May 28, 2021

Legal Updates

MCA issues clarification on offsetting the excess CSR spent for FY 2019-2020

Ministry of Corporate Affairs ("**MCA**") received several representations by companies for setting off the excess Corporate Social Responsibility ("**CSR**") amount spent by the companies in Financial Year ("**FY**") 2019-20 by way of contribution to 'PM CARES Fund' against the mandatory CSR obligation for FY 2020-21.

By way of clarification vide circular dated 20.5.2021, MCA has clarified that where a Company has contributed any amount to 'PM CARES Fund' on 31.03.2020, which is over and above the minimum amount as prescribed under Section 135 (5) of the Companies Act, 2013 for FY 2019-20, and such excess amount or part thereof is offset against the requirement to spend under Section 135(5) for FY 2020-21, then the same shall not be viewed as a violation subject to the following conditions:

i) the amount offset as such shall have factored the unspent CSR amount for previous financial years, if any;

ii) the Chief Financial Officer shall certify that the contribution to "PM-CARES Fund" was indeed made on 3.03.2020, in pursuance of the appeal and the same shall also be so certified by the statutory auditor of the company; and

iii) the details of such contribution shall be disclosed separately in the Annual Report on CSR as well as in the Board's Report for FY 2020-21 in terms of section 134 (3) (o) of the Act.

Personal Guarantors to Corporate Debtors liable under the Insolvency and Bankruptcy Code, 2016

Supreme Court in *Lalit Kumar Jain* v. *Union of India (Transferred Case (Civil) No. 245/2020)* considered challenge to Notification dated November 15, 2019 (introducing certain provisions to the Insolvency and Bankruptcy Code ("**IBC**") relating to insolvency of personal guarantor) ("**Impugned Notification**"), Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 and Sections 95, 96, 99, 100 and 101 of the IBC as unconstitutional in so far as they apply to personal guarantors of corporate debtors.

The principal ground of attack was that the government could not have selectively brought into force IBC and applied some of its provisions to one sub-category of individuals, i.e., personal guarantors to corporate creditors and that the same was ultra vires.

Supreme Court categorically held that the intimate connection between the guarantors and corporate debtors and the possibility of two different insolvency proceedings at two different forums lead to carving out personal guarantors as a separate species of individuals, for whom the Adjudicating Authority was common with the corporate debtor to whom they stood guarantee. It was also noted that the National Company Law Tribunal ("**NCLT**") could be able to consider the whole picture which would facilitate the Committee of Creditors ("**CoC**") to frame realistic plans keeping in mind the prospect of realizing some part of the dues from the guarantors.

Supreme Court further held that the Impugned Notification is not an instance of legislative exercise or amounting to impermissible and selective application of provisions of the IBC. There is no compulsion that it should be made applicable to all individuals, (including personal guarantors) or not at all. There is sufficient indication under Section 2(e), Section 5(22), Section 60 and Section 179 of the IBC, indicating that personal guarantors, though forming part of the larger grouping of individuals, dealt with differently, through the same adjudicatory process and by the same forum. It was also held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee.

Supreme Court makes observations upon imposition of Cess in building and construction works and reiterated that existence of arbitration clause does not prohibit a High Court from entertaining a writ petition

Supreme Court in *Uttar Pradesh Power Transmission Corporation Ltd. and Anr*. v. *CG Power and Industrial Solutions Ltd. and Anr. (Special Leave Petition (C) No. 8630 of 2020*) dismissed the appeal that arose from the decision of Allahabad High Court that directed Uttar Pradesh Power Transmission Corporation Ltd. ("**UPPTCL**"), in a writ petition filed by CG Power, to remit Labour Cess collected under Sections 3(1) & (2) of the Building and Other Construction Workers' Welfare Cess Act, 1996, ("**Cess Act**") read with the Cess Rules, and the BOCW (Regulation of Employment and Condition of Service) Act, 1996 ("**BOCW Act**").

Supreme Court observed that Cess under the Cess Act read with BOCW Act is leviable in respect of building and other construction works. The condition precedent for imposition of cess under the Cess Act is the construction, repair, demolition, or maintenance of and/or in relation to a building or any other work of construction, transmission towers, in relation inter alia to generation, transmission and distribution of power, electric lines, pipelines etc. Mere installation and/or erection of pipelines, equipment for generation or transmission or distribution of power, electric wires, transmission towers etc. which do not involve construction work are not amenable to Cess under the Cess Act. Thus, a contractor who enters into a pure Supply Contract is statutorily exempted from levy under the BOCW Act. The Court further held that when statute requires a thing to be done in a particular manner, it is to be done in that manner alone. UPPTCL could not have taken recourse to the methods adopted by it.

The Supreme Court further observed that availability of an alternative remedy (arbitration clause in the present case) does not prohibit a High Court from entertaining a writ petition in an appropriate case. The High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) the vires of an Act is under challenge. It was also observed that High Courts usually refrain from entertaining a writ petition which involves adjudication of disputed questions of fact which may require analysis of evidence of witnesses.

APTEL observes that State Commissions cannot delegate the adjudicatory power to determine Incremental Tariff on account of Change in Law

Appellate Tribunal for Electricity ("**APTEL**") vide its decision in *M/s Fortum Solar India Private Limited* v. *Karnataka Electricity Regulatory Commission & Anr. (APL-104/2021 & IA-764/2021 and batch matters*) considered the plea of a generator claiming the benefit of Change in Law ("**CIL**") on account of imposition of Safeguard Duty ("**SGD**") and Integrated Goods and Services Tax ("**IGST**") leviable on SGD. The Power Purchase Agreement ("**PPA**") entered between the generator and the distribution licensee provided for the benefit of CIL and the incremental tariff to be determined by the State Commission.

State Commission in discharge of its adjudicatory function reached an affirmative finding with respect to the claim of the CIL but called upon the parties to exchange documents and verify the actual amount payable.

APTEL opined that the above direction of the State Commission is repugnant to Section 97 of the Electricity Act, 2003 and it is the duty of the State Commission to determine the consequential compensation that is to be granted, while specifying the date from which such compensation would be payable, and considering the additional burden of carrying cost, leading eventually to determination of the additional tariff. Moreover, asking the parties to exchange documents and verify the actual amount payable shall be tantamount to asking the parties virtually to sit in review of what had been decided by the State Commission itself. If the intent behind such exercise was to bring about amicable resolution to the dispute, it should have preceded the determination of the claim by the State Commission. While setting aside the operative part of the impugned order, the State Commission was directed to take up the exercise of determination of incremental tariff consequent to the determination already done by it on the quantum of compensation.

A-142, Neeti Bagh
New Delhi – 110 049, India
T: +91 11 4579 2925 F: +91 11 4659 2925
E: mail@neetiniyaman.co
W: www.neetiniyaman.com

Office No. 51, 4th Floor, Nawab Building,
327, Dr. D.N. Road,
Opp. Thomas Cook, Flora Fountain
Mumbai – 400 001, India
T: +91 22 4973 9114