

Newsletter

July - August 2021

It gives us immense pleasure to circulate this edition of DMD Advocates' newsletter focusing on recent legal developments in India.

In this edition, we have covered some of the key orders, judgements and notifications issued by the Indian government, courts, and regulatory authorities from July to August 2021.

We hope you enjoy reading this edition and find it useful in your area of work.



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Supreme Court

Payment of Gratuity Act: No retrospective effect for 2010 Amendment enhancing Gratuity upper limit as Rs 10 Lakhs - 13 August 2021

The Supreme Court in the matter of Krishna Gopal Tiwary vs. Union of India (CA 4744 of 2021) has observed that 2010 amendment of Payment of Gratuity Act 1972 is not retrospective. The appellants were former employees of Coal India Limited, who were paid gratuity amount of Rs 10 lakhs in January 2007 in terms of an Office Memorandum of the Union Government. In 2007, the statutory upper limit of gratuity was Rs 3.5 lakhs. According to the Income Tax Act, the amount of gratuity received by an employee to the extent it does not exceed the upper limit under the Payment of Gratuity Act is exempt from tax liability. Since the upper limit for gratuity in 2007 was Rs 3.5 lakhs, the appellants had to incur TDS liability for the remaining amount. Since the upper

limit of gratuity was amended as Rs 10 lakhs in 2010, the appellants sought for a retrospective effect to it from 1 January 2007, so as to claim complete tax exemption for the gratuity received. Thus, they challenged the date of commencement i.e. 24 May 2010 (the date when the amendment act received the assent of the President) and asserted that it should be made effective from 1 January 2007. While dismissing the appeals, the court held that “the date of commencement fixed by the Executive in exercise of power delegated by the Amending Act cannot be treated to be retrospective as the benefit of higher gratuity is one-time available to the employees only after the commencement of the Amending Act. The benefit paid to the appellants under the office memorandum is not entitled to exemption in view of specific language of Section 10(10)(ii) of the Income Tax Act”. To access a copy of the judgement dated 13 August 2021, click [here](#).



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IBC: Application for initiating CIRP to be rejected if a dispute truly exists in fact and is not spurious, hypothetical or illusory - 10 August 2021

The Supreme Court in the matter of Kay Bouvet Engineering Ltd. vs Overseas Infrastructure Alliance (India) Private Limited (CA 1137 of 2019) observed that adjudicating authority has to reject an application seeking initiation of Corporate Insolvency Resolution Process (CIRP) under Section 9 of Insolvency and Bankruptcy Code (IBC), if a dispute truly exists in fact and is not spurious, hypothetical or illusory. The bench comprising of Justices RF Nariman and BR Gavai observed that, at this stage, the authority is not required to be satisfied as to whether the defence is likely to succeed or not and it cannot go into the merits of the dispute. To access a copy of the judgement dated 10 August 2021, click [here](#).

Arbitration: Foreign award can be binding on non-signatories to arbitration agreement - 10 August 2021

The Supreme Court in the case of Gemini Bay Transcription Pvt. Ltd. vs. Integrated Sales Service Ltd. (CA 8343-8344 of 2018), has held that a foreign award can be binding on non-signatories to the arbitration agreement and can be thus enforced against them. In this regard, the Court referred to Section 46 of the Arbitration and Conciliation Act, which deals with the circumstances under which a foreign award is binding. The Court noted that the provision speaks of "persons as between whom it was made" and not parties to the agreement. "Persons" can include non-signatories to the agreement. To access a copy of the judgement dated 10 August 2021, click [here](#).

Arbitration: Emergency arbitration award enforceable in Indian law - 6 August 2021

Ruling in favour of e-commerce giant Amazon, the Supreme Court in the case of Amazon.com NV Investment Holdings LLC vs. Future Retail Limited (CA 4492-4493 of 2021) has held that that Emergency Award passed by Singapore arbitrator stalling Future Retail Limited-Reliance deal is enforceable in Indian law. The court also upheld the order of the single bench of the Delhi High Court which had ruled in favour of the enforcement of the Emergency Award and has held that single judge's order was not appealable to the division bench of the High Court under Section 37(2) of the Arbitration Act. To access a copy of the Supreme Court's judgement dated 6 August 2021, click [here](#).

IBC: No bar in permitting amendment of pleadings or filing of additional documents in CIRP application under Section 7 of IBC - 4 August 2021

The Supreme Court in the matter of Dena Bank vs. C. Shivakumar Reddy (CA 1650 of 2020) has held that there is no bar in permitting amendment of pleadings or filing of additional documents apart from those initially filed along with application under Section 7 of the IBC in Form-1. The court further stated: "[I]n the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the Appellant Bank to file additional documents." To access a copy of the judgement dated 4 August 2021, click [here](#).

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IBC: Lender who advanced interest free loans to corporate body is also a financial creditor - 26 July 2021

The Supreme Court in the matter of Orator Marketing Pvt. Ltd. vs. Samtex Desinz Pvt. Ltd. (CA 2231 of 2021) has held that a person who gives a term loan to a Corporate Person, free of interest, on account of its working capital requirements is a Financial Creditor, and therefore, competent to initiate the Corporate Resolution Process under Section 7 of the IBC. The court observed that: “the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor. ‘Default’ means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of ‘debt’ is also expansive and the same includes inter alia financial debt. The definition of ‘Financial Debt’ in Section 5(8) of IBC does not expressly exclude an interest free loan. ‘Financial Debt’ would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.” To access a copy of the judgement dated 26 July 2021, click [here](#).

Arbitration: Section 34 of Arbitration Act gives no power to modify arbitral award - 20 July 2021

The Supreme Court in the matter of Project Director, National Highways vs. M. Hakeem (CA 2797 of 2021) has held that an Appellate Court cannot modify an arbitral award under Section 34 of the Arbitration and Conciliation Act.

The court further observed that the Appellate Court has limited power to either set aside the award or remit the award back to the Arbitrator under Section 34. To access a copy of the judgement dated 20 July 2021, click [here](#).

Notifications & Amendments



Official Gazette: Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) Regulations, 2021 – 9 August 2021

On 9 August 2021, SEBI released the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 (Regulations) that have come into force from 16 August 2021. The Regulations apply to:

1. Issuance and listing of debt securities and non-convertible redeemable preference shares by an issuer by way of public issuance;
2. Issuance and listing of non-convertible securities by an issuer issued on private placement basis which are proposed to be listed; and
3. Listing of commercial paper issued by an issuer in compliance with the guidelines framed by the Reserve Bank of India. Further, the Regulations also introduce a definition for ‘green debt security’. To access the gazette copy of the Regulations, click [here](#).

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Official Gazette - The Factoring Regulation (Amendment) Act, 2021 - 9 August 2021

The Factoring Regulation (Amendment) Act, 2021 has received presidential assent and will come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. The Amendment Act amends the Factoring Regulation Act, 2011 and widens the scope of entities which can engage in factoring business. Further, it is aimed at aiding the MSME sector by smoothening the working capital cycle for the seller and healthier cash flow for MSMEs. To access the gazette copy of the Amendment Act click [here](#).

Official Gazette - The Insolvency and Bankruptcy Code (Amendment) Act, 2021 - 12 August 2021

The Insolvency and Bankruptcy Code (Amendment) Act, 2021 (Amendment Act) received presidential assent on 11 August 2021 and shall be deemed to have come into force from 4 April 2021. The Amendment Act introduces pre-packaged insolvency resolution process for corporate persons classified as Micro, Small or Medium Enterprises (MSMEs) under the IBC. The Amendment Act provides that the Central Government may, by notification, specify such minimum amount of default of higher value, which shall not be more than Rs 1 Crore, for matters relating to pre-packaged insolvency resolution process of MSME corporate debtors. Further, the Amendment Act also inserts a new Chapter III-A (Pre-packaged Insolvency Resolution Process) under the Code, that lays down the working of such resolution process, along with duties of Resolution Professional before initiation of pre-packaged insolvency resolution process, while speci-

fyng that the process shall be completed within a period of 120 days from the pre-packaged insolvency commencement date. It distinguishes between the pre-packaged process from normal corporate insolvency resolution process and stipulates that during the pre-packaged insolvency resolution process period, the management of the affairs of the corporate debtor shall continue to vest in the Board of Directors or the partners, as the case may be, of the corporate debtor, subject to such conditions as may be specified. To access the gazette copy of the Amendment Act, click [here](#).

Official Gazette - The Tribunals Reforms Act, 2021 - 13 August 2021

The Tribunals Reforms Act, 2021 (Act) received presidential assent on 13 August 2021 and is deemed to have come into force on 4 April 2021. The Act abolishes nine appellate tribunals, including the Film Certification Appellate Tribunal, tribunals under the Geographical Indications of Goods (Registration and Protection) Act, 1999; the Protection of Plant Varieties and Farmers' Rights Act, 2001; and the Control of National Highways (Land and Traffic) Act, 2002 etc. The Act also amends the Cinematograph Act, 1952, the Customs Act, 1962, the Airports Authority of India Act, 1994, the Trade Marks Act, 1999 and certain other legislations. Further, all cases pending before such tribunals or authorities will be transferred to the Commercial Court or High Court. The Act also provides for uniform terms and conditions of service for chairperson and members of various tribunals. To access the gazette copy of the Amendment Act, click [here](#).

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Publications, Case Highlights, Webinars & Interviews

CCI consultations with stakeholders on proposed revisions to the extant CCI confidentiality regime - 2 September 2021

Partner *Vivek Agarwal* participated in consultations held by the Competition Commission of India (CCI) with stakeholders on the proposed revisions to the extant CCI confidentiality regime. The CCI is in the process of amending its confidentiality regulations to make it more robust in line with global best practices.

Bombay High Court's judgment in favour of our client discharging a German National from proceedings under the NDPS Act - 2 August 2021

In a significant judgement, the Bombay High Court's Goa Bench presided by Justice M S Jawalkar discharged our client, a German National, from proceedings under the Narcotic Drugs and Psychotropic Substances (NDPS) Act for conspiracy and possession of narcotics, in absence of sufficient material/evidence and held that mere presence in the flat not sufficient to commence trial. The German National was arrested from a flat in Goa belonging to the main accused from where narcotic substance of commercial quantity was seized in the raid. In the chargesheet, apart from the presence of the German National in the said flat, no other evidence of possession of narcotics or conspiracy was found by the Police. The German National filed an application for discharge under Section 227 of the CrPC before the Additional Sessions Judge which was rejected. The

rejection order was challenged before the High Court. The High Court while exercising its criminal revisionary jurisdiction quashed and set aside the Additional Sessions Judge's order after considering the jurisprudence of conscious possession and power to discharge under Section 227. The German National was represented by Partner *Tushar Jarwal* along with Counsel *Rahul Sateja*, Senior Associate *Deepak Thackur* and Associate *Anurag Soan*. For more details, click [here](#).

Senior Partner Anuradha Dutt and Partner Sachit Jolly shared their views with NDTV on the recently introduced Taxation Laws (Amendment) Bill 2021 - 5 August 2021

Senior Partner *Anuradha Dutt* and Partner *Sachit Jolly* shared their views with NDTV on the recently introduced Taxation Laws (Amendment) Bill 2021 introduced to nullify the effect of the amendment brought by the Finance Act 2012 imposing tax liability on gains arising from indirect transfer of Indian assets with retrospective effect. To view the interview, click [here](#).

Partner Sachit Jolly shares his views, with ETCFO, on India scrapping the controversial retrospective tax law - 6 August 2021

In an exclusive interview with ETCFO, our Partner *Sachit Jolly* shared his views on India scrapping the controversial retrospective tax law. To view the interview, click [here](#).

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Partner Vivek Agarwal shared his opinion on the recent CCI investigation against Google in the smart TV segment - 4 July 2021

Partner *Vivek Agarwal* shared his opinion on CCI's investigation into Google's anti-forking policy in the smart TV segment with Mint. To view the article, click [here](#).

DMD Advocates advised Vipul Medcorp and Vipul Medcare for sale of their entire shareholding to Vidal Health Insurance TPA - 25 May 2021

DMD Advocates advised the Beriwalla family (majority stakeholders) and other shareholders of Vipul Medcorp Insurance TPA Private Limited and Vipul Medcare Private Limited for sale of their entire shareholding to Vidal Health Insurance TPA. Senior Partner *Rashi Dhir* oversaw the deal, while the transaction was led by Partner *Sumit Sinha* along with Principal Associate *Ashima Dewan*. For more details, click [here](#).

Supreme Court has upheld the constitutional challenge to third proviso to Section 254(2A) of the Income tax Act - 10 April 2021

In a significant judgement, the Supreme Court upheld the constitutional challenge to third proviso to Section 254(2A) of the Income tax Act and further held that the said proviso (which provides for automatic vacation of stay beyond 365 days even if the assessee was not responsible for delay in hearing of the appeal) falls foul on both counts i.e. 'arbitrary' and 'discriminatory' and hence liable to be struck down as offending Article 14 of the Constitution.

Our partner *Sachit Jolly* argued for one of our clients, as part of a batch of matters, before the Supreme Court. Sachit was assisted by Counsel *Rohit Garg* and Associate *Disha Jham*. To access the case highlight, click [here](#).

Rajasthan HC issued notice in a Writ challenging the denial of refund of unutilised Input Tax Credit (ITC) of GST under inverted duty structure - 7 April 2021

DMD team comprising Partner *Tushar Jarwal*, Counsel *Rahul Sateja*, Senior Associate *Deepak Thackur* and Senior Associate *Anurag Soan* assisted Sr. Advocate *Tarun Gulati*, for Petitioner *Baker Hughes Asia Pacific Ltd.*, in a matter before the Rajasthan High Court wherein the refund rejection order passed by the GST authorities and vires of para 3.2 of CBEC Clarificatory Circular no. 135/05/2020 dated 31 March 2021 were under challenge. The Court issued notice in the Writ Petition on 7 April 2021.

Madras High Court granted relief to our client Areva T&D India Ltd. - 23 March 2021

In a significant income tax matter before the Madras High Court, DMD team led by Partner *Tushar Jarwal* along with Counsel *Rahul Sateja* obtained a ruling, in favour of client *Areva T&D India Ltd.*, allowing depreciation on non-compete fee and deleting the addition of surplus to general reserve arising from acquisition of companies from purchase consideration being lower than the net book value of the entities. To access a copy of the judgement, click [here](#).

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Partners & Directors

Anuradha Dutt

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Vijayalakshmi Menon

Founder & Senior Partner, Delhi
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Rights*

Pawan Sharma

Partner, Delhi
Regulatory, Competition

Ekta Kapil

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