Prakash Sachin & Co | Newsletter | Volume III

September 2021

Prakash Sachin & Co

We, Prakash Sachin & Co. is a reputed firm of Chartered Accountants with a perfect blend of experienced & young mind, active and talented team with a robust network of Associates. The Firm was founded on September 2004 by Mr. Prakash Sinha FCA, and Mr. Sachin Sinha, FCA. Today, the firm has a pan India presence and its head office is located at 13D, Atma Ram Building, 1 Tolstoy Marg , Connaught Place New Delhi, India 110001. As on today, the firm has a team size consisting of five partners and more than 35 professionals working with it and the numbers are increasing day by day. The firm has its offices in Mumbai, Kolkata, & Jharkhand. The firm has also marked its presence overseas through its associates in different countries across USA Europe, Asia and Latin America.

We are a full service professional Chartered Accountants Firm offering services in:

1. Risk & Assurance,
2. Fiscal and Tax Advisory, compliance and litigation Support,
3. Corporate Laws, fiscal statute and regulatory support through advisory, Compliance & litigation,
4. Business development Support through guidance on various regulatory matters.
5. Business Processes Support by way of process audit, SOP and system compliance.

The motto of the firm is to provide the complete and integrated deliverables. The firm believes in performance and visible output in terms of delivery. The mantra of the firm is “Delivering Solutions - Professionally”

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COMPLIANCE CALENDAR

Income Tax/PF/ESI

S. No.	Particulars	Due Date
1	Due date for deposit of Tax deducted/collected for the month of Aug, 2021	07.09.2021
2	Due date for deposit of Equalization Levy for the month of Aug, 2021	07.09.2021
3	Due date for issue of TDS Certificate for tax deducted u/s 194-IA, 194-IB, 194-M for the month of July, 2021	14.09.2021
4	Due date for deposit of PF, ESIC for the month of Aug, 2021	15.09.2021
5	Due date for furnishing of Form 24G by an office of the Government where TDS/TCS for the month of Aug, 2021 has been paid without the production of a challan	15.09.2021
6	Due date for furnishing statement in Form no. 3BB by a stock exchange in respect of transactions in which client codes been modified after registering in the system for the month of Aug, 2021	15.09.2021
7	Second installment of advance tax for AY 2022-23	15.09.2021
8	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA, 194-IB, 194M for the month of Aug, 2021	30.09.2021
9	Payment of tax under the Direct Tax Vivad se Vishwas Act, 2020 without additional charge	30.09.2021

Goods & Services Tax

S. No.	Particulars	Due Date
1	GSTR 7: A return to be filed by the persons who is required to deduct TDS (Tax deducted at source) under GST for August, 2021	10.09.2021
2	GSTR-8: A return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST for August, 2021	10.09.2021
3	GSTR-1: Taxpayers having an aggregate turnover of more than Rs. 1.50 Crores or opted to file Monthly Return for August, 2021	11.09.2021
4	GSTR 1 IFF (QRMP): GST return for the taxpayers who opted for QRMP scheme (Optional) for August 2021	13.09.2021
5	GSTR 6 by Input Service Distributors (ISDs) for August, 2021	13.09.2021
6	GSTR-3B: Taxpayers having an aggregate turnover of more than Rs. 5 Crores or opted to file Monthly Return for August, 2021 with NIL interest and No Late Fee	20.09.2021
7	GSTR 5 & 5A: Return by Non-Resident Taxpayers and ODIAR services provider for August, 2021	20.09.2021
8	GST Challan Payment if no sufficient ITC for August, 2021 (for all Quarterly Filers)	25.09.2021

Companies Act

S. No.	Particulars	Due Date
1	E-Form DIR-3 KYC/ Web DIR-3 KYC: Director KYC submission for DIN holders as on 31 March 2021 and the status of the DIN is '**Approved**'	30.09.2021
2	Notice & Agenda of **Annual General Meeting (AGM)** and Annual	Atleast 21 Clear

	Report for the financial year ended on 31.03.2021.	Days before the AGM
3	Due Date of AGM: AGM for the financial year ended on 31.03.2021. (AGM shall be held within 06 month from closure of F.Y. subject to the 15 Months from Previous AGM)	30.09.2021 (Subject to 15 Months from Previous AGM)
4	E-Form FC-3: Every **Foreign Company** shall file to RoC, the financial statement and a list of all the business places established in India as on the date of balance sheet.	30.09.2021 (Within a period of Six months from the Close of FY)

INCOME TAX ACT

Relevant Judgments and updates of the week;

As per plain literal interpretation of section 24(b), there is no bar on an assessee to claim deduction of interest payable on a loan taken for purchasing a residential property, though, possession of same might not have been vested with him: ITAT (Abeezar Faizullabhoy v. CIT(A) dated 01.09.2021, AY 2015-16)

FACTS:

1. The assessee who is a lawyer by profession had e-filed his return of income for AY 2015-16 on 31.03.2017, declaring a total income of Rs. 1,19,68,190/-. The return of income was initially processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

2. During the course of the assessment proceedings, it was observed by the AO that the assessee had u/h "Income from House property" claimed deduction of interest paid on borrowed capital of Rs. 2 lac u/s 24(b) of the Act. On being queried, it was submitted by the assessee that the aforesaid claim for deduction of interest pertained to the funds which were borrowed by him for purchasing a residential property viz. Flat No. A-2101, Palm Beach Residency "A" Wing, 21st Floor, Sector 4, Palm Beach Road, Nerul, Navi Mumbai. However, the AO taking note of the fact that the assessee had not taken possession of the aforementioned property in question, thus, disallowed his aforesaid claim for deduction of interest u/s 24(b) of the Act. Accordingly, the AO vide his order passed u/s 143(3) of the Act, dated 27.12.2017 assessed the income of the assessee at Rs.1,21,68,190/-.

3. Aggrieved, the assessee assailed the assessment order before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the disallowance of the assessee's claim for deduction u/s 24(b) of the Act, observing as under:

"5.4 Appros to the above, I find that there is absolutely no force in the contention of the appellant at all. This is because, it is an admitted position that the particular property in respect of which the appellant is trying to claim the deduction u/s. 24(b) is neither in the possession of the appellant nor does he have any sort of physical domain over the same.

In reality, the fact situation of the appellant is that here is a dispute going on between the appellant and the society/builder due to which there is protracted litigation and that the appellant is not in a position to take control/domain of the impugned property.

5.4 It is very clear that section 24(b) pre-supposes that there should be an income chargeable under the head House Property against which the deduction of municipal tax etc., can be claimed. Here, this is not so at all because of the dispute as referred to the above and hence, it is an axiomatic corollary that the appellant is not likely to get any kind of control/domain over the property in the near future and hence, is not likely to have any income from the same. If the logic of the appellant is to be given credence to, then it would mean that for several years, the appellant would not be in receipt of any income from the properly and yet, the deduction u/s. 24(b) would continue to be claimed by it. This, obviously, cannot be the intent of the legislature in providing for the typology of the deduction u/s 24(b).

5.5 In view of the above discussion, I cannot find any fault with the order of the AO in disallowing the deduction u/s. 24(b) to the tune of Rs. 2,00,000/-. The same is therefore, confirmed and the ground no.1 and its sub-grounds are dismissed."

4. The assessee being aggrieved with the order passed by the CIT(A) has carried the matter in appeal.

5. On a perusal of the aforesaid statutory provision, ITAT find that the same therein contemplates that an assessee shall be entitled to claim deduction of any interest payable on the capital borrowed by him for acquiring, constructing, repairing, renewing or reconstructing a property. Admittedly, the assessee had acquired the residential property in question way back vide an "agreement" dated 20.09.2009. In ITAT considered view, for claiming deduction of interest u/s 24(b) there is neither any such precondition nor an eligibility criteria prescribed that the assessee should have taken possession of the property so purchased or acquired by him. Insofar the "1st and 2nd proviso" to Sec 24(b) are concerned, the same only contemplates an innate upper limit of the amount of deduction qua the properties referred to in Sec 23(2) i.e., a residential house. However, the aforesaid provisos by no means jeopardizes the entitlement of an assessee to claim deduction of the interest payable by him on the capital borrowed for acquiring, constructing, repairing, renewing or reconstructing a residential property that does not fall within the realm of Sec 23(2). Also, ITAT said that it was unable to persuade ourselves to accept the view of the CIT(A) that as in the absence of any control/domain over the property in question the assessee would not be in receipt of any income from the same, therefore, allowing of deduction u/s 24(b) qua the said property would be beyond comprehension. ITAT said that the said view of the CIT(A) is absolutely misconceived and in fact divorced of any force of law. Insofar the determination of the "annual lettable value" of a property is concerned, the same as per Sec. 22 r.w.s. 23 is dependent on the "ownership" of the property, irrespective of the fact whether the assessee has taken the possession of the same or not. Although, as per the plain literal interpretation of Sec 24(b), there is no bar on an assessee to claim deduction of interest payable on a loan taken for purchasing a residential property, though, the possession of the same might not have been vested with him, however, even otherwise the logic given by the CIT(A) for declining the aforesaid claim of deduction of the assessee clearly militates against the mandate of Sec 22 to 24 of the Act. Accordingly, as in the case before us the assessee had admittedly paid interest of Rs. 2,69,842.12/- on the capital that was borrowed by him for acquiring the property in question, which was duly evidenced on the basis of the certificate that was filed in the course of the assessment proceedings, therefore, we are unable to concur with the lower authorities who had declined his aforesaid claim for deduction of interest under Sec. 24(b) of the Act.

HELD:

An assessee shall be entitled to claim deduction of any interest payable on capital borrowed by him for acquiring, constructing, repairing, renewing or reconstructing a property for claiming deduction of interest u/s 24(*b*) and there is neither any precondition nor any eligibility criteria prescribed that assessee should have taken possession of property so purchased or acquired by him.

GST AND OTHER INDIRECT TAX LAWS

Relevant Judgments and updates of the week;

Government approved Production Linked Incentive (PLI) Scheme for Textiles: Press Release

The Government has approved Production Linked Incentive (PLI) Scheme for Textiles. PLI scheme for Textiles is part of the overall announcement of PLI Schemes for 13 sectors made earlier during the Union Budget 2021-22, with an outlay of Rs.1.97 lakh crore. It will promote production of high value MMF Fabric, Garments and Technical Textiles in country.

Production Linked Incentive (PLI) Scheme for Auto Industry and Drone Industry approved: Press Release

The Government has approved the Production Linked Incentive (PLI) Scheme for Automobile Industry and Drone Industry with a budgetary outlay of Rs. 26,058 crore. The PLI scheme for the auto sector will incentivize high value Advanced Automotive Technology vehicles and products.

No writ admissible if statutory remedy available & there was no violation of principles of natural justice

SC: The Assistant Commissioner of State tax v. M/s Commercial Steel Limited

FACTS:

The respondent i.e. M/S Commercial Steel Limited is a proprietary concern engaged in the business of iron and steel. The respondent's consignment was being carried in a truck and proceeding from

Karnataka and earmarked for delivery at Balanagar, Telangana. The Truck was intercepted at Jeedimetala because of the reason that Balanagar is situated between the State of Karnataka and Jeedimetala and that no reasonable person would cross Balanagar and then turn around to go back to the place of destination.

An order of detention was issued in Form GST MOV-06 on 12 December 2019 and a notice was served on the person in charge of the conveyance. The respondent paid the tax and penalty, following which the goods and the conveyance were released.

Being aggrieved by the action of the officers, respondent filed a writ before a HC. HC allowed the writ and come to the conclusion that since the vehicle was being driven from Karnataka by the local driver from that State, "it is perfectly possible for the driver to lose his way on account of being unfamiliar with the roads" in Hyderabad and bypass Balanagar to proceed to Jeedimetala.

Being aggrieved by the order of HC, department is before Supreme Court now. Department submits that the High Court was in error in entertaining the writ petition under Article 226 of the Constitution, having regard to the statutory alternative remedy which is available under Section 107 of the CGST Act.

HELD:

As per section 107 of the GST Act, any person aggrieved by any decision or order passed under this Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

SC set aside the order of HC on the ground that the respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:

(i) a breach of fundamental rights;
(ii) a violation of the principles of natural justice;

(iii) an excess of jurisdiction; or

(iv) a challenge to the vires of the statute or delegated legislation.

Writ petition dismissed filed against order of rejected refund claims being appealable order

Delhi HC: Ajanta Industries v. Commissioner of Central Goods and Service Tax

FACTS

The assessee claimed the refund of Rs. 2.05 crores for the period of April 2020 and may 2020 along with interest thereon. The competent authority on the basis of report of Anti Evasion Branch, had rejected the refund clam by order dated 04-04-2021 stating that the premises of assessee was found being locked during the inspection and partners of assessee not responding to summons. Further suppliers have passed on fake Input Tax Credit for which the taxpayer is claiming refund. Being aggrieved by the order, assesse filed the writ.

HELD:

As per section 107 of the GST Act, any person aggrieved by any decision or order passed under this Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

Therefore, HC dismissed the writ on the ground that the impugned order is an appealable order.

CORPORATE AND OTHER LAWS

SEBI UPDATES: -

SEBI probe finds Poonawalla Fincorp MD, others guilty of Insider Trading (September 15, 2021)

The SEBI passed an interim order banning Poonawalla Fincorp's Managing Director Ajay Bhutada and seven others from the securities market after they were found guilty in an insider trading case.

SEBI's investigation found that Bhutada had shared information about Adar Poonawalla's Rising Sun Holdings' proposed takeover of Magma Fincorp in his capacity as MD and CEO of Poonawalla Finance.

The investigation found that Bhutada, who was in possession of the Unpublished Price-sensitive Information (UPSI) regarding the acquisition, and shared the same with Saumil Shah, Rakesh Bhojgadhiya and Rakesh Bhojgadhiya HUF.

SEBI confirms directions passed against 6 entities in Infosys insider trading case (September 16, 2021)

Markets regulator SEBI confirmed its directions passed earlier against certain entities to bar them from the capital markets for allegedly indulging in insider trading in Infosys Ltd.'s shares. Besides, SEBI has tweaked its interim order passed in May 2021, to the extent of allowing credit and debit of securities in the accounts of the entities. A thorough investigation in this matter is pending, SEBI said.

SEBI Chairman's Speech at 12th Financial Markets Summit of CII (September 16, 2021)

Speaking at 12th Financial Markets Summit of CII, Shri Ajay Tyagi, Chairman, SEBI, said, "I will like to highlight the robustness of our market infrastructure, which has successfully gone through the real life stress testing on account of wide market fluctuations.

- After the markets touched new highs in January 2020, as the pandemic started reaching global proportions, the market indices started falling in March 2020; the indices touched a low on March 23

which was around 40% below the January high. Since then, the markets recovered and, except for a brief period of fall in April 2021, have been touching new highs. As on date, the flagship indices are more than double of what they were at the lowest point in March 2020. In fact, during FY2021-22, the Indian equity markets have given best returns, in dollar terms, as compared to any other major jurisdiction in the world- whether emerging or developed markets. Huge increase in secondary market turnover during this period further tested the market infrastructure.

- 'Building India for a new World' needs further encouragement and growth of the capital markets to meet the funding requirements of growing economy. Much more needs to be done – at present, capital market share in the overall fund raising in India is nowhere near the proportions in the developed countries.

- Post the onset of Pandemic, individual investors' participation in our stock markets has increased by leaps and bounds. The available data in this regard is quite revealing.

- SEBI has progressively strengthened the margining provisions. These improvements have held the trading and clearing system in good stead in the present scenario of tremendous increase in turnover and individual investors' participation in the market.

- The fund raised through IPOs more than doubled in FY21 to around INR 46,000 Crore from around INR 21,000 crore in the previous financial year. Based on the applications filed with SEBI, the equity raising through IPOs this year is likely to surpass the highest amount ever raised in any financial year during the last decade.

- Sustainable development and addressing the climate change concerns have emerged• as priority areas. SEBI came out with Business Responsibility and Sustainability Reporting norms for the listed corporates.

- SEBI has launched another investor education programme called - SMARTs (Securities• Market Trainers) programme. Individuals and organisations with knowledge and experience in securities market and interest in creating investor awareness are empaneled as SMARTs.

Consultation Paper on Review of the SEBI (Settlement Proceedings) Regulations, 2018 (September 14, 2021)

SEBI has placed a consultation paper on its website for public comments on the proposed amendments in the Settlement Regulations with the objective of taking into consideration the concerns of various stakeholders, latest by October 14, 2021 by 05:00PM, in the prescribed format. SEBI has proposed to revise the Settlement Regulations to harmonize them with the specific nature of violations done by entities, in a bid to make the mechanism more effective.

RBI/BANKING UPDATES: -

Application for Aadhaar e-KYC Authentication Licence (September 13, 2021)

In terms of Section 11A of the Prevention of Money Laundering Act, 2002, entities other than banking companies may, by notification of the Central Government, be permitted to carry out authentication of client's Aadhaar number using e-KYC facility provided by the Unique Identification Authority of India (UIDAI). A detailed procedure for processing of applications under the aforementioned Section for use of Aadhar authentication services by entities other than banking companies has been provided by the Department of Revenue, Ministry of Finance.

Accordingly, Non-Banking Finance Companies (NBFCs), Payment System Providers and Payment System Participants desirous of obtaining Aadhaar Authentication License -KYC User Agency (KUA) License or sub-KUA License (to perform authentication through a KUA), issued by the UIDAI, may submit their application to this Department for onward submission to UIDAI.

Extension of timelines for sale and renewal of short term Covid specific Health Insurance Policies (September 13, 2021)

Reference is invited to the short term Covid specific health insurance policies permitted to be offered by all Insurers. All insurers are permitted to offer and renew short term Covid specific health policies up to 31.03.2022. Accordingly, Corona Kavach Policies offered as per Guidelines on Covid Standard

Indemnity based Health Policy and Corona Rakshak Policies offered as per Guidelines on Covid Standard benefit based Health Policy are also permitted to be offered and renewed by all insurers up to 31.03.2022.

RBI releases Handbook of Statistics on the Indian Economy 2020-21 (September 15, 2021)

The Reserve Bank released its annual publication titled "Handbook of Statistics on the Indian Economy, 2020-21" (HBS). This publication, the 23rd in the series, disseminates time series data on various economic and financial indicators relating to the Indian economy.

Feedback / comments on the HBS may be sent: -

(i) through the feedback button available on DBIE portal (https://dbie.rbi.org.in); or

(ii) to the email; or

(iii) to the Director, Data Management and Dissemination Division, Department of Statistics and Information Management, Reserve Bank of India, C-9/3rd Floor, Bandra-Kurla Complex, Mumbai 400051.

The electronic form of its current and previous issues can also be freely downloaded from the Reserve Bank's website (www.rbi.org.in).

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Master Direction – Reserve Bank of India (Marketmakers in OTC Derivatives) Directions, 2021 (September 16, 2021)

The draft RBI (Market-makers in OTC Derivatives) Directions, 2020 were released for public comments on December 04, 2020. Based on the feedback received from the market participants, the draft Directions were reviewed and have since been finalized. RBI has issued Master Direction – Reserve Bank of India (Market-makers in OTC Derivatives) Directions, 2021.

CASE LAW: -

Naresh Kumar Poddar (Appellant) vs. Union of India, through Secretary, Ministry of Corporate Affairs and Another (Respondent) Calcutta High Court (05.01.2021).

Disqualification of director due to non-filing of the Annual Return and Financial Statement of the company for three financial years.

Fact of the case:

The petitioner was a director of a Private Limited Company, namely, Lambodar Vinimay Private Limited whose name was removed/ struck off from the Register of Companies. Accordingly, the petitioner's Director Identification Number (DIN) and Digital Signature Certificate (DSC) were deactivated under Section 164(2) of the 2013 Act, with effect from November 1, 2016 till October 3, 2021. A petition was moved by the director challenging his disqualification during the said period, due to non-filing of the annual return and financial statement of the company for three financial years.

The legal questions posed in the present case were:

- Whether Section 164(2)(a), as introduced by the 2014 Amendment Act and the proviso to Section 167(1)(a), as introduced by the 2018 Amendment Act, are prospective, retrospective or retroactive in nature?
- Whether there is any scope for giving opportunity to the defaulting company or its directors to represent against the disqualification under Section 164, read with Section 167 of the Companies Act, 2013 Act?

Judgment:

- The Calcutta High Court observed that in the absence of any requirement of adherence to the principles of natural justice or any scope of discretion in applying the amended provisions of Sections 164 and 167 of the Companies Act 2013, there is no scope for the authorities to consider the reason behind defaults and desist from disqualifying the directors if necessary.
- This lack of discretion in the matter of disqualification operates directly to the detriment of corporate functioning of the small and medium corporate operators. The fall-out of retrospective operation of the amendments is fatal to small and medium businesses, which still comprise the backbone of the economy. There can be umpteen reasons, arising from the inherent disadvantages of functioning befalling private limited companies and small corporate units, which might result in unintentional contravention of Sections 92 and 137 of the Companies Act, 2013.
- That apart, there might be 'Black Swan' situations, for example, economic recession and debilitating pandemics, which would throw off business and commerce out of gear for

considerable periods of time, having little or no effect on robust or anti-fragile large operators but ruining the credibility and goodwill of small companies, completely veering them off course. SOPs in the form of credit incentives for MSMEs and other medium sector units have been proved to be ineffective to alleviate such large-scale economic disasters. This, coupled with the automatic disqualification envisaged in the 2014 and 2018 amendments to the Companies Act, 2013 is sufficient to ruin the economy as a whole which, somewhat counterintuitively, is detrimental to the growth of the economy. Thus, attributing retrospective/retroactive effect to the said amendments would run contradictory to the purpose of public good.

Hence, the answer to Question (i), as formulated above, is that Section 164(2)(a), as introduced by the 2014 Amendment, and the proviso to Section 167(1)(a), as introduced by the 2018 Amendment, to the Companies Act, 2013 are prospective in operation. Thus, the appeal is allowed, thereby setting aside the deactivation of DIN by virtue of the notice dated April 7, 2017.

Case under The Arbitration and Conciliation Act, 1996

Delhi Airport Metro Express Pvt. Ltd. VS. Delhi Metro Rail Corporation Ltd.

FACTS

Delhi Metro Rail Corporation Ltd. (DMRC) entered into a Concession Agreement with Delhi Airport Metro Express (P) Ltd. (DAMEPL) for design, installation, commissioning, operation and maintenance of the Airport Metro Express Line. Although, DMRC itself undertook design and construction of basic civil structure for the project. After completion of work, safety approval were obtained from the Commissioner of Metro Railway Safety (CMRS) and commercial operations ensued in February 2011.

Defects occurred in the civil structure constructed by DMRC. DAMEPL issued a notice on 9-7-2012 asking DMRC to cure the defects in its works within a period of 90 days from the date of the notice, failing which it shall be treated as a breach having Material Adverse Effect on the Concessionaire (DAMEPL) under the Concession Agreement. Thereafter, on 8-10-2012, DAMEPL issued a notice terminating the Concession Agreement as the defects were not cured within 90 days causing in an Event of Default under the Agreement.

DMRC invoked arbitration under the Concession Agreement. The Arbitral Tribunal made an award of Rs 2782.33 crore plus interest in favour of DAMEPL. DMRC filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award, which was dismissed by a Single Judge. However, on DMRC's appeal under Section 37 a Division Bench partly set aside the award passed by the Arbitral Tribunal. Aggrieved, DAMEPL approached the Supreme Court.

Reliefs of Court's power to review arbitral awards

The UNCITRAL Model Law and Rules, the legislative intent with which the Arbitration and Conciliation Act, 1996 is made, and Sections 5 and 34 of the 1996 Act, the Supreme Court noted that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or re-appreciation of matters of fact as well as law. The Court relied on *SsangYong Engg. & Construction Co. Ltd.* v. *NHAI*.

The Court said that the limited grounds available to courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. It was observed:

"There is a disturbing tendency of courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award."

The Court was of the opinion that such approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards.

Patent illegality

Observing that 'patent illegality' should be illegality which goes to root of the matter, the Court explained that:

Very error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression 'patent illegality'.

Public policy

Breach of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law.

Integrity of the court and Morality

HELD:

The Supreme Court concluded as above, the Supreme Court allowed the appeal filed by DAMEPL and set aside the judgment of the Division Bench of the High Court.

Noted that the Supreme Court all together considered a separate appeal filed by DMRC against the same judgment of the High Court in relation to issues which went against DMRC such as rejection to grant relief of specific performance of the Concession Agreement, waiver of termination notice due to DAMEPL's conduct, etc.

However, the Court did not find merit in any of the submissions advanced by DMRC in its appeal, which was consequently dismissed.

M/S. INDSIL HYDRO POWER AND MANGANESE LIMITED vs. STATE OF KERALA AND OTHER

FACTS

The appeals were preferred by Indsil Hydro Power and Manganese Ltd. and Carborundum Universal Ltd. The business of both the appellants required continues supply of electricity. Both the appellants were Captive Power Producers. A captive power producer is the one who produces electricity for self-consumption. The appellants had set up hydroelectric power projects in fulfilment of the Policy enclosed

by the Kerala Government allowing private agencies and public undertakings to set up hydel schemes for generation of electricity at their own cost. As per the Policy matters concerning construction, operation and maintenance of the hydel scheme were to be managed as per the provisions made by the Kerala State Electricity Board. ***Clause 14*** of the Policy stated Royalty for the use of water together with the tax and duties on generation of power as fixed by Government/Board from time to time have to be paid by the agency.

Attempts on part of the Board to charge royalty/cost component for controlled release of water from the two CPPs in terms of Clause 14 of the Policy led to disputes. Both the CPPs arraigned separate proceedings before the High Court challenging the demand of royalty. They were granted relief by the Single Judge, but the Division Bench of the High Court reversed the orders of the Single Judge. The two CPPs approached the Supreme Court.

Issue and court observations

However dismissing the appeals the Supreme Court rejected all the arguments by the appellants the conversation is here:

Location of the projects

The Court considered whether the projects of the two CPPs are located at places where the advantage of controlled supply of water is secure and can be derived.

It was noted that hydro electric projects rely on the force of fall of water from a height to enable the turbines to generate electricity. The supply of water from a big reservoir is one way of guaranteeing dependable and controlled supply of water.

The Court found that the location of the two projects was such that supply of water meant for powerhouses situated at a height and with larger capacity definitely guaranteed dependable and controlled supply of water to the two projects located at a lower altitude. Thus, both the projects certainly derived advantage of controlled supply of water as planned in Clause 14 of the Policy.

Brief the judicial judgement on this point, the Court pronounced that it could not be said that the two CPPs were in a position with lesser negotiating power or were so vulnerable that by force of situations

they were forced to accept such term as Clause 14. Therefore, Clause 14 of the Policy that stood combined in the respective agreements could not be termed immoral.

Further, the Court observed that:

"There is nothing arbitrary or unreasonable in having such term in the Policy. Since the private entity or agency would stand to gain from and out of the capital outlay and infrastructure put in place by the State, some reasonable charges for such benefit would naturally be imposed. It was only under such Policy that [the two CPPs] were given permissions to set up their electricity generating units and such term was consciously accepted by them."

The Court measured that even if the important term in the policy was not found to be immoral or arbitrary the question still continue whether any discriminatory treatment was meted out to CPPs in the application of Clause 14 to CPPs alone and not to Independent Power Producers.

The Court noted that qualitatively, the CPPs and IPPs have a basic difference. CPPs produce electricity for self-consumption. As against that, IPPs produce electricity not for self-consumption but for the use of the Board. The electricity generated by IPPs becomes part of the network to be supplied by the Board to its consumers like electricity produced by the generating units or power houses of the Board. It was observed.

If the charges towards controlled supply of water were to be imposed uniformly for CPPs and IPPs, the effect would be that the electricity supplied through IPPs to common consumers and general public would necessarily have an additional burden or load towards equal element of water charges. In these situations, if the Board decided not to apply Clause 14 of the Policy in case of all IPPs, such decision would not be termed as biased.

Additional issues

The appellants submitted that royalty or charges for controlled supply of water would be nothing but compulsory exaction and in the absence of any legal approval behind such imposition, the actions on part of the Board would be without jurisdiction.

The expression Royalty has regularly been understood to be compensation paid for rights and rights enjoyed by the grantee and normally has its start in the agreement entered into between the grantor and the grantee. As against tax which is imposed under a statutory power without reference to any special benefit to be conferred on the payer of the tax, the royalty would be in terms of the agreement between the parties and normally has direct relationship with the benefit or privilege conferred upon the grantee.

The Court concluded that whatever be the nomenclature, the charges for use of controlled release of water were for the privilege enjoyed by the two CPPs. The basis for such charges was directly in terms of, and under the arrangement entered into between the parties, though, not referable to any statutory instrument.

Lastly, the Court held that the submission that it was compulsory exaction and thus assumed the characteristics of a tax, was completely incorrect and untenable. It was a pure and simple contractual relationship between the parties.

The Supreme Court observed:

"Since the private entity or agency would stand to gain from and out of the capital outlay and infrastructure put in place by the State, some reasonable charges for such benefit would naturally be imposed."

The Supreme Court held that the charge was perfectly justified. Accordingly, the appeals were dismissed.

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