

BULLETIN



OCTOBER
2022



N K Gupta, Founder & Managing Partner

What is litigation?

According to the Black's law dictionary, "litigation is the act, process or practice of settling the dispute in a court of law". Litigation is more than just a courtroom proceeding; it is an entire court craft; the need for litigation arises when there is a conflict of interest between the two parties. Litigation can be a bit of a wager at times. While it is often preferable to settle your legal dispute before it goes to court, this is not always possible.

Clogging of Cases:

Recent socioeconomic advancements and increased awareness of legal rights are the primary causes of this enormous backlog, or more precisely, the influx of a significant number of cases, resulting in a flood of individuals contacting the judicial system more frequently.

As per the latest data from the Department of Law and Justice, approximately 4.7 crore cases are pending in various courts; this includes 3.06 crore criminal cases and 1.08 crore civil cases. The total number of pending cases in the Supreme Court is approximately 71000, out of which 57000 are civil matters, and approximately 15000 are criminal matters as of May 2022. Around 59 lakh cases are pending in all the High Courts of India; some are more than 30 years old. (source: *The Hindu, Live law*)

Apparent Causes:

- Apart from all the other reasons for the pendency of cases, the most prominent one lately has been the pandemic. In addition, the coronavirus outbreak caused additional delays in the Indian legal system.
- Procedural requirements are very rigid, leading to the postponement of hearings of cases, ultimately leading to the pendency of cases.
- There has been a significant increase in litigation over the past few decades as more and more people and organisations are approaching courts. However, the number of judges available to hear these cases is still significantly less.
- Per the Ministry of Law and Justice report, the government is one of the most prominent litigants, and government departments are a part of around 46 per cent of cases.
- Frequent adjournments and other procedural delays by the advocates.

Effective solutions:

- Alternate Dispute Resolution

Alternate dispute resolution is one of the most effective mechanisms to prevent the pendency of cases. ADR provides various modes of settlement, including arbitration, conciliation, mediation, negotiation and *Lok adalats*. ADR is also in line with the essential principles of the constitution enshrined in Articles 14, 21 and 39A.

- Improving the judge-to-population ratio

By strengthening the subordinate judiciary. Appointment of retired judges as Ad hoc Judges. The Supreme Court has suggested that retired high court judges with area competence be reinstated as Ad Hoc judges. This will expedite the resolution of cases. (*as indicated in the 120th Law Commission of India Report*)

- **Optimising technology in litigation to streamline the process.**

COVID has taught us a hybrid working, *i.e.*, Virtual Courts. The adoption of digital tools will not only save time but will also improve efficacy in the litigation process. Similarly, there is the possibility of speeding lawsuits and procedural formalities using other digital tools.

- **Pro Bono cases**

The attorneys and the law firms should take up some percentage of pro bono cases. In this way, the lawyer and the law firm recognise their responsibility to further social goals and work selflessly in society's interests.

- **Fast Track Courts**

Setting up more and more fast-track courts. Over 10 lakh cases were pending in over 900 FTCs as of September 2021.

MISSION: LET US REDUCE TIME FACTOR OF LITIGATION

Executive Summary

1. The issue regarding the Levy of sales tax / VAT and Central Sales Tax on the alleged transfer of the right to use the Trademark under the TMA Agreement was being litigated for the A.Y. 2000-2001 onwards by the Department at various stages. However, in its opinion, the Hon'ble Supreme Court dismissed the petitions above of the Department, dated October 13, 2022, after observing that the Department had consistently upheld the Company's position in the preceding assessment years.

The Levy of VAT/sales tax and central sales tax on alleged transfers of the right to use Trademark under TMA is thus settled in favour of the corporation as of the GST period, i.e., 30.06.2017, with the Hon'ble Supreme Court's ruling dated 13.10.2022.

2.

- a. Employees' contributions deposited after the due date by the employees is not eligible for deduction. Accordingly, the benefit of section 43B can't be made available for the employee's contribution deposited before the filing of the Income-tax Return.
- b. No Equalization Levy if the person runs ads on Google and Target audience is located outside India.

3. Residential property leased to the business entity registered under GST is subject to GST under RCM. It means GST is payable by the business entity if registered under GST on the lease amount paid for residential purposes of the employees. Unfortunately, credit is also not available as the same is for personal consumption.

4. The Foreign Trade Policy's validity has been extended from September 30, 2022, to March 31, 2023, per notice number 37 from the Directorate General of Foreign Trade, dated September 29, 2022. By DGFT notification no. 39, dated October 14th, 2022, the export of wheat flour (atta) would be permitted only with advance authorization, by EOU units, by SEZ units. The export of raw sugar to the USA under the TRQ has been extended from September 30, 2022, to December 31, 2022. By the public notice no. 30 dated October 12, 2022, SION appearing at sr. No. A254 A267 A282A1939 A1973 A261 A2331 A2539 A2818 A 3056 A3486 are suspended immediately.

5. Prohibition of Benami Transactions Act- 1988 (as Amended in 2016) applies Prospectively:

Recently, the Hon'ble Supreme Court, in the case of *UOI v. M/s.Ganpati Dealcom Pvt. Ltd. (Civil Appeal No. 5783 of 2022) [2022] 141taxmann.com 389 (SC)* has held:

Certain amendments carried out by the Benami Transaction (Prohibition) Amendment Act of 2016 in Benami Act are prospective.

The 2016 Amendment Act made significant changes, allowing the designated authorities to attach benami properties that may be confiscated provisionally. The amended law also modifies the definition of "Benami Transaction." However, the taxpayers argued the amendments to be prospective.

The Hon'ble Supreme Court has held:

- a) Section 3(2) of the unamended 1988 Act is declared unconstitutional for being manifestly arbitrary and violative of Article 20 (1) of the Constitution.
- b) In the rem forfeiture provision under section 5 of the 2016 Act, punitive can only be applied prospectively and not retrospectively.
- c) For transactions completed before the 2016 Act, i.e., October 25, 2016, concerned authorities cannot initiate or continue criminal prosecution or confiscation proceedings. Accordingly, all these prosecutions or confiscation processes shall be quashed due to the above declaration.

6) The Hon'ble NCLT, Chennai, in the case of ***Renuka Devi Rangaswamy Vs. M/s Regen Powertech Private Limited and Ors.*** in Comp. (AT) (CH) (Ins) No. 357 / 2022 & IA/814/2022, held that the Transfer of Assets among the Group Companies ex-facie is not a Fraudulent Trading, as per Section 66 (1) of the IB Code, 2016.

It has been observed and held by the NCLT, Chandigarh, that in the case of ***Mr Sameer Rastogi, erstwhile RP Tara Chand Rice Mills Pvt. Ltd. Vs Mr Rakesh Ahuja Liquidator of M/s. Tara Chand Rice Mills Pvt. Ltd*** in IA No.953/2020 in CP (IB) No.121/Chd/Hry/2017 absence of any order from this Adjudicating Authority appointing a liquidator, the applicant's continuation as an RP is not in contravention of any provisions of IBC and as the company is already under liquidation, the liquidator was directed to disburse the professional fee of RP at the rate approved by CoC.

Levy of VAT on Transfer of Right to use Trademark:

By Adv. Puneet Agrawal

The issue regarding the Levy of sales tax / VAT and Central Sales Tax on the alleged transfer of the right to use Trademark under the TMA Agreement was being litigated for the A.Y. 2000-2001 onwards by the Department at various stages.

After many years of litigation, the Company won the matter in the Hon'ble Department of Commercial Tax Tribunal for the A.Y. 2006-07, and the Hon'ble Tribunal held that there is no transfer of right to use goods, after extensively interpreting the agreements between the parties.

In appeal, the High Court held in favour of the assessee and dismissed the appeals of the revenue. Accordingly, the Revenue's SLP was dismissed by the Hon'ble Supreme Court.

Despite this, the Revenue continued to agitate for various other years. As a result, the Department kept losing matters at different stages, particularly Appellate Authority/Tribunal.

However, later, the Department, except for the years 2003-04, 2004-05 and 2007-08 (April 2007 to December 2007), accepted the stand of the Company that there is no transfer of right to use Trademark as alleged by the Department. Thus, no additional liability can be imposed on the receipts booked under the head of "revenue from bottling arrangement" in the balance sheet.

But the Department kept contesting the issue for the A.Y. 2003-04, 2004-05 and 2007-08 (April 2007 – December 2007) at every stage. Despite the fact the Hon'ble Tribunal and Hon'ble High Court decided the case for the said years in favour of the Company, Department approached the Hon'ble Supreme Court by filing special leave petitions in respect of the said financial years.

The Hon'ble Supreme Court, after noticing that the Department has itself consistently accepted the stand of the Company in other assessment years, dismissed the said petitions of the Department vide its judgment dated 13.10.2022.

Thus, with the order of Hon'ble Supreme Court dated 13.10.2022, all the matters stand settled in favour of the company so far as the Levy of VAT/sales tax and central sales tax on alleged transfer of right to use Trademark under TLA is considered, till the GST period, i.e., 30.06.2017.

Direct Taxes: Income Tax:

By Anil Gupta, Sr. Mentor-Direct Taxes

Checkmate Services Pvt Limited Vs CIT (2022) 143 Taxmann.com 178 (SC)

Employee's contribution to ESI/PF paid before filing of ITR not deductible even for AY before 21-22: SC

The issue before the Supreme Court was concerning the interpretation of **Section 36(1) (va)** and **Section 43B** as to:

Whether deposit of an employee's contribution towards the EPF and ESI after the expiry of the due date under the relevant Acts eligible for the deduction?

The Supreme Court of India held that the Parliament treated contributions under Section 36(1) (va) differently from those under Section 36(1)(iv). The latter is the "sum paid by the assessee as an employer by contribution towards a recognized provident fund".

However, the phraseology of Section 36(1) (va) differs from Section 36(1)(iv). It enacts that "any sum received by the assessee from any of his employees to which the provisions of section 2(24)(x) apply if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date."

These establish that Parliament while introducing Section 36(1) (va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. Accordingly, under the IT Act, the two had a statutory classification.

The essential character of an employee's contribution, i.e., that it is part of the employee's income, held in trust by the employer, is underlined by the condition that it must be deposited on or before the due date.

Amounts retained by the employer from out of the employee's income by deduction, etc., were treated as income in the hands of the employer. The significance of this provision is that, on the one hand, it brought into the fold of "income"; at the time, payment within the prescribed time is to be treated as a deduction (Section 36(1) (va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1) (va) was maintained and continues to be maintained

Since there is a marked distinction between the two amounts' nature and character, the employer's liability is to be paid out of its income. In contrast, the second is deemed an income, and this marked distinction must be borne while interpreting the obligation of every assessee under Section 43B.

Accordingly, the benefit of section 43B can't be made available for the employee's contribution deposited before the filing of the Income-tax Return.

Circular No. 22/2015 dated 17-12-2015 (admits admissibility of even late deposits of PF & ESI under respective laws provided the same is/are deposited on or before the due date of filing ITR, although said Circular bars admissibility of Employees' Contribution to PF/ESI under this Circular).

DCIT Vs Prakash Chandra Mishra (2022) 143 Taxmann.com 121 (Jaipur Trib.)

No Equalization Levy if a person running ads on Google and Target audience, both located outside India

The assessee was an individual operating the business of providing support services for online ads, Digital Marketing and Web Designing. The assessee was an agent of Google Singapore. The assessee carried out an online advertising campaign for his clients to avail of Google Singapore services. During the relevant year, the assessee paid Google Singapore for online advertisement on behalf of his clients.

During scrutiny, the Assessing Officer (AO) made an addition under section 40(a)(ib) for non-charging of Equalization levy (EL) as the conditions prescribed under section 165 of the Finance Act, 2016 are fulfilled.

On appeal, the CIT(A) reversed the order of the AO. As a result, the matter reached the Jaipur Tribunal.

The Jaipur Tribunal has held the assessee was acting only as an agent of Google Singapore. On approaching the assessee, the assessee's client gets login credentials generated by the assessee on the website of Google. Through such credentials, the person on their own runs advertisements on Google. Such a person decides where the advertisement is to be run, in which geographical location, who would be the targeted audience, and how long such advertisement is to run. All such aspects are decided by the person advertising and not by the assessee. The assessee was merely a conduit for getting the advertisement run on Google. Thus, when the intention of the Levy was related to the targeted audience, and the party paying for the online advertising had no relation in India, EL was not attracted.

Goods and Services Tax:

Rakesh Garg, Sr. Mentor IDT & GST

Renting of residential dwelling for use as residence to a registered person:

1. Up to 17 July 2022, “**renting of residential dwelling for use as a residence**” was exempt from GST even if the house is leased to a commercial concern for residence of its employees or directors (*vide Entry no. 12 of N. No. 12/2017-CT(R) dated 28 June 2017*). However, effective from 18 July 2022, the said exemption has been withdrawn in those cases where the residential dwelling is rented to a registered person. Further, in such cases, GST shall be paid by the registered tenant on a reverse charge basis (RCM) @18%.
2. Thus, where premises for residential purposes are rented to an unregistered person, the supply is exempt, and no GST is payable. However, where such premises are leased to a registered person, the tenant shall pay GST on an RCM basis. And where the premises are rented for commercial purposes, then irrespective of the nature and identity of the tenant, GST shall be payable by the lessor on a forward charge basis (subject to threshold limit for registration).

3. However, renting a residential dwelling to a proprietor (in his name) of a registered proprietorship firm, who takes the premises on rent in his capacity for use as his residence and not for use in the course or furtherance of the business of his proprietorship firm and such renting is on his account and not that of the proprietorship firm, the same shall be exempt from GST. [*Seema Gupta v Union of India - 2022 (9) TMI 1387 dated 27.09.2022 (Del. HC)*]
4. Further, the term “registered” means registered in the State where the immovable property is located. For example, suppose M/s ABC is not written in Delhi as it does not make any supply in Delhi despite having a fixed establishment. If ABC-Delhi, takes on rent any property in Delhi, then it shall not be liable for registration in Delhi and pay GST on RCM basis.
5. So far as the eligibility of ITC to the tenant is concerned, in these cases. However, the GST is paid on an RCM basis by the business entity in the course or furtherance of business. The facts remain that the dwelling is used for the residence of self or an employee of the business entity. Thus, the Revenue would deny ITC to the business entity under clause (g) of sec 17(5) of the GST Act, which blocks ITC on goods or services or both used for personal consumption.

Foreign trade policy:

J M Gupta Sr. Mentor-Foreign Trade Policy

India-UAE Free Trade Agreement

The Free Trade Agreement was signed on February 18, 2022, and officially entered on May 1, 2022.

What is a CEPA?

India and the United Arab Emirates signed a **Comprehensive Economic Partnership Agreement** in February this year. Partnership agreements are more extensive than Free Trade Agreements. CEPA is a type of **Free Trade Agreement** which covers the regulatory aspect of trade and involves negotiation on the work in goods, services and investment and other areas of economic partnership.

Key Benefits

This agreement aims to boost bilateral trade in goods to over USD \$100 billion in value and services to USD \$15 billion over the next five years. UAE is currently the ninth most significant investor in India. According to the FY21-22 data, the UAE was India’s third-largest trading partner in 2022.

Customs has a significant influence over the FTA's operation. As per the pact, 90 % of India's exports will have duty-free access to the Emirates and duty from some goods will be removed in a phased manner while effectively rationalised in others. Leather and textiles, gems and jewellery, furniture, agriculture and food products, plastics, engineering goods, pharmaceuticals, medical devices, and sports goods industries will immediately benefit from this agreement.

Regarding CEPA, **India's** tariff commitments for trade-in products cover 11,908 items compared to the **UAE's** obligations, which cover 7,581 items. As a result, India is expected to benefit from preferential market access provided by the UAE. Additionally, India will grant the UAE preferential access to more than 90% of its tariff lines. The aim is to eliminate the tariff on more than 10,000 tariff lines in the following ten years.

Objective

The CEPA with the UAE addresses several topics, including trade in goods and services, **Rules of origin, Technical Barriers to Trade (TBT), Sanitary and Phytosanitary measures (SPS), dispute resolution, the movement of natural persons, telecom, customs procedures, pharmaceutical products, government procurement, IPR, investment, digital trade, and cooperation in other areas.**

Rules of Origin

The rules of origin are a vital part of any Free Trade Agreement. To prevent misuse, the CEPA specifies the Rules of Origin and origin requirements (envisaged in Chapter 3 of the FTA) for obtaining a Certificate of Origin (COO) of Goods. The CEPA states "that goods are considered to have originated in a country if they are entirely obtained or produced on the territory of that country or have undergone sufficient working or production by the product-specific rules".

According to the format outlined in the CEPA, a COO must be issued before or within five working days of the date of export, and a COO shall be valid from twelve months of its issue.

Sanitary and Phytosanitary measures (SPS)

The main objective of CEPA is to cooperate on numerous issues related to trade, people, culture, climate, and other factors. **For example, the CEPA provides sanitary and phytosanitary measures** to protect human, animal, and plant life or health in both India and the UAE to prevent any unjustified trade barriers, increase transparency, and encourage the development and adoption of international standards, guidelines, and recommendations that are based on science. This will also help promote implementing these standards, guidelines, and recommendations.

Technical Barriers to Trade

The Technical Barriers to Trade (TBT) Agreement aims to guarantee that technical rules, standards, and conformity assessment processes are impartial and do not obstruct trade unnecessarily.

Overall the agreement is an enabling pact and will ease and strengthen trade between nations. In addition, the government hopes the agreement with the UAE will resurrect a long-abandoned Free Trade Agreement (FTA) with the Gulf Co-operation Council. This six-nation bloc includes the UAE, Saudi Arabia, Kuwait, Bahrain, Qatar, and Oman, and open up markets in Africa, particularly for India's pharmaceutical industry.

[Source:](#)

www.wto.org

[The Economic Times](#)

[The Indian Express](#)

[Ministry of Commerce and Industry \(dept. of commerce\)](#)

FTP Updates:

1. DGFT has issued a notification no 37 dated 29th September 2022 whereby the validity of Foreign Trade Policy is extended from 30th September 2022 to 31st March 2023.
2. Vide notification no 38 dated 12 /10/2022 DGFT has notified the quota of 397267MT of only broken rice under HS code10064000 to be exported during 2022-23. The quota will be distributed amongst the applicants whose L/Cs were opened and where messages were exchanged before 8th September 2022.
3. DGFT has issued a notification no 39 dated 14th October 2022 whereby earlier notification no 30 dated 27th August 2022 has been amended to the extent that export of wheat flour (atta) will be allowed against advance authorisation; by EOU units; by SEZ units and where it is produced from imported wheat and without Procurement from domestic wheat.
4. DGFT has issued public notice no 29 dated 12th October 2022 whereby the export of raw sugar to the USA under TRQ has been extended from 30th September 2022 to 31st December 2022.
5. DGFT has issued public notice no 30 dated 12th October 2022 whereby SION appearing at sr. No. A254 A267 A282A1939 A1973 A261 A2331 A2539 A2818 A 3056 A3486 are suspended immediately.

Prohibition of Benami Transactions Act- 1988 (as Amended in 2016) applies Prospectively to Recent Developments -

Tarun Rohatgi - Senior Mentor

Recently, the Hon'ble Supreme Court, in the case of *UOI v. M/s. Ganpati Dealcom Pvt. Ltd. (Civil Appeal No. 5783 of 2022) [2022] 141 taxmann.com 389 (SC)* has held that certain amendments carried out by Benami Transaction (Prohibition) Amendment Act of 2016 in Benami Act are prospective. The Hon'ble Supreme Court has upheld the decision of the Calcutta High Court in *M/s. Ganpati Dealcom Pvt. Ltd -421 ITR 483*.

The 2016 Amendment Act brought in substantial changes which amended not only the definition of the Benami Transaction but also the Amended law, empowering the specified authorities to attach benami properties which can eventually be confiscated provisionally.

Before this decision, there were doubts about whether the 2016 amendment Act shall have an effect covering transactions entered before 2016. The Benami Authorities treated the amendments retrospectively and sought to apply the 2016 amendment to past transactions; however, the taxpayers argued the amendments to be prospective. There were conflicting decisions of the High Courts – Rajasthan & Calcutta being in favour and Chhattisgarh -being adverse to the assessee.

The Hon'ble Supreme Court has held:

- (a) Section 3(2) of the unamended 1988 Act is declared unconstitutional for being manifestly arbitrary (Section 3(2) deals with criminal liability). Accordingly, section 3(2) of the 2016 Act is also unconstitutional as it is violative of Article 20(1) of the Constitution. (Article 20(1) prohibits Ex Post Facto laws)
- (b) In rem forfeiture provision under section 5 of the unamended Act of 1988, i.e. (confiscation proceedings), before the 2016 Amendment Act, was unconstitutional for being manifestly arbitrary.
- (c) The 2016 Amendment Act was not merely procedural. Instead, it prescribed substantive provisions.
- (d) In the rem forfeiture provision under section 5 of the 2016 Act, punitive can only be applied prospectively and not retroactively.
- (e) Concerned authorities cannot initiate or continue criminal prosecution or confiscation proceedings for transactions entered into before the coming into force of the 2016 Act, viz., 25-10-2016. Because of the above declaration, all such prosecutions or confiscation proceedings shall stand quashed.
- (f) As this Court is not concerned with the constitutionality of such independent forfeiture proceedings contemplated under the 2016 Amendment Act on the other grounds, the questions above are left open to adjudication in appropriate proceedings.

It may be noted that certain questions have been left open by the Supreme Court, which may come in some other proceedings before it; however, for pending litigations where a person has entered into any transaction before 25.10.2016, we would advise moving miscellaneous applications at various judicial forums were ever such disputes are pending since these transactions cannot be subjected to the manifestly arbitrary provisions of the Prohibition of Benami Property Transactions Act, 1988, which has been held to be violative of Article 20(1) of the Constitution.

For Previous articles on **Prohibition of Benami Transactions Act- 1988 (as Amended in 2016)** by **Tarun Rohatgi**:

1. (2020) 116 Taxmann.com 88 (Article)
2. (2019) 108 Taxmann.com 235 (Article)

Corporate Laws:

Jatin Sehgal: Sr. Partner Corporate Laws

The Transfer of Assets among the Group Companies Ex-Facie does not tantamount to Fraudulent Trading:

The Hon'ble NCLT, Chennai, in the case of *Renuka Devi Rangaswamy Vs. M/s Regen Powertech Private Limited and Ors.* in Comp. (AT) (CH) (Ins) No. 357 / 2022 & IA/814/2022, held that the Transfer of Assets among the Group Companies ex-facie is not a Fraudulent Trading, as per Section 66 (1) of the IB Code, 2016.

The NCLT observes that whenever fraud on a Corporate Debtor is committed while carrying on its business, it does not mean that the business is being carried on with the intent to defraud its creditors.

In the absence of any order from the adjudicating authority appointing a liquidator, Resolution Professional's continuation as a Resolution Professional is not in contravention of any provisions of IBC, and his fees are payable:

The Hon'ble NCLT, Chandigarh, in the case of *Mr Sameer Rastogi, erstwhile RP Tara Chand Rice Mills Pvt. Ltd. Vs Mr Rakesh Ahuja, Liquidator of M/s. Tara Chand Rice Mills Pvt. Ltd* in IA No.953/2020 in CP (IB) No.121/Chd/Hry/2017 has adjudicated the issue of whether the application for the payment to the Resolution Professional for the period beyond what was expressly approved by the CoC is maintainable or not.

It has been observed and held by the NCLT, Chandigarh that in the absence of any order from this Adjudicating Authority appointing a liquidator the applicant's continuation as an RP is not in contravention of any provisions of IBC and as the company is already under liquidation, the liquidator was directed to disburse the professional fee of RP at the rate approved by CoC.

Reach us:

N.K. Gupta

Advocate

Founder & Managing Partner



delhi@legalworldgroup.com



+91-9911152709; 011-35730674

011-35730703



www.legalworldgroup.com

Registered Office & Head Office:

C-582, Defense Colony, New Delhi-110024

Offices:

Haryana; Uttar Pradesh; Uttarakhand; Jammu & Kashmir; Punjab; Chandigarh (UT); Rajasthan; Madhya Pradesh; Tamilnadu; Kerala.

DISCLAIMER:

This newsletter contains general information only, and NIC LEGAL WORLD LLP is not using this document, rendering accounting, business, legal, tax, or other professional advice or services. This document is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking action that may affect your business, you should consult a qualified professional advisor.