, Employment and HR, TAX, Immigration, Finance and Banking Etc.,

The said website also contains information’s in other fields like, Foods and Drugs, International Laws, Real Estate and Construction, Consumer protection and Insurance. Go right ahead and get all the updates...!!!

News Room



- Column by CS Chakri Hegde and
CS Vijayalakshmi Karur

NEWSROOM EXPRESS

- Swachh Bharat Cess will be levied @0.5% on value of all taxable services with effect from 15 Nov 2015
- Microsoft to fund hundreds of new Indian entrepreneurs in smart city space
- SEBI comes out with shareholding disclosure format on IDRs
- On E-Commerce Portals an insurance policy will be drafted soon by IRDAI
- SEBI to release 10-pager abridged prospectus for IPOs
- Sun Pharma to recall over a million boxes of anti-allergic Loratadine drug from the US market after checks revealed the tablets were 'super potent' and 'out of specification'.
- Idea Cellular is in talks with China's TCL Communication to procure 4G-ready smart phones to support its soon to be launched high-speed broadband services in the country.

India likely to Ratify WTO Trade Pact by November

The government has started simplifying trade-related processes and classifying them as per WTO norms as it plans to ratify the Trade Facilitation Agreement of WTO by November.

World Trade Organization Dispute Settlement Panel Rules against India In Its Solar Energy Dispute Against USA (<http://www.mondaq.com/>)

The World Trade Organization (WTO) Dispute Settlement Panel has ruled against India in its solar energy dispute with USA, requiring the Government of India to offer a level playing field to both foreign and domestic manufacturers of solar panels and solar modules. Under the Jawaharlal Nehru National Solar Mission (JNNSM), the Government of India launches projects that require the procurement of solar modules and solar cells from domestic producers for allocated capacity generation under the JNNSM. This mandatory requirement of sourcing equipment from India is termed as Domestic Content Requirement (DCR).

However, the DCR has been struck down by the WTO Dispute Settlement Panel as being in violation of the WTO agreements to which the two nations are signatories. India plans to appeal against this decision, or look for a bilateral arrangement with USA to resolve the issue. According to the WTO rules, the decision will be reviewed and finalized by WTO Dispute Settlement Panel and delivered to the two signatory countries.

1st Big FDI in Rail: GE, Alstom May Get Nods for Rs 40,000-Cr Loco Plans in Bihar

Global giants GE and Alstom are likely to be awarded the contracts for setting up of multi-crore diesel and electric locomotive factories in Marhora and Madhepura in Bihar, marking the first major FDI in rail projects.

In A Fresh Setback, Dr Reddy's Gets Warning Letter for Three Plants

Hyderabad-based Dr. Reddy's Laboratories has received a warning letter from the US Food and Drug Administration wherein the drug regulator has sighted its observations for the company's three facilities, the pharma major informed the Bombay Stock Exchange.

IRDAI clarifies on claims of the life insurers not to become time barred

The Insurance Regulatory IRDA has clarified the life insurers about the rejection of the policy claims after certain tenure as defined by the IRDAI shall not take effect even on the suppression of the material and important facts as required for approving the claim of the applicant insurers.

WTO agrees to extend drug patent exemption for Least Developed Countries

A TRIPS (Trade-Related Aspects of Intellectual Property Rights) Council meeting in Geneva on Friday agreed, and decided to allow "maximum flexibility" in their approach to patenting pharmaceutical products until "at least January 2033".



World Higher Education Database (WHED)

The **IAU World Higher Education Database (WHED) Portal** is a service provided by the International Association of Universities (IAU) in association with UNESCO. It is the unique tool where one can find comprehensive information on higher education systems and credentials in 184 countries and over 18,000 higher education institutions. This portal on URL: <http://www.whed.net> is a replacement for WHED CD-ROM (stopped since 2014) which IAU was releasing every year with the updated lists, rankings and information. The access to IAU WHED portal is offered free of charge to everyone. The information on the portal includes the data on systems and credentials including information provided by higher education authorities on overall structure of pre-higher and higher education systems, different stages of study, national bodies responsible for higher education, admission requirements (including for foreign students), quality assurance/recognition system, education level and entrance requirements and such other related credentials. Questionnaires are sent to the institutions regularly to obtain more detailed and updated information.

Did
You
Know?

Immunomatrix – A Vaccine without Needle

Vaccines save lives, but most of them are delivered by needle. That's a problem for people without access to refrigerated solution, clean syringes, and safe ways to dispose of medical waste. Biomedical engineer Kasia Sawicka invented a painless alternative: a patch, called ImmunoMatrix, that can vaccinate patients without breaking the skin. The skin doesn't absorb large molecules easily and thus the vaccine solutions were inserted through a needle. Over several years, Sawicka perfected a process that involves combining the polymer with vaccine solution, forming it into nano fibres with large surface areas, and weaving those fibres into dense mats. In tests on rats and synthetic human skin, the patches successfully delivered vaccine molecules 250 times larger than those the skin typically absorbs making the pricks unnecessary.

Vacation of Office of Director by Non Attendance to Board Meeting

While calculating the period for vacation of office of the Director for not attending the board meeting, it may be noted that the period of twelve months is neither Financial Year nor the Calendar Year. Section 167 (1) (b) reads as "if a Director absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board." In this clause, the usage of words '**Period of twelve months**' emphasises that the period of twelve months of non attendance shall be calculated from the date of previous meeting in which the respective Director was present.

Pick of
the
month

Regulatory Updates

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CUSTOMS & FTP

Notifications/Circulars/News

The Central Government has notified Tirupati State of Andhra Pradesh as Customs Airport for unloading of imported goods and loading of export goods.

No. 99/2015-Customs (NT) dated 15 October, 2015

The Central Government has invited comments from field formations in relation to initiatives for increasing ease of doing business, and reducing use of paper in Customs clearances.

No. 450/25/2013 -CusIV (Pt) dated 01 October, 2015

The Central Government has mandated the use of digital signature for all importers and exporters using services of Customs brokers for submission of customs process documents, w.e.f from 01/01/2016: *No. 26/2015 dt 23.10. 2015*

As a part of the Government's initiative for improving India's rank on the "Ease of Doing Business" survey, the Central Government has issued instructions for implementation of electronic transmission of Delivery Order.

No. 24/2015 dated 14 October, 2015

The Central Government has clarified that in relation to exports made between 01 April, 2015 and 31 May, 2015, Merchandise Exports from India Scheme (MEIS) benefit can be claimed by submitting physical copies of free shipping bills with Directorate General of Foreign Trade (DGFT) after filing MEIS application even if, at the time of export, intent to claim MEIS benefit was not made in the shipping bill.

No. 40/2015-20, dated 09 October, 2015

The Central Government has authorised International Society for Small and Medium Enterprises (ISSME) to issue Certificate of Origin (Non-Preferential).

No. 39/2015-20, dated 01 October, 2015

The Central Government has updated the list of organisations that can import Aircraft and Helicopters (including used/ second-hand aircraft and helicopters) without obtaining an import licence from DGFT.

No. 24/2015-2020, dated 09 October, 2015

The Central Government has extended the eligibility of all services specified under Appendix 3D exported from India for reward under Service Exports from India Scheme (SEIS) during the period 01 April, 2015 to 31 March, 2016 as against the originally announced period of 01 April, 2015 to 30 September, 2015.

No. 42/2015-20, dated 26 October, 2015

The Central Government has extended the levy of anti-dumping duty on imports of Plain Medium Density Fibre Board of thickness 6 mm and above, falling under Chapter 44 of Customs Tariff Act (CTA), originating in or exported from the People's Republic of China, Malaysia, Thailand and Sri Lanka, for a period of five years from 21 October, 2015.

No. 48/ 2015-Customs (ADD) dated 21 October, 2015

The Central Government has extended levy of anti-dumping duty on imports of Front Axle Beam and Steering Knuckles meant for heavy and medium commercial vehicles, falling under Chapter 73 and 87 of CTA, originating in or exported from the People's Republic of China, for five years from 21 October, 2015.

No. 49/2015-Customs (ADD) dated 21 October, 2015

The Central Government has imposed anti-dumping duty on imports of Hexamine, falling under Customs Tariff Heading (CTH) 2921 29 10 of CTA, originating in or exported from the People's Republic of China and UAE, for five years from 21 October, 2015.

No. 50/2015-Customs (ADD) dated 21 October, 2015

The Central Government has extended the levy of anti-dumping duty on imports of all Fully Drawn or Fully Oriented Yarn/ Spin Draw Yarn/ Flat Yarn of Polyester (non-textured and non-POY), falling under Chapter 54 of CTA, originating in or exported from the People's Republic of China and Thailand, for five years from 21 October, 2015.

No. 51/2015-Customs (ADD) dated 21 October, 2015

Case Law

The Supreme Court of India held that the value of imported goods could not be re-determined in absence of cogent reasons for rejection of invoice value.

CC v Bayer Crop Science Ltd. (2015-TIOL-252-SC-CUS),

The Supreme Court held that consideration paid for technical know-how for manufacture of products was not includible in value of imported capital goods, since it was not a condition of sale of imported goods, but was a post-importation activity.

CC v Denso Kirloskar Industries Pvt. Ltd. (2015-TIOL-222-SC-CUS)

The Kerala High Court held that clearance of warehouse goods for home consumption under Section 68 of the Customs Act would be considered complete when the duty on warehouse goods was paid and "out of charge" order for home consumption was made by the proper officer. Duty cannot be demanded by Customs Authorities after "out of charge" order.

Ruchi Infrastructure Ltd v Union of India (2015-TIOL-2411-HC-Kerala)

The High Court held that relevant date for computation of interest on delayed refund payment was date of expiry of three months from date of filing the initial refund claim.

CC v Pfizer Products India Private Limited (2015 (324) ELT 259)

The Delhi High Court held that interest under section 27A of Customs Act was payable in case of delay in SAD refunds, and that circular denying such interest was ultra vires.

CC v Riso India P Ltd (2015-TIOL-2384-HC-DEL)

The Tribunal held that the transaction value of exported goods could not be rejected in absence of contrary evidence to show that declared value was incorrect.

In R Krishan and Co. v CC (2015-TIOL-2103-CESTAT-MAD)

The High Court held that CENVAT credit of Countervailing Duty (CVD) paid through Duty Entitlement Pass Book Scheme (DEPB) scrips could not be denied in case there was no specific denial in exemption notification to take credit for such duty.

CCE v HavellsIndia Ltd. (2015-TIOL-2399-HC-DEL-CUS)

The Madras High Court held that amendment in Bills of Entry under Section 149 was allowed in case importer wanted to pay CVD in cash and get credit back in DEPB scrips, since he could not be deprived of taking credit either by using DEPB scrips or by paying CVD in cash.

In CC v Brakes India Ltd. (2015-TIOL-2334-HC-MAD-CUS)

The Supreme Court of India held that concessional rate for clearance from EOU to DTA could not be denied in a case where imported catalyst, which was not a raw material, was used, since condition of use of domestic raw material was not breached.

CC v I.G. Petrochemical Ltd (2015 (324) ELT 21

High Court held that if drawback payable to the assessee was not paid within one month from the date of filing the claim, interest at the fixed rate had to be paid to the assessee after the expiry of the said period of one month.

Kapur K.C.P Packagings Ltd. v CC (2015 (324) ELT 58)

The Tribunal held that “titanium sheets” required for reactors were capital goods defined in FTP. Further, once FTP allowed such goods as capital goods, then it was not open for the Customs to object to this.

CC v Sree Rayalaseema Hi-Strength Hypo Ltd. (2015-TIOL-2239-CESTAT-MAD)

The High Court held that a Bank guarantee could only be encashed by Customs when a quantification of duty payable was made by the DGFT.

Kerala Hotels P Ltd v CC (2015 (323) ELT 743)

The Tribunal held that second-hand SO2 Analyser was capital goods as defined in FTP, and hence freely importable, and so no penalty could be imposed on the courier agency for mis-declaration or for not declaring restricted goods.

DHL Express (India) Private Ltd. v CC (2015-TIOL-2174-CESTAT -MUM)

Ministry of Corporate Affairs

Notifications/Circulars/News

In the Companies (Share Capital and Debentures) Rules, 2014, in rule 18, -(a) In sub-rule (I), in clause (a) for sub-clause (iii) following sub clauses shall be substituted, namely:-

“(iii) Infrastructure Debt Fund Non-Banking financial Companies, as defined in clause (b) of direction 3 of Infrastructure Debt fund Non-Banking Financial Companies (Reserve Bank) Directions, 2011; (iv) Companies permitted by a Ministry or Department of the Central Government or by Reserve Bank of India or by the National Housing Bank or by any other statutory authority to issue debentures for a period exceeding ten years”.

Companies (Share Capital and Debentures) Third Amendment Rules, 2015 dated 6 November 2015

The Ministry of Corporate Affairs has relaxed the additional fee payable on forms AOC-4 and AOC-4 XBRL up to 30th November, 2015. The additional fee requirement for MGT-7 E-Form is also relaxed for all such forms filed till 30th November, 2015, wherever additional fee is applicable.

General Circular No.14/2015 dated 28.10.2015

CENVAT

Case Law

The Supreme Court held that additional amount received after clearance of goods should not be added to the transaction value unless undervaluation had been proved by the department.

In CCE v Hitkari Fibres Ltd. (2015 (324) ELT 24)

The Supreme Court held that cash and volume discount were allowable as deduction when the same was stipulated in the sale agreement between the assessee and its buyers and known at, or prior to, clearance of goods.

Purolator India Ltd vCCE (2015 (323) ELT 227)

The Supreme Court held that the royalty paid to the buyer for use of brand name was not an additional consideration, as the appellant had paid the buyer, not the other way round. (The appellant was making approximately 50% of its sales to other buyers -other than the brand owner.)

Lakhanpal Ltd v CCE (2015 (323) ELT 645)

The Delhi Tribunal held that cheque discounting charges collected to cover delay in realisation of payment by up-country buyers was nothing but interest on receivable and that the same was not includible in the assessable value.

Cadbury India Ltd. v CCE (2015 (323) ELT 606)

The Kolkata Tribunal held that the pro rata value attributable to the bonus quantity of lubricant was not includible in the assessable value when the bonus/ combo pack had already suffered duty under MRP-based assessment.

Castrol India Ltd v CCE (2015-TIOL-2194-CESTAT-KOL)

The Mumbai Tribunal held that cost of secondary packing not ordinarily used, and given at specific request of customer, was not includible in the assessable value of goods.

Essel Propack Ltd v CCE (2015-TIOL-2173-CESTAT-MUM)

The Mumbai Tribunal held that difference between sales tax collected from the customers and sales tax paid to the state authorities at Net Present Value of deferred taxes under Package Incentive Scheme could not be treated as an additional consideration, since payment of sales tax at NPV (which was less than originally payable), could not make the amount actually payable at a different time and place of removal, particularly when under Sales Tax Law such a payment was considered as deemed payment of the sales tax payable.

CCE v Uttam Galva Steels Ltd (2015-TIOL-2242-CESTAT-MUM)

The Madras High Court held that there was no requirement to reverse CENVAT credit on inputs and capital goods under rule 3(5) on leasing out of factory to another company since there was no physical removal of such goods.

CCE v CESTAT (2015 (323) ELT 290)

The Delhi Tribunal held that omission by Head Office to register as an Input Service Distributor was a procedural lapse, and therefore, CENVAT credit was admissible on invoice issued in name of the Head Office.

National Engineering Industries Ltd vCCE (2015-TIOL-1976-CESTAT-DEL)

The Ahmedabad Tribunal held that CENVAT Credit was admissible on inputs and capital goods used exclusively for R & D and Quality Control Laboratory, since such R&D activities were essential for manufacture of finished goods.

Sabic Innovative Plastics Pvt Ltd v CCE (2015-TIOL-2014-CESTAT-AHM)

The Ahmedabad Tribunal held that CENVAT credit was admissible on pipes used for transportation of natural gas from supply point of GAIL to the appellant's factory for further use in the manufacture of finished goods.

Bell Ceramics Ltd v CCE (2015-TIOL-2227-CESTAT-AHM)

The Delhi Tribunal held that there was no requirement to reverse CENVAT credit on inputs, inputs contained in work in progress/ finished goods lying in stock on the date of availing full exemption under notification no. 6/2002-CE dated 1.3.2002.

SPL Ltd v CCE (2015-TIOL-2092-CESTAT-DEL)

GST (VAT, Sales Tax and Entry Tax)

Case Laws

The Karnataka High Court held that in the course of ERP implementation, if any software came into existence, no VAT was payable on such software as the title of software rested with the client, and not the assessee. The HC observed that such software could not be held to be 'goods available in the market'.

State of Karnataka v IBM India P Ltd (2015-TIOL-2298-HC-KAR-VAT)

The Karnataka High Court held that smart cards designed specifically for RTO as part of providing computerized service delivery system were not liable to VAT. The HC observed that supply of smart cards was for providing service, and there was no element of sale involved therein.

Zylog Systems P Ltd v Addl. Commissioner of Commercial Tax, Bangalore (TS-549-HC-2015-KAR-VAT)

The Delhi High Court held that a taxpayer was eligible for credit of Value Added Tax paid on purchase of Duty Entitlement Passbook ('DEPB') scrip against output Delhi VAT liability on sale of imported goods in the State of Delhi.

Jagriti Plastics Ltd v Commissioner of Trade & Taxes (2015-TIOL-2332-HC-DEL-VAT),

Service Tax

Notifications/Circulars/News

With effect from November 15, 2015 'Swatch Bharat Cess' @ 0.5% will be levied on value of all taxable services i.e. the effective rate of Service tax including SB Cess will be 14.5% from November 15, 2015.

No. 22/2015-ST dated November 6, 2015

The CBEC has clarified in the context of Goods Transport Agency (GTA) services that if ancillary services are provided in the course of transportation of goods by road, and the charges for such services are included in the invoice issued by the GTA, such services would form a part of the GTA services and the corresponding abatement shall be allowed. Further, even in cases where GTA undertakes to deliver goods within stipulated

time, it would be considered as GTA services till the time the entire transport is by road and the GTA issues a consignment note.

No. 354/98/2015-TRU dated 5 October 2015

Service tax exemption has been granted to an Indian Bank or other entity acting as an agent to money transfer service operators in relation to remittance of foreign currency into India for the period 1st July, 2012 to 13th October, 2014. This exemption is granted by exercising the powers under section 11C of the Central Excise Act, 1944, which is made applicable to service tax vide section 83 of the Finance Act, 1994.

No. 19/2015-Service Tax dated 14 October 2015

Service Tax exemption has been granted to services provided by business facilitator / business correspondent to a banking company in rural area, restricted to a Basic Savings Bank Deposit Account covered by Pradhan Mantri Jan Dhan Yojana in rural area branches by way of account opening, cash deposits, cash withdrawals, obtaining e-life certificate, and Aadhar seeding. The services provided by any person as intermediary to a business facilitator/ business correspondent with respect to the above-mentioned services provided by the business facilitator/ business correspondent have also been exempted from service tax.

No. 20/2015-Service Tax dated 21 October 2015

Case Laws

The Sikkim High Court held that the activity of buying and selling lottery tickets did not amount to provision of services to the State, and hence, there was no service tax liability, even after the amendment of explanation 2 to Section 65B(44) in June 2015.

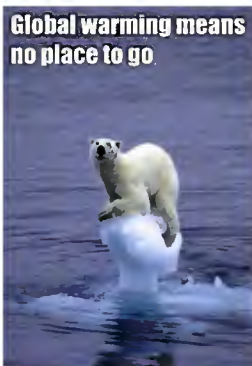
Future Gaming & Hotel Services P Ltd & Anr v Union of India & Ors (TS-564-HC-2015(SIK)-ST)

The CESTAT held that even in case of an associated enterprise transaction, for an entry to be included in the 'gross amount charged', it must be a payment in the nature of a consideration for a service. In the present case, the entry for lease rent equalisation was only an accounting entry in the balance sheet to comply with the accounting standard 19; it was not an income for the purpose of Income Tax Act also. Accordingly, such entries made in books could not be treated as consideration subject to service tax.

Reliance Infratel Limited v Commissioner of Central Excise (TS-569-CESTAT-2015-ST)

The Madras High Court held that the findings of facts by the Tribunal, which is the final fact-finding authority, could not be overturned by the High Court merely based on a plea made in appeal, without any grounds being advanced by the Department to substantiate the same.

Commissioner of Service Tax v Vijay Television P Ltd (TS-565-HC-2015(MAD))



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