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COGNIZANCE

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INSIDE THIS ISSUE:

Vodafone tax liability setback at The Hague a serious loss for India?

In a unanimous decision of the Permanent Court of Arbitration at the Hague ruled in favour of the British telecommunication company, Vodafone stated that India's retrospective demand of Rs. 22,100 Cr. as capital gains and withholding tax imposed on Vodafone violated fair and equitable treatment and was held as a breach of the investment treaty agreement between India and the Netherlands a.k.a. the Netherlands-India Bilateral Investment Treaty (BIT).

In May 2007, Vodafone had bought a 67% stake in Hutchison Whampoa for $11 billion. This included the mobile telephony business and other assets of Hutchison in India. In September that year, the India government for the first time raised a demand of Rs 7,990 crore in capital gains and withholding from Vodafone, saying the company should have deducted the tax at source before making a payment to Hutchison. This order was challenged by Vodafone before the Bombay High Court, which ruled in favour of the Department of Income Tax, and subsequently before the Supreme Court which held that Vodafone was not required to pay any taxes and demanded Income Tax Department. However, that same year, the then finance minister, Late Pranab Mukherjee, proposed amendments to the finance Act which gave power to the Income Tax Department to retrospectively tax such deals, as a result of which the onus of paying the taxes fell back on Vodafone. The Adjusted Gross Revenue (AGR) calculation is what the government and telecom majors have had a disagreement over since 2005. The telecom companies argued that AGR should include income only from telecom operations whereas, the government ,that is, the Department of Telecommunications(DoT) disagreed and said it should also include non-telecom incomes like the sale of assets, interest on deposits, rents, etc.

Vodafone runs out of talktime

The Supreme Court accepted the definition by the DoT and ordered the telecommunication firms to pay off the AGR dues which undoubtedly put the those under tremendous pressure. The Supreme Court termed the contentions raised by the telecommunication companies as frivolous; and held that not only the original charges, but principal interest and penalties on delayed payments would also be payable. A Supreme Court bench led by Justice A. Mishra delivered its final verdict regarding this issue on September 2020. A 10 year timeline was allowed to the telecommunication companies to clear its dues, which was to begin from April, 2021. The companies were required to make an advance payment of 10% of the dues and the Court clarified that there will be no revaluation of the dues.

The judges warned the businesses that failure to pay the instalments o the AGR-related dues would invite penalty, interest and contempt of court.This posed a grave challenge for the debt ridden Vodafone India Ltd. With a staggering liquidity stress, a shorter repayment timeline is a big setback for Vodafone making capital investment in license fees and spectrum usage a primary concern. Further, repayment of such expenditure would require higher tariffs, cost savings, and an equity capital infusion. It was very much likely that most financial institutions would refrain from lending large amounts of money to Vodafone, considering its indebted condition, making revenue targets unattainable within the stipulated timeline.

Decision of the Arbitration Tribunal

However, in the International Arbitration proceedings, which were initiated by Vodafone India Ltd. against the Government of India back in 2014, the award was passed in favour of Vodafone, thus stating that the government should stop seeking AGR dues from Vodafone and infact should pay about 40 crore as partial compensation for its legal costs.

This ruling was passed based on the reasoning that the demand by the Indian Government was violating "fair and equitable" treatment through its demands and was in breach of the investment treaty agreement between India and the Netherlands, the Netherlands-India Bilateral Investment Treaty. This treaty was signed between India and Netherlands in 1995 or promotion and protection of investment by companies of each country in the other's jurisdiction. Among the various agreements, the treaty stated that both countries would "encourage and promote favourable conditions for investors" of the other country and that the two countries would, under the BIT, make sure that companies present in each other's jurisdictions would be "at all times be accorded fair and equitable treatment and shall enjoy full protection and security within the territory of the other". Although this treaty came to an end in 2016, Vodafone India Ltd. was able to fully secure its interests under it

This award definitely gave a very valuable relief to Vodafone India Limited, however, it will also have implications on other international arbitration cases over retrospective tax claims and cancellation of contracts.If other companies were to follow suit, the Government of India could end up paying burning a hole in its treasury for damages if it loses. The Government has reportedly decided to act on the opinion of the Solicitor General Tushar Mehta to challenge this arbitration award. The government lawyer has reportedly advised that an arbitration tribunal's decision cannot go against the law passed by a sovereign parliament, and hence it is liable to be challenged. It is debatable whether the fault lies in the tax laws and the amendments made thereof, however the after effects will have to borne by the entire economy regardless.

AT A GLANCE:

1. In May 2007, Vodafone had bought a 67% stake in Hutchison Whampoa for $11 billion.
2. India revised the tax statute which resulted into Vodafone having to pay heavy taxes.
3. The demand was challenged by Vodafone at various stages but the decisions seemed to favour the Indian Tax Authorities (Government of India).
4. In the final verdict in September 2020, the Supreme Court decided against Vodafone India Ltd. and allowed a period of 10 months to clear all the dues.
5. In the International Arbitration proceedings the demand by India was held to be violative of "fair and equitable" treatment and thus the debt on Vodafone was waived off.

Re-thinking Cybersecurity risks and Prevention of Sexual Harassment (PoSH) concerns during WFH

The nationwide disruption led to one of the largest Work From Home ("WFH") experiments in the world thereby making it the new "normal" amidst the pandemic. Since workplaces moved into people's homes, an uncharted territory for companies to regulate their employees, the bigger question is what exactly constitutes these concerns? Across the globe, this novel working style has been plagued with issues that largely remain unaddressed such as cybersecurity, work ethics and sexual harassment at workplaces. This nebulous situation may impact companies in the long run and so organisations are required to make long-term adjustments to adapt working practices and culture until the COVID-19 dust settles.

Cyber Security Risks

With every institution shifting to digital space, companies have been steadily witnessing a rise in cyber-attacks, frauds and crime that can seriously and negatively affect the already ailing business enterprise. With the lack of IT expertise and data security protocols, employees working from home are particularly vulnerable to phishing scams due to human errors and allow hackers easier access to the network's traffic. However, proprietary confidential data and information pertaining to businesses are being accessed from such unsecured laptops and desktops, thereby leading to an increased exposure to phishing, email scams, and ransom ware attacks by cybercriminals. "

Managers are in dire straits to reassess the legal, technical and personal dimensions of the cyber-security threats to their data, and proactively evaluate loss prevention processes. The combination of flawed technology and human errors make WFH a cybersecurity concern. there is a need to develop good cyber-security habits to reduce associated risks amidst the mass digitization of businesses.

The present data protection regime namely, the ***Information Technology Act, 2000 and Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011,*** fail to protect individual interest in today's time thus making it imperative for businesses and employees to strengthen data security protocols and etiquettes. Using personal email on the laptops/computers authorized by the organization can create data thefts and raise concerns. This is because emails from unknown sources may pose a threat to the data downloaded and transferred from these emails. Therefore, it is mandatory to use only the emails provided by the organization while handling any sensitive data. The workplace should make it mandatory for the employees to either use the systems provided by the organization or one that has been approved by the organization.

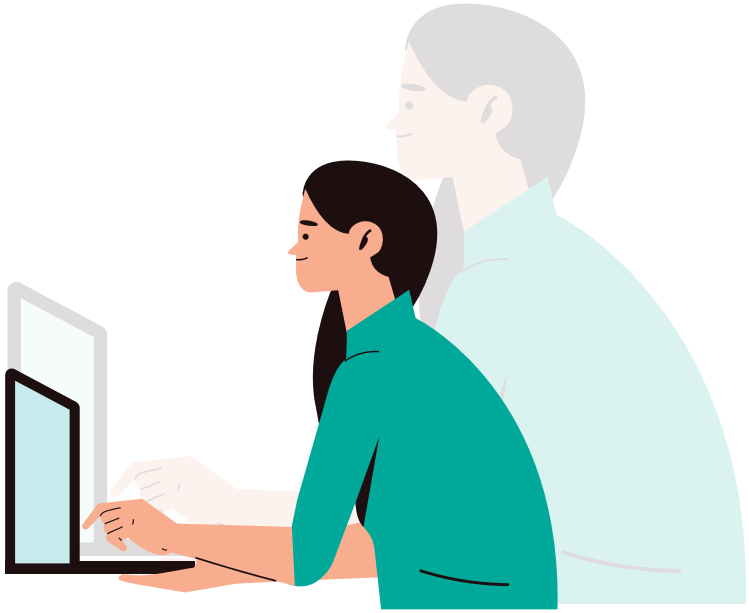
All these systems, then, must necessarily have a pre-installed and authentic anti-virus programme (either on the cost of the organization or otherwise) to avoid

any loss of data or third-party malware to access sensitive data. Thus, stakeholders involved must ensure highly-secure working platforms for employees, create awareness of good security habits, conduct due diligence and be vigilant, so as to quick action to salvage any loss.

Preventing Sexual Harassment at Work (From Home)

It goes without saying that employees must adhere to the organization's code of conduct and sexual harassment policies irrespective of the place of work. This raised a pertinent question – whether the ***Sexual Harassment of Women at Workplace Prevention, Prohibition and Redressal) Act, 2013; POSH Act*** is applicable to harassment occurring through an online platform. The legislation was enacted as a comprehensive one to provide a safe, secure and enabling environment, free from sexual harassment.

Another question that arises is even if the harassment is recognised, are there any legal remedies that available to the victims of sexual harassment online while the courts have partially shut down. Firstly, ***Section 2(o)*** of the Act defines "workplace" in an inclusive and non- exhaustive manner which under its sub clause (vi) includes 'a dwelling place or a house'. Although, the spirit of the Act refers to the domestic servants and helpers who are employed in a dwelling place or a house when it means that workplace includes a dwelling place or a house. However, given the unprecedented situation, and on application of literal rule of interpretation, the meaning of workplace shall also encompass Work From Home for most job roles thereby broadening the definition of workplace from the traditional 'registered office' to 'any place visited by the employee arising out of or during the course of employment' including their dwelling place or house.



What accurately consists of sexual harassment online has been defined in ***section 2(n)*** of the Act, which is yet another non-exhaustive and inclusive clause defining "sexual harassment", which deals with the expressed or implied unwelcome acts or behaviour demanding or requesting sexual favours, making sexually coloured remarks, showing pornography and any other unwelcome verbal or non-verbal conduct of sexual nature, respectively. This was reiterated in the case of ***Jahid Ali vs.Union of India & Ors***. in 2017, wherein the Delhi High Court considered sexually coloured messages over mobile phone, as sexual harassment of a woman under the POSH Act.

Finally, how does one tackle the situation? Organisations must maintain robustness of ethics and rigour on the PoSH agenda to ensure that the value system and execution of policies remain true to intent. Employees must be advised on where to draw the line between work and private life and establish their own liability as employers. The problem arises when the woman has to explain the situation to the HR, and virtually it becomes a minefield for them to either risk their employment in an already sensitive environment where people are laid off from their jobs every day. Government intervention is essential in strengthening the POSH Act when sexual harassment has been pushed down in priorities of companies, who are more focused on rebuilding themselves in a crumbling economy. In the view of above, the employer and employee are two sides of the same coin who must sail together during this difficult storm of Covid-19.

Hospitality laments' a pitch-black Friday despite reopening of industry

The virus-induced lockdown and social distancing norms incinerated the revenues and survival of the travel, tourism and hospitality industry. Mass unemployment, business disruptions, vacant hotel rooms have further aggravated the woes of the hospitality industry. On a business level, the impact of the crisis has percolated across verticals from luxury, to niche and budget market players jeopardizing their survival in these turbulent times.

The redemption of the crippled hospitality sector is contingent upon people and their urge to socialize, which has been thwarted on account of the pandemic thereby hurling the sector in an unfathomable abyss of debt and losses. In addition to this, the sector's dependency on aviation, tourism and travel industry makes its recovery agonizingly difficult. To ease the wounds of the sector, the government introduced an array of economic packages such as providing a loan moratorium, relaxation in tax and corporate compliances, etc. to ease the burden of cumbersome paperwork and processes in a time where business operations have been adversely affected. The packages and relaxations ushered in a glimmer of hope during the industry wide gloom, however recovery at the grassroots level may take longer than anticipated, leaving numerous industry players in the lurch.

Measures by RBI

In RBI's endeavor to provide interim relief, it announced loan moratorium on interest and principal repayment for three months extendable to six months for the hospitality sector thus providing an immediate but short-term relief to survive the pandemic. The Hotel Association of India requested the government and RBI to extend the moratorium on interest and repayment of principal for the entirety of the Fiscal Year 2021 till 31 st March. It is an industry-wide belief that such an extension would ease short-term financial trenches, however a pressing issue is whether the industry can take flight while balancing the costs incurred for safety measures and economic survival in the long term.

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However, with the conclusion of the moratorium period, the Finance Ministry introduced a one-time debt restructuring package for ailing business sitting on large debt piles. This measure is another short-term infusion shot by the government aimed at keeping businesses afloat, however in a capital- and labour-intensive industry such as hospitality with high fixed costs and pay rolls, this may provide for a breather for many players. In principle, this measure appears equitable; however, in practice, hotel and restaurant owners have experienced procedural roadblocks in availing the one-time restructuring facility due to reservations and non-cooperation by banks. Therefore, intervention by the government and RBI is pertinent to ensure fair and equitable implementation of the scheme and penalize institutions that ride against the spirit of the scheme.

Thus, it goes without saying that the slew of measures announced by the RBI and government to alleviate liquidity woes of financial institutions, may have lesser impact in the short term, but a one-time credit rebuilding framework, if implemented properly, may become an attractive option for businesses who intend to stay competitive and progressive in these difficult times. In particular, financial support from the government is imperative for MSME entities such as bed & breakfast, hostels, pubs, cafés, restaurants, bistros and beach bars to name a few, which are vulnerable and worst hit by change in general. Therefore, infusing adequate liquidity and relaxations into smaller businesses may help mitigate the impact of change caused due to supply chain disruptions and reduced consumer confidence and demand.

The ineffectiveness of government measures is likely to adversely impact the industry at large. Although the hospitality industry has demonstrated resilience through heavy discounts, constant innovation, cost reduction and adoption to technology to survive the pandemic – physically and financially, many MSME players may not see light at the end of the COVID- 19 tunnel. While larger players struggle to make profits, emerging concepts such as homestays in remote locations, Work-from-Hotel, emotional and psychological retreats, cloud kitchens, etc. offered by the industry players may help them re-establish a consumer base and stay relevant even today. It goes without saying that a resumption of economic activity is essential, but its success hinges upon the right implementation of government's measures and relaxations along with liberal governance on finances of the hospitality sector while maintain a strong vigil on the virus.

Lapse of Stay Orders and Judicial Delays: A Constitutional Conundrum

The constitutional predicament of the Supreme Court's direction in the case of ***Asian Resurfacing of Road Agency v. Central Bureau of Investigation*** ("Asian Resurfacing") assumes significance because of the controversial dictum regarding stay orders. The direction in its essence is that any order that stays civil or criminal proceedings will now lapse every six months, unless it is clarified by an exception of a speaking order. The major grievance is that every order which is passed by the High Courts while exercising its jurisdiction under ***Article 227*** of the Constitution and ***Section 482*** of the Criminal Procedure Code, is virtually annulled with the passage of time.

The decision comes into existence due to the indefinite delays that occur because of stay orders granted by the High Courts, which leads to judicial delays and denies the fundamental right to speedy justice. The Apex Court has observed that proceedings are adjourned sine die i.e. without a future date being fixed or arranged, on account of stay. Even after the stay is vacated, intimation is not received, and proceedings are not taken up.The concern is that during criminal trials, a stay order delays the efficacy of the Rule of Law and the justice system. The power to grant indefinite stays demands accountability and therefore the trial court should react by fixing a date for the trial to commence immediately after the expiry of the stay. Trial proceedings will, by default, begin after the period of stay is over. In case where a stay order has been granted on an extension, it must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized.

The High Court may exercise powers to issue writs for infractions of all legal rights, and also has the power of superintendence over all "subordinate courts," a power absent in the Supreme Court as it was never intended to supervise subordinate courts or the High Courts. In the case of ***Tirupati Balaji Developers (P) Ltd v. State of Bihar***, the Supreme Court recognized that despite having appellate powers, the current directive ordered by the Supreme Court takes a precarious position since the High Court cannot be limited in its exercise of power by any restrictions placed on it by the Supreme Court, unless the Supreme Court interprets a statute or the Constitution and prescribes it as a matter of law, which is not the case in the directions issued for Asian Resurfacing.

There are two perspectives to this: firstly, the directive does not annul "every order" of the High Court merely with the passage of time. It only causes those orders that "stay the trial proceedings of courts below" to lapse with the passage of time, wherein even those orders can be extended as per the High Court's own discretion on a case-to-case basis. If this is considered as supervisory or unconstitutional, then Appellate Courts will be left with little prerogative to safeguard the basic rules of fair procedure. Secondly, the directive itself is not applicable to interim order granted by the Supreme Court as reiterated in the case of ***Fazalullah Khan v. M. Akbar Contractor.***

It is clear that the demand for justice to be disbursed and a trial to be completed in 6 months is a necessity given the incessant judicial delays and indefinite freezes on criminal cases. Staying trial proceedings for 6 months must be made a thing of the past and should not be stayed for 6 months or more, save in exceptional circumstances. Allowing trial proceedings to be stayed for longer than 6 months encourages parties to abuse the process of law and move an appellate court merely to stall a trial that has an inevitable conclusion. Legal procedures, appointment of judges, and judicial vacancies all contribute equally to judicial delay, the rot has spread far and wide in creating systemic delays in the entire judicial procedure. Although courts will be bound to welcome the judgement in letter and spirit, some pressing questions remain unanswered. It is unclear why the Supreme Court provided "directions" to the High Courts now when it has been cautious in issuing such directions in the past? Further, if the primary motive was curbing the judicial delays and ushering a change in the way the judicial system works, why is the Supreme Court not bound by its own directive?

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