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OCTOBER 2024

Legal Updates, Insights and Summary Judgements

This update covers:

1.Insight and Foresight: our perspective on key global developments ____ 2

2.Recent Judgements ____

2.1 Civil ____ 07
2.2 Arbitration ____ 10
2.3 General Corporate ____ 14
2.4 Criminal ____ 19
2.5 Tax ____ 23

3. Articles ____ 31

4. A closer look at our recent features ____ 44

Insight and Foresight: our perspective on key global developments

Update on Competition Law!

Introducing the Deal Value Threshold (DVT) under the Competition Amendment Act 2023 brings India's merger regulation in line with global standards. This new provision, effective September 10, 2024, will significantly impact Mergers and Acquisitions (M&As), particularly in the digital and emerging sectors.

Key Highlights:

DVT applies to deals exceeding Rs 2,000 crore or where the target company has substantial business operations in India. It aims to capture M&A deals in digital markets, where traditional thresholds may fall short. India now joins the ranks of the US, Germany, Austria, and South Korea, which have successfully implemented similar thresholds. This is a critical step forward in ensuring a competitive and fair marketplace, especially in data-driven industries.

To delve into the specifics, please review the information provided in the following link :

https://www.linkedin.com/feed/update/urn:li:activity:7248009938914942976

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Supreme Court Calls for POCSO Act Amendment!

In a landmark development on September 23, 2024, the Supreme Court of India urged Parliament to amend the Protection of Children from Sexual Offences (POCSO) Act. The court recommended a critical change in terminology: replacing the term "child pornography" with "child sexual exploitative material" to better reflect the gravity of the crime and its exploitative nature.

Key Highlights:

The new terminology aligns with international standards, addressing the abuse and exploitation involved.
A more robust legal framework to enhance the prosecution of offenders.
The court emphasized the urgent need for public awareness campaigns to combat child exploitation in the digital age.
This proposed amendment is a major step toward strengthening child protection laws in India.

To delve into the specifics, please review the information provided in the following link.

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Chief Commissioner of Central Goods and Service Tax vs M/s Safari Retreats Private Limited

CASE ALERT

Chief Commissioner of Central Goods and Services Tax & Ors. vs. M/s Safari Retreats Private Ltd. & Ors. [Order dated 03.10.2024 in Civil Appeal No. 2948 of 2023]

In a significant ruling, the Hon'ble Supreme Court of India addressed the constitutional validity of exceptions under clauses (c) and (d) of Section 17(5) of the Central Goods and Services Tax Act, 2017 ("CGST Act"), which blocks the availment of Input Tax Credit (ITC) on goods and services used for the construction of immovable properties, even if the property is used for business purposes.

The appeal resulted from the construction of a shopping mall by Safari Retreats, which claimed ITC on the goods and services used for the construction. The respondents argued that since the mall was let out for commercial purposes, they should be allowed to claim ITC against the rent received.

The key issues revolved around whether the denial of ITC in such cases was constitutionally valid, particularly under Articles 14, 19(1)(g), and 300A of the Constitution of India, and whether the definition of "plant and machinery" in Section 17 will also apply to "plant or machinery" in Section 17(5)(d) The appellants, the tax authorities, contended that ITC could not be claimed due to the restrictions placed by Section 17(5)(d) and the use of "plant or machinery" in clause (d) should be read as "plant and machinery" as both clauses deal with the construction of immovable property.

The Hon'ble Supreme Court made the following observations:

(a) Distinction between "Plant or Machinery" and "Plant and Machinery" made consciously

There is a distinction between "plant and machinery" (used elsewhere in the CGST Act) and "plant or machinery" (under Section 17(5)(d)). Section 17(5)(d) does not exclude all immovable properties from ITC eligibility. ITC is available for the construction of "plant or machinery." The expression "plant or machinery" was deliberately used in clause (d) to distinguish it from "plant and machinery", which is defined in the explanation in Section 17(5). The explanation defining "plant and machinery" excludes land, buildings, and other civil structures from ITC, but Section 17(5)(d), by using "plant or machinery," shows that there could be an immovable property which is "plant" and so offers more leeway, allowing availment of ITC if the construction qualifies as a plant or machinery. Whether a building is a plant, is a question of fact.

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info@whiteandbrief.com
022-40059911

In one of the most anticipated judgments of on GST, Chief Commissioner of Central Goods and Service Tax vs M/s Safari Retreats Private Limited [TS-622-SC-2024-GST], the Hon'ble Supreme Court has upheld the constitutional validity of the clauses (c) & (d) of Section 17 and Section 16(4) of the CGST Act, 2017 has been upheld. However, the literal interpretation of "plant or machinery" in Section 17(5)(d) has offered some respite to the businesses who have incurred or will incur expenses in constructing buildings for the purposes of their businesses.

The Apex Court held that even a building can be a "plant" under Section 17(5)(d) as long as it satisfies the functionality test and remanded the matters back to respective High Courts to decide the factual question of whether the structure built by the taxpayer qualifies as "plant".

To delve into the specifics, please review the information provided in the following link :

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M/s Mercedes Benz India Pvt Ltd. vs. State of Telangana

In the recent case of M/s Mercedes Benz India Pvt Ltd. vs. State of Telangana [TS-679-HC(TEL)-2024], the Hon'ble Telangana High Court gave relief to the taxpayer from the condition of pre-deposit for appeal before the Appellate Authority. The petitioner had already paid IGST but the department issued him show cause notice, in respect of the same transaction, demanding payment of CGST and SGST. The Court exercised its extraordinary powers to allow petitioner to file appeal against the order of adjudicating authority, while acknowledging that there is no such enabling provision with the appellate authority to give such exemption.

To delve into the specifics, please review the information provided in the following link :

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CASE ALERT

Mercedes Benz India Pvt Ltd. vs. State Tax & Ors. [Order dated 16.10.2024 in W.P. Nos. 22693, 22694 & 22758 of 2024]

The Hon'ble Telangana High Court in this matter examined a GST dispute arising under the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as the "IGST Act") and the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act") along with the Telangana State Goods and Services Tax Act, 2017 (hereinafter referred to as the "TSGST Act").
The petitioner, Mercedes Benz India Pvt Ltd., challenged the show cause notice issued under the CGST/TSGST Act despite having paid GST under the IGST Act. The petitioner claimed to have paid INR 93 crores as GST under the IGST Act. However the GST Department issued a show cause notice dated 16.03.2024 under the CGST/TSGST Actr demanding the tax to be paid on the same transaction under the latter. The petitioner contended that similar payments under the IGST Act had been accepted in other cases and that he was being subjected to discriminatory treatment. Moreover the petitioner sought exemption from the statutory requirement of depositing 10% of the disputed tax before filing of the appeal.

The Hon'ble Court's ruling addressed two critical aspects:

(a) Discrimination and Similar Treatment Under the IGST Act
The petitioner submitted documentary evidence showing that the tax authorities had accepted payments under the IGST Act in comparable circumstances. The Court observed that points raised in the petitioner's reply to the show cause notice, including the claim of discriminatory treatment, had not been fully addressed by the department. This formed the basis for the Court's direction to allow the petitioner to file an appeal.

(b) Statutory Pre-deposit Requirement: Relief Granted
The Hon'ble Court granted the petitioner relief from the 10% deposit requirement, directing the competent appellate authority to consider the appeal on merits even in the absence of such deposit. The Court also directed the GST authorities not to take any coercive steps against the petitioner pending the appeal. The Court ruled that the final outcome of the appeal would determine whether the tax liability falls under the IGST Act or the CGST/TSGST Act.

Recent Judgements

CIVIL

Rama KT Barman (Died) through its LRS V. Md. Mahim Ali & Ors Civil (Appeal No. 3500 of 2024)

In the instant case, Supreme Court held that an Appellate Court cannot create a new case by framing additional issues and is obligated to decide the issues involved in the suit based on the pleadings of the parties. The Supreme Court referred to Order XLI, Rule 25 of the Code of Civil Procedure Code, 1908 that empowers the Appellate Court to frame issues and remand the same for trial to the Court whose decree is appealed from, if necessary.

The Appellants in the present case had filed a suit before the trial court seeking a declaration with regard to the right, title and interest over the scheduled land and for eviction of the Respondents from the said land in question as also seeking permanent injunction. The trial court had decreed the said Suit filed by the Appellants. Being aggrieved, the Respondents preferred two appeals.

First Appeal was dismissed. Thereafter, the Respondents filed a Second Appeal before the Gauhati High Court. Gauhati High Court allowed the said Second Appeal and set aside the orders passed by the trial court and the Appellate Court. As such, being aggrieved, the Appellants filed the present appeal before the Supreme Court.

The Supreme Court observed that the said substantial questions of law formulated by the High Court were neither raised before the trial court or the Appellate Court. Furthermore, the parties were not given any opportunity to lead evidence on the said issues. The Supreme court criticized the Gauhati High Court and emphasized the role of Appellate Courts and necessity of adhering to procedural rules of CPC. The Supreme Court further held that the Court cannot create any new case at the appellate stage for either of the parties and, the Appellate Court is supposed to decide the issues involved in the suit on the pleadings of the parties. Accordingly, the Supreme Court set aside the impugned judgment and decree passed by the Hon'ble High Court in the Second Appeal and remanded the case to the Gauhati High Court for deciding the same afresh and in accordance with law.

State Project Director, UP Education for All Project Board & Ors. V. Saroj Maurya & Ors (2024 SCC Online SC 2602)

In the present case, Supreme Court overturned order passed by the Division Bench of the Allahabad High Court ("High Court") for lacking proper reasoning wherein the High Court had merely affirmed the Single Bench's decision without providing detailed explanation for its concurrence. The Supreme Court noted that a decision without reasoned judgment cannot be legally sustained.

The State of Uttar Pradesh ("State") had filed an appeal against judgment passed by the High Court. The High Court's judgment was in response to an intra-court appeal against a common judgment passed by the Single Judge in a batch of Writ Petitions. The State had issued various Government Orders including one dated 11.12.2020. The State contended that the Allahabad High Court did not adequately consider or address the Government Orders and Circulars issued by them. During the pendency of the matter, the Supreme Court issued a stay order dated 2.9.2022 which was subsequently made absolute on 2.05.2023. The stay order allowed the State to make appointments with teachers, subject to final orders in the appeal. The State further argued that the High Court had not applied its mind to the submissions made by both sides and had simply upheld the Single Judge's order without proper reasoning. The case involved issues related to teacher appointments in Uttar Pradesh, with subsequent developments occurring after the initial judgments were passed, however the same was not considered.

The Supreme Court noted that the High Court in its impugned judgment, merely placed on record the cases of the Writ Petitioners and Respondents, followed by the findings of the Single Judge. The Supreme Court emphasized that in the absence of any reasoning in the impugned judgment, the same cannot be sustained. Relying on the precedent set in CCT v. Shukla & Bros (2010), the Supreme Court reiterated the principle that reason is the very life of law and that giving reasons furthers the cause of justice while avoiding uncertainty. The Supreme Court observed that the absence of reasons in a judgment leads to frustration of these objectives and introduces an element of uncertainty and dissatisfaction and accordingly directed the High Court to hear the intra court appeal again.

ARBITRATION

Cox & Kings Ltd. V. Sap India Pvt. Ltd. & Anr. (2024 SCC OnLine SC 2452)

Cox & Kings Ltd. filed a petition under Section 11(6), read with Section 11(12)(a) of the Arbitration & Conciliation Act, 1996, seeking the appointment of an arbitrator to adjudicate disputes and claims arising from an agreement signed between Cox & Kings Ltd. and SAP India Pvt. Ltd.

The dispute arose over the timely completion and implementation of SAP Hybris Software. SAP India assured Cox & Kings that 90% of the software was compatible with their requirements and that the remaining customization would take approximately 10 months. However, delays, project execution challenges, and a lack of response from SAP India, combined with missed deadlines, led to the initiation of arbitration proceedings.

Cox & Kings argued that several agreements existed between the parties, all of which were interlinked. They contended that SAP India's parent company, though not a signatory to the agreement, played an active role in implementing the project and intervening in the dispute. This involvement, they claimed, made the parent company a "veritable party" to the agreement. Furthermore, Cox & Kings invoked the Group of Companies doctrine to include SAP SE (the parent company) in the arbitration and requested fresh arbitration proceedings, despite a previous arbitration being ongoing.

In response, SAP India countered that the same issue was already being adjudicated, and allowing another arbitration would lead to risk of conflicting judgments on the same subject matter and as such, the principles of res sub-judice and res judicata would be attracted to the second arbitration proceedings and consequently the present petition. They also argued that the parent company never consented to arbitration and that the arbitration clause did not extend to the parent company or any unrelated agreements.

After reviewing the materials on record, the court held that although the respondents raised numerous objections, none of these objections questioned the existence of the arbitration agreement under which the petition had been filed. The court found that the prima facie existence of an arbitration agreement was satisfied under Section 11 of the Act. The court ruled that once the arbitral tribunal was constituted, the respondents would be able to raise all legal objections, and the tribunal would consider these before proceeding with the case.

On the issue of including SAP SE (the parent company) in the arbitration, the court acknowledged the complexity of determining whether a non-signatory could be made a party to the arbitration. It deemed it appropriate for the arbitral tribunal to decide on this matter based on the facts and legal doctrines involved.

The judgment reaffirmed the limited role of the court at the referral stage, emphasizing that the arbitral tribunal is best suited to resolve complex issues such as the applicability of the arbitration agreement to non-signatories.

Ajay Madhusudan Patel & Ors. V. Jyotrindra S. Patel & Ors. (2024 SCC OnLine SC 2597)

The case centres around the scope of the Court's jurisdiction and the role of the referral court in the appointment of an arbitrator, particularly in determining whether a non-signatory can be considered a party to an arbitration agreement. This matter pertains to an arbitration petition under Section 11(6) of The Arbitration and Conciliation Act, 1996.

In this case, the Family Arrangement Agreement (FAA) was signed between the AMP Group (the petitioners) and the JRS Group. The petitioners sought the appointment of a sole arbitrator to resolve disputes. The petitioners argued that the SRG Group, although not a signatory, should be included in the arbitration due to their involvement in negotiations and the benefits they derived from the FAA. The respondents opposed this, asserting that the SRG Group was not bound by the agreement.

The petitioners contended that despite the SRG Group not being a signatory, their involvement in negotiations and implementation of the FAA and their benefit from it should bind them to the agreement, warranting their inclusion in the arbitration proceedings. The JRS Group, while not objecting to arbitration with the AMP Group, opposed the inclusion of the SRG Group, arguing that the FAA was exclusively between the AMP and JRS Groups, with no obligations or definitions extending to the SRG Group.

The SRG Group also asserted that they were neither parties to the FAA nor involved in its execution, arguing that there was no privity of contract between them and the petitioners and thus, they should be excluded from arbitration proceedings.

The primary legal issue was whether the SRG Group, as a non-signatory to the FAA, could be referred to arbitration, which required examining the scope of the referral court's jurisdiction under Section 11(6) of the Act, 1996. After considering various earlier precedents like Cox and Kings Ltd. Vs. SAP India Pvt. Ltd. and Vidya Drolia and various documents crucial to the dispute, the Court concluded that while the SRG Group prima facie may be connected to the FAA and included in the settlement contemplated therein, this aspect should be looked into more closely by the Arbitral Tribunal. The Court emphasized that it should not engage in a mini-trial or delve into disputed facts. Given the complexity of determining whether the SRG Group is a veritable party to the arbitration agreement or not, the Court held that it is appropriate for the Arbitral Tribunal to assess the evidence and apply relevant legal doctrines, as outlined in the Cox and Kings decision.

GENERAL CORPORATE

Coaster Shoes Company Pvt. Ltd. v. Registrar of Trademarks & Anr vide [COMMERCIAL MISCELLANEOUS PETITION (L) NO.4309 OF 2023]

The case of Coaster Shoes Company Pvt. Ltd. v. Registrar of Trade Marks & Anr. brings into focus critical questions about the procedural obligations in trademark opposition proceedings, and the rights of parties under the Trade Marks Act, 1999 and the Trade Marks Rules, 2002.

Coaster Shoes Company Pvt. Ltd. is engaged in the manufacturing, marketing, and sale of footwear and has been in the business for several decades. The dispute began when Coaster Shoes Company sought to protect its trademark "TRAVEL FOX," which was first adopted by its predecessor, Apex Shoes Co. Pvt. Ltd., in 1999 and used since 2000. Over time, this trademark built substantial goodwill and recognition in the Indian market.

The central issue arose in 2007 when Respondent No. 2 filed applications for trademarks proposing the use of a mark similar to "TRAVEL FOX." The petitioner promptly filed opposition proceedings on 8th March 2010 against these applications, claiming that the impugned mark was deceptively similar to its registered and widely used trademark, thus creating confusion in the market.

Petitioner alleged non-receipt of the counter-statement from Respondent No. 2, which is essential for the progression of opposition proceedings.

The most significant issue in this case was whether the Registrar of Trade Marks fulfilled its statutory duty by properly serving the counter-statement filed by Respondent No. 2 to the Petitioner.

Section 21(3) of the Trade Marks Act, 1999 stipulates that the Registrar of Trade Marks must serve a copy of the counter-statement filed by the applicant (Respondent No. 2) on the opponent (the Petitioner, in this case) within a reasonable period. The service of the counter-statement triggers the next stage in opposition proceedings. Rule 50 of the Trade Marks Rules, 2002 requires the opponent (Petitioner) to file evidence in support of the opposition within two months from the date of service of the counter-statement. Failure to do so leads to the abandonment of the opposition. Section 27 of the General Clauses Act, 1897 establishes a presumption of service when a document is properly addressed, prepaid, and sent by post. However, this presumption is rebuttable if the party can provide evidence showing non-receipt.

The Petitioner emphasized that it had never received the counter-statement from Respondent No. 2 or from the Registrar of Trade Marks. They contended that under Section 21(3) of the Act, it is the statutory duty of the Registrar to serve the counter-statement. As no evidence of service was provided, the timeline for filing evidence under Rule 50 never started. Even though Section 27 of the General Clauses Act allows for the presumption of service once a document is dispatched, the Petitioner argued that they successfully rebutted this presumption by presenting evidence (such as written follow-ups and affidavits from their legal representatives) proving that the counter-statement was never received. Respondent No. 1, the Registrar of Trade Marks claimed that the counter-statement was dispatched on 30th March 2012 via speed post to the Petitioner's address. He provided dispatch records from their system as proof of service. He argued that under Section 27 of the General Clauses Act, service is deemed complete once the document is dispatched by post, irrespective of whether it was received or not.

In its judgment, the court found that the Registrar of Trade Marks failed to provide conclusive evidence proving that the counter-statement had been received by the Petitioner. The court noted that while dispatch may have occurred, no proof of delivery was furnished, which is crucial in cases where statutory rights are impacted. The court accepted the Petitioner's argument that the presumption of service under Section 27 of the General Clauses Act had been successfully rebutted.
This case highlights how procedural technicalities should not overshadow the substantive rights of parties, especially in matters involving the protection of intellectual property.

Commissioner v. Debts Recovery Tribunal And Others [WRIT PETITION No. 2241 of 2014 and connected matters]

This case, adjudicated by the High Court of Madhya Pradesh, revisited the critical question of whether secured creditors such as banks, under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), have precedence over dues claimed by government departments like the Customs and Central Excise Department when both parties seek to recover dues from the borrower's mortgaged property.

M/s Maya Spinners Ltd., is a 100% export-oriented unit engaged in manufacturing cotton, synthetic, and blended yarn. The company, along with other respondents, availed various credit facilities from institutions such as the Madhya Pradesh State Industrial Development Corporation (MPSIDC) and Dena Bank (which later merged with Bank of Baroda). To secure these loans, Maya Spinners Ltd. mortgaged its immovable properties, including its land, buildings, and machinery.

In the course of their business, Maya Spinners Ltd. imported machinery without paying customs duties, as they were classified as an export-oriented unit eligible for duty exemption. However, the company defaulted on customs duty payments amounting to ₹51,00,988 and excise duties of ₹10,14,099. Consequently, the Central Excise and Customs Department initiated proceedings against the company, confiscating machinery and seeking to recover the unpaid dues.

Simultaneously, the financial institutions involved, including MPSIDC and Bank of Baroda, moved to recover their outstanding loans by enforcing their security interests over the mortgaged property, initiating debt recovery proceedings under the SARFAESI Act through the Debt Recovery Tribunal (DRT).

The Customs Department argued that the machinery seized from Maya Spinners Ltd. was lawfully confiscated to recover unpaid customs and excise duties. They asserted that the government's dues, particularly in relation to customs duties, had priority over all other claims, including those of secured creditors.

To support their position, the Customs Department cited the State Tax Officer v. Rainbow Papers Ltd. (2023) case, where the Supreme Court ruled that the definition of secured creditor in IBC does not exclude any Government or Government Authority on the ground that the financial creditors cannot secure their dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.

The banks and financial institutions argued that as secured creditors, they held a superior claim to the mortgaged property under the SARFAESI Act. They contended that their security interests over the property should take precedence over any dues owed to the government, as provided by Section 35 of the SARFAESI Act, which explicitly states that the Act's provisions override any other laws.

The respondents further relied on the Punjab National Bank v. Union of India (2022) case, where the Supreme Court ruled that the claims of secured creditors under the SARFAESI Act took precedence over statutory dues, even after the inclusion of Section 11-E in the Central Excise Act.

The Madhya Pradesh High Court ruled in favor of the secured creditors, dismissing the petitions filed by the Customs and Central Excise Department. The court reaffirmed the precedence of secured creditors over government dues, citing the Punjab National Bank decision. The court emphasized that Section 35 of the SARFAESI Act grants secured creditors a first charge on the property, which supersedes any claims of statutory dues. The Court agreed with MPSIDC's reliance on Industrial Development Bank of India v. Superintendent of Central Excise and Customs and others, (2023) in which the Apex Court held that the Customs Act does not override payments due to overriding preferential creditors covered under Section 529-A of the Companies Act 1956.

The court held that the customs authorities' confiscation of the mortgaged machinery was invalid, as the property had already been hypothecated to the secured creditors.

The above ruling aligns with various similar judgments passed in other jurisdictions that have upheld the precedence of secured creditors' rights over the government's statutory dues.

One of the significant cases reaffirming this principle is the Ronak Industries vs. Assistant Commissioner Central Excise & Customs & Ors. (2023), decided by the Bombay High Court wherein the court upheld that dues of secured creditors would take priority over government dues under Section 26E of the SARFAESI Act. This decision reinforced earlier rulings, such as ICICI Bank Ltd. vs. SIDCO Leathers Ltd., which clearly established that after registration of security interest, secured creditors enjoy precedence over the government's claims.

Moreover, the Gujarat High Court's ruling in the case of Madhaviben Jitendrabhai Rupareliya v. State of Gujarat, (Special Civil Application No. 9565 of 2023), further cemented this principle. Here, the court dealt with issues arising from the auction of properties previously owned by defaulters and held that the rights of secured creditors under Section 26E of the SARFAESI Act take precedence over any dues owed to the state, such as sales tax. This judgment was in line with other decisions of the Gujarat High Court, including M/s Mahadev Cotton Industries v. Department of Central Sales Tax and Vinod Realties Private Limited v. State of Gujarat.

CRIMINAL

S Vijikumari v. Mowneshwarachari C [S Vijikumari v. Mowneshwarachari C ARISING OUT OF SLP(CRL.) NO. 5342 OF 2023]

The Protection of Women from Domestic Violence Act, 2005, is undoubtedly a landmark piece of legislation in India's legal framework. Section 25 of the act holds particular significance, as it allows for the alteration, modification, or revocation of orders passed under the Act. However, the scope and limitations of this provision have been subject to varied interpretations, leading to the present case before the Supreme Court.

The case originates from a domestic dispute between S Vijikumari (the appellant-wife) and Mowneshwarachari C (the respondent-husband). S Vijikumari filed a petition under Section 12 of the PWDVA seeking protection and maintenance. The learned Magistrate allowed the petition granting Rs. 12,000 per month as maintenance and Rs. 1,00,000 as compensation. The husband's subsequent appeal against this order was dismissed by the Appellate Court on the grounds of delay, resulting in the Magistrate's order attaining finality.

The husband later filed an application under Section 25 of the PWDVA before the Magistrate. This application sought to set aside the original order and requested a refund of the entire maintenance amount paid, alleging fraud by the wife. The Magistrate dismissed this application, but on appeal the Appellate Court remanded the matter to the Magistrate, directing reconsideration of the Section 25 application.

The wife's revision petition to the High Court was dismissed, upholding the Appellate Court's remand order. Aggrieved by these orders, the wife appealed to the Supreme Court, leading to the present judgment.

The appellant-wife contended that the application under Section 25 was not maintainable as it sought to set aside a final order rather than alter, modify, or revoke it as permitted by the provision. She argued that the prayers in the husband's application went beyond the scope of Section 25(2) of the PWDVA, which does not allow for setting aside of orders or refund of maintenance. The wife's counsel emphasized that the original maintenance order had attained finality by merging with the appellate order that dismissed the husband's appeal on the grounds of delay. Furthermore, they asserted that Section 25(2) cannot be used to retrospectively challenge orders or seek refunds for periods prior to the application.

On the other hand, the respondent-husband's arguments centered around allegations of fraud. He claimed that the wife had misrepresented her employment status, which went to the root of the maintenance order, thus justifying the application under Section 25. The husband's counsel argued that the discovery of this alleged misrepresentation constituted a change in circumstances warranting reconsideration of the maintenance order.

The Supreme Court, in its nuanced and comprehensive judgment, allowed the appeal and set aside the orders of the High Court and Appellate Court. The judgment clarifies that while Section 25(2) allows for alteration, modification, or revocation of orders based on a change in circumstances, these changes must occur after the initial order is passed and cannot relate to a period prior to the order. The Court emphasized that the provision is broad enough to deal with all nature of orders passed under the Act, including maintenance, residence, and protection orders.

A significant aspect of the judgment is the Court's elaboration on the interpretation of the phrase "change in circumstances." Noting that this crucial phrase is not defined in the Act, the Court held that it gives discretion to the Magistrate to interpret based on case specifics. The judgment advocates for a broad interpretation, stating that changes can be of a pecuniary nature (such as income changes) or other significant life changes of either party. Factors such as cost of living, income fluctuations, and other circumstantial changes post the initial order can be considered relevant in determining a change in circumstances.

The Court strongly emphasized the prospective nature of orders under Section 25(2). It clarified that such orders operate prospectively, not retrospectively. The judgment states that alterations can take effect from the date of the application or as specified by the Magistrate.

The Court categorically ruled against using Section 25(2) to seek refunds for maintenance already paid.

This judgment has far-reaching implications for the application of the PWDVA. It provides much-needed clarity on the scope and limitations of Section 25, preventing its misuse to reopen settled matters. By ruling against retrospective revocation and refunds, the judgment safeguards the interests of women who are beneficiaries of maintenance orders.

MODH. ENAMUL HAQUE v.DIRECTORATE OF ENFORCEMENT, SLP(Crl) No.11129/2024

In a significant judgment, the Supreme Court of India granted bail to the appellant, who was charged under the Prevention of Money Laundering Act, 2002 (PMLA).

The appellant was charged under Sections 7, 11, and 12 of the PMLA. The allegations stemmed from a predicate offense involving illegal transportation of cattle across the border and subsequent bribery of officials. The Enforcement Directorate (ED) accused the appellant of using the proceeds from these activities for money laundering.

The appellant's counsel presented three key arguments for bail. Firstly, they pointed out that the co-accused in the case had already been granted bail, arguing for parity in treatment.

Secondly, they highlighted the prolonged incarceration of the appellant, which, including the period in the predicate offense, amounted to nearly four years. Lastly, they emphasized that the trial was yet to commence, suggesting an undue delay in the judicial process.

The prosecution strongly opposed the bail application. They contended that the charges were extremely serious and that the period of incarceration should not be considered as grounds for bail in this case. The ED also argued that the delay in trial commencement was due to the appellant's request for additional documents.

After considering the arguments from both sides, the Supreme Court decided to grant bail to the appellant.

The Court noted that the appellant had been incarcerated for more than 2½ years in the present case alone. It also considered the complexity of the trial, with 85 witnesses to be examined. The bench observed that even if the period of incarceration in the predicate offense was excluded, the continued detention of the appellant, who was not entirely at fault for the trial delay, warranted consideration for bail.

Importantly, the Court emphasized that the appellant could not be solely blamed for the non-commencement of the trial. It recognized that the delay did not benefit the accused in any way.

This case serves as a significant precedent in matters relating to bail in cases under the Prevention of Money Laundering Act. The judgment is likely to influence future bail decisions in similar cases, particularly where there are substantial delays in trial commencement and prolonged periods of pre-trial detention.

It must be noted that the Supreme Court has recently made significant rulings that potentially ease the stringent bail provisions under the Prevention of Money Laundering Act (PMLA). In cases like Manish Sisodia v. Directorate of Enforcement SLP(Crl) No. 8781/2024 and SLP(Crl) No. 8772/2024 and Prem Prakash v. Union of India through the Directorate of Enforcement SLP(Crl) No. 5416/2024, the Court has emphasized that the principle "bail is the rule, jail is the exception" applies even to PMLA cases. The Court stated that in situations of delayed trials coupled with prolonged incarceration, the right to bail should be read into Section 45 of PMLA, depending on the nature of the allegations. The twin conditions are:

I.The public prosecutor must be given an opportunity to oppose the bail application.
II.The court must be satisfied that there are reasonable grounds to believe that the accused is not guilty of the offense and is unlikely to commit any offense while on bail.

These conditions make it difficult for the accused to secure bail, emphasizing the severity of money laundering offenses and ensuring that bail is granted only in exceptional cases. However, there has been a shift from the Court's earlier stance in Vijay Madanlal Choudhary v Union of India (2022), where it had upheld the stringent bail conditions of PMLA. The Court has now stressed the importance of constitutional rights under Article 21, balancing them against the powers of the Enforcement Directorate under PMLA. These judgments indicate a trend towards fostering safeguards for individual liberty within the PMLA framework, potentially making it easier for accused persons to obtain bail in money laundering cases, especially when trials are delayed.

TAX

Chief Commissioner of Central Goods and Services Tax vs. M/s Safari Retreats Private Ltd. [2024 (10) TMI 286]

In a significant ruling, the Hon'ble Supreme Court of India addressed the constitutional validity of exceptions under clauses (c) and (d) of Section 17(5) of the CGST Act.

The appeal resulted from the construction of a shopping mall by Safari Retreats, which claimed ITC on the goods and services used for the construction. It was argued that since the mall was let out for commercial purposes, they should be allowed to claim ITC against the rent received.

The Court addressed the issue whether the denial of ITC in such cases was constitutionally valid and whether the definition of "plant and machinery" in Section 17 will also apply to "plant or machinery" in Section 17(5)(d).

The Hon'ble Supreme Court made the following observations:

(a)Distinction between "Plant or Machinery" and "Plant and Machinery" made consciously
Section 17(5)(d) does not exclude all immovable properties from ITC eligibility. ITC is available for the construction of "plant or machinery." Whether a building is a "plant", is a question of fact.

(b)Functionality or essentiality tests must be applied to decide "plant"
The term "plant" is not defined under the GST laws. The Supreme Court applied the functional test to determine whether a building can be considered a "plant." If a building is constructed for technical requirements, it can qualify as a "plant". If the building is used for personal use or as a site of business, ITC will not be available.

(c) Section 17(5)(c) & (d) and Section 16(4) of CGST Act does not violate Article 14 of the Constitution.
Section 17(5)(c) and (d) of the CGST Act does not violate the Constitution. Restrictions on ITC imposed under Section 17(5) are based on reasonable classification and have a rational nexus to the objectives of the CGST Act. Section 16(4) has also been held to be constitutional.

(d)There are hardly any similarities between clauses (c) and (d).
Under clause (c), the chain of credit breaks at the dividing line of 'issuance of completion certificate or after its first occupation'. Ther is no such line in Clause 2 of Schedule II and hence in case of renting or leasing, the building may qualify to be a "plant".

(e)Meaning of 'own account'
The expression 'own account' means: (i) construction is made for personal use and not for providing service, or (ii) construction is to be used as a setting in which business is carried out.

Matter has been remanded to the High Court to determine whether the shopping mall in question qualifies as a “plant” based on the functionality test.

W&B Comments: By recognizing that a building integral to business operations may qualify as a “plant,” the Court has opened the door for claiming ITC on GST paid during the construction of such buildings, where the construction directly contributes to service provision, such as leasing or renting.

Despite the Court recognizing that constructing immovable property for leasing or licensing falls under the first exception, it still proceeded to examine the second exception related to "plant or machinery" and remanded the matter to the High Court. This creates a grey area. The exception of "Other than own account" is broad enough to exclude all constructions intended for leasing or licensing, which should allow ITC for supplies used in such construction without requiring further tests.

The functional test adopted by the Supreme Court also appears subjective. The distinction between a building being a "mere setting" for business and a "means" of carrying out business is subtle. In our opinion, if a building is constructed with the intention of leasing, it should be viewed as the primary asset for the leasing business, making it a "means" for conducting that business and qualifying for ITC. If such functionality exists, ITC should not be blocked.

While the Supreme Court has upheld the constitutional validity of Section 17(5)(c) and 17(5)(d), its acceptance of the argument on the interpretation of “plant or machinery” is a positive development. But it requires case-by-case analysis using the functional test to determine ITC eligibility.

In Re: Green India Wind Farm Assets Limited [2024 (10) TMI 771]

The Authority for Advance Ruling, Rajasthan in its order dated 258.06.2024 in RAJ/AAR/2024-25/10, examined the time of supply and the correct manner of payment of GST in case where corporate guarantee has been given by a foreign related company to the banks and financial institutions in respect of loans taken by the India company.

The loans of the Applicant (Indian company), in this case were guaranteed by its related foreign company. The guarantee is valid from the effective date of Deed of Guarantee and the final settlement date. The Applicant relied upon Section 2(33) of the CGST Act r.w. Section129 of the Indian Contract Act, 1872 and the judgment of Hasan Ali vs. Waliullah AIR 1930 All 730, to argue that "supply" occurs only once when the deed of guarantee is entered into and since there is no actual payment nor periodic payment by the applicant, there is no continuous supply and the Applicant is only required to make the payment only once. The Applicant drew parallels with other sectors like insurance and transfer of know-how. The payment of 1% GST has to be paid either at once or as an average over a period of time with the total GST never increasing beyond 1% of the guaranteed value.

The Ld. AAR relied upon 2nd proviso to Section 13(3) and held that the time of supply of service would be the date when the transaction is entered in the books of accounts. In respect of valuation, it was held that if the contract is executed prior to 26.10.2023, GST will be payable as per Rule 28(1) of CGST Rules. But if the contract is executed after 26.10.2023, GST will be payable as per Rule 28(2), under RCM on 1% of the deemed value of loan.

W&B Comments: The ruling of the AAR is in accordance with clarification at Sr. No. 1 of Circular No. 225/19/2024-GST dated 11.07.2024 issued by the CBIC.

Mercedes Benz India Pvt Ltd. vs. State Tax & Ors. [TS-679-HC(TEL)-2024]

The Hon'ble Telangana High Court in this matter examined a GST dispute arising under the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as the "IGST Act") and the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act") along with the Telangana State Goods and Services Tax Act, 2017 (hereinafter referred to as the "TSGST Act").

The petitioner challenged the show cause notice issued under the CGST/TSGST Act despite having paid GST under the IGST Act. The petitioner claimed to have paid INR 93 crores as GST under the IGST Act. However, the GST Department issued a show cause notice dated 16.03.2024 under the CGST/TSGST Act, demanding the tax to be paid on the same transaction, under the latter. The petitioner contended that similar payments under the IGST Act had been accepted in other cases and that he was being subjected to discriminatory treatment. Moreover, the petitioner sought exemption from the statutory requirement of depositing 10% of the disputed tax before filing of the appeal.

The Hon'ble Court's ruling addressed two critical aspects:

(a)Discrimination and Similar Treatment Under the IGST Act
The petitioner submitted documentary evidence showing that the tax authorities had accepted payments under the IGST Act in comparable circumstances. The Court observed that points raised in the petitioner's reply to the show cause notice, including the claim of discriminatory treatment, had not been fully addressed by the department. This formed the basis for the Court's direction to allow the petitioner to file an appeal.

(a)Statutory Pre-deposit Requirement: Relief Granted
The Hon'ble Court granted the petitioner relief from the 10% deposit requirement, directing the competent appellate authority to consider the appeal on merits even in the absence of such deposit.

The Court also directed the GST authorities not to take any coercive steps against the petitioner pending the appeal. The Court ruled that the final outcome of the appeal would determine whether the tax liability falls under the IGST Act or the CGST/TSGST Act.

W&B Comments: The Hon'ble Telangana High Court's decision sets an important precedent for businesses where tax has been paid in respect of one transaction but the department is seeking to levy another tax in respect of the very same transaction by recharacterizing the said transaction. Reference in this regard may be made to Section 19 of the IGST Act r.w. Section 77 of the CGST Act by virtue of which refund of the tax earlier paid be granted post which the assessee would become liable to pay another tax in respect of the same transaction.

As regards the requirement of mandatory pre-deposit is concerned, this judgment underscores the extraordinary writ jurisdiction of the high court under Article 226 of the Constitution, so as to make way for the extraordinary circumstances despite the clear letter of law. Given that the payment of pre-deposit is a mandatory pre-condition for lodging appeal on the GST portal, pursuant to this judgment it is likely that the said appeal would be required to be filed physically with the appellate authority.

M/s. Soremartec S.A., Luxembourg vs. State of Maharashtra [2024 (10) TMI 783]

In the present case, the Hon'ble Bombay High Court dealt with a case whereby such a gross violation of natural justice of the taxpayer has happened that the court observed that the assessment order is vitiated by legal mala fides and imposed a cost of Rs. 50,000/- on the respondents (department).

Petitioners No. 1 and No. 2 ('P1' & 'P2') (both foreign companies) had entered into an agreement with Petitioner No. 3 ('P3') for the right to use of their IPR in India, with effect form 01.01.2013. All three companies are group companies. On 05.05.2023, for the first time ever, notice was issued to P1 & P2 regarding this agreement from the MVAT department, seeking to levy VAT on the value of 'royalty' payments made to them by the P3 against the license to use IPRs and technical know-how. Representative of P1 & P2 appeared before the concerned officer and sought extension of time, which was orally granted, informing the Representative that next date will be notified.

Without any such notification, on 01.07.2023, P3 was served with three assessment orders, for FY 2013-14, 2014-2015 and 2015-2016. For FY 2013-14 and 2014-2015, no notice ever served on any of the petitioners. One of the orders also appeared to be back dated to the Court since the time limit to pass order had expired.

The Court observed that normally in cases of violation of natural justice, the matters are remanded, but the present case involves such flagrant breach of statutory provisions of Section 23(4) of the MVAT Act and legal mala fides that the orders will have to be quashed. It was observed that though the interest of revenue is vital, such interest cannot override considerations of probity and fairness in tax governance. The Court observed that remanding the present case and to allow department a further period of 24 months, under Section 24(7), to pass the order would not be inappropriate. The Court also imposed a cost of Rs. 50,000/- to be paid by the Respondents to the Petitioners within 2 months.

W&B Comments: Under the present GST regime, almost every taxpayer has faced some form of natural justice violation primarily due to notices/orders served in blank notified form or lack of reason due to haste to meet the limitation deadline. Usually, in such cases it was the taxpayer who has to be cautious not to approach the High Court prematurely. However the present case, makes it clear that actions of the department which flagrantly violate principles of natural justice cannot be ignored on the pretext of “interest of revenue” and the statutory provisions cannot be bent to recover tax, once the limitation has expired and the appropriate provisions have not been invoked.

Articles

Importance of judicial restraint in contracts involving intricate technical aspects in light of BTL EPC Ltd v. Macawber Beekay Pvt Ltd.

The Supreme Court of India has delivered a significant judgment reinforcing the doctrine of judicial restraint in matters involving complex technical contracts, particularly when courts exercise their powers of judicial review. This ruling resulted from a dispute between Bharat Heavy Electricals Limited (BHEL) and competing bidders, specifically concerning the construction of the 5x800 MW Yadadri Thermal Power Station.

The bench after careful consideration of the facts, issues involved and the competing arguments of the parties held that courts must exercise considerable restraint when reviewing commercial contracts involving complex technical issues, even when the parties involved include a 'State' entity under Article 12 of the Constitution. The bench observed that while the high courts possess writ jurisdiction under Article 226, their role in commercial disputes should be confined to evaluating the decision-making process, particularly for signs of arbitrariness, mala fides, or procedural impropriety, rather than engaging in technical assessments themselves.

The dispute arose when BHEL, acting under a contract from the Telangana State Power Generation Corporation Limited (TSPGCL) to establish the 5x800 MW Yadadri Thermal Power Station, awarded a subcontract to BTL EPC Ltd (the appellant) for the construction of an Ash Handling Plant.

The appellant, BTL EPC Ltd, was issued a Letter of Intent (LoI) for a contract valued at Rs. 378.64 crores on September 29, 2022. The rival bidder, Macawber Beekay Pvt Ltd (MBP Ltd), challenged this award on the grounds that the appellant's collaboration with a Chinese company, Fujian Longking Company Ltd, violated a July 2020 Ministry of Finance order concerning bidders from countries sharing land borders with India. This order, issued under Rule 144(xi) of the General Financial Rules 2017, mandates the registration of such bidders with the Competent Authority before participating in government tenders.

The Karnataka High Court, Division Bench, had earlier quashed the LoI awarded to the appellant and directed BHEL to reconsider the bid submitted by MBP Ltd. The High Court held that the consortium agreement between BTL EPC Ltd and Fujian Longking constituted a violation of the Finance Ministry's 2020 procurement order, as the Chinese entity had not been registered with the Competent Authority, which is mandatory for entities from countries sharing land borders with India.

The Supreme Court, however, overturned the High Court's decision, pointing out several critical factors. The appellant argued that its bid was submitted as a standalone entity, and the Chinese company's involvement was limited to a service agreement, not a consortium arrangement as defined under clause 7.2 of the pre-qualification requirements. Clause 7.2 mandates that a consortium agreement must involve equity participation by the members of the consortium, with at least 51% of the ownership stake held by one member acting as the lead. The Supreme Court observed that the Chinese company, in this case, had no such equity stake and was only providing technical design support, making the agreement a service arrangement rather than a joint bidding consortium.

The Court emphasized that the Public Procurement Order dated July 23, 2020, was later clarified by an Office Memorandum (OM) issued on February 8, 2021, which stated that the registration requirement for entities from countries sharing land borders with India did not apply to the procurement of services but only to goods and turnkey contracts. Since the Chinese company's role in the project was confined to providing technical support services, and no goods were being procured from it, the registration requirement under the original order did not apply.

The Court reiterated that BHEL, as the tender-inviting authority, is best placed to interpret its own tender conditions and assess whether bidders meet the technical and commercial criteria. In this case, BHEL and TSPGCL had both determined that the appellant's agreement with the Chinese company was not a violation of the 2020 order and did not constitute a consortium requiring registration. The Supreme Court stressed that judicial intervention should not replace the discretion and technical judgment of tender authorities, especially when no evidence of mala fides or bias is presented.

MBP Ltd offered to match the appellant's lower bid, but the Supreme Court found that allowing this substitution at an advanced stage of the project would lead to substantial delays and increased costs. BHEL argued that replacing the contractor would necessitate the redesign of the entire project, which was design-intensive, thereby imposing significant additional expenses on the public exchequer. The Court took note of the progress already made, stating that over 80% of the civil work and 72% of the structural work had already been completed, and further delays would be contrary to the public interest.

The Supreme Court established several important principles concerning judicial intervention in technical and commercial contracts. It noted that the Courts should defer to the technical expertise of tender-inviting authorities, which are best placed to assess whether bidders meet the requirements outlined in tender documents. Courts should not act as appellate authorities in such cases. The Court reiterated that judicial review in contractual matters should focus on examining the decision-making process for arbitrariness, mala fides, or irrationality, rather than re-evaluating the merits of technical qualifications. Even in writ appeals, Division Benches should exercise restraint and only interfere with Single Judge rulings when there is clear evidence of perversity or error. The Court highlighted that judicial interference should be avoided where it would result in significant financial loss to the public exchequer or cause delays in projects of national importance.

The Supreme Court set aside the Division Bench's order and restored the Single Judge's decision, emphasizing the principle of judicial restraint in matters involving complex technical contracts. This ruling has broad implications for future cases involving public procurement and technical contracts, especially those involving State entities, reaffirming that courts should not overstep into technical domains unless there is clear evidence of procedural violations.

Analyzing duty-free import benefits to solar power projects set up in warehouses in light of recent Delhi HC ruling.

In a significant ruling that could shape the future of India's solar power sector, the Delhi High Court has upheld the rights of solar power-producing units to access benefits under the Manufacture and Other Operations in Warehouse Regulations, 2019 (MOOWR). The Court's decision, delivered in May 2024, strikes down instructions issued by the Central Board of Indirect Taxes and Customs (CBIC) that had attempted to exclude solar power producers from the scheme. As noted by the Court, the impugned instruction, dated 09 July 2022, issued under Section 151A of the Customs Act, 1962, was deemed to have exceeded its advisory mandate, leading to this pivotal decision.

The MOOWR scheme, introduced in 2019, is a duty deferment program designed to facilitate manufacturing operations in India. Under this scheme, manufacturers can import capital goods and inputs into customs-bonded warehouses without paying upfront customs duties. The duty payment is deferred until the goods are cleared for home consumption, providing significant working capital benefits to manufacturers. As observed by the Court, the MOOWR Regulations essentially facilitate the housing of imported capital goods or imported raw materials in a duly designated warehouse and for a manufacturing process being undertaken in relation to those goods.

The controversy arose when solar power producers, who had obtained necessary permissions under MOOWR, began importing capital goods such as solar panels and equipment without immediate duty payment. The unique aspect of their operation was that their only output product - electricity - is exempt from customs duties. This created a situation where these producers could potentially operate without paying any customs duties throughout their production lifecycle, even when clearing electricity for domestic consumption.

In July 2022, the CBIC issued instructions asserting that electricity production fell outside the scope of MOOWR. The primary justification for this exclusion was the technical requirement in Regulation 15 of MOOWR, which mandates the affixation of a one-time lock to goods removed from warehouses for export. CBIC argued that this condition could not be met in the case of electricity, which cannot be physically locked for transportation. As per the instruction, Electricity, which may come to be cleared for home consumption, cannot possibly comply with the one-time-lock condition thus it would consequently fall outside the scope of the MOOWR Regulations.

The legal challenge was led by Acme Heergarh Powertech Private Limited and other solar power producers, who contested the validity of the CBIC's instructions before the Delhi High Court. The petitioners argued that they had valid licenses under MOOWR and that solar power generation should not be excluded from the scheme. The petitioners also highlighted that the CBIC's instructions effectively revoked their rights without proper legal justification. The impugned Instruction compels and commands the Customs authorities to cancel all licenses pertaining to solar generation units and thus impeding the statutory discretion.

The Court's decision rested on several crucial observations. The Court found that neither Section 61 (duration of warehousing) nor Section 65 (manufacturing and other operations) of the Customs Act, 1962, could be interpreted to exclude solar power-producing units from MOOWR benefits. The Court emphasized that the MOOWR Regulations apply to all goods that undergo a manufacturing process or other operations in customs-bonded warehouses. The fact that electricity could not meet technical requirements like a one-time lock did not justify exclusion from the scheme.

The Court determined that CBIC had exceeded its advisory mandate under Section 151A of the Customs Act. While Section 151A allows CBIC to issue policy directions, the Court pointed out that these instructions cannot interfere with the exercise of discretion by customs officials. The instruction issued on 09 July 2022 was seen as an attempt to curtail the discretion vested in customs officers by compelling them to revoke the licenses of solar power producers without proper justification

The Court clarified that capital goods need not be consumed or integrated into the final product to qualify for MOOWR benefits. The Court highlighted that the MOOWR scheme's intent was to facilitate manufacturing operations, and the use of capital goods in the generation of electricity should qualify for the same benefits, even if electricity is exempt from customs duties. The Court rejected CBIC's argument that technical requirements like input-output ratios should determine scheme eligibility. It emphasized that the MOOWR scheme was designed to defer duties, and such requirements should not be a limiting factor. The Court stressed the importance of a purposive interpretation of the law to fulfill its objective of facilitating manufacturing operations in bonded warehouses.

This ruling has significant implications for India's solar power sector. Solar power producers can continue to benefit from duty deferment on imported capital goods, reducing their initial capital expenditure burden. The judgment provides clear guidance on the applicability of MOOWR to solar power generation activities. The ruling may encourage more investment in the solar power sector by maintaining favorable import duty structures.

Understanding RBI's Advisory on AIF Investments and Loan Evergreening.

The Reserve Bank of India (RBI) has enacted comprehensive modifications to its regulatory framework governing investments by regulated entities (REs) in Alternative Investment Funds (AIFs), marking a pivotal evolution in the financial sector's oversight mechanisms. These amendments, issued on March 27, 2024, refine the earlier guidelines set forth on December 19, 2023, which aimed primarily at curbing the practice of loan evergreening through AIF investments. The regulatory changes are designed to ensure a more robust and transparent investment framework for REs, including commercial banks, cooperative banks, financial institutions, and non-banking financial companies (NBFCs).

In its initial circular, the RBI imposed stringent restrictions on REs, preventing them from investing in AIF schemes that had downstream investments in their debtor companies. This measure was part of a broader strategy to eliminate indirect exposures that could potentially mask distressed loan accounts. According to the RBI's directive, REs were required to divest from such AIF schemes within 30 days of a downstream investment being made into their debtor companies or face provisioning penalties equal to 100% of their investment.

The revised framework introduces several key modifications that balance stakeholder concerns while maintaining stringent regulatory oversight. One of the most critical changes is the exclusion of equity investments from the definition of downstream investments, although the oversight of hybrid instruments remains. This adjustment, noted in the March 2024 circular, reflects a more nuanced understanding of corporate financing structures, acknowledging the role of equity in capital formation while addressing risks associated with hybrid instruments. By distinguishing between equity and other financial instruments, the RBI has demonstrated a sophisticated approach to managing systemic risk.

Another significant revision pertains to the provisioning requirements for REs. Under the revised guidelines, the 100% provisioning requirement now applies only to the portion of the RE's investment that is channeled through the AIF into a debtor company, rather than the entirety of the RE's investment in the AIF scheme. This proportional provisioning requirement reflects a more calibrated risk management framework that better aligns with actual risk exposure, mitigating unnecessary capital strain on REs while ensuring that provisions are appropriately allocated where risks are concentrated.

Moreover, the RBI has introduced specific guidance on capital treatment for investments in subordinated units of AIF schemes with a priority distribution model. Under the revised guidelines, the capital deduction for such investments must now be equally distributed between Tier-1 and Tier-2 capital, encompassing all forms of subordinated exposures, including sponsor units. This amendment provides greater clarity and precision in calculating capital adequacy, enabling REs to maintain compliance with prudential norms while managing their exposure to subordinated risks.

A particularly notable development is the explicit exclusion of investments made through intermediary vehicles, such as fund of funds and mutual funds, from the scope of the original circular. This carve-out allows REs to maintain strategic investments via such intermediaries while adhering to the broader regulatory objectives set out by the RBI. The exclusion is especially beneficial to development finance institutions like NABARD, SIDBI, and NIIF, which rely on intermediary investment vehicles to fulfill their sectoral mandates without being encumbered by direct regulatory restrictions.

Despite these clarifications and amendments, certain challenges remain. Tracking downstream investments continues to pose practical difficulties due to the fungible nature of funds within AIFs and the independent decision-making authority of AIF managers. Additionally, the treatment of compulsorily convertible instruments and the broader implications for sponsor relationships within AIFs may require further clarification from the RBI.

These modifications represent a measured and balanced regulatory approach, addressing industry concerns while upholding the RBI's commitment to safeguarding the financial system from systemic risks. The amendments demonstrate the RBI's agility in adapting its regulatory frameworks to evolving market conditions, ensuring that investments by REs in AIFs remain transparent and subject to rigorous oversight. As the financial sector adapts to these revised guidelines, ongoing dialogue between the RBI and stakeholders will be critical in ensuring effective implementation and addressing any emerging challenges.

Analyzing whether the Banks can Label MSME Loans as NPAs at Will in light of the latest Supreme Court ruling.

In a landmark judgment that significantly impacts the banking sector's approach to Micro, Small, and Medium Enterprises (MSMEs), the Supreme Court has established comprehensive guidelines regarding the classification of MSME loan accounts as Non-Performing Assets (NPAs). The judgment emphasizes the mandatory nature of the Framework for Revival and Rehabilitation of MSMEs which have been prioritised by the government for a long time.

The Court examined the legislative framework, particularly focusing on the intersection of three crucial statutes: the MSMED Act, 2006, the Banking Regulation Act, 1949, and the SARFAESI Act, of 2002. Section 9 of the MSMED Act empowers the Central Government to take measures for facilitating promotion and development and enhance the competitiveness of MSMEs by specifying programs, guidelines, or instructions as it may deem fit.

The Framework, initially notified by the MSME Ministry on May 29, 2015, was designed to provide a simpler and faster mechanism to address stress in MSME accounts. Under this Framework, as the Court emphasized, the Banks had to identify incipient stress in the account by creating three sub-categories under the Special Mention Account (SMA) category: SMA-0 for accounts showing signs of incipient stress but not overdue for more than 30 days, SMA-1 for accounts overdue between 31-60 days, and SMA-2 for accounts overdue between 61-90 days.

The Court explicitly stated that the Instructions/Directions issued by the Central Government under Section 9 of the MSMED Act and by the RBI under Section 21 and Section 35A have statutory force and are binding to all the Banking companies. This interpretation significantly strengthens the Framework's implementation requirements.

The Court's ruling creates a balanced approach to responsibilities between banks and MSMEs. While the court mandated that the entire exercise as contained in the Framework for Revival and Rehabilitation of MSMEs is required to be carried

out by the banking companies before the accounts of MSMEs turn into Non-Performing Assets, it simultaneously emphasizes that it would be equally incumbent on the part of the concerned MSMEs to be vigilant enough to follow the process laid down under the said Framework.

As far as the SARFAESI Act is concerned, the judgment clarifies that while the SARFAESI Act provisions have an overriding effect, they can only be initiated after the proper classification of an account as NPA, which must follow the Framework's requirements for MSME accounts. However, the Court also established a crucial limitation which states that if at the stage of classification of the loan account of the borrower as NPA, the borrower does not bring to the notice of the concerned bank/creditor that it is a Micro, Small or Medium Enterprise under the MSMED Act then such an Enterprise could not be permitted to misuse the process of law for thwarting the actions taken under the SARFAESI Act by raising the plea of being an MSME at a belated stage.

The Supreme Court's verdict explicitly overturned the High Court's interpretation that banks were not obliged to adopt the restructuring process without an application from MSMEs. The Court termed this interpretation as "highly erroneous," establishing unequivocally that the Framework's requirements are mandatory, not directory and banks can initiate the restructuring process independently.

This judgment has far-reaching implications for both banking institutions and MSMEs. Banks must now ensure comprehensive compliance with the Framework before NPA classification, including the creation and maintenance of Special Mention Account categories and a proactive approach to stress identification. MSMEs, in turn, must maintain timely documentation of their status and actively participate in the stress identification process.

The Supreme Court's ruling thus establishes a clear precedent for handling MSME loan accounts, emphasizing both the rights and responsibilities of financial institutions and MSMEs. While maintaining existing SARFAESI proceedings and preserving alternative remedies for appellants, the judgment creates a comprehensive framework that demands proactive engagement from both financial institutions and MSMEs while ensuring procedural fairness and systematic stress resolution. This balanced approach serves to protect MSME interests while maintaining banking sector stability, marking a significant development in banking jurisprudence.

New FVCI Guidelines: DDPs Empowered for Regulatory Oversight &

The Securities and Exchange Board of India ("SEBI") has instituted significant modifications to the SEBI (Foreign Venture Capital Investors) Regulations, 2000, through the SEBI (Foreign Venture Capital Investors) (Amendment) Regulations, 2024 ("Amendment"). These amendments, accompanied by detailed Operational Guidelines for FVCIs ("Operational Guidelines"), mark a fundamental shift in the regulatory landscape, with implementation scheduled for January 1, 2025. According to the circular issued on September 26, 2024, these changes are intended to facilitate smooth transition and promote the development of, and regulate, the securities market while protecting investors' interests.

Existing FVCIs are required to engage a Designated Depository Participant (DDP) by March 31, 2025, to facilitate the continued registration process and meet enhanced due diligence requirements. FVCIs failing to engage a DDP will be mandated to liquidate their investments according to a set timeline: listed securities by March 31, 2026, and other investments by March 31, 2027. The proceeds from the sale must comply with KYC and AML/CFT requirements.

For existing FVCIs registered on or before December 31, 2019:

- Renewal fee payment to the designated DDP.
- Mandatory disclosure of information changes by March 31, 2025.

For FVCIs registered post-December 31, 2019:

- Renewal fee submission to DDP.
- Information update requirement: Minimum 15 days before the conclusion of the 5-year registration period.
- Continuation provision for subsequent 5-year blocks.

If the FVCI fails to pay the renewal fee by the due date, SEBI mandates that the FVCI liquidate its existing investments within the specified timeline: listed securities within one year and other investments within two years from the registration block's end date

As far as DDP Assessment Parameters are concerned, the Operational Guidelines prescribe a detailed assessment for determining the eligibility of FVCIs. DDPs are required to verify the applicant's country of origin, ensuring that they are from a jurisdiction compliant with SEBI's criteria, including being a member of IOSCO or FATF. Additionally, DDPs must ensure the applicant is 'fit and proper' as per SEBI's eligibility standards

The DDP must monitor FVCI compliance regularly, including tracking material changes in ownership or structure, and report any sanctions or regulatory actions taken against the FVCI

Primary Eligibility Requirements include:

- Applicants must have valid registration in IFSC (International Financial Services Centre) or another external jurisdiction, meeting SEBI's specified regulatory requirements.
- They must belong to a jurisdiction with a securities market regulator having a bilateral MoU with SEBI or be a signatory of the IOSCO Multilateral MoU. For banking entities, central bank membership in the Bank for International Settlements (BIS) is mandatory
- Compliance with international standards, including FATF and the UN Security Council sanctions list, is also required for FVCI registration and continued operation

SEBI emphasizes the need for FVCIs to maintain fit and proper status, adhere to comprehensive KYC processes, and implement regular monitoring of compliance with AML/CFT guidelines. FVCIs must notify SEBI and the DDP about any material changes in structure or control within the prescribed timelines. They must also ensure proper documentation of beneficial owners, as outlined in the Prevention of Money-laundering Rules, 2005

DDPs are tasked with processing FVCI applications, performing due diligence, and collecting fees. DDPs are also responsible for reporting to SEBI monthly, covering applications received and disposed of, compliance status, and any material changes that may affect the FVCI's registration status. The DDP must notify SEBI of any instances where an FVCI's jurisdiction becomes non-compliant with FATF or IOSCO standards and halt any new investments from such FVCIs until they regain compliance

Significant Regulatory Modifications include Elimination of the minimum commitment requirement (previously USD 1 million), the amendments specifically include eligibility for IFSC-based entities, marking a critical inclusion in the regulations, and enhanced KYC integration with the KRA (KYC Registration Agency) portal. SEBI has streamlined custodian requirements, mandating a single custodian even if an FVCI holds accounts in multiple depositories (NSDL and CDSL)
SEBI expects these amendments to improve operational efficiency by streamlining the registration process, enhancing due diligence, and enabling better monitoring of FVCIs. This also aligns Indian regulations with international best practices. The enhanced eligibility criteria and due diligence processes are likely to foster greater investor confidence, facilitating increased participation in the IFSC.

The latest FVCI Regulations represent a significant evolution in India's venture capital regulatory framework. The delegation of key regulatory functions to DDPs, coupled with enhanced compliance requirements and clearer operational guidelines, indicates SEBI's commitment to creating a more robust and efficient regulatory environment. The success of this regulatory transformation will depend on effective coordination between FVCIs, DDPs, and SEBI, with particular emphasis on meeting the prescribed timelines and compliance requirements. With the explicit inclusion of IFSC-based entities and a streamlined regulatory process, SEBI aims to foster greater participation in India's venture capital ecosystem while maintaining rigorous oversight mechanisms

A Closer Look at Our Recent Features

Experts welcome GST anti-profiteering revamp but warn on consumer protection and ongoing litigation

GST Amnesty Scheme eases litigation burden, but questions on eligibility, legal risks remain: Experts

"If I decide to settle the demand for FY 2017-18 but want to litigate the same issue for FY 2021-22 will that create an estoppel against me establishing the need for careful structuring of applications to avoid such complications. One is required to pay the full amount for the entire period even though the waiver only applies to certain years. This could lead to businesses being disadvantaged particularly when they have strong cases for certain issues. There are instances where frivolous notices have been issued under Section 74 even when there's no element of fraud. These businesses are excluded from the amnesty benefit and the uncertainty around whether fraud exists will only be resolved through prolonged litigation. While this scheme covers the first three years businesses can't demand that similar amnesty be offered for subsequent periods. That's purely a government policy decision."

We are delighted to share that our Partner, Prateek Bansal , has been featured in ETCFO article titled - "Experts welcome GST anti-profiteering revamp but warn on consumer protection and ongoing litigation"

To read the article, please click on the link.

https://cfo.economictimes.indiatimes.com/news/tax-legal-accounting/experts-welcome-gst-anti-profiteering-revamp-but-warn-on-consumer-protection-and-ongoing-litigations/113890986

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White & Brief's
SIDEBAR

Outlook Start-Up

Purusharth Singh
Co-Founder ,
White & Brief's Sidebar

WhatsApp's Privacy Policy Back in Spotlight as CCI Investigation Intensifies

"The privacy policy introduced in 2021 has been a concern for regulators and consumers alike raising questions about data privacy and competition implications say experts. However from WhatsApp's perspective the policy was designed to offer enhanced functionality and integration across Meta's services enabling users to benefit from a more connected digital experience. This argument has been raised in past cases where WhatsApp has defended the policy as pro-innovation and in the interests of user convenience not as a means to stifle competition."

WhatsApp's privacy policy back in spotlight as CCI investigation intensifies

We are delighted to share that White and Brief's Sidebar Co-founder , Purusharth Singh , has been featured in Outlook Start-up article titled - "WhatsApp's privacy policy back in spotlight as CCI investigation intensifies"

To read the article, please click on the link.

https://www.outlookbusiness.com/start-up/explainers/whatsapps-privacy-policy-back-in-spotlight-as-cci-investigation-intensifies

Our Managing Partner NILESH TRIBHUVANN has been featured in Forbes India Magazine

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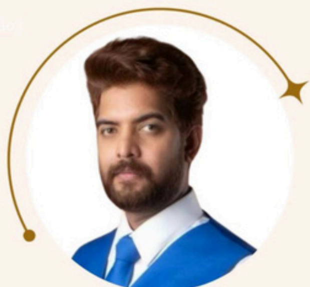
We are delighted to share that our Managing Partner has been featured in Forbes India .

Forbes INDIA



Nilesh Tribhuvann
Managing Partner

We are thrilled to announce that our Managing Partner NILESH TRIBHUVANN has been featured in Forbes India Magazine! You can find the article on page 82.

To read the article, please click on the link.
https://www.forbesindia.com/article/column/indias-top-100-digital-stars-redefining-influence/94378/1

GST Amnesty Scheme eases litigation burden, but questions on eligibility, legal risks remain: Experts

We are delighted to share that our Partner, Prateek Bansal , has been featured in ETCFO article titled - "GST Amnesty Scheme eases litigation burden, but questions on eligibility, legal risks remain: Experts"

To read the article, please click on the link.
https://cfo.economictimes.indiatimes.com/news/tax-legal-accounting/gst-amnesty-scheme-eases-litigation-burden-but-questions-on-eligibility-legal-risks-remain-experts/114298925

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Our Partner, Mr. Prateek Bansal was invited by Lex Witness - India's 1st Magazine on Legal & Corporate Affairs

We are delighted to share that our Partner, Mr. Prateek Bansal, was invited by Lex Witness - India's 1st Magazine on Legal & Corporate Affairs as a distinguished speaker at the 9th Annual Media, Advertising & Entertainment Legal Summit 2024 in Mumbai.

He contributed to the panel on "Advertising Regulations in the 21st Century Media Landscape," discussing ASCI and CCPA guidelines, and the impact of overlapping laws on advertisers.

He shared the stage with esteemed industry leaders :

- Narayan Ranjan Senior Advisor, NDTV Group
- Kanan Rele Director and Head of India, Legal Monks
- Manisha Kapoor , CEO & Secretary General, ASCI
- Prashant Ramdas Vice President and Head-Legal, ENIL Mirchi
- Srishti Ojha , Founding Partner, Verist Law

The Sea GC Summit Singapore
(Future of Energy and Infrastructure in Asia)

White and Brief participated in the Law Ninjas SEA GC Summit in Singapore on October 18, 2024, with partners Purusharth Singh and Humera Niyazi. Purusharth joined an insightful panel on the "Future of Energy and Infrastructure in Asia," discussing sector strategies, investment trends, and energy transition challenges. The summit featured vibrant, informal interactions, followed by networking over drinks. The delegation, led by Nilesh Tribhuvann, also renewed client ties and explored cross-border collaboration opportunities during their week-long visit to Singapore.

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FINANCIAL EXPRESS

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Nilesh Tribhuvann
Managing Partner

Tighter H1B visa rules in Republican regime could hurt business for IT firms .

"Under a Trump administration a return to stringent H-1B regulations rigorous scrutiny and restrictions could be expected. This would likely compel Indian IT companies to adapt by investing further in local hiring and onshore talent pools. During Trump's previous term the Indian IT industry experienced increased denial rates tighter eligibility criteria heightened wage requirements and extended processing times impacting their ability to staff projects efficiently. These restrictive measures prompted many firms to explore alternative visa categories such as the L-1 for intra-company transfers."

Tighter H1B visa rules in Republican regime could hurt business for IT firms .

We are delighted to share that our Managing Partner NILESH TRIBHUVANN has been featured in Financial Express (India) article titled- Tighter H1B visa rules in Republican regime could hurt business for IT firms .

To read the article, please click on the link.
https://www.financialexpress.com/business/investing-abroad-tigher-h1b-visa-rules-in-republican-regime-could-hurt-business-for-it-firms-3656532/

Quick Commerce's Love for Medicine Delivery Gets Shrouded in Criticism

We are delighted to share that our Managing Partner NILESH TRIBHUVANN has been featured in Outlook Start-Up article titled - Quick Commerce's Love for Medicine Delivery Gets Shrouded in Criticism .
To read the article, please click on the link.

https://www.outlookbusiness.com/start-up/news/quick-commerces-love-for-medicine-delivery-gets-shrouded-in-criticism

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Head Office

61A, 62 A & 63 A , Mittal Court "A" Wing Jamnalal Bajaj Marg, Nariman Point Mumbai, Maharashtra 400021.

Branch Offices

Mumbai

Enam Sambhav C-20, G-Block Rd, G Block - Banra Kurla Complex, Bandra East, Mumbai, Maharashtra 400051

New Delhi

1504, Tower C, ATS Bouquet, Sector 132, NOIDA, 201308

Bangalore

62/63 The Pavillion, Church Street, Bangalore, Karnataka 560001