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FOREIGN LAWYERS & FIRMS TO PRACTICE IN INDIA

N K Gupta
Founder & Managing Partner

In a move that could transform the legal landscape, the Bar Council of India has allowed foreign lawyers and law firms to practice law in India on a reciprocity basis.

What's allowed for the foreign lawyer and Law Firms in India

- Practice law in India in non-litigious matters only
- Entitled to transacting business, giving advice and opinion
- Providing legal expertise/advice and appearing as a lawyer for a person, firm, company, corporation, trust, society etc., who/which has an office in a foreign country in any international arbitration case
- Can advise on issues relating to countries other than the Indian Laws only
- Can provide legal expertise/advice concerning the laws of the Country of primary qualification
- Open law office or offices in India
- Can enter into Partnership with one or more Foreign Lawyers or Foreign Law Firms registered in India under these rules
- Allowed to practice transactional work /corporate work such as joint ventures, mergers and acquisitions, intellectual property matters, drafting of contracts

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What's not allowed for the foreign lawyer and Law Firms in India

Foreign lawyers or law firms are not permitted to appear before any court.
Shall not be involved or permitted to do any work of conveyancing of property, Title investigation or other similar jobs.

Practice

A foreign lawyer registered under the rules shall be entitled to practice law in India in non-litigious matters only, subject to such exceptions, conditions and limitations as are laid down under these Rules. The person shall be deemed an advocate within the meaning of sections 29, 30 and 33 of the Act qua such acts and deeds as are envisaged to be performed by him under these Rules as a foreign lawyer.

Foreign lawyers or law firms shall not be permitted to appear before any courts, tribunals or other statutory or regulatory authorities.

But what's the real catch??

Amongst Buzz, in the **recent notification, BCI clarified that foreign law firms and lawyers would only be allowed to advise** their clients about foreign and international laws.

Although Foreign lawyers were already in Practice before this Notification and were advising the Clients based on **"Fly in and Fly out"**. However, the Bar Council of India is now open to granting a license and Recognising Foreign lawyers to Practice in India conditionally.

However, Major Development is, foreign lawyers can provide legal expertise/advice and appear as a lawyer for a person, firm, company, corporation, trust, society etc., who/which is having head office in a foreign country in **any international arbitration case** which is conducted in India.

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FUTURE OF AI: CHAT GPT

Prem Chandra Vaish
Principal Director

Since The release, OpenAI's GPT has taken the tech world by storm. Now the buzz revolves around the GPT-4 (The next Level of GPT-3). Most surprisingly, the chat GPT had excelled in the world's toughest exams, including the US Bar exams, SAT etc. Let's discuss this Revolution.

What is Chat GPT?

ChatGPT is an Artificial Intelligence chat BOT and is based on a large language model developed by OpenAI. It is designed to generate human-like responses to various prompts and questions.

It is a pre-trained generative chat using Natural Language Processing (NLP). Its data source is textbooks, websites, and various articles, which it uses to model its language for responding to human interaction.

ChatGPT has been trained on a vast amount of text data from the internet, which allows it to understand natural language and produce coherent and relevant responses to queries.

ChatGPT uses a deep learning algorithm called a transformer to generate responses to user input. The transformer is a neural network that significantly improves natural language processing tasks. For example, it can generate creative writing based on a given prompt or topic, such as poetry or short stories.

ChatGPT is an excellent tool for getting information in summary form, which saves time and delusion. Its ability to generate coherent and engaging text in response to prompts, adapt to new tasks and domains, and develop advanced conversational interfaces make it a valuable asset for businesses, researchers, and individuals.

How can ChatGPT help?

Legal Research: ChatGPT can help law firms quickly research and retrieve relevant information on legal cases, statutes, and regulations from a vast amount of legal data available on the internet.
Document Review: ChatGPT can assist in the review and analysis of legal documents, such as contracts, briefs, and opinions, by quickly identifying relevant clauses and highlighting discrepancies or errors.
Due Diligence: ChatGPT can assist in due diligence by analyzing large amounts of data and documents, flagging potential legal issues, and helping law firms make informed decisions.
Compliance: ChatGPT can assist in ensuring compliance with regulatory requirements by analyzing and identifying relevant regulations and helping law firms to develop appropriate policies and procedures.
Legal Writing: ChatGPT can assist in legal writing by generating drafts of legal documents, such as contracts and agreements, and by providing suggestions for revisions and improvements.
Customer Support: ChatGPT can assist in customer support by answering frequently asked legal questions promptly and efficiently, addressing client concerns.
Overall, ChatGPT can help increase productivity, improve accuracy, and reduce costs by automating repetitive and time-consuming tasks, and one can focus on higher-value work.

OBSERVATIONS

Smart + Work: It is going to help in Reducing the Burden.

60% Assistance: Total dependence on AI is not justifiable. The Chat Bot is equipped with Artificial Intelligence with limited data and smartness to share, which is still far from Human Intelligence and Experienced Professionals in addressing complicated questions. Therefore, one might take a primary percentage of Help from these bots but can't rely entirely on any information. Time-Saving: It saves enormous time and can assist in Every Domain of Law.

Good so far, but not so Great!

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GOODS AND SERVICES TAX - MARCH 2023

Rakesh Garg
Sr. Mentor IDT & GST

1Claim of ITC – Burden of proof – Hon'ble Supreme Court on 13.03.2023

In the case of **State of Karnataka vs. Ecom Gill Coffee Trading (P) Ltd. 2023 (3) TMI 533 (SC),** the Supreme Court, about sec 70 of the Karnataka VAT Act, held that burden of proving the correctness of ITC remains upon the dealer claiming such ITC. Therefore, it cannot be shifted on the revenue.

In the absence of any other convincing material, like furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. and the actual physical movement of the goods by producing the cogent materials, the Assessing Officer was justified in denying the ITC.

The Supreme Court also observed that in the case On Quest Merchandising [6093/2017 & CM No. 25293/2017 dated 26.10.2017], the burden to prove the genuineness of transactions was not the issue before the Delhi High Court.
It is important to note that the GST Act also has similar provisions, and its sec 155 reads, "**Where any person claims that he is eligible for an input tax credit under this Act, the burden of proving such claim shall lie on such person**."

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Service of notice – Hon'ble Supreme Court on 15.03.2023

In the case of CTO vs. Neeraja Pipes Pvt. Ltd.- 2023 (3) TMI 688 (SC), the Supreme Court observed that challenge to the service of an order does not survive when the assessee has the information of the issue of the order. The Court relied upon its earlier judgment in the case of Amina Bi Kaskar (D) vs. U.O.I. (2018) 16 SCC 266 (SC), which held,

"If the appellants knew the order passed against them and which they admit to having as per their own admission mentioned above, pursuant to which they filed appeals, then in our opinion, so-called irregularity in the manner of effecting the service of the order on them, etc. was of no consequence and cannot be termed as illegal per se (if found to exist though denied by the Revenue)."

In this regard, sec 160(2) of the GST Act reads,

"The service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the person to whom it is issued or where such service has not been called in question at or in the earlier proceedings commenced, continued or finalised under such notice, order or communication."

CHALLENGE FACED BY INDIAN ARBITRATION REGIME DESPITE STIPULATING TIME LIMITS TO COMPLETE ARBITRATION

Vijay Sharma
Senior Partner

Time Frame for Completion of Arbitration Proceedings

Section 29A of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the A&C Act") deals with the time limit for passing an arbitral award and it provides that an arbitral tribunal has a time **limit of 12 months** to complete the arbitration proceeding and pass the arbitral award from the date on which the pleadings stand complete.

According to Section 23 of the A&C Act, the filing of pleadings, i.e., statement of claim, statement of defence and rejoinder, if any, **must be completed within six months** from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

Accordingly, a total period of 12 months from the time of completion of pleadings is available for an arbitral tribunal to pass an award in a matter, i.e., a maximum of six months for completion of pleadings and **another 12 months for completion of the rest of the proceedings.**

The timeline can be further extended by another six months only by the mutual consent of the parties. The said timeline has been introduced through the amendment of the Act made by way of the Arbitration and Conciliation (Amendment) Act of 2019, which, was rendered effective through a notification dated 30.08.2019.

While the said timeline under Section 23 is mandatory for domestic arbitration, it is only recommendatory for international commercial arbitration. Before the amendment of 2019, a total time of 12 months was available to the tribunal to complete the entire arbitral proceeding including the pleadings. The introduction of Section 29A is a laudatory step and it has contributed in the expeditious disposal of arbitration proceedings.

The Final Disposal

However, in **majority of the arbitration cases, either the award passed by the arbitral tribunal is challenged** by the either side by preferring Application under Section 34 of the A&C Act or the decision given by the Courts while disposing Application under Section 34 of the A&C Act is challenged by preferring Appeal under Section 37 of the A&C Act before the Courts.

Since the Courts in India have a large number of pendency, disposal of the **Applications under Section 34 of the A&C Act and Appeals under Section 37 of the A&C Act takes number of years**, which, in reality jeopardizes the stakes of the party in whose favor the arbitral award was passed by the Arbitral Tribunal.

So, despite stipulating the timelines for completion of arbitration proceedings, the **Indian Arbitration regime is yet to overcome this challenge so that the objectives with which the A&C Act was brought in force are met.**

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REFUNDS WITHHELD BY THE DEPARTMENT. WHAT OPTIONS DO TAXPAYERS HAVE?

Puneet Agrawal
Senior Partner

The **Success and Size of a Business** is directly proportionate to **quantum of Capital infused by assessees.** The taxes which are paid by an individual assessee or a corporate assessee, when due as refunds, form one of the major components of Capital. Therefore, it is utmost important that the taxes so paid are available to the assessees in the form of refunds in a timely manner.

The significance of timely refund is very well understood by the Legislature, therefore the **intent of the Legislature is always to grant the refund to the assessees in the timely manner.** The intent of the legislature is evident from the language of statutes wherein fixed timeline are given for granting of refund and when the timelines are crossed, then the interest is to be paid along with the refunds.

However, on numerous counts, it is seen that the Actions of Administrative Authorities, responsible for disbursing the refunds, are not synchronized with the intent of legislature and objects of the Statutes. This leads to inordinate delay in granting of refunds to the assessees, for which they are legally eligible. **Refunds are sometimes withheld for years** on the grounds of technicalities, on the grounds that some imaginary demands are pending, on the grounds that the claim of the refund is wrong, and in number of cases for no reasons at all. Even if an assessees is successful in obtaining the refund after great ordeal, in number of cases, interest is not given to the asseessees.

What can an assessee do in such cases? Is option of Knocking at the doors of High Courts available?

If the Department do not follow the statute and withhold the eligible refunds, then the assessees may knock the doors of High Courts. In refunds matter, the High Courts have been intervening time and again and safeguarding the rights of assessees. Strict directions are given to the Respondents to grant the refunds along with the statutory interest in timely manner. To quote a few instances:

i. W.P.(C) No. 1528 of 2023 - Ircon International Ltd. v. CIT.
For the assessment years 2001-02 to 2003-04, the refund and interest amounting to more than Rs. 55 Crores was due to the Petitioner for more than 15 years. After running from post to pillars, the Petitioner knocked the doors of Hon'ble Delhi High Court and within a period of 2 months significant amount of the refund amount was credited in the Bank Account of the Petitioner and that too along with interest.

ii. W.P.(C) No. 12746/2022 – Aditya Birla Retail Ltd. v. Commissioner DVAT & Ors.
The refund amount of Rs. 15 Crores was due to the Petitioner for the AY 2013-14. The AO raised the demand of Rs. 14 Crores and withheld the refund. The demand was set aside in 2018. However for long 4 years, the Department withheld the refund. the Petitioner knocked the doors of Hon'ble Delhi High Court and within a period of 1 month, complete refund amount was credited in the Bank Account of the Petitioner and that too along with interest.

iii. W.P(C) No. 9314/2019 – HCL Infosystems Ltd. v. UOI.
The GST Refund amounting to Rs. 5.5 Crores was rejected by Department without giving any reason and without hearing the Petitioner. The Petitioner approached the Hon'ble Delhi High Court and the Hon'ble Delhi High Court set aside the refund rejection order and directed for the disposal of refund. The refund was granted to the Petitioner in the year 2019, and after 3 years, the Hon'ble Delhi High Court, also directed the Department to grant the interest to the Petitioner.

Way Forward:

If an assessee is eligible for a refund under Income Tax/VAT/GST and the same is not given in the prescribed period of time, then **the assessee may the follow the following steps:**

i. Request the Department for granting of refund along with interest.
ii. If there is no action from the end of the Department, then the assessee can knock the doors of the Hon'ble High Courts under Writ Jurisdiction.

GLIMPSES OF SIGNIFICANT DIRECT RULINGS – MARCH 2023

Tarun Rohatgi
Senior Mentor,
B.com(Hons), FCA , LLB

Black Money Act

1.Authorities under Black Money Act cannot act mechanically and without application of Mind

[2023] 148 taxmann.com 238 (Karnataka) HIGH COURT OF KARNATAKA Jitendra Virwani v. Joint Commissioner of Income-tax.

Where Joint Commissioner issued a notice under section 10 of Black money Act upon assessee on ground that an information was received from Income tax department that assessee as a beneficial owner of a company, since there was no proper application of mind both at stage of sending information by Income tax department and by authorities under BM Act before issuing said notice and, further, Tribunal under Income tax proceedings had also held that burden was not discharged to prove that assessee was beneficial owner of a company, impugned notice was to be quashed .

2. Where assessee filed a writ petition challenging vires of certain sections of Black Money and Imposition of Tax Act, 2015, a notice was to be issued to Advocate General

[2023] 146 taxmann.com 178 (Bombay) Anil Dhirajlal Ambani v. Union of India

A show-cause notice was issued under sections 50 and 51 of BlackMoney (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 on petitioner based on assessment made against him by Deputy Director of Income-tax- Petitioner challenged said notice on ground that since his civil appeal against said assessment was pending before Commissioner (Appeals), it would be premature at this stage to take any criminal action - He further filed a petition challenging vires of certain sections of BlackMoney (Undisclosed Foreign Income & Assets) and Imposition of tax Act, 2015 on ground that since said act came into force in year 2015 whereas alleged transactions were of assessment year, 2006 and 2010-11, criminal provision of sections 50 and 51 could not have a retrospective effect - High Court ordered stay of criminal proceedings. pursuant to impugned show-cause notice until respondent had made their submissions sought by assessee in reply to show-cause notice - notice was to be issued to Advocate General regarding petition filed by petitioner and stay granted earlier to be extended till next date of hearing .

Income Tax Act

3. Private Discretionary Trust created for benefit of self and relatives- Settlement not income and not hit by provisions of Section 56(2) . ITO v. Aam Family Private Trust (Mum.)(Trib.) www.itatonlline.org

The assessee is a private discretionary trust. Settlor Mrs Archana Miglani settled moveable assets (Value of equity shares) in favour of the trust. The beneficiaries of the Trust are, self, co-sister in law, Mother in law, children of Mrs Archana & Children of Mr Anuj Miglani, Children of Mrs Priyanka & Mrs Ankit Nephew & Nice of Miglani. The Assessing Officer treated the entire value of moveable assets (Value of equity shares) settled by settlor of the Trust, Smt Archana Miglani in favour of trust by treating the same as income under section 56(2)(x) of the Act . On appeal the CIT(A) deleted the addition. On appeal by Revenue ,dismissing the appeal of the Revenue the Tribunal held that, the discretionary trust created by Smt. Archana Miglani for the benefit of her self, her co -sister in law, mother in law, own children, nephew and niece any sum of money received by the assessee trust is not covered under section 52(2)(x) by virtue of the proviso. Tribunal also held that assessee in this case a pass through entity and it was the settlers money/ property which is given to the private discretionary trust for benefit of herself and her relatives.

4.Reassessment proceedings under section 148 of Income-tax Act, 1961 cannot be initiated merely for verification of the information reflected on the Insight Portal.

Digi1 Electronics Pvt. Ltd. vs. Assistant Commissioner of Income Tax (Bombay High Court) 148 taxmann.com 184 (Bombay)[08-03-2023]

Assessee company, engaged in business of electronic appliances, filed its return of income which was accepted and an assessment order was passed - Later on, an information was received on insights portal that high risk transactions had taken place in case of assessee which was required to be verified - On basis of same, Assessing Officer issued a reopening notice upon assessee - It was noted that there was no any mention about "cash credits and subsequent debits" in reasons recorded - Moreover, as per reasons itself transactions were to be verified - Further, there was no new tangible material as contended by revenue - Debits and Credits could not in any way disclose nature of transactions or lead to an inference of income escaped assessment -There was no live link or nexus between information received

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APPLICATION UNDER SECTION 12A OF INSOLVENCY AND BANKRUPTCY CODE, 2016

Jatin Sehgal
Senior Partner

Company Law

The application under section 12A for withdrawal cannot be said to be kept pending for constitution of CoC, even where such application was filed before constitution of CoC

Supreme Court Bench of Justice B.R. Gavai and Justice Vikram Nath observed,

"the application under section 12A for withdrawal cannot be said to be kept pending for constitution of CoC, even where such application was filed before constitution of CoC,".

"The IBBI which had the power to frame Regulations wherever required and in particular section 240 of IBC for the subjects covered therein had accordingly substituted Regulation 30A dealing with the procedure for disposal of application for withdrawal filed under section 12A of IBC,".

"The substituted Regulation 30A of IBC as it stands today clearly provided for withdrawal applications being entertained before constitution of CoC. It does not in any way conflicts or is in violation of section 12A of IBC. There is no inconsistency in the two provisions. It only furthers the cause introduced vide section 12A of IBC".

WRIT PETITION IN CONTRACTUAL MATTERS

Mudit Sharma
Senior Partner

In a dispute between Gas Authority of India Limited **(GAIL) (a Public Sector Undertaking**) and Indian Petrochemicals Corporation Ltd (**IPCL**) (**an erstwhile Public Sector Undertaking**) the Hon'ble Supreme Court has held 1 that a Writ Petition challenging the clauses of a Contract containing an Arbitration Agreement was maintainable.

Briefly the facts were that **IPCL** had entered into a Contract with **GAIL** for supply of natural gas and IPCL had to lay down its own Pipelines and those pipelines alone were to be utilized for carrying gas.

In this regard a Contract was entered. In terms of the Contract, GAIL levied "**Loss of Transportation Charges**".

Clauses of the Contract were primarily challenged in a Writ Petition on 2 (two) grounds

(i) arbitrary and unfair; and

(ii) unequal bargaining power. It was contended by IPCL that GAIL occupied a monopolistic position in respect of supply of gas. During the pendency of the dispute IPCL ceased to be a Public Sector Undertaking.

The **Hon'ble Supreme Court held** that the **Writ Petition was maintainable despite existence of alternate remedy as the actions of Public Sector Undertaking i.e. GAIL were ex facie discriminatory and the contractual exercise of providing such clauses runs contrary to every commercial and common sense and thus is manifestly arbitrary.**

The Hon'ble Supreme Court proceeded to uphold the quashing of the clauses of the Contract in a Writ Petition despite existence of an alternate efficacious remedy and delay on the part of IPCL in challenging the provisions of the Contract.

With all respect and regard to the Hon'ble Supreme Court, it is unclear as to how two Public Sector Undertakings can be concluded to be in different bargaining positions, further, the Contract was commercial contract containing an arbitration agreement and the issue of unequal bargain and / or abuse of dominance between two Public Sector Undertakings most respectfully in our view would **a triable issue which could have been avoided to be dealt with under Writ Jurisdiction.**

Another aspect of the matter is that opening of option to challenge contracts with a Public Sector Undertaking in Writ Jurisdiction increases the burden on already burdened judicial infrastructure.

No doubt, in exceptional matters Writ Jurisdiction can be invoked and the facts of each case would be relevant to determine the same and **in the view of Hon'ble Supreme Court the present case was an exceptional matter.**

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JURISDICTION UNDER ARTICLE 226 OF THE CONSTITUTION

Deepak Vijay
Senior Partner

Service Law

Writ Petition Against Armed Forces Tribunal Orders Maintainable in High Court

Supreme Court bench of Justice Sanjay Kishan Kaul, Abhay S. Oka, and B.V. Nagarathna J.J, ruled in a set of petitions that the High Courts can decide on orders made by the Armed Forces Tribunal, thereby overturning the decision in **Union of India v. Major General Shri Kant Sharma, (2015),** which had prohibited the use of jurisdiction under Article 226 of the Constitution of India for cases challenging orders passed by the Armed Forces Tribunal.

Apex Court did not agree with the views expressed in the case of Major General Shri Kant Sharma (mentioned above), which had aimed to restrict the use of **jurisdiction under Article 226 of the Constitution** and weaken an important aspect of the Constitution's basic structure.

The Court believed that the principles of basic structure have been validated over time and have been highlighted in numerous judicial rulings as the ultimate test.

The Court also stated that the self-restraint of the High Court under Article 226 is different from imposing a restriction on the High Court while reviewing a decision arising from an order of the Tribunal.

Supreme Court in it's order said,

"The principles of basic structure have withstood the test of time and are emphasized in many judicial pronouncements as an ultimate test...the self-restraint of the High Court under Article 226 of the Constitution is distinct from putting an embargo on the High Court...while judicially reviewing a decision arising from an order of the Tribunal."

Union of India vs. Parashotam Dass, 2023

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C-582, Defence Colony, New Delhi-110024