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The Chamber's Journal

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

A Monthly Journal of
The Chamber of Tax Consultants

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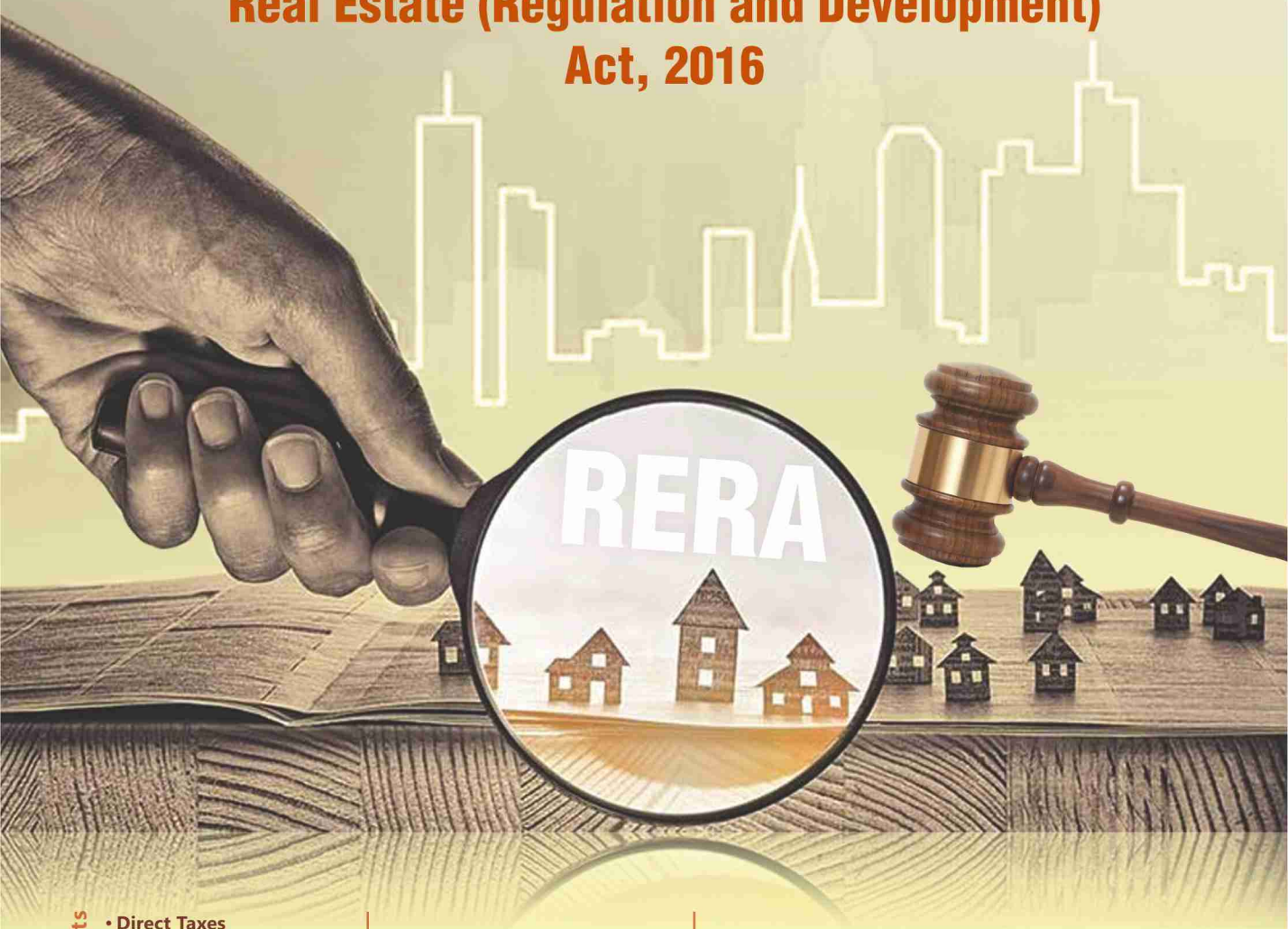
Real Estate (Regulation and Development) Act, 2016



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Innovate Excel & Lead

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www.ctconline.org

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Managing Council Members 2017-18

Seated from (L to R): Ms. Nishtha Pandya, Mr. K. Gopal (Past President), Mr. Mahendra Sanghvi (Past President), Mr. Manoj Shah (Past President), Mr. Kishor Vanjara (Past President), Mr. Ajay Singh (President), Mr. Hitesh R. Shah (Imm. Past President), Mr. Hinesh Doshi, Mr. Vipul Joshi (Past President), Mr. Jayant Gokhale and Ms. Charu Ved

Standing from (L to R): Mr. Heneel Patel, Mr. Ketan Vajani, Mr. Rahul Hakani, Mr. Anish Thacker, Mr. Rajesh Shah, Mr. Sanjeev Lalan, Mr. Ashok Sharma, Mr. Vipul Choksi, Mr. Parag Ved, Mr. Paresh Shah, Mr. Dinesh Tejwani, Mr. Sachin Gandhi, Mr. Ashok Mehta, Mr. Naresh Sheth and Mr. Ganesh Rajgopalan

PRESIDENT 2017-18

Shri Ajay R. Singh, President, addressing the members at 90th Annual General Meeting

OFFICE BEARERS 2017-18

Seated from (L to R): S/Shri Ajay R. Shah, President, Hinesh R. Doshi, Vice-President

Standing from (L to R): Ms. Nishtha Pandya, Hon. Jt. Secretary, S/Shri Parag S. Ved, Hon. Treasurer and Ketan Vajani, Hon. Jt. Secretary.

Direct Taxes Committee

Direct Tax Update Series Lecture on Income Tax Amendments & Return Filing for AY 2017-18 – Provisions and Issues held on 7th July, 2017 at IMC.

Mr. Ajay R. Singh (President) giving opening remarks. Seen from L to R: CA Ashok D. Mehta (Chairman), CA Mahendra Sanghvi (Speaker) and Mr. Dharan Gandhi, Advocate

CA Mahendra Sanghvi (Speaker) addressing the participants

CA Ashok D. Mehta (Chairman) welcoming the speaker. Seen from L to R: CA Mahendra Sanghvi (Speaker), Mr. Ajay R. Singh (President) and Mr. Dharan Gandhi, Advocate

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The Chamber's Journal

MEMBERSHIP FEES & JOURNAL SUBSCRIPTION FOR THE F.Y. 2017-18 (w.e.f. 1-7-2017)

Sr. No.	Membership Type		Fees	GST 18%	Total
1.	Life Membership (W.e.f. 1-7-2017)	₹	12000	2160	14160
2.	Journal Subscription (Life Members)	₹	1200	0	1200
					₹ 15360
3.	Admission Fees – Ordinary Members	₹	500	90	590
4.	Ordinary Membership Fees	₹	2200	396	2596
					₹ 3186
5.	Admission Fees – Associate Members	₹	1000	180	1180
6.	Associate Membership Fees	₹	5000	900	5900
					₹ 7080
7.	Journal Subscription (Non Members)	₹	2100	0	₹ 2100
8.	Student Membership Fees	₹	700	45	₹ 295
9.	Journal Subscription	₹	700	0	₹ 700

Editorial

At the outset, I congratulate Mr. Hitesh R. Shah who completed his term as President of CTC on 4th July, 2017. It was fun working under an efficient and dynamic leader. I welcome and wish all the best to the incoming President Mr. Ajay Singh and his team. I thank him for continuing me as editor. In a lighter vein, he has not male enough efforts to find a substitute editor. I wish the entire Team Chamber a great year ahead.

The special story for the month of July 2017 of the Chamber's Journal is on Real Estate Regulatory Authority (RERA). In my childhood, I had heard a slogan that all will be provided "Roti, Kapda Aur Makaan". All the three remain to be an issue even today also. Even after 70 years of independence the basic issues concerning these three essentials for survival are not effectively regulated. The housing sector remained ignored and unorganised for such a long time. The consumers or flat purchasers did not have any effective solution against the builders. Any proceedings initiated in Court of Law were retarded by procedures and the unscrupulous elements could get away without any blemish. The new statute generates a ray of hope that Real Estate sector will be properly regulated and this essential sector will be taken care of. The Centre and State, both have placed, their piece of legislation on the statute book. The Journal Committee, with a view to make our members aware of the provisions of the statute, has planned this special story. Very eminent and senior professionals have contributed to this special story. I thank all of them for sparing their time for this special story.

In this issue of Chamber's Journal, in the direct taxes column, the contributors for High Court and Tribunal are a new team. I hope they will do a great job. I request all of you to give me suggestions to improve the regular columns or add new regular columns. In this issue we have added a regular column on GST. This column will introduce you to the nitty gritties of GST and keep you updated.

I thank all the contributors of this issue of the Journal Committee.

K. GOPAL
Editor

From the President

Dear Members,

Namaste !! At the outset I thank all of you for bestowing faith and trust on me to lead this august organisation. It is an honour & privilege for me to lead this esteem organisation. At the same time I am also conscious of the fact that it also carries great responsibility which I need to discharge to the best of my ability.

I thank the Almighty for his blessings and also my Parents who have taught me to be straightforward, fearless and yet be simple. I also thank, my seniors who have shaped my professional career, my family who have also always stood besides me and my friends who are there with me at all times and situations. It is indeed a proud moment for all to see me at this position.

MY JOURNEY WITH CHAMBER

My professional journey started in the year 2000 and, in April 2005 I was invited to write an article on Model Application & Petition in Chamber's monthly Journal. Thereafter in the same year I was invited to take up the regular column 'Best of the Rest' pertaining to Allied Laws which I have written till May, 2017 continuously. In the year 2006 I was given an opportunity to speak in a Study Circle on 5th December 2006 on the topic Appeals, Rectification & Revision and it was my honour to present for the first time paper on the Case Studies in the year 2009 at Residential Refresher Course, Calicut. Thereafter I was regularly delivering talk at various meetings and Conferences of Chamber. It was a learning process for me. I was introduced to the Managing Council during the Presidentship of Shri Parimal Parikh in year 2011 as Chairman of Direct Tax Committee and became part of Office Bearer during the Presidentship of Shri Paras K. Savla. It was my academic interest which has made me closely associated with Chamber. It is the CHAMBER which has given opportunity for my professional development.

MY VISION FOR CHAMBER: INNOVATE, EXCEL AND LEAD, THE MANTRA OF THE YEAR 2017

To be a President of Chamber is always a privilege however it is a challenging task considering the past glorious history of Chamber it requires tremendous skill and vision to execute the show.

Chamber has progressed by metes and bounds over years and at great pace in terms of its activities. Every year bar of the Chamber keep rising higher and higher. Hence it is equally important for one to maintain the vibrancy and pace of its activities. To my mind quality always matters and hence I will be mainly focusing on providing qualitative and meaningful education and knowledge rather than focusing on number of programmes. It is need of an hour to introduce new innovative ideas in disseminating knowledge to members along with quality of programme. Success of any programme depends on the relevant topic chosen, structure of the programme, speakers, timing of the programme and innovative feature it has. Once a sincere efforts are put on the above aspect our goal is accomplished.

This year concentration will be more on innovative/unique programme which will stimulate and generate creative thinking amongst the members to bring out the potentials of a true professional. A professional is required to lead the society in right direction and therefore his strong commitment towards his profession is must.

Today Chamber is led by young team supported by experienced professionals. Young people are full of enthusiasm. This young leaders who are future of our country are to be nurtured. We need to provide young minds a platform for overall development of their personality. This year we have a dedicate Student Committee who will plan programmes, seminars, competitions and other activities exclusively for students of law and accountancy.

Fundamental concepts and basic legal principle are done away with, in this era of google and whats app. Young professional need to undertake more and more research activities and focus on creativity which is presently missing. One needs to appreciate that gadgets should not drain away our skills and power of thinking. These are mere technical tools and cannot replace the powerful human mind. The greater challenge lies in channeling the young mind in the right direction and Chamber will act as a lighthouse for them.

Chamber always contributes to Research and Development of Law. Today Chamber leads in making representations before the Regulatory Authorities and do not hesitate to raise its voice for professional brothers when the crucial moments arises. It will be my endeavour to make effective representations before any Regulatory Authorities or before the Court

of Law against any arbitrary provisions of law. Chamber is not a mute spectator. I am proud to say that Chamber is the only association who has approached the court challenging ICDS. The matter is pending for hearing at Delhi High Court. The Chamber has a robust team for making a effective representation.

My efforts will be to broaden and strengthen the base of the Chamber. My task is to spread the activities of the Chambers across the country. Chamber always believe to be leader in bringing out new initiatives. Thus this year Chamber will be disseminating knowledge through its 14 committees. My effort is to give a sustainable model and a clear vision to the Chamber.

Chamber is a human driven organisation and my challenge will always be to keep the tread intact which should run amongst all members and we need to work in close co-ordination for common object and goal. The Chamber over years has developed its own culture and ideology and has a rich tradition which we need to preserve.

For the first time the Chamber has two elected lady members in Managing Council. Direct Taxes Committee had organised the 1st Lecture meeting for the year on 7th July, 2017 on Income Tax Return Filing dealing with amendments and issues therein. CA Mahendra Sanghvi was excellent in his content and delivery and also generated lots of queries from participants and also resolved the same.

The Special Story of this month is on RERA designed by Mr. Rahul Hakani who deserves appreciation. This is a newly enacted law and this Special Story on RERA explaining the intricacies of law will be of immense help to professionals. Journal is adding new features in its fleets which will prove to be interesting to readers namely GST Updates.

At the end, your support and guidance is important to me while leading this august organisation.

Thank you all.

Jai Hind.

AJAY R. SINGH
President

Chairman's Communication

Dear Readers,

1st July, 2017 witnessed one of the biggest reforms of independent India, enactment of Goods and Service Tax (GST) Act. This was possible only due to the strong resolve of the Government at the Centre despite many impediments. While launching this Act on mid-night of 1st July 2017, the Hon'ble Prime Minister described GST as Good and Simple Tax because it is claimed that it is not very complex, in the long run it is going to be beneficial to the countrymen and will give boost to the economy of the country. Time will tell how true this statement is. However, the Government appears to be very confident of smooth implementation of GST which is going to work entirely on information technology and communication infrastructure. Despite initial resistance and opposition of GST by all and sundry, everyone has reconciled with the fact that GST is a reality and one has to live with it. Before GST stabilises, initial period of six months to one year of implementation of GST is going to be a challenge for entrepreneurs and professionals as well. The ministry continues to bring out notifications and clarifications on GST and therefore we are starting a new monthly column on GST with this issue.

The Government continues to bring in changes and enacting new Acts with a view to bring more efficiency and transparency in the way various Government agencies function. One such piece of legislation which became effective from May 1, 2017 is Real Estate (Regulation and Development) Act, 2016 (RERA). RERA is supposed to protect the interest of the home buyer and ensure timely delivery of projects. Some of the provisions beneficial to the buyers are (i) developer will have to put 70% of the money collected from a buyer in a separate account to meet the construction cost of the project, (ii) RERA will make it mandatory for all commercial and residential real estate projects where the land is over 500 sq. mt. or eight apartments will have to register with the regulator before launching a project, (iii) The buyer will pay only for the carpet area The builder can't charge for the super built-up area, as is the practice at present etc.

Under RERA, each State has to notify rules and set-up regulatory bodies as Appellate Tribunals to solve the disputes between buyer and builder within 120 days. Only eighteen States have notified the rules so far and handful of States have set-up regulatory authorities. In Maharashtra, the rules under RERA have come into effect from May 1, 2017. As per the rules, all the projects have to be registered with the authorities by July 31, 2017, however given the rate at which the projects are getting registered, substantial projects in Maharashtra could be left unregistered before the deadline of July 31, 2017.

It is always the endeavour of the Journal Committee, to bring out the issues on subjects which are very relevant and timely and therefore this issue of the Journal is on RERA. It shall be my sincere endeavour, along with able Vice-Chairman, Convenors and the Committee members to bring out issues which carry relevant subject matters and are of the highest standard that you expect.

I wish to put on record my sincere appreciation for my colleague in the Council Rahul Hakani for designing this issue as also Vice-Chairman Bhadresh Doshi and Convenor Toral Shah for overall co-ordination. My gratitude to all the learned authors for sparing their valuable time and sharing their knowledge.

VIPUL K. CHOKSI
Chairman – Journal Committee

K. K. Ramani, *Advocate*

RERA – Overviews

1. The preamble to the RERA states its purpose and the objects as –

"to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment of building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."

1.1 Objectives

RERA aims to regulate and promote the real estate sector with the primary purpose of protecting the interest of consumers by ensuring sale of plot, apartment or building in a real estate project in an efficient and transparent manner and, for this purpose –

- To establish the Real Estate Regulatory Authority in each State/Union Territory to provide an effective implementing arm and enforce compliance with the obligations and duties of the stakeholders viz. the promoters, the real estate agents and the consumers i.e., the allottees;
- To establish an adjudicating mechanism for speedy dispute redressal by establishing Real Estate Appellate Tribunals to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority; and
- To appoint Adjudicating Officers to determine the compensation payable by the promoters, wherever the Act provides for payment of such compensation to the allottees, and for resolution of grievances relating thereto.

1.2 Territorial applicability

The Act extends to whole of India except the State of Jammu and Kashmir. The subject of legislation being a matter in the concurrent list, there are parallel legislations in quite a few States, Maharashtra being one, which have not been repealed and continue to operate with RERA. Section 88 of the Act makes it clear that the provisions of this Act are in addition to, and not in derogation of the provisions of any other law for the time being in force dealing with similar objectives. Section 89 clarifies the legal position that being a Central Act, provisions of this Act shall have effect in case of any inconsistent provision in any other Act in force.

1.3 Scope of regulatory powers

The Act seeks to regulate construction and sale of apartments for residential purposes but also projects involving

- Development of buildings as units;
- Development of buildings consisting of apartments;
- Conversion of existing buildings into apartment buildings;
- Development of land for carving out plots with or without superstructure

with the object of selling the buildings, apartments or plots to the general public.

1.4 The projects to be regulated are not restricted to development for residential purposes. The Act extends to projects covering construction for residential as well as commercial purposes. Although the purpose of industrial construction is not specifically stated, the MahaRERA has clarified that it covers construction for industrial purposes as well.

2. Registration of the projects

The Act makes it mandatory for the promoters to register their projects with the Regulatory Authority by following the procedure laid down in the rules of the relevant State. An application in the prescribed form accompanied by the fee as may be prescribed in the rules, is to be made. The same is to be made manually till the Authority operationalise a web based online system for submitting applications. It may be mentioned that the State of Maharashtra has created a website for applications for registration of the project and the real estate agents. On being satisfied that all required details have been furnished and the application for registration is in order, the Authority is required to take a decision within 30 days of the receipt of application. In case registration is granted, a certificate and a registration number is given to the promoter. He is also given a login ID and password for accessing the authority's website. If the Authority fails to take decision within 30 days, the project is deemed to have been registered and in that case, the Authority shall, within 7 days of the expiry of these 30 days, provide the registration number, login ID and password to the promoter. The Authority can refuse registration after giving opportunity of hearing to the applicant promoter.

2.1 Provision exists for withdrawal of application before the expiry of 30 days, in which case the Authority may retain certain amount, as provided in the relevant rules, for administrative and processing charges.

2.2 The registration is valid for the period as declared by the promoter for completion of the project or the phase thereof. Provision has been made for extension of the period if sufficient grounds exist, but as per RERA, the extension is not to exceed a period of one year. Rules framed by States generally provide for such extensions not to go beyond the local laws for completion of the project.

2.3 RERA provides for revocation of registration *suo motu* or on receipt of complaint, if the promoter has defaulted under the law or violated any condition of the approval or is involved in any kind of unfair practice or irregularity.

2.4 Registration of ongoing projects

RERA also regulates the projects which commenced prior to the Act coming into force, if the Completion Certificate was not issued till the date of such commencement, all such projects are required to be registered within 3 months of coming into force of Section 3 of the Act which came into force on 1st May, 2017. In case the Occupation Certificate/Completion Certificate was issued before this date there will be no requirement of registration. It has been clarified by MahaRERA that even when Occupation Certificate is received within 90 days from the commencement of the Act, the registration of the project will not be required.

2.5 Projects not required to be registered

The Act exempts following projects from the registration requirement:–

(i) Where the area of land proposed to be developed in the project does not exceed 500 square metres;

(ii) Where the total number of flats proposed to be developed, inclusive of all phases, is less than eight;

(iii) Where the promoter has already received the completion certificate in respect of an ongoing project before the coming into force of the Act; and

(iv) Where the project is a renovation, repair or redevelopment project which does not involve fresh or new allotment of flats or marketing for sale of flats.

2.6 Consequences of non-registration

The Acts prohibits a promoter from advertising, marketing, booking, selling or offering for sale or inviting persons to purchase in any manner any plot, apartment or building without registering the real estate project with the Authority. Contravention of the provision attracts penalty which may extend up to 10% of the estimated cost of the project. In case of continued default the promoter can, in addition to further penalty of 10% be made punishable with imprisonment for a term which may extend up to 3 years or with fine or both.

The issue as to whether RERA regulates only registered projects or all real estate projects has been clarified by MahaRERA to say that RERA regulates only registered projects and consequently projects which could not be registered for any reason, as well as those which are exempted from registration, are outside the ambit of RERA. Based on this, it has been clarified that the Authority will entertain complaints in respect of registered projects only.

2.7 Disclosure of information

The Act mandates furnishing of information relating to the project, the promoter and all others associated with the project which will enable the prospective buyers to take an informed decision about buying. The details required to be furnished are contained in sub-section (2) of section 4 and are comprehensive enough to include anything a purchaser should know. Besides, the rules framed by the States contain certain additional information required to be furnished along with the application for registration. In Maharashtra, such additional details are mentioned in Rule 3.

2.8 Besides furnishing the prescribed information, the promoter is required to make declaration to the effect that he has a legal title to the land, that the land is free from encumbrance, the time period within which he undertakes to complete the project and that he will be depositing 70% of the amount realised from the allottees in a separate bank account which will be withdrawn only to cover the cost of construction and the land cost of that project only, to the extent as prescribed in law and after following the procedure to be prescribed in the rules of the relevant State.

2.9 Display on the website/web page

A very significant feature of RERA is the provision which requires the Authority to display all the information and the additional information furnished by the promoter and the real estate agent on the website of the Authority to be updated quarterly for information of the public. The promoter is also required to upload all such information on the web page to be created by him. This formalises the information by bringing it in public domain which not only enables the buyer to take an informed decision but also binds the promoter and makes him liable if he deviates from the information furnished and displayed on the website.

3. Promoter's obligations

Safeguarding the interest of allottees is possible by casting certain obligations on the promoters and ensuring its compliance by suitable mechanism and deterrant consequences in case of non-compliance. Besides the obligation to get the project registered and not to advertise/sell the units till the project is registered, create a

web page and display all details therein, RERA casts other obligations which are summerised below:

3.1 To make available prescribed information to the allottee at the time of booking and issue of allotment letter

This includes the sanctioned plans, layout plans with specifications approved by the Competent Authority and the stage-wise time schedule of the completion of the project, including provision of civic infrastructure.

3.2 To obtain completion certificate/occupancy certificate

The promoter is obliged to obtain the certificate and make it available to the allottees individually or to the association of allottees, if formed. It is unlawful for the promoter to hand over the possession of the unit to the allottee without getting the occupancy/completion certificate.

3.3 To obtain Lease Certificate

Where the project has been developed on the leasehold land, the promoter should obtain the lease certificate from the relevant authorities specifying the period of lease and certifying that all dues in respect thereof have been paid.

3.4 To ensure correctness of facts disclosed in the advertisements

A buyer taking decision to buy on the basis of false, incorrect or misleading information contained in the advertisement and making an advance or deposit on that basis, is entitled to be compensated by the promoter for any loss or damage suffered by him as a result of such information. Apart from compensation, the buyer has also the option to withdraw from the project in which case he is entitled to refund of entire money paid with interest at the prescribed rate and compensation as may be determined by the Adjudicating Authority.

3.5 Not to accept more than 10% of the consideration of the unit without executing Agreement of sale

A promoter is prohibited from accepting any sum exceeding 10% of the cost of the unit as advance payment or application fees unless, he executes an agreement for sale with the allottee and gets it registered under the law of registration. Similar provision exists in MOFA with the difference that the percentage prescribed is 20% in place of 10% in RERA.

3.6 To deposit 70% of amount received from allottees in separate bank account

In order to ensure that the money received from the allottees of a project is used only for that very project and is not shifted to any other project resulting in delay in completion of that project, RERA obligates the promoter to keep 70% of the total amount realised from the allottees in a separate bank account to be used for meeting the construction cost and the land cost of that project only. To ensure this, it is provided that only so much of the amount can be withdrawn as does not exceed the amount proportionate to the completion of the project as certified by the engineer, the architect and the chartered accountant in practice. Different States have framed rules laying down the manner of computing the amount to be withdrawn and the computation of construction and land cost for this purpose. Rule 5 of Maharashtra Rules lays down the manner of such computation. RERA further provides for accounts to be audited within 6 months after the end of every financial year and obtain certificate from the chartered accountant to the effect that the amount has been withdrawn and used as per the provisions of the Act and the Rules.

3.7 To adhere to the sanctioned plans and approved specifications

The promoter should develop and complete the project in accordance with the approved plan and specifications and not depart from it in any manner, including in the matter of fixtures and fittings, amenities and common area. He cannot make any addition or alteration. For being able to

make any alteration or addition, he should obtain the previous consent of at least two-thirds number of allottees, other than the promoter, who have agreed to take the apartment. He can, however, make minor additions and alterations as may be required by the allottee himself or such minor changes as may be necessary due to architectural or structural reasons duly recommended and verified by an authorised architect or engineer after proper intimation to the allottees.

3.8 To give possession in time

The promoter is expected to complete the project and give possession in accordance with the terms of the agreement of sale and within the time specified therein. In case of failure, the allottee has the option either to withdraw from the project or continue with it. In case he decides to withdraw, the promoter is under the obligation to return the amount received by him with interest at the prescribed rate and compensation as may be determined. In case he decides to continue, the promoter will be liable for interest for every month of delay computed till the date of handing over of possession.

3.9 To compensate the allottee for loss due to defective title over the land

In case the allottee sustains any loss due to promoter's defective title of the land, the promoter will be under an obligation to compensate the allottee by an amount and in the manner as may be determined by the Adjudicating Authority. The allottee's right in the matter will not be barred by limitation under the Limitation Act or any other law in force.

3.10 To form an Association or Society of the allottees or a Federation of the same

RERA, like MOFA, requires the promoter to form a collective body of the allottees which can be an association or a society or a co-operative society or a company or any other form of organisation with allottees as member or shareholders. Once such a body is constituted, he is supposed to hand over the management of the building, its common area, amenities and facilities to such body. In case of layout, which involves construction of several buildings, such body is constituted for each building separately and an Apex Body or Federation is constituted for management of area and facilities common to all the buildings. In case there is no law governing such body in the State, RERA requires such body to be constituted within a period of three months of the majority of allottees booking their plot or apartment in the building.

3.11 To provide essential services till handing over the management to the association of allottees

Till the association of allottees is formed and the management is handed over to it, the promoter will be responsible to provide and maintain the essential services on reasonable charges. The obligation is similar to that in MOFA.

3.12 To execute conveyance in favour of allottees and their association

After the project is completed, Occupation Certificate is issued and possession is handed over to the allottees, the legal title over the plot, apartment or building is to be conveyed to the allottees by executing a registered conveyance deed. The legal title over the common area, which include the land underneath, is however, to be conveyed to the association of allottees. In cases where there is no local law providing for execution of conveyance deed and no period for conveying the title is agreed upon in the agreement of sale, the conveyance needs to be executed and registered within a period of three months from the date of issue of occupancy certificate.

3.13 To pay all outgoings till transfer of physical possession

The promoter is obliged to pay all outgoings including ground rent, municipal or other taxes, water and electricity charges, maintenance charges, etc. and all other liabilities payable to Competent Authority, banks and financial institutions relating to the project, out of money collected from the

allottees till he hands over physical possession to the allottees and/or their association.

3.14 Not to create any charge after execution of agreement of sale

The promoter is prohibited from creating any charge on the plot, apartment or building after execution of agreement of sale. In case any charge is created in contravention of the provision, such charge will not affect the rights and interest of the allottees.

3.15 To get the project insured

Promoter is obliged to obtain all such insurances as the State Government may notify which may include the title of land and building and construction of the project. He is liable to pay all premiums till the project along with the insurance is transferred to the association of allottees.

3.16 Not to assign the majority rights and liabilities to a third party

After getting the project registered and starting the sale of plot, apartment or building, the promoter cannot leave it mid-way by transferring his majority rights and liabilities to a third party. Such assignments are possible only with prior written consent of at least two-thirds number of allottees and approval of Regulatory Authority. In case of transfer after obtaining required consents, the transferee steps into the shoes of the transferer. The rights of the allottees remain unaffected. The transfer so effected will not result in extension of time to the new promoter for completing the project and he will be bound by the time period for completion declared by the erstwhile promoter in his declaration.

3.17 To rectify defects pointed out by the allottee within specified time

In case any structural or any other defect in workmanship, quality or provision of services etc. is brought to the notice of the promoter within a period of five years by the allottee from the date of getting possession, the promoter shall be bound to rectify such defects without any charge within 30 days. On failure to do so, the aggrieved allottee shall be entitled to receive appropriate compensation. The provision is similar to that in MOFA except for the difference that the period for bringing the defect to the notice of the promoter is two years under that Act.

4. Regulation of allottees

RERA seeks to regulate the activities of not only the promoters but also the allottees in order to ensure unbiased fairness in the transactions in the real estate sector. It lays down the rights and duties of allottees also. In fact the obligations of the promoters are the rights of the allottee and their rights result in the duties of the allottees. Specifically, RERA gives right to the allottees to obtain information relating to the project, to know stage-wise time schedule of completion of the project, to claim possession as per the promoters declaration, to claim refund in the event of non-completion and to obtain documents and plans after the possession is handed over by the promoter.

4.1 The allottee is responsible to make payment in the manner and within time as specified in the agreement of sale, to pay interest at the prescribed rate for any delay in the payment of any amount due, to participate in formation of society or association, to take physical possession within the specified time which is two months from the issue of occupancy certificate and to participate in execution and registration of conveyance deed. In case of failure to discharge the responsibilities, the allottee can be subjected to penalty computed on the basis of per day of the default which cumulatively can extend to 5% of the cost of the plot, apartment or building.

5. Regulation of the activities of real estate agent

RERA seeks to regulate the activities of real estate agents also. This is done by –

i. Requiring them to register themselves with the Authority which gives them the authority to operate as agent. They, in their application for registration, are required to furnish relevant information about themselves and their service record which is put in public domain. The rules framed in this respect require the application to be made in prescribed form along with specified information and documents and accompanied by prescribed fee.

ii. By laying down their duties and obligations under the Act, default in regard to which entails consequences under the Act. Any real estate agent is prohibited from facilitating the sale or purchase of any plot, apartment or building without getting registered as agent. He is not to involve himself in any unfair trade practice. He should maintain such books of account, records and documents as may be prescribed, he is responsible for facilitating the disclosure of information to which the purchaser is entitled and is not to permit any publication or advertisement of something which he does not intend to perform.

iii. By providing deterrent consequences by way of penalty and prosecution in case they fail to perform the duties or violate any provision of the Act. For failure to register and perform other obligations, he can be made liable to pay a penalty of an amount up to ₹ 10,000 per day which can go up to 5% of the cost of the plot, apartment or building, sale or purchase of which was facilitated by him.

6. Offences and penalties

Consequences of contravention of the provisions of the Act relating to the obligations of the promoter, allottee and the agent are provided by way of penalty and, in some cases, also conviction for the specified terms of imprisonment.

6.1 For promoter's default

A promoter contravening the provision requiring registration of the project and prohibiting him from advertising the project before registration, is made liable to pay penalty which can be of an amount up to 10% of the estimated cost of the project. In case of continued default even after the imposition of penalty, he can be punished with imprisonment up to three years or with fine up to further 10% of the estimated cost or, with both. Where the promoter fails to act as per provision of law relating to submission of application for registration, he can be made liable to penalty up to the amount equal to 5% of the estimated cost of the project. Contravention of any other provision is made punishable with penalty up to 5% of the estimated cost.

6.2 Promoter who fails to comply with or contravenes any order of the Authority is punishable with penalty calculated at the determined amount per day for the period of default subject to the maximum of 5% of the estimated cost of the project. Same is also the case when he fails to comply or contravenes the order or direction of the Real Estate Appellate Tribunal in which case he can be imprisoned for a term up to three years or with punished with fine which can be upto 10% of the cost of the project, or both.

6.3 For allottee's default

An allottee failing to comply with the order or direction of the Authority is liable for penalty of a determined amount per day of the default which can cumulatively be up to 5% of the cost of the plot, apartment or building. For failing to comply with or contravening the order or direction of the Real Estate Appellate Tribunal, he can be punished with imprisonment for a term up to one year or with fine for every day of default or with both. The fine can be up to an amount equal to 10% of the cost of plot, apartment or building.

6.4 For real estate agent's default

A real estate agent facilitating the sale or purchase of a plot, apartment or building without obtaining

registration is liable to a penalty of ₹ 10,000 per day of the default so that the total penalty is not to exceed 5% of the cost of the unit, the sale or purchase of which was facilitated by him. For failing to comply with or contravening the order of the Authority, he can be made liable to penalty per day of the default which can be up to 5% of the estimated cost of the plot, apartment or building. For failing to comply with or contravening the orders of the Real Estate Appellate Tribunal, punishment with imprisonment up to one year or fine up to 10% of the estimated cost or both, is provided.

7. Establishment of Real Estate Regulatory Authority

Even the best of legislation fails to achieve its objectives unless there is an effective arm to implement the provisions and take action for non-observance or contravention of those provisions. RERA provides for setting up of a Regulatory Authority by each of the Appropriate Government within a period of one year from the date of coming into force of the Act i.e., 1st May, 2016. The Authority shall be a body corporate having perpetual succession and a common seal. It shall perform regulatory as well as advisory functions. As a regulator, it will ensure compliance with the obligations cast upon the promoter, the allottee and the agent and perform incidental functions necessary for discharging such duties.

7.1 Any aggrieved person can file complaint with the Authority for any violation of the provision of the Act. The procedure for making complaint, the prescribed fee and the manner in which it is to be disposed of, is to be prescribed in the rules to be framed by the appropriate Governments.

7.2 As an advisory body, the Authority acts as a think tank for the State administration for facilitating the growth and promotion of a healthy, transparent and competitive real estate sector. It will make recommendations either *suo motu* or on request from the State Government.

8. Appointment of Adjudicating Officer

RERA provides for appointment by the Authority of Adjudicating Officer for the purpose of adjudicating compensation payable under the provisions of Sections 12, 14, 18 and 19. The officer is to be appointed by the Authority in consultation with the Appropriate Government. He should be a judicial officer who is or has been a District Judge. Any person who is entitled to compensation for the default made by the promoter can file a complaint with the Adjudicating Officer. The form in which the complaint is to be made, the fee payable and the manner of its disposal is to be prescribed in the Rules to be framed by the Appropriate Governments.

9. Setting up a Real Estate Appellate Tribunal

Recognising the need for speedy resolution of disputes in matters decided by the Authority, RERA provides for establishment of an Appellate Tribunal known as Real Estate Appellate Tribunal to adjudicate any dispute and hear and dispose of appeal against any direction, decision or order of the Authority or the Adjudicating Officer. The appeal filed by the promoter is, however, not to be entertained unless he deposits 30% of the penalty imposed or such higher amount as may be determined by the Tribunal. The Tribunal has the same powers as are vested in the Civil Court while trying a suit in the matter of enforcing attendance, production of documents, receiving evidence on affidavit, issuing commissions, reviewing its decisions, dismissing applications or deciding them ex parte and any other prescribed matter. The orders of the Tribunal are deemed to be decree of the civil court to be executed in the same manner.

ISSUES CONCERNING RERA

After doing detailed study of the Central and State legislation, a detailed representation was made to MahaRERA Authority. The representation was on the following issues. For the sake of convenience, the same are reproduced hereunder:

1. Registration

Registration of a project is mandatory under the Act. Failure to get the project registered visits with penalty and prosecution provided under Section 59 of the Act. Apart from the penal provisions, the law prohibits a promoter from advertising, soliciting customers and selling the plots, apartments or building without getting the projects registered, contravention whereof also visits with penal consequences.

1.1 There is no clarity about the status of unregistered projects. Certain projects which are to be registered may not be registered by the promoter for whatever reason. There are projects which are exempt from the requirement of registration. The status of such projects is not specified under the Act or the Rules as to whether such projects are subject to the regulatory provisions of the Act or not.

1.2 One view can be that projects which are registrable but not registered and those which are not to be registered remain outside the purview of RERA and, for all purposes will be governed by MOFA. The other view can be that getting registered is one of the obligations with consequences provided for non-compliance and all the provisions of RERA laying down obligations of the promoters, agents and allottees remain applicable in respect of unregistered projects as well. The question has assumed particular significance in respect of obligation to deposit 70% of realization in the separate bank account.

1.3 Answer to Q. 2, 5 and 12 of the Additional FAQ 2 issued by the MahaRERA states that complaints to MahaRERA have to be against registered projects only. This seems to suggest that MahaRERA will regulate the registered projects only. In view of the uncertainty in the matter, however, a clarification is solicited.

1.4 RERA Rules requires ongoing projects to be registered within a period of 90 days. As a general rule any advertisement/sale is prohibited before registration. Maharashtra, however, has allowed this period of 90 days as a free period during which period sale etc. can take place even without registration. In other words the operation of Section 3 insofar as it relates to prohibition to advertise and/or sell before registration in case of ongoing project, has been deferred in Maharashtra by a period of 90 days and the provision will apply only from the expiry of 90 days.

1.5 Is such deferment only for above purpose or impact other provisions also. We may, in this connection, refer to Answer to Q. 11 of Additional FAQ 2 which states that ongoing projects have time till 30th July to register. If before doing registration, the project has got OC/BCC, the project has been completed as per section 5(3) of the Act and hence does not require registration. Under RERA, if OC stands issued by the date of commencement of the Act, the ongoing project is not to be registered which means that issue of OC thereafter will not avoid registration. The response referred to above gives relevance to the date of registration in place of the date of commencement of the Act The scope of deferment will impact other areas also.

2. Promoters

There are cases where builders have entered into agreements with the Authorities like municipal corporation etc. for construction of affordable housing to be handed over to them, free of any charge, in consideration of additional FSI in the remaining area, without having to purchase TDR. The concerned Authority, in all probability, will sell these units. As per RERA, it is a project in which the person constructing and person selling are different and accordingly, both are co-promoters and are to be shown as such in the details to be submitted along with the application for registration.

2.1 In cases like this, issue arises as to whether the State or the Authority like MHADA or Municipal Corporation etc. are to be impleaded as co-promoter and whether such co-promoter will be subject to all the duties and responsibilities under the Act. Whether such Authority will also be liable to deposit 70% realisation in a separate bank account.

2.2 Most of the societies are going through the process of redevelopment under which they appoint a developer who is assigned development rights over society land in consideration of flats for the members, free of charge. There are divergent views in respect of whether society in such redevelopment arrangement, is a co-promoter with the developer, or not. In reply to Question No. 6 of FAQ-2 MahaRERA has stated that the existing members are members of the society which is a co-promoter in the redevelopment project. In RERA, the object of selling the plot, apartment or building is essential for a project to be called real estate project and for a person to be promoter. Since the society will not be selling the apartments in the newly constructed building but only providing them to its members in lieu of their flats in the old building, it is for consideration whether the society will fall within the term promoter so as to be liable as co-promoter with the builder. Such societies may have to be distinguished from primary co-operative societies constructing apartments or buildings for their members for initial allotment. A clarification in the matter will be useful for many societies.

3. Ongoing projects

The law or the Rules do not define the term ''Ongoing project''. We have to take a meaning as generally understood. Projects may be in different stages of development at the commencement of the Act. What will make them ongoing project putting them to the requirement of registration? Is it ongoing construction or sale or both or any other criteria?

3.1 In answer to Q. 9 in Additional FAQ 2 it is stated that if the project does not have layout/ building plan approval and if no booking or sale of flats have taken place, the project will not be called an ongoing project. In other words where neither construction has started nor any booking has taken place, it will not be ongoing. What if booking has taken place but construction has not started. Will it be ongoing? What if advertisement has taken place and construction also started but no booking has taken place. Whether it will be ongoing?

3.2 In answer to Q. 14, it is stated that an ongoing project is one where construction is still not complete, OC is yet to be obtained and building has not been occupied by allottees. It needs to be clarified whether these determining situations are cumulative or alternative or to be considered in different permutations. For instance, if construction is fully complete and all units are sold and occupied, will it be ongoing project only for the reason that OC was not received on the day of commencement of the Act. If it is so, there will be a very large number of projects to be registered which may prove unproductive as there will hardly be anything left for RERA to regulate.

3.3 It also needs clarification as to whether it is booking/sale of the apartment or occupation by allottees, which will be relevant for such determination.

4. Deposit in and withdrawal from the separate bank account

Rule 5 provides for the manner in which the amount that is required to be deposited and can be withdrawn in respect of new projects. So far as ongoing projects are concerned, it provides for the amount to be deposited but is silent about the amount that can be withdrawn. The draft rules provided that the rule in respect of new project will *mutatis mutandis* apply to ongoing projects but, the same is missing in the final rules.

4.1 In ongoing projects only the amount to be realised, and not the amount realised, is to be deposited which should imply that for withdrawal only the estimated cost of the balance project and the actual cost incurred for the balance project

should be taken into account. There is, however, need for an authentic clarification.

4.2 Rule 5 provides for amount to be realised to be deposited in separate bank account in case of ongoing projects. The words 'to be realised' are not followed by the date from which the realisation is to be reckoned. Does it envisage realisation from the date of registration or the date of commencement of the Act? On this will depend whether in case of ongoing project, realisation within the permitted period of 90 days for registration will be subject to deposit or not.

4.3 Neither the Act nor the Rules prescribe the periodicity for making deposit which raises a question as to whether 70% of each individual receipt is to be deposited or there is some periodicity prescribed for the same. It is presumed that the realisation need not directly go to the separate earmarked bank account. It should initially go to the common bank account and from there 70% thereof can go to the separate bank account.

4.4 There is a special issue arising in cases of redevelopment projects of immovable property where development is carried on the land belonging to person other than the developer. In such cases, the developer as well as the landowner are the promoters as the project is deemed to be jointly developed. The question as to whether they should open bank accounts separately has been dealt with in MahaRERA order dated 11th May, 2017 and maintenance of separate accounts has been ordered.

4.5 If separate accounts are to be opened, the landowner will have to deposit 70% of the realisation in respect of his share of constructed portion. The landowner, however, will not be incurring any cost which will mean that all his money will remain blocked till OC is received. This does not appear to be the legislative intent and a solution needs to be found.

4.6 A possible solution can either be to prescribe a single bank account for the project in which all the realisations are deposited and withdrawn as per rule 5 or, to lay down the manner of apportioning the total cost incurred between the land cost and construction cost. In substance, the cost incurred in construction of the landowner's portion is virtually the land cost for the development of the project and, if the cost relatable to landowner's portion is termed as the land cost, the landowner will be able to withdraw the proportionate cost out of his deposits.

4.7 In cases of ongoing projects, some of the plots or apartments might have been sold or booked prior to registration. It has been clarified that the registration takes place not only with reference the balance project but the whole project and such sold/booked units will also be governed by RERA. There may be situations where although the units were sold pre-registration but the amount in respect thereof is realised afterwords. It is not clear whether such realisation is subject to deposit requirement up to the date of registration. A confirmation will help.

5. Advertisements

Every layout project offers certain amenities like swimming pool, gymnasium, club house etc. which are common facilities for all the buildings/wings in the layout. Such facilities are, however, included in the approved plan of only one of the buildings in the layout. It is desirable for the promoters to inform the potential buyers of other buildings about such facilities which impacts their decision to buy. A reference to answer to question 53 in FAQ 1 prohibits mention in the advertisement of whatever is not shown in the approved plan. This raises a question about the legality of mentioning such facilities in the advertisement of other buildings.

5.1 In this connection, it is relevant to mention that the layout plan which will be showing such facilities, is required to be submitted with registration application and is also to be displayed on the website. No harm, therefore, appears to be caused if such facilities are permitted to be mentioned in the application for initial phase or building in the layout.

6. Apartments/Buildings

The Act seeks to regulate sale of plots, apartments or buildings. The apartment or building as per the definition of these terms as per the Act are those which are used or intended to be used for any residential or commercial use such as residence, office, shop, showroom, or godown or for carrying on any business, occupation, profession or trade or for any other type of use ancillary to the purpose specified. In both the definitions the intended use is residential or commercial. The specific types mentioned in the definition of apartment also fall within these uses only. The word ''industrial'' is conspicuous by its absence which is leading to a doubt as to whether RERA governs construction of industrial units.

6.1 There are divergent views on the issue. As per one view, the absence of the word 'industrial' is a conscious omission. The legislature does not intend RERA to govern industrial construction. The other view gives a wider meaning to the word commercial and feels that commercial include industrial as well. An authoritative view is therefore, solicited.

7. Land cost

Explanation III to rule 5 lays down the manner of determining the construction cost. It specifically excludes interest on sum which the promoter has raised by way of loan for the purpose of purchase of land for the project or for obtaining the development rights over such land.

7.1 Explanation I which lays down the cost includable in land cost is silent about interest mentioned above. A question arises as to whether interest on loan borrowed for purchase of land which is excluded from construction cost, can form part of land cost.

7.2 The list of cost mentioned in Explanation I is inclusive and not exhaustive. In the scheme of RERA, it appears that what is excluded from construction cost being relatable to land, can be taken to be part of land cost. This view finds support from the proforma certificate of the Chartered Accountant which includes interest cost incurred on land in the land cost. An authoritative clarification however, will be necessary.

8. Apartments on long lease

RERA applies to sale, allotment or transfer of plot, apartment or building by the promoter. The definition of 'allottee' clearly states that it will not include a person to whom such plot, apartment or building, as the case may be, is given on rent. A question in this connection arises as to whether a long-term lease can be taken as sale. Although, a long-term lease is technically a lease, a long-term lease with provision for extension gives right of occupation for a long period and may be taken to be a viable and proven form of ownership. It needs to be clarified whether long-term lease will tantamount to sale for the purpose of RERA and if so, how a long-term lease will be defined.

9. Unsold stock

Under the scheme of RERA any sale without registration of the project is prohibited. There will be situations where a project was registered up to a particular date and, for valid reasons, the registration was extended but the entire stock of plots or apartments could not be sold even by the extended, date of registration although the promoter had completed construction and obtained O.C. Will it be permissible for the promoter to sell the remaining units when registration has lapsed. Such situations will not be uncommon and some ways may have to be devised to meet them.

The MahaRERA authority was kind enough to consider the same and issue clarifications in the form of the questions and answers. The same are as under:-

1. ***Whether the rights and obligations of promoters, allottees and agents under RERA are relevant to such stakeholders in projects which are – (A) Required to be registered but not registered for any reason;***

Ans: Promoters are, liable u/s. 59, for contravention of Section 3 of RERA Act and (B) Exempt from the requirement of registration as per the Act.

Ans: Provisions of RERA will apply only to registered projects

[Paras 1.0 to 1.3]

2. Whether the provision in Maharashtra rules to permit advertisement/sale within 90 days from commencement of the Act even without registration impacts any other provision of the Act

Ans: MahaRERA follows Maharashtra Government Rules. It may have been the intention of Government of Maharashtra to not bring the Real Estate Industry to a standstill on 1st May, 2017 by stopping sales in ongoing projects. Hence a window of 90 days has been provided. [Paras 1.4 & 1.5]

3. Whether the State or its institutions can be impleaded as promoters and whether they will be subject to all the duties and obligations under the Act, Rules and Regulations.

Ans: They can be impleaded as co-promoters. Duties, obligations and liabilities of co-promoters will be determined by the agreement they sign with the promoter. Only if the co-promoters get an area share to sell, they will have interaction with buyers and therefore they should be liable to adhere to the fiscal discipline norms of 70% deposits in designated accounts.

[Paras 2.0 & 2.1]

4. Whether the society going for redevelopment, where it gets flats for the members and not for sale, is a promoter to be impleaded as a co-promoter.

Ans: Society being a landowner who is getting its revenue share, in kind, as constructed area + additional area for its members, is a co-promoter. However, the area it gets for its member is revenue share and not area share because it is not for sale to new buyers.

[Para 2.2]

5. Whether a project in which bookings were done but construction has not started will be treated as an ongoing project under RERA.

Ans: Yes, as third party rights have got created.

[Para 3.1]

5.1 Whether a project in which construction had started and advertisements were also made but no booking has taken place will be treated as ongoing project under RERA

Ans: Yes, as advertisement for sale were made. [Para 3.1]

6. Whether the following projects will be ongoing within the meaning of the Act –

(a) In which construction was complete but sale/booking had not taken place of all the units on the relevant date.

Ans: If OC is obtained, it is not ongoing

(b) In which all the units stood sold but construction was going on the relevant date.

Ans: Yes, because construction is going on and OC not obtained.

(c) In which construction as well as sale was complete on the relevant date but OC was not received.

Ans: If construction competed and apartment occupied but no OC, then it is not ongoing

[Paras 3.2 & 3.3]

7. Whether the relevant date for purposes of above will be 30th July in Maharashtra or the date of commencement of the Act i.e., 1st May.

Ans: Irrespective of 1st May or 30th July, 2017, if a project is constructed and OC obtained and prior to OC no advertisement or sale has been effected, then such project does not require registration.

8. Whether withdrawal from bank account in the case of ongoing project will be based on total estimated cost and total expenditure incurred or, on the balance estimated cost and expenditure on the balance project. [Para 4.1]

Ans: This will be clarified by MahaRERA circular

(Note: Clarified by MahaRERA on 28-6-2017 as per Circular No. 5)

9. Whether the expression 'to be realised' in Rule 5 in the context of 70% deposit in case of ongoing project refers to amount to be realized from the date of commencement of the Act or from the date of registration [Para 4.2]

Ans: This will be clarified by MahaRERA circular

(Note: Clarified by MahaRERA on 28-6-2017 as per Circular No. 5)

10. Whether deposit in separate bank account is based on individual realisation or, on the total realization during a prescribed period- say monthly or quarterly.

Ans: 70% of every realisation from the allottees has to be deposited in the separate account.[Para 4.3]

11. Whether in redevelopment projects, the cost of construction of land owner's share in constructed units can be taken as land cost and whether it will be permissible for the landowner to withdraw an amount equal to the cost incurred which is proportionate to his share in the constructed area as per the redevelopment agreement. [Para 4.4 to 4.6]

Ans: Question is not clear. If promoter + land owner are developing jointly as one entity, then they open and operate one single designated account. If land owner receives his share as revenue share or area share then he is a co-promoter.

12. Whether the amount realised post- registration in respect of the units sold pre-registration of ongoing project is subject to the requirement of deposit in separate bank account for a period of 90 days w.e.f. 1-5-2017 [Para 4.7]

Ans: Yes, but not for 90 days only but till OC is obtained.

13. Whether advertisement of a building in the layout can include the common facilities which will be available to the buyers in that building but are part of the approved plan of some other building of the layout. [Paras 5.0 & 5.1]

Ans: Yes, as long as the common facilities are registered in some phase, same or different, of the project.

14. Whether RERA have jurisdiction over the projects involving construction of units for industrial use [Paras 6.0 & 6.1]

Ans: Yes, the online registration portal of MahaRERA mentions so.

15. Whether long term lease tantamounts to transfer for the purpose of RERA? [Para 8.0]

Ans: Yes

16. Suppose a new project was registered up to 31-12-2017, the Promoter got extension of one year upto 31-12-2018. He obtained OC in October, 2018 but could not sell all apartments upto 31-12-2018. Without registration he cannot sell any apartment. What should a promoter do under such circumstances? [Para 9.0]

Ans: After OC no registration is needed. Hence, sale of apartments in building with OC does not require MahaRERA registration.

17. Whether the interest paid on the amount borrowed for acquiring land will be treated as the cost of land ? [Paras 7.0 to 7.2]

Ans: Yes.

Prasanna Sarpotdar, *Solicitor*

Application, Scope, Professional Opportunities and Shortcomings of RERA

1. Housing sector is a relatively recent urban phenomenon which has grown with the development of the free market economy. What started as an activity for catering to the basic need of humanity viz. housing, the sector has now grown to an enormous size partly due to increase in size of urban areas and new cities. Housing and building industry has retained its roots across all the States of the country regardless of how the other sectors are performing. A large part of this development coincides with the opening of the Indian economy in the late nineties when investments in private sector came to be liberated from many Government controls and an impetus was given to the private sector to grow. A large part of the investment found its way in the housing sector which was seen as an activity giving lump sum and much higher returns than the trading or manufacturing activity could ever yield.

2. The corporatisation of the housing sector has only recently taken place. It arose because the real estate projects grew in size and they demanded constant inflow of capital as well as managerial abilities. The business houses began investing in projects which earlier could have been afforded only by the Government corporations. For instance, if the private sector's development of Gurugram in Haryana is seen, it would be noticed that the same is similar to what the Government corporation CIDCO implemented in Navi Mumbai.

3. Regardless of the same, a large share of the housing sector was and still is in the hands of the Promoters and builders who do not belong to organised business houses, are much smaller in size, command very little or no individual financial strength and lack in technical abilities. It is not surprising to find a small time local trader starting a building project on a small plot of land and then try to work his way up by garnering more such projects. In the hands of such a start-up developer, the project entails palpable financial risk and invariably the risk is passed on to the flat purchasers. In spite of it flourishing in an elite urban setting, this sector has been found to be flouting many a legal provisions and try to ride over all the legal obstacles with the power of money. The situation becomes acute for a flat purchaser who is lured by an offer of lower purchase price at the beginning of the project. The purchaser does not realise that these beginning stages of the project are fraught with the maximum risks. By making investments at initial stages, the

purchaser exposes himself to all the risks which actually ought to be borne by the Promoter.

4. Apart from a few examples such as Maharashtra Ownership of Flats Act, 1963, there was no special legislation governing the real estate sector. There was a considerable difference in the types of the contracts which were being entered into between the developers and the purchasers. For example, under the Maharashtra Ownership of Flats Act, 1963 a dichotomy between the land and building was maintained, and the apartment was permitted to be sold without transfer of any share in the ownership of the underlying land. In certain parts of the country, which did not have such a local, this dichotomy was addressed by a complicated mechanism where the flat purchaser used to purchase a fractional undivided share in the project land through the realtor and then enter into a building contract with the realtor for construction of the apartment. Thus, though all other aspects of the business were the same, the legal rights of the flat purchasers differed from place to place. The situation was one-sided and the balance was never in favour of the flat purchasers in spite of introduction of the Consumer Protection Act.

5. Though the anatomy of large and a small project is the same, the magnitude of the financial and legal risk differ with the size of the project. The losses suffered by a large project are exponentially higher and far reaching. This is valid also where there are no illegalities in the project, all the attendant financial discipline is observed, but the project suffers due to lower sales, increase in cost of capital, change in other input costs or the tax structure. Thus, with all things in place, the project loss would be borne not only by the developer, but also by the investors, flat purchasers and suppliers of raw material. The situation is no different when a project suffers from illegalities and indiscipline. In such a case , though the loss can be fixed on a particular agency, the effect of the loss cannot be mitigated.

6. Thus there was a dire need to regulate with complete strictness the real estate sector and protect the end customer. This is exactly what Real Estate Regulation Act, 2016 seeks to achieve and though is yet to be tested in the courts of law, has received an encouraging reception. The RERA Bill was introduced by the Government in the year 2013. The Bill was passed by the Rajya Sabha on 10th March 2016 and by Lok Sabha on 15th March, 2016. The Act came into force from 1st May, 2016 with 59 of 92 sections notified. Remaining provisions came into force from 1st May, 2017.

7. The essence of RERA is to prove a regulatory mechanism for ensuring the timely construction and delivery of real estate projects and to provide for protection of the legal rights of the flat purchasers. The Act aims at protecting the contractual rights, but also ensures several statutory rights unto the allottees. The overall scheme Plaintiff the Act is in the nature of beneficial legislation. The protectionist nature of the legislation is evident in the headnote itself to protect the interest of the consumer in real estate sector. The Act has 92 sections spread over in 10 Chapters. Section 88 provides that the provisions of the Act shall be in addition to the provisions of other laws in force, which mean any other contemporaneously existing law can be applied. However Section 89 sets out that the provisions of RERA shall prevail notwithstanding provisions any other statute. This means that the provisions of RERA shall prevail over those of the other statutes for all the matters with which RERA deals with.

8. As per Section 3(1) of the Act, the provisions of the Act apply to all future real estate projects as well as to all the

ongoing projects which have not received Completion Certificate. Such existing projects will have to be registered within 90 days of the implementation of the Act i.e., before 31st July, 2017. Though the Act applies to projects in planning areas, the second proviso to section 3(1) makes it clear that the Competent Authority may act in the interest of the allottees of a project which may lie outside the planning area and require the Promoter to register the project. Sub-section (2) registration is not required:

(a) Where area of land proposed to be developed does not exceed 500 square metres or number of apartments proposed to be developed does not exceed 8 inclusive of all phases.

(b) Where Promoter has received completion certificate for real estate project prior to commencement of Act.

(c) For purpose of renovation or repair or redevelopment which does not involve marketing, advertising, selling or new allotment of any apartment, plot or building, under real estate project

9. Further, all the principal stakeholders in a real estate project such as consumers, developers and brokers are made subjects of the Act. The Act defines the key terms such as 'Protect' 'Building', 'Carpet Area' 'Promoter', 'Allottee' etc. in broadest possible manner so as to ensure inclusion and reduce the exclusions. This is a special feature of the Act and should prove to be a key to the interpretation of this statute in times to come. The Act aims at including within its ambit a very broad spectrum of real estate related stakeholders and transactions and to seal any escapes from application of the Act. The legislative intent and the drafting of the provisions make it abundantly clear that the applicability of the Act would not be allowed to shrink in any future legal challenges.

10. The provisions of the encompasses all the activities or stages through which the project passes through and thereby ensures the compliance by the developers of the provisions of the other statutes as well. The Act applies to allotment, sale (on freehold or leasehold basis) or transfer of plots, apartments including parking areas, shops, offices and other such properties. It does not apply where the transaction is for letting out properties etc. on rent. Thus, not only the building constructions schemes, but also the plot layout schemes would be subjected to the provisions of the Act.

11. Sections (4) and (11) of the Act put an onus on the Promoter to make varies disclosures relating to not only the project, but also of the legal capacity and financial standing of the Promoter himself. The project registration form being Form 'A' under Rule 3(3) makes it mandatory for the Promoter to disclose all the projects launched by the Promoter in last 5 years whether completed or being developed. It also requires a disclosure of all the legal cases pending on such project.

So far as disclosure of the particular project is concerned, the information to be filed with the registering authority is indeed vast. Thus the nature of the Act is to mandate a voluntary disclosure of information and require the Promoter to adhere to the project proposal strictly as registered. The scope of the Act being regulatory, it would have a positive impact on the real estate transactions so far as consumers are concerned.

12. A very important feature of this Act is of putting restrictions on the appropriation of the sale consideration generated from the project. The Act puts restrictions on the quantum of consideration which a Promoter can accept from the allotee before

registration of the agreement for sale/ allotment. Though the Act is silent on the quantum of money which can be recovered subsequently by the Promoter, the model form of agreement suggests stage-wise recovery of the sale consideration where certain percentages are suggested for each stage. So far as Maharashtra is concerned, the efficacy of the provisions of the model agreement is found in Rule 10 of which states that the modification to the model form of agreement can be made only to the extent which does not contradict the provisions of Act. Thus the possibility of 'Contracting out' of the statutory provisions is nullified. Since the model form is suggested to be used as a proforma throughout the county, its language has been kept broad, but the intent has been kept very sharp.

13. Normally it is a prerogative of the seller to appropriate the sale consideration. In the event of the seller failing to deliver property as per the contract, the seller would be held accountable for the said sum received by the seller. However RERA takes further strides in keeping with its regulatory nature and provides in Section 4(2)(l)(D) that the Promoter is restricted from withdrawal of 70% of the amount realised from the allottee and the same shall be deposited in a separate account to cover the (a) costs of construction and (b) the land costs. Any withdrawal from the said account is permissible only to the extent of the completed construction as would be certified by the project engineer, architect and chartered accountant. A recent notification issued by MAHARERA dispenses with submission of Chartered Accountant's certificate to the bank, but makes it clear that the Promoter shall be required to retain the said certificate.

14. The Act relies heavily on the contribution of the professional expertise of several professionals in giving effect to the provisions of the Act. On a careful reading of the Act, the key importance given to the professional contribution by Advocates, Chartered Accountants, Engineers, Architects and Cost Accountants becomes evident. For example, an advocate's title certificate has been made mandatory. Though the same is already known in Maharashtra owing to the provisions of MOFA, in many other parts of the country such certification of title was not required for registration of agreement of the sale of an apartment. Now the same has been made a statutory requirement. Also though the role of an Architect was known to every common flat purchaser, the statutory role envisaged by RERA for Architect and Civil Engineer in certification of completed work is a newly added concept. The intension of the legislation is very clear – it seeks a third party validation of the facts which are claimed by the Promoter. In addition to role of the above professionals, in the matter of determining the costing of the project, not only the certified cost accountants but also the skilled quantity surveyors would gain importance.

15. Though the Act seeks to improve the situation in the property market, the Act is not without limitations of its own. Some of the very acute limitations can be summarised as follows:

(a) The greatest impact of RERA will be on the on-going projects. At this point of time the projects are bound to be at varying stages of completion where financial and legal commitments are already in place. In such a situation, it is difficult to make material changes to such crystallised positions. The Act could have been made applicable to new projects which are yet to be

launched or to those projects where the plans were yet to be approved and booking is not yet taken.

(b) The provision that only 10% of the sale consideration can be accepted in advance before the execution of the agreement for sale would immediately result in two consequences – that the early buyers would lose the opportunity to buy properties at cheaper rates and concommitantly the promoters would lose the upfront finances generated from such pre-launch bookings. This may result in increasing the price of properties.

(c) The resultant situation may give rise to unfair competition amongst Promoters and also lose the level playing field for the Promoters. Though ultimately the Promoters would pass on the increased cost to allottees, the smaller Promoters would find it difficult to fund for the initial project stages which are expensive. This would result in big Promoters becoming even bigger while leaving no scope for the smaller ones to grow.

(d) The Act envisages multiple registrations and thereby increases burden on the Promoters. For example, if a project has two phases, then each phase will be considered as a separate project and the registration would be necessary. This is bound to increase the pressure on the Promoters. This is bound to affect the timelines.

(e) Though the Act limits the rights of the allottee only to the apartment or plot bought by the allottee, in many other respects the allottee has been given a place where he/she can effect the lawful commercial interests of the Promoter in respect of the larger layout. For example, if FSI increases in the middle of the project implementation, then it becomes the right of the Promoter to construct further by using the increased FSI. However, now under Section 14 of RERA, the Promoter shall be required to obtain consent of 2/3rd allottees before the plans for the increased FSI can be submitted for approval. Such provisions are very difficult to be implemented in reality.

(f) RERA treats the landowners, contractors etc. as 'Co-Promoter' where the landowners, contractors etc. are given a share in the saleable areas. Though it may sound to be a legal fiction, considering the huge responsibilities on the shoulders of Promoters, the said legal capacity shall prove to be dissuading to property owners and they will shy away from lifting share in the sale areas. This will result in Promoters being compelled to compensate the landowners etc. in monetary terms and the same is bound to increase financial costs.

(g) The period of 60 days for refund in case of cancellation of booking is short. It cuts into the finances of the Promoter who shall now be required to raise funds so as to refund the sums paid by such buyer. The Act should treat the defaulting buyer on the same footing as that of the defaulting Promoter.

16. In order to give proper effect to this central legislation, the following suggestions become relevant. The law has regulated most of the inputs which are used in real estate project. However, in many areas, the Government should take further steps.

(a) Common title and tenure

The lands which are used for constructions are having various types of

titles. Some are Government lands, some are private freehold and rest are limited grant or leasehold lands or limited tenure lands. In special cases such as providing housing to slum dwellers or project affected persons by Government authorities, the said independent as well as limited titles are abolished and the entire land receives a unified status. This helps in not only implementing the scheme without legal hassles, but also in preventing any claims on title of the land after project implementation commences. Hence, for a smooth implementation of the Act post the completion of the project, it would be in the best interest of all the stakeholders that the project land should be declared as 'tenure free' or 'freehold' and the association of buyers should be accorded the superior dominion over the same.

(b) Formation and Registration of Allottee's Association

Section (17) of the Act requires a Promoter to transfer the title of the land to the association of allottees. Thus the execution of the deed of conveyance of the underlying land favouring the association is a statutory obligation. In order to ensure that the association is incorporated, the Competent Authority should be accorded the status of registering authority for registration of the said association. Further, a mandatory provision should be made requiring the Promoters to file returns of the project sales made by them with the Competent Authority and upon it becoming evident that the requisite number of buyers have purchased the units in a project, the Competent Authority should register such an association whether or not the Promoter takes any steps.

(c) Deemed conveyance

Since the Act envisages it to be statutory right of allottees to become members of the association and own the subject land, it would be in the best interest of the allottees if the Competent Authority is given powers to issue certificate of deemed conveyance. A similar provision exist in MOFA, 1963 and the same has been proved to be very effective in Maharashtra. However, such a provision is missing in RERA as it exist now and may, therefore, be inserted.

(d) Change of Promoter

Where it becomes evident that a Promoter shall be in no position to complete the project and hence no amount of statutory directions can ensure delivery of property to the buyers, it would be in the interest of the allottees if a mechanism is implemented to effect change of developer. The State Government of Maharashtra has taken care of this issue while framing rules for implementation of slum redevelopment projects. In dire cases, the statutory provisions enable the slum dwellers to effect change of the developer. In such a case, as a corollary, the developer is changed even for the freesale component. This fact should be taken note of and a similar provisions be made in case of other projects also. In other words, a more positive role be given to the allottees in deciding their fate in case a Promoter fails to deliver.

The number of legal issues which may arise from real estate project are myriad. There can never be a permanent solution to each and every issue associated with real estate projects. However, RERA does take positive steps which were felt required in many parts of the country for regulating this sector.

CA Ramesh Prabhu

Registration of the Real Estate Project and Agent with Real Estate Regulatory Authority (RERA)

1. Introduction

The real estate sector is governed by multiple laws of Central and State Governments but largely remained unregulated. The real estate as the word suggests involves immovable property which are developed and under development. The Government having realised that the real estate development need a comprehensive regulator to have orderly growth and accordingly enacted a new legislation called "Real Estate (Regulation and Development) Act, 2016 which has completely become effective from 1st May, 2017 across India except Jammu and Kashmir.

The main focus of RERA is to bring complete transparency by registering the maximum real estate projects with the Authority.

2. About Real Estate Project

As the word itself indicates real estate project means any immovable property which is developed or will be developed as a plot, apartment or building for the purpose of sale of some or all them.

As per Section 2(zn) of the Act, "real estate project" "real estate project" means

(i) The development of a building, or

(ii) A building consisting of apartments, or

(iii) Converting an existing building or a part thereof into apartments, or

(iv) The development of land into plots or apartment, as the case may be,

(v) For the purpose of selling all or some of the said apartments or plots or building, as the case may be, and

(vi) Includes the common areas,

(vii) The development works,

(viii) All improvements and structures thereon, and

(ix) All easement rights and

(x) Appurtenances belonging thereto.

Words such as apartment, building, immovable property, common areas, development work etc. have been defined sub-sections of section 2 of the Act. It becomes clear that the "Real Estate Project" is an inclusive definition and covers all types of development of immovable property including the redevelopment of the property done for the purpose of selling all or some of the apartments, plot or building used for any purpose as commercial, residential, industrial etc.

3. About the promoter or developer or co-promoter of a real estate project

Any person who constructs or causes construction of real estate project for the purpose of sale of some or all of them are considered as the developer or promote or builder or Co-promoter who is/are made liable, responsible and accountable under the Act.

(a) As per Section 2(zk) the term "Promoter" means

(i) A person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) A person who develops the land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) Any development authority or any other public body in respect of allottees of—

(a) Buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) Plots owned by such authority or body or placed at their disposal by the Government.

(c) For the purpose of selling all or some of the apartments or plots; or

(iv) An apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) Any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) Such other person who constructs any building or apartment for sale to the general public.

Explanation— For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder.

(b) Co-promoter as defined by MahaRERA Order dated 11-5-2017

Considering the fact that a particular project is many times developed jointly by the owner, developer, investors etc, MahaRERA has issued an order vide Maha-RERA/LA/32/2017 dated 11th May, 2017 to include the co-promoter at the time of registering the real estate project.

The MahaRERA *vide* its above order at para No. 5, defined "co-promoter" means and includes any person(s) or

ogranisation(s) who, under any agreement or arrangement with the promoter of a Real Estate Project allotted or entitled to a share of total revenue generated from sale of apartments or share of the total area developed in the real estate project. The liabilities of such co-promoter shall be as per the agreement or arrangement with the promoters. However, for withdrawal from designated bank Account, they shall be at par with the promoter of the Real Estate Project.

Further, the arrangement or agreement of co-promoter(s) with promoter should clearly detail the share of co-promoter(s) and a copy of the said arrangement or agreement should be uploaded on the MahaRERA portal, at the time of registration, along with other details of the co-promoter(s). Such co-promoter/ individuals / organisation should submit a declaration in Form B of MahaRERA (Regulation and Development) (Registration of Real Estate Project, Registration of Real Estate Agents, Rate of Interest and Disclosures on Website) Rules, 2017. Further each of the co-promoters/ individuals/ Organisation, entitled to share of the total area developed, should open separate bank account for deposit of 70% of the sale proceeds realised from the allottees.

In the online application for registration of Real Estate Project, to submit the details of co-promoter, a separate window / page has been incorporated post the above order dated 11th May, 2017 by MahaRERA.

Authors note regarding the promoter

From the two definitions of promoter, person as per the Act, co-promoter defined by the order dated 11th May, 2017 of MahaRERA and the explanation provided to the definition of promoter, it is very clear that the definition of the promoter is an inclusive definition. It includes person who constructs and causes construction such as all individuals, legal entities, non-legal entities whether registered or not, Government authorities, co-operative societies, associations etc. and also differ persons who constructs and sells and includes both.

Thus the definition of promoter includes following persons :

(1) Developer or builder who constructs the real estate project

(2) Land owner who causes the construction through the developer by executing the development agreement

(3) Financier or investors who causes construction by paying the required amount

(4) Contractor who constructs and sells the apartment

(5) The person who sells after getting it constructed as an investor, financier, land owner etc.

(6) Co-operative Housing Societies/Trust / Institutions who execute the development agreement with the builder and gets area sharing from them whether to sell in the market or for self-use.

4. Real Estate Projects which require registration

(1) **Section 3(1) of the Act which provides for registration of the Real Estate Project before the advertisement, sale, marketing of any Real Estate Projects. The proviso to this section has given a period of 3 months to register the ongoing projects which do not have completion or occupation certificate as the case may be**.

(2) **Section** 3(2) exempts following projects from the requirement of registration

(a) Where the area of land proposed to be developed does not exceed five hundred square metres or

(b) Where the number of apartments proposed to be developed does not exceed eight, inclusive of all phases;

(c) Where the promoter has received completion certificate for a Real Estate Project prior to commencement of this Act;

(d) Where the project is developed for the purpose of renovation or repair or redevelopment which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the Real Estate Project.

(3) Therefore every Real Estate Project whose area is more than 500 square metres even if the number of apartments, flats or units are less than 8 including all the phases and all types of units like commercial, residential etc., they are required to register the project. Similarly, if the area of land is less than 500 square metres but if the number of apartments, units whether commercial or residential in all phases together are more than 8 in number, such projects also required to be registered. All the areas in Maharashtra which fulfil the above criteria requires to be registered as Real Estate Project as and when the promoter wants to market, advertise, sell some, any or all of the apartments, plots or buildings.

Further considering the status of the Real Estate Project and the intention of the promoter, provision for Registration of Real Estate Project with Real Estate Regulatory Authority (RERA) has been made in Section 3 of the Act.

They can be classified into four situations and the registration requirement with RERA may be explained in detail as under:

(1) New projects

As per section 3(1) of Real Estate (Regulation and Development) Act, 2016, all the new real estate projects have to be registered, if the promoter wants to :

(i) Advertise,

(ii) Market,

(iii) Book,

(iv) Sell or

(v) Offer for sale, or

(vi) Invite persons to purchase

(vii) In any manner any plot, apartment or building, as the case may be,

(viii) In any real estate project or part of it,

(ix) In any planning area.

(2) Ongoing projects

As per first proviso to section 3(1) of RERA, 2016, all the projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter has to make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act (i.e., on or before 31st July, 2017).

(3) Projects outside the planning area

All the projects other than exempted projects developed in the planning area need to be registered. As per the notification issued under Maharashtra Regional Town Planning Act, 1966 (MRTP Act), entire Maharashtra including the rural areas are notified as planning area and therefore, all the projects other than exempted projects in Maharashtra required to be registered with the Authority.

As per section 3(1) of the Act, the projects which are developed outside the planning area are not required to be registered under the Act.

However, second proviso to section 3(1) of the Act, provides that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(4) Projects exempted from registration

As per section 3(2) of the Act, no registration of the real estate project shall be required—

(a) Where the area of land proposed to be developed does not exceed five hundred square metres inclusive of all phases or

(b) The number of apartments proposed to be developed does not exceed eight inclusive of all phases:

As per first proviso to section 3(2) of the Act, provides that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square metres or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act; Maharashtra Government has not issued any notification to reduce the number of units or lesser area for registration of the real estate projects.

(c) Where the promoter has received completion certificate (for Maharashtra Occupation Certificate or Completion Certificate whichever is earlier) for a real estate project prior to commencement of this Act;

(d) For the purpose of renovation or repair or redevelopment which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

(5) If the project is ongoing and also buildings which are not having Occupation / Completion Certificate as on 1st May, 2017 are required to register within 3 months and till such date cannot advertise, market and sell the plot, apartment or buildings as per the RERA Act, 2016 and also as per the clarification issued by MHUPA on 12th June, 2017. However, MahaRERA 2nd provisio to **Rule 4(4) of MahaRERA Rules, 2017 provides** "that, at the end of ninety days from the date of notification of section 3 of the Act, the promoter shall not advertise, market, book, sell or offer for sale or invite persons to purchase in any manner any plot, apartment or building in respect of such land parcel unless he registers such independent phase as a separate real estate project within the meaning of clause (c) of the Explanation to section 3 and even Shri Gautam Chatterjee, in number of meetings has expressed that till 30th July, the ongoing projects may be advertised.

Considering this contrary provision of the Act and Rules, the provision of Act shall prevail. However, the implementation of the provision of the Act is done by the appropriate Government (in this case Maharashtra State Government) who will be governed by the Rules notified. Further in case of contrary provision, the benefit of doubts are always given by the court and the authorities to the person against whom complaints are lodged. Therefore, in Maharashtra, the developers may continue to advertise of the ongoing projects till 30th July, 2017 without registration but thereafter, they cannot book, sell, advertise or market any on going projects or new projects without first registering the same. However, the projects which they have obtained OC before the commencement of the Act (before 1st May, 2017) may be advertised even after 31st July, 2017. All new projects which are started after 1st May, 2017 and even after receiving OC, they will have to register the project with the Real Estate Regulatory Authority as provided under section 3 of the Act and then only market, advertise or

sell the plot, apartment or the building in a Real Estate Project.

(6) In case, the projects which required registration and if the complaint is filed before MahaRERA, by any allottees, against such builder, MahaRERA will consider it as source information. MahaRERA will issue show cause notice. After hearing the promoter, MahaRERA may if finds violating the provision shall direct the promoter to register within a stipulated time and also may levy of penalty under section 59(1) of the Act which may extend up to 10% of Estimated cost of the project as determined by the Authority. Therefore, in all legal advice, we need to guide the promoter to register the project and give an affidavit in Form B within which period the project shall be completed by obtaining necessary OC/Completion Certificate and also submit the estimated cost to be incurred to complete the project. There is wrong notion among the promoters and some of the consultants that if all the stock is sold and is nothing balance to be marketed, then there is no requirement to register the project, even if the same falls under ongoing. They are under the wrong notion that they will not be doing any future sales or marketing of the project after 1st May, 2017 and so need not register with RERA. Since such promoters have already created the liabilities and sales are already affected and work is in progress, the project is not completed, therefore, they need to register with MahaRERA, even if there is no future sales to be done. ***The point to be remembered is that the exemptions to the registration of the project with RERA doesn't exempt the promoter from other rules and regulation as per this act* Further, the period of relaxation or time for registration will be over by 31st July, 2017 and thereafter, every ongoing projects which do not have Occupation or Completion Certificate required to be registered even if one or more apartments are sold earlier or whenever the promoter decides to market, sell or advertise about the project.**

5. Application for Registration of the project and the documents required

MahaRERA has made the system driven online application since the commencement of the Act. Therefore, all the application for registration of the project need to be submitted online on the MahaRERA portal: www.maharerait.mahaonline.gov.in.

SECTION 4 OF THE ACT AND **CHAPTER II** of The Real Estate (Regulation and Development) Rules 2017 deals with the **REAL ESTATE PROJECTS.**

MahaRERA Rule No. 3, 4 and 5 provide the rules for the Information to be furnished **by the promoter for the registration** of Real Estate Project.

More than 50 projects have already been registered in Maharashtra which can be searched by visiting the above website district wise by going through the respective division.

When any promoter wants to register the Real Estate Project following steps need to be followed by visiting MahaRERA portal:

(1) Create the Login and Password of the promoter who wants to register the Real Estate Project. Thus you create your own login details to visit the website and also to upload the information at the time of application as well on regular basis.

(2) Submit the details of the entity which is undertaking the project and its complete details like individual, partnership firm, company, directors etc. Thus promoter gets registered.

(3) Submit the project details which could be one phase of the entire project with demarcated land area or register the entire project consisting of many phases. For submitting the details what is required is approval of the layout with sanction of at least one wing/building in the layout.

All the details of the project either as a whole or in phases of the project such as number of buildings, FSI sanctioned, FSI proposed to be used in due course in that project under registration, has to be submitted. The layout has to be approved as IOD or Letter of Approval etc. The date of completion of the project which is being registered and also various documents as provided under section 4, MahaRERA Rules 3, 4 and 5 need to be submitted.

(4) Then submit the details of the building or wing or floors which is defined as phase 1 or 2 as the case may be registered. In this case only that phase is registered and apartment in that phase may be offered for advertise or sale and not in any of the proposed phases... The additional phase is disclosed but not registered.

(5) Thus once the promoter is registered, then give the complete details of the entire project or layout and then the declaration B should be only for phases of the project which you are registering.

(6) Then, you may go on adding new phases for registration and each phase will be given a separate registration number.

(7) Promoter or the applicant needs to go through section 4(2) which has provided the details and disclosure to be made at the time of registration of the Real Estate Project. Further MahaRERA Rule 3, 4 and 5 provides additional details to be submitted by the promoter/applicant at the time of registration of the project.

(8) MahaRERA has also notified Maharashtra Real Estate Regulatory Authority (General) Regulations, 2017 on 24th April, 2017. These regulations have provided the various formats to be used by the three professionals which are as under:

(a) Architect to certify the percentage of construction completed (Form 1)

(b) Engineer to certify the cost incurred (Form 2) and

(c) Chartered Accountant to certify the cost of the land and construction incurred as per the books of account and the estimated cost to complete the balance construction (Form 3). All these certificates have been made an Annexure to this article.

(9) The application for registration has to be done in Maharashtra online by visiting MahaRERA portal www.maharera.mahaonline.gov.in. Some of the details which are required under the Act, Rules, Regulations and orders are not provided in the online application. We are of the view that all this information needs to be submitted to the authority in a PDF format as an Annexure to Form B which is a declaration in the form of affidavit submitted to the Authority at the time of registration. The Form B is also given at the end of this article as Annexure. Some of the details which are compulsory to be submitted to the Authority but not provided separately in the online application are as under:

(b) Proforma of Conveyance Deed proposed to be signed with the allottees.

(c) Areas of exclusive balcony and verandah and areas of exclusive open terrace attached to the apartments.

(d) Particulars in respect of architecture and design standards, type of construction technology etc. under Rule 3(2)(g) of General Rules.

(e) Nature of organisation of the allottees to be constituted and to which title of the land is to be conveyed.

(f) Offsite expenditure under the heading Cost of construction.

(g) Other requirements are listed in Annexure 1.

(i) **Registration fees : As per Rule 3(5)(i) application fees for registration fees will be calculated on the area** of the land proposed to be developed at the rate of, **rupees ten per square metre,** subject to a **minimum** of rupees fifty thousand only and a maximum of rupees ten lakhs. (The website charges for the registration of fees will be ₹ 750 additionally has to be paid).

6. Procedure to grant, withdraw or reject the application:

(1) Section 5 of the Act provides for the Authority to scrutinise the application and grant or reject the same within 30 days from the date of application . After the expiry of 30 days it is deemed to have been registered.

(2) On granting or deemed to have been registered, the Authority shall give the Login and Password of the Authority website where, the complete details of the project shall be uploaded for the public viewing and also to update on quarterly basis the progress of the work and all the approvals already received and subsequently received for the benefit of the clients.

(3) The registration granted under this Section shall be valid for a period declared by the promoter under sub-clause (C) of clause (1) of sub-section (2) of Section 4 for completion of the project or phase thereof, as the case may be."

7. Procedure to get the extension of the registration?

(1) Section 6 of the Act provides regarding the extension of the period of registration.

The registration granted under section 5 may be extended by the Authority on an application made by the promoter due to *force majeure,* in such form and on payment of such fee as may be specified by regulations made by the Authority. The maximum extension that can be given for the project is one year.

Explanation — For the purpose of this section, the expression "force majeure" shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project

8. Situations and the procedure to be followed by the authority before cancellation of the project?

(1) Section 7 of the Act provides for the cancellation of the Registered real estate project by the Authority on receipt of a complaint or *suo motu* in this behalf or on the recommendation of the competent authority, revoke the registration granted under section 5, after being satisfied that the promoter has really done serious violations or for unfair trade practices.

(2) The Authority, upon the revocation of the registration,

(a) Shall debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;

(b) Shall facilitate the remaining development works to be carried out in accordance with the provisions of section 8;

(c) Shall direct the bank holding the project bank account, to freeze the account, and thereafter take such further necessary actions, including consequent defreezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8;

(d) May, to protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.

9. Consequences of lapse or revocation of the registration?

As per Section 8 , it is an obligation on the Authority upon lapse of the registration or on revocation of the registration under this Act, to consult the appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority.

10. About separate designated account to deposit of 70% of the sum received from the customer

(1) Section 4(2)(l)(D) provides that the promoter shall maintain a 'separate account' for every project undertaken by him wherein seventy per cent of the money received from the allottees shall be deposited for the purposes of construction and land cost. The account has to be self maintained and is not an escrow account requiring the approval of the Authority for withdrawal. Section 4(2)(l)(D) clearly provides that the funds can only be used for construction and land cost.

(2) As per section 4(2)(l)(D) first and second provisos, the promoter is required to withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project. In addition, the promoter is permitted to withdraw from the separate account after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project:

11. What are the obligations of the promoter post registration

(1) As per Section 11(1) the promoter shall, upon receiving his Login ID and password create his webpage on the website of the Authority and enter all details of the proposed project as provided under sub-section (2) of section 4, in all the fields as provided, for public viewing, including—

(a) Details of the registration granted by the Authority;

(b) Quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;

(c) Quarterly up-to-date the list of number of garages booked;

(d) Quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;

(e) Quarterly up-to-date status of the project; and

(f) Such other information and documents as may be specified by the regulations made by the Authority.

(2) As per Section 11(2) the advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered

project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.

(3) As per Section 11(3) the promoter at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:—

(a) Sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;

(b) The stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

(4) As per Section 4(2)(l(D) provides that 70% of the collection from the buyers should be deposited in a separate designated account which should be utilised only for the purpose of land cost and construction as per the certificate issued by Architect, Engineer and Chartered Accountant.

(5) As per Section 4(2)(l)(D) provides for the Annual Audit to be done by a practising Chartered Accountant.

12. Penalty for non registration

(1) As per section 59. (1) If any promoter contravenes the provisions of section 3 (regarding the registration of the Real Estate Project), he shall be liable to a penalty which may extend up to ten per cent of the estimated cost of the Real Estate Project as determined by the Authority.

(2) As per section 59(2) If any promoter does not comply with the orders, decisions or directions issued under sub-section (1) or continues to violate the provisions of section 3, he shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten per cent. of the estimated cost of the real estate project, or with both.

Therefore, it is in the interest of the developer / promoter to register the project before effecting any sale, advertising or marketing of any real estate projects.

13. Registration of Real Estate Agent

(1) Section 9 provides regarding the registration of every Real Estate Agent who facilitates any sale of plot, apartment or building in any Real Estate Project. As per MAHARERA Rules, 2017, the estate agents may be registered by submitting an online application by visiting MahaRERA website for a period of 5 years. For individual registration fees is ₹ 10,000/- and for other than individuals the fees is ₹ 1,00,000/-

(2) Section 10 of the Act provides for various duties of the estate agent in which includes sale of only plot, apartment and buildings in any Real Estate Projects which is registered with the Authority and such agents name also should be disclosed by the promoter on his website as authorized Agent.

Let us sacrifice our today so that our children can have a better tomorrow.

— Dr. A. P. J. Abdul Kalam

Pravin Veera, *Advocate & Solicitor*

Rights and Duties of Promoters

Promoter

The term promoter has been defined under Section 2(zk) of Real Estate (Regulation & Development) Act, 2016 (RERA) as under:

"promoter" means -

(i) A person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) A person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) Any development authority or any other public body in respect of allottees of—

(a) Buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) Plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) An apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its members or in respect of the allottees of such apartments or buildings; or

(v) Any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) Such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder.

A promoter is person who develops or causes to develop a real estate project involving construction of building or buildings consisting of apartments or division of land into various plots for the purpose of selling such apartments or sub-divided plots to other persons. To bring such person within the definition of "promoter" it is necessary that the building/s or apartments in such buildings or the plots are intended for the purpose of sale. It may be noted that now the authorities or bodies such as MHADA etc., who construct buildings or apartments for sale on the lands owned by them or placed or on the land placed at their disposal by the Government are also covered by the definition of the Promoters under RERA.

Co-Promoter

In the course of development of a real estate projects the promoters (i.e. developers) enter into agreement/arrangement with individuals or organisation by which such individuals / organisations became entitled to a share of the total sale proceeds realised from sale of the apartments in the building/s or such persons/organisations became entitled to a share in the constructed area of the building upon development of land and such persons / organisations are entitled to sale such the premises coming to their share and are entitled to get the sale proceeds thereof. Such persons / organisations are not covered by the definition of the term "promoter" under RERA. By Office Order dated 11th May, 2017 passed by Maharashtra Real Estate Regulatory Authority such persons/ orgnisations should be considered as Promoters and hence shall be termed as co-promoters.

Since the term co-promoter is not defined in the RERA Rules or Regulations in exercise of the powers vested in MahaRERA under Regulation No. 38 of Maharashtra Real Estate Regulatory Authority (General) Regulations 2017, the definition of co-promoter has been notified as under:

"co-promoter" means and includes any person(s) or organisation(s) who, under any agreement or arrangement with the promoter of a Real Estate Project is allotted or entitled to a share of total revenue generated from sale of apartments or share of the total area developed in the real estate project. It has been clarified that the liabilities of such co-promoters shall be as per the agreement or arrangement with the promoters, however for withdrawal from designated bank account, such co-promoters shall be at par with the promoter of the Real Estate Project.

The said Order of MahaRERA also provides that:

(1) The arrangement or agreement of co-promoter(s) with Promoter should clearly detail the share of co-promoter(s) and a copy of the said arrangement or agreement should be uploaded on the MahaRERA portal, at the time of registration of the real estate project, along with other details of the co-promoter(s).

(2) Such co-promoters/Individuls/ Organisation should submit a declaration in Form B of MahaRERA (Regulation & Development) (Registration of Real Estate Project, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017.

(3) Each of the co-promoters/Individuals/ Organisation, entitled to share of the total area developed, should open separate bank account for deposit of 70% of the sale proceeds realised from the allottees to whom the apartments are allotted / sold by them.

Functions and duties of the promoter

The various functions and duties of the promoter under RERA are as under:

TO GET THE REAL ESTATE PROJECT REGISTERED WITH THE REAL ESTATE REGULATORY AUTHORITY [Sec. 1]

Every promoter in respect of his projects which are ongoing on the date of commencement of the

RERA and for which the Completion Certificate / Occupation Certificate has not been issued by the Competent Authority is required to get such ongoing projects registered with the Real Estate Regulatory Authority (i.e., RERA authority) within three months from the date of commencement of RERA i.e., on or before 31st July, 2017.

NOT TO ADVERTISE, MARKET OR OFFER FOR SALE WITHOUT REGISTERING PROJECT WITH RERA AUTHORITY [Sec.3 (1)]:
Under Section 3 (1) of RERA a promoter is prohibited from advertising, marketing, booking, selling or offering for sale or inviting persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project with the Real Estate Regulatory Authority.

TO CREATE A WEBPAGE AND DISPLAY THE DETAILS OF THE PROPOSED PROJECT [Sec.11 (1)]
Upon receiving his Login ID and password under Section 5(1)(a) or under Section 5(2) of RERA as the case may be, it is the duty of the promoter to create his webpage on the website of the RERA Authority and enter all details of the proposed real estate project for public viewing, including—

(1) Details of the registration of the project granted by the Authority;

(2) Quarterly up-to-date list of (i) number and types of apartments or plots, as the case may be, booked by the promoter, (ii) number of garages booked by the promoter and (iii) approvals taken and the approvals which are pending subsequent to commencement certificate;

(3) Quarterly up-to-date status of the project; and

(4) Such other information and documents as may be specified by the regulations made by the Authority.

ADVERTISEMENT OR PROSPECTUS BY THE PROMOTER [Sec.11 (2)] :
As per section 11(2) of RERA the promoter is required to mention prominently in all advertisements and/or prospectus issued by the promoter the website address of the Authority which contains all the details of the registered project as well as the registration number obtained from the Authority and such other matters incidental thereto.

TO MAKE AVAILABLE CERTAIN DOCUMENTS AT THE TIME OF BOOKING AND ISSUE OF ALLOTMENT LETTER [Sec.11(3)]
As per section 11(3) of RERA at the time of the booking and issue of allotment letter to the allottee the promoter shall be responsible to make available to the allottee the sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority and the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

PROMOTER RESPONSIBLE FOR ALL OBLIGATIONS AND RESPONSIBILITIES AS PER AGREEMENT FOR SALE [Sec.11(4)]:
The promoter shall be responsible for all obligations, responsibilities and functions under the provisions of RERA or the rules and regulations made thereunder or to the allottees as per the agreement for sale executed by and between the promoter and the allottees, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the conveyance of the common areas to the association of allottees or the competent authority, as the case may be.

Under section 14(3) of the RERA the responsibility of the promoter, with respect to the structural defect or any other defect shall be for the period of five years therefore such responsibility of the promoter shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed till the completion of the period of five years.

TO OBTAIN THE COMPLETION CERTIFICATE OR THE OCCUPANCY CERTIFICATE [Sec.11 (4)(b)]:
It will be the responsibility of the promoter to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the authority concerned as per applicable law and furnish the same to the allottees or to the association of allottees, as the case may be.

TO OBTAIN THE LEASE CERTIFICATE [Sec.11 (4)(c)]:
If the real estate project is developed on a leasehold land it will be the responsibility of the Promoter to obtain the lease certificate, specifying the period of lease and certifying that all dues and charges in regard to the leasehold land have been paid, and to provide such lease certificate to the allottees individually or to association of the allottees, as the case may be.

TO PROVIDE AND MAINTAIN ESSENTIAL SERVICES [Sec.11 (4)(d)]:
The Promoter shall be responsible for provision and maintenance of the essential services, on reasonable charges, till the time the maintenance of the project is taken over by the association of the allottees.

TO FORM THE ASSOCIATION OR SOCIETY OF ALLOTTEES [Sec.11 (4)(e)]:
To enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the association of allottees in accordance with the applicable laws. Provided that in the absence of local laws, the association of allottees, shall be formed within a period of three months of the majority of allottees having booked their apartment or building or plot, as the case may be, in the project.

TO EXECUTE CONVEYANCE [Sec.11 (4)(f)]:
The Promoter shall be responsible to execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under Section 17 of RERA.

TO PAY ALL OUTGOINGS [Sec.11 (4)(g)]:
The Promoter shall be responsible to pay all outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges) until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, out of the amount which he has collected from the allottees, for the payment of outgoings. The promoter shall be responsible for payment of mortgage loan and interest thereon or other encumbrances in respect of the project. In the event any promoter fails to pay the outgoings, mortgage loan and interest thereon or any such other liabilities before transfer of the real estate project the promoter shall remain liable to pay such outgoings, penal charges, mortgage loan, etc, including the cost of the legal proceedings, if any, to the authority or person concerned even after the transfer of the property.

NOT TO MORTGAGE OR CREATE A CHARGE AFTER EXECUTION OF AGREEMENT [Sec.11 (4)(h)]:
The promoter after he executes an agreement for sale for any apartment, plot or building, as the case may be, shall not mortgage or create a charge on such apartment, plot or building, and if any such mortgage or charge is made or created the Promoter alone shall be responsible to clear the same.

CANCELLATION OF ALLOTMENT [Sec.11(5)]:
The promoter can cancel the allotment of apartment or building or plot, as the case may be, only in terms of the agreement for sale executed by and between the promoter and the allottee. If the Allottee is aggrieved by such cancellation and if such cancellation is not in accordance with the terms of the agreement for sale, the allottee may approach the Authority for relief.

PREPARE AND MAINTAIN OTHER DETAILS [Sec.11 (6)]:

The promoter shall prepare and maintain all such other details as may be specified, from time to time, by regulations made by the Authority.

PROMOTER TO ENSURE VERACITY OF ADVERTISEMENT [Sec.12]:

The promoter must ensure that any advertisement, prospectus or any other advertisement inviting the public to purchase any apartment or plot do not contain any incorrect, false or misleading information. If any person makes an advance or a deposit to the promoter on the basis of the incorrect, false or misleading information contained in the notice, advertisement or prospectus, or on the basis of any model apartment, plot or building and sustains any loss or damage by reason of such incorrect, false or misleading information the promoter shall be liable to compensate such person as provided under the RERA. Provided that if such affected person intends to withdraw from the proposed project, he shall be entitled to refund of his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under the RERA.

PROMOTER NOT TO ACCEPT ANY ADVANCE OR DEPOSIT EXCEEDING 10% OF COST WITHOUT EXECUTING WRITTEN AGREEMENT FOR SALE [Sec.13]:

A promoter cannot accept a sum exceeding ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or deposit or an application fee, from a person without first entering into a written agreement for sale with such person and register such agreement for sale in accordance with the applicable law. [Section 13(1)].

The agreement for sale referred to in Section 13 (1) shall be in such form as may be prescribed. In Maharashtra, the Model Form of such Agreement is prescribed under Rule 10 (1) of the Maharashtra Real Estate (Regulation and Department) Act, 2016. Such agreement shall specify the particulars of development of the project, construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner in which payments towards the cost of the apartment, plot or building, are to be made by the allottee and the date on which the possession of the apartment, plot or building is to be handed over by the promoter to the allottee. Such agreement should also mention the rates of interest payable by the promoter to the allottee and by the allottee to the promoter in case of default, which rate of interest will be same in both the cases. Such agreement should be in accordance with the model agreement however modification or variation in such agreement may be done having regards to the facts and circumstances of respective case provided such modification or variation are in accordance with the provisions of RERA and the rules and regulations made under RERA.

TO ADHERE TO SANCTIONED PLANS AND SPECIFICATIONS [Sec.14]:

(1) The promoter is under obligation to develop and complete the proposed project in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities and which are disclosed to the allottees.

(2) The promoter shall not make any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken by the allottee, without the previous written consent of that allottee.

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer

after proper declaration and intimation to the allottees who have agreed to take the apartment, plot or building, as the case may be.

Explanation — For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

The promoter shall not make any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation — For the purpose of sub-section 2(ii) of section 14 for counting two-third number the allottee who has booked more than one apartment or plot in his own name or in the name of his family is to be considered as one allottee only. In case the apartments or plots are booked by other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises all such allottee shall be considered as one allottee only.

PROMOTER'S LIABILITY FOR STRUCTURAL DEFECT [Sec.14 (3)]:

Section 14(3) of RERA provides for the promoter's responsibility in case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to the project. In the event if the allottee finds any structural defect or any other defect in workmanship, quality or provision of service or any other obligation of the promoter as per agreement for sale within a period of five years from the date of handing over possession and the allottee brings such defects to the notice of the promoter, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event if the promoter fails to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation from the promoter in the manner as provided under the RERA.

PROMOTER NOT TO TRANSFER OR ASSIGN HIS MAJORITY RIGHTS AND LIABILITIES TO A THIRD PARTY [Sec.15]:

After registration of the project and having commenced sale/booking of apartment or plot the promoter shall not be entitled to transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority. It is also provided that any such transfer or assignment even if permitted / approved shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

In the event the transfer or assignment of the promoter's rights and liabilities being permitted by the allottees and the Authority under sub-section (1) of Section 15, the intending promoter shall be responsible to independently comply with all the pending obligations under the provisions of the RERA and the rules and regulations made thereunder, as well as all the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.

It is also specifically provided that any transfer or assignment permitted under provisions of the Section 15 shall not result in extension of time to the new promoter to complete the real estate project and such new promoter shall be under obligation to comply with all the pending

obligations of the erstwhile promoter, in time as agreed. In case of default by the intending promoter in complying with all the pending obligations in time such intending promoter shall be liable for the consequences of breach or delay, as the case may be, as provided under the RERA and the rules and regulations made thereunder.

PROMOTER TO GET THE REAL ESTATE PROJECT INSURED [Sec.16]

1. The promoter has to get the real estate project insured. The promoter is under obligation to obtain all such insurances as may be notified by the appropriate Government, including to obtain insurance in respect of (i) title of the land and building and (ii) construction of the real estate project.

2. The promoter is liable to pay all the premium and charges in respect of all such insurances and he shall pay the same till the project with the insurance is transferred by him to the association of the allottees.

3. The insurance as specified hereinabove shall stand transferred to the benefit of the allottee or the association of allottees, as the case may be, at the time of promoter entering into an agreement for sale with the allottee.

4. All the documents relating to the insurance shall be handed over by the promoter to the association of the allottees upon formation of the association of the allottees.

PROMOTER TO EXECUTE CONVEYANCE [Sec.17]:

Section 17 of the RERA provides for the promoter's obligation to execute the conveyance:

(1) The promoter shall be responsible to execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and he shall hand over the physical possession of the plot, apartment or building, as the case may be, to the allottees and he shall handover the common areas to the association of the allottees or the competent authority, as the case may be. The promoter shall also handover the sanctioned plans and the other title documents pertaining to the real estate project within specified period as provided under the local laws. It is also provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under Section 17 of the RERA shall be executed by the promoter within three months from date of issue of occupancy certificate or when 51% of the total number of allottees in the building or wing have paid to the promoter the full consideration whichever is earlier. In case of allotment of plots, the promoter has to convey the title to the allottees within 3 months from the date the allottees have paid full consideration to the promoter.

(2) It shall be the responsibility of the promoter that after obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), to hand- over all the necessary documents and plans relating to the project, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws as applicable. However in the absence of any local law, the promoter shall handover all the necessary documents and plans relating to the project, including common areas, the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the occupancy certificate.

PROMOTER LIABLE TO REFUND THE AMOUNT RECEIVED FROM THE ALLOTTEE IN CASE OF FAILURE TO GIVE POSSESSION IN TIME [Sec.18]:

Under section 18 of the RERA the promoter is under the obligation to complete the project and give possession of the apartment, plot or building, as the case may be, in time as agreed with the allottees.

(1) If the promoter fails to complete the project or if he is unable to give possession of an apartment, plot or building to the allottees (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified in the agreement or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the RERA or for any other reason, then in such an event the promoter shall be liable on demand to pay to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by the promoter from such allottee in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under the RERA.

However in the event where an allottee does not intend to withdraw from the project, such allottee shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) In the event of any defective title of the land, on which the project is being developed or has been developed the promoter shall be liable to compensate the allottees in case of any loss caused to the allottees, in the manner as provided under the RERA, and the claim for compensation under sub-section (2) of Section 18 shall not be barred by limitation provided under any law for the time being in force.

(3) In the event if the promoter fails to discharge any other obligations imposed on the promoter under the RERA or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale executed by and between the promoter and the allottees, the promoter shall be liable to pay such compensation to the allottees, in the manner as provided under the RERA.

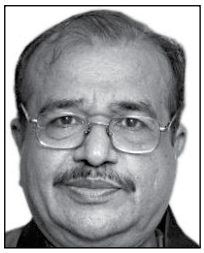
TO KEEP 70% OF THE AMOUNT RECEIVED FROM ALLOTTEES IN SEPARATE BANK ACCOUNT [Sec.4(2)(l)(d)]

With a view to execute that amount of consideration paid by the allottees for allotment of apartment or plot in a particular project only, the promoter is required to deposit 70% of the amount realised from the allottees from time to time in a separate bank account with a scheduled bank for the project. The promoter shall be entitled to withdraw the amounts from such bank account as per the Certificates issued by an engineer, an architect and a chartered accountant in practice as provided under Section 4(2)(l)(d) of the RERA.

Note: The readers are requested to take note that the information given in this article is only for the purpose of general knowledge and not an expert advice or guidance. for taking any decision the readers are requested to obtain proper professional advice from their professionals.

If we are not free, no one will respect us.

— Dr. A. P. J. Abdul Kalam




Kirit Hakani & Shefali Alvaris

Dispute Resolution Mechanism under RERA

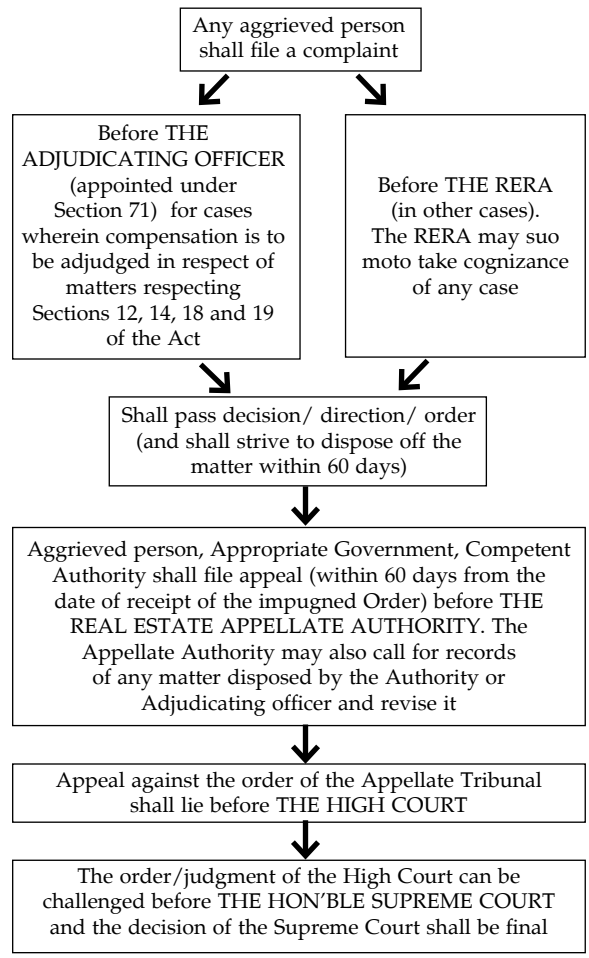
Prior to the introduction of The Real Estate (Regulation and Development) Act, 2016 ("the Act"), cases related to real estate were adjudicated in the Consumer Disputes Redressal Forum/Commission (NCDRC) and in the Civil Courts. In case of offences which are criminal in nature, Section 13 of the Maharashtra Ownership of Flats Act, 1963 provided a remedy to prosecute the promoter. However, the disposal used to take a lot of time owing to the huge volume of cases pending before the Consumer Commission/Forum under the Consumer Protection Act, 1986 and in the Civil Courts in the case of a civil suit.

The Act has also reduced the time for disposal of complaints and appeals by the Authority and Appellate Tribunal to a period of 60 days as against the earlier provision of 90 days prescribed under the Real Estate (Regulation and Development) Bill, 2013.

The Dispute Resolution machinery as prescribed under the Act has been elucidated under Chapter V and Chapter VII of the Act.

The basic structure of the Dispute Resolution machinery is the Regulatory Authority and also the Adjudicating Officer at the primary level, the Appellate Tribunal at the Appellate level to decide appeals arising out of decisions passed by the Regulatory Authority/Adjudicating Officer. The Act provides for Second Appeal before the High Court against the decisions of the Appellate Tribunal.

I. Bird's Eye View of the Act



II. Dispute Resolution Machinery under the Act

A) REAL ESTATE REGULATORY AUTHORITY ("RERA")

i. Establishment and incorporation of RERA

Chapter V of the Act deals with RERA. The Appropriate Government of Union Territory or State is required to set up a Regulatory Authority within a period of one year of the Act coming into force. As per Section 20 of the Act, the Regulatory Authority is required to be established within 1 year of the commencement of the said Section. As Section 20 has been notified with effect from 1st May, 2016, the Authority was required to be established maximum by 30th April, 2017.

However, for speedy implementation of the Act, Section 20 of the Act empowers the 'Appropriate Government' to designate any Regulatory Authority or any officer preferably the Secretary of the department dealing with Housing as the Regulatory Authority, until the establishment of the fulltime Authority, for the purposes mentioned under this Act. After the establishment of the RERA, all complaints or cases pending with such Regulatory Authority designated shall be heard from the stage such applications, complaints or cases are transferred to them. The powers and functions of the Authority to be exercised are conferred under Sections 31, 32, 34, 37 and 38 of the RERA.

ii. RERA – Body Corporate

As per Section 20(2) of the Act, RERA shall be a body corporate and shall have a perpetual succession and a common seal, with the power, subject to the provisions of this Act, to acquire, hold and dispose off property, both movable and immovable, and to contract, and shall by its name, sue or be sued.

iii. RERA – Status in Maharashtra

In Maharashtra, the State Government has established Maharashtra Real Estate Regulatory Authority *vide* Notification No. 23 dated 8th March, 2017 for regulation and promotion of the real estate sector in Maharashtra. The Maharashtra Real Estate Regulatory Authority ("MahaRERA") is headquartered at Mumbai and is situated at Bandra (East). An aggrieved person may file a complaint with MahaRERA or the adjudicating officer, as the case may be, with respect to any registered real estate project, for any violation or contravention of the provisions of this Act or the rules and regulations made there under.

The Government of Maharashtra has launched a website i.e. www.maharera.mahaonline.gov.in for the purpose of disseminating information on updated laws and Rules made under the Act. Real Estate projects which have been registered can be viewed on the website. Similarly, Orders and Circulars as well as Rulings of the Real Estate Regulatory Authority are uploaded on the website for public reference.

iv. Composition of RERA

The Authority shall consist of a Chairperson and not less than two wholetime members to be appointed by the Appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department dealing with Housing and the Law Secretary. Sections 22 to 30 of the Act deal with qualifications of chairperson and members, term of office, salaries and allowances, removal, administrative powers of the chairperson, officers and other employees of staff, vacancies, etc.

v. Functions of the Authority

The functions of the Authority are prescribed under Sections 32 to 34 of the Act. The important functions of the RERA are as under:

(a) Protection of interest of the allottees, Promoter and real estate agent;

(b) Creation of a single window system for ensuring time bound project approvals and clearances for timely completion of the project;

(c) Creation of a transparent and robust grievance redressal mechanism against acts

of omission and commission of competent authorities and their officials;

(d) Measures to encourage investment in the real estate sector including measures to increase financial assistance to affordable housing segment;

(e) Measures to encourage construction of environmentally sustainable and affordable housing, promoting standardisation and use of appropriate construction materials, fixtures, fittings and construction techniques;

(f) Measures to encourage grading of projects on various parameters of development including grading of promoters;

(g) Measures to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations;

(h) Measures to facilitate digitisation of land records and system towards conclusive property titles with title guarantee;

(i) To render advice to the appropriate Government in matters relating to the development of real estate sector;

(j) Any other issue that the Authority may think necessary for the promotion of the real estate sector;

(k) The give opinion (within 60 days of reference) on possible effect if policy is formulated on real estate sector (including review of laws related to real estate sector) or any other matter, upon a reference made by the appropriate Government [Section 33(1) of the Act];

(l) To take suitable measures for the promotion of advocacy, creating awareness and imparting training about laws relating to real estate sector and policies [Section 33(3) of the Act];

(m) To register and regulate real estate projects and real estate agents registered under this Act;

(n) To publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;

(o) To maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;

(p) To maintain a database, on its website, for public viewing, and enter the names and photographs of real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked;

(q) To fix through regulations for each area under its jurisdiction the standard fees to be levied on the allottees or the promoter or the real estate agent, as the case may be;

(r) To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;

(s) To ensure compliance of its regulations or orders or directions made in exercise of its powers under this Act;

(t) To perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of this Act.

vi. Filing of complaints with the authority

As per Section 31 of the Act, any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter, allottee or real estate agent, as the case may be.

The term "person" for the purposes of Section 31 of the Act shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

In case of Maharashtra, the form, manner and fees for filing complaints before MahaRERA or adjudicating officer is laid down in the Maharashtra Real Estate (Regulation and Development) (Recovery of Interest, Penalty, Compensation, Fine payable, Forms of Complaints and Appeal, etc.) Rules, 2017 ("the said Rules"). As per Rule 6 of the said Rules, any aggrieved person, having any interest in the project, may file a complaint with the Authority for any violation under the Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the Adjudicating Officer, as per Form 'A' in triplicate which shall be accompanied by a fee of ₹ 5,000/- (Rupees Five Thousand only) through NEFT or RTGS system or any other digital transaction mode. However, as and when the Authority makes a provision for filing a complaint web-based, it shall not be necessary to submit such form in triplicate. The procedure to be followed by MahaRERA while adjudicating a complaint is detailed in Section 36 of the Act read with Rule 6(2) of the said Rules.

It is pertinent to note that the Act empowers the Authority to take *suo motu* action against any person found violating the provisions of this Act. As per Section 35 of the Act, where the Authority considers it expedient to do so, it may, by order in writing and recording reasons therefore to call upon a promoter or allottee or real estate agent to furnish in writing such information or explanations relating to its affairs as the Authority may require and appoint one or more persons to make an enquiry in relation to the affairs as the Authority may require.

The Maha RERA has already exercised its powers under Section 35 by taking *suo motu* cognizance of a complaint relating to the Act or the Rules made thereunder in the case of *"Maharashtra Real Estate Regulatory Authority vs. Sai Estate Consultant Chembur Pvt. Ltd" vide* Order dated 5th June, 2017. In the said case, the Respondent had published advertisements without registration of the Real Estate project which was a violation of Section 9(5) of the Real Estate (Regulation and Development) Act, 2016 and Rule 14(1) and (2) of Maharashtra Real Estate (Regulation and Development) (Registration of real estate projects, Registration of real estate agents, rates of interest and disclosure on website) Rules 2017. These provisions require that every real estate agent who has registered as per the provisions of the Act or Rules and Regulations shall be granted a registration number by the Authority, which shall be quoted by the real estate agent in every sale facilities by him under the Act. In one of the recent cases, the Respondent did not mention its registration number on some advertisements and mentioned it incorrectly on other advertisements. Therefore, the Respondent was imposed a fine of ₹ 1,20,000/- under Section 36 of the Act.

vii. Powers of RERA

- **Power to call for information, conduct investigation [Section 35(1)]**

  Where the Authority considers it expedient to do so, on a complaint or *suo motu*, relating to this Act or the rules or regulations made thereunder, it may, by order in writing and recording reasons therefor call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require and appoint one or more persons to make an inquiry in relation to the affairs of any

promoter or allottee or the real estate agent, as the case may be.

- **Shall have the same powers as that of the Civil Court [Section 35(2)]**
  While exercising the powers under Section 35(1) of the Act, the Authority shall have the same powers as are vested in a civil Court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, in respect of the following matters, namely:

  (i) The discovery and production of books of account and other documents; at such place and at such time as may be specified by the Authority;

  (ii) Summoning and enforcing the attendance of persons and examining them on oath;

  (iii) Issuing commissions for the examination of witnesses or documents;

  (iv) Any other matter which may be prescribed.

- **Power to issue Interim Orders during an inquiry [Section 36]**
  Section 36 of the Act empowers the Regulatory Authority to issue interim Orders or directions. The said Section provides that where during an inquiry, the Authority is satisfied that an action in contravention of this Act, Rules and Regulations has been committed and continues to be committed or that such act is about to be committed, the Authority may by order, restrain any Promoter, allottee or real estate agent from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where the Authority deems necessary.

- **Power to issue Directions [Section 37]**
  Section 37 of the RERA empowers the Authority to issue directions from time to time to the Promoters or allottees or real estate agents for the purpose of discharging its functions under the provisions of this Act or the rules and regulations made thereunder and its directions shall be binding on all concerned.

- **Power to impose penalty or interest [Section 38(1)]**
  Section 38(1) empowers the Authority to impose penalty or interest, in the event of contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.

- **Power to regulate its own procedure [Section 38(2)]**
  The Authority shall be governed by principles of natural justice and shall have the power to regulate its own procedure in the exercise of the power conferred under section 38(1).

- **Power to *suo motu* make reference of certain issues to the Competition Commission of India [Section 38(3)]**
  When the issue under consideration of the Authority relating to agreement, action, omission, practice or procedure has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project or has effect of market power of monopoly affecting the interest of allottees adversely, then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India.

- **Power to rectify orders [Section 39]**
  The Authority has the power to amend any order passed by it at any time within a time frame of two years from the date

of the order, made under this Act. This power may be exercised in order to correct a mistake apparent from the record and if the parties inform the Authority about the mistake committed in exercise of this power. However, if the Order passed by it has already been appealed against, it loses its power to amend the order. The Authority shall not amend substantive part of its order passed under the provisions of this Act while rectifying any mistake apparent from record.

- **Power to appoint Adjudicating Officer [Section 71]**
  Section 71 empowers the Authority, in consultation with the Appropriate Government, to appoint one or more persons as an Adjudicating Officer for the purpose of adjudging compensation under Sections 12, 14, 18 and Section 19. The provisions relating to Adjudicating Officer have been dealt with in detail hereinbelow.

viii. Other powers of MahaRERA

The other powers of the MahaRERA are laid down in the Maharashtra Real Estate Regulatory Authority (General) Regulations, 2017 ("the said General Regulations").

- **Power to review its decisions, directions and orders**
  As per Regulation 36 of the said General Regulations, the Authority has the power to review any decision, direction or order of the Authority referred to it by any person aggrieved by a direction, decision or order of the Authority, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed. However this power may be exercised only upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the aggrieved person or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons. The aggrieved person may apply for such review within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Authority.

- **Inherent powers of MahaRERA**
  As per Regulation 39 of the said General Regulations, Nothing in the Regulations shall limit or otherwise affect the inherent power of the Authority to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Authority. As per Regulation 41, nothing in the Regulations shall bar the Authority to deal with any matter or exercise any power under the Act or Rules for which no regulations have been framed, and the Authority may deal with such matters, powers and functions in a manner it thinks fit.

- **Power to award costs**
  Regulation 46 of the said General Regulations, empowers the Authority (discretionary power) to award costs of and incidental to all proceedings and the Authority shall have full power to determine by whom or out of what funds and to what extent such costs are to be paid and give all necessary directions for the aforesaid purposes. The costs shall be paid within thirty (30) days from the date of the order or within such time as the Authority may, by order, direct. If a party fails to comply with an order for costs within the permitted period, the order of the Authority awarding costs shall be executed forthwith in the same manner as a decree/order of a Civil Court.

ix. Time Limit for disposal of complaint

Under Section 29(4) of the Act, the Authority has to dispose off a Complaint filed before it within 60

days and in the event of it failing to do so, it shall record its reasons in writing for such failure.

B) ADJUDICATING OFFICER

i. Appointment, function and powers of Adjudicating Officer [Section 71]

The RERA, in consultation with the Appropriate Government, shall appoint one or more persons as an Adjudicating Officer for the purpose of adjudging compensation under Sections 12 (Obligations of promoter regarding veracity of the advertisement or prospectus), 14 (Adherence to sanctioned plans and project specifications by the promoter), 18 (return of amount and compensation) and Section 19 (rights and duties of allottees). Such Adjudicating Officer may be a person who is or was a District Judge.

The application for adjudging compensation shall be dealt with by the adjudicating officer as expeditiously as possible and shall be disposed off within a period of sixty days from the date of receipt of the application. The adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections.

ii. Factors to be taken into account by Adjudicating Officer [Section 72]

As per Section 72 of the Act, while adjudging the quantum of compensation or interest, as the case may be, under Section 71, the adjudicating officer shall have due regard to the following factors, namely:

(a) The amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) The amount of loss caused as a result of the default;

(c) The repetitive nature of the default;

(d) Such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

iii. Manner of filing a complaint with the Adjudicating Officer and the manner of holding an inquiry by the Adjudicating Officer (in Maharashtra)

Rule 7 of the said Rules, provide that any aggrieved person may file a complaint with the Adjudicating Officer, through the office of the Authority, for compensation under Section 12, 14, 18 and 19. The complaint shall be filed in Form 'B' which shall be accompanied by a fee of ₹ 5,000/- (rupees five thousand only) through NEFT or RTGS system or any other digital transaction mode. The procedure for deciding the Complaint is laid down in Rule 7(2) of the said Rules.

As stated above, as the Adjudicating Officer is appointed by RERA, he has been appointed specifically to deal with cases wherein compensation has to be adjudged in respect of Sections 12, 14, 18 and 19 of the Act. Moreover, it is not mandatory to file such cases before the Adjudicating Officer. The complainant has an option, it can either approach Consumer Courts or it can approach Adjudicating Officer, but not both (Sr. No. 11 of the FAQs for MahaRERA Website). Under Section 79 of the Act only Civil Courts are barred from dealing with disputes under the Act, not Consumer Courts. (Sr. No. 31 of the said FAQs).

C) REAL ESTATE APPELLATE TRIBUNAL

i. Establishment of Appellate Tribunal

Chapter VII of the Act provides for the establishment of a Real Estate Appellate Tribunal as an Appellate Authority to hear appeals filed by any aggrieved persons against ANY decisions, directions or orders of the Real Estate Regulatory Authority as well as Adjudicating Officer. The term 'person' shall also include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

As per Section 43 of the Act, the Appellate Tribunal is required to be established within 1 year of the commencement of Section 43. As per Section 43 has been notified with effect from 1st May, 2016, the Appellate Tribunal was required to be established maximum by 30th April, 2017. However, for speedy implementation of the Act, Section 43 empowers the 'Appropriate Government' to designate an existing Appellate Tribunal (under any other law in force) to function as an Appellate Tribunal under the Act.

ii. Transitional provision

During the intervening period of establishment of the Appellate Tribunal, the Appropriate Government shall designate, by order, any Appellate Tribunal Functioning under any law for the time being in force, to be the Appellate Tribunal to hear appeals under the Act. When the Appellate Tribunal under this Section is established, all matters pending with the Appellate Tribunal designated to hear appeals, shall stand transferred to the Appellate Tribunal so established and shall be heard from the stage such appeal is transferred.

iii. Appealable Orders

The Act does clearly state that an appeal against ANY decision, order or direction of the RERA or Adjudicating Officer can be appealed against, before the Appellate Tribunal. Some such examples are:

a) Denying registration of the project to the promoter [Section 5(1)(b)]

b) Denying extension of registration to the promoter [Section 6]

c) Revoking registration of the project and debarring the promoter from accessing to website [Section 7]

d) Passed under Section 8 ordering completion of the construction of remaining uncompleted work in cases where the registration is revoked [Section 8]

e) Imposing penalty for contravention of Section 3 [Section 59]

f) Imposing penalty for failure to make application for registration or providing information [Section 60]

g) Imposing penalty for contravention of any other provision including to complete the project in time, accepting more than 10% amount before executing the agreement for sale, not depositing 70% of the receipt in separate bank account and other defaults [Section 61]

h) Imposing penalty on allottees for failure to comply with or contravening the orders of RERA [Section 67]

i) Imposing penalty on the promoters for non-compliance with the orders of RERA [Section 63]

j) Imposing penalty on real estate agent for failure to comply with the provisions of the Act [Section 62]

k) Imposing penalty on real estate agent for contravening the orders or direction of RERA [Section 65]

l) Adjudication Authority determining the amount of interest and compensation u/s 12, 14, 18 and 19 [Section 71]

iv. Powers of the Appellate Tribunal

- **Power to regulate its own procedure:** Under Section 53, the Appellate Tribunal shall have the power to regulate its own procedure on the principles of natural justice. It shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

- **Shall be vested with the same powers as that of the Civil Court [Section 53(4) of the Act]**
  The Appellate Tribunal shall have, for the purpose of discharging its functions, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 in respect of following matters, namely:
  (a) Summoning and enforcing the attendance of any person and examining him on oath,
  (b) Requiring the discovery and production of documents,
  (c) Receiving evidence on affidavits,
  (d) Issuing commissions for the examinations of witnesses or documents,
  (e) Reviewing its decisions,
  (f) Dismissing an application for default or directing it ex parte; and
  (g) Any other matter which may be prescribed.

- **All proceedings of the Appellate Tribunal shall be deemed to be judicial proceedings**
  The proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 for the purposes of Section 196 of the Indian Penal Code, and the Appellate Tribunal shall be deemed to be Civil court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.
  Therefore, the Appellate Tribunal has the power to direct the prosecution against any party who produces false documents or false evidences, etc.

- **Supervisory or Revisionary Power**
  Section 44(6) confers upon the Appellate Tribunal the Supervisory/ Revisionary power to call for the records of the Authority or Adjudicating Officer as are necessary to dispose of such appeal and make such orders as it thinks fit for the purpose of examining the legality or propriety or correctness of any order or decision of the Authority or the adjudicating officer. This power may be exercised on its own motion or on an application to it.

v. Process of preferring an Appeal to the Tribunal under RERA

Section 43(5) of the Act provides that any person (shall include any association of allottees or any voluntary consumer association) aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter.

However, provision is more stringent, if the promoter prefers an Appeal. If the promoter wishes to prefer an Appeal, he would need to deposit a minimum of 30% (thirty per cent) or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be with the Arbitral Tribunal, before the appeal is heard.

Moreover, under Section 44(1) of the Act, the Appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal.

In Maharashtra, as per Rule 9 of the said Rules, every Appeal shall be filed in Form "C" in triplicate accompanied by a fee of ₹ 5,000/- (Rupees Five Thousand only) through NEFT or

RTGS. In case of web-based filing, it shall not be necessary to submit the form in triplicate. Every appeal filed in Form 'C' shall be submitted along with the following documents,—

(a) Attested true copy of the order against which the appeal is filed;

(b) Copies of the documents relied upon by the appellant and referred to in the appeal;

(c) Index of the documents.

vi. Time Limit within which an Appeal may be preferred

Every appeal made under Section 44 (1) shall be preferred within a period of sixty days from the date on which a copy of the direction or order or decision made by the Authority or the adjudicating officer is received by the Appropriate Government or the competent authority or the aggrieved person and it shall be in such form and accompanied by such fee, as may be prescribed. The Appellate Tribunal may entertain any appeal after the expiry of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

vii. Interim Order or Final Order

Section 44(3) states that on receipt of an appeal under sub-Section (1), the Appellate Tribunal may after giving the parties an opportunity of being heard and may pass such orders, including interim orders, as it thinks fit.

viii. Time limit for the Appellate Authority to dispose off the Appeal

Section 44 (5) mandates a period of 60 days within which the Appellate Tribunal shall dispose of an Appeal failing which it shall record its reasons for not being able to do so. Hence, an Order passed after the expiry of the said limitation period is a valid and binding Order if the Appellate Tribunal furnishes its reasons, in writing.

viii. Effect of Orders passed by Appellate Tribunal

As per Section 57 of the Act, every Order made by the Appellate Tribunal shall be executable by Appellate Tribunal as a decree of Civil Court, and for this purpose, the Appellate Tribunal shall have all the powers of a Civil Court. The Appellate Tribunal may transmit any order made by it to a Civil Court having local jurisdiction and such Civil Court shall execute the order as if it were a decree made by the Court.

ix. Right to legal representation

Under Section 56 of the Act, the appellant or applicant may either appear before the Appellate Tribunal or the Regulatory Authority to present its case:

(a) In person

(b) Through a Chartered Accountant

(c) Through a Company Secretary

(d) Cost Accountant or

(e) Legal practitioner

D) RECOVERY OF INTEREST OR PENALTY OR COMPENSATION AND ENFORCEMENT OF ORDER, ETC.

If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue [Section 40(1) of the Act].

As per Section 40(2) of the Act, If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed.

Status in Maharashtra

In Maharashtra, Rule 3 of the said Rules, lays down that any interest or penalty or compensation imposed on a promoter or an allottee or a real estate agent shall be recoverable under section 40 of the Act, from such promoter or allottee or real estate agent, as the case may be, in the same manner as applicable in respect of land revenue as provided in the Maharashtra Land Revenue Code, 1966 (Mah. XLI of 1966).

Similarly, Rule 4 of the said Rules prescribes the procedure to be followed for the purposes of Section 40(2) of the Act. As per Rule 4, every order passed by the Adjudicating Officer, Authority or Appellate Tribunal, as the case may be, under the Act or the rules and regulations made thereunder, shall be enforced by the Adjudicating Officer, the Authority or the Appellate Tribunal in the same manner as if it were a decree or order made by the principal civil court of original jurisdiction in a suit. In the event such Adjudicating Officer, the Authority or Appellate Tribunal is unable to execute the order, it shall send a copy of such order to the principal Civil Court, to execute such order either within the local limits of whose jurisdiction the real estate project is located or in the principal civil court of original jurisdiction within the local limits of whose jurisdiction the person against whom the order is being issued, resides, or carries on business, or personally works for gain alongwith a certificate stating that such an order has not been executed by it.

E. APPEAL TO HIGH COURT

Section 58 of the RERA provides for second appeal arising out of decision or order of the Appellate Tribunal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908.

As per Section 100 of the CPC, a second appeal shall lie in the High Court, if the issue in appeal involves a substantial question of law. The High Court, may, at its discretion, entertain the Appeal after the expiry of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

However, no Appeal shall lie against any Order or decision made by the Appellate Tribunal, if it is made with consent of the parties.

F. APPEAL TO THE SUPREME COURT

An appeal against the order or judgment of the High Court shall lie to the Supreme Court, in a case which the High Court certifies to be a fit one for appeal to the Supreme Court. The provisions of the Code of Civil Procedure, 1908 in regard to appeal shall apply in the case of all appeals to the Supreme Court. However, where no such certificate is granted by the High Court, then the remedy of Special Leave to appeal as provided under Article 136 of the Constitution of India may be availed. The cost of appeal shall be decided at the discretion of the Supreme Court. Where the Judgment of a High Court is varied in the appeal, effect should be given to the order of the Supreme Court in the same manner as provided in the case of a judgment of the High Court. The order or judgment of the Supreme Court shall be final and binding on all.

III. Conclusion

This new legislation is a positive step in regulating the highly unregulated Real estate sector and in providing a dedicated dispute resolution mechanism in matters relating to Real Estate. Disputes in matters related to Real estate will now be disposed of in an efficient and speedy manner. This will attract investments in the sector and restore confidence of buyers and other stakeholders in the Real estate market. The Act shall benefit both the promoters as well as the buyers through the stringent compliances imposed under the Act.

Manoj Pandit, *Advocate*

RERA: Offences and Penalties

Intent of Legislature

The Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as the Act) is

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and to establish Appellate Tribunal to hear the appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith and incidental thereto."

The Act has broad aim to regularise and promote the real estate sector by putting in checks and safeguards along with transparency in the real estate transactions. It aims at minimisation of grievances and speedy redressal mechanism. The 'promoter' has to provide comprehensive details of the 'project' so that the 'allottee' may make an informed decision and there is certainty in the deliverables from 'promoter's side and expectations from the 'allottee's side. There are certain obligations cast upon by the Act on the 'promoter', 'real estate agent' and the 'allottee'.

Penalties and Prosecution Provisions

To ensure that the so far unorganised sector submits itself to the authority of law, there are heavy penalties and provisions of prosecution under the Act. These provisions are contained in Chapter VIII of the Act. Section 59 to Section 68 of the Act provides for penalties and prosecution under the Act as tabulated below.

A. Offence-wise Penalties for Promoters'

Section	Offence	Violation	Penalty
59(1)	Non-registration of a project	Section 3	Penalty ≤ 10% of the estimated cost of real estate project
59(2)	Not obeying orders, decision or direction in connection with the above offence	Section 59(1) or Section 3	Imprisonment ≤ 3 years with and/or without fine ≤ 10% of the estimated cost of real estate project
60	Providing false information etc.	Sec 4	Penalty ≤ 5% of the estimated cost of real estate project
61	Other contravention	Other than Section 3 or Section 4	Penalty ≤ 5% of the estimated cost of real estate project

Section	Offence	Violation	Penalty
63	Contravention of any order of the RERA	Section 63	Penalty for every day (quantum to be decided) of defaults which may cumulatively extend up to 5% of the estimated cost of real estate project
64	Contravention of the orders or direction of the Appellate Tribunal	Section 64	Imprisonment ≤ 3 years with and/or without fine ≤ 10% of the estimated cost of real estate project

B. Offence-wise Penalties for Real Estate Agents

Section	Offences	Violation	Penalties
62	Contravention of the applicable provisions of the Act	Section 9 or Section 10	Penalty of ₹ 10,000 per day of default subject to maximum up to 5% of the cost of the property whose sale or purchase was facilitated by the agent
65	Contravention of the orders or direction of the RERA	Section 65	Penalty for every day (quantum to be decided) of defaults which may cumulatively extend up to 5% of the estimated cost of the property whose sale or purchase was facilitated by the agent
66	Contravention of the orders or direction of the Appellate Tribunal	Section 66	Imprisonment ≤ 1 year with and/or without fine ≤ 10% of the estimated cost of the property whose sale or purchase was facilitated by the agent

C. Offence-wise Penalties for Allottees

Section	Offences	Violation	Penalties
67	Contravention of any order of the RERA	Section 67	Penalty ≤ 5% of the apartment or building cost, for the period during which defaults continues
68	Contravention of the orders or direction of the appellate tribunal	Section 68	Imprisonment ≤ 1 year with and/or without fine ≤ 10% of the apartment or building cost

In case the offences are committed by any company (which has been defined in the explanation to include any body corporate, partnership firm or an association of person), then every person who was responsible to the company for the conduct as well as the company shall be deemed to be guilty of the offence. If the offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the company (which means partner in relation to the firm), then such person shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Other Offences

Section 61 has given wide powers to the Authority to levy penalty for contravention by the promoter of any provisions of the Act or the Rules and Regulations made there under, excluding Section 3 and Section 4 of the Act, which inter alia may include contravention of following provisions

1. Section 11 (1) – Failure to create webpage on the website of the Authority or to enter all details of the proposed project as required.
2. Section 11 (2) – Failure to mention in the advertisement or prospectus issued or published by the promoter, the registration number obtained and the website address of the Authority
3. Section 11 (3) – Failure of the promoter to make available the information as required, at the time of the booking and issue of allotment letter
4. Sec 11 (4) (b) – Failure to obtain the completion certificate or the occupancy certificate, or both, and to make it available to the allottee's individually or to the association of allottee's
5. Sectiontion 11 (4) (c) – Failure to obtain lease certificate, where the project is developed on a leasehold land and to make it available to the association of allottee's
6. Sectiontion 11 (4) (d) – Failure to provide and maintain essential services
7. Sectiontion 11 (4) (e) – Failure to enable the formation of an association or society
8. Sectiontion 11 (4) (f) & Sectiontion 17 – Failure to execute a registered conveyance deed in favor of the allottee's or the association of allottee's
9. Sectiontion 11 (4) (g) – Failure to pay all outgoings till handover of physical possession to the allottee or the associations of allottee's
10. Sectiontion 11 (4) (h) – Creates a mortgage or charge on apartment, plot or building after execution of agreement for sale
11. Section 11 (6) – Failure to prepare and maintain details as may be specified by the Authority
12. Section 13 – Accepts more that 10% of the price without making a registered agreement for sale
13. Section 14 (1) – Not developing and completing the project in accordance with the sanctioned plans, layout plans and specifications approved by the competent authorities
14. Section 14 (3) – Not rectifying the defects brought to notice within the limitation period of 5 years
15. Section 15 – Transfers or assigns majority rights and liabilities in respect of the project to a third party without obtaining consent from two-third allottee's or approval of the Authority
16. Section 16 – Failure to obtain insurance notified by the Government
17. Section 18 – Failure to complete the project in time and give possession as per agreement terms

Compounding of Offences

A non-obstante clause in Sectiontion 70 states that at any stage before or after the initiation of proSectionution the offences punishable with imprisonment may be compounded on payment of such sum which shall not exceed the maximum amount of fine prescribed for the offence.

Adjudication Principles

It appears that the penal provisions are quite harsh, compared to some of the offences. It is expected that the adjudicating authority will take into account the guiding principles of Section 72, though the provisions mentions that they

are for deciding the quantum of compensation or interest under Section 71, but they may be applied for all the adjudications under the Act. These guiding principles are

a. Disproportionate gains or unfair advantage made by the default;

b. The amount of loss caused by the default;

c. The repetitive nature of the default;

d. Any other factor for furtherance of justice.

Mens rea

"Mens rea," is a Latin word for "guilty mind", i.e. intent to commit a crime. Mens rea can be divided into four types depending upon the mindset of the person at the commission of the crime and accordingly the punishment may vary from pardon with warning to most severe like imprisonment. These four types are also defence available to the accused to plead for less severe punishment. These are (a) Negligence, (b) Carelessness, (c) Knowledge and (d) Intentional. In criminal law mens rea needs to be proven before punishment however in quasi criminal liabilities mens rea may be presumed. This shifts the burden of proof from the plaintiff to the defendants to prove that something they are accused of being done was an innocent conduct on their part and was not an intentional crime/ wrongful conduct.

As can be seen from the way the Sectiontions has been drafted the mens rea has been presumed and the onus to prove that there was no intention to contradict the provisions of law or to disobey the orders or authority or Tribunal and the errors and omissions, if any, had happened inadvertently, without any wilful fault on the part of the persons being penalised, will be on the persons taking the defence.

Depending on whether the errors and omission / commission have happened due to the negligent, careless, with knowledge or intentionally the penalty / fine or proSectionution will take place. The law makers have left little or no room for the person contravening the provisions of law or the orders of authorities. It is the strict way they want to organise the hitherto unorganised Sectiontor of real estate transactions.

It is expected that first few cases will be showcased so that it will become a deterrent to the other players in the industry.

Development Goal

For the growth of any Sectiontor, it is paramount that there is trust and transparency between the two sides i.e. buyers and sellers. The regulatory authority aims at bringing in that lost Trust in real estate transactions. With strictly complete disclosures and heavy penalty for defaulters there will be increased transparency in real estate transactions. The projects registered with the authority will ensure the quality of disclosures required. It will streamline and set new policies and practices and bring in standardisation in the quality of information required to take an informed decision not only from buyers' perspective but also from investors' perspective.

The promoters who have most completed projects and nil or least enquiries / complaints against them will stand on elite footing and may get good response from market players. The financial institutions may provide finance at more favourable terms as against the promoters who have contravened the provisions of the Act in past. It will set a new trend in the real estate Sectiontor.

Conclusion

In the end any righteous acts with good intend will not attract penalty. And if inadvertently there is initiation of penalty proceedings, then it will be important to establish the reason for the error and the reasonable care and efforts made to avoid it. Explain why the error was harmless and was made under the bona fide belief. If the error was due to carelessness then improve the internal controls. The real estate business runs on goodwill and it may not be a good idea to be spotted on the wrong side of law.

Sunil Ramani, *Advocate*

Rights and Duties of Allottees

The Real Estate (Regulation & Development) Act, 2016 aims to regulate and promote the real estate sector by introducing professionalism and transparency in dealings between the stakeholders viz., the promoters, the real estate agents and the consumers i.e., the allottees. Although, the major thrust is to protect the purchasers against the possible defaults and manipulations of the promoters, the Act has taken care to regulate the conduct of purchasers as well, to ensure smooth and orderly functioning of the sector in the matter of construction, sale and transfer of plots, apartments and buildings.

Chapter IV of the Act lays down the rights and duties of the allottees which broadly follow from the obligations cast on the promoters for ensuring fairness in agreement with the buyer and in implementation thereof. What obligates the promoter in the interest of the allottee becomes an enforceable right of the allottee.

Rights of Allottees

To obtain information [Section 19(1)]

An informed decision by the potential buyer is the basic requirement of any transaction, more so in the real estate sector. The need for such informed decision was recognised by MOFA also which obligated the promoter to furnish the relevant information to the buyer. The MOFA provisions lacked effectiveness in the absence of proper mechanism for such disclosure and speedy remedy for non-observance of such requirements.

RERA not only specified the information to be furnished, it also provided the mechanism putting the information in public domain and providing access to the general public to such information relating to the promoters, the project, the agents and other persons associated with the project viz., the contractor, the architect, the engineer and others. Sub-section (2) of section 4 lists out the details to be furnished with the application for registration which under section 34(1) are to be displayed by the Authority on the website for public viewing.

Besides section 11(1) obligates the promoter also to create his webpage on the Authority's website and enter all the details of the project for public viewing. He is also supposed to update the information every three months.

Apart from the information to be submitted along with the registration application as laid down in section 4(2) to be uploaded on the website, Government of Maharashtra has as per Rule 3 prescribed certain additional information to be submitted with

the registration application which is to be displayed by the Authority on its website and the promoter on the webpage for public viewing.

The information to be framed as per sub-section (2) of section 4 and additionally as per Rule 3 of Maharashtra Rules is elaborate enough to include every detail with a potential buyer would like to be aware of. It includes details as to the promoters profile, enterprise details, projects launched by the promoter in past 5 years, approvals and sanctioned plans, details of development work, information about the number, type and carpet area of the apartments and number of garages for sale. The names and addresses of real estate agents, contractors, architect, structural engineer are also to be furnished.

The Maharashtra Rules provide for additional information which include information about the flow of land title, development agreement if any, where the developer is not the owner of land, information regarding encumbrances if any, proposed plan, covered parking spaces, nature of allottees organisation to be constituted and others.

The promoter has also to file a declaration about legality of land title, time period within which the project is to be completed and declaration to the effect that an amount equal to 70% of realisation from allottees will be kept in separate bank account to be used only for that project.

The information is required to be periodically updated and displayed on the website quarterly. In particular the following information is required to be updated:

(a) The list of number and type of apartments or plots as the case may be, booked

(b) The list of number of garages booked

(c) The list of approvals taken and the approvals which are pending subsequent to commencement certificate

(d) Status of the project, and

(e) Other information and documents which may be specified by the regulations made by the authority

To know stage-wise time schedule of completion [Sec. 19(2)]

The stagewise time schedule of completion is required to be displayed on the website. Apart from the time scheduled for the completion and handing over of possession, the allotee is entitled to information regarding stagewise time schedule of construction along with development work such as water, sanitation, electricity and other amenities and services as agreed with the promoter in the agreement for sale.

To claim possession [Sec. 19(3)]

The allottee is entitled to claim possession of the building, apartment or plot as per the agreement of sale executed with the promoter.

As per para 2.2 of the model agreement of sale the promoter shall abide by the time schedule for completing the project and handing over the apartment to the allottee and the common areas to the association of the allottees after receiving the occupancy certificate or the completion certificate, as the case may be.

To claim refund in the event of non-completion of the project [sec. 19(4)]

The allottees is entitled to claim the refund of the amount paid along with interest at the prescribed rates, and compensation as may

be determined by the adjudicating authority in the event of failure by the promoter to give possession in accordance with the terms of the agreement for sale. Even if such failure is due to discontinuance of business as a developer on account of suspension or revocation of registration, the allotee's right to claim such refund and other amount remains unaffected.

Under Maharashtra model agreement of sale, the promoter is entitled to reasonable extension of time for giving delivery of apartment if the completion of building in which the apartment is to be situated is delayed on account of (i) war, civil commotion or act of God and (ii) any notice, order, rule, notification of the government and/or other public or competent authority.

The rate of interest to which the allottee is entitled has been prescribed @ 2% above the highest marginal cost of lending of the State Bank of India. In case the SBI marginal cost of lending rate is not in use, it would be replaced by such benchmark lending rate which the SBI may fix from time-to-time for lending to the general public.

To obtain documents and plans [Section 19(5)]

The allottees are entitled to have documents and plans including that of common area after the possession of the plot, apartment or building is physically handed over by the promoter to him or the association of allottees.

RESPONSIBILITIES OF ALLOTTEES

To make payment [Section 19(6)]

Every allottee, who has entered into an agreement to take an apartment, plot or building as the case may be, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, as may be payable. The obligation to make payment within specified time may be changed with mutual agreement.

To pay interest at prescribed rate [Section 19(7) & (8)]

The allottee is liable to pay interest at the rate to be prescribed for any delay in payment of any amount which is due from him in respect of cost, maintenance, registration or under any other head. The liability towards interest may be reduced by the mutual agreement between the promoter and the allottee.

The rates prescribed for payment of interest is the same as in respect of interest payable by the promoter in case of failure to give possession in time i.e., the rate at 2% above the SBI's highest marginal cost of lending. In the absence of such rate not being in use, such benchmark lending rate which the SBI may fix from time to time for lending to the general public.

To participate towards formation of Society/Association [Section 19(9)]

Every allottee of the building apartment or plot is required to participate in the formation of an association or society or co-operative society of the allottees or a federation of the same. Under clause (e) of sub-section (4) of sec. 11, the promoter is obliged to form an association or society or co-operative society of the allottees or a federation of the same. The allottee is responsible to participate in the Process of such formation, extend all co-operation to the promoter and do his part in the process as per the applicable law.

To take physical possession [Section 19(10)]

An allottee shall take physical possession of the building, apartment or plot within a period of two months of the issue of occupancy certificate. The Maharashtra model agreement of sale in para 7.2 stipulates that the allottee shall take possession of the apartment within 15 days of the written notice from the promoter to the allottee intimating that the said apartments are ready for use and occupancy. As per para 7.3, the allottee shall take possession from the promoter by executing necessary indemnities, undertakings and such other documentations as prescribed in the agreement. In case the allottee fails to take possession within the time, such allottee shall continue to be liable to pay maintenance charges as applicable.

To participate in Registration of Conveyance Deed [Section 19(11)]

Under section 17(11) the promoter is required to execute a registered conveyance deed of the building, apartment or plot in favour of the allottee and of the undivided proportionate title in the common areas in favour of their association. While the primary responsibility of conveying the title is that of the promoter, the allottee is also responsible to participate in the process and extend all co-operation in the matter.

Under the Maharashtra Rule 9(2) the promoter shall execute the conveyance of title to the legal entity of allottees in case of single building project within three months from the date of issue of occupancy certificate or when 51% of the total number of allottees in such building have paid the full consideration to the promoter, whichever is earlier. In case of layout the conveyance of the structure of the building or the wings is to be made to the legal entity of the allottees within one month from the date on which the co-operative society or the company is registered or the association of the alllottees is duly constituted or within three months from the date of issue of occupancy certificate, whichever is earlier. So far as the conveyance of the entire undivided or inseparable land underneath all buildings is concerned, the conveyance shall be executed within three months from the date on which the Apex Body or Federation or Holding Company is registered or the association of allottees is constituted or within three months from the date of issue of occupancy certificate to the last of the building, whichever is earlier.

Penal Consequences in case of failure [Section 67]

The allottee, in case he fails to comply with or contravene any order decision or direction of the RERA, is liable to a penalty computed per day for the period during which such default continues. The penalty may cumulatively extend up to 5% of the cost of the building, apartment or plot allotted to him as may be determined by the authority.

In case he fails to comply with or contravenes any order or direction of the Real Estate Appellate Tribunal he can be punished with imprisonment for a term up to one year or with fine for everyday during which such default continues which may extend up to 10% of the cost of the building, apartment or plot. He may also be punished by imprisonment as well as fine in appropriate case (Section 68).

CA Priti Paras Savla

RERA – An Opportunity !

"I cannot teach anybody anything, I can only make them think.'

— Socrates

Government of India has enacted the Real Estate (Regulation & Development) Act, 2016 and it has come into force with effect from May 1, 2017 in the State of Maharashtra. The Act strives to ensure greater financial discipline, transparency, accountability in the real estate sector. The Act has been enacted keeping customer in centre. It also tries to bring transparency and discipline amongst the builders and developers, so as to improve the perception of the real estate sector among various stakeholders in a uniform regulatory environment across the country. With the introduction of RERA, builders and developers will have to face different business environment. It's crucial for builders/ developers and professionals to understand the winds of change and prepare themselves for unfolding opportunities and impending threats. This generates opportunity for professionals viz. Chartered Accountants, Cost Accountants, Company Secretaries, Lawyers etc. but it's an opportunity that comes with various challenges. The opportunities strive around the pillars of the Act. The pillars are:

Financial Discipline

- A promoter shall not accept more than 10% of the cost of the apartment, plot or building, as the case may be, as an advance payment or an application fee, from the prospective buyer without entering into a written agreement for sale with the buyer & register the same.
- 70% of the funds collected from the allottees shall be deposited in a separate bank account to cover the land cost & cost of construction and shall be used for that purpose only.
- The withdrawal from such accounts shall be in proportion to the completion of the project, which shall be certified by an engineer, architect & chartered accountant in practice.
- The project accounts are required to be audited.

Transparency

- All the construction projects to be registered with RERA authority and the details shall be available online to everyone. Various details such as approved sanctioned plans, detailed lay-out plans, number-type & carpet area of apartments, scheduled completion details are required to be submitted for registration.
- Various quarterly & timely updates about the progress of the project are required to be given to the authority.

Accountability

- The promoter has to update RERA website quarterly disclosing the progress of the project work & sales effected.
- The approvals pending from the authority about the projects are also required to be updated quarterly on the RERA website.
- Every officer including director/manager/ secretary of the company who was in charge or responsible shall be liable for the conduct of the company and deemed to be guilty.

Customer centricity

- All the disclosures pertaining to approved projects shall be available on the Website of the authority and can be accessed by anyone.
- Promoters shall not be able to make any addition or alterations in the sanctioned plan, layout plan, specifications, amenities etc. without the prior consent of at least two-thirds of allottees.
- Promoter has to give timely possession as mentioned in the agreement.

Compliance

- Authenticated copy of all approvals, commencement certificate, sanctioned plan, layout plan, specification, plan of development work, proposed facilities, proforma allotment letter, agreement for sale, conveyance deed etc. are to be given while making application for registration with RERA authority within the prescribed time limit.
- The details are required to be updated on quarterly basis on RERA website.
- The extension is given for maximum 1 year in case of delay due to no default of developer.
- Dispute resolution within 6 months at RERA & RERA Appellate Tribunal

The non-compliance of RERA Act may lead to stringent panel consequences/ refund of amount to the buyer along with interest/ freezing of project bank account etc. Hence the builders, developers, real estate agents/brokers shall have to comply with all the requirements of RERA Act in timely manner. In first 50 days of applicability, RERA Authorities has started levying penalties on occurrence of violation.

The Opportunities striving around the pillars are:

- **Advising the Real Estate Developers about the Real Estate Regulatory Authority Regulations:** It shall be of utmost importance to apprise the real estate developers & agents about the provisions of RERA, applicability to them, compliances & disclosures required under the Act, maintenance of Escrow account & provisions regarding withdrawal of money, audit requirements, role of various professionals such as architect, engineer, chartered accountant, advocate and certification requirement by them at various stages. A professional can support the real estate developer/agent for the timely compliances under the Act & co-ordinate with other professionals for the benefit of real estate developer/agent. Further, it would also provide opportunity for evaluation of financial and regulatory risks together with the identification of procedures to avoid, minimize or mitigate their impact.
- **Registration of the project with the Real Estate Regulatory Authority:** In respect of a real estate project situated in planning area, it is only after registration of a real estate project, a promoter can advertise, book, sell or offer for sale or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it.

  Promoter of a real estate project which is ongoing, on the date of commencement

of the Act and for which the completion certificate has not been issued, shall make an application within 3 months from the date of commencement of the Act i. e. July 31, 2017.

As the registration under RERA Act is compulsory for ongoing projects within 3 months from the commencement of the Act or for new projects before the launch of the project, a professional can play a vital role in the registration of the real estate projects. There are various documents and information such as details of the promoter, sanctioned plan, layout plan, specifications, proposed facilities & amenities to be provided, proforma of allotment letter, agreement for sale, conveyance deed, the apartment details, an affidavit containing various details, details of projects launched by promoters in last 5 years etc. are required to be submitted for the registration of the project with RERA Authority. A professional can provide the details of documents & information required for registration of the project, compile the documents & information received, verify the same, co-ordinate with the team of promoters for the details, support in submission of the details for registration of the project.

- **Drafting and vetting of documents**
  Various documents such as draft Allotment letter, Agreement for Sale, Conveyance deed, Booking letter etc. are required to be submitted along with the application for the registration of the project. A professional can provide services in drafting of such documents.

- **Ongoing compliances**
  The promoter has to update the RERA website quarterly i.e. within 7 days from the end of the each quarter and update the status about sales made, status of project, status of approvals.

The promoter is liable & responsible for execution of various documents on timely basis under RERA such as obtaining Completion Certificate (CC), Occupation Certificate (OC) on timely basis, execution of registered conveyance deed with 3 months from the date of OC, adherence to the sanctioned plans etc.

A professional can play a vital role and provide support to the promoter in such compliances.

- **Estimation of Land cost, Cost of construction, Estimated cost of Real Estate project**

The promoter has to disclose separately

(a) Land cost in the real estate project for the purposes of section 4(2)(l)(D) of RERA

Land cost shall include –

i. The costs incurred by the promoter for acquisition of ownership and title of the land parcels proposed for the real estate project, including its lease charges, which shall also include overhead cost, marketing cost, legal cost and supervision cost;

ii. Premium payable to obtain development or redevelopment rights;

iii. Amount paid for acquisition of TDR;

iv. Premium for grant of FSI, including additional FSI (if any), fungible FSI; and any other instruments permissible under the Development Control Regulations;

v. Consideration payable to the outgoing developer to relinquish the ownership and title rights over such land parcels.

(b) Cost of construction in the real estate project for the purpose of section 4(2)(i)(D) of RERA

i. Cost of Material

ii. Cost of Labour

iii. Cost of contract labour

(c) 'Estimated cost of the Real Estate project' in terms of section 2(v) of RERA while making application for registration of the project.

Section 2(v) of the Act defines – "estimated cost of real estate project" means the total cost involved in developing the real estate project and includes the land cost, taxes, cess, development and other charges;

Section 2(s) of the Act defines – "development" with its grammatical variations and cognate expressions, means carrying out the development of immovable property, engineering or other operations in, on, over or under the land or the making of any material change in any immovable property or land and includes redevelopment;

A professional can play a vital role in the determination of land cost, cost of construction estimated cost of Real Estate project. Withdrawal of funds is highly regulated, hence professional guidance may be required for working capital management, determination of cost of capital, etc.

- **Chartered Accountants' certificates**
  Every promoter registered under RERA has to obtain following certificates from chartered accountant.
  - Certificate of the Cost of the Project.
  - Certificate of estimated balance cost of completion of project.
  - Certificate of Estimated amount of receivables from unsold apartments calculated at prevailing ASR rate.
  - Certificate certifying the amount that could be withdrawn from the Escrow Account of the Project depending on the percentage of completion of the project in Form 3. The withdrawals are required to be certified by Chartered Accountant, engineer & architect. The chartered accountant has to certify the proportion of the cost incurred on the land cost and construction cost and also the proportion of the cost incurred on the construction cost & land cost to the total estimated cost of the project.
  - Annual certificate from Statutory Auditor in Form 5.
  - Audit of every project account
  - Internal Audit
- **Representation before Authorities**
  A professional can represent before the Real Estate Regulatory Authority and Appellate Tribunal on behalf the Developer or Flat purchasers.

Real Estate sector is second largest employer after agriculture in India. The scale of such opportunities will be much bigger post-introduction of RERA and opportunities would be emerging for every professional in their domain area. I would like to end this Article with the words of Karen Kaiser Clark – Life is change. Growth is optional. Choose wisely.

Adv. Sanjay Buch, Partner, Crawford Bayley & Co.
Co-authored by and researched by: Shashank Bajaj, Crawford Bayley & Co.

Conflict between RERA and State Laws and Between RERA Act & the Rules

The Real Estate Regulation & Development Act, 2016 came into full force from May 1st, 2017 with all the 92 sections of the Act becoming effective, while all the administrative provisions (69 of the 92 sections) were applicable from May 1st, 2016. While the RERA specifically overrides all existing applicable laws for the time being in force, it currently provides for repeal of only one statute, i.e., the Maharashtra Housing (Regulation and Development) Act, 2012 ("MHRDA").

These days, the lawmakers are trying to change the landscape of the country by simultaneously notifying various laws without repealing or abrogating earlier laws that run in the parallel adding confusion in the minds of the public and professionals alike. Thus, there is, indeed a fair amount of confusion if the Maharashtra Ownership of Flats Act, (Regulation of the Promotion of Construction, Sale, Management and Transfer) 1963 **("MOFA")** is still in force, with Real Estate (Regulation & Development Act) 2016 **("RERA")** being enacted and implemented across the country and, if, errant builders can be booked under MOFA. Some experts and housing related citizen activists have maintained that MOFA is still in force as there has been no notification repealing MOFA. However, the readers should also know the correct legal position as follows:

MOFA was actually repealed by section 56 of the Maharashtra Housing (Regulation & Development) Act, 2012 which came into force on 6th September 2015. Thereafter, the Central Act the Real Estate (Regulation & Development) Act, 2016 has repealed the MHRDA under section 92 which came into force from 1st May, 2016.

Despite the aforesaid repeal, some experts are under the impression that MOFA is still prevailing. In this connection the author would like to draw reader's attention to the provisions of section 6 of the General Clauses Act, 1897 which deals with effect of repeal and provides that where any Central Act or Regulation repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, **the repeal shall not —**

(a) Revive anything not in force or existing at the time at which the repeal takes effect; or

(b) Affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) Affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) Affect any penalty, forfeiture or punishment incurred in respect of any

offence committed against any enactment so repealed; or

(e) Affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

Further, your attention is also drawn to section 8 of the General Clauses Act, 1897 that deals with construction of references to repealed enactments and provides that where any Central Act or Regulation, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, **be construed as references to the provision so re-enacted.** It can thus be inferred that notification of the new sections automatically repeals their corresponding counterpart in MOFA.

In other words, the General Clauses Act, 1897 provides that an Act once repealed cannot come into force automatically. Suppose Act Z was repealed / scrapped by Act Y and Act Y was repealed by Act X. Hence, Act Z cannot come to life automatically unless a separate provision or Act is passed to revive it.

It may also be noted that the Maharashtra (RERA) Act, which repealed MOFA, had a condition for MOFA repeal:

"Provided that, the repeal shall not affect, — (a) the previous operation of the law so repealed or anything duly done or suffered thereunder, or (b) any right, privilege, obligation or liability acquired, accrued or incurred under the law so repealed, or (c) any penalty, forfeiture or punishment incurred in respect of any offence committed against the law so repealed, or (d) any investigation, proceedings, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, proceedings, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act has not been passed : Provided further that, subject to the preceding proviso and any saving provisions made elsewhere in this Act, anything done or any action taken under the provisions of the law so repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act; and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under this Act. (2) Any reference in any law or in any instrument or other document to the provisions of the law so repealed shall, unless a different intention appears, be construed as a reference to the corresponding provisions of this Act."

Which means all cases, right, interest and liabilities incurred during the MOFA's period will be in offing and all courts and agreements will adhere to MOFA provisions for transactions entered into during MOFA's tenure. It is interesting to note that section 465 of the Companies Act, 2013 also contains similar provisions.

RERA has carved out an overriding provision (Section 89) whereby its provisions will override all other laws, which are inconsistent with the provisions of RERA. As such the provisions of MOFA *(such as Sections 4 and 7 amongst other provisions)*, which are inconsistent with the provisions of RERA, are overridden by provisions of RERA, though there is no specific notification to that effect.

In this view of the matter, the author believes that MOFA is scrapped / repealed by Maharashtra Housing Act and Maharashtra Housing Act is repealed by Central Real Estate (Regulation & Development) Act, 2016 since 1st May, 2016.

Having regards to the aforesaid position, all matters will be treated under Central Real Estate (Regulation & Development) Act. Even Article 254 of the Constitution provides that in case of confusion as to the Act enacted by the Centre and the State on the same subject, in such circumstances Central Real Estate (Regulation & Development) Act will prevail and will have supremacy over the State Act i.e., MahaRERA.

The difference between MOFA and RERA is as follows:

Sr. No.	Salient Issues	Provisions in MOFA, 1963	Provisions in RERA, 2016
1	Developers/Promoter	Registration not required	Registration Compulsory
2	Sale of parking	Not permissible	Covered only car parking space/ garage including mechanical car parks
3	Carpet area	Balcony included and net usable area was permissible	Includes: Area covered by the internal walls of the apartment Excluded: Area covered by external walls, exclusive balconies, veranda area, service shaft and terrace not included. 3% tolerance allowed. Compulsory remeasurement of flat at the time of possession.
4	Before execution of agreement	Not to exceed 20%	Not to exceed 10%
5	Proportionate charging of common areas	Chargeable	Chargeable
6	Deemed Conveyance	Applicable within six months of notice	Applicable within three months of completion certificate of real estate project if date has not been specified in the agreement to sale.
7	Defect period	3 years	5 years
8	Refund of money only if delay for possession then refund of money with interest to the buyer	Simple interest @ 9% p.a. from the date sums are received	Simple interest @ 2% p.a. + prevailing MCLR rate of the State Bank of India from the date sums are received
9	Formation of a Society	As soon as a minimum number of persons (60%) require to take flat. Within four months of 60% of occupation	Within three months of date of 51% of allotees that have booked their apartment

Sr. No.	Salient Issues	Provisions in MOFA, 1963	Provisions in RERA, 2016
10	Conveyance	If no period mentioned within 4 months of the formation of society	If no period mentioned then for single building within three months of issue of occupation certificate or 51% of total number of allotees in the building/wing having paid full consideration whichever is earlier. In case an apex body has to be formed if no date is agreed upon them three months from the completion of the last building
11	Extension of time for delivery of flat	i. Non availability of steel, cement, other building, water or electric supply ii. War, civil commotion or act of god iii. Any notice, order, rule, notification, etc. of the Government and/or other public or competent authority [Note the provision of this proviso are not mandatory but negotiable]	i. War, civil commotion or act of god ii. Any notice, order, rule, notification, etc. of the Government and/or other public or competent authority iii. Excludes period of registration where actual construction not carried by promoter due to specific stay, injunction order to the project by any court of law, tribunal, competent authority, statutory authority, high power committee, etc. or due to other mitigating circumstances as decided by the RERA authority iv. If authority is convinced that due to no fault of the promoter there has been a delay he can get extension for the registration of the project
12	Payment Terms	Very stringent/ not practical therefore no developers used to follow	Liberal and practical for the promoters and allotees
13	Escalation	Increase in local taxes, water charges, insurance and such other levies, if any, imposed by local authority/ Government	Escalation free except duty increase on account of development charges/ charges to authority
14	Share of outgoings	In proportion to floor area of flat	Proportion to carpet area

Sr. No.	Salient Issues	Provisions in MOFA, 1963	Provisions in RERA, 2016
15	All receipts	Mentions maintain a separate account	70% to be maintained with designated account and to be withdrawn as per progress of construction
16	Project potential	Till conveyance/ society formation any FSI increase would belong to developer	Disclosure to be made about expectation of FSI proposed to be utilised including expectation of future FSI or else consent of 2/3rds allottees required
17	Interest	Developers discretion	M.C.L.R. plus 2% of SBI bank rate
18	Termination	Developer was entitled to terminate after notice on default of payment	Promoter entitled to terminate after three instalments not paid and notice given. Refund must be made within 30 days
19	Specification of material	Generic declaration would suffice	To mention brand, or price of product (if unbranded)
20	Registration of project	Not required	Compulsory before any advertisement or receipt of payment
21	Insurance	Of Building	Of Building and title
22	Disclosure	To be available on site	On the site and website
23	Title liability	Up to conveyance is done	Liability is perpetuity
24	Offences & penalties	Imprisonment & nominal fines were prescribed	Heavy fine linked with up to 10% of estimated project cost and imprisonment only if directions not followed for both developer as well as allottees
25	Consent to change sanctioned plans	Consent not required unless individual unit is affected	Consent of 2/3rd allottees required for making any major modification in sanctioned plan or revised plan
26	Development of project and amenities	Phase wise development not mentioned	Detailed phase wise development permitted along with different date of possession for apartments and amenities
27	Unfinished project	No provision to take over	Authority with approval of State Government may allow development of project by any other person including first right to take over and complete the project will rest with allottees who have purchased the apartment in the same project
28	Marketing agent	Not required to be registered	Registration is mandatory within RERA authorities

Co-promoter and its origin into RERA

The term co-promoter is not defined in MahaRERA. Co-promoter means and includes any person(s) or organization(s) who, under any agreement or arrangement with the promoter of a Real Estate Project is allotted or entitled to a share of total revenue generated from sale of apartment or share of the total area developed in a real estate project. The liabilities of such co-promoters shall be as per the agreement or arrangement with the promoters, however for withdrawal from designated bank account, they shall be at par with the promoter of the Real Estate project.[1]

Also, the arrangement or agreement of co-promoter(s) with promoter should clearly detail the share of co-promoters and a copy of the said agreement or arrangement should be uploaded on the MahaRERA portal at the time of registration along with other details of the co-promoter(s). Further each of the co-promoter(s)/ Organization/individuals entitled to share of the total area developed, should open separate bank account for deposit of 70% of the sale proceeds realized from the allottees.

This origin was due to the differences in arrangements made by promoters as well as the investor/landowner who may be an individual/organisation and takes part in the earning revenue by way of development or better say creation of the buildings, apartments, etc. Therefore the collection of revenue may be split into two thereby affecting the sale proceeds and is not considered as cost of the project and withdrawn from designated bank account merely by virtue of this arrangement. For the purpose of withdrawal from the designated bank account, these individuals/organisations should also be considered as promoters and hence shall be termed as co-promoters.

Major points of disconnect

- **Definition of ongoing projects:** RERA 2016 includes projects that are ongoing on the date of commencement of the Act (i.e., May 1, 2017), and for which the completion certificate has not been issued. However, Andhra Pradesh, Kerala and Uttar Pradesh have altered this definition in their notified rules.
- **Penalties for non-compliance with the Act:** RERA 2016 recommends imprisonment for a term which may extend up to three years, or fine which may extend up to 10% of the estimated cost of the real estate project, or both, in case of non-compliance with the Act. However, most states have added a clause of compounding of offence to avoid imprisonment.
- **Payment schedule and liability in case of structural defects:** According to the Central legislation, the model sale agreement is required to specify 10% advance payment, or charge an application fee from buyers, while entering into a written agreement for sale. In addition, in case of any structural defects arising within five years of handing over the possession of project to buyers, developers will be liable to rectify such defects without further charge. However, there is no clarity on these clauses in most States' RERA notifications[2].

1. Maharashtra Real Estate Regulatory Authority, office order dated 11th May 2017.
2. http://economictimes.indiatimes.com/wealth/real-estate/how-well-has-your-state-complied-with-rera-rules-heres-a-ready-reckoner/articleshow/58478583.cms

RERA Sections	Draft Rules	Comments
13, 2 and 84/2/h	9	While RERA mandates a balanced Agreement with precise details (s/s 2) Draft Rule 9 does not provide a model agreement with balanced and harmonised terms. Annexure A reads "to be inserted" can lead to developers pushing lopsided agreements? Law is unheard if RERA has powers to moderate /amend / reject whole or part of agreement proposed by builder
88 and 89		Rules are silent on this contradiction. Section 88 vs. 89 of RERA is contradictory – Provisions of RERA will be in addition to and not in derogation to any other law currently applicable. If MOFA or any other State Act has a stronger provision in favour of allottee should it prevail? Would developer take recourse to a less stringent provision and litigate
?	3(a) and (b)	If the promoter company is a joint venture or partnership, the procedure of giving details must be followed by all partners. Rules must specify Balance sheet should be last year's Statutory balance Sheet an audited one for tax purpose. Loophole to be plugged
4(1) and (2)(b)	4(1) and (2)	Rules must clarify that this information must also include all enterprises with whom promoters / key management personnel have had significant No of Transactions during last 5 years
31 (1)	36 and 37	Definition of Aggrieved person should be alike insurance industry (insurable interest) including voluntary consumer association (not related to the property) as aggrieved would excessive litigation and cause delays in project
59 (1)	35 (2)	RERA Section 59(1) already lays a fine equal to 10% of the cost of the project. If that is not paid, or if the violation continues, RERA has three options for imposing an additional penalty: (a) An additional fine of 10% of the cost of the project (b) Imprisonment of "up to" 3 years c) both (a) and (b) above. Instead of giving a "crime-vs-penalty" look-up table that acts as a guide based on the scale/gravity of the crime, the rules have "commuted" the prison term into a fixed rate: 10% of the project cost. How can the Rules overturn the Act, and make it impossible to follow? Draft Rules – Open Issues and teething troubles

Apartment Owners Act, 1970 versus RERA

- The problem is accentuated when there are some glaring differences between RERA and the State laws, which will affect the direct interest of the buyers. For example, the RERA says if you are charging more than 10% of the value of the property as advance payment, then the

document must be registered. On the other hand, the Apartment Owners Act says, the document needs to be registered f the advance is 20%.

- The RERA Act is not in contravention of the Apartment Owners Act or any other State Act, but an addition to these Acts. RERA does not automatically amend the Apartment Owners Act. "Sections 88 and 89 of the RERA says the provisions of the Act will be in addition to and not in derogation to any other law that is presently applicable.
- On the debated topic of alterations to original layouts, approval from all allottees is required under the said law while RERA says the developer will not be allowed to make any changes to the original plan midway without the written consent of at least two-thirds of buyers. "Here, Maharashtra has been following a more stringent law. However, unless clarified, a developer can now choose to take the consent of only two-thirds people and go ahead with an alteration." This will be a regressive step for Maharashtra.
- There can be litigations over penalty as well. The RERA has very structured provisions in terms of how penalties will be calculated. "Typically, the penalty is the advance amount with interest and a compensation amount that this authority takes decision on. However, under the Apartment Owners Act, since there is no authority, a flat 9% interest is paid on the advance amount," Therefore, unless the State amends the clauses which are different, there are high chances of the home buyers getting entangled between these two laws.
- RERA says the regulations are in addition to the existing laws and the basic idea is to protect the buyer, the likely interpretation is that the stronger of the two provisions will apply to the builders. For instance, in case of alteration consent, a home buyer whose consent was not sought can always quote the State law. However, from a legal perspective, the Doctrine of Occupied Field comes into play. "When on a particular subject of the Concurrent List on which the State has made a law and subsequently Centre also makes a law, the field gets occupied by the Central legislation, and State legislation cannot hold something contrary to the Central legislation,"

Conclusion

It would have been better if the enforcement machinery and infrastructure was put in place first before the new law was brought into effect through notifications in order to avoid ambiguities and inconsistencies. Hurried legislation is always complicated and difficult to implement.

Disclaimer: Views expressed in this Article by the authors are personal and do not represent their firm's view.

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Checklist Under RERA

The Real Estate (Regulation and Development) Act, 2016 ('the Act') is an Act of the Parliament of India which seeks to protect real estate buyers. It seeks to provide a code of conduct for the key players in the real estate sector, namely, promoters, real estate agents and buyers. This article provides compliance checklists for the following-

I. Registration of Real Estate Projects by the Promoter

II. Registration of ongoing Real Estate projects

III. Steps for promoters post registration of the real estate project

IV. Registration of Real Estate Agents.

All Real Estate projects are mandatorily required to be registered by the promoter with Real Estate Regulatory Authority **('RERA').**

Moreover, no promoter can advertise, market, book, sell, or offer for sale , or invite persons to purchase in any manner any plot, apartment or building, as the case may be in any Real Estate Project or part of it, in any planning area, without registering the real estate project with the RERA established under the Act.

As per the proviso to section 3(1) of the Act, all ongoing projects on the date of commencement of the Act and for which no completion certificate has been issued, the promoter shall mandatorily make an application to the Authority for registration of the said project **within three months** from the date of commencement of this Act (i.e. within three months from 1st May, 2017).

Under the Act, promoters shall have to register all **commercial and residential** Real Estate Projects with RERA, except in projects where:

- Area of land proposed to be developed does not exceed five hundred square meters
- Number of apartments proposed to be developed does not exceed eight inclusive of all phases
- Promoter has received completion certificate[1] for a Real Estate Project prior to commencement of this Act
- For the purpose of renovation or repair or redevelopment which does not involve

1. **Explanation (II) to the Rule 4(1),** defines the term **"completion certificate"** shall mean such building permission or certificate, by whatever name called, which is issued by the competent authority by or under the provisions of Maharashtra Regional Town Planning Act, 1966 or any other law for the time being in force, in accordance with which the permission for development has been granted.

marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project

If any promoter fails to register his project with RERA, he shall be liable to a penalty which may extend up to ten per cent of the estimated cost of the real estate project. On continued violation, he shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten per cent of the estimated cost of the real estate project, or with both.

On registration, the promoter is required to fill in details of the project on the RERA website (in case of projects in Maharashtra, registration shall be done through the website – www.maharerait.mahaonline.gov.in). The website will thus form a central repository of all information relating to real estate projects.

I. Registration of new real estate projects

While registering their real estate projects, every promoter shall provide the details and documents as specified in section 4 of the Act and also as provided in the Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017('the said Rules'):-

A. Promoters' details

- Authenticated copy of the PAN card of the promoter[2].
- Type of enterprise/Applicant.
- Name, photograph, contact details (such as office number, office mobile number, secondary office number, fax number, e-mail ID) and address of the promoter if he is an individual or authorized representative; or
- Name, photograph, contact details and address of the chairman, partners, directors, as the case may be, and the authorised representative in case of other entities.
- Name and address of the bank or banker with which Account in terms of section 4(2)(l)(D) of the Act is maintained[3].
- Agency to take up external development works (local authority/self-development).

B. Promoter's past five years experience details

- Project Names, Project Type.
- Current Status of the Project (whether on-going project or new project).
- Type of land, Plot/CTS/Survey No.
- Address of the Project.
- Land Area in Sq. Mtrs.
- Number of Buildings.
- Number of Apartments sold and the size of apartments[4].
- Final sanction Plan.
- Final Advocate Search report.
- Extent of development works carried as per the last approved sanctioned plan.

2. Also submit a letter of authority or board resolution, in case promoter not being an Individual
3. Section 4(2)(l)(D) reads as follows:- " that seventy per cent of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose"
4. Size of the apartment should be based on carpet area even if earlier sold on other basis such as super built up area etc. which shall not affect the validity of the agreement entered into between the promoter and the allottee to that extent.

- Total Cost (INR) (including estimated cost and actual cost incurred).
- Original proposed date of Completion[5], Actual Completion Date (in case of delay) and expected period of completion[6].
- Details of third party interest created[7]
- Cases pending.
- Payment pending (if any).

C. Project Details

- Project name, project type.
- Proposed date of completion.
- Revised proposed date of completion.
- Advocate search report.

i. LEGAL DETAILS

- Copy of the **legal title report**[8 9]
- Copy of the **collaboration agreement, development agreement, joint development agreement**[10] or any other form of agreement , as the case may be, entered into between the promoter and such owner
- The information relating to the **encumbrances**[11] in respect of the land where the real estate project is proposed to be undertaken and the details regarding the proceedings which are **sub-judice**[12] (if any) in respect of such land.

ii. SANCTIONED/ PROPOSED PLAN DETAILS (INCLUDING FSI DETAILS)

- Sanctioned plan, layout Plan and specifications thereof, where the project is being developed along with information relating to the FSI/ TDR and other entitlements which are proposed to be utilized in accordance with the relevant Development Control Regulations for the time being in force, for carrying out such sanctioned plan and the amenities and common facilities (including common areas, parking spaces) to be provided in accordance with the sanctioned plan.
- An authenticated copy of the **approvals and commencement certificate** from the competent authority

5. As disclosed to the allottees
6. This should be commensurate with the extent of development already completed.
7. i.e. names and addresses of such persons in whose favour such interest have been created
8. The legal title report should reflect the flow of title of the owner or promoter to the land on which development is proposed and the same should be authenticated by a practising advocate
9. If promoter is not the owner of the land then authenticated (by an Advocate) copies of legal title report of such owner has to be submitted
10. The said document is required to be produced where the promoter is not owner of the land and it should be reflecting the consent of the owner of the land
11. the details of encumbrances include any rights, title, interest, dues, litigation, details relating to mortgage / charge created for the project land for the facility taken by the applicant or any third party and name of any party in or over such land or no encumbrance certificate from an advocate having experience of ten years or from revenue authority not below the rank of Tehsildar, as the case may be;
12. Details such as type of case, which Court, stage of the case, case no., year in which filed, whether any Order passed, etc., have to be mentioned

obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application[13].

- The **Proposed plan, Proposed Layout Plan** of the whole project and **Floor Space Index (FSI)[14]** proposed to be consumed in the whole project, as proposed by the promoter.
- Proposed FSI to be consumed and sanctioned FSI.[15]
- Proposed Number of **building(s) or wing(s)** to be constructed and sanctioned number of the building(s) or wing(s)[16].
- The plan of **development works** to be executed in the proposed project and the **proposed facilities** to be provided thereof including firefighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy.
- Proposed number of **floors** in respect of each of the building or wing to be constructed and sanctioned number of floors in respect of each of the building or wing.[17]
- the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas apartment with the apartment, if any.

iii. **LAND AND BUILDING DETAILS**

- Plot/CTS/Survey No.[18], Boundaries (East, West, North, South)[19].
- **Aggregate area in sq. metres** and also area of the recreational open space.
- **Land cost[20]** as per section 4(2)(l)(D) of the Act.

13. Where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases is to be submitted;
14. Rule 2(1)(m) of the said Rules defines FSI as - "FSI "or" Floor Space Index" shall have the same meaning as assigned to it in the Building Rules or Building Bye-laws or Development Control Regulations made under any law for the time being in force
15. In case the sanctioned Floor Space Index is different than what is proposed to be consumed by the promoter, then the proposed Floor Space Index shall be disclosed at the time of registration and as and when the Floor Space Index is sanctioned, the same shall be uploaded on the website of the Authority by the promoter from time to time.
16. i.e. sanctioned building count, proposed but not sanctioned building count. In case the sanctioned number of building(s) or wing(s) is different than what is proposed to be constructed by the promoter, then the proposed number of building(s) or wing(s) shall be disclosed at the time of registration and as and when the additional number of building(s) or wing(s) are sanctioned, the same shall be uploaded on the website of the Authority by the promoter from time-to-time
17. In case the sanctioned number of floors is different than what is proposed to be constructed by the promoter, then the proposed number of floors shall be disclosed at the time of registration and as and when the additional number of floors are sanctioned, the same shall be uploaded on the website of the Authority by the promoter from time to time.
18 The location details of the project should show clear demarcation of land dedicated for the project.
19. Including the latitude and longitude of the end points of the project.
20. i.e. Acquisition cost of land, cost of acquiring TDR, FSI, Stamp Duty, transfer charges, registration fees, land premium, estimated cost of construction of rehab building, etc.

- The number of open and **covered parking spaces**[21].
- The number and area of **garages** for sale in the project.
- Number of basements, number of plinth, number of podiums, number of slab of super structure and number of stilts.
- The particulars in respect of **Architecture and Design Standards,** type of construction technology, earthquake resistant measures and the like to be adopted for buildings and for common areas and of amenities/ facilities in the layout plan of the real estate project[22].

iv. **OTHER DETAILS**

- The nature of the organisation of allottees[23] to be constituted and to which the title of such land parcels is to be conveyed and the specific local laws to govern such organisation of allottees on completion of real estate project;
- Proforma of the **allotment letter, agreement for sale,** and the **Conveyance Deed** proposed to be signed with the allottees;
- The names, address, registration no., Aadhaar No. and contact details of **real estate agents,** if any, for the proposed project;
- The names, address, Aadhaar No. and contact details of the **contractors, architect, structural engineer,** if any and other persons concerned with the development of the proposed project;

D. Other documents to be submitted

- Copy of the Commencement Certificate
- Copy of the Bank Account (cancelled Cheque)
- A **Declaration** (in prescribed "Form B"), supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter[24],

21. Rule(2)(1)(j) "Covered parking space" means an enclosed or covered area as approved by the competent authority as per the applicable Development Control Regulations for parking of vehicles of the allottees which may be in basements and/or stilt and/or podium and/or space provided by mechanised parking arrangements but shall not include a garage and/or open parking.
22. Namely – internal roads and footpaths, water supply, sewage, storm water drains, landscaping and tree planting, street lighting, community buildings, treatment and disposal of sewage and soilage water, solid waste management and disposal, water conservation rain water harvesting, energy management, fire protection and fire safety requirements, electrical meter room, sub-station, receiving station, etc.
23. Namely society, federation, common organisation of allottees or federation of common organisation
24. the Affidavit shall state the following:-

(A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;

(B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;

(D) that seventy per cent. of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose

- Certificate from the project Architect[25] certifying the **percentage of completion of construction work**[26] [27] of each of the building / wing of the project,
- A certificate from the Engineer[28] for the **estimated balance cost to complete the construction work** of each of the building / wing of the project, and
- A certificate from a practising Chartered Accountant[29], for the **estimated balance cost to complete the project**.
- The promoter shall submit a certificate from a practising Chartered Accountant, certifying the **balance amount of receivables** from the apartments / flats / premises sold or allotted and in respect of which agreement have been executed and estimated amount of receivables in respect of unsold apartments /flats / premises calculated at the **prevailing ASR rate**[30] on the date of certificate.
- The promoter shall also provide such other information and documents, as maybe required by the Authority under these rules or the regulations.

Registration Fees

As per Rule 4(5)(i) of the said Rules, at the time of application for registration, the promoter shall pay a registration fee, calculated on the area of the land proposed to be developed **at the rate of rupees ten per square meter,** subject to a minimum of ₹ 50,000/- (Rupees Fifty Thousand Only) and a maximum of ₹ 10,00,000/- (Rupees Ten Lakhs only).

The fees for registration of real estate project shall be paid through NEFT or RTGS System or any other digital transaction mode.

II. Registration of on-going real estate project

Along with the above-mentioned details, following details and documents are also required to be submitted:-

- Last approved sanctioned plan of project
- Extent of development of common areas, amenities, etc.
- Expected completion date
- Original time period disclosed to the allottees for completion at the time of sale and expected delay
- A Certificate from the practscing project Architect certifying the percentage of completion of construction work of each of the building, wing of the project
- A Certificate from the practising Chartered Accountant, for the estimated balance cost to complete the project
- Certificate from the practising Chartered Accountant, certifying the balance amount of receivables from the apartments/flats premises sold or allotted and in respect of which agreement have been executed and

25. in Form 1
26. i.e. estimated cost of construction, On-Site expenditure for development of entire project, Payment of Taxes Fees to Statutory Authority, Principle sum of interest to financial institute
27. In case of SRA projects, cost of construction shall also disclose estimated construction cost for Rehab Building, Cost towards clearance of land, etc.
28. In Form 2
29. In Form 3
30 Rule 2(1)(e) of the said Rules defines ASR as – " "ASR" or "Annual Statement of Rates" means the rate of land and building for different users and as notified under the provisions of the Maharashtra Stamp (Determination of True Market Value of Property) Rules, 1995;"

estimated amount of receivable in respect of unsold apartments/ flats/ premises calculated at the prevailing ASR rate on the date of certification

- The number of apartments sold or allotted to the allottees and further disclose the size of the apartment based on the carpet area even if such apartments are sold earlier on any other basis, such as super area, super built up area etc.
- In case of plotted development, the promoter shall disclose the area of the plots sold to the allottees including the extent if share of common areas and amenities etc.

III. Checklist for promoters post registration

As per Section 11 of the Act, the promoter shall, upon receiving his Login ID and password under clause (a) of sub-Section (1) or under sub-Section (2) of Section 5, as the case may be, **create his web page on the website of the Authority** and enter all details of the proposed project as provided under sub-Section (2) of Section 4, in all the fields as provided, for public viewing, including:-

- Details of the registration granted by the Authority;
- Quarterly up-to-date the list of number and types of **apartments or plots,** as the case may be, **booked**;
- Quarterly up-to-date the list of number of **garages booked;**
- Quarterly up-to-date the **list of approvals taken** and the approvals which are pending subsequent to commencement certificate;
- Quarterly up-to-date **status of the project;** and
- Such other information and documents as may be specified by the regulations made by the Authority

IV. Checklist for registration of real estate agents

As per Section 9 of the Act, no real estate agent shall facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being the part of the real estate project registered under section 3, being sold by the promoter in any planning area, without obtaining registration under this section. Section 2(zm) of the Act defines real estate agent as follows:-

> "(zm) "real estate agent" means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called;"

Every real estate agent required to be registered as per sub-Section (2) of Section 9 shall make an application in writing. In case of registered real estate projects, real estate agent shall register forthwith and in any case prior to engaging in any activity relating to marketing, advertising sale or purchase of any apartments. The application shall be in **Form 'G'.** The following

documents shall also be submitted along with the application, namely:

- Brief details of his enterprise including its **name, registered address of place of business, type of enterprise** (proprietorship firm, societies, partnership, company etc.);
- **Registration numbers** of his enterprise (under the respective laws governing the same.
- **PAN, Aaadhar Card No, DIN,** as the case may be, under which returns are required to be filed with statutory authority;
- **Particulars of registration** obtained under other laws, and rules and regulations, as the case may be, along with the authenticated copy of **partnership deeds, memorandum of association, articles of association,** etc.;
- Recent colour **photographs** of the real estate agent, if an individual or
- Recent colour photographs of all the partners, directors, trustees, etc. including persons in service or assigned work expected on a real estate agent, in case of other entities;
- **Income-tax returns** for last three financial years preceding the application[31]
- Authenticated copy of **the proof of address** of the principal place of business, **number of branch offices** if any along with contact details including Telephone Numbers, Fax Numbers and e-mail address; and
- Details (if any) of **all real estate projects and their promoters** on whose behalf he has acted as real estate agent in preceding five years;
- Details of all **civil or criminal cases pending** against him if an individual or any of the partners, directors, trustees etc. in case of other entities;
- Authenticated copies of all **letter heads; rubber stamp images, acknowledgement receipts** proposed to be used by the real estate agent;
- Such other information and documents, as may be specified by regulations.

Registration Fees

A sum of ₹ 10,000/- (Rupees Ten Thousand only), in case of applicant being an individual; and ₹ 1,00,000/- (Rupees One Lakh), in case of the applicant being other than an individual.

The fees for registration of real estate project shall be paid through NEFT or RTGS System or any other digital transaction mode.

It is pertinent to note that the real estate agent upon being engaged by the promoter under clause (f) of sub-section (2) of section 4 for a real estate project shall maintain and preserve books of accounts, records and documents separately for each such real estate project.

31 In case the applicant was exempted from filing returns in any of the three financial years preceding the application, a declaration to such effect should be submitted

THE CHAMBER OF TAX CONSULTANTS

THE DASTUR ESSAY COMPETITION 2017 - MERIT LIST

Rank	Name	Office / College	Topic
1st	 Mr. Rahul Singh	Chanakya National Law University, Patna, Bihar	Freedom of Expression and Action - can it ever be curtailed?
2nd	 Ms. Prerna Singh	Delhi University, Delhi	Demonetisation – Challenges in Cashless Economy
3rd	 Ms. R. Harishni	Sastra University - School of Law, Thanjavur	Freedom of Expression and Action - can it ever be curtailed?
4th	 Ms. Sanchi Dhamija	Vivekananda Institute of Professional Studies, New Delhi	Freedom of Expression and Action - can it ever be curtailed?
5th	 Mr. P. Mohan Chandran	MSS Law College, Secunderabad	Demonetisation – Challenges in Cashless Economy
6th	 Mr. Anurag Sarda	Bangalore Institute of Legal Studies, Bengaluru	Demonetisation – Challenges in Cashless Economy
7th	 Mr. Smit Samir Dedhia	GBCA & Associates, Chartered Accountants, Mumbai	Demonetisation – Challenges in Cashless Economy
8th	 Mr. Pritesh Harish Ranawat	UKG & Associates, Chartered Accountants, Mumbai	Demonetisation – Challenges in Cashless Economy
9th	 Mr. Vatsal Nitin Shah	UKG & Associates, Chartered Accountants, Mumbai	Accountability – Government, Businessmen, Professionals & Others
10th	 Ms. Sudeshna Prashant Deshmukh	Sastakar Vaidya & Co., Chartered Accountants, Mumbai	Accountability – Government, Businessmen, Professionals & Others

Mr. Rahul Singh

Right to Freedom of Expression

1. Introduction

For decades, freedom of speech and expression has been the epicentre of major political and social debates and has gained much attention of eminent political leaders, jurists and erudite thinkers of the world. India is the perfect epitome of these debates as many a time right to freedom of expression has been attacked. Be it the regime of late PM JawaharLal Nehru when journalist Romesh Thapar's left-leaning magazine Cross Roads was banned for being critical of Nehru's policies in Madras[1], or, the present age of Narendra Damodardas Modi, when JNU student's union leader Kanhayia Kumar was booked under seditious charges. Students and professors who were protesting claimed that he has not committed sedition but his real crime is his belief in freedom of speech and expression and his unfaltering support for the downtrodden sections of India.[2] If we look towards the post freedom history of this world's largest democracy freedom of expression occupies a significant place in development of the Indian political and Constitutional structure. Justice Shastri of Supreme Court in Romesh Thapar vs. State of Madras[3] observed that freedom of speech and press lay the foundation of all democratic organisations, for, without free political discussion no public education, so essential for proper functioning of the process of popular Government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with Madison who was the leading spirit in the First Amendment of the Federal Constitution, that "it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits". Similar opinion was laid by Justice Bhagwati in the case of *Maneka Gandhi vs.UOI*[4], Justice Bhagwati observed, that if democracy means Government of the people, by the people then it is necessary that every member must be entitled to take part in democratic process and to enable him to intellectually exercise his right of making choice, it is essential to provide free and general discussion of public matters.

Right to freedom of speech and expression is one of the fundamental rights which have been guaranteed by the Constitution of India. Article

1 Seema Chishti, Explained: 'Freedom' to express oneself, but within limits, The Indian Express, (March 16, 2017,9:10 pm), http://indianexpress.com/article/india/india-others/explained-freedom-to-express-oneself-but-within-limits/

2 MURTAZA HAIDER, Jawaharlal Nehru University row: Freedom of speech now Modi-fied in New Delhi, Dawn (March 16, 2017, 9:20 pm), https://www.dawn.com/news/1240136

3 Romesh Thapar vs. State of Madras, AIR 1950 SC 124

4 Maneka Gandhi vs. UOI, AIR 1978 SC 597

19(1)(a) of Constitution of India reads that "all citizens have right to freedom of speech and expression". The words speech and expression used in Article 19(1)(a) may seem simple enough not to require any explanation. But no word is perhaps too plain for the purpose of legal interpretation in the Courts[5]. It is difficult to provide a precise definition to the fundamental right of freedom of speech and expression. The explanations which are apt in one case may not deem fit in another case as the ambit of fundamental rights is very vast. Similarly, the definition which was apt in past may require new dimensions to cope with the present need. United States Supreme Court, explained freedom of speech and expression as, freedom of speech and expression means the right to express one's own conviction and opinions freely by words of mouth, writing, printing pictures or any other mode. It thus includes the expression of one's ideas through any communicable medium or representation, such as, gesture, signs and the like.[6]

Though the ambit of Article 19(1) of the constitution of India is very vast, and guarantees numerous freedom regarding the freedom of expression, but the next clause i.e. article 19(2) imposes certain restrictions upon the free speech and expression. It says that, nothing in 19(1)(a), shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by 19(1)(a). Article 19(2) says that reasonable restrictions can be imposed in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence.

So, one thing which may strike every mind that whether the rights provided under 19(1)a is an absolute right which cannot be curtailed, or is a limited right upon which the State can impose certain restrictions. Whether the right to freedom of expression is like a star which shines radiantly in the galaxy of fundamental rights, or is a gloomy one which is overburdened with restrictions.

2. Rationale of free expression and provision in other nations

Noted historian Bury observed that, freedom of expression is a supreme condition of mental and moral progress.[7] M. P. JAIN in his book Indian Constitutional Law explained that freedom of speech and expression is bulwark of democratic Government. It is very essential for human development and it is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties and it helps in protecting all other liberties.[8] Freedom of speech and expression fulfils a vast purpose so, rationale behind providing citizens the right to freedom of expression are –

a. Self governance – In democracy we govern ourselves as we choose representatives who run the Government. The people must be free to choose away all the conceivable ideas in formulating public policy. Free expression helps to prevent entrenchment of interest in Government. It also helps to check the abuse of power by public officials by providing citizens the information needed for using their veto power while electing their representatives. While voting, the voters express their opinion and ballot paper or the EVM is the device through which they express their opinion.[9]

5 Express Newspapers vs. UOI, AIR 1958 SC 578

6 Lowell vs. Griffin, (1939) 303 US 444

7 Bury, History of Freedom of Thought, at 239, 1913

8 M. P. Jain, Indian Constitutional Law, at 1019, Vol 1, 7th Edition, 2013

9 DD BASU, Commentary on the Constitution of India, at 3650, Volume 4, 9th Edition, 2014

b. The search of truth – Free speech helps in the search of truth. In *Abrams vs. United States*[10] it was held that "the theory of our Constitution is that the best test of truth is the power of the thought to get it accepted in the competition of the market." Related to truth is the idea, that, free expression is necessary to develop moral virtue. In the world of extreme moral relativism, this may be one aspect of the "market place" of ideas, but human moral compass has calibrated the ability to make moral choices. People will accept those facts which they will consider good and will reject the evil and for this, transfer of ideas and right to freedom of expression is necessary.

c. Tolerant society – Free expression of ideas and opinions helps in making society tolerant. It involves a special act of carving out one area of social interaction for extra ordinary self restraint. It helps in shaping the intellectual character of the society and for shaping the intellectual character exchange of ideas is very essential.

d. Conformity and dissent – It is also very essential and fruitful for the democratic and plural nation. Widespread conformity deprives the citizens of information that they need to have. Conformists are often regarded as the protective of social interest by keeping quiet and singing the same song which the majority sings. On the other hand dissenters seem to be selfish person as they don't agree with the opinion that is generally accepted. But it is said that opposite is closer to the truth. If dissenters are punished for, expressing their non conforming views they will fail to disclose what they know and believe to the determined society.[11] In democracy everyone need not to sing the same song will find that it is the dissenting voices are the life blood of democracy, for survival of a healthy democracy we must include dissenting voices in the national conversation.[12]

2.1 Provisions in other nations

Freedom of expression has been guaranteed in almost all of the democratic nations of the world. First Amendment to the Constitution of United States of America says, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Constitution of Eire too, protects the freedom of expression in Section 40(6)(1) and says that, the State guarantees liberty for the exercise of right of citizens to express freely their convictions and opinions, subject to public order and morality.

Article 5 of West German Constitution 1948 provides the right to freely express and to disseminate one's opinion through speech, writing and illustration.

Article 21 of Japan Constitution reads that, freedom of assembly, association, speech and press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Though right to freedom of expression has not been explicitly mentioned in any particular rule or statute of England, but the right is based on the ordinary rule of law that no man is to be punished except for a distinct breach of law.[13]

10 Abrams v United States, 250 US 616 (1919)

11 DD BASU, Commentary On the Constitution of India, at 3652, Volume 4, 9th Edition, 2014

12 Praveen Swami, The compelling virtue of treason, The Indian Express, (March 20, 2017, 9:55 pm), http://indianexpress.com/article/opinion/columns/the-compelling-virtue-of-treason-4559218/

13 DD BASU, Commentary On the Constitution of India, at 3659, Volume 4, 9th Edition, 2014

3. History of Freedom of Expression and Restriction in India

The historical background stands in stark contrast to other major democracies of the world. Right to freedom of speech and expression guaranteed in Article 19(1)(a), is not a sudden outcome of enactment of Indian Constitution in late 1950's. The journey to protect fundamental rights and freedom of expression dates back to the era of India's struggle for independence from the British rule. Perhaps the earliest demand for fundamental rights was made in the Constitution of India Bill, 1895. Article 16 of Constitution of India Bill, 1895 stated that "Every citizen may express his thoughts by words or writings, and publish them in print without liability to censure, but they shall be answerable to abuses, which they may commit in the exercise of this right, in the cases and in the mode the Parliament shall determine".[14] Though the author of this document is not known, but it is regarded as being the work of Bal Gangadhar Tilak.

During the India's freedom struggle, right to freedom of expression was given due importance by the national leadership. Thorough campaigns were organised to ensure the freedom of expression against the sedition and other repressive laws prevailing those days. It was defended by all the political trends and groups, who otherwise used to criticize each other. The moderates defended the extremist leader Bal Gangadhar Tilak's right to speak and write. Further, the Karachi Convention of the Congress in 1931, passed a resolution on Fundamental Rights which, *inter alia,* guaranteed right of free expression of opinion through speech and Press.[15]

To understand the scope of right to free speech provided in the Constitution of India, it is essential to go through the debates of Constituent Assembly, which was formed to draft the Constitution of India. To assist the Constituent Assembly, several sub-committees were made on different subjects, which were obliged to report to the Assembly. One such sub-committee was Fundamental Rights Sub-Committee. During the Constitutional debates, there was never any doubt whether the right to freedom of speech and expression should be protected or not.[16] Several members of the Constituent Assembly had experienced the brutish colonial administration's attempts to stifle the freedom movement by using oppressive anti-sedition laws as a tool. They strongly believed that the Constitution must explicitly recognise various fundamental freedoms, including free speech and expression.[17] However, there was considerable division about whether to include specific grounds that would enable the Government to curtail or restrict these freedoms. After gruelling debate among the members, Article 13(2) as a restrictive clause on free speech was finally passed. Article 13 of draft Constitution was analogous to Article 19 of the present Constitution, which declared that the freedom of speech and expression shall not affect "the operation of any existing law, in so far as it relates to, or prevent the State from making any law on matters concerning libel, slander, defamation, contempt of court, any matter offending decency and morality, or undermines the security of or tends to overthrow, the State".

Though our founding fathers awarded India with a fine Constitution which provided, Right

14 Arun K. THIRUVENGADAM, The Interplay of the Universal and the Particular in the Evolution of the Constitutional Right to Free Speech in India, National University of Singapore, (March 17, 2017, 10:14 pm) http://law.nus.edu.sg/cals/pdfs/wps/CALS- WPS-1408.pdf

15 Subhradipta Sarkar, right to free speech in a censored democracy, University of Denver, (March 17, 2017, 10:33 pm) http://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/07/right.pdf

16 Niru sharan, freedom of speech and expression; indian constitution: an overview, best Journals, Vol. 3, Issue 7, Jul 2015, at 69-76

17 Niru sharan, freedom of speech and expression; indian constitution: an overview, best Journals, Vol. 3, Issue 7, Jul 2015, at 69-76

to freedom of speech and expression, but Indian elite has always been cynical towards freedom of speech expression and seen this with deep suspicion since the Constitution of the Republic of India.[18]

In early 1950, Romesh Thappar's left-leaning journal called Crossroads was banned by the Madras State Government for supposedly publishing critical or defamatory views on the Congress party, which had just begun to rule India after independence. At that time, Madras State had banned the Communist Party and, as part of that policy, prohibited the entry and circulation of Crossroads in the State. Thappar appealed against the ban in the Supreme Court of India and court pronounced the judgment in favour of Thappar and declared the Madras Maintenance of Public Safety Act, 1949 unconstitutional. This decision greatly alarmed the Government and within a week of the decision, then Home Minister Vallabhbhai Patel wrote to the Prime Minister Nehru, complaining that this ruling "knocks the bottom out of most of our penal laws for the control and regulation of the press". Nehru and Patel did not often see eye to eye but there was perfect agreement between the two leaders on this issue, as both leaders believed in a strong and centralised State. In fact, not only Nehru and Patel, there was broad agreement on this matter throughout the Government. In February 1951, Nehru constituted the Cabinet Committee for amendment and modification of Article 19 which contained the freedom of speech and expression. B. R. Ambedkar the then law minister suggested that the phrase "reasonable restrictions" should be added. Home Minister Patel, was not satisfied by Ambekar's suggestion and opposed the addition of qualifier "reasonable". Nehru came down on the line of the Home Minister and introduced the draft bill in Parliament, allowing the State to make laws imposing "restrictions" on freedom of speech and expression in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. The bill faced severe criticism and opposition in the Parliament. Facing fierce opposition in the Parliament, Nehru reintroduced the qualifier "reasonable" and then it was finally passed.[19] Again in 1963, "the sovereignty and integrity of India" was added by the way of Sixteenth Constitutional Amendment.[20]

4. Penalised expression and validity of restrictions

These days, print media, news rooms, and social domain are filled with plethora of news, regarding the offences concerning right to freedom of expression. Some expressions have been penalised under IPC (Indian Penal Code 1860) and other statutes like Contempt of Courts Act, 1971. IPC penalises, sedition, offences relating to obscenity, criminal defamation, and hate speech.

4.1 Sedition

Few days back, Amnesty International criticised the Indian Government for using the crude, colonial sedition law to silence its critics.[21] Sedition is one of the most debated and controversial topic in the IPC. Section 124-A of IPC defines sedition as "Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or

18 Praveen Swami, The compelling virtue of treason, The Indian Express, (March 20, 2017, 9:55 pm), http://indianexpress.com/article/opinion/columns/the-compelling-virtue-of-treason-4559218/

19 Shoaib Daniyal, Why Nehru and Sardar Patel curbed freedom of expression in India, scroll.in, (March 21, 2017, 4:15 pm) https://scroll.in/article/700020/why-nehru-and-sardar-patel-curbed-freedom-of-expression-in-india

20 Sec 2, Constitutional Sixteenth Amendment Act, 1963

21 Aditi Khanna, Amnesty International criticizes India's sedition law, Live Mint, (March 21, 2017, 8:37 pm) http://www.livemint.com/Politics/DR8TS3IDkm1EQBtyp3a8CI/Amnesty-International-criticizes-Indias-sedition-law.html

attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine. Three explanations are also provided in Section 124-A of which, first explanation says that "The expression "disaffection" includes disloyalty and all feelings of enmity".[22] Since the origin of the sedition law dates back to colonial rule in India, so pre constitutional explanation to this rule is also necessary in order to find the viable explanation and Constitutional validity of this colonial rule. Privy Council defined the meaning of word disaffection, as an utterance which excites or even attempts to excite a bad feeling towards the Government is punishable under this section, irrespective of the intention of the speaker or the affect of the utterance upon the audience.[23] The Constitution framers deleted the word sedition from article 19(2), and as a result of the omission of the word sedition criticism of the Government could only be penalised, if it was attended with violence or was calculated to bring anarchy so as to either undermine the security of the state, or tend to overthrow it.[24] But the first Constitutional Amendment added "interest of public order" in Article 19(2). The term, "interest of public order" is wide enough to cover incitement to violence[25], and hence mere words would also amount to offence defined under section 124-A. Supreme Court interpreted section 124-A and held that, an utterance would be punishable under this section only when it is intended or has reasonable tendency to create disorder or disturbance of public peace by resorting to violence.[26]

4.2 Defamation

The second most debated topic of IPC which is often seen in conflict with right to freedom of expression is defamation. In India, defamation is both civil and criminal offence. The civil law regarding defamation is still uncodified in India but is penalized under IPC. It says that, whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person. Section 499 also talks about certain exceptions, like, publication of imputation of truth which is required for the public good, or, the public conduct of government officials, or, conduct of any person touching any public question and merits of public performance.

Section 499 of IPC does not infringe on the right to freedom of expression because such infringement is secured by Article 19(2). Liberty has to be limited in order to beeffectively possessed, one while enjoying the freedom guaranteed under Article 19(1)a must not encroach the rights of others.[27] If one has freedom to express his opinion and convictions, then others too possess right to his reputation. Hence nobody can use his freedom of expression to injure another's reputation.[28]

4.3 Contempt of Court

Third most debated topic under this head is contempt of Court. Recently, for the first time in the history of Indian judiciary, the Supreme

22 See section 124-A of IPC 1860

23 Sadashiv vs. Emperor, (1947) 74 IA 89

24 Romesh Thappar vs. State Of Madras, AIR 1950 SC 124

25 Debi Soren vs. State, AIR 1954 Pat 254

26 Kedar Nath Singh vs. State of Bihar, AIR 1962 SC 955

27 Lily Thomas vs. UOI AIR 2000 SC 1650

28 DD BASU, Commentary On the Constitution of India, at 3862, Volume 4, 9th Edition, 2014

Court issued a contempt notice to a sitting High Court judge, Justice CS Karnan for levelling, allegations against former judges of the Supreme Court and sitting judges of Madras High Court.[29]

Contempt of Court means scandalising or lowering authority of any Court. Though the expression contempt of Court is nowhere defined in the Constitution, but in absence of any such definition, it does not make Contempt of Courts Act invalid as it has been well recognised by judicial interpretation.[30] The basic foundation of law of contempt which is followed in India is based on the decision of English case Rex v Almon.[31] It was observed in this case that, judges are not doing dispensing justice for their own cause but for the cause of public which they are vindicating at the instance of public. If the seat of justice abuses that confidence and such impression is created in the mind of public that judge is excitable and insultive to the party or the counsel, then the public confidence will be shaken, and whenever public allegiance to the law is fundamentally shaken, it is the most fatal and dangerous obstruction to justice. Supreme Court, summarised the jurisprudence behind the contempt of Court as, our Constitutional scheme is based upon the concept of "Rule Of Law" which we have adopted and given to ourselves. Rule of law says that no one is above law, notwithstanding how high or powerful he or she may be. For achieving the rule of law, our Constitution has assigned this special task to the judiciary, and for judiciary to perform it duties effectively, the dignity of Court has to be maintained at all costs. The confidence in the Courts of justice which the people possess cannot be allowed to be diminished and tarnished,[32] and for this purpose Courts are entrusted with extraordinary power of punishing those who indulge in acts which tends to undermine their authority and diminish their reputation. It is truly said that a judge who has not committed any mistake is yet to be born and our legal system also acknowledges the same and provides both internal and external checks to correct the errors. Internal checks constitute review, appeals, revisions, the open public hearing, while external check constitute objective critiques, debates, and discussions of judgment the. These two go long way to correct judicial errors.[33] The Contempt of Court act doesn't infringe the right to freedom of expression as it is very evident from the language of Article 19(2) which says that nothing in Article 19(1)(a) shall prevent the state from making law which imposes reasonable restriction in relation to contempt of Court.

5. Conclusion

Our Constitution drafters inscribed the certain basic rights which inhere in every human being and which are essential for the unfolding and development of his full personality. These rights represent the basic values of a civilised society and our Constitution makers gave these rights due place of pride and inscribed them as fundamental in the Constitution of India.[34] Fundamental rights are the modern name of those rights which were traditionally known as natural rights.[35] Justice Hidayatullah once pointed out that, fundamental rights are those rights which the State enforces against itself.[36]

29 A Vaidyanathan, In A First, Supreme Court Issues Contempt Notice to Calcutta High Court's Justice Karnan, NDTV, (March 23, 2017, 9:12 pm) http://www.ndtv.com/india-news/in-a-first-supreme-court-issues-contempt-notice-to-calcutta-high-court- judge-1657157

30 Legal Remembrances vs. Bibhuti Bushan, AIR 1954 Pat 203

31 DD BASU, Commentary On the Constitution of India, at 3832, volume 4, 9th edition, 2014

32 DD BASU, Commentary On the Constitution of India, at 3832-3833, volume 4, 9th edition, 2014

33 DD BASU, Commentary On the Constitution of India, at 3844-3845, volume 4, 9th edition, 2014

34 Maneka Gandhi vs. Union of India, AIR 1978 SC 597

35 Golakh Nath vs. State of Punjab, AIR 1967 SC 1643

36 Golakhnath vs. State of Punjab, AIR 1967 SC 1643

Right to freedom of speech and expression is one of the six fundamental guaranteed under Article 19 of the Constitution of India. Though, our Constitution recognises only six kinds of rights as fundamental rights but the Supreme Court evolved the doctrine of implied fundamental rights, and asserted that in order to treat a right as a fundamental right, it is not necessary that it should be expressly mentioned in the Constitution as a fundamental right. Political, social and economic changes occurring in the nation may entail the recognition of new fundamental rights.[37] The fundamental rights themselves have no fixed content and attempt of Court should be to expand the ambit of these rights. Most of the fundamental rights are like empty vessels into which each generation must pour its content in the light of experiences.[38] The scope of Article 19(1)a is expanded to many fields which are unremunerated rights but are integral part of the freedom of expression, as there is no separate guarantee of freedom of press, but is an integral part of freedom of expression. With the development of Indian civilization, the right to freedom of expression took right to receive information within its ambit. Right to expression or speech also includes right not to express or remain silent.

The right to freedom of speech and expression is a development of the political philosophy regarding the form of the Government in any country. The nature of the polity implies clearly by or by expressed words signals the role of freedom of speech and expression. A democracy or a democratic form of State is synonymous with the existence right to freedom speech and expression. The true significance of the freedom of speech and expression for the democrat lies in the fact that thousands of martyrs have shed their blood in defence of those liberties and the modern citizen who breathes the air of democracy should consider those liberties as sacred and invaluable and try to preserve them. In fact the very essence of democracy lies in free debate and free discussion. Without them it is impossible to build up an opinion. This could only be done by conferring on the citizens the right to freedom of speech and expression, which is the basic importance in a democratic way of life. It is characteristic of democracy that it should provide the fullest opportunity to the citizens to develop their personality in any way they choose and they must be free to propagate their views without fear.

Right to freedom of expression, as explained in case of PUCL vs. UOI[39], is absolutely like a star which shines radiantly in the galaxy of fundamental rights, but it need to be noted that in course of shining it must not encroach upon right of others. The integrity of the sky, which in this context is nation and the Constitution providing these rights, must be maintained.

Though the right to freedom of speech and expression is considered to be the first condition of liberty and mother of all liberty but our Constitution also acknowledges that there cannot be absolute or uncontrolled liberty, which would lead to anarchy and disorder in the society.[40] Recently, Union Finance Minister Arun Jaitley, during a lecture at London School of Economics said that he personally believes that free speech in India and in any society need to be debated and further referring to the exemption clause in the Indian Constitution that allows "reasonable restrictions" on free speech in the interests of the "sovereignty and integrity of India" stated that, free speech and expression don't come before sovereignty of the nation.[41] In democracy it is necessary to maintain and preserve freedom of

37 Unni Krishnan J.P vs. State of A.P, AIR 1993 SC 2178

38 Kesavananda Bharti vs. UOI, AIR 1973 SC 1461

39 PUCL vs. UOI (2003 4 SCC 399)

40 Gopalan vs. State of Madras, AIR 1950 SC 27

41 Aliya Ram, India's Jaitley calls for limits on free speech, Financial Times, (March 24, 2017, 4:00pm) https://www.ft.com/content/e2a44a08-fc05-11e6-96f8-3700c5664d30

expression, so in order to preserve this freedom it is also necessary to place some restrictions on this freedom for the maintenance of social order, because no freedom can be absolute or completely unrestricted. Liberty has to be limited in order to be effectively possessed, one while enjoying the freedom guaranteed under Article 19(1)a must not encroach on the rights of others.[42] In the words of Canadian Supreme Court, the concept of right postulates the inter-relation of individual right in society all of whom have the same right. Thus the right of a person to drive along the highway is limited to the right of others persons to pass along that highway. Hence it is the duty of State to impose restrictions in order to prevent accident to other vehicles or to passerby.[43]

The State can impose certain restrictions upon the fundamental rights guaranteed under Article 19(1)a. Clause 2 of Article 19 enables legislature to impose reasonable restrictions upon the freedom of speech and expression for maintaining public order, decency and morality, contempt of Court, defamation, incitement to an offence, and sovereignty and integrity of India. The word reasonable connotes an intelligent care and deliberation, that is, the choice of a course which reason directs.[44] Reasonable restriction imposed upon the fundamental right has to be adjudged in the light of nature or right, danger or injury which may be innate in the rampant exercise of the right and the necessity protection against danger which may result to public by the exercise of the right.[45]

By these above observations and the judgment we can say that restrictions imposed by Article 19(2) upon the freedom of speech and expression guaranteed by Article 19(1)(a) serves a two-fold purpose viz. on the one hand, they specify that this freedom is not absolute but are subject to regulation and on the other hand, they put a limitation on the power of a legislature to restrict this freedom of press/media. But the legislature cannot restrict this freedom beyond the requirements of Article 19(2) and each of the restrictions must be reasonable and can be imposed only by or under the authority of a law, not by executive action alone.

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42 Lily Thomas vs. UOI AIR 2000 SC 1650

43 DD BASU, Commentary On the Constitution of India, at 3293, Volume 3, 9th Edition, 2014

44 Janath Mosque vs. Vakhon Joseph, AIR 1955 TC 227 (FB)

45 State of Maharashtra vs. H.N Rao, AIR 1970 SC 1157

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It means, people who are in high and responsible positions, if they go against righteousness, righteousness itself will get transformed into a destroyer.

— Dr. A. P. J. Abdul Kalam

Look at the sky. We are not alone. The whole universe is friendly to us and conspires only to give the best to those who dream and work.

— Dr. A. P. J. Abdul Kalam

B. V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

Law on tests to be applied to determine whether income from property is chargeable as "Income from House Property" or as "Profits and Gains of Business" explained. The objects clause is not determinative. Income earned from a shopping centre is required to be taxed under the head "Income from House Property". (Chennai Properties 373 ITR 673 (SC) and Rayala Corporation distinguished)

Raj Dadarkar & Associates vs. ACIT – CC-46 (Civil Appeal Nos. 6455-6460 of 2017) [Arising out of SLP(C) No(s). 17277-17282 of 2015, dated 9th May, 2017]

The Supreme Court considered the following facts:

The Maharashtra Housing and Developing Authority ('MHADA') had constructed a building. However, there was a reservation for Municipal retail market on the plot on which MHADA had put up the construction. Therefore, MHADA handed over the ground floor [stilt portion] of the above said building to Market Department of Municipal Corporation Greater Bombay ('MCGB'). The Market Department of the MCGB auctioned the market portion on a monthly licence [stallage charges] basis to run municipal market. The assessee firm participated in the auction to acquire the right to conduct the market. The assessee was the successful bidder and was handed over possession of the market portion. The terms and conditions subject to which the assessee was given the said market portion to run and maintain municipal market contained in the terms and conditions of the auction. The premises allotted to the assessee was a bare structure, on stilt, that is, pillar/column, sans even four walls. In terms of the auction, it was the assessee who had to make the entire premises fit to be used a market, including construction of walls and construction of entire common amenities like toilet blocks, etc. After taking possession of the premises, the assessee spent substantial amount on additions/alternations of the entire premises, including demolishing the existing platform and, thereafter, reconstructing the same according to the new plan sanctioned by the MCGB. The assessee constructed various shops and stalls of different carpet areas on the premises. The assessee collected the receipt from the sub-licensees in form of leave & licence fees and service charges for providing various services, including security charges, utilities etc. The assessee filed the return wherein income from the aforesaid shops and stalls sub-licensed by it was offered to tax

under the head 'Profits and Gains of Business or Profession'. The Assessing Officer computed the income from the shops and the stalls under head 'Income from House Property'. The reasons given for so computing the income under the head 'Income from House Property' were by virtue of section 27(iiib), the appellant was 'deemed owner' of the premises as it had acquired leasehold right in the land for more than 12 years; in agreements for sub-licensing the words 'lease compensation' were used instead of 'license fees' and deposits were referred as 'sub-lease deposits'; property tax had been levied on the assessee. The Tribunal also held that assessee had not established that it was engaged in any systematic or organised activity of providing service to the occupiers of the shops/stalls so as to constitute the receipts from them as business income. The assessee received income by letting out shops/stalls, and therefore, the same had to be held as income from house property. The High Court confirmed the order passed by Tribunal. On appeal the Supreme Court had to consider the following questions:

(1) Whether in the facts and circumstances of the case, and in law, the Tribunal erred in holding that the appellant was owner of the shopping centre within the meaning of section 22 read with Section 27 of the Income-tax Act, 1961?

(2) Whether in the facts and circumstances of the case, and in law, the Tribunal was right in holding that the income earned by the appellant from the shopping centre was required to be taxed under the head "Income from House Property" instead of the head "Profits and Gains from the Business or Profession" as claimed by the Appellant?

(3) Whether on the facts and circumstances of the case, and in law, the order of the Tribunal, confirming the action of the Respondent, is perverse inasmuch as the same is based on surmises, conjectures and suspicions by taking into account incorrect, irrelevant and extraneous consideration while ignoring relevant materials and considerations?"

The Supreme Court held as under:

"14. There may be instances where a particular income may appear to fall in more than one head. These kind of cases of overlapping have frequently arisen under the two heads with which we are concerned in the instant case as well, namely, income from the house property on the one hand and profits and gains from business on the other hand. On the facts of a particular case, income has to be either treated as income from the house property or as the business income. Tests which are to be applied for determining the real nature of income are laid down in judicial decisions, on the interpretation of the provisions of these two heads. Wherever there is an income from leasing out of premises and collecting rent, normally such an income is to be treated as income from house property, in case provisions of Section 22 of the Act are satisfied with primary ingredient that the assessee is the owner of the said building or lands appurtenant thereto. Section 22 of the Act makes 'annual value' of such a property as income chargeable to tax under this head. How annual value is to be determined is provided in Section 23 of the Act. 'Owner of the house property' is defined in Section 27 of the Act which includes certain situations where a person not actually the owner shall be treated as deemed owner of a building or part thereof. In the present case, the appellant is held to be "deemed owner" of the property in question by virtue of Section 27(iiib) of the Act. On the other hand, under certain circumstances, where the income may have been derived from letting out of the premises, it can still be treated as business income if letting out of the premises itself is the business of the assessee.

"15. What is the test which has to be applied to determine whether the income would be

chargeable under the head "Income from the House Property" or it would be chargeable under the head "Profits and Gains from Business or Profession", is the question. It may be mentioned, in the first instance, that merely because there is an entry in the object clause of the business showing a particular object, would not be the determinative factor to arrive at a conclusion that the income is to be treated as income from business. Such a question would depend upon the circumstances of each case. It is so held by the Constitution Bench of this Court in *Sultan Bros. (P) Ltd. vs. CIT [1964] 51 ITR 353 (SC)* and we reproduce the relevant portion thereof:

"7. … We think each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. We find nothing in the cases referred, to support the proposition that certain assets are commercial assets in their very nature."

"16. In view thereof, the object clause, as contained in the partnership deed, would not be the conclusive factor. Matter has to be examined on the facts of each case as held in Sultan Bros. (P) Ltd. case (supra). Even otherwise, the object clause which is contained in the partnership firm is to take the premises on rent and to sub-let. In the present case, reading of the object clause would bring out two discernible facts, which are as follows:

(a) The appellant which is a partnership firm is to take the premises on rent and to sub-let those premises. Thus, the business activity is of taking the premises on rent and sub-letting them. In the instant case, by legal fiction contained in Section 27(iiib) of the Act, the appellant is treated as "deemed owner".

(b) The aforesaid clause also mentions that partnership firm may take any other business as may be mutually agreed upon by the partners.

"17. In the instant case, therefore, it is to be seen as to whether the activity in question was in the nature of business by which it could be said that income received by the appellant was to be treated as income from the business. Before us, apart from relying upon the aforesaid clause in the partnership deed to show its objective, the learned counsel for the appellant has not produced or referred to any material. On the other hand, we find that ITAT had specifically adverted to this issue and recorded the findings on this aspect in the following manner:

"26. …On this issue facts available on record are that the assessee let out shops/stalls to various occupants on a monthly rent. The assessee collected charges for minor repairs, maintenance, water and electricity. As per the terms of allotment by the BMC, the assessee was bound to incur all these expenses. The assessee, in turn, collected extra money from the allottees. The assessee collected 20% of monthly rent as service charges. Such service charges were also used for providing services like watch and ward, electricity, water etc. This in our opinion was inseparable from basic charges of rent. The assessee has made bifurcation of the receipt from the occupiers of the shops/stalls as rent and service charges. As rightly held by the Assessing Officer, decision of Hon'ble Supreme Court in the case of Shambu Investment Pvt. Ltd., 263 ITR 143 will apply. The assessee has not established that he was engaged in any systematic or organised activity of providing service to the occupiers of the shops/stalls so as to constitute the receipts from them as business income.

In our opinion, the assessee received income by letting out shops/stalls and therefore, the same has to be held as income from house property."

"18. The ITAT being the last forum insofar as factual determination is concerned, these findings have attained finality. In any case, as mentioned above, the learned counsel for the appellant did not argue on this aspect and did not make any efforts to show as to how the aforesaid findings were perverse. It was for the appellant to produce sufficient material on record to show that its entire income or substantial income was from letting out of the property which was the principal business activity of the appellant. No such effort was made.

"19. Reliance placed by the appellant on the judgments of this Court in Chennai Properties & Investments Ltd. (supra) and Rayala Corporation (P) Ltd. (supra) would be of no avail. In Chennai Properties & Investments Ltd. (supra) where one of us (Sikri, J.) was a part of the Bench found that the entire income of the appellant was through letting out of the two properties it owned and there was no other income of the assessee except the income from letting out of the said properties, which was the business of the assessee. On those facts, this Court came to the conclusion that judgment of this Court in *Karanpura Development Co. Ltd. vs. CIT [1962] 44 ITR 362 (SC)* was applicable and the judgment of this Court in *East India Housing & Land Development Trust Ltd. vs. CIT [1961] 42 ITR 49 (SC)* was held to be distinguishable. In the present case, we find that situation is just the reverse. The judgment in East India Housing and Land Development Trust Ltd. (supra) which would be applicable which is discussed in para 8 of Chennai Properties & Investments Ltd. case (supra) and the reproduction thereof would bring home the point we are canvassing:

"8. With this background, we first refer to the judgment of this Court in East India Housing and Land Development Trust Ltd. case *[East India Housing and Land Development Trust Ltd. vs. CIT, [1961] 42 ITR 49 (SC)]* which has been relied upon by the High Court. That was a case where the company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Thus, the main objective of the company was to develop the landed properties into markets. It so happened that some shops and stalls, which were developed by it, had been rented out and income was derived from the renting of the said shops and stalls. In those facts, the question which arose for consideration was: whether the rental income that is received was to be treated as income from the house property or the income from the business? This Court while holding that the income shall be treated as income from the house property, rested its decision in the context of the main objective of the company and took note of the fact that letting out of the property was not the object of the company at all. The Court was therefore, of the opinion that the character of that income which was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties."

"20. In Rayala Corporation (P) Ltd. (supra) fact situation was identical to the case of Chennai Properties & Investments Ltd. (supra) and for this reason, Rayala Corporation (P) Ltd. (supra) followed Chennai Properties & Investments Ltd. (supra) which is held to be inapplicable in the instant case.

"21. For the aforesaid reasons, we are of the opinion that these appeals lack merit and are, accordingly, dismissed with cost."

S. 14A disallowance has to be made also with respect to dividend on shares and units on which tax is payable by the payer u/s. 115-O & 115-R. Argument that such dividends

are not tax-free in the hands of the payee is not correct. Section 14A cannot be invoked in the absence of proof that expenditure has actually been incurred in earning the dividend income. If the AO has accepted for earlier years that no such expenditure has been incurred, he cannot take a contrary stand for later years if the facts and circumstances have not changed

Godrej & Boyce Manufacturing Company Limited vs. DCIT & Anr. [Civil Appeal No. 7020 of 2011, dated 8th May, 2017]

The Supreme Court had to consider two questions arising from the judgment of the Bombay High Court in *Godrej & Boyce vs. CIT 328 ITR 81 (Bom.):*

(a) Whether the phrase "income which does not form part of total income under this Act" appearing in Section 14A includes within its scope dividend income on shares in respect of which tax is payable under Section 115-O of the Act and income on units of mutual funds on which tax is payable under Section 115-R?

(b) Whether bearing in mind the unanimous findings of the lower authorities over a considerable period of time (which were accepted by the Revenue) there could at all be any question of the provisions of Section 14A in the appellant's case?

The Supreme Court held as under:

"24. The object behind the introduction of Section 14A of the Act by the Finance Act of 2001 is clear and unambiguous. The legislature intended to check the claim of allowance of expenditure incurred towards earning exempted income in a situation where an assessee has both exempted and non-exempted income or includible or non-includible income. While there can be no scintilla of doubt that if the income in question is taxable and, therefore, includible in the total income, the deduction of expenses incurred in relation to such an income must be allowed, such deduction would not be permissible merely on the ground that the tax on the dividend received by the assessee has been paid by the dividend paying company and not by the recipient assessee, when under Section 10(33) of the Act such income by way of dividend is not a part of the total income of the recipient assessee. A plain reading of Section 14A would go to show that the income must not be includible in the total income of the assessee. Once the said condition is satisfied, the expenditure incurred in earning the said income cannot be allowed to be deducted. The section does not contemplate a situation where even though the income is taxable in the hands of the dividend paying company the same to be treated as not includible in the total income of the recipient assessee, yet, the expenditure incurred to earn that income must be allowed on the basis that no tax on such income has been paid by the assessee. Such a meaning, if ascribed to Section 14A, would be plainly beyond what the language of Section 14A can be understood to reasonably convey."

"27. We do not see how the principle of law in K. P. Varghese (Supra) can assist the Assessee in the present case. The literal meaning of Section 14A, far from giving rise to any absurdity, appears to be wholly consistent with the scheme of the Act and the object/ purpose of levy of tax on income. Therefore, the well entrenched principle of interpretation that where the words of the statute are clear and unambiguous recourse cannot be had to principles of interpretation other than the literal view will apply. ….. "

"30. While it is correct that Section 10(33) exempts only dividend income under Section 115-O of the Act and there are other species

of dividend income on which tax is levied under the Act, we do not see how the said position in law would assist the assessee in understanding the provisions of Section 14A in the manner indicated. What is required to be construed is the provisions of Section 10(33) read in the light of Section 115-O of the Act. So far as the species of dividend income on which tax is payable under Section 115-O of the Act is concerned, the earning of the said dividend is tax free in the hands of the assessee and not includible in the total income of the said assessee. If that is so, we do not see how the operation of Section 14A of the Act to such dividend income can be foreclosed. The fact that Sections 10(33) and Section 115-O of the Act were brought in together; deleted and reintroduced later in a composite manner, also, does not assist the assessee. Rather, the aforesaid facts would countenance a situation that so long as the dividend income is taxable in the hands of the dividend paying company, the same is not includible in the total income of the recipient assessee. At such point of time when the said position was reversed (by the Finance Act of 2002; reintroduced again by the Finance Act, 2003), it was the assessee who was liable to pay tax on such dividend income. In such a situation the assessee was entitled under Section 57 of the Act to claim the benefit of exemption of expenditure incurred to earn such income. Once Section 10(33) and 115-O was reintroduced the position was reversed. The above, actually fortifies the situation that Section 14A of the Act would operate to disallow deduction of all expenditure incurred in earning the dividend income under Section 115-O which is not includible in the total income of the assessee.

"31. So far as the provisions of Section 115-O of the Act are concerned, even if it is assumed that the additional income tax under the aforesaid provision is on the dividend and not on the distributed profits of the dividend paying company, no material difference to the applicability of Section 14A would arise. Sub-sections (4) and (5) of Section 115-O of the Act makes it very clear that the further benefit of such payments cannot be claimed either by the dividend paying company or by the recipient assessee. The provisions of Sections 194, 195, 196C and 199 of the Act, quoted above, would further fortify the fact that the dividend income under Section 115-O of the Act is a special category of income which has been treated differently by the Act making the same non-includible in the total income of the recipient assessee as tax thereon had already been paid by the dividend distributing company. The other species of dividend income which attracts levy of income tax at the hands of the recipient assessee has been treated differently and made liable to tax under the aforesaid provisions of the Act. In fact, if the argument is that tax paid by the dividend paying company under Section 115-O is to be understood to be on behalf of the recipient assessee, the provisions of Section 57 should enable the assessee to claim deduction of expenditure incurred to earn the income on which such tax is paid. Such a position in law would be wholly incongruous in view of Section 10(33) of the Act.

"35. For the aforesaid reasons, the first question formulated in the appeal has to be answered against the appellant-assessee by holding that Section 14A of the Act would apply to dividend income on which tax is payable under Section 115-O of the Act.

"36. ..... Nevertheless irrespective of the aforesaid question, what cannot be derived is that he requirement for attracting the provisions of Section 14A(1) of the Act is proof of the fact that the expenditure sought to be disallowed/deducted had actually been incurred in earning the dividend income. Insofar as the assessee is concerned, the issues stand concluded in its favour in respect of the Assessment Years 1998-99, 1999-2000 and 2001-02. Earlier to the introduction of sub-sections (2) and (3) of Section 14A of the Act,

such a determination was required to be made by the Assessing Officer in his best judgment. In all the aforesaid assessment years referred to above it was held that the Revenue had failed to establish any nexus between the expenditure disallowed and the earning of the dividend income in question. Findings have been recorded that the expenditure in question bore no relation to the earning of the dividend income and hence the assessee was entitled to the benefit of full exemption claimed on account of dividend income.

"37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-03. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable.

"38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-03, to hold that the claims of the Assessee that no expenditure was incurred to earn the dividend income cannot be accepted and why the orders of the Tribunal for the earlier assessment years were not acceptable to the Assessing Officer, particularly, in the absence of any new fact or change of circumstances. Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received. That any part of the borrowings of the assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (₹ 270.51 crores as on 1-4-2001 and ₹ 280.64 crores as on 31-3-2002) remains unproved by any material whatsoever. While it is true that the principle of *res judicata* would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. ….. "

"39. In the above circumstances, we are of the view that the second question formulated must go in favour of the assessee and it must be held that for the Assessment Year in question i.e. 2002-03, the assessee is entitled to the full benefit of the claim of dividend income without any deductions."

Severe strictures passed against the High Court for "inconsistent decision-making" and passing orders which are "palpably illegal, faulty and contrary to the basic principles of law" and by ignoring "large number of binding decisions of the Supreme Court" and giving "impermissible benefit to accused". Law on condonation of delay explained. CBI directed to implement mechanism to ensure that all appeals are filed in time

State of Jharkhand through SP, CBI vs. Lalu Prasad @ Lalu Prasad Yadav [Criminal Appeal No.394 of 2017, dated 8th May, 2017]

The Supreme Court considered the following facts and held as under:

"1. The appeals arise out of three separate judgments and orders of learned Single Judge of High Court of Jharkhand at Ranchi discharging three accused persons namely: Lalu Prasad Yadav, Sajal Chakraborty and Dr. Jagannath Mishra on the ground of their conviction in one of the criminal cases arising out of fodder scam of erstwhile State of Bihar. Applying the provision under Article 20(2) of the Constitution of India and Section 300 of Code of Criminal Procedure, 1973 (for short 'the Cr.PC'), the High Court has quashed RC No.64A/96 against Lalu Prasad Yadav, four cases against Dr. Jagannath Mishra being RC Nos.64A/96, 47A/96, 68A/96 and 38A/96 and two cases against Sajal Chakraborty being RC Nos.20A/96 and 68A/96 on the ground that they have been convicted in one of the cases for offences involving the same ingredients with respect to Chaibasa Treasury.

"16. The main question for consideration is whether in view of Article 20(2) of Constitution of India and section 300 Cr. PC, it is a case of prosecution and punishment for the "same offence" more than once. No doubt about it that the general conspiracy had been hatched as alleged for the period 1988 to 1996 but defalcations are from different treasuries for different financial years by exceeding the amount of each year which was allocated for Animal Husbandry Department for each of the district for the purpose of animal husbandry. The amount involved is different, fake vouchers, fake allotment letters, fake supply orders had been prepared with the help of different sets of accused persons. Though there is one general conspiracy, offences are distinct for different periods. Question arises whether there is one general conspiracy pursuant to which various defalcations of different amounts have been made running into several years from different treasuries, by different sets of accused persons. Whether there could have been only one trial or more than one. Whether legal requirement is for one trial or more than one in such cases. Article 20(2) of the Constitution is extracted hereunder:

"20. (2) No person shall be prosecuted and punished for the same offence more than once."

"35. We are unable to accept the submissions raised by learned senior counsel. Though there was one general charge of conspiracy, which was allied in nature, the charge was qualified with the substantive charge of defalcation of a particular sum from a particular treasury in particular time period. The charge has to be taken in substance for the purpose of defalcation from a particular treasury in a particular financial year exceeding the allocation made for the purpose of animal husbandry on the basis of fake vouchers, fake supply orders etc. The sanctions made in Budget were separate for each and every year. This Court has already dealt with this matter when the prayers for amalgamation and joint trial had been made and in view of the position of law and various provisions discussed above, we are of the opinion that separate trials which are being made are in accordance with provisions of law otherwise it would have prejudiced the accused persons considering the different defalcations from different treasuries at different times with different documents. Whatever could be combined has already been done. Each defalcation would constitute an independent offence. Thus, by no stretch, it can be held to be in violation of Article 20(2) of the Constitution or Section 300 Cr.P.C. Separate trials in such cases is the very intendment of law. There is no room to raise such a grievance. Though evidence of general conspiracy has been adduced in cases which have been concluded, it may be common to all the cases but at the same time offences are different at different places, by different accused persons. As and when a separate offence is committed, it becomes punishable and the substantive charge which has to be

taken is that of the offence under the P.C. Act etc. There was conspiracy hatched which was continuing one and has resulted into various offences. It was joined from time to time by different accused persons, so whenever an offence is committed in continuation of the conspiracy, it would be punishable separately for different periods as envisaged in section 212(2), obviously, there have to be separate trials. Thus it cannot be said to be a case of double jeopardy at all. It cannot be said that for the same offence the accused persons are being tried again.

"49. Thus, it is apparent that it is premature to raise the plea of issue of estoppel before evidence is recorded for different sets of accusations of different offences for different periods. Then it is difficult to say that prosecution would be bound by the finding in a previous trial on a similar issue of fact and there may not be any contradiction if the periods are different and with respect to culpability for different periods and without fear of contradiction, separate findings can be recorded. In what manner the duty has been carried on for different periods would be the question of fact in each case and there is no question of double jeopardy in such a case.

"50. We are constrained to observe that the same learned Judge of the High Court had taken a different view in Dr. R. K. Rana's case (criminal W. P. No.226/2011) on the basis of same facts, and same question of law in the same cases. Judicial discipline requires that such a blatant contradiction in such an important matter should have been avoided. The order passed in the case of Dr. R.K. Rana was on sound basis and though the court had noted that there was some overlapping of facts but the offences were different, it, however, has taken a different view in the impugned order for the reasons which are not understandable. The Court ought to have been careful while dealing with such matters and consistency is the hallmark of the Court due to which people have faith in the system and it is not open to the court to take a different view in the same matter with reference to different accused persons in the same facts and same case. Such inconsistent decision-making ought to have been avoided at all costs so as to ensure credibility of the system. The impugned orders are palpably illegal, faulty and contrary to the basic principles of law and Judge has ignored large number of binding decisions of this Court while giving impermissible benefit to the accused persons and delayed the case for several years. Interference had been made at the advanced stage of the case which was wholly unwarranted and uncalled for. Let now amends be made by expediting the trial without any further hindrance from any quarter.

"51. Coming to the question of delay, we find that there is a delay of 113, 157 and 222 days in filing the respective appeals by the CBI. Applications have been filed for condonation of delay on account of the departmental, administrative procedures involved in filing the special leave petition. It is submitted that unlike the private litigant the matters relating to the Government are required to be considered at various levels and then only a decision is taken to file special leave petition. The process of referring the particular file from one department to another is a time consuming process and decisions have to be taken collectively.

"52. It was submitted by Shri Ram Jethmalani, learned senior counsel appearing on behalf of the respondents that delay of 157 days has not been satisfactorily explained. The averments made in the applications seeking condonation of delay are based upon earlier authorities which no longer can be said to be good law. He has relied upon the decisions in *Postmaster General & Ors. vs. Living Media India Ltd. & Anr. (2012) 3 SCC 503* and *State of U.P. thr. Exe. Engineer vs. Amar Nath Yadav (2014) 2 SCC 422*. His submission is that

Law of Limitation binds everybody equally including the Government and defense by the Government of impersonal machinery and inherited bureaucratic methodology cannot be accepted in view of the modern technology being used and available; more so in the light of the aforesaid decisions. Delay in moving files from one department to another is not sufficient explanation for condoning abnormal delay. Condonation of delay is an exception and should not be used as an anticipated benefit for the Government department. The case was investigated by CBI from beginning to end and the CBI manual 58 provides mechanism for filing appeal expeditiously. The CBI was bound by its manual and in violation of the provisions contained in manual without sufficient explanation, the delay cannot be condoned.

"53. Reliance was also placed on *Ajit Singh Thakur & Anr. vs. State of Gujarat 1981 (1) SCC 495,* which has been approved in *Pundlik Jalam Patil (D) by Lrs. vs. Exe. Engineer, Jalgaon Medium Project & Anr. (2008) 17 SCC 448* that as per the conduct of the appellants they are not entitled for condonation of delay, more so, in view of the decision in *Binod Bihari Singh vs. Union of India (1993) 1 SCC 572* as there was suppression as to when the judgment was applied or received. CBI Manual has a statutory force as held in *Vineet Narain & Ors. vs. Union of India & Anr. (1998) 1 SCC 226* and the guidelines as to time frame should have been strictly adhered to as observed by this Court.

"54. On the other hand, learned Solicitor General has submitted that delay deserves to be condoned. He has relied upon the decision of this Court in *Japani Sahoo vs. Chandra Sekhar Mohanty (2007) 7 SCC 394* in which it has been observed that in serious offences, prosecution is done by the State and the court of law should not throw away prosecution solely on the ground of delay. Mere delay in approaching a court of law would not by itself afford a ground for dismissing the case. He has also referred to *Sajjan Kumar vs. Union of India (2010) 9 SCC 368* to contend that a prosecution should not be quashed merely on the ground of the delay. The aforesaid decisions cited of Japani Sahoo and Sajjan Kumar (supra) are with respect to the delay in institution of the case not with respect to sufficient cause in filing of appeals. However, reliance on the *State of Tamil Nadu vs. M. Suresh Rajan (2014) 11 SCC 709* is apt in which the time consumed in taking opinion on change of Government was held to be sufficient cause so as to condone the delay. Reliance has also been placed on *Indian Oil Corporation Ltd. & Ors. vs. Subrata Borah Chowlek, etc. (2010) 14 SCC 419* in which there was a delay in filing the appeals in which this Court has observed that Section 5 owes no distinction between State and citizen. The Court has to ensure that owing to some delay on part of the machinery, miscarriage of justice should not take place. It is also contended that the power under Section 5 of the Limitation Act should be exercised to advance substantial justice by placing reliance on *State of Nagaland vs. Lipok AO & Ors. (2005) 3 SCC 752.*

"55. In view of the averments made in the applications we are satisfied that delay has been sufficiently explained and considering the facts and circumstances of the case, gravamen of matter and also the divergent views taken by the same Judge of the High Court in the same case vis-a-vis different accused persons on same question, we consider it our duty not to throw away petition on the ground of delay. The explanation offered by the CBI of movement of file so as to condone the delay so as to subserve the ends of justice, deserves to be accepted. No doubt about it that the CBI ought to have acted with more circumspection and ought to have followed the CBI Manual. It is regrettable that we are receiving majority of the special leave petitions filed in this Court barred by limitation not only on behalf of the Government but also by

the other private litigants. Not only that the special leave petitions are preferred with the delay but in refiling also enormous time is consumed and this Court in order to advance substantial justice is not throwing away cases only on limitation.

"56. Sufficiency of cause has to be judged in a pragmatic manner so as to advance cause of justice. No doubt about it that litigants are supposed to act with circumspection within limitation and that there should not be delay and laches and State machinery should not be differentiated vis-a-vis with the private individual in the matter of filing the appeals, petitions etc., however, in the facts and circumstances of the case and considering the averments in the applications, we deem it appropriate to condone the delay in filing the appeals in this Court.

"57. In this case, we are surprised at the conduct of the CBI in such important matters how such delay could take place. The CBI ought to have been careful in filing the Special Leave Petitions within limitation considering the factual matrix of the case. The criticism made by the senior counsel for respondent is not wholly unjustified. CBI ought to be guided by its manual. It is expected of it to be more vigilant. It has failed to live up to its reputation. In the instant case, lethargy on its part is intolerable. If CBI fails to act timely, peoples' faith will be shaken in its effectiveness. Let the Director of CBI look into the matter and saddle the responsibility on a concerned person. In important cases Director, CBI should devise methodology which should not be cumbersome as reflected in these cases, otherwise in future, Director, CBI cannot escape the responsibility for delay in such cases to be termed as deliberate one, which is intolerable. Being the head of the institution it was the responsibility of the Director, CBI to ensure that appeals were filed within limitation. There should not have been delay in filing special leave petitions at all."

S.143(1)(a): Even though there was a raging controversy amongst the High Courts on whether expenditure for raising capital is capital or revenue in nature, the judgment of the jurisdictional High Court is binding on the assessee and any view contrary thereto is a "prima facie" mistake that requires adjustment

Dy. CIT vs. Raghuvir Synthetics Ltd., Ahmedabad [Civil Appeal No.2315/2007, dated 28th March, 2017]

The assessee claimed revenue expenditure of ₹ 65,47,448/- on advertisement and public issue. However, in the Return of Income, the Company made a claim that if the aforesaid claim cannot be considered as a revenue expenditure then alternatively the said expenditure may be allowed under Section 35D of the Income Tax Act, 1961 (hereinafter referred to as "the Act") by way of capitalizing in the plant and machinery obtained. The Assessing Officer issued an intimation under Section 143(1)(a) of the Act on 23-2-1995 disallowing a sum of ₹ 58,92,700/- out of the preliminary expenditure incurred on public issue. He, however, allowed 1/10th of the total expenses and raised demand on the balance amount. The intimation was challenged before the First Appellate Authority which *vide* order dated 1-10-1996, allowed the appeal by holding that the concept of *"prima facie* adjustment" under Section 143(1)(a) of the Act cannot be invoked as there could be more than one opinion on whether public issue expenses were covered by Section 35D or Section 37 of the Act. Feeling aggrieved by the order passed by the First Appellate Authority, the Revenue preferred an appeal before the Income Tax Appellate Tribunal. The Tribunal upheld the order of the Commissioner (Appeals) and dismissed the Appeal filed by the Revenue. The Revenue preferred an appeal under Section 260-A of

the Act before the High Court of Gujarat at Ahmedabad. The Division Bench of the High Court dismissed the appeal on the ground that a debatable issue cannot be disallowed while processing return of income under Section 143(1)(a) of the Act. On appeal by the department to the Supreme Court held as under:

"9. We find that there was a divergence of opinion between the various High Courts; one view being taken by the Madras High Court in *CIT vs. Kisenchand Chellaram (India) (P) Ltd . – (1981) 130 ITR 385(Mad), Andhra Pradesh High Court in Warner Hindustan Ltd. vs. CIT (1988) 171 ITR 224, Kerala High Court in Federal Bank Ltd. vs. CIT (1989) 180 ITR 241 (Ker) and Karnataka High Court in Hindustan Machine Tools Ltd.(No.3) vs. CIT – (1989) 175 ITR 220* that the preliminary expenses incurred on raising a share capital is a revenue expenditure.

"10. On the other hand, a contrary view was expressed by the *Allahabad High Court in CIT vs. Modi Spg. & Wvg. Mills Co. Ltd.-(1973) 89 ITR 304 (All), Himachal Pradesh High Court in Mohan Meakin Breweries Ltd. vs. CIT (1979) 117 ITR 505 (HP), Delhi High Court in Bharat Carbon and Ribbon Mfg. Co. Ltd. vs. CIT (1981) 127 ITR 239 (Del), Calcutta High Court in Brooke Bond India Ltd. vs. CIT (1983) 140 ITR 272* and *Kesoram Industries & Cotton Mills Ltd. – (1992) 196 ITR 845, Bombay High Court in Bombay Burmah Trading Corpn. Ltd. vs. CIT (1984) 145 ITR 793, Punjab & Haryana High Court in Groz Beckert Saboo Ltd. v. CIT (1986) 160 ITR 743 (P&H), Gujarat High Court in Ahmedabad Mfg. & Calico 4 (P) Ltd. v. CIT – (1986) 162 ITR 800 (Guj)* and *Alembic Glass Industries Ltd. vs. CIT (1993) 202 ITR 214 (Guj.), Andhra Pradesh High Court in Vazir Sultan Tobacco C.. Ltd. vs. CIT (1988) 174 ITR 689 (AP) and Rajasthan High Court in CIT vs. Aditya Mills (1990) 181 ITR 195 (Raj) and CIT vs. Multi Metals Ltd . – (1991) 188 ITR 151 (Raj.)*, that the said expenses are capital expenditure and cannot be allowed as revenue expenditure.

"11. Even though it is a debatable issue but as Gujarat High Court in the case of Ahmedabad Mfg. & Calico (P) Ltd. (supra) had taken a view that it is capital expenditure which was subsequently followed by *Alembic Glass Industries Ltd. vs. CIT (supra)* and the registered office of the respondent assessee being in the State of Gujarat, the law laid down by the Gujarat High Court was binding. *(See Taylor Instrument Com.(India) Ltd. vs. Commissioner of Income Tax (1998) 232 ITR 771, Commissioner of Gift Tax vs. J.K. Jain (1998) 230 ITR 839, Commissioner of Income Tax vs. Sunil Kumar (1995) 212 ITR 238, Commissioner of Income Tax vs. Thana Electricity Supply Ltd. – (1994) 206 ITR 727, Indian Tube Company Ltd. v. Commissioner of Income Tax & Ors. (1993) 203 ITR 54, Commissioner of Income Tax vs. P.C. Joshi & B.C. Joshi (1993) 202 ITR 1017* and *Commissioner of Income Tax, West Bengal, Calcutta vs. Raja Benoy Kumar Sahas Roy (1957) 32 ITR 466).* Therefore, so far as the present case is concerned, it cannot be said that the issue was a debatable one.

"12. In view of the above submissions, in our considered view the order passed by the CIT (Appeals), the Income Tax Appellate Tribunal and also the order of the Gujarat High Court impugned herein cannot sustain and are set aside as they have wrongly held that the issue was debatable and could not be considered in the proceedings under section 143 (1) of the Act."

Those who cannot work with their hearts achieve but a hollow, half-hearted success that breeds bitterness all around.

Dr. A. P. J. Abdul Kalam



Paras S. Savla, Jitendra Singh, Nishit Gandhi
Advocates

DIRECT TAXES
High Court

1. Section 32(1)(iia) – Additional Depreciation allowable even if the date of purchase of the asset and its installation fall in two separate assessment years

Principal CIT vs. IDMC Ltd. – (2017) 393 ITR 441 (Guj.)

The assessee purchased plant and machinery on 12-2-2004. However as certain damaged parts were subsequently replaced by the seller, the machinery was installed after 31-3-2005 i.e. on 15-4-2005. Assessee had claimed additional depreciation u/s. 32(1)(iia) of the Income Tax Act, 1961, which was denied by the AO and CIT(A) on the ground that the twin conditions of acquisition and installation were not complied with. The Tribunal however allowed the additional depreciation. On further appeal by the Department, it was argued that for claiming the additional depreciation under Section 32(1)(iia) of the IT Act, the Assessee is required to install and use the plant and machinery in the year under consideration and fulfil the twin conditions, which the assessee failed to do. The Assessee rebutted that while interpreting a particular statute the object of enacting the same is required to be considered and the section is required to be interpreted in such a manner as not to nullify the object of enacting particular provision. A purposive construction of a statute should be adopted to effectuate the object and purpose of the IT Act. The High Court observed that the purpose and object under Section 32(1)(iia) of the IT Act is to encourage the industries by permitting the Assessee setting up the new undertaking/ installation of new plant and machinery and to give a boost to the manufacturing sector by allowing additional depreciation deduction. If the contention of the revenue is accepted, in that case, the twin conditions of the acquired and installed shall never be satisfied in a year and therefore, the assessee shall never get any depreciation. The provision of section 32(1)(iia) of the IT Act is required to be interpreted reasonably and purposively as the strict and literal reading of section 32(1)(iia) of the IT Act will lead to an absurd result denying the additional depreciation to the Assessee though admittedly the Assessee has installed new plant and machinery.

2. Section 67, r.w.ss. 64 and 65, of the Finance Act, 1997 – No TDS Credit available in respect of income disclosed under VDIS 1997

Earnest Business Services (P.) Ltd. vs. CIT – (2017) 393 ITR 453 (Bombay)

The Petitioner had declared certain rent income amounting to ₹ 5,00,63,885/- under the VDIS 1997 on 31-12-1997 which was not disclosed earlier. Tax alongwith interest liable to be paid on the said income was ₹ 1,85,73,702/- by 31-3-1998. It approached the CIT seeking credit of TDS made on its rent income for AY 1994-95, 1995-96 & 1996-97 *vide* communication dated 16th March, 1998. The same was rejected by the CIT *vide* order dated 18-3-1998 relying on Circular No. 755 dated 25th July, 1997 issued by the CBDT. Against the said order the Petitioner filed the instant writ petitions which were admitted on 23rd March, 1998. The Hon'ble High Court held that the VDI Scheme of 1997 Act is a different and distinct statute from the 1961 Act and the subject matter of tax and rate of tax are different under the Scheme of 1997 Act and under the 1961 Act. Based on its elaborate reasoning the High Court ruled that tax paid under the 1961 Act is different and distinct from tax paid under VDIS though the definition of tax is the same both under the VDIS 1997 as well as the Income-tax Act 1961. The High Court also distinguished and refused to follow the Judgment of the Hon'ble Calcutta High Court in the case *Sushila Devi Mohata vs. CIT - 2004 (1) Cal LJ 128* which dealt with an exactly same issue which arose under the VDIS, 1976 on the ground that the above distinction regarding the difference in the scope of VDIS and the Income-tax Act, 1961 and the taxes and subjects covered therein was not pointed out to the Hon'ble Calcutta Court. As a result the Petitioner was denied credit of TDS against tax payable on the Voluntarily Disclosed Income under the VDIS, though the income which suffered TDS and which was disclosed under VDIS were the same. With all due respect, this judgment may require reconsideration as :

(i) The scheme for voluntary disclosure was treated as a statute having a separate charging provision whereas it was held that the scheme was optional;

(ii) The Doctrine of Unjust Enrichment was not considered;

(iii) The Petitioner challenged the validity of Circular No.755 dated 25-7-1997 stating it was issued without any authority. The same Circular was relied on by the Commissioner for denying the benefit to the Petitioner. The High Court held that the said Circular had no application since it was issued under the 1961 Act but despite that confirmed the order of the Commissioner denying credit to the Petitioner of TDS on the basis of the said Circular.

3. Section 184 of Finance Act, 2016 – When credit for TDS is provided under the Income Declaration Scheme, 2016, credit for Advance Tax could not be denied

Kumudam Publications (P.) Ltd. vs. CBDT – (2017) 393 ITR 599 (Del.)

The petitioner-company had been filing its Return of Income till the financial year 2008-09, i.e. AY 2009-10. Thereafter due to serious disputes between its directors, and shareholders petitioner could not appoint any statutory auditor and even accounts could not be made. In the absence of audited accounts, no return of income was filed from financial year 2009-10, i.e. assessment year (AY) 2010-11 till date. However, despite its inability to file income tax returns, it paid advance tax through various amounts, on 23 occasions in the past 5 years or so. The Petitioner made a declaration in Form 1 dated 15-9-2016 under the Income Declaration Scheme, for all the assessment years. The income so disclosed under the scheme in terms of the unaudited accounts was disclosed at ₹ 43.55 crores and the tax payable including interest and penalty as per IDS was ₹ 19.60 crores, against which advance tax paid by the petitioner and TDS deducted to its benefit was ₹ 16.49

crores, leaving the net tax payable of ₹ 3.11 crores. However, the Principal Commissioner of Income-tax, (PCIT) in response to its declaration in Form 1 refused to grant credit of advance tax and TDS and thereby demanded a tax of ₹ 19.60 crores. After various correspondences with the PCIT and CBDT the Petitioner finally approached the High Court seeking an order directing the respondent Revenue to grant credit for TDS and Advance Tax on the income declared under IDS. The High court held that though such schemes are to be seen as containing special dispensations, etc and interpreted in a "stand alone" or sui generis manner, there should be something which provides a clear insight that Parliament wished that tax amounts paid in the past are not to be reckoned at all, for purposes of payments. All that the words of the statute enjoin are that the tax and surcharge amounts under the scheme "shall be paid on or before a date to be notified". These words necessarily refer to all payments. They are not limited in their meaning to only what is paid immediately before, or in the proximity of the declaration filed. Further, it was held that as per Section 182 of the scheme states that for the purposes of the IDS, undefined terms and expressions shall be in terms of the Income Tax Act, by incorporating those into the Finance Act and the scheme and therefore the definition of "Undisclosed income" (which is the foundational provision to be invoked by declarants) has to interpreted as that defined under the Income Tax Act,1961. The only bar discernable under the scheme in question is evident from Section 189 that no person declaring under the Act shall not be entitled to "claim any set off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment." It was further held that there is no bar for an assessee or declarant to claim credit of advance tax amounts paid previously relative to the assessment years or periods for which it seeks benefits under the scheme. The court also held that clarification by the Revenue, that credit for TDS paid, can be enjoyed for availing the benefit (under the scheme in question) precluded any meaningful argument by it that advance tax payments relative for the assessment years covered by the declaration cannot be taken into consideration as payments under and for purposes of availing the benefits of the scheme.

Comments

This Judgement and that rendered by the Hon'ble Bombay High Court in Earnest Business Centre (supra) appear to be taking conflicting views though in the case of Earnest a similar issue was raised under VDIS 1997 and not IDS 2016. The Hon'ble Delhi High Court has correctly interpreted the purpose and intent of the scheme after considering various aspects of the matter including the doctrine of unjust enrichment, double taxation, correctness of the clarification / circular issued by the CBDT under the IDS, etc. While the Hon'ble Bombay High Court in the case of Earnest Business Centre (supra) did not consider the fact that same income was taxed twice, the Hon'ble Delhi High Court seems to have dealt with the same issue while allowing the Petition of the Assessee and directing the revenue to grant credit for advance tax on the same income offered under IDS on which advance tax was earlier paid by the Assessee. The Hon'ble Delhi High Court further held that once as per the clarification issued by the Revenue credit for TDS is to be granted there is no ground to say that advance tax paid relative to the assessment years in questions could not be granted credit of as payments under the scheme. It rejected the argument of the Revenue that the instruction clarified that credit for TDS shall be allowed only in those cases where the relative income is declared under the Scheme and credit for the tax has not already been claimed in the return of income. Again in the above case of Earnest Business Centre (supra) the Hon'ble Bombay High Court despite agreeing that by virtue

of section 63 (d) of the VDIS 1997 the term 'tax' was to be given the same definition as that under the Income-tax Act, 1961 held that the credit of TDS could not be given since it did not affect the Charging Section of VDIS 1997. Whereas in the above case of Kumudam (supra) the Hon'ble Delhi High Court based on a similar section of IDS [Section 182 (c)] held that terms not defined in IDS but defined in the 1961 Act shall prevail and as a result the credit of Advance Tax which is also a mode of recovery could not be denied credit under the IDS despite no specific mention of the same in the scheme. The Revenue's argument that, if the petitioner were to be allowed to opt to the Scheme and given credit for amounts paid as advance tax, it would be allowed to achieve indirectly what it is forbidden to secure directly was also correctly repelled keeping in mind the intent of the scheme.

4. Section 144C – Even in a case remanded back by the Tribunal for passing fresh assessment orders it is essential for the AO to comply with the procedure laid down in section 144C(1) by passing a draft assessment order.

Turner International India (P.) Ltd. vs. DCIT – [W.P. (C.) Nos. 4260 & 4261 of 2015, Delhi High Court]

By a common order for AYs. 2007-08 and 2008-09, ITAT observed that neither the Petitioner nor the TPO had taken into consideration appropriate comparables and, therefore, the determination of arm's length price ('ALP') was not justifiable. While setting aside the order of the DRP, the ITAT remanded the matters to the AO for undertaking a transfer pricing study afresh and framing an assessment in accordance with law. Following the above order of the ITAT, fresh notices were sent by the TPO to the petitioner under Section 92CA(2) of the Income-tax Act, 1961 ('Act'). Again, two separate orders were passed by the TPO proposing an upward adjustment to the total income of the Petitioner for each of the AYs. Pursuant to the above order of the TPO, the AO directly passed final Assessment Orders in respect of both AYs under Sections 254/143(3)/144 C (13) read with Section 92 CA (4) of the Act confirming the additions as proposed by the TPO. The Assessee challenged the said orders in Writ Petition before the High Court. The Hon'ble High Court held that the failure by the AO to adhere to the mandatory requirement of Section 144C(1) of the Act and first pass a draft assessment order would result in invalidation of the final assessment order and the consequent demand notices and penalty proceedings.

Comments

The Hon'ble High Court reiterated the settled position by relying on the following judgments:

Zuari Cement Ltd. vs. ACIT – [WP(C) No. 5557 of 2012, Andhra Pradesh High Court]

Vijay Television (P) Ltd. vs. DRP – [2014] 369 ITR 113 (Mad.)

ESPN Star Sports Mauritius S.N.C. ET Compagnie vs. UOI – [2016] 388 ITR 383 (Delhi) International Air Transport Association vs. DCIT – [2016] 241 Taxman 249 (Bombay)

5. Section 253(1)(a) of the Income-tax Act, 1961 – territorial jurisdiction of the Appellate Tribunal is to be determined with reference to the location of the office of the AO

CIT vs. Yamuna Expressway Industrial Development Authority [2017] 152 DTR 105 (All.) (HC)

Before the Hon'ble High Court the department had challenged the jurisdiction of the Tribunal in deciding the appeal filed by the assessee on the ground that jurisdiction of respective Tribunals should be determined with reference to place wherefrom order subjected to appeal is passed. It was argued that the order was passed by CIT(E) at Lucknow, in view of Rule 4(1) read with Notification dated 29-5-2001, appeal should have been filed at Lucknow Bench and not at Delhi. The High Court dismissed this question observing that jurisdiction is not to be determined, as per aforesaid notification, with reference to the place where order under appeal was passed, but it has to be determined with reference to the location of office of Assessing Officer. The High Court relied on para 4 of Standing Order under Income Tax Appellate Tribunal, Rules 1963 (hereinafter referred to as "Rules, 1963") issued with reference to Rule 4(1) of Rules, 1963 which states that the ordinary jurisdiction of the Bench will be determined not by the place of business or residence of the assessee but by the location of the office of the Assessing Officer.

6. Section 2(47) of the Income-tax Act, 1961 – Transfer of immovable property under joint development agreement which is unregistered does not fall under section 53A of Transfer of Property Act – The assessee is not liable to pay capital gains tax

CIT vs. Dr. Amrik Singh Basra [2017] 82 taxmann.com 186 (Punjab & Haryana)

The assessee was one of the members of Punjabi co-operative housing society. The society entered into a tripartite joint development agreement dated 25-2-2007 with two developers, viz., Hash Builders Private Limited and Tata Housing Development Company Limited under which it was agreed that developers would undertake development of land owned and registered in the name of the society. The agreed consideration to be paid by the developers was to be disbursed to each individual member of the society partly in monetary and balance in terms of built up property. The assessee was to receive proportionate amount. The Assessing Officer applied the provisions of Section 2(47)(v) of Income-tax Act, 1961 r.w.s. Section 53A of the Transfer of Property Act, 1882 which provides that any transaction involving allowing the possession of the immovable property to be taken or retained in part performance of contract of the nature referred to in Section 53A of the Act of the 1882 Act shall be treated as transfer for purposes of the Act. Since the joint development agreement was signed on 27-4-2007 i.e., during the previous year relevant to the assessment year 2008-09, the Assessing Officer computed chargeable capital gains in that year, on the entire amount received/receivable in future under the head capital gains. On appeal, the First Appellate Authority deleted the addition made by the Ld. A.O. The Tribunal upheld the order of the Ld. CIT(A) and dismissed the appeal filed by the revenue. On further appeal, Hon'ble High Court dismissed the appeal filed by the revenue and held that

a) Perusal of the JDA dated 25-2-2007 read with sale deeds dated 2-3-2007 and 25-4-2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties had agreed for pro-rata transfer of land.

b) No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25-2-2007 so as to fall within the domain of Section 53A of 1882 Act.

c) The possession delivered, if at all, was as a licencee for the development of the property and not in the capacity of a transferee.

d) Section 53A of 1882 Act, by incorporation, stood embodied in section 2(47)(v) of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of Joint Development Agreement dated 25-2-2007 having been executed after 24-9-2001, the agreement does not fall under Section 53A of 1882 Act and consequently Section 2(47)(v) of the Act does not apply. (A.Y. 2008-09)

7. Section 2(15) – Charitable Purpose – Merely because assessee had generated profits out of activity of publishing and distribution of school text books, it could not be concluded that it ceased carrying on charitable activity of education

Delhi Bureau of Text Books vs. DIT(E) [2017] 394 ITR 387 (Delhi)

The assessee before the Hon'ble High Court was charitable society was engaged in printing and publication of text books for students of Government Schools, New Delhi Municipal Council Schools and Delhi Cantonment Schools. The books were provided at subsidised rates by the assessee. The assessee was also distributing free books, reading material and school bags to needy students. The assessee claimed exemption under sections 11 and 12. During the course of assessment proceedings, the A.O. observed that since the assessee was earning huge profit margins of about 35.15 per cent, the activity of publication and sale of books could not be said to be a 'charitable activity'. Accordingly, the A.O. treated the income from the sale and publication of books as taxable. On appeal, the Ld. CIT(A) allowed exemption under sections 11 and 12 of the Act by observing that the A.O. had not found that the assessee's activities were beyond the aims and objectives of the society as per its Memorandum of Association & Rules. He further held that generation of income was no test in itself for determining the charitable nature of the activities. Earning of a surplus in working out the charitable purpose would not place the entity outside the purview of section 2(15), read with sections 11 and 12. The department, being aggrieved by the order of the Ld. CIT(A) preferred an appeal before the Tribunal. The Tribunal reversed the order of the Ld. CIT(A) by observing that the books had been sold at a huge profit margin about 40 per cent which showed that the assessee was engaged in the activities of earning profit. On further appeal by the Assessee, the Hon'ble court allowing the appeal held that the ITAT came to the erroneous conclusion merely because the Assessee had generated profits out of the activity of publishing and selling of school text books it ceased carrying on the activity of 'education.' The ITAT failed to address the issue in the background of the setting up of the Assessee, its control and management and the sources of its income and the pattern of its expenditure. The ITAT failed to notice that the surplus amount was again ploughed back into the main activity of 'education'. The activity of the Assessee contributed to the training and development of the knowledge, skill, mind and character of students. The Court held that the ITAT erred in holding that the activities carried out by the Assessee fell under the 4th limb of Section 2 (15) of the Act, i.e., 'the advancement of any other object of general public utility' and that its activities were not solely for purpose of advancement of 'education'.



Neelam Jadhav, Keerthiga Sharma &
Neha Paranjpe, *Advocates*

DIGEST OF CASE LAWS
Tribunal

Reported Decisions

1. Business expenditure – Disallowance – Section 40A(3) of the Income-tax Act, 1961 – assessee acquired land as an agriculturist and converted same into stock-in-trade for business – Cash payment made by the assessee are genuine and no disallowance is warranted under section 40A(3) of the Act

Ch. Hanumantha Rao vs. ITO [2017] 81 taxmann.com 421 (Visakhapatnam - Trib.) [Assessment Year: 2010-11]

Facts

The assessee was engaged in the business of development of sites and flats. During the impugned assessment year assessee acquired land as an agriculturist for investment and converted the same as a stock-in-trade for his business. The assessee made cash payment of ₹ 52,97,925/- towards purchase of said land. The learned A.O. disallowed cash payments made by the assessee invoking section 40A(3) on the ground that impugned lands were not agricultural land and no agricultural operations were carried on since the said land was immediately converted into flats and sold to customers. On appeal, the Ld. CIT(A) confirmed the action of the learned A.O. The assessee being aggrieved by the appellate order preferred the appeal before the Hon'ble Appellate Tribunal.

Held

The Hon'ble Tribunal allowed the appeal of assessee by observing that the provisions of section 40A(3) of the Act, does not apply to a case where the payment is made for acquisition of capital assets or investments for business. It is undisputed fact that the assessee has purchased the impugned lands as investment and subsequently converted into stock-in-trade for business purposes. In present case there exist a business expediency and other relevant factors. Further, the payments made by the assessee are also genuine. The Act provides for immunity from disallowance of expenditure, if the assessee proves to the satisfaction of the learned A.O. that there is a business expediency in making the cash payments. In this case, the assessee has filed necessary evidences to prove that the impugned land has been acquired as an investment and subsequently converted into stock-in-trade of his business. Thus, disallowance made invoking provisions of section 40A(3) of the Act is unjustified and hence, the A.O. is directed to delete the additions made

towards cash payments under section 40A(3) of the Act.

2. Exemption – Section 54 of the IT Act, 1961 – Capital Gains received from sale of property invested in new property within period of 3 years – Condition for completion of construction within 3 years is not mandatory – Exemption under section 54 is to be granted

Kannan Chandrasekar vs. ITO [2017] 82 taxmann.com 284 (Chennai - Trib.) [Assessment Year: 2012-13]

Facts

The assessee is an individual, sold a residential property on 22-6-2011 for the consideration of ₹ 1,15,00,000/- and earned Long Term Capital Gain of ₹ 24,20,062/- thereon. The assessee purchased new residential premises fully utilizing Capital Gain and claimed deduction under section 54 of the Act. The assessee made entire payment for new residential premises on 11-1-2012. Thus, the capital gain was appropriated within a period of 3 years. However, the possession was handed over on 5-11-2015 since the construction of the new building was not completed. The learned A.O. denied the claim of exemption under section 54 of the Act by observing that the construction was not completed within 3 years as prescribed under section 54 of the Act. On appeal, the learned CIT (A) upheld the action of the learned A.O. The assessee being aggrieved by the appellate order preferred the appeal before the Hon'ble Appellate Tribunal.

Held

The Hon'ble Appellate Tribunal allowed the claim of exemption under section 54 of the Act by observing that the assessee entered into a construction agreement dated 21-12-2011 and made payment towards a new residential property within 3 years from the date of sale of residential premises. Further, the Tribunal observed that the completion of construction within three years was not mandatory and what is necessary that the construction should be commenced. When the commencement of the construction of the residential unit which is evidenced by construction agreement and also sale deed, in our opinion, assessee over and above satisfied the conditions laid down by Section 54 of the Act and demonstrated his intention to invest the capital gains in residential house. Accordingly, the assessee is entitled for exemption under section 54 of the Act. Thus, the order of lower authorities is reversed and appeal filed by the assessee is allowed.

3. Head office expenditure – Section 44C – Payment for Management Fee is held to be at arm's length based on detailed documentation produced, thereby satisfying the rendition and benefit test. The TPO could not reject a method applied, without applying one of the prescribed methods himself

Schneider Electric India Private Limited. vs. DCIT (ITA No. 209/Ahd/2015) (TS-433-ITAT-2017(Ahd)-TP) Assessment Year: 2009-10

Facts

1. The assessee had paid management fees to its Associated Enterprise ('AE') under a cost contribution agreement. As per the said agreement, cost incurred for the services would be allocated to the group entities.

2. For the purpose of benchmarking its international transactions, the assessee applied Transactional Net Margin Method ('TNMM') on an entity level basis and held that all its international transactions were at arm's length.

3. Though the Transfer Pricing Officer ('TPO') accepted the entity-level TNMM, he alleged that the ALP for payment for management fee was NIL, since the assessee did not prove whether it required such services, whether it had actually received any services and that the payment was commensurate to the benefit received by it. Further, the TPO also alleged that since the expenditure was incurred for the entire group, nothing had to be allocated to individual entities, especially when the benefits were common to all group entities. The TPO also observed that services in the nature of stewardship activities or shareholder activities need not be charged to the assessee. An adjustment was proposed by the TPO u/s. 92CA of the Act, which was followed by the A.O. while passing the order u/s. 143(3) of the Act.
4. The assessee filed an appeal before the CIT(A), who upheld the order of the A.O. / TPO. Aggrieved, the assessee filed an appeal before the Hon'ble ITAT.

Held

1. The Hon'ble ITAT held that the case was similar to *Merck Limited vs. DCIT [2016] 139 DTR 1 (Mum)*, to which one of the members was a party.
2. The Hon'ble ITAT deleted the TP adjustment and held that the TPO had not applied any method while determining that the ALP of the payment for management fee was NIL. It further observed that merely because the services were worthless according to the Revenue, the ALP of these services could not be held to be NIL.
3. Relying on the cost contribution agreement and detailed documentation submitted by the assessee, the Hon'ble ITAT held that services were in fact received by it. It also observed that consideration was not required for shareholder activities, but certain other stewardship activities must be compensated.
4. Further, the Hon'ble ITAT also held that the TPO could not question the business expediency of the payment. Lastly, it also observed that the Revenue had accepted the said payment to be at ALP in earlier years, and could not change stands in the impugned year. Accordingly, the Hon'ble ITAT allowed the assessee's appeal and deleted the transfer pricing adjustment.

4. International transaction – Section 92 – If the international transaction between the AE and the assessee was exactly same as the transaction between the AE and the third party, CUP was the most preferred method to determine the ALP

DCIT vs. Calance Software Pvt. Ltd. (ITA No. 5023/Del./2012) (TS-451-ITAT-2017(Del.)-TP) [2017] 82 taxmann.com 390 (Delhi – Trib.) Assessment Year: 2007-08

Facts

1. The assessee was engaged in providing software development services to its AE. Some of the said transactions were entered into by the AE, back-to-back with independent parties and the entire amount of the transaction was passed on to the assessee.
2. The assessee, applying Comparable Uncontrolled Price Method (CUP), contended that these transactions were at arm's length since they were entered into at the same price with the AE, as that between the AE and the third party.

3. The TPO rejected the application of CUP and applied TNMM to determine the ALP of the international transactions entered into by the assessee.

4. On appeal, the CIT(A) decided in favour of the assessee by holding that both by application of CUP or TNMM, the said international transactions were at arm's length. The Department filed an appeal before the Hon'ble ITAT.

Held

1. The Hon'ble ITAT upheld the application of CUP and held that functions, assets and risk ('FAR') analysis was to be conducted *qua* the transaction and since the transaction between the AE and the assessee was the same as that between the AE and third party, there was no difference in the FAR.

2. The Hon'ble ITAT observed that CUP was not a residuary method and when perfect comparable transactions were available, it was the most suitable and direct method, and it hardly left any scope for distortion of results by extraneous factors. Accordingly, the Hon'ble ITAT dismissed the Department's appeal on this count.

5. Transfer Pricing – ALP – Section 92CA – Payment for Management Fee is held to be at arm's length based on detailed documentation produced, thereby satisfying the rendition and benefit test. The TPO could not reject a method applied, without applying one of the prescribed methods himself

Schneider Electric India Private Limited. vs. DCIT (ITA No. 209/Ahd./2015) (TS-433-ITAT-2017 (Ahd.)-TP) Assessment Year: 2009-10

Facts

1. The assessee had paid management fees to its Associated Enterprise ('AE') under a cost contribution agreement. As per the said agreement, cost incurred for the services would be allocated to the group entities.

2. For the purpose of benchmarking its international transactions, the assessee applied Transactional Net Margin Method ('TNMM') on an entity level basis and held that all its international transactions were at arm's length.

3. Though the Transfer Pricing Officer ('TPO') accepted the entity-level TNMM, he alleged that the ALP for payment for management fee was NIL, since the assessee did not prove whether it required such services, whether it had actually received any services and that the payment was commensurate to the benefit received by it. Further, the TPO also alleged that since the expenditure was incurred for the entire group, nothing had to be allocated to individual entities, especially when the benefits were common to all group entities. The TPO also observed that services in the nature of stewardship activities or shareholder activities need not be charged to the assessee. An adjustment was proposed by the TPO u/s. 92CA of the Act, which was followed by the AO while passing the order u/s. 143(3) of the Act.

4. The assessee filed an appeal before the CIT(A), who upheld the order of the AO / TPO. Aggrieved, the assessee filed an appeal before the Hon'ble ITAT.

Held

1. The Hon'ble ITAT held that the case was similar to *Merck Limited vs. DCIT [2016] 139 DTR 1 (Mum),* to which one of the members was a party.

2. The Hon'ble ITAT deleted the TP adjustment and held that the TPO had not applied any method while determining that the ALP of the payment for management fee was NIL. It further observed that merely because the services were worthless according to the Revenue, the ALP of these services could not be held to be NIL.
3. Relying on the cost contribution agreement and detailed documentation submitted by the assessee, the Hon'ble ITAT held that services were in fact received by it. It also observed that consideration was not required for shareholder activities, but certain other stewardship activities must be compensated.
4. Further, the Hon'ble ITAT also held that the TPO could not question the business expediency of the payment. Lastly, it also observed that the Revenue had accepted the said payment to be at ALP in earlier years, and could not change stands in the impugned year. Accordingly, the Hon'ble ITAT allowed the assessee's appeal and deleted the transfer pricing adjustment.

6. Penalty – Section 271(1)(c) – No penalty – On additions, which were not made in the final assessment order

JRK Auto Part (P) Ltd. vs. ACIT (ITA No. 3458/Del./2014) (TS-434-ITAT-2017(Del.)-TP) Assessment Year: 2007-08

Facts

1. The TPO, *vide* his order u/s. 92CA of the Act, proposed two adjustments, namely, on import of raw material and on purchase of capital goods.
2. However, the A.O. in his order u/s 143(3) of the Act, *inter alia*, only made an adjustment in respect of purchase of capital goods and did not make any adjustment in respect of import/purchase of raw materials by the assessee. The A.O. also disallowed, *inter alia,* fees paid to Registrar of Companies for increase of authorised capital and considered the same as capital expenditure.
3. Penalty u/s. 271(1)(c) of the Act was also initiated and levied on the additions made by the A.O.
4. The assessee did not prefer any appeal before the CIT(A) against the order u/s. 143(3) of the Act. However, an appeal was filed before the CIT(A) against the order levying penalty.
5. The CIT(A), while affirming the levy of penalty, enhanced the penalty to also include the adjustment u/s 92CA of the Act in respect of the import of raw material.

Held

1. The Hon'ble ITAT deleted the enhanced penalty and held that once the assessment order had attained finality, penalty could be levied only on those additions made in the said order and not on those additions not made in the said order.
2. It observed that the order u/s .143(3) of the Act had attained finality and it was neither rectified / revised u/s. 263 or u/s 154 nor reopened u/s. 147 of the Act. It observed that the CIT(A) had vast powers u/s. 251 of the Act, but could not transgress his jurisdiction and exercise power beyond the mandate of law. Accordingly, the Hon'ble ITAT allowed the appeal of the assessee and deleted the levy of penalty.

Unreported Decisions

7. Business expenditure – Section 37(1) of the IT Act – Refurbishment expenses of leasehold property –

Benefit of enduring nature but the same was not sole and decisive factor for determining the nature of expenditure

JCIT vs. Standard Chartered Investments & Loans (India) Limited, I.T.A. No. 2908/Mum./2011, dt. 2-6-2017

Facts

The assessee, a corporate engaged in financing as NBFC, claimed certain expenses incurred towards development of leasehold property as revenue expenditure. The same was capitalised in the books of account and against which depreciation was provided. The learned A.O. held that the same were incurred in connection with starting of new consumer business which was altogether a new line of business and hence the same were capital in nature. The depreciation claimed by the assessee on these expenses was disallowed by the learned A.O. on which premises that the assessee failed to substantiate that leasehold assets were put to use during the year.

The CIT(A) held that the expenditure in the course of venturing into retail financing business and therefore, both business being business related only and since expenditure was incurred to refurbish the leasehold premises which were not owned by the assessee, the same being revenue expenditure, was allowed to the assessee.

Held:

The Hon'ble ITAT held that, the assessee, was already engaged in corporate financing, it proposed to enter into retail finance segment and during the course of business incurred expenditure. Therefore, there was no new line of business, the said expenditure was incurred against several properties located over different places and were incurred mainly on account of interior work, electrical works, cabling & wiring, carpets, signage expenses, architect's fees, brokerage expenses, consultants' fees etc. which *prima facie,* are expenses of revenue in nature. Further held that assessee may have received benefit of enduring nature but the same was not sole and decisive factor of determining the nature of expenditure.

8. Business expenditure – Section 40(a)(ia) of the Act – No TDS is required to be deducted on payment made to the bank in the form of charges paid for collecting payments on account of service fees/discount/ merchant discount rate/commission etc. (r.w.s. 194H)

DCIT vs. M/s. Future Value Retail Ltd. ITA No.3968/MUM/2015, dtd. 31-5-2017

Facts

In this case, the learned A.O. observed that assessee had debited expenditure in the Profit and Loss account as credit card charges. During the assessment proceedings assessee explained that it is engaged in the business of sale of readymade garments and other products and it receives payments from customers through credit cards, therefore the aforesaid expenditure reflects the charges paid to the banks for collecting payments and is on account of service fees/ discount/ merchant discount rate/ commission, etc. The learned A.O.'s view that such charges are in the nature of 'commission', for which the tax is required to be deducted at source under sections 194H and therefore he disallowed the expenditure under section 40(a)(ia). The CIT(A) deleted the additions.

Held

The Hon'ble ITAT while deciding the issue held that said credit card charges paid to the bank for collecting payments which would never fall within the meaning of the expressions 'commission or brokerage' as understood for the purposes of s. 194H. Therefore, no amount of tax is deductible

at source on such kinds of payments under section 194H. Therefore, disallowance made by the learned A.O. under section 40(a)(ia) is deleted.

9. Cash Credit – Section 68 – AIR Information – Cash deposited – Planning to purchase agricultural land – Deal could not materialise – Presumption cannot take the shape of evidence – Addition deleted

Chirag Jayant Mehta vs. ACIT ITA No. 8871/Mum/2011 dt. 31-5-2017

Facts

The assessee is an individual and also partner in a partnership firm. The case of the assessee was selected for scrutiny under CASS, information was received through AIR, that there is cash deposit exceeding ten lakh in the saving bank account held by the assessee. The assessee during assessment proceedings explained that the assessee was planning to purchase agricultural land; therefore, the cash was withdrawn from the bank. Since, the deal could not materialise, the cash withdrawn from bank was re-deposited. Further, explained that the cash deposited was from the account which was jointly with Mr. X (Brother). The learned A.O. held that claim of the assessee is merely an afterthought and no corroborative evidence to support the stated purpose of withdrawal was produced. The sum and substance of making the addition was that the onus to prove the withdrawal/source is upon the assessee, the same was not been discharged. learned CIT(A) confirmed the stand of the learned A.O..

Held

The Hon'ble ITAT held that factum of withdrawal of cash was not disputed by the Revenue. The point which has to be considered that the purpose of withdrawal. The assessee right from beginning i.e. from the assessment stage has been claiming that the amount was withdrawn for the purchase of land, which finally could not materialise and the same amount was re-deposited in the bank account, Human probabilities apply to both sides. The decision to deposits the unutilised cash into the bank is a decision of an individual. Presumption cannot take the shape of evidence, however strong it may be. The Hon'ble ITAT has deleted the addition.

10. Deduction – Section 80-IB(10) of the IT Act, 1961 – Built up area of "shops and commercial establishments" as per clause (d) of section 80-IB(10) – Basement area fall under regulation 38(9) of the DCR has to be excluded – Deduction under section 80-IB(10) is allowable

ITO vs. M/s. Avani Developers, ITA No. 7368/Mum./2014 [Assessment Year: 2010-11], dt: 12-4-2017

Facts

The assessee is engaged in the business of slum rehabilitation scheme. During the course of such activity it had undertaken development and construction of a housing project and claimed deduction of ₹ 1,61,00,007/- under section 80-IB(10) of the Act with respect to the profit derived from such project. The learned A.O. denied the claim of deduction observing that the built up area of shops and other commercial establishments including basement violated prescribed limit laid down in clause (d) of section 80-IB(10) of the Act. On appeal, the learned CIT(A) allowed the claim under section observing that as per Development Control Rules, the built up area of a basement is not to be considered as part of FSI if it confirms to the restrictive uses under Regulation 38(9). Thus, accordingly if the basement area is excluded from the commercial built up area of the project. The remaining area is less than 5000 sq.ft. as provided under

clause (d) of section 80-IB(10) of the Act. The Department preferred the appeal before the Hon'ble Appellate Tribunal.

Held

The appeal filed by the Department was dismissed by the Tribunal observing that the Income-tax Act does not prescribes the meaning of "built up are of shops and commercial establishments". Though Section 80-IB(14) prescribes the meaning of "built up area" but incidentally it is with respect to residential units and not for shops and commercial establishments. Thus, it would be appropriate to fall back on local laws i.e. DC Rules to understand the meaning of " built up area" for commercial establishments since the provisions of section 80IB(10)(d) itself prescribe that the deduction is available to only such housing projects approved by the local authority. The section 35(2) of the DCR prescribes the exclusion from calculation of built up area wherein clause (e) excludes the area of basement as provided in regulation 38(9) of the DCR from the preview of built up area. Thus, after exclusion of basement, the commercial built up area in the project does not exceed limit prescribed under section 80-IB (10)(d) of the Act. Therefore, the conclusion of Ld. CIT(A) to allow the claim of deduction under section 80IB (10) is hereby affirmed.

11. Deemed dividend – Section 2(22)(e) of the IT Act, 1961 – Advances received during the course of business – Provisions of section 2(22)(e) of the Act are not attracted

D. P. Vora Securities Pvt. Ltd. DCIT, ITA 5961/Mum/2016 [Assessment Year: 2013-14], dt. 24-4-2017

Fats

The assessee is a private limited company, received a loan to the tune of ₹ 5,60,00,000/- from M/s. Touchstone Capital Market Services Pvt. Ltd. [TCMSPL]. The learned A.O. observed that Deepak Vora, director of the assessee company is holding 6,30,000 (66.315%) shares in assessee company and 50,500 (38%) shares in TCMSPL. Thus, he invoked section 2(22)(e) of the Act and made addition of ₹ 4,15,05,865/- to the extent of accumulated profit of TCMSPL. On appeal, the learned CIT(A) confirmed the addition made by the learned A.O. The assessee being aggrieved by the order of learned CIT (A) preferred the appeal before the Appellate Tribunal.

Held

The appeal filed by the assessee was allowed by observing that the assessee company and TCMSPL are holding 0.01% shares in each other which is less than 10%. The money received by the assessee from TCMSPL were used to meet its trading commitments on the stock exchange and similar assistance was rendered to TCMSPL. Thus, provisions of section 2(22)(e) of the Act are not applicable to business transaction. Further, it was observed that the advances received by the assessee from the companies having reserved accumulated profit can be added only in the hands of registered shareholder who is entitled to receive dividend and not in the hands of any other business entity. Thus, the learned A.O. is directed to delete the addition made under section 2(22)(e) of the Act. The Hon'ble Appellate Tribunal relied on decisions in case *CIT vs. Creative Dyeing and Printing P. Ltd. [2009] 318 ITR 476 (Del.)* and *CIT vs. Universal Medicare Pvt. Ltd. [2010] 324 ITR 263 (Bom.).*

12. Exemption – Section 54 of the IT Act, 1961 – Investment made in a residential property outside India – Allowable as deduction before 1-4-2015

ITO vs. Nishant Lalit Jadhav, ITA No. 6883/Mum/2014 [Assessment Year: 2011-12, dt. 26-4-2017

Facts

The assessee, a Non-resident Indian, during the impugned assessment year earned Long Term Capital Gain of ₹ 67,06,652/- from sale of residential property at Mumbai. In the Computation of Income assessee claimed exemption under section 54 of the Act on investment made in a residential property at New York, USA. The learned A.O. denied the claim under section 54 of the Act as the property was acquired outside India and not in India. On appeal, the learned CIT(A) reversed the order of learned A.O. and allowed the appeal of the assessee observing that during the year under consideration there was no such condition in section 54 that the investment in a residential property is to be made in India. The amendment to section 54 carried out through Finance (No. 2) Act, 2014 has come into force from 1-4-2015. The Department being aggrieved by the appellate order preferred the appeal before the Hon'ble Appellate Tribunal.

Held

The Hon'ble Appellate Tribunal dismissed the appeal filed by the department observing that prior to the amendment made by Finance (Nos 2) Act, 2014 w.e.f 1-4-2015, the language of section 54 required the assessee to invest the capital gains in a residential property. It is only subsequent to amendment w.e.f. 1-4-2015, the investment is required to be made in a residential property in India. The assessment year in the present appeal is prior to 1-4-2015 and thus, the amendment will not apply here. In view of the above we affirmed the order of learned CIT(A) and dismissed the appeal filed by the department.

13. Revision – Scope of revision and assessment – Sections 143(3) & 263 – On the basis of AIR Information scrutiny under section 143(3) done – Proceedings under section 263 cannot be expanded beyond the issue raised in AIR

Sanjeev Kr. Khemka vs. Pr. CIT, ITA No.1361/Kol/2016, dt. 2-6-2017 (Kol)(Trib.)

Facts

The assessee challenged the jurisdiction of CIT in passing order under section 263 holding that the order of the learned A.O. is erroneous. The case was selected for scrutiny on the basis of AIR Information. During the course of assessment, the learned A.O. sought information with respect to issues which were beyond the scope of assessment picked up under the CASS module. The cases were selected for scrutiny on the basis of either AIR data or CIB information. The information has to be restricted to the information received. The learned A.O. conducted scrutiny of those items as well which were not emanating from the AIR. Against the same the assessee filed appeal before the appellate authority.

Further the CIT has passed 263 order stating that the order of the AO as erroneous and prejudicial to the interest of Revenue on those item not listed in AIR.

Held

Before the Hon'ble ITAT the issue of the assessee was that under section 143(3) selected under CASS for limited scrutiny or regular scrutiny? The ITAT has adjudicated the said issue and held that the initiation of proceedings under section 143(3) on the basis of regular scrutiny should have been limited to the extent of the information gathered through AIR. Accordingly the proceedings under section 263 cannot be expanded beyond the issue raised in AIR. Further, there is no whisper in the order of the learned A.O. for expanding the scope of limited scrutiny after obtaining the permission from the Administrative CIT. Therefore, the scrutiny should have been limited only to the information emanating from the AIR. Thus, the order passed under section 143(3) was beyond the points of AIR is invalid and so the same is with the order passed under section 263 of the Act.


CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT

1) The Court upheld the assessee's inclusion of comparable having different financial year than that of the assessee as per the first proviso to Rule 10B(4)

Techbooks Electronics Services Pvt. Ltd. vs. Pr. CIT [TS-442-HC-2017(DEL)-TP]

Facts

1. The assessee, a 100% subsidiary of Tech Books, US was engaged in providing IT enabled data conversion services and marketing, business development/product selling services etc. to its associated enterprises ('AEs'). It applied TNMM as the most appropriate method to benchmark its transaction relating to `software development and customized electronic data'.

2. The TPO held that M/s. Datamatics Ltd, selected as comparable by the assessee was not comparable as the financial yearend of Datamatics Ltd. (i.e., the calendar year was the financial year) was different from that adopted by the assessee (March ending was the financial year). Accordingly, he rejected the comparable and made the consequent TP adjustment.

3. The CIT(A) observed that the assessee had suitably adjusted financial results of Datamatics Limited by adopting the figures of quarterly data from Annual Reports and thus, accepted assessee's contention for inclusion of Datamatics Ltd. with OP/TC of 1.76%. Accordingly, it directed the inclusion of Datamatics Ltd. since the financial results of Datamatics Ltd. could have been calibrated by the TPO so as to coincide with the financial year of the assessee. He rejected the contention of the TPO that the data of Datamatics Limited was not contemporaneous and held that contemporaneous data as referred to in Rule 10D(4), did not necessarily mean data pertaining exactly to the same financial year and covering the same period as the international transaction under consideration and it simply meant relating to the same period of time.

4. The Tribunal remitted comparability of Datamatics Ltd. holding that a valid comparison could be made only if the comparable company had also the same financial year. It disagreed with the CIT(A)'s and it further held that for making a valid comparison, it was *sine qua non* that the data of the comparables must be for the same period as that of the assessee company and if such a data was not readily available, then, the company albeit functionally comparable, disqualified for inclusion in the list of comparables. It clarified that only if the assessee provided the relevant data of this company for the concerned financial year on the basis of the information available from Annual

reports, without making its own calculations, the TPO could include this company and if the amounts were not directly available without any apportionment or truncation, then the company could not be considered as comparable.

5. Aggrieved, the assessee filed further appeal before the High Court.

Held

1. The Court held that the Tribunal had overlooked the first proviso to Rule 10B(4) which provides that data relating to a period not more than two years prior to such financial year may also be considered for comparability if such data could have an influence on the determination of transfer prices in relation to the transactions being compared. Accordingly, it held that the Tribunal could not have placed a restriction on the assessee to place before the AO/TPO only the relevant data of the said company for the concerned financial year on the basis of the information available from their annual reports, without making any own calculations as such a restriction was contrary to the proviso to Rule 10B(4).

2. Accordingly, it directed the AO/TPO to consider the relevant data consistent with Rule 10 B(4) read with the first proviso, while checking the veracity of the OP/TC of Datamatics Ltd. as a comparable and allowed the appeal of the assessee.

2) The Court held that LIBOR plus was to be adopted for benchmarking the loan given to the AEs outside India

CIT vs. Aurionpro Solutions Ltd. [TS-474-HC-2017(BOM)-TP]

Facts

1. The assessee had given interest free working capital advances to its wholly owned subsidiary. The assessee adopted cost plus method as the most appropriate method and bench marked its loan transaction at cost plus zero mark-up contending that since it was getting business from AEs, there was commercial consideration between the assessee and the AE and accordingly, no interest was charged.

2. The TPO adopted CUP as the most appropriate method and contended that in a comparable situation, a third party would have charged interest on advances/loans given. Accordingly, he adopted LIBOR + 3% for benchmarking the assessee's loan transaction. The assessee contended before the TPO that since no cost was incurred by the assessee in providing the advances, no interest was charged on the loan. It further contended that since it had full control over its AEs, the loans were in the nature of quasi equity and accordingly, no interest was charged and TP adjustment was not warranted. Rejecting assessee's contention, the TPO made TP addition.

3. The DRP held that LIBOR was applicable for benchmarking inbound loans i.e. ECBs, whereas the interest rate prevalent in India was to be adopted for benchmarking outbound loans as in the assessee's case. Accordingly, it rejected TPO's adoption of LIBOR + 3% and adopted 14% rate of interest on unrated unsecured corporate bonds as the comparable. Accordingly, it enhanced the TP adjustment.

4. The Tribunal rejected assessee's contention that there was a commercial consideration between the assessee and the AE which did not warrant TP adjustment and held that there was no requirement of existence of commercial consideration for the TP provisions to apply and the transaction of advancing of loans to AEs fell specifically within the ambit of international transaction u/s. 92B. Accordingly, it held that the ALP of the loan transaction was required to be determined. It accepted TPO's adoption of CUP method as the most appropriate method for benchmarking the advances given and agreed with DRP's view that for benchmarking outbound loans, the interest rate prevalent in India was required to be adopted. However, it held that the Co-ordinate Bench in various cases

had adopted LIBOR plus for benchmarking interest on interest free loans and for the purpose of consistency, it adopted LIBOR + 2% on the monthly closing balance of advances during the financial year for benchmarking the loan transaction as comparable.

5. Aggrieved, the Revenue appealed before the Court and contended that since the advances were given by the Indian entity, the rate prevalent in India on the loans was to be adopted.

Held

1) The Court observed that in the case of *DCIT vs. Tech Mahindra Ltd. [2011] 12 taxmann. com 132 (Mum. Trib.),* the Tribunal had held that interest rate in respect of currency in which transaction had taken place was to be adopted and accordingly, accepted LIBOR for benchmarking the foreign currency loan rather than the rate of interest on domestic borrowings. It further observed that the reasoning of the Tribunal was approved by the Court in the case of *CIT vs. Tata Autocomp Systems Ltd [2015] 56 taxmann.com 206 (Bombay)* wherein the Court upholding the decision of the Tribunal held that in the case of loans to AE, ALP would be determined on the basis of rate of interest being charged in the country where the loan was received/consumed.

2) Accordingly, relying on the above judgments, the Court held that LIBOR was to be considered to determine Arm's Length interest and it accepted Tribunal's adoption of LIBOR + 2% instead of LIBOR + 3% applied by the TPO.

3) The Court upheld Tribunal's deletion of TP addition as the transaction price was within the tolerance range of (+/-) 5% of the ALP determined by the TPO as per the second proviso to Section 92C(2)

CIT vs. Mettler Toledo India Pvt. Ltd. [TSS-478-HC-2017(Bom.)-TP]

Facts

1. The assessee, engaged in the business of manufacturing, marketing, sales and services of weighing equipments, purchased goods from its AEs worth ₹ 5.10 crores. It selected Avery India Ltd. as a comparable to benchmark its international transaction by applying TNMM as the most appropriate method. Adopting net profit/sales as PLI, it computed its operating margin at 11.29% whereas the operating margin of comparable was 5.45% and accordingly, claimed that its international transaction of purchase of goods was at ALP.

2. The TPO adopted operating profit/sale as the PLI and noted that the assessee's margin was 6.18%. Further, he contended that one comparable was not sufficient and accordingly, he added two more comparables viz., Flex Engineering Ltd., and Manugraph India Ltd. He computed the average of the PLI of 3 comparables at 9.6% and compared it with the assessee's PLI of 6.18% and determined the ALP at ₹ 4.42 crores. Accordingly, he held that the transaction was not at ALP and made the TP addition.

3. The CIT(A) rejected the two comparables selected by the TPO and accepted assessee's comparable. He observed that the PLI (operating profit/sale) of Avery India was 7.7% while that of the assessee was 6.18% and accordingly, reduced the TP addition.

4. Aggrieved, the Revenue appealed before Tribunal against CIT(A)'s rejection of the two comparables. The Tribunal, without adjudicating upon the CIT(A)'s rejection of 2 comparables, observed that the TPO had computed assessee's operating margin at 6.18% as compared to average of the operating margin of comparables at 9.6%. Accordingly, it held that even if the ALP determined by the TPO was accepted no adjustment was warranted since the assessee's price of the international transaction was within the tolerance range of 5% as per the second proviso to section 92C(2).

5. Aggrieved, the Revenue filed appeal before the High Court contending that the value of purchases from AEs was ₹ 5.10 crore and the tolerance limit after adding/deducting 5% would be between ₹ 5.36 crore to ₹ 4.85 crore and the ALP of the purchases worked out by the TPO was ₹ 4.42 crore which clearly fell outside the range of 5% and accordingly, the Tribunal erred in applying the second proviso to section 92C(2). Further, it contended that the Tribunal did not adjudicate on Revenue's specific ground of appeal that CIT(A) had rejected the two comparables adopted by the TPO.

Held

1. The Court observed that the assessee's operating margin as computed by TPO was 6.18% as compared to the average of the operating margin of comparables of 9.6% and that the same was at arm's length as it fell within the range of (+)/(-) 5% as per section proviso to 92C(2). Accordingly, it held that this aspect was properly considered by the CIT(A) and the Tribunal.

2. It further held that since the Revenue did not raise before the Tribunal the contention of the transaction price of the assessee not being within the tolerance range of (+)/(-) 5% of the ALP determined by the TPO, the same could not now have been taken up by the Court and accordingly, it dismissed the Revenue's appeal.

4) Determination of ALP and the consequent TP addition, if any, should be restricted only to international transaction of the assessee with its AE and not on the total turnover of the assessee

CIT vs. Phoenix Mecano (India) Private Limited [TS-460-HC-2017(Bom)-TP]

Facts

1. The assessee, engaged in the manufacturing of metal and plastic enclosures and industrial profiles, entered into international transactions of imports and exports with its AEs. For benchmarking the international transactions with its AEs, the assessee adopted TNMM as most appropriate method using the net profit margin as the Profit Level Indicator (PLI) which was 4.21%. It adopted 10 comparables and computed their PLI at 3.03% and claimed that its international transaction was at ALP.

2. The TPO selected a set of 11 comparables after adding and rejecting certain comparables selected by the assessee with margin of 7.26%. He determined the ALP of the assessee with respect to its total turnover instead of determining ALP with respect to its international transactions with its AEs and made TP adjustment.

3. The DRP upheld the order of the TPO.

4. The Tribunal relying on the case of *Thyssen Krupp Industries India Pvt. Ltd. vs. ACIT (TS-721-ITAT-2012(Mum)-TP),* held that determination of ALP should be restricted only to international transaction of the assessee with its AE and the same could not be done *vis-à-vis* the total turnover of the assessee (including the transaction with non-AEs). Further, it observed that the segmental information regarding the AE and non-AE transactions were available with the AO and accordingly directed the AO to consider only the international transactions of the assessee with its AEs for determining ALP.

5. Aggrieved, the Revenue appealed before the High Court contending that there was no segmental data of the transactions of AE and non-AE and therefore there was no method whereby the AO could come to a fair determination of ALP by restricting the same to only transactions with AE.

Held

1. The Court took note of the Tribunal's finding that the segmental figures were available with the AO. It further held that since the details of the international transaction were

available before the AO, the apprehension of the department was misplaced.

2. It relied on the decision in the case of *Alstom Projects India Ltd [TS-758-HC-2016 (Bom.)-TP]* wherein it was held that in absence of segmental information, TP adjustment cannot be done on entity level and had to be done only in respect of international transactions and in absence of substantial question of law, it dismissed the Revenue's appeal.

5) Subject to the remand by Tribunal, the Court directed the Tribunal to decide the issue by holding that the issue should be remanded to the TPO only where there is lack of clarity or some new facts have emerged (and not otherwise)

Alcatel Lucent India Ltd. vs. DCIT [TS-437-HC-2017(Del)-TP]

Facts

1. The assessee, engaged in the business of distribution and sale of Telecommunication Equipment provided Contract Software Development (CSD) Services and Technical Support Services (TSS) to its Associated Enterprises (AEs). The assessee adopted TNMM as its most appropriate method by selecting 13 comparables in respect of CSD Services and 4 comparables in respect of TSS segments. The assessee also claimed risk and the working capital adjustment.

2. The TPO in respect of CSD segment, adopted Sasken Communication Technologies Limited as comparable and considered the data in respect of the same at the entity level. Further, in respect of TSS segment, he adopted Water and Power Consultancy Services Limited (WAPCOS) and Mahindra Consulting Engineers Ltd (Mahindra) as comparables. He also rejected Kirloskar Consultants Limited selected by the assessee on the ground that it failed the RPT filter of 25%. The TPO also rejected the assessee's claim of risk and the working capital adjustment on the ground that the assessee was not able to substantiate the same. Accordingly, he made the TP addition.

3. The DRP upheld the order of the AO.

4. The Tribunal remitted comparability of Sasken Communication Technologies Ltd noting that the segmental data in respect of the company was available. In respect of TSS segment, the assessee contended that WAPCOS was not functionally comparable as they were engaged in rendering consultancy services in Water Resources, Power and Infrastructure and that Mahindra was also not functionally comparable being into multi Disciplinary Projects including designing, engineering etc. Accordingly, the Tribunal restored the comparability of WAPCOS and Mahindra for verification of the assessee's claim Further, it also restored the comparability of Kirloskar Consultants Limited selected by the assessee and rejected by the TPO to verify the assessee's contention that the RPT to sales ratio of the company was 11.79% which was less than 25%. Regarding the TPO's disallowance of working capital adjustment and risk adjustment, the assessee contended before the Tribunal that the issue may be restored for obtaining expert assistance and further the same was allowed to the assessee by the DRP in the earlier years. Accordingly, it restored the issue of working capital and risk adjustment to TPO for fresh consideration and examination.

5. Aggrieved, the assessee appealed before the High Court against the Tribunal's remanding the matter to the AO on the ground that the Tribunal had not given any findings.

Held

1. The Court observed that the Tribunal did not give any finding in respect of exclusion of Sasken Communication Technologies Ltd in CSD segment and exclusion of Mahindra and WAPCOS and inclusion of Kirloskar as a comparable for the TSS segment.

2. The Court held that an issue may be remanded either because of lack of clarity on factual aspects or because some new facts may emerge and that the scope of remand order should be clearly spelled out. It further held that where all the relevant facts were already before the Tribunal and the parties had no new material to provide, simply remanding the issue to the TPO without rendering a finding thereon would be an abdication of the functions of the appellate body.

3. Consequently, it directed the Tribunal to decide the issue on merits after hearing both the parties.

6) The Court admitted appeal against the Tribunal's order of upholding penalty levied by the AO u/s. 271(1)(c) in respect of TP addition and the consequent disallowance of the claim u/s. 10A since the appeal against the quantum order of the Tribunal was also admitted.

Deloitte Consulting India Pvt. Ltd. vs. ACIT [TS-467-HC-2017(Bom.)]

Facts

1. The assessee was engaged in rendering offshore and onsite software development services to Deloitte USA. The role of the assessee was limited to provide software and the information technology services in respect of the project assigned to it by Deloitte USA. Deloitte USA was responsible for delivery of the output to the end customer and marketing and generating sales. The assessee made payment to its AE in respect of the reimbursement of marketing services rendered by the senior managers deployed by Deloitte USA to the assessee on cost-to-cost basis.

2. A reference was made to the TPO. After the reference was made to the TPO, the assessee revised its return of income disallowing the entire marketing expense claimed. The TPO held that the marketing costs incurred and allocated by Deloitte USA to the assessee did not result in rendering of any service to the assessee as the role of the assessee was only to execute the project on behalf of the Deloitte USA and it was not engaged in the marketing activity and accordingly, there was no logic for reimbursement of marketing cost by the assessee to Deloitte USA. Accordingly, it determined the ALP of the reimbursement as 'nil. The assessee contended before the TPO that transfer pricing adjustment u/s. 92CA was not warranted as the assessee had disallowed the expense. The TPO noted that the assessee had revised the return but had failed to file revised Form 3CEB and further, the revised returns were filed after initiation of transfer pricing proceedings, in anticipation of transfer pricing adjustment. Accordingly, he held that the returns filed by the assessee were invalid and rejecting the assessee's contention, he made TP addition. Further, the AO disallowed the claim of the assessee for enhanced deduction u/s 10A on disallowance of reimbursement of marketing services in view of the provisions of Section 92C(4). AO also observed that the revised returns were invalid. Thereafter, the AO levied penalty u/s. 271(1)(c) for furnishing inaccurate particulars.

3. The CIT(A) confirmed the penalty levied by the AO u/s. 271(1)(c).

4. The Tribunal observed that in the quantum proceedings the TP addition was upheld on the ground that there was no justification for reimbursement of marketing expenses when the assessee was not involved in marketing and was only involved in delivering the output to Deloitte USA. It held that the assessee's withdrawal of the claim of expenditure was guided by its inability to prove its claim. It further held that the revised returns filed by the assessee were invalid since the same were filed after the commencement of the TP proceedings and were filed after the time limit provided u/s. 139(5). It further observed that the assessee failed to furnish revised report in Form 3CEB.

Accordingly, based on the Explanations 1 and 7 to section 271(1)(c), it upheld the penalty levied by the AO.

5. Aggrieved, the assessee appealed before the High Court.

Held

1. The Court observed that the quantum appeal of the assessee against the Tribunal's order was admitted and accordingly, it admitted the appeal of the assessee against the Tribunal's order of upholding the penalty levied u/s 271(1)(c) by the AO.

B) Tribunal Decisions

7) Permanent Establishment- Article 5 of India-USA DTAA – Whether the liaison office would constitute fixed place PE, when business of overseas entities are partly carried on in India and the activities carried out from a fixed place are not of preparatory or auxiliary character? - Held: Yes, against the assessee; Whether the nature of activities performed by expatriate employees of GEII located in India and employees of GEIIPL, i.e. GE India, which are of core nature and not merely preparatory or auxiliary, would mean that GE India has authority to conclude contracts on behalf of the GE Overseas entities and would constitute Agency PE in India? - Held Yes; against the assessee

GE Energy Parts Inc. vs. Addl. DIT, International Taxation [TS-34-ITAT-2017(Del.)] Assessment Year: 2001-02

Facts

1. GE Energy Parts Inc. ('the assessee') is a company incorporated in the United States of America ('USA') and is also a tax resident of the USA. The assessee is a part of the GE Group, which makes equipments for the customers in India relating to oil and gas, energy, transportation and aviation business

2. A survey u/s 133A of the Income-tax Act, 1961 ('the Act'), was conducted at the premises of All India Fine Arts and Crafts Society, Liaison Office of GEIOC, i.e. liaison office of General Electric International Operations Company Inc. (GEIOC). During the course of survey and post-survey enquiries, the revenue authorities obtained certain incriminating material / documents / information and also recorded statements of some persons

3. On the basis of the material/ information gathered, the Assessing Officer ('AO') issued notices u/s 148 of the Act to 24 GE group entities (including the assessee) which were incorporated in various countries like UK, Japan, USA, Germany, Canada, Italy, Mauritius, Singapore, etc.

4. The AO observed that many activities relating to marketing and sales were carried out in India. The AO also observed that the expatriates from GE International Inc., US ('GEII') along with the employees of GE India Industrial Private Limited, India ('GEIIPL') constituting the Indian team ('GE India') were always involved and participated in the negotiation of prices

5. Thus, the AO passed an order and held that the GE group entities were selling goods in India with the involvement of its Permanent Establishment (PE) (i.e. a fixed place PE and a dependent agent PE) in India and, accordingly, the profits attributable to such PE were chargeable to tax in India. The Commissioner of Income-tax (Appeals) ['CIT(A)'] also upheld the order of the AO.

6. Aggrieved by the order of the AO / CIT(A), the GE group overseas entities filed a batch of 139 appeals. The GE group selected the assessee's case as lead case and fairly admitted

that there are four broad common issues to be dealt with. The following broad issues are as under:

(a) Whether there exits any Fixed Place PE or Agency PE in India;

(b) Attribution of profits to such PE;

(c) Whether re-assessment proceedings are valid and

(d) Levy of interest u/s. 234B

Decision
The Tribunal observed and held as under:

A) Re: Existence of PE
1. Fixed Place PE

a) The Tribunal considered the Double Tax Avoidance Agreement ('DTAA') between India and USA to examine the provisions in respect of 'Fixed Place PE'. Article 5 of the said DTAA deals withPE, and in particular paragraphs 1 to 3 deal with the fixed place PE.

b) The Tribunal observed that on a conjoint reading of the relevant parts of paras 1, 2 and 3 of Article 5, a PE means a fixed place of business through which the business of an enterprise is wholly or partly carried on and such fixed place is not maintained for activities of a preparatory or auxiliary character.

c) Thus, based on the facts, the ITAT found that expatriates from GEII, permanently using the liaison office premises of GEIOC at AIFACS building. It was also observed that these expats and employees of GEIIPL working under expats were working in AIFACS building, has never been denied by the assessee.

d) The Tribunal also observed the primary, specific and original substantiated material in the form of survey documents, self-appraisals, manager assessment, etc., and held that GE overseas entities were selling its products in India and the core activities in regard to sale, namely, pre-sale, during-sale and post-sale were being carried out in India by GE India

e) Thus, the Tribunal held that all the conditions for constituting a fixed place PE in terms of paras 1, 2 and 3 of the Article 5 are fully satisfied, as AIFCAS building is a fixed place from which business of GE overseas entities is partly carried on in India and the activities carried out from such fixed place are not of preparatory or auxiliary character.

2. Re: Agency PE

a) The Agency PE is subject matter of paras 4 and 5 of Article 5 of the DTAA.

b) The Tribunal observed that para 4 of Article 5 states that where a person, other than an agent of independent status to whom para 5 applies, and fulfils the conditions as set out in the para 4, the said person will constitute a PE of the enterprise

c) The Tribunal further observed that the first part of para 5 refers to an agent of independent status and the second part of para 5 refers to an agent of independent status who is not considered an agent of independent status because of the conditions set out in the said paragraph. Thus, it is axiomatic, that the 'person' referred to in para 4 refers to an agent of dependent status and also an agent of an independent status who is covered in part 2 of para 5. Exception to the first part of para 5 created in part 2 is restricted only to 'an agent of independent status'. On the other hand, if there is an agent of dependent status per se whose activities are devoted to one or multiple related enterprises, he will be directly covered

within the scope of para 4 of Article 5 of the DTAA

d) Thus, the Tribunal observed that the nature of activities done by GE India, which are of core nature, and they clearly indicate GE India's authority to conclude contracts on behalf of GE overseas entities. Thus, the ITAT held that GE India constituted agency PE of all the GE overseas entities in India.

B) Re: Attribution of Profits

1. The Tribunal observed that the AO was correct in its approach in estimating total income at 10% of sales made in India due to non-availability of year-wise, and entity-wise profits of GE overseas entities for the operations carried out in India.

2. Further, the Tribunal held that GE India conducted core activities and the extent of activities by GE Overseas in making sales in India is roughly one-fourth of the total marketing effort. Thus, it was estimated that the 26% of total profit (i.e. 10% of sales) in India, as attributable to the operations carried out by the PE in India, instead of 35% estimated by the AO.

C) Validity of Re-assessment Proceedings

1. The Tribunal on the basis of various facts/ information collected during and after the survey proceedings observed that various GE group entities are carrying out the business in India. The ITAT also observed that the assessee has taken several legal objections against the initiation of reassessment, but did not deny correctness of factual assertions in this regard in the reasons.

2. The Tribunal relying on various judgments held that the initiation of reassessment proceedings requires the AO to form a *prima facie* view about the escapement of income and there is no need to conclusively establish at that stage that such income escaped assessment. Thus, the Tribunal held that that the AO was justified in initiating reassessment proceedings based on the incriminating material found during the survey.

D) Levy of Interest U/S. 234B

The Tribunal, relying on the decision of the Hon'ble Delhi High Court in assessee's own group cases involving identical facts, has approved the cancellation of the levy of interest u/s 234B of the Act.

8) TDS u/s. 195 from Reimbursement of Expenses – No Liability to withhold tax on payment made at cost to member company on the concept of mutuality – in Assessee's favour

DCIT vs .M/s KPMG TS-150-ITAT-2017(Mumbai-Tribunal) Assessment Year : 2001-02

Facts

1. The assessee, a partnership firm set up in India was engaged in the business of providing services to its clients, such as auditing, accounting, taxation, management consultancy, etc.

2. The assessee was an Indian member firm of ABC International (ABCI), which was a non-commercial association established under the law of the Swiss Confederation. The object of ABCI was development, coordination, support promotion and facilitation of the operation of ABC member firms *vis-a-vis* their clients.

3. The assessee entered into a partnership agreement and licence agreement with ABCI. The assessee made certain payments to ABCI for discharging its function within the terms of the Membership Agreement. The assessee had not withheld tax on the payment made under section 195 of Act based on the contention that principle of mutuality applied in case of the assessee and that the amount remitted by the assessee outside India was in the nature of reimbursement of cost to ABCI.

4. The Revenue in the proceedings under section 201 of the Act considered that the

expenses incurred by the assessee on account of the reimbursement of cost was in the nature of "royalty" under section 9(1)(vi) of the Act, and the assessee was liable to withhold tax on the same under section 195 of the Act. Accordingly, the revenue authorities charged interest under section 201(1A) and the assessee was treated as a "assessee in default".

5. The Commissioner of Income-tax (Appeals) [CIT(A)], reversing the order of the Revenue, observed that ABCI was a mutual association and its receipt would not constitute the income chargeable to tax. Therefore, the CIT(A) held that the assessee was not obliged to withhold any tax on such receipt.

6. The Revenue was aggrieved with the order of the CIT(A) and filed an appeal before the Tribunal.

7. Assessee's contentions :

a) ABCI was a mutual association/ organisation and the assessee was a member of organisation. ABCI helped in co-ordinating the activities of the members, doubling-up abilities and raising professional standards which required certain costs. As per the arrangement between the members, the costs of ABCI would be pooled by its member firms. Thus, the members had access to all benefits that arose from such membership and would accordingly reimburse their respective shares of cost incurred. According to the agreement, such reimbursement was granted on the basis of respective turnover of the member firms.

b) ABCI did not charge any mark-up on the cost recovered from member firms and operated on no-profit and no-loss model. If surplus was generated, the same was adjusted in the subsequent year's contribution.

c) The costs of ABCI were estimated at the beginning of the year and recovered from the member firms at the end of the year, the actual costs were taken into consideration and the share of cost of each member was determined.

d) The principle of mutuality applied and the amount remitted by the assessee outside India was in the nature of reimbursement of costs to ABCI. Thus, the assessee was not liable to withhold tax at the time of payment.

8. Revenue's contentions

a) The assessee acquired goodwill associated with the name of "ABC" and various other consequential benefits, additional and incidental incentives through payments made to ABCI. The payment to ABCI was for the use of the brand name, and therefore, covered by the definition of "Royalty."

b) The relation between the assessee and ABCI was that of franchisee and not of a member of mutual association. The main objective of ABCI has a commercial taint and its elementary aim was to create an international chain of professionals who could practice across the globe by using its name and marks, in terms of making payments of percentage from the respective turnover.

Decision

The Tribunal held in favour of the assessee as under:

1. Under section 28(iii) of the Act, income derived by a trade, professional or similar association from specific services performed for its members was chargeable to income tax under the head "profits and gains of business or profession." The concept behind section 28(iii) of the Act is to cut at the mutuality principle being relied upon in support of a claim for exemption, when the assessee actually derives income as

a result of rendering its specific services for its members in a commercial manner.

2. The Tribunal relied on various decisions of the Supreme Court and High Courts and emphasised the following settled principles on the principle of mutuality:

a) "A person cannot trade with himself" is the basic idea in the principle of mutuality. It is on this hypothesis that the income, which falls within the purview of the "doctrine of mutuality," is exempt from taxation.

b) There must be complete identity between the contributors and the participants. This means identity as a class so that at any given moment of time the persons who are contributing are identical with the persons entitled to participate. It does not matter that the class may be diminished by persons going out of the scheme or increased by others coming in. At the same time, it does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what they paid.

c) The actions of the participants and the contributors must be in furtherance of the mandate of the association.

d) There must be no scope of profiteering from the fund for contributors. The contributions made could only be expended or returned to themselves.

e) Simply because some incidental activity generates revenue, it does not give any justification to hold that it is tainted with commerciality and reaches the point where a mutual relationship ends and that of trading begins.

3. Applying the above principles to facts of the assessee, the Tribunal held that the assessee falls within the four corners of the ambit of the "Principle of Mutuality." On the said basis, the Tribunal further held that income would not be taxable in the hands of ABCI, and therefore, the assessee need not be required to withhold taxes on such payments.

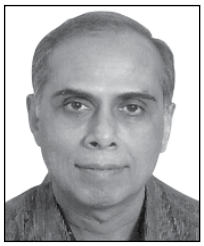
Cases followed

(i) CIT vs. Royal Western India Turf Club Limited [1953] 24 ITR 551 (SC).

(ii) CIT vs. Bankipur Club Limited [1997] 226 ITR 97 (SC)

(iii) Bangalore Club vs. CIT [2013] 350 ITR 509 (SC)

(iv) CIT vs. Standing Conference of Public Enterprises (SCOPE) [2009] 319 ITR 179 (Del.)




CA Rajkamal Shah & CA Naresh Sheth

INDIRECT TAXES
Service Tax – Statute Update

Date of filing of service tax returns

Rule	Return Type	Period	Due Date	Form
7	Original	April – June, 2017	15th August, 2017	ST-3 or ST-3C as the case may be
7B	Revised	April – June, 2017	Within 45 days from the date of submission of original return	

ST – 3 : Normal Return

ST – 3C : Return of OIDAR

(Notification No. 18/2017 – ST, dated 22-6-2017)

RELAXATION IN RETURN FILING PROCEDURE FOR FIRST TWO MONTHS OF GST IMPLEMENTATION

PRESS INFORMATION BUREAU GOVERNMENT OF INDIA, NEW DELHI, 18th JUNE 2017

Month	GSTR – 3B	GSTR – 1	GSTR – 2 (auto populated from GSTR-1)
July, 2017	20th August	1st – 5th September*	6th – 10th September
August, 2017	20th September	16th – 20th September	21st – 25th September

*Facility for uploading of outward supplies for July, 2017 will be available from 15th July, 2017.


CA Kush Vora CA Pankit Shah

INDIRECT TAXES
GST – Legal Update

As GST approached the last mile, the Government has issued a series of notifications in the GST Act especially the Central enactments (such as CGST, IGST, UTGST). All the notifications are available on www.cbec.gov.in or www.gstcouncil.gov.in.

The authors have herein attempted to summarise all the notifications issued in public domain till 30th June 2017. Mainly, the updates under CGST are elaborated and the since the notifications under other GST Acts are identical, a passing reference to the same is made. An analogy from CGST may be drawn with respect to notifications under other Acts.

Furthermore, the notifications under CGST Act are bifurcated into normal and rate notifications and the same are listed as under

CGST Act

01/2017-Central Tax, dt. 19-06-2017 (Notifying the Sections)

Various sections of CGST Act are brought into force w.e.f. 22-6-2017(i.e. Sections 1, 2, 3, 4, 5, 10, 22, 23, 24, 25, 26, 27, 28, 29, 30, 139, 146 and 164).

02/2017-Central Tax, dt. 19-6-2017 (Notifying the Jurisdictions)

The jurisdiction of Central Tax Officers has been notified such as Principal, Chief Commissioners, Additional, Joint, Deputy, Assistant Commissioners pertaining to tax, audit and appeal. Further jurisdiction of all such Commissioners are notified pin code wise all over India.

03/2017 – Central Tax, dt. 19-6-2017 (Notifying Rules)

The CGST Rules on registration and composition levy has been notified along with Forms of registration and composition.

04/2017 – Central Tax, dt. 19-6-2017 (Notifying the Common Portal)

www.gst.gov.is notified as the Common Goods and Services Tax Electronic Portal which shall be managed by GSTN which is a company incorporated under the provisions of section 8 of the Companies Act, 2013.

05/2017 – Central Tax, dt. 19-6-2017 (Exemption from registration)

Vide this notification, exemption from registration is provided to such a person who is engaged in making taxable supplies but the tax on such supply is liable to be discharged wholly under reverse charge (Eg. Lawyers, goods transport agency etc)

06/2017 – Central Tax, dt. 19-6-2017 & 11/2017 – Central Tax,dt. 28-06-2017 (Method of authentication)

For the purpose of filing registration application, filing replies to notices, filing returns or any other documents required to be filed electronically, the mode of authentication has been notified. The said authentication can be done through verification by EVC – Aadhaar based Electronic Verification Code or OTP- Bank account based One Time Password. Such verification shall be done within two days of furnishing the documents.

07/2017 – Central Tax, dt. 27-6-2017 (Amendment to Rules)

Several amendments are made to the Registration and Composition Rules which are effective from 22nd June 2017.

08/2017 – Central Tax, dt. 27-6-2017 (Composition levy)

Seeks to notify the turnover limit for Composition levy for CGST

Turnover limits are specified for Composition levy which are as under:

Normal States- Aggregate Turnover in preceding F.Y.- ₹ 75 lakhs

North Eastern States –Aggregate Turnover in preceding F.Y.- ₹ 50 lakhs

The applicable rate of GST is as under:

Type	CGST Rate
Manufacturer	1 per cent
Catering	2.5 per cent
Other suppliers (traders etc.)	0.5 per cent

Further, it has been stated that manufacturers of ice cream, pan masala, tobacco will not be entitled to Composition Scheme.

09/2017 – Central Tax, dt. 28-6-2017 (Notifying the Sections)

Various sections of CGST Act are brought into force w.e.f. 1-7-2017 such as Sections 6 to 9, 11 to 21, 31 to 41, 42 (except the proviso to sub-section (9) of sections 42), 43 (except the proviso tosub-section (9) of section 43), 44 to 50, 53 to 138, 140 to 145, 147 to 163, 165 to 174.

10/2017 – Central Tax, dt. 28-6-2017 (Notifying Rules)

Further Rules are notified w.e.f. 1st July 2017 such as Valuation Rules, Input Tax Credit Rules, Invoice Rules, Accounts and Record Rules, Return Rules, Payment Rules, Refund Rules, Assessment and Audit Rules, Advance Ruling Rules, Appeals & Revision Rules, Transition Rules, Anti Profiteering Rules, E-Way Rules. Further corresponding Forms under all the rules are also notified.

12/2017 – Central Tax, dt. 28-6-2017 (HSN Codes)

Notification regarding HSN codes is also issued wherein it has been stated to specify HSN code on invoice as under:

T/o in preceding F.Y.	HSN Code
Up to 1 crore and fifty lakhs	No HSN codes required
>than 1.5 crore but less than 5 crore	HSN code up to 2 digits
>5 than Crore	HSN code up to 4 digits

13/2017 – Central Tax, dt. 28-6-2017 (Interest Rates)

Interest rates under CGST Act has been notified which are as under:

18%- Section 50(1)- Late payment of Tax

24%-Section 50(3)- ITC mismatch or undue ITC claimed

6%- Section 54(12)- Delay in granting of refund

9%- Proviso to Section 56- Delay in granting of refund based on order passed by adjudicating authority or appellate authorities or court.

CGST Act (Rate)

01/2017 – Central Tax (Rate), dt. 28-6-2017 (CGST Rates for 'goods')

The CGST rates are notified and are bifurcated into 5 Schedules consisting of rates of 2.5%, 6%, 9%, 14%, 1.5% and 0.125%.

The rates are notified based on HSN codes of the product (mainly 4 digits) and the rules for interpretation of First Schedule to Customs Tariff Act, 1975 including Section and Chapter notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to interpretation of this notification.

Residuary entry i.e. goods not specified in Schedules I, II, IV, V or VI are subjected to 9% rate.

02/2017 – Central Tax (Rate), dt. 28-6-2017 (CGST Exemption for 'goods')

Exemption from levy of CGST is provided to certain goods based on their respective HSN codes (Sr. No.1 to Sr. No. 149)

03/2017 – Central Tax (Rate), dt. 28-6-2017 (Concessional CGST rate for certain goods)

Concessional CGST rate of 2.5% is provided for goods supplied in relation to petroleum operation subject to the conditions mentioned in the notification and subject to goods forming part of List in the notification.

04/2017 – Central Tax (Rate), dt. 28-6-2017 (RCM for goods)

CGST is payable under Reverse charge on certain specified supplies of goods such as Cashew Nuts, bidi wrapper, tobacco leaves, silk yarn, lottery if supplied by specific category of persons.

05/2017 – Central Tax (Rate), dt. 28-6-2017 (Refund of ITC not available)

Refund of unutilized input tax credit (arising on account of inverted duty structure) shall not be allowed in case of specified goods as per the notification (Sr No. 1 to 15)

06/2017 – Central Tax (Rate), dt. 28-6-2017 (Refund to CSDs)

This notification allows refund of 50% of input CGST to Canteen Stores Department (CSD) under Ministry of Defense on its subsequent supplies to authorized customers.

07/2017 – Central Tax (Rate), dt. 28-6-2017 (Exemption to CSDs)

CGST exemption is provided on supply of any goods by:

- CSD to Unit Run Canteens
- CSD toauthorized customers
- Unit Run Canteens toauthorized customers

08/2017 – Central Tax (Rate), dt. 28-6-2017 (Exemption for URD purchase)

CGST exemption from reverse charge is provided for URD purchase upto Rs.5000 per day from any or all of registered suppliers. Accordingly, small businesses whose URD expense (of goods and service both) is upto ₹ 5,000 need not pay CGST on the same. However, if value of URD expense exceeds ₹ 5000, CGST under reverse charge may be payable from Re 1.

09/2017 – Central Tax (Rate), dt. 28-6-2017 (Other exemption)

Exempts intra-state supplies received by a deductor from an unregistered supplier provided deductor is not liable to be registered otherwise than for the said purpose

10/2017 – Central Tax (Rate), dt. 28-6-2017 (Other exemptions)

CGST exemption to dealers dealing in second hand goods when purchased from unregistered persons provided tax is paid on outward supply in the prescribed manner.

11/2017 – Central Tax (Rate), dt. 28-6-2017 (CGST Rates for 'services')

CGST rates for services are notified. *Inter alia,* rate of construction service is notified to be 9% with 1/3rd value available as deemed deduction for land. Accordingly, effective rate becomes 6%. Actual valuation for the purpose of land deduction has not been provided under the said notification.

12/2017 – Central Tax (Rate), dt. 28-6-2017 (CGST Exemption for 'services')

Exemption from CGST is provided on supply of specified services (Sr No. 1 to 81). These exemptions appear to be a continuation of Mega Exemption Notification No. 25/2012 and negative list of erstwhile Service Tax regime.

13/2017 – Central Tax (Rate), dt. 28-6-2017 (RCM for services)

Several categories of services are notified on which CGST will be payable under reverse charge mechanism. For e.g. Payments to Goods Transport Agencies, advocates, Government, director, insurance agent, recovery agent, artist, etc.

14/2017 – Central Tax (Rate), dt. 28-6-2017 (Transactions with Government)

Certain activities or transaction undertaken by the Central Government or State Government or any local authority in which they are engaged as public authority shall be treated neither as supply of goods nor services and accordingly exempted from levy of CGST. "Services by way of any activity in relation

to a function entrusted to a Panchayat under article 243G of the Constitution" have been notified under the subject notification.

15/2017 – Central Tax (Rate), dt. 28-6-2017 (Refund of ITC not available)

It has been provided that refund of unutilized ITC cannot be claimed by persons engaged in construction activity as per clause 5(b) of Schedule II.

16/2017 – Central Tax (Rate), dt. 28-6-2017 (Special provision for diplomats, etc)

Specialized agencies such as United Nations, Foreign Diplomats, Consulars are entitled to claim a refund of taxes paid on the notified supplies of goods or services or both received by them under CGST Act subject to fulfilment of specified conditions.

17/2017 – Central Tax (Rate), dt. 28-6-2017 (E commerce operator)

Several categories of services are notified on which CGST shall be paid by electronic commerce operator (ECO) -

- Services by way of transportation of passengers by radio-taxi, motorcab, maxicab and motorcycle;
- Services by way of providing accommodation in hotels, guest houses, etc except where the person supplying the service through ECO is liable for registration under section 22(1) of CGST Act.

18/2017 – Central Tax (Rate), dt. 30-6-2017 (Rate of fertilizers)

Reduces the rate of CGST on fertilizers from 6% to 2.5%

Compensation Cess

Notification No.1/2017 – Compensation Cess (Rate) dt. 28-6-2017

Certain goods are notified on which compensation cess of different value will be levied such as pan masala, aerated waters, tobacco, cigarettes, certain vehicles, other aircrafts for personal use, yachts and other vessels for pleasure and sports, etc.

Notification No. 2/2017 – Compensation Cess (Rate) dt. 28-6-2017

Compensation Cess at same rate as applicable on supply of similar goods (involving transfer of title in goods) will be applicable in case of below services:

- Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.
- Transfer of right in goods or of undivided share in goods without the transfer of title thereof.

IGST Act

Many notifications are issued under IGST Act as well.

Exemption from reverse charge mechanism on Intra-state purchase of goods or services up to ₹ 5,000/- from unregistered supplier does not apply under IGST Act. Any person making inter-state supply is liable for registration under Section 24(1) of CGST Act..

Further, reverse charge notification under IGST [Notification No. 10/2017 – Integrated Tax (Rate)] has two more entries i.e. import of services and inward ocean freight which are subjected to IGST on reverse charge mechanism.

Further, the Corrigendum dated 30-6-2017 to Notification No. 8/2017- Integrated Tax (Rate) provides that if value of freight service in the case of inward ocean freight is not available, then, the value shall be deemed to be 10% of CIF value. The rate of IGST applicable to ocean transportation is 5%. Thus, the importer is required to pay IGST at the rate of 5% on 10% of CIF value of imports .

UTGST Act

Many rate notifications, exemption notifications, rules/notifications are issued under UTGST Act as well which are in lines with notifications issued under CGST Act.

Maharashtra SGST Act

Many rate notifications, exemption notifications, rules notifications are issued under Maharashtra GST Act as well which are in lines with notifications issued under CGST.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. 1 (Unreported)

NCLT/Hyderabad/C.A. No. 29/621A/HDB/2016

[http://nclt.c2k.in/OtherNCLT/Publication/Hyderabad_Bench/2017/Other/JellaJaganN.pdf

[Before the National Company Law Tribunal, Hyderabad Bench]

Mr. Jella Jagan Mohan Reddy & Others vs. Re.

Balance sheet of a Company is an important / basic financial Statement used by stakeholders for various purposes and the audited Balance Sheet will provide correct / factual amount under various heads. When, disclosures are not in accordance with Section 211(1) of the Act and thus, pledging that it is an inadvertent default and has not caused any prejudice to members, creditors or affect public interest and no harm is cause to the public does not hold good.

Brief case

The application has been filed by directors and the Company Secretary of Jagati Publications Limited ("Company") for compounding of offence under section 211 (1) of the Companies Act, 1956 ("Act") read with section 621A of the Act. The application was filed before the Hon. CLB, Chennai Bench and now is transferred to the National Company Law Tribunal. Hyderabad Bench ("NCLT"). The facts are as follows:

1. The Office of the Regional Director ("RD'), Hyderabad, has carried out the inspection of books of account for the years 2006-07 to 2012-13.

2. As per Section 211(1) of the Act, every balance sheet of a company shall give a true and fair view of the state of affairs of the company as at the end of the financial year and shall be in form as set out in Part I of the Schedule VI or as near there as.

3. The RD has observed that the Balance sheet as at 31-3-2009 disclosed the issued capital as ₹ 84.41,80,000/-, whereas actual paid-up capital was ₹ 100 cr.

4. The above has resulted into disclosing false particulars of issued capital in the Balance Sheet as on 31-3-2009.

5. RD has made an observation that the Company has violated the provisions of Section 211(1) read with Schedule VI of the Act.

6. In its reply, the Company has replied that it is maintaining the books of

account in line with section 211 of the Act reads with Schedule VI.

7. The Company has admitted that inadvertently the issued capital was mentioned as ₹ 84,41,80,000/- instead of ₹ 100 cr.

8. The accounts for the year ended 31-3-2008 was audited by M/s. S. P. Associates, CA and was signed by two Whole time Directors and the Company Secretary.

9. As per the 31-3-2008 accounts, the paid-up capital was ₹ 106,41,87,650/. However, the accounts of 31-3-2009 was audited by M/s. Price Water House and signed by two directors and Company Secretary shows the previous year paid-up capital as ₹ 81.91 crores.

10. There was no reduction of capital during the period 2008 & 2009.

As per Section 211(7) of the Act, any non -compliances of section 209 as to keeping books of accounts etc., for such offence shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both.

The Company has submitted the application for compounding under section 621A read with section 211(1) of the Act. In its application, it has submitted that the default is not intentional and is not of such nature as would prejudice the interest of the members or creditors or others dealing with the Company and same is also not effecting the public interest.

On behalf of the Company, it was submitted that CLB/NCLT has power to compound the offence in question. In its support, the judgments of CLB in (1) Hoffland Finance Limited in re (1997) 13 SCL 12 (CLB-Delhi) and (2) *VLS Finance Limited vs. Union of India (2005) 123 Company Cases 33 (Delhi)* were referred.

Judgment and reasoning

NCLT has dismissed the application. NCLT has viewed that the instant case is not fit case for compounding the alleged offence as prayed for. NCLT has provided the reasons as follows.

1. NCLT has full powers to compound the offences attracting imprisonment or fine or both. The NCLT has referred its judgment in Cambridge Technology Enterprises Limited (CA No. 59/621A/HDB/2016) dated 21-12-2016.

2. Balance sheet of a Company is an important / basic financial Statement used by stakeholders for various purposes.

3. The audited Balance Sheet will provide correct / factual amount under various heads.

4. Thus, Balance Sheet of 31-3-2009 was not in accordance with Section 211(1) of the Act inasmuch as "True & Fair View"

5. This has resulted in disclosing false particulars of issued capital.

6. Reduction of capital occurs in various ways but the current balance sheet does not have any of this events / information.

7. Thus, the applicant's submission is inadvertent, default has not caused any prejudice to members, creditors or affect public interest and no harm is caused to any person does not hold good.



CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update and Analysis

In this article, we have discussed recent amendments to FEMA through Circulars and Notifications issued by RBI and updated FAQs:

1. Issuance of Rupee Denominated Bonds Overseas

RBI has laid down framework for issuance of Rupee denominated bonds overseas (Masala Bonds) to harmonise the various elements of the ECB framework. RBI has decided that any proposal of borrowing by eligible Indian entities by issuance of these bonds will be examined at the Foreign Exchange Department, Central Office, Mumbai. Further, RBI has revised the provisions in respect of maturity period, all-in-cost ceiling and recognised lenders (investors) of Masala Bonds as under:

i. Maturity period: Minimum original maturity period for Masala Bonds rose up to USD 50 million equivalent in INR per financial year should be 3 years and for bonds raised above USD 50 million equivalent in INR per financial year should be 5 years.

ii. All-in-cost ceiling: The all-in-cost ceiling for such bonds will be 300 basis points over the prevailing yield of the Government of India securities of corresponding maturity.

iii. Recognized investors: Entities permitted as investors under the provisions of paragraph 3.3.3 of the Master Direction but should not be related party within the meaning as given in Ind AS 24.

[A.P. (DIR Series) Circular No. 47 dated 7th June, 2017]

(Comments: Maturity period has been increased from 3 years to 5 years for investment beyond USD 50 million equivalents to INR. Now the issuance of these bonds requires RBI approval. All-in-cost ceiling will be 300 basis points over the yield of GOI security of corresponding maturity. Eligible investors shall not be a related party as per Ind AS 24.)

Related party as per Ind AS 24

A person or a close member of that person's family is related to a reporting entity if that person:

(i) Has control or joint control of the reporting entity;

(ii) Has significant influence over the reporting entity; or

(iii) Is a member of the key management personnel of the reporting entity or of a parent of the reporting entity

An entity is related to a reporting entity if any of the following conditions applies:

(i) The entity and the reporting entity are members of the same group (which means that each parent, subsidiary and fellow subsidiary is related to the others).

(ii) One entity is an associate or joint venture of the other entity (or an associate or joint venture of a member of a group of which the other entity is a member).

(iii) Both entities are joint ventures of the same third party.

(iv) One entity is a joint venture of a third entity and the other entity is an associate of the third entity.

(v) The entity is a post-employment benefit plan for the benefit of employees of either the reporting entity or an entity related to the reporting entity. If the reporting entity is itself such a plan, the sponsoring employers are also related to the reporting entity.

(vi) The entity is controlled or jointly controlled by a person identified in (a).

(vii) A person identified in (a)(i) has significant influence over the entity or is a member of the key management personnel of the entity (or of a parent of the entity). 919

(viii) The entity, or any member of a group of which it is a part, provides key management personnel services to the reporting entity or to the parent of the reporting entity.

2. Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2017

RBI through Notification has amended Regulation 6 of Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2017.

In sub-regulation (C), after the words, "viz. EDF and SOFTEX", the words "and Exchange Control copies of the shipping bills" has been deleted.

[Notification No. FEMA.23(R)/(1)/2017-RB dated 23rd June, 2017]

(Comments: This is a welcome move by RBI. This will provide less documentation and ease of doing business.)

3. FAQ on Issuance of Rupee Denominated Bonds

RBI Updated FAQs as on June 9, 2017 now contains new and updated 21 Questions in the FAQs on Issuance of Rupee Denominated Bonds.

Refer https://www.rbi.org.in/scripts/FS_FAQs.aspx?Id=113&fn=5

RBI has amended FAQs 3,6,9 & 10 as mentioned in below table:

FAQ No.	Existing	Modified
3	Who can subscribe or invest in such bonds? ➔ The Rupee denominated bonds can be subscribed / invested by an investor who is a resident of a country satisfying criteria given at 2 above or by Multilateral and Regional Financial Institutions where India is a member country.	Who can subscribe or invest in such bonds? The Rupee Denominated bonds can be subscribed / invested by an investor who is a resident of a country satisfying criteria given at 2 above or by Multilateral and Regional Financial Institutions where India is a member country. However, related party within the meaning as given in Ind AS 24 cannot subscribe or invest in òr purchase such bonds.

FAQ No.	Existing	Modified
6	What would be the minimum maturity of such bonds? ➔ The minimum maturity period for such bonds will be 3 years. In case the subscription to the bonds/ redemption of the bonds is in tranches, minimum average maturity period should be 3 years.	What would be the minimum maturity of such bonds? ➔ The minimum maturity period for Masala Bonds raised up to USD 50 million equivalent in INR per financial year should be 3 years and for bonds raised above USD 50 million equivalent in INR per financial year should be 5 years. In case the subscription to the bonds/ redemption of the bonds is in tranches, minimum average maturity period should be 3/5 years, as mentioned above.
9	Is there any ceiling on the all in cost of such bonds? ➔ The all in cost of such borrowings should be commensurate with prevailing market conditions and should be comparable with the cost at which the borrowing company is able to raise funds domestically.	Is there any ceiling on the all in cost of such bonds? ➔ The all in cost ceiling for such bonds will be 300 basis points over the prevailing yield of the Government of India securities of corresponding maturity.
10	What would be the maximum amount that can be raised through issuance of Rupee denominated bonds under automatic route? ➔ The maximum amount that any eligible borrower can raise through issuance of these bonds under automatic route is INR 50 billion or its equivalent during a financial year. This limit is over and above the amount permitted to be raised under the automatic route by an entity eligible to raise External Commercial Borrowings (ECB).	Where to submit applications for issuance of Rupee Denominated Bonds? ➔ Applications for issuance of Rupee Denominated Bonds, whether under Automatic Route or Approval Route, by eligible Indian entities will be submitted to Foreign Exchange Department, Central Office, Mumbai of the Reserve Bank through AD Bank only.

RBI has newly inserted FAQ 21. The new FAQ is reproduced as follows:-

21. Whether the framework of External Commercial Borrowings (ECB) overlaps the framework for issuance of Rupee Denominated bonds overseas?

Answer: No. The two frameworks run separately. For example, limit of borrowing under the ECB framework would be separate from the borrowing under the framework for issuance of Rupee Denominated bonds overseas.

4. FAQ on External Commercial Borrowings (ECB) framework

RBI updated FAQs on June 9, 2017 now contains new and detailed 62 Questions on External Commercial Borrowings (ECB) framework.

Refer https://www.rbi.org.in/scripts/FS_FAQs.aspx?Id=120&fn=5

RBI has amended FAQs 25 & 59 as mentioned in below table:

Sr. No.	Existing	Modified
25	Whether the minimum average maturity period under the Track I of the ECB framework is solely decided on the basis of amount of ECB? Whether the minimum maturity of 5 years is applicable only to ECBs of ticket size beyond USD 50 million or equivalent? What about ECB raised under the Track II? ➔ No, the applicable minimum average maturity period for an ECB under Track I would be decided not only from the amount of ECB but also from the all in cost of the ECB. For example, for an ECB of up to USD 50 million or equivalent, if the all in cost is exceeding Libor + 300 bps per annum, the applicable minimum maturity period would be 5 years. For ECBs of ticket size beyond USD 50 million or equivalent and for ECBs of any ticket size when the aggregate ECB borrowing during a financial year breaches USD 50 million or equivalent under Track I, the minimum average maturity period shall be 5 years. Any ECB raised under Track II of the ECB framework, irrespective of the amount, should have minimum average maturity of 10 years.	Whether the minimum average maturity period under the Track I of the ECB framework is solely decided on the basis of amount of ECB? Whether the minimum maturity of 5 years is applicable only to ECBs of ticket size beyond USD 50 million or equivalent and above? What about ECB raised under the Track II? ➔ No, the applicable minimum average maturity period for an ECB under Track I would be decided not only from the amount of ECB but also from the all in cost of the ECB. For example, for an ECB of amount less than USD 50 million, if the all in cost is exceeding Libor + 300 bps per annum, the applicable minimum maturity period would be 5 years. For ECBs of ticket size beyond USD 50 million equivalent and for ECBs of any ticket size when the aggregate ECB borrowing during a financial year breaches USD 50 million equivalent under Track I, the minimum average maturity period shall be 5 years. Any ECB raised under Track II of the ECB framework, irrespective of the amount, should have minimum average maturity of 10 years.
59	What are the permitted derivative products for hedging of ECB? ➔ Hedging for ECB purposes means hedging currency risk through products as permitted under Master Direction on Risk Management and Interbank dealings. However, use	What are the permitted derivative products for hedging of ECB? ➔ Hedging for ECB purposes means edging currency risk through products as permitted under Master Direction on Risk Management and Interbank dealings. Use of any cost reduction structure for hedging

Sr. No.	Existing	Modified
	of any cost reduction structure for mandatory hedging of ECB, which does not fully cover the foreign exchange risk associated with ECB any time during the currency of the borrowing, is not permitted.	of ECB, which does not fully cover the foreign exchange risk currency risk associated with ECB any time during the currency of the borrowing, is not permitted.

RBI has newly inserted FAQs 33 & 49. The new FAQs are reproduced as follows:-

33. Does all in cost ceiling apply on a continuous basis or can be calculated even on average basis?

Answer: All in cost should be within the applicable ceiling at all times, for example, giving interest breaching the ceiling in first year and much lower in second year so as to comply on an average, is not permitted.

49. Is 100 per cent mandatory hedging applicable to infrastructure space entities for ECBs being refinanced, which were raised under the earlier ECB framework?

Answer: No. Such ECBs will be exempt from the mandatory hedging clause, however, they are encouraged to undertake hedging for the open currency risk exposure.

Rahul Sarda, *Advocate*

BEST OF THE REST

1. Companies Act – Winding up – Inability to pay debts – Discretionary powers of Court – Factors to be considered before ordering winding up.

The Petitioner, a banking company, sanctioned various facilities/financial assistance in favour of the Respondent not exceeding an aggregate amount of ₹ 200 crores in favour of the Respondent Company. The Petitioner addressed numerous letters to the Respondent reminding the Respondent that an amount of ₹ 20 crores under the short term loan facility was to be repaid by the Respondent. The Respondent replied for the first time to the notices issued by the Petitioner and attempted to foist its inability to pay on business compulsions and market volatility and according to the Petitioner did not deny its liability to pay to the Petitioner.

Thereafter, the Petitioner issued a statutory notice to the Respondent under section 433 of the Companies Act, 1956. The Respondent replied to the said statutory notice and reiterated what was stated by it in their earlier reply. It was alleged in the said reply that the Respondent had not defaulted but there was some delay in making payments for the reasons beyond its control. It was also alleged that an additional interest charged by the Petitioner was not payable by the Respondent which required reconciliation. It was mentioned that once the figures were reconciled, the Respondent will immediately provide the Petitioner with revised repayment schedule. The Respondent also requested the Petitioner to resolve the issue amicably. The Petitioner filed a company petition *inter alia* praying for winding up of the Respondent company and also filed a separate company application *inter alia* praying for the appointment of the Official Liquidator.

Before the High Court, the Petitioner submitted that since the Respondent is heavily indebted and has suffered tremendous financial loss and is in process of hiving off its business to a third party, the Respondent company is deemed to be unable to pay its debts and thus this company petition deserves to be admitted and the Official Liquidator should be appointed as the Provisional Liquidator. It was also submitted that reconstructing the Respondent company proposed in the Joint Lenders Forum meeting and the steps of rectification had totally failed and no SDR scheme had been finalised till date.

On behalf of the Respondent, it was submitted that the corrective action plan accepted by 75% of the lenders in value and 50% in number, such decision was binding on all the lenders including the Petitioner. It was submitted that if any lender including the Petitioner did not wish to be a part of such a scheme, it was bound to sell its exposure to another lender and it was not open to the dissenting lender to continue with its existing exposure and simultaneously not agree for rectification or restructuring as part of the corrective action plan. Also, 21 bankers had already passed a resolution unanimously to oppose the winding up petition and had authorised IDBI bank as a leader of consortium

to file an intervention application before this Court on behalf of the consortium lenders for their working capital limits and term loan limits.

On behalf of the intervenor banks, it was submitted that total debts of the Respondent towards those 21 members of the consortium was about ₹ 8593 crore and the principal amount of the Petitioner was however only to the extent of ₹ 70 crore and the alleged liability of the Petitioner recoverable from the Respondent company was hardly 2% of the total debts of the other lenders and is at 1% of the debts of the total creditors.

Held, winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. There is serious consequence of admission of the company petition and thus the Court has to apply its mind and consider the wishes of major creditors, workers and contributories if they intervene in the proceedings before passing an order of admission against the Respondent company. If the Petitioner is allowed to proceed with the recovery process by adopting this winding up petition at the stage when the process of rectification and restructuring is being decided by the said JLF, the entire process of corrective action plan i.e., by rectification and restructuring would be adversely affected. It is not in dispute that about 98% of the total numbers of creditors have resolved to oppose this winding up petition. The Petitioner having about 2% debts of the total debts of the other lenders and at 1% of the debts of the total creditors thus cannot be allowed to proceed with winding up petition against the Respondent.

It was the case of the Respondent on affidavit that the Respondent has 21 manufacturing units and alone processes 15% of the processing capacity of India's edible oil requirements and provides nutritious and value oriented foods to over 15 crore Indian consumers through a network built up over last 30 years. The Respondent is responsible for the lives of around 7-8 million farmers. The Respondent has exclusive access to 55,000 hectares of land planted with palm plantations under the Oil Palm Plantation Programme sponsored by Government of India in several States. The Respondent is a public listed company having more than 25,000 shareholders. Therefore, the power to order winding up of a company being discretionary was fit not to be exercised in the present case.

IDFC Bank vs. Ruchi Soya Industries Ltd. [2017] 201 CompCas 114 (Bom.)

2. Constitution of India – Article 142 – Order to do complete justice in the matter – Whether consequences of fraud could be overlooked, in order to render complete justice – Medical admissions.

Orders were passed by the State Professional Examination Board (Vyapam), cancelling the results of the Appellants, of their professional MBBS course, on the ground that the Appellants had gained admission to the course, by resorting to unfair means, during the Pre-Medical Test. These orders were passed, with reference to candidates, who had been admitted to that course, during the years 2008 to 2012. A challenge to the orders of cancellation, was raised by the Appellants. All writ petitions raising the challenge were dismissed. The Appellants approached the present Court. The orders of the High Court were affirmed by a Division Bench (former Division Bench). However, in exercise of jurisdiction vested in the present Court, Under Article 142 of the Constitution, the Presiding Judge of the 'former Division Bench' expressed the view, that complete justice in the matter would be rendered, if the qualifications successfully acquired by the Appellants were not annulled, and the knowledge gained by them, was not wasted. This, for the simple reason, that knowledge could not be transferred to those, who had been wrongfully deprived of admission, and cancellation of the results of the Appellants, would not serve any purpose.

The Companion Judge in the 'former Division Bench' expressed his disinclination for invoking jurisdiction Under Article 142, to sustain the benefit of education acquired by the Appellants, through a separate order of the same date. This, for the simple reason, that those who had adopted unfair means, could not be extended any indulgence. On account of the divergence of opinion expressed by the former Division Bench, through their separate orders, the Chief Justice of India, constituted the present larger Division Bench, to deal with the matter.

Held, keeping in mind the conscious involvement of the Appellants in gaining admission to the MBBS course, by means of a fraudulent stratagem of trickery, it was not possible to ignore or overlook, the declaration of law with reference to fraud. Nothing obtained by fraud, can be sustained. This declared proposition of law, must apply to the case of the Appellants, as well. This was the outcome of the "trust" reposed in the present Court, as being fully equipped, to determine at its own, when Article 142 of the Constitution can be invoked to render complete justice, and when it cannot be so invoked. The conferring rights or benefits on the Appellants, who had consciously participated in a well thought of, and meticulously orchestrated plan, to circumvent well laid down norms, for gaining admission to the MBBS course, would amount to espousing the cause of 'the unfair'. It would seem like, allowing a thief to retain the stolen property. It would seem as if, the Court was not supportive of the cause of those who had adopted and followed rightful means. Such a course, would cause people to question the credibility, of the justice delivery system itself. The exercise of jurisdiction in the manner suggested on behalf of the Appellants, would surely depict, the Court's support in favour of the sacrilegious. It would also compromise the integrity of the academic community. In the name of doing complete justice, it was not possible for the present Court to support the vitiated actions of the Appellants, through which they gained admission to the MBBS course. It would not be proper to legitimise the admission of the Appellants, to the MBBS course, in exercise of the jurisdiction vested in the present Court Under Article 142 of the Constitution. The prayer made on behalf of the Appellants was declined.

Nidhi Kaim and Ors. vs. State of Madhya Pradesh and Ors. (2017) 4 SCC 1

3. Arbitration Act – Appointment of arbitrators – Independence and impartiality

The Petitioner, a foreign Company, had its branch office in India and was engaged in the business of steel production with the use of advance technology. The Respondent (DMRC) awarded the contract to the Petitioner for supply of rails. Certain disputes arose between the parties with regard to the said contract inasmuch as the Petitioner felt that Respondent wrongfully withheld a sum towards invoices raised for supply of last lot of 3000 MT of rails and also illegally encashed performance bank guarantees. Respondent also imposed liquidated damages and invoked price variation Clause to claim a deposit of a certain amount. Not satisfied with the performance of the Petitioner, the Respondent suspended the business dealings with the Petitioner for the period of six months. The Petitioner felt aggrieved by all these actions and wanted its claims to be adjudicated upon by an Arbitral Tribunal, having regard to the arbitration agreement between the parties. The Arbitration Agreement prescribes a particular procedure for constitution of the Arbitral Tribunal which stipulated that the Respondent shall forward names of five persons from the panel maintained by the Respondent and the Petitioner would have to choose his nominee arbitrator from the said panel. The Respondent had furnished the names of five such persons to the Petitioner with a request to nominate its arbitrator from the said panel. However, it was not acceptable to the Petitioner as the Petitioner felt that the panel prepared by the Respondent consisted of

serving or retired engineers either of Respondent or of Government Department or Public Sector Undertakings who did not qualify as independent arbitrators. According to the Petitioner, with the amendment of Section 12 of the Arbitration and Conciliation Act, 1996 such a panel, by Amendment Act, 2015, as prepared by the Respondent, had lost its validity, as it is contrary to the amended provisions of Section 12 of the Act. The Petitioner preferred the present petition under Section 11(6) read with Section 11(8) of the Act for appointment of sole arbitrator/arbitral tribunal.

Held, the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the Court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. It cannot be said that simply because the person is retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide 'to determine whether circumstances exist which give rise to such justifiable doubts'. The only relief given to the Petitioner was that choice should be given to the parties to nominate any person from the entire panel of arbitrators. It was imperative to have a much broad based panel, so that there was no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the arbitral tribunal. A direction was issued that DMRC shall prepare a broad based panel on the aforesaid lines.

Voestalpine Schienen GmbH vs. Delhi Metro Rail Corporation Ltd. (2017) 4 SCC 665

CA Ninad Karpe

The Lighter Side

LIFE AFTER GST?

30th June it is! On 30th June, at the stroke of the midnight hour, while the world sleeps, India will transition to a revolution in her fiscal history – she will wake up to GST and a new wave in India's reformed taxation system will roll out!

So, how do tax professionals cope with all these dramatic changes? What will they do at midnight on 30th June? Will they spend a sleepless night? Will they ensure that their clients accept compliance of the new system? What about all the labyrinthine processes that will have to be followed? And more importantly, will they start paying lower prices for the goods they consume from 1st July?

My wife asked me a simple question – What is GST? I struggled to respond to it as I could not find a simple answer. All my explanations regarding credit for input tax and the other processes surrounding GST sounded really tepid. But I told her, you can go ahead and ask a tax consultant and you will get a ten-pager response!

For the past many months, all tax consultants have been thinking only about GST. I have refused to entertain any tax consultants at my home, as they have nothing to discuss other than GST. And it is hard to digest a delicious meal with GST rolling on my tongue along with the food! But for tax consultants – their dreams must revolve around GST as well!

So, what happens when GST stabilises after some time? Will these same tax consultants display withdrawal symptoms? Unlikely! Tax consultants are tenacious and hard working and will plod along even after GST is fully implemented.

Irrespective of what happens, 2017 will be remembered as a historic year. Just like great epochs have a special significance and marked by well-known acronyms, we have BC, which stands for "Before Christ" and AD, which stands for "Anno Domini". In the same vein, we will add the start of another dramatic moment in 2017 – GST – Gone are Several Taxes!


CA Ketan Vajani & CA Nishtha Pandya
Hon. Jt. Secretaries

The Chamber News

BRIEF REPORT ON 90th ANNUAL GENERAL MEETING

At the 90th Annual General Meeting held on Tuesday, 4th July, 2017 the following business was transacted:

i) The Annual Report for the year 2016-17 was approved & adopted.

ii) The Accounts for the year ended 31st March, 2017 were adopted.

iii) Mr. J. L. Thakkar, Chartered Accountant, was appointed as Auditor for the year 2017-18 and will hold office up to the next AGM.

iv) Results of the elections for the year 2017-18 were declared as follows :

- Mr. Ajay R. Singh, Advocate was elected as President
- The following fourteen members were elected to the Managing Council

1.	Mr. Ashok D. Mehta	8.	Mr. Ketan Vajani
2.	Mr. Ashok Sharma	9.	Mr. Naresh K. Sheth
3.	Ms. Charu Ved	10.	Ms. Nishtha Pandya
4.	Mr. Dinesh Tejwani	11.	Mr. Parag Ved
5.	Mr. Ganesh Rajgopalan	12.	Mr. Rahul Hakani
6.	Mr. Heneel Patel	13.	Mr. Rajesh P. Shah
7.	Mr. Hinesh Doshi	14.	Mr. Sachin R. Gandhi

THE DASTUR ESSAY COMPETITION

The winners of the Dastur Essay Competition were announced and the winners present at the AGM were felicitated by offering momento and certificates by Past Presidents. The first three winners at the competition are as under:

THE DASTUR ESSAY COMPETITION 2017, MERIT LIST

Rank	Name	Office/College	Topic
1	Mr. RAHUL SINGH	Chanakya National Law University, Patna, Bihar	Freedom of Expression and Action – can it ever be curtailed?
2	Ms. PRERNA SINGH	Delhi University, Delhi	Demonetisation – Challenges in Cashless Economy
3	Ms. R. HARISHNI	Sastra University – School of Law, Thanjavur	Freedom of Expression and Action – can it ever be curtailed?

RELEASE OF PUBLICATIONS

1. Mr. Anup Shah released the publication on "Director's Responsibility"
2. Mr. Sujal Shah, Past President released the publication on "Handbook on Valuation"
3. Mr. Keshav Bhujle, Past President, released the publication on "FAQ on LLP"
4. Mr. Mahendra Sanghvi, Past President, released the publication on "An Analysis of Income Computation & Disclosure Standards"
5. Mr. Rutvik Sanghvi and Manoj Shah released the publication on "Tax Withholding from Payments to Non-Resident"
6. Mr. Kishor Vanjara and Mr. Vipin Batavia , Past Presidents, released the publication on "EPC Contracts – Compendium on Taxation and Regulatory Issues"
7. Mr. Y. P. Trivedi released the publication of 90th Year Celebration "CTC History" and "Supreme Court Landmark Judgments (Direct Taxes, Indirect Taxes and Allied Laws.)"

THE NEW TEAM FOR 2017-18

i) In the First Managing Council Meeting held on Tuesday, 4th July, 2017, the following members were elected as Office Bearers

	Name	Designation
1.	Mr. Hinesh R. Doshi	Vice-President
2.	Mr. Ketan Vajani	Hon. Jt. Secretary
3.	Ms. Nishtha Pandya	Hon. Jt. Secretary
4.	Mr. Parag S. Ved	Hon. Treasurer

ii) The following Nine members were Co-opted to the Managing Council for the year 2017-18:

1. Mr. Kishor Vanjara
2. Mr. Vipul Joshi
3. Mr. Mahendra Sanghvi
4. Mr. Vipul Choksi
5. Mr. Paresh P. Shah
6. Mr. Sanjeev D. Lalan
7. Mr. Manoj C. Shah
8. Mr. Anish Thacker
9. Mr. Jayant Gokhle

iii) EDITOR & EDITORIAL BOARD OF THE CHAMBER'S JOURNAL

Mr. V. H. Patil was appointed as Chairman of Editorial Board and Mr. K. Gopal was appointed as Editor of "The Chamber's Journal". Mr. Vikram Mehta, Mr. Paras K. Savla, Mr. Paras S. Savla, Mr. Yatin Vyavaharkar, Mr. Manoj Shah and Mr. Devendra Jain were appointed as Assistant Editors.

Following members were appointed to Editorial Board

1. Mr. Keshav Bhujle
2. Mr. Pradip Kapasi
3. Mr. Kishor Vanjara
4. Mr. Akbarali S. Merchant
5. Mr. Vipul Joshi

iv) COMMITTEES

The following Committees were formed and their Chairmen, Chairpersons and Co-Chairmen appointed:

	Committees	*Chairman/Chairperson/ Co-Chairman*
1.	Accounts & Auditing Committee	Mr. Heneel Patel
2.	Allied Laws Committee	Mr. Rahul Hakani
3.	Corporate Members Committee	Mr. Anish Thacker
4.	Direct Taxes Committee	Mr. Ashok D. Mehta
5.	Indirect Taxes Committee	Mr. Naresh Sheth
6.	International Taxation Committee	Mr. Rajesh P. Shah
7.	I. T. Connect Committee	Mr. Dinesh Tejwani
8.	Journal Committee	Mr. Vipul Choksi
9.	Law & Representation Committee	Mr. Mahendra Sanghvi
10.	Membership & Public Relations Committee	Mr. Paresh P. Shah - ***Chairman***
		Mr. Sachin R. Gandhi ***Co-Chairman***
11.	Research & Publication Committee	Mr. Ganesh Rajgopalan
12.	Residential Refresher Course & Skill Development Committee	Ms. Charu Ved
13.	Student Committee	Mr. Sanjeev Lalan
14.	Study Circle & Study Group Committee	Mr. Ashok Sharma

* It was decided to continue Office Premises and Finance Committee formed in the year 2016-17.

DELHI CHAPTER

The following members were appointed as Chairman and Office Bearers of Delhi Chapter

1.	Mr. Suhit Agarwal	Chairman
2.	Mr. Vijay Gupta	Co-Chairman
3.	Mr. Deependar Kumar Agarwal	Jt. Hon. Secretary
4.	Mr. Harish Kumar	Jt. Hon. Secretary
5.	Mr. Prakash Sinha	Hon. Treasurer
6	Mr. R. P. Garg	Immediate Past Chairman
7.	Mr. V. P. Verma	Advisor
8	Mr. C. S. Mathur	Advisor

Past Programmes

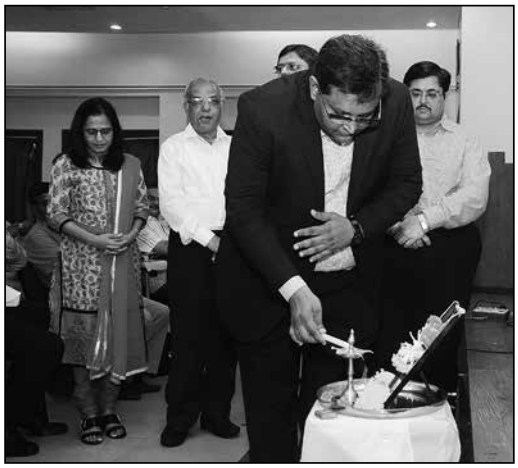
- Direct Tax Update Series Lecture on "Income Tax Amendments & Return Filing for AY 2017-18 – Provisions and Issues was held on 7th July, 2017 at IMC. The meeting was addressed by CA. Mahendra Sanghvi. The meeting was well appreciated by the members present.
- **11th Residential Refresher Conference on International Taxation, 2017** was held from 22nd to 25th June, 2017 at The Taj Gateway, Nashik. The Conference was inaugurated by Mr. Ahswin Kondai – Director and Co-Founder, Winjit. The conference was attended by 157 delegates which includes 1 delegate on non-residential basis. The Conference was addressed by eminent faculties in the field of International Taxation. The delegates also visited the Shirdi Temple.

  At the RRC, the first Journal on International Taxation was released by Mr. K. Gopal, Advocate and Past President, Mr. H. Padamchand Khincha and Dr.Amar Mehta. The journal will be published on quarterly basis.

Glimpses of 2016-17

Direct Taxes Committee

Half Day Workshop on General Anti Avoidance Rules (GAAR) held on 1st July, 2017 at M. C. Ghia Hall, Mumbai.



CA Hitesh R. Shah (President) inaugurating the workshop by lighting the lamp. Seen from L to R – CA Geeta Jani (Speaker), CA Ashok Sharma, CA Yogesh Thar (Speaker) and CA Ketan Vajani (Chairman)

CA Hitesh R. Shah (President) giving opening remarks. Seen from L to R: CA Ketan Vajani (Chairman), CA Yogesh Thar (Speaker) and CA Ashok Mehta (Convenor)

CA Ketan Vajani (Chairman) welcoming the Speaker. Seen from L to R: CA Yogesh Thar (Speaker), CA Hitesh R. Shah (President), and CA Ashok Mehta (Convenor)

CA Yogesh Thar (Speaker) addressing the participants

CA Geeta Jani (Speaker) addressing the participants

Delegates

Webinar on Penalty under Section 270A & Immunity u/s. 270AA of Income-tax Act, 1961 held on 8th June, 2017

Mr. Rahul Hakani – Advocate (Speaker) addressing the members

Webinar on Revision Proceedings u/ss. 263 and 264 of Income-tax Act, 1961 held on 27th June, 2017

CA Devendra Jain (Speaker) addressing the members

Direct Taxes Committee

Full Day Workshop on Income Computation & Disclosure Standards (ICDS) held on 17th June, 2017 at Mysore Association Auditorium, Mumbai

CA Hitesh R. Shah (President) inaugurating the workshop by lighting the lamp. Seen from L to R: CA Ketan Vajani (Chairman), CA Ashok Mehta (Convenor) and CA Yogesh Thar (Speaker)

CA Hitesh R. Shah (President) giving opening remarks

CA Ketan Vajani (Chairman) welcoming the Speaker

Speakers

CA Yogesh Thar

CA Jagdish Punjabi

CA Gautam Nayak

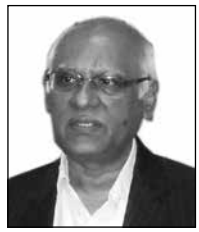
CA Nihar Jambusaria

Intensive Study Group on Recent Important Decisions under Direct Taxes held on 12th June, 2017 at CTC Conference Room

CA Sanjay Chokshi (Speaker) addressing the members

Allied Laws Committee

Intensive Study Group on Ind-AS held on 13th June, 2017 at SNDT Committee Room, Mumbai



CA Jayesh Gandhi (Speaker) addressing the members

Study Circle & Study Group Committee

Study Circle on Issues u/s. 68 arising on account of issues of Share at Premium, Penny Stock & Client modification in Share Transactions held on 20th June, 2017 at SNDT Committee Room

CA Reepal Tralshawala (Speaker) addressing the members

Study Circle on Recent Judgment under Direct Taxes held on 9th June, 2017 at SNDT Committee Room

Mr. Ajay R. Singh (Speaker) addressing the participants

International Taxation Committee

11th Residential Conference on International Taxation, 2017
held from 22nd June to 25th June, 2017 at The Hotel Taj, Nashik.

Mr. Ahswin Kondai – Director and Co-Founder, Winjit (Chief Guest) inaugurating the Conference by lighting the lamp. Seen from L to R: Mr. Abhijit J – Director & Founder, Winjit, CA Namrata Dedhia (Convenor), CA Rajesh P. Shah (Co-Chairman), Dr. Amar Mehta (Speaker), CA Paresh P. Shah (Chairman) and CA Hitesh R. Shah (President)

CA Hitesh R. Shah (President) giving opening remarks. L to R: CA Namrata Dedhia (Convenor), CA Paresh P. Shah (Chairman), Mr. Ahswin Kondai (Chief Guest) and CA Rajesh P. Shah (Co-Chairman)

CA Paresh P. Shah (Chairman) welcoming the Chief Guest and Speakers. L to R: CA Namrata Dedhia (Convenor), CA Hitesh R. Shah (President), Mr. Ahswin Kondai (Chief Guest) and CA Rajesh P. Shah (Co-Chairman)

Mr. Ahswin Kondai – Director and Co-Founder, Winjit (Chief Guest) giving keynote address. Seen from L to R: CA Namrata Dedhia (Convenor), CA Paresh P. Shah (Chairman), CA Hitesh R. Shah (President) and CA Rajesh P. Shah (Co-Chairman)

CA H. Padamchand Khincha (Speaker) addressing the participants

Speakers

CA T. P. Ostwal

CA Himanshu Parekh

Dr. Amar Mehta

CA Yogesh Thar

Mr. Siddharth Shah

International Taxation Committee

11th Residential Conference on International Taxation, 2017 held from 22nd June to 25th June, 2017 at The Hotel Taj, Nasik.

Release of International Tax Journal. Seen from L to R: CA Paresh P. Shah (Chairman), CA H. Padamchand Khincha (Speaker), CA Hitesh R. Shah (President), Mr. K. Gopal, Advocate (Past President), and Dr. Amar Mehta (Speaker)

Panel Discussion. Seen from L to R: CA Manoj Shah (Past President), Mr. Nitesh Joshi, Advocate (Panelist), CA Pranav Sayta (Chairman of the Panel), CA Karishma Phatarphekar (Panellist), CA Priya Murali (Panellist) and CA Parag S. Ved (Hon. Treasurer)

Group Photo

The Dastur Essay Competition, 2017

The winners of the 6th The Dastur Essay Competition, 2017 were felicitated by presenting a Memento and Certificate.

10th Winner – Ms Sudeshna Deshmukh, Sastakar Vaidya & Co., Chartered Accountants, Mumbai felicitated by Mr. Ajay R. Singh, Advocate

7th Winner – Mr. Smit Dedhia, GBCA & Associates, Chartered Accountants, Mumbai felicitated by Mr. A. S Merchant (Past President) Seen in the photo: CA Parimal Parekh – Chairman, Student and IT Connect Committee

90th Year Celebration Committee

Metro to Retro – A Musical Evening held on 26th June, 2017
at Shree Vile Parle Gujarati Mandal (Navinbhai Thakkar Auditorium) Mumbai

Mr. Kishor Vanjara (Chairman - 90 YCC) welcoming the members. Seen in the picture from L to R: CA Vijay Bhatt and CA Hitesh R. Shah (President)

Ms. Varsha Galvankar (Convenor - 90 YCC) proposing Vote of Thanks. Seen from L to R: Mr. Sujal Shah (Co-Chairman - 90 YCC), Mr. Vijay Bhatt, Mr. Kishor Vanjara (Chairman - 90 YCC) and Mr. Hitesh R. Shah (President)

Group Photo: Seen from L to R: Mr. Bhavik R. Shah, Ms. Varsha Galvankar (Convenor - 90 YCC), Mr. Mehul Sheth, Mr. Yatin Desai (Co-ordinator - 90 YCC), Mr. Bhavesh Joshi, Mr, Kishor Vanjara, Mr. Vijay Bhatt, Mr. Hitesh R. Shah (President), Mr. Sujal Shah (Co-Chairman - 90 YCC), Mr. Parimal Parikh.

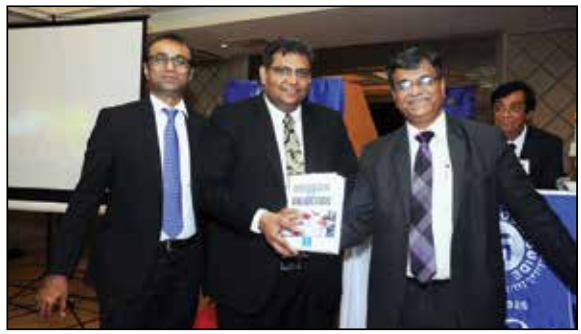
Singer's at the event

Section of Members

AGM held on 4th July, 2017 at Garware Club, Mumbai

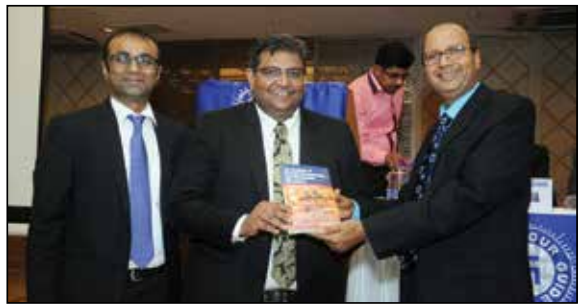
Book Release

Mr. Anup Shah released the publication on "Director's Responsibility"

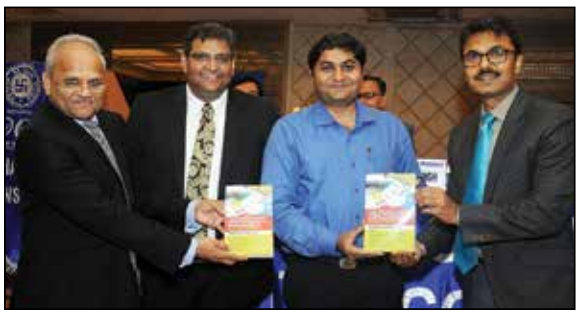


Mr. Sujal Shah, Past President released the publication on "Handbook on Valuation"

Mr. Keshav Bhujle, Past President, released the publication on "FAQ on LLP"



Mr. Mahendra Sanghvi, Past President, released the publication on "An Analysis of Income Computation & Disclosure Standards "



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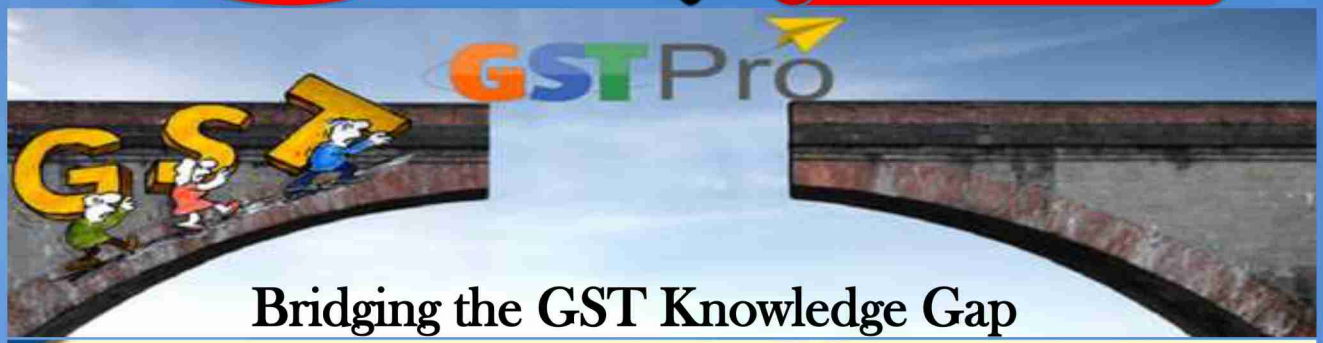

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- Registration
- Input Tax Credit
- GST Administration
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- Time of Supply
- Transitional Provisions
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- Concept of Supply

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