

PKMG LAW CHAMBERS

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MONTHLY REPORT FOR NOVEMBER, 2014

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CIRCULARS AND NOTIFICATIONS ISSUED BY THE MINISTRY OF CORPORATE AFFAIRS (MCA) IN THE MONTH OF OCTOBER, 2014.

▪ **General Circular No.37/2014**

The Ministry of Corporate Affairs (MCA) came out with a clarification vide Circular No. 37/2014, dated 14/10/2014, clarifying that a trust or a trustee representing a trust in the case of "Real Estate Investment Trust (REIT)" or "Infrastructure Investment Trust (InvITs)" or such other trusts set up under the regulations prescribed under the Securities & Exchange Board of India Act, 1992 is not barred to become a partner in an LLP.

▪ **General Circular No.38/2014**

The Ministry of Corporate Affairs (MCA) came out with a clarification vide its circular, dated 14.10.2014, regarding Refund of deposit Under Section 160 of the Companies Act, 2013. The Ministry has clarified that when in companies registered under section 8 of the Companies Act, 2013 (corresponding to section 25 of Companies Act, 1956) a person, other than retiring Directors, stands for directorship, the Board of Directors of such 8 Company is to decide as to whether the deposit made by or on behalf of the person failing to secure more than twenty five percent of the valid votes is to be forfeited or refunded.

▪ **General Circular No.39/2014**

The Ministry of Corporate Affairs (MCA) came out with Circular No. 39/2014, dated 14/10/2014, mentioning that the Government has received representations from stakeholders seeking clarifications on the manner of presentation of notes in Consolidated Financial Statement (CFS) to be prepared under Schedule III to the Companies Act, 2013. These representations have been examined in consultation with the Institute of Chartered Accountants of India (ICAI) and it is clarified that Schedule III to the Act read with the applicable Accounting Standards does not envisage that a company while preparing its CFS merely repeats the disclosures made by it under stand alone accounts being consolidated. In the CFS, the company would need to give all disclosures relevant for CFS only.

- **General Circular No.40/2014**

The Ministry of Corporate Affairs (MCA) came out with circular, dated 15/10/2014, informing that the Company Law Settlement Scheme (CLSS) is extended upto 15/11/2014.

- **General Circular No.41/2014**

The Ministry of Corporate Affairs (MCA) clarified through its circular, dated 15/10/2014, that the disqualification of Directors U/S-164(2)(a) of the Companies Act ,2013 shall apply only for prospective defaults on the Companies who have filed their balance sheet and annual returns on or after 01/04/2014 but prior to launch of Company Law Settlement Scheme (CLSS)-2014.

- **Notification for Amendment dated 14.10.2014**

In the Companies (Audit and Auditors) Rules, 2014, after rule 10, the following shall be inserted, namely:-

"10A. For the purposes of clause (i) of sub-section (3) of section 143 for the financial years commencing on or after 1st April, 2015, the report of the auditor shall state about existence of adequate internal financial controls system and its operating effectiveness.

Provided that auditor of a company may voluntarily include the statement referred to in this rule for the financial year commencing on or after 1st April, 2014 and ending on or before 31st March, 2015."

- **Notification for Amendment dated 24.10.2014**

In exercise of the powers conferred by sub-section (1) of section 467 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following further amendments to Schedule VII of the said Act, namely:- (i) In item (i), after the words "and sanitation", the words "including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation" shall be inserted; (ii) In item (iv), after the words "and water", the words "including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga;" shall be inserted.

- **Notification for Amendment dated 14.10.2014**

In the Companies (Accounts) Rules, 2014, in rule 6, after the existing proviso, the following provisos shall be inserted, namely:-

"Provided further that nothing in this rule shall apply in respect of preparation of consolidated financial statement by an intermediate wholly owned subsidiary, other than a wholly-owned subsidiary whose immediate parent is a company incorporated outside India.

Provided also that nothing contained in this rule shall, subject to any other law or regulation, apply for the financial year commencing from the 1st day of April, 2014 and ending on the 31st March, 2015, in case of a company which does not have a subsidiary or subsidiaries but has one or more associate companies or Joint ventures or both, for the consolidation of financial statement in respect of associate companies or joint ventures or both, as the case may be."

COMPANIES ACT 1956 - BY SHRI PRADEEP K. MITTAL-9811044365

- If the rectification of the Register of Member is sought for and the same is not a simple rectification but requires adjudication of basic rights of the parties, the petition before the Company Law Board not maintainable as the jurisdiction of the Company Law Board is summary in nature. The parties be relegated to the civil suit who will decide after taking evidence and cross examination of the witnesses of both parties. DSLB Ventures LLC Vs. Dr. Kamakshi Memorial Hospital 2014 (120) CLA 225.
- When the Court finds that reduction of share capital is being carried out for the purpose of achieving the commercial and business objective and the same is approved by the majority of shareholders and there are no material and significant objections the petition u/s 100 of the Companies Act, 1956 is liable to be allowed. India Steamship Ltd. 2014 (120) CLA 288 (Rajasthan).
- When the Company treats an investor as a shareholder or member, though his name has not been entered in the register of member, the Company Court is fully entitled to relax or overlook the conditions imposed by sub-section 2 of Section 41 and such person is entitled to file a petition U/s 397 for claiming relief against oppression and mismanagement. Umesh Kumar Baweja Vs. IL & FS Transportation Network Ltd. 2014 (118) CLA 541.
- Transfer of shares, in violation of shareholders agreement, cannot be termed as act of oppression. The shareholders have a right to elect directors and to participate in the management but have no right to claim proportional representation on the Board unless otherwise

there is a specific provision. The allegation of manipulation of account in a profit making Company cannot easily be proved unless cogent evidence has been brought on record specially in view of the fact that the books of account/records are periodically audited by the Statutory Auditors. South India Infrastructure Development Company Pvt. Ltd. Vs. Kakinada Sea Ports Ltd. 2014 (122) CLA 268 CLB.

- In case the Notice U/s 173(2) of the Companies Act, 1956 does not disclose the name of the buyer, reserved price and the proposed sale consideration in respect of the property for which the permission of the shareholders is asked for U/s 293(1)(a) of the Companies Act, 1956 has been sought, such notice is illegal. Where the valuable right of the shareholder is denied in gross disregard of the statutory provisions, the petition U/s 397 of the Companies Act, 1956 would be maintainable on just an equitable grounds. Mehool Bhuva Vs. Indian Nippon Chemical Co.Ltd. 2014 (122) CLA 95 CLB.
- Though the provisions of Section 117C(4) of the Companies Act, 1956 has come into operation with effect from 13.12.2010, the debentures pending redemption as on the date, the Company Law Board will have a jurisdiction to direct the Company to redeem the debenture upon payment of principal amount and interest due thereon. Vijay Kumar Jalan Vs. Bharat Hydro Power Corporation Ltd. 2014 (122) CLA 139 CLB.
- Despite an arbitration clause in the agreement executed between the Petitioner and the Respondent, if it is seen that the Arbitral Tribunal cannot grant relief, the Company Law Board is entitled to grant relief despite arbitration agreement and can even allow prayer/relief which have not been specifically prayed for by the Petitioner in the petition once the Petitioner is able to establish the acts of oppression and mismanagement against the Respondents. Sadhbhav Infrastructure Projects Ltd. Vs. Monte Carlo Ltd. 2014 (122) CLA 142 CLB.
- Where an investor has invested substantial amount of money in the Company and has provided bank guarantee to its subsidiaries and the Company itself recognized/treated the investor a shareholder or member, the Company Law Board would be right in treating such investor as a member who is entitled to file a petition U/s 397/398 of the Companies Act, 1956. Gulbarga Airport Towers Pvt. Ltd. Vs. IL & FS Transportation Network Ltd. 2014 (119) CLA 63 A.P.
- Where a complaint has been filed by the Registrar of Companies seeking to prosecute to Directors/officers of the Company U/s 68 or 628 of the Companies Act, 1956 against whom there are

general/bald allegations and there are no specific allegations, the petition U/s 482 of Cr.P.C. shall be maintainable to quash and set-aside the complaint filed by ROC. Dr. T.H. Chowdary vs. RCO 2014 (119) CLA 82 A.P.

SEBI LAWS - BY SHRI PRADEEP K. MITTAL-9811044365

- The Securities Appellate Tribunal (SAT) has held that the Company Secretary of the Company is not merely a conduit to pass on information/data which he receives from promoters, to the Stock Exchange despite the fact that the records of the Company say otherwise or contrary to the information so supplied to him. While forwarding the information to the Stock Exchange, it is obligatory on the part of the Company Secretary to verify such information/data/record with the records being maintained at his end otherwise the Company Secretary is liable to penal action. (In this case penalty on the Company Secretary was levied – which was much more than the penalty levied on the promoter). GHCL Vs. SEBI 2014 (122) CLA 190 SAT.
- The Securities Appellate Tribunal (SAT) has held that disclosure as made under sub-regulation 1A of Regulation 7 read with sub-regulation 2 of Insider Trading Regulation is not sufficient disclosure within the meaning of regulation under Takeover Regulation. In other words, disclosure is required to be made under both the regulations i.e. Insider Trading Regulation and Take over Regulation. Bindal Synthetics Pcv. Ltd. Vs. SEBI 2014 (122) CLA 243 SAT.
- The SAT, in the case of D.J.Nanavati Vs. SEBI 2014 (122)CLA 263, (in my respectful submission) has taken a somewhat contrary view to say that disclosure made under Insider Trading Regulation could be treated as disclosure under Takeover Regulation.

INCOME TAX NOTIFICATION, CIRCULAR AND CASES -BY SHRI MANOJ KUMAR MITTAL - 9810764620

CBDT Directive on calling for returns of Non-Filers for A.Y.2014-15

The Joint Director of Income-tax Systems has issued a letter dated 29.10.2014 stating that 5,09,898 taxpayers who had submitted an e-return in the earlier AYs with returned income of Rs. 10 lakhs and more have not filed a return for AY 2014-15. It has been stated that

as a measure of revenue augmentation, a notice must be sent to the non-filers to furnish their returns for AY 2014-15.

CBDT Clips AO's Power To make Fishing Enquiry In CASS cases September 26th, 2014

- The CBDT has issued Instruction No. 7 of 2014 dated 26.09.2014 pointing out that in cases selected for scrutiny under Computer Aided Scrutiny Selection ('CASS'), some AOs routinely call for information which is not relevant for enquiry into the issues to be considered. This has been causing undue harassment to the taxpayers and has also drawn adverse criticism from several quarters. The CBDT has directed that cases selected for scrutiny during the Financial Year 2014-2015 under CASS, on the basis of either AIR data or CIB information or for non-reconciliation with 26AS data the scope of enquiry should be limited to verification of these particular aspects only. The Assessing Officer shall confine the questionnaire and subsequent enquiry or verification only to the specific point(s) on the basis of which the particular return has been selected for scrutiny.
- It is also directed that the AO should make all efforts to ensure that assessment proceedings are completed expeditiously in minimum possible number of hearings without unnecessarily dragging the case till the time-barring date.
- The Instruction permits the AO to go into other aspects only after obtaining the sanction of the Pr. CIT/ DIT in writing.

CBDT Extends Due Date For Filing ROI For AY 2014-15 To 30.11.2014, Press release dated 26.09.2014

- As per the provisions of the Income-tax Act, 1961 ('the Act'), for an assessee, who is required to obtain Tax Audit Report (TAR) under section 44AB of the Act, the due date for furnishing his return of income is 30th September of the Assessment Year.
- The Central Board of Direct Taxes ('the Board') vide order dated 20th August, 2014 extended the due date for obtaining and furnishing of Tax Audit Report under section 44AB of the Act for Assessment Year 2014-15 from 30th September, 2014 to 30th November, 2014. Subsequently, a number of representations were received in the Board requesting for extension of the due date for furnishing of return of income also. Writ petitions were also filed in various High Courts for directing the Board to extend the due date for furnishing of return of income from 30th September, 2014 to 30th November,

2014 in conformity with the extension of the due date for filing of Tax Audit Report.

- The Gujarat High Court vide judgement dated 22.09.2014 directed the Board to extend the due date for furnishing the return of income to 30th November, 2014, except for the purposes of charging of interest under section 234A of the Act for late filing of return of income. Other High Courts also directed the Board to look into the practical difficulties of the petitioners and take a just and proper decision in this matter.
- In compliance to the judgments of various High Courts and after considering the representations received for extension of the due date, the Board, in exercise of its power conferred by section 119 of the Act, has extended the `due-date' for furnishing return of income from 30th September, 2014 to 30th November, 2014 for the Assessment Year 2014-15 for all purposes of the Act in the case of an assessee, who is required to file his return of income by 30th September, 2014, and is also required to get his accounts audited under section 44AB of the Act or is a working partner of a firm whose accounts are required to be audited under section 44AB of the Act.
- There shall be no extension of the "due date" for the purposes of charging of interest under section 234A of the Act for late filing of return of income and the assessee shall remain liable for payment of interest as per the provisions of section 234A of the Act.
- For removal of doubt, it is clarified that for an assessee (other than working partner of a firm which is required to obtain and furnish Tax Audit Report), who is required to file its return of income by 30th September, 2014 but not required to obtain and furnish Tax Audit Report under section 44AB, the due date for furnishing of return of income for assessment year 2014-15 remains as 30th September, 2014.

CBDT issues NOTIFICATION NO 46/2014 dated 24.09.2014

- In exercise of the powers conferred by section 295 read with section 197 of the Income "tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income "tax Rules, 1962, namely:"
 1. (1) These rules may be called the Income-tax (9th Amendment) Rules, 2014.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Income-tax Rules, 1962,-

(a) in rule 28AA, for sub-rule (4) and sub-rule (5), the following sub-rules shall be substituted, namely:-

"(4) The certificate for no deduction of tax shall be valid only with regard to the person responsible for deducting the tax and named therein.

(5) The certificate referred to in sub-rule (4) shall be issued direct to the person responsible for deducting the tax under advice to the person who made an application for issue of such certificate.

(6) The certificate for deduction of tax at lower rate shall be issued to the person who made an application for issue of such certificate, authorising him to receive income or sum after deduction of tax at lower rate.";

CBDT Circular 14/2014 dated 08.10.2014 relating to deduction u/s 10A/10AA

- The CBDT, in suppression of its earlier circular No. 12/2014 dated 18.07.2014 has issued a new circular No. 14/2014 dated 08.10.2014 stating that in the case of employment or redeployment of technical manpower from existing unit to new unit in SEZ in the first year shall not be construed as reconstitution or splitting of the unit provided the number so transferred does not exceed 50% of the total manpower actually deployed in the development of software or it enabled services at the end of financial year in the new unit.
- In the alternative, if the assessee is able to prove that total number of new addition of technical staff in all its unit is at least equal to the number that represents 50% of the total number of manpower in new unit during such year, the deduction will not be disallowed.

The assessee may opt either one of the alternative as stated above Case Laws under Income Tax Act.

- Where in support of advance received, assessee produced ledger details of trade creditors as well as their confirmatory letters and The AO has failed to look into the information already on record and without making any proper enquiries on his own has added back to

income the entire trade creditors outstanding without any justification Held that no addition as cash credits was to be made. ITO v. Smt. Umadevi Shankarappa Thimmaiah, 157 TTJ 90, Bangalore Tribunal.

- Whether if a transaction involves allowing of possession of any immovable property to be retained in part performance of a contract of a nature referred to in section 53A of Transfer of Property Act, it amounts to transfer and Whether where assessee handed over possession of property to builder on first installment of sale consideration, transfer of property took place when said installment was received and the capital gain tax will be leviable in the year of transfer of property. CIT v. Cochin Stock Exchanges Ltd, [2014] 363 ITR 382 (Kerala)
- Assessee-company claimed deduction in respect of payment of both employer and employee provident fund, employees state insurance, sales tax and other statutory liabilities beyond period prescribed under respective Act but before due date of filing return as prescribed under section 139(1). It was held as allowed. ACIT vs Phillips Carbon Black Ltd, [2014] 65 SOT 181 (Kolkata - Trib.)
- Assessee-company claimed deduction in respect of aircraft flying flight charges - Assessing Officer partly disallowed such claim on ground that assessee failed to explain business expediency of incurring such expenditure and he further held that part of such expenditure may be incurred for personal use of directors and senior management personnel and, accordingly, he disallowed 25 per cent of such expenditure towards non-business purpose and made addition. The Kolkata ITAT allowed it that the AO is not competent to decide the business expediency of the expenditure and in the case of limited company; there cannot be disallowance on account of personal use. ACIT vs Phillips Carbon Black Ltd,[2014] 65 SOT 181 (Kolkata - Trib.)
- Assessee-company was a member of an international organization and two foreign group concerns developed and provided administrative and management support services in connection with technology updates, system and methodology and upgrades, training through webs, etc. - Assessee reimbursed its share of cost for services utilized in its business. Held that the assessee was not liable to deduct TDS under section 195 and no disallowance could be made under section 40(a)(ia). DCIT v. Ernst & Young (P.) Ltd, 2014] 32 ITR(T) 639 (Kolkata - Trib.)

- Rigour of disallowance of payment under Section 40(a)(ia) is relaxed in case of payment to resident if recipient pays taxes on such sum and files return of income. Now the question is Whether it would be contrary to scheme of DTAA and discriminatory if similar relaxation is not allowed under Section 40(a)(i) in case of payment to non-resident without withholding of taxes if such non-resident pays taxes on such sum and files return of income and Whether relaxation under second proviso to Section 40(a)(ia) is to be read into Section 40(a)(i) as well and it was required to be treated as retrospective in effect in the same manner as second proviso to Section 40(a)(i). It was held yes and disallowance was deleted. Mitsubishi Corporation India (P.) Ltd v. DCIT, [2014] 50 taxmann.com 379 (Delhi - Trib.)

CENTRAL EXCISE –BY SHRI PRADEEP K. MITTAL-9811044365

- The clearances to different class of bulk buyers was on contracted prices for their use and not for retail sale. A particular goods could be assessed under Section 4 and 4A of the Central Excise Act depending upon the nature of supplies. It was rightly concluded in adjudication that only due to departmental visit to the factory and scrutiny of invoices in respect of sales to such buyers the facts of supply on contracted price came to the notice. It is general practice in the trade that when the goods are meant for specific use for specific purpose, marking on the packages is done accordingly. But that was not done with the intention of getting the benefit of Rule 34 of CP Rules. Accordingly appellants are not entitled to the assessment of goods under section 4A of the Central Excise Act. Valuation was done by appellant under section 4A with the sole intention to evade payment of duty as is revealed by the fact situation of the case. Suppressing of material facts was manifested resulting in invocation of extended period in terms of first proviso to section 11A of the Act. Once suppression was manifested, appellant was liable to the imposition of penalty and plea of time bar fails. SPL Ltd Vs. CCE MANU/CE/0248/2014.
- The Tribunal held in Circular No. 983/7/2014-CX : MANU/EXCR/0007/2014 dated 10.7.2014, the Board has clarified that the subsidy given by the Government is not includable in the assessable value and Central Excise duty is not payable on the subsidy component provided by the Government. The definition of transaction value deals with only such elements which otherwise may form part of value which a buyer is liable to pay to the assessee either by reason of sale or in connection with sale himself or on behalf of the assessee. Subsidy paid by the Government cannot be considered as an additional consideration includable for excise duty in

accordance with statute. Coromondal International Ltd Vs. CCE MANU/CB/0087/2014.

- The CESTAT has noted that “ the provisions of law are very clear to the effect that the assessment of duty is to be on the basis of transaction value as disclosed in the invoices issued at the time of clearance of goods unless there is suppression of correct value in the invoices. It is nobody's case that there was any suppression of the correct value. It is the contention of the assessee that the clearance was on the basis of provisional price. As regards the provision of law, there is no concept called provisional price. In case there is any doubt about the price of the goods at the time of clearance, then it is the duty of the manufacturer to seek provisional assessment. Munjal Auto Industries Vs. CCE MANU/CS/0068/2014.
- In case Company A is manufacturer of goods and sells its entire productions to a company B and the goods are manufactured under Joint Venture Agreement and the company B undertakes advertising and sales promotion activities – whether amounts spent on such activities is required to be included in the “assessable value” of the goods sold by A to B. The Tribunal held that for the purpose of inclusion of expenses, there should be flow of funds from B to A for the purpose of inclusion of such expenses in the assessable value of goods cleared by A. Godrej Consumer Products Ltd Vs. CCE 2014(308) ELT 61 (Tri).
- Once show cause notice has been issued invoking the extended period of limitation, then second Show Cause Notice cannot be issued once again invoking the extended period. If the manufacturer who manufacture both excisable and exempt goods, used the dutiable inputs (without maintaining separate records) but has reversed the credit along with interest, cannot be said that the manufacturer has used inputs both dutiable and exempt goods. Swiss Parentals (P) Ltd Vs. CCE 2014(308) ELT 81 (Tri).
- Where the clandestine removal of goods has been alleged in the Show Cause Notice and the dealers has specifically stated that the Price List (which is impugned) is that of theirs (i.e. dealers) and not that of supplier i.e. manufacturer. There is no incriminating documents for any payment by dealers to the manufacturer for the alleged excess of invoice value., the demand can be confirmed on the basis of conjectures and surmises – in the absence of cogest documents. Mekala Raja Plywoods (P) Ltd Vs. CCE 2014(308) ELT 90 (Tri).

- Where the transporter is not manufacturer of goods but is only carrying the goods for consignor who happens to be a fake person. No investigation done by the Department to find out as to whether who is the manufacturer of goods and whether payment of excise duty has been made or not. The vehicle of transporter cannot be impounded and imposition of penalty on transporter is not justified. *Welcome Transport Co Vs. CCE 2014(308) ELT 104 (Tri)*.
- In case it is held by CESTAT that the extended period of limitation is not invocable and the demand is barred by time, there is absolutely no reason for the Tribunal to consider merits of the case since the act of Tribunal was outside its jurisdiction u/s 73(1) of the Finance Act, 1994 *CCE Vs. Monsanto Manufacturers Pvt.Ltd. 2014 (35) STR 177 (Allahabad)*.
- At the time of consideration of stay application, if the stay order gives an impression that the Tribunal is not sure as to whether the impugned service is taxable or not and at the same time, the Tribunal has not considered the financial difficulties of the Appellant Company and has directed the Appellant Company to deposit the entire amount of the assessed tax, the order is liable to be set-aside. On an appeal, the Allahabad High Court has reduced the amount of pre-deposit from Rs. 2.5 crores to Rs. 75 lakhs. *Force-7 Securities Pvt. Ltd. Vs. CCE 2014 (35) STR 188 Allahabad*.
- In case the CESTAT found prima facie case in favour of the Appellant, there is no reason to call upon the Appellant to deposit 50% of the amount of Cenvat Credit, which is sought to be disallowed. The Hon'ble High Court has ordered for submission of security bond for such amount. *Kohinoor Biscuits Products Vs. CCE 2014 (35) STR 198 Allahabad*.
- Transportation of finished goods from the place of removal to the place of delivery i.e. outward transportation service would be held to be input service and, therefore, service tax paid on such transportation is allowable as cenvat credit to the manufacturer/assessee. *CCE Vs. Ellora Time Limited 2014 (34) STR 801 Gujarat*.
- The excise duty paid on welding electrodes which have been used for the purpose of manufacture of plant and machinery is allowable as a Cenvat Credit. *CCE Vs. ACE Glass Containers Ltd. 2014 (32) STR 805 Uttaranchal High Court*.

**SERVICE TAX – BY SHRI PRADEEP K. MITTAL
9811044365**

- In the event service tax and interest has been paid before initiating proceedings , the extended period cannot be invoked and penalty cannot be invoked. However, the penalty is imposable for non-filing of returns. Indo US MIM Tech (P) Ltd Vs. CCE 2014 (36) STR 92 (Tri).
- When summons have been issued by the Excise Authorities from the State of Kerala and they have been received in Kolkata, the party is not entitled to challenge the said summon before the Kolkata High Court just because summons have been received in Kolkata High Court. No material cause of action has arisen at Calcutta and hence Calcutta High Court has not jurisdiction. Magma Fincorp. Ltd. Vs. Assistant Director, DGCEI, Kochi 2014 (36) STR 21 (Cal.)
- The Harvesting and transportation of sugarcane from the field to the sugar factory and the payment is made on the basis of number of tones of sugarcane supplied, the service is neither labour supply nor recruitment supply of manpower. Samarth Sevabhavi Trust Vs. Commr.of Central Excise 2014 (36) STR 83

COMPETITION LAWS- BY SHRI PRADEEP K. MITTAL-9811044365

- A petition filed before the Competition Commission was held to be not maintainable – as in the petition it was challenged that the clause in the “Letter of Appointment” restricting the employee from taking employment with the competitors for certain period after leaving the employment company does not raise the issue of competition and accordingly the petition was dismissed. Larry Le Mecalister Vs. Pangea 3 Legal Data Base Systems Pvt. Ltd. 2014 (122) CLA 265 CCI.
- In case there is a meeting of manufacturers of a particular product, there is every possibility that they would have discussed among others the issue concerning submission of tender price of the product, which all of them manufacture. It is, therefore, not necessary to establish that on a particular meeting they had discussed about the price to be quoted in a tender. Once the agreement is proved U/s 3, the burden shifts on the opposite party i.e. upon manufacturer that there was no caterlisation. The International Cylinders Pvt. Ltd. Vs. Competition Commission of India 2014 (122) CLA 41 Competition Appellate Tribunal.

CORPORATE LAWS - BY SHRI PRADEEP K. MITTAL -9811044365

- Section 138 of NI Act does not prescribe any particular format of sending legal notices to the drawer of the cheque in the event of dishonor. A handwritten letter demanding money otherwise fulfill the requirement of Section 138 B of the NI Act is good enough for the purpose of filing a complaint U/s 138. The issue of limitation is a mixed question of law and facts and the High Court on a petition U/s 482 of Cr.PC cannot embark upon the exercise of deciding as to whether the complaint is barred by time or not. The parties are to be relegated to the Trial Court to decide as to whether complaint is barred by time or not. Pawan Kumar Ralli Vs. Ms. Narula 2014 (122) CLA 216 (SC).
- The Civil Court will not have jurisdiction to intervene when the secured creditors have invoked the provisions of SARFAESI Act in view of the fact that the provisions of the above act has over-riding effect over all other laws. The aggrieved party is entitled to file an appeal before DRT if it is a case that the order passed by secured creditors under SARFAESI Act is illegal. Kingfisher Airlines Limited Vs. State Bank of India 2014 (120) CLA 278. Karnataka High Court
- The Hon'ble Supreme Court has held, inter-alia, that in case of Sick Industrial Company whose reference is pending before BIFR, it shall be entitled to protection of Section 22 of SICA as against the recovering proceedings filed by the Bank or Financial Institutions under the provisions of RDDB Act and the Bank/FI shall not be entitled to proceed with the recovery proceedings under the Original Application before DRT for recovery of money against such Sick Company. KSL Industries Ltd Vs. Arihant Threads Ltd MANU/SC/0961/2014. SC.

FEMA LAWS - BY SHRI PRADEEP K. MITTAL -9811044365

- The RBI has issued a Circular No.31/RBI/2014-15/234 (in term of Notification No.31/5/200 amended by 19.10.2012) saying that the body corporate is permitted to issue of equity shares against any other funds payable by the investee company, remittance of which does not require prior permission of the Government of India or Reserve Bank of India under FEMA, 1999 or any rules/ regulations framed or directions issued thereunder, provided that (i) the equity shares shall be issued in accordance with the extant FDI guidelines on sectoral caps, pricing guidelines etc. as amended by Reserve

bank of India, from time to time. However, issue of shares/convertible debentures that require Government approval in terms of paragraph 3 of Schedule 1 of FEMA 20 or import dues deemed as ECB or trade credit or payable against import of second hand machinery shall continue to be dealt in accordance with extant guidelines. Further, issue of equity shares under this provision shall be subject to tax laws as applicable to the funds payable and the conversion to equity should be net of applicable taxes.

CIVIL LAW - BY SHRI PRAVEEN K. MITTAL -9810826436

- If the terms, conditions and language of the sale deed is plain and simple and conveys right, title and interest in the immovable property for consideration, later on, the seller cannot be heard to say that the sale deed was executed as a security only. This argument would be contrary to the provisions of Section 91 of Indian Evidence Act (which says that no oral evidence contrary to the terms of the written documents can be allowed) and further to allow a party to plead contrary to the terms of the documents would be permitting the dis-honesty to gain bonus and premium. Even if the defendant/seller wishes to set up its defence its counter-claim and such counter-claim cannot be allowed to be dragged and prolonged and such counter-claim is liable to be dismissed. In the face of Sale Deed, it cannot be allowed to argue that no right, title and interest in the property has passed on. *Karan Madaan & others Vs. Nageshwar Pandey 2014(209) DLT 241. DHC.*
- The Delhi High Court in the case of *Maharashtra Hybrid Seeds Co Ltd Vs. Govt of NCT of Delhi 2014(210) DLT 650* has relied upon the observations of the Supreme Court in the case of *Vijay S Sathye Vs. Indian Airlines Ltd in SLP (Civil) No.24220-24221/2007* has observed as under:-

It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a mis-conduct but when absence is for a very long period, it may amount to voluntary abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the Employer.

- The court cannot permit amendment to the application for leave to defend for the purpose of taking a plea which was otherwise available

at the time of initial filing of application for leave to defend (the leave to defend application is statutorily required to be filed within a period of 15 days from the date of receipt of summons). The application for amendment, if allowed, would frustrate the mandate of law of law i.e. filing of application for leave to defend within a period of 15 days. S K Gupta Vs. Nirula Handicraft Bazar (P) Ltd 2014(212) DLT 486. DHC.

- The tenant is prohibited in law from challenging the title of landlord to the property in view of Section 116 of Evidence Act, 1872. Further, the tenant has no right to question the Will of the landlord which is agreed inter-se among legal heirs of the landlord. The tenant is liable to be thrown out of the tenanted premises once there is a termination of tenancy and rent is more than Rs.3500 per month in respect of premises located in Delhi. D N Singhal Vs. Krishna Kumar 2014(212) DLT 525.
- In case there is a gift of the property in accordance with law, the right, title and interest in the property stands transferred from donor to the donee and the donor cannot subsequently revoke or cancel the such gift. M S Verma Vs. JPS Verma 2014(212) DLT 432.
- The suit against the company cannot be filed at a place where only registered office of the company is located but no cause of action has arisen. J K Goel Vs. Civitech Developers (P) Ltd 2014(212) DLT 3 (CN) DHC.
- In case an application under Order 9 Rule 13 CPC is not maintainable only civil court but is maintainable before DRT, the court ought not have dismissed the application but should have transferred the same to the DRT which is the appropriate forum. Rodenia (India) & others Vs. Syndicate Bank 2014(212) DLT 2A (CN). DHC.
- The suit for specific performance in respect of an immovable property is required to be filed within a period of 3 years commencing from date fixed for performance or if no such date is fixed, when plaintiff has notice that performance has been refused. Generally, in contracts relating to immovable property, time is not essence of the contract unless intention can be gathered expressly from terms of contract or impliedly from intention of parties. Ravinder Nath Sahni Vs. Poddar Construction (P) Ltd 2014(211) DLT 561. DHC.
- The readiness and willingness is that former refers to financial capacity and latter refers to conduct of the plaintiff seeking specific performance. The plaintiff must allege and prove both readiness and

willingness and must show continuous and uninterrupted readiness and willingness to perform contract or his part from the date of agreement. Ravinder Nath Sahni Vs. Poddar Construction (P) Ltd 2014(211) DLT 561. DHC.

- The interim orders passed from time to time can always be altered or modified and do not attain finality and the principle of res-judicata cannot be claimed in respect of interim order. The order calling upon the tenant to pay the monthly damages for continued user of property which the tenant is using, can be changed or altered and the amount of damages can either be increased or decreased depending upon situation prevailing and the Appellate Court can, even without the application of any party. Federal Motors (P) Ltd Vs. Atma Ram Properties (P) Ltd 2014(209) DLT 374. DHC.
- The injunction can be granted u/s 151 Code of Civil Procedure even without an application under order XXXIX Rule 1 & 2. The Delhi High Court has held that injunction can be granted against a party who is not one of the parties to the suit. On the contrary, few other High Courts have held that no injunction can be granted against a party, who is not a party to the suit. Reliance Industries Ltd. Vs. Vijay Cable Industries 2014 (201) DLT 266. DHC.

ARBITRATION & CONCILIATION ACT, 1996 - BY SHRI PRAVEEN K. MITTAL-9810826436

- The award is based on probable interpretation of the terms of contract and said interpretation may not be the only interpretation and so long as the interpretation is not perverse or based on wrong proposition of law, the Award cannot be interfered. The contractual clauses have to be read with conjunction with other clauses. Steel Authority of India Ltd Vs. D Norden 2014(211) DLT 324.
- Under Section 9 of the Arbitration & Conciliation Act, 1996 vests power on a Court to pass necessary orders and/or interim injunction for preservation, interim custody or sale of any goods which are the subject-matter of a reference and/or for securing the amount in dispute in the arbitration. The law is well-settled that the discretion of the Court to grant interim relief under Section 9 of the Act has to be exercised sparingly and only in appropriate cases and the Courts should be extremely cautious in granting the interim relief and the interim measures should always be exercised by Court for the purpose of safeguarding the interest of the parties. C V Rao Vs. Strategic Iron Ore (P) Ltd MANU/DE/2033/2014.

- It is well settled by the judgments of the Hon'ble Apex Court and this Court that the power of setting aside an award passed under the 1996 Act is supervisory in nature and not appellate or revisional. Interference with the award made under the 1996 Act can be warranted only when the award is contrary to the conditions of the contract between the parties, or is patently illegal, or exceeds the reference made to the Arbitrator, or is vitiated for palpable ex-facie perversity, or is in excess of the Arbitrator's jurisdiction. *Vijay Wallia Vs. Urban Improvement Trust, Ajmer* MANU/RH/0901/2014.
- The Supreme Court held that an arbitral award may be set aside only if one of the conditions specified under Section 34 is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Arbitrator appointed by the parties is the final judge of the facts and findings of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him. *Swan Gold Mining Ltd Vs. Hindustan Copper Ltd* MANU/SC/0849/2014.
- The Bombay High, while replying upon the judgment of the Apex Court, therefore, has concluded that an application could be filed under Section 34 of the Arbitration & Conciliation Act of 1996 within three months, which was extendable, on showing sufficient cause for a period of thirty days, but not thereafter. It has also laid down the law that when the special statute prescribes certain period of limitation, as well as an extension up to a specific time limit, then the period of limitation provided as such must prevail and to that extent the provisions of the Act of 1963 shall stand excluded. The applicability of Section 5 of the Act of 1963 would stand excluded by virtue of Section 29(2) thereof. *Mahindra & Mahindra Financial Services Ltd MV Kawle* MANU/MH/0177/2014.
- The Arbitrator is entitled to grant interest in case there is an admitted delay in releasing payment - as interest is basically a compensation for denial of use of money unless the agreement/contract specifically provide for non-award of interest by the Sole Arbitrator. *Union of India Vs, Shri Krishna Paper Mills* 2014 (210) DLT (CN).DHC.
- The issue whether the claim barred by time or not cannot be decided at the stage of appointment of Arbitrator on a petition under Section

11 of Arbitration & Conciliation Act, 1996 as this issue is a mixed question of law and facts and it is for the Arbitrator to decide as to whether the claim made by one of the parties is barred by time or not. ABB Ltd. Vs. Anand Rao Infrastructure Pvt. Ltd. 2014 (210) DLT 456. DHC.

- The Arbitration clause in the agreement shall not become void because of non-observance of the due procedure laid-down therein. Winstar India Investments Co, Ltd. Vs. Haldia Petr-chemicals Ltd. 2014 (118) CLA 558 Kolkata.
- The Arbitration Award made against a dead person is nullity in law. In case on the date of invocation of the arbitration clause, during arbitration proceedings and on the date of rendering the award, if the Respondent/Defendant was a dead person, the Award made is in nullity in law. Sarala Devi Vs. G.E.Money Financial Services Pvt. Ltd. 2014 (210) DLT 315.

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