

**STUDY MATERIAL**

**EXECUTIVE PROGRAMME**

**ECONOMIC,  
COMMERCIAL &  
INTELLECTUAL  
PROPERTY LAWS**

**GROUP 2  
PAPER 6**



**THE INSTITUTE OF  
Company Secretaries of India**

**भारतीय कम्पनी सचिव संस्थान**

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# EXECUTIVE PROGRAMME

## ECONOMIC, COMMERCIAL & INTELLECTUAL PROPERTY LAWS

Every legislation, especially in economic matters, is essentially empiric, and it is based on experimentation or what one may call the trial and error method. It may not provide for all possible situations or anticipate all possible abuses. There can be crudities or inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. (*R.K. Garg v. Union of India and Others (1981) 4 SCC 675*). Commercial law is also known as 'trade law', 'mercantile law' or 'business law'. It encompasses business organizations and individuals who are engaged in the buying, selling or trading of merchandise goods. It is imperative that commercial activities being economic activities exerting an impact on the economic development, national income, per capita income and other vital economic and financial variables, needs to be regulated to ensure transparency thereby fostering growth of business activities.

Conceptual understanding and application of compliance mandates of Economic and Commercial legislation is vital for professionals like Company Secretaries specifically from the perspective of compliance risks and especially when it involves foreign exchange, foreign investments, competition law aspects, consumer rights etc. This study aims to provide conceptual and application oriented understanding of the subject and will also equip the student with skills to stand up-to-date with industries need and the economic changes.

Further, Company Secretary plays advisory, compliance and representative roles with respect to various Economic and Commercial Laws including Foreign Exchange Management Act, FDI Policy, Foreign Trade Policy, Competition Law, Consumer Protection Act, law relating Real Estate Regulation etc. It is important for a Company Secretary to be well versed with Economic and Commercial Laws. It is also vital for students to have working knowledge of various Economic and Commercial legislations.

Intellectual Property Rights (IPRs) are private rights which are applied for, and enforced, by the owner of the concerned Intellectual Property (IP). While IPRs are becoming increasingly important in the global arena, there is a need to increase awareness on IPRs in India, be it regarding the IPRs owned by oneself or respect for others' IPRs. The importance of IPRs as a marketable financial asset and economic tool also needs to be recognised. In the Intellectual Property Rights regime Company Secretary is also authorized to act as a Trade Marks Agent.

This study material has been prepared to provide an understanding of certain Economic, Commercial and Intellectual Property legislations which have direct bearing on the functioning of companies. The study material has been divided into two parts consisting of twenty study lessons. Part I dealing with Economic and Commercial Laws consists of Study Lessons I to XIV, whereas Part II dealing with Intellectual Property Laws consists of Study Lesson XV to XX.

This study material has been published to aid the students in preparing for the Economic, Commercial & Intellectual Property Laws paper of the CS Executive Programme under ICSI Syllabus 2022. It has been prepared to provide understanding of the Economic, Commercial & Intellectual Property laws thereunder, which have a bearing on the conduct of corporate affairs. It is part of the educational kit and takes the students step by step through each phase of preparation stressing key concepts, principle, pointers and procedures.

The legislative changes made upto January, 2024 have been incorporated in the study material. The students are advised to refer to the updations at the Regulator’s website, Supplement relevant for the subject issued by ICSI and ICSI Journal Chartered Secretary and other publications. Specifically, students are advised to read “Student Company Secretary” e-Journal which covers regulatory and other relevant developments relating to the subject. In the event of any doubt, student may contact the Directorate of Academics at [academics@icsi.edu](mailto:academics@icsi.edu).

***The amendments to law made upto 31st May of the Calendar Year for December Examinations and upto 30<sup>th</sup> November of the previous Calendar Year for June Examinations shall be applicable.***

Although due care has been taken in publishing this study material, the possibility of errors, omissions and/or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omissions and/or discrepancies or any action taken in that behalf.



# EXECUTIVE PROGRAMME

## Group 2

## Paper 6

# ECONOMIC, COMMERCIAL & INTELLECTUAL PROPERTY LAWS

## SYLLABUS

### OBJECTIVES:

**Part I: To equip the students with working knowledge about Economic & Commercial Laws.**

**Part II: To provide conceptual & basic understanding of Intellectual Property Laws.**

**Level of Knowledge:** Working Knowledge

### Part I: Economic & Commercial Laws (60 Marks)

- 1. Law relating Foreign Exchange Management:** Introduction • Current and Capital Account Transactions • Liberalized Remittance Scheme • Acquisition & Transfer of Immovable Property in India • Export of Goods and Services • Realization and Repatriation of Foreign Exchange • Reserve Bank of India.
- 2. Foreign Direct Investments – Regulations & Policy :** Automatic Route of FDI • Approval Route of FDI • Prohibited Sector • Permitted Sector • Foreign Portfolio Investments • Non-Debt Instrument Rules & Regulations • Filing of FCGPR Form & other Returns.
- 3. Overseas Direct Investment:** ODI Policy • Foreign Currency Remittances • Setting up of Subsidiary/ Joint Venture/ Branch Office Abroad • Filing of Returns.
- 4. External Commercial Borrowings (ECB):** Eligible Lender • Eligible Borrower • Parking of EBC • Filing of Returns.
- 5. Foreign Trade Policy & Procedure:** Focus of the Foreign Trade Policy (FTP) • Legal Basis of the Foreign Trade Policy • Importer-Exporter Code (IEC) Number • Status Holder • Imports and Export Policy • Deemed Exports • Trade Disputes • Various Schemes under Foreign Trade Policy & Procedure.
- 6. Law relating to Special Economic Zones:** Establishment of Special Economic Zones • Approval and Authorization to Operate SEZ • Setting up of Unit • Special Economic Zone Authority.
- 7. Law relating to Foreign Contribution Regulation:** Introduction and Object • Eligible Contributor • Eligible Receiver • Registration • Offences and Penalties.
- 8. Prevention of Money Laundering:** Process of Money Laundering • Adjudication • Attachment and confiscation • Obligation of Banking Companies, Financial Institutions and Intermediaries • Problem and Adverse effect of Money Laundering • Offence of Money Laundering • Enforcement Directorate • KYC & FIU.

9. **Law relating to Fugitive Economic Offenders:** Declaration of Fugitive Economic Offender and Procedure therefor • Attachment of Property • Powers of Director and Other Officers • Power of Survey • Search and Seizure • Declaration of Fugitive Economic Offender.
10. **Law relating to Benami Transactions & Prohibition:** Benami Property • Benami Transaction • Prohibition of Benami Transaction • Authority & Adjudication of Benami property.
11. **Competition Law:** Competition Policy • Anti-Competitive Agreements • Abuse of Dominant Position • Overview of Combination • Regulation of Combinations • Competition Advocacy • Competition Commission of India • Appellate Tribunal.
12. **Law relating to Consumer Protection:** Consumer Protection in India • Rights of Consumers • Consumer Dispute Redressal Forums • Nature and Scope of Remedies • E-commerce & Direct Selling Guidelines.
13. **Legal Metrology:** Standard Weights And Measures • Power of inspection, Seizure • Declarations on Pre-packaged Commodities • Offences and penalties.
14. **Real Estate Regulation and Development Law:** Registration of Real Estate Project • Real Estate Agents • Real Estate Regulatory Authority • Central Advisory Council • The Real Estate Appellate Tribunal • Offences, Penalties and Adjudication.

## Part II: Intellectual Property Laws (40 Marks)

15. **Law relating to Patents:** Applications for Patents • Publication and Examination of Applications • Inventions Not Patentable • Opposition Proceedings to Grant of Patents • Restoration of Lapsed Patents • Surrender and Revocation of Patents • Working of Patents • Compulsory Licences and Revocation • Infringement of Patents.
16. **Law relating to Trade Marks:** Classification of Goods And Services • Conditions for Registration • Procedure for and Duration of Registration • Absolute Grounds for Refusal of Registration • Assignability and Transmissibility of Registered Trademarks • Collective Marks • Certification Trademarks • Trademark Agent • Infringement of Trade Marks.
17. **Law relating to Copyright:** Meaning of Copyright • Works in which Copyright Subsists • Registration of Copyright • Ownership of Copyright • Assignment of Copyright • Term of Copyright • Licences by Owners of Copyright • Copyright Society • Infringement of Copyright.
18. **Law relating to Geographical Indications of Goods :** Geographical Indication • Application for registration • Procedure for and Duration of Registration • Effect of Registration • Prohibition of registration of geographical indication as Trade Mark.
19. **Law relating to Industrial Designs :** Registration of Designs • Prohibition of Registration of Certain Designs • Certificate of Registration • Copyright in Registered Designs • Industrial and International Exhibitions • Piracy of registered design.

# ARRANGEMENT OF STUDY LESSONS

## ECONOMIC, COMMERCIAL & INTELLECTUAL PROPERTY LAWS

### GROUP 2 • PAPER 6

#### PART I: ECONOMIC & COMMERCIAL LAWS

**Sl. No. Lesson Title**

1. Law relating Foreign Exchange Management
2. Foreign Direct Investments – Regulations & Policy
3. Overseas Direct Investment
4. External Commercial Borrowings (ECB)
5. Foreign Trade Policy & Procedure
6. Law relating to Special Economic Zones
7. Law relating to Foreign Contribution Regulation
8. Prevention of Money Laundering
9. Law relating to Fugitive Economic Offenders
10. Law relating to Benami Transactions & Prohibition
11. Competition Law
12. Law relating to Consumer Protection
13. Legal Metrology
14. Real Estate Regulation and Development Law

#### PART II: INTELLECTUAL PROPERTY LAWS

15. Intellectual Property Rights
16. Law relating to Patents
17. Law relating to Trade Marks
18. Law relating to Copyright
19. Law relating to Geographical Indications of Goods
20. Law relating to Designs

# LESSON WISE SUMMARY

## ECONOMIC, COMMERCIAL & INTELLECTUAL PROPERTY LAWS

### PART I: ECONOMIC & COMMERCIAL LAWS

#### Lesson 1 – Law relating to Foreign Exchange Management

The Foreign Exchange Management Act, 1999 (FEMA) is an Act of the Parliament of India to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. The Act extends to the whole of India and it also applies to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies. The management of foreign exchange is very important in the present day business. FEMA is a regulatory mechanism that enables the Reserve Bank of India to pass regulations and the Central Government to pass rules relating to foreign exchange in tune with the Foreign Trade policy of India. The Act is more transparent in its application as it lays down the areas requiring specific permissions of the Reserve Bank/ Government of India on acquisition/holding of foreign exchange. It stipulate the strict compliances in case of import, export, debt funding, equity capital infusion, transfer of shares etc.

It is expected that, at the end of this lesson, students will, inter alia, be in a position to understand the:

- Concept of FEMA;
- Concept of Current Account Transactions and Capital Account Transactions;
- Provisions of Realization, Repatriation and Surrender of Foreign Currency;
- Structure and Overall Schemes of FEMA;
- Rules and Regulations framed by RBI under FEMA.

#### Lesson 2 – Foreign Direct Investments – Regulations & Policy

Foreign Direct Investment (FDI) is a major source of non-debt financial resource for the economic development of India. Foreign companies invest in India to take advantage of relatively lower wages, special investment privileges such as tax exemptions, etc. To promote Foreign Direct Investment (FDI), the Government has put in place an investor friendly policy, wherein except for a small negative list, most sectors are open for 100% FDI under the Automatic route.

The objective of the lesson is to familiarize the students with:

- Eligible Investors under FDI;
- Entry Routes for Investment i.e. Automatic Route, Government Route, Competent authority etc;
- Prohibited and Permitted Sectors;
- Non-debt Instruments Rules & Regulations;

- Conditions of FDI in major sector i.e. E-commerce activity, Insurance etc.;
- Modes of Payment allowed for receiving FDI in an Indian Company;
- Reporting of FDI i.e. reporting of Inflow/Issue of shares/Transfer of shares etc. and filing of FCGPR form and other returns.

### **Lesson 3 – Overseas Direct Investments (ODI)**

“Overseas Investment” means financial commitment and Overseas Portfolio Investment by a person resident in India. Overseas investments by persons resident in India enhance the scale and scope of business operations of Indian entrepreneurs by providing global opportunities for growth. Such ventures through easier access to technology, research and development, a wider global market and reduced cost of capital along with other benefits increase the competitiveness of Indian entities and boost their brand value. These overseas investments are also important drivers of foreign trade and technology transfer thus boosting domestic employment, investment and growth through such inter-linkages. In view of the evolving needs of businesses in India, in an increasingly integrated global market, there is need of Indian corporates to be part of global value chain and in keeping with the spirit of liberalization and to promote ease of doing business, the Central Government and the Reserve Bank of India have been progressively simplifying the procedures and rationalizing the rules and regulations under the Foreign Exchange Management Act, 1999. In this direction, a significant step has been taken with operationalization of a new Overseas Investment regime. Foreign Exchange Management (Overseas Investment) Rules, 2022 have been notified by the Central Government on August 22, 2022.

The purpose of the lesson is to familiarize the students with:

- ODI Policy;
- Foreign currency remittances;
- Setting up of Subsidiary/Joint Venture/Branch Office abroad;
- Filing of various returns.

### **Lesson 4 – External Commercial Borrowings (ECB)**

External Commercial Borrowings are commercial loans raised by eligible resident entities from recognized non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. Transactions on account of External Commercial Borrowings (ECB) are governed by clause (d) of sub-section 3 of section 6 of the Foreign Exchange Management Act, 1999 (FEMA). However, ECB framework is not applicable in respect of investment in Non-convertible Debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPs).

The objective of the lesson is to familiarize the students with:

- Overview of ECB, Tracks of ECB and kinds of ECB;
- Routes available for raising ECB;
- Parking of ECB;
- Procedure for raising ECB; and
- Reporting Requirements and filing of returns i.e. In case of Changes in terms and conditions of ECB, Conversion of ECB into equity etc.

### **Lesson 5 – Foreign Trade Policy & Procedure**

The Foreign Trade Policy as notified by Central Government seeks to provide a stable and sustainable policy

environment for foreign trade in merchandise and services. India's Foreign Trade Policy (FTP) has, conventionally, been formulated for five years at a time and reviewed annually. The focus of the FTP has been to provide a framework of rules and procedures for exports and imports and a set of incentives for promoting exports.

The objective of the lesson is to facilitate the students to acquaint with:

- Legal Basis of the Foreign Trade Policy;
- Importer-Exporter Code (IEC) Number;
- Required Documents for Export/Import of Goods From/into India;
- Remission of Duties or Taxes on Export Products Scheme (RoDTEP);
- Duty exemption / remission schemes;
- Quality Complaints and Trade Disputes;
- Concept of Deemed Exports.

### **Lesson 6 – Law relating to Special Economic Zones**

Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs. Goods and services going into the SEZ area from Domestic Tariff Area treated as exports and goods coming from the SEZ area into DTA treated as if these are being imported.

Special Economic Zone Act, 2005 to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto. SEZ Rules, 2006 authorizes company secretaries to appear before Board of Approval constituted under Section 8 of the Act.

The purpose of this lesson is to provide the students with:

- Establishment of Special Economic Zones;
- Approval and Authorization to Operate SEZ;
- Setting up of Unit; and
- Special Economic Zone Authority.

### **Lesson 7 – Law relating to Foreign Contribution Regulation**

Foreign Contribution (Regulation) Act, 2010 regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto. The Act mandates that every bank or authorized person in foreign exchange shall report to specified authority, the prescribed amount of foreign remittance, source and manner in which foreign remittance was received and other particulars.

It is expected that, at the end of this lesson, students will, inter alia, be in a position to understand the:

- Regulation of foreign contribution, foreign Source and foreign hospitality;
- Eligible contributor & eligible receiver;
- Accounts, Intimation, Audit and Disposal of Assets; and
- Offences and Penalties.

## **Lesson 8 – Prevention of Money Laundering**

The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. Organized crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments. The economic and political influence of criminal organizations can weaken the social fabric, collective ethical standards, and ultimately the democratic institutions of society. In countries transitioning to democratic systems, this criminal influence can undermine the transition. Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generated it. Laundering enables criminal activity to continue.

The Prevention of Money-laundering Act, 2002 enacted to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto.

The objective of the lesson is to introduce the students regarding:

- Problem and adverse effect of money laundering;
- Process and Methods of money laundering;
- Offence of money laundering and its adverse effect;
- Attachment, adjudication and confiscation;
- Obligation of Banking Companies, Financial Institutions and Intermediaries;
- Enforcement Directorate; and
- Concept of KYC and FIU.

## **Lesson 9 – Laws relating to Fugitive Economic Offenders**

There have been several instances of economic offenders fleeing the jurisdiction of Indian courts anticipating the commencement of criminal proceedings or sometimes during the pendency of such proceedings. The absence of such offenders from Indian courts has several deleterious consequences, such as, it obstructs investigation in criminal cases, it wastes precious time of courts and it undermines the rule of law in India. Further, most of such cases of economic offences involve non-repayment of bank loans thereby worsening the financial health of the banking sector in India. The existing civil and criminal provisions in law are inadequate to deal with the severity of the problem. In order to address the said problem and lay down measures to deter economic offenders from evading the process of Indian law by remaining outside the jurisdiction of Indian courts, Parliament enacted a legislation, namely, the Fugitive Economic Offenders Act, 2018 to ensure that fugitive economic offenders return to India to face the action in accordance with law.

It is expected that, at the end of this lesson, students will, inter alia, be in a position to understand the:

- Procedure for declaration of fugitive economic offender;
- Attachment of property;
- Powers of Director and other officers;
- Power of survey, search and seizure.

## **Lesson 10 – Law relating to Benami Transactions & Prohibition**

Benami Transactions (Prohibition) Act, 1988 defines benami transaction and benami property and also provides for exclusions and transactions which shall not be construed benami. The legislation is also intended to effectively prohibit benami transactions and consequently prevent circumvention of law through unfair practices.

It empowers the Government to confiscate benami property by following due procedure. It therefore promotes equity across all citizens.

The purpose of this lesson is to provide the students with the concept of:

- Benami Property;
- Benami Transaction;
- Prohibition of Benami Transaction; and
- Authority & Adjudication of Benami property.

### **Lesson 11 – Competition Law**

Economic theory suggests that prices and quantities in a competitive market equilibrate to levels that generate efficient outcomes at a given point of time. Competition is therefore, beneficial as it provides to consumers wider choice and provides sellers with stronger incentives to minimize costs, so eliminating waste. Competition Act, 2002 to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participant in the markets in India and for matters connected therewith or incidental thereto. Competition Act, 2002, authorizes a company secretary holding a certificate of practice to appear before Competition Commission of India.

The objective of the lesson is to introduce the students regarding:

- Competition Policy;
- Anti-Competitive Agreements;
- Abuse of Dominant Position;
- Overview of Combination and Regulation of Combinations;
- Competition Advocacy;
- Competition Commission of India; and
- Appellate Tribunal.

### **Lesson 12 – Law relating to Consumer Protection**

The Consumer Protection Act, 1986 was enacted to provide for better protection of the interests of consumers and for the purpose of making provision for establishment of consumer protection councils and other authorities for the settlement of consumer disputes, etc. Consumer markets for goods and services have undergone drastic transformation, therefore, Parliament enacted the Consumer Protection Act, 2019.

The objective of the lesson is to introduce the students regarding:

- Consumer Protection in India;
- Rights of Consumers;
- Consumer Dispute Redressal Forums;
- Nature and Scope of Remedies; and
- E-Commerce & Direct Selling Guidelines.



### **Lesson 13 – Legal Metrology**

The branch of knowledge concerning weights and measures is technically known as legal metrology. In basic form, metrology is the science of measurement. Legal metrology Act, 2009 intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.

The objective of the lesson is to introduce the students regarding:

- Standard weights and measures;
- Power of inspection, seizure;
- Declarations on pre-packaged commodities; and
- Offences and penalties.

### **Lesson 14 – Real Estate Regulation and Development Law**

Parliament enacted the Real Estate (Regulation and Development) Act, 2016 which aims at protecting the rights and interests of consumers and promotion of uniformity and standardization of business practices and transactions in the real estate sector. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism.

As per Section 56 of the Act, the applicant or appellant may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be.

The objective of the lesson is to introduce the students regarding:

- Registration of Real Estate Project;
- Real Estate Agents;
- Real Estate Regulatory Authority;
- Central Advisory Council;
- The Real Estate Appellate Tribunal; and
- Offences, Penalties and adjudication under the Act.

## **PART II- INTELLECTUAL PROPERTY LAWS**

### **Lesson 15 – Intellectual Property Rights**

Intellectual property is a vital component of economic growth and a tool for corporate competitiveness in today's highly competitive global market. Intellectual property rights serve as a catalyst for the development of innovations and inventions. Ideas, innovations, and creative expressions on the basis of which there is a public desire to grant the status of property are referred to as intellectual property rights (IPR). In order for the inventors or developers of that property to profit commercially from their creative efforts or reputation, IPR grant them specific exclusive rights. There are various forms of intellectual property protection, including trademark, copyright, and patent.

The objective of this lesson is to acclimatize student with:

- The basics of Intellectual Property Rights, their purpose, need, scope, regulatory framework;
- International legal framework for IPR such as General Agreement on Trade in Services (GATS), World Intellectual Property Organization (WIPO), Trade-Related Aspects of Intellectual Property Rights (TRIPS), international conventions;
- India's National Intellectual Property Rights Policy, its coverage and goals.

### **Lesson 16 – Law relating to Patents**

With increase in the technological progress of India, the patents are given to promote innovations & developments and to ensure that these creations got recognition commercially without delay; and patents are conceded to empower patentee to commercially utilize the monopoly for the importation of the patented product into the nation. Patent is a monopoly grant and it enables the inventor to control the output and within the limits set by demand, the price of the patented products. A Patent is a statutory right for an invention granted for a limited period of time to the patentee by the Government, in exchange of full disclosure of his invention for excluding others, from making, using, selling, importing the patented product or process for producing that product for those purposes without his consent.

The objective of this lesson is to facilitate the students to get acquainted with:

- Concept of Patents, its infringement, duration, inventions, what does not fall under purview of inventions etc.;
- Patent Cooperation Treaty;
- Practical aspects relating to the process of registration, termination, revocation, withdrawal of patent application.

### **Lesson 17 – Law relating to Trade Marks**

In view of developments in trading and commercial practices, increasing globalisation of trade and industry, the need to encourage investment flows and transfer of technology, need for simplification and harmonization of trade mark management systems and to give effect to important judicial decisions, a new Trade Marks Act, 1999 have been enacted. It aims to provide for registration of trade mark for goods as well as services including prohibition to the registration of imitation of well-known trademarks, and expansion of grounds for refusal of registration. A Trade Mark distinguishes the goods of one manufacturer or trader from similar goods of others and therefore, it seeks to protect the interest of the consumer as well as the trader.

The objective of this lesson is to familiarize students with:

- Key concepts such as Trade Marks, Well Known Trade Mark, Certification Trade Mark among others;
- The process of application, withdrawal of trademark application;
- Infringement of trademark, Passing Off, Effect of registration;
- Law governing the trademark and its application in India.

### **Lesson 18 – Law relating to Copyright**

In view of technological advancements in recent times, copyright protection has been expanded considerably. Copyright is a well-recognised form of property right which had its roots in the common law system and subsequently came to be governed by the national laws in each country. Today, copyright law has extended protection not only to literary, dramatic, musical and artistic works but also sound recordings, films, broadcasts,

cable programmes and typographical arrangements of publications. Computer programs have also been brought within the purview of copyright law. The copyright law deals with the particular forms of creativity, concerned primarily with mass communication. It is also concerned with virtually all forms and methods of public communication, not only printed publications but also with such matters as sound, and television broadcasting, films for public exhibition etc. and even computerised systems for the storage and retrieval of information.

The purpose of this lesson is to help students understand the:

- Key concepts such as Copyright, Adaptations, Author, what all is covered under copyright law, works in which copyright subsists;
- The object, purpose, need and scope of copyright law in India;
- Copyright, its meaning, term, assignment, infringement, registration process and its licensing.

### **Lesson 19 – Law relating to Geographical Indications of Goods**

Every region has its claim to fame. Each fame and reputation was carefully built up and painstakingly maintained by the masters of that region, combining the best of nature, man and traditionally handed over from one generation to the next for centuries. Gradually, a specific link between the goods and place of production evolved resulting in growth of geographical indications. Geographical Indications of Goods are that aspect of industrial property which refers to a country or to a place situated therein as being the country or place of origin of that product. These identifications became so important that these regions started specializing in producing these unique products. Rising demand for such products among the consumers, gave rise for counterfeit products, which began to tarnish the image of genuine products. A effort to safeguard the interest of the producers and consumers led to evolution and conceptualization of “Geographical Indications”.

The objective of this lesson is to familiarize students with:

- Key concepts such as Geographical Indications, duration, infringement of the same among others;
- Regulatory framework governing the Law of Geographical Indications of Goods in India and important concepts related thereto;
- Practical aspects relating to Step by Step Guide on Geographical Indication of Goods Registration Process in India.

### **Lesson 20 – Law relating to Designs**

Design is one of the categories of IPR where the design system focuses on the aesthetic feature of an article derived from its visual appearance. Relevant aspects are the shape, configuration, surface pattern, the colour or line or a combination thereof as applied to an article which produces an aesthetic impression on the sense of sight. The objective of the Designs Act, 2000 is to protect new or original designs so created to be applied or applicable to particular article to be manufactured by Industrial Process or means. Sometimes purchase of articles for use is influenced not only by their practical efficiency but also by their appearance. The important purpose of design registration is to see that the artisan, creator, originator of a design having aesthetic look is not deprived of his bonafide reward by others applying it to their goods.

The purpose of this lesson is to help students understand the:

- Concept of Design, its duration, infringement and publication;
- Regulatory framework governing the Law of Design in India and important concepts related thereto;
- Practical aspects relating to Step by Step Guide on registration of design in India.

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### KEY CONCEPTS

- Authorised Person
- Capital Account Transaction
- Current Account Transaction
- Foreign Exchange
- Foreign Security

### Learning Objectives

#### To understand:

- Concept of Current Account Transactions
- Capital Account Transactions
- Provisions of Realisation, Repatriation and Surrender of Foreign Currency
- Limits for possession or retention of foreign currency or foreign coins
- Procedure for Adjudication, Appeal and Compounding

### Lesson Outline

- Foreign Exchange
- Foreign Securities
- Current Account Transactions
- Capital Account Transactions
- Acquisition & Transfer of Immovable Property outside India
- Realisation & Repatriation of Foreign Exchange
- Adjudication
- Compounding of Contraventions
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## INTRODUCTION

The Foreign Exchange Regulation Act, 1973 was reviewed in 1993 and several amendments were enacted as part of the on-going process of economic liberalisation relating to foreign investments and foreign trade for closer interaction with the world economy. At that stage, the Central Government decided that a further review of the Foreign Exchange Regulation Act would be undertaken in the light of subsequent developments and experience in relation to foreign trade and investment. It was subsequently felt that a better course would be to repeal the existing Foreign Exchange Regulation Act and enact a new legislation. Reserve Bank of India was accordingly asked to undertake a fresh exercise and suggest a new legislation. A Task Force constituted for this purpose submitted its report in 1994 recommending substantial changes in the existing Act.

Significant developments have taken place since 1993 such as substantial increase in our foreign exchange reserves, growth in foreign trade, rationalisation of tariffs, current account convertibility, liberalisation of Indian investments abroad, increased access to external commercial borrowings by Indian corporates and participation of foreign institutional investors in our stock markets.

Keeping in view the changed environment, the Central Government has decided to introduce the Foreign Exchange Management Bill and repeal the Foreign Exchange Regulation Act, 1973. The provisions of the Bill aim at consolidating and amending the law relating to Foreign Exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange markets in India. Accordingly, the Foreign Exchange Regulation Act (FERA) was repealed and replaced by the new Foreign Exchange Management Act (FEMA) with effect from June 2000. The philosophical approach was shifted from that of conservation of foreign exchange to one of facilitating trade and payments as well as developing orderly foreign exchange market.



## REGULATORY FRAMEWORK

### Foreign Exchange Management Act, 1999 (FEMA)

*The Foreign Exchange Management Act, 1999 enacted to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. In fact it is the central legislation that deals with inbound investments into India and outbound investments from India and trade and business between India and the other countries.*



**The Rules made under FEMA are as follows:**

- Foreign Exchange Management (Overseas Investment) Rules, 2022
- FEM (Non-debt Instruments) Rules, 2019
- FEM (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000
- FEM (Authentication of Documents) Rules, 2000
- FEM (Current Account Transaction) Rules, 2000
- FEM (Adjudication Proceedings and Appeal) Rules, 2000
- FEM (Compounding of Proceedings) Rules, 2000

**The Regulations made under FEMA are as follows:**

- Foreign Exchange Management (Overseas Investment) Regulations, 2022
- FEM (Debt Instruments) Regulations, 2019
- FEM (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019
- FEM (Borrowing and Lending in Rupees) Regulations, 2000
- FEM (Borrowing or Lending in Foreign Exchange) Regulations, 2000
- FEM (Deposit) Regulations, 2016
- FEM (Export and Import of Currency) Regulations, 2015
- FEM (Guarantees) Regulations, 2000
- FEM (Establishment in India of Branch office or a Project office or any other Place of Business) Regulations, 2016
- FEM (Export of Goods and Services) Regulations, 2015
- FEM (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015
- FEM (Insurance) Regulations, 2015
- FEM (Manner of Receipt and Payment) Regulations, 2023
- FEM (Permissible Capital Account Transactions) Regulations, 2000
- FEM (Possession and Retention of Foreign Currency) Regulations, 2015
- FEM (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2015
- FEM (Remittance of Assets) Regulations, 2016
- FEM (Foreign Exchange Derivative Contracts) Regulations, 2000
- FEM (Crystallization of inoperative Foreign Currency Deposits) Regulations, 2014
- FEM (Transfer or Issue of any foreign Security) Regulations, 2004
- FEM (International Financial Services Centre) Regulations, 2015
- FEM (Regularization of Assets Held Abroad by a Person Resident in India) Regulations, 2015

## IMPORTANT DEFINITIONS

Section 2 of the Foreign Exchange Management Act defines various terms used in the Act, and certain important definitions are given below:

### Authorised Person [Section 2(c)]

The term 'authorised person' is defined to include an authorised dealer, money changer, offshore banking unit or any other person for the time being authorised to deal in foreign exchange or foreign securities.

### Currency Notes [Section 2(i)]

'Currency Notes' means and includes cash in the form of coins and bank notes. In fact, it means money and such bank notes or other paper money as are authorised by law and circulate from hand to hand as a medium of exchange.

### Export [Section 2 (l)]

'Export', with its grammatical variations and cognate expressions, means (i) the taking out of India to a place outside India any goods (ii) provision of services from India to any person outside India.

### Foreign Exchange [Section 2(n)]

The term 'foreign exchange' has been defined to mean foreign currency and includes deposits, credits, balance payable in foreign currency, drafts, travelers cheques, letters of credit, bills of exchange expressed or drawn in Indian currency but payable in any foreign currency. Any draft, travelers cheque, letters of credit or bills of exchange drawn by banks, institutions or persons outside India but payable in Indian currency has also been included in the definition of foreign exchange.

### Foreign Security [Section 2(o)]

The term 'foreign security' has been defined to mean any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency but where redemption or any form of return such as interest or dividend is payable in Indian currency.

Transfer or issue of a foreign security is a capital account transaction within the meaning of Section 6(3)(a) of the Act. The Reserve Bank of India has made Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2000 for regulation, acquisition and transfer of a foreign security by a person resident in India i.e. investment by Indian entities in overseas joint ventures and wholly owned subsidiaries as also investment by a person resident in India in shares and securities issued outside India.

### Person [Section 2(u)]

The definition of the term 'person' includes, an individual, a Hindu Undivided Family, a company, a firm, an association of persons or body of individuals whether incorporated or not; any agency, office or branch owned or controlled by such persons. Even every artificial juridical person not falling within the above definition has been treated as person as per clause (u) of Section 2.

### Person Resident in India [Section 2(v)]

The expression 'person resident in India' has been defined to mean -

- (i) a person residing in India for more than 182 days during the course of the preceding financial year.

However, two categories of persons are excluded from the purview of definition.

The first category includes any person who has gone out of India or who stays outside India for or on taking up employment outside India, or for carrying on outside India a business or vocation. The definition also includes person who stays outside India for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period. The second category of persons which have been excluded from the definition of person resident in India include:

A person who has come to stay or stays in India, in either case otherwise than—

- (a) for or taking up employment in India; or
  - (b) for carrying on in India a business or vocation in India; or
  - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.
- (ii) any person or body corporate registered or incorporated in India.
  - (iii) an office, branch or agency in India owned or controlled by a person resident out of India.
  - (iv) an office, branch or agency outside India owned or controlled by a person resident in India.

### **Repatriate to India [Section 2(y)]**

‘Repatriate to India’ means bringing into India the realised foreign exchange and (i) the selling of such foreign exchange to an authorised person in India in exchange for rupees, or (ii) the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank, and includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange and the expression “repatriation” shall be construed accordingly.

### **Special Director (Appeals) [Section 2(zc)]**

‘Special Director (Appeals)’ means an officer appointed under section 17. Section 17 empowers Central Government which shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction.

## **REGULATION AND MANAGEMENT OF FOREIGN EXCHANGE**

Chapter II of the Act containing sections 3-9 deals with Regulation and Management of Foreign Exchange. Section 3 prohibits any person other than an authorised person from dealing in or transferring any foreign exchange or foreign security to any person or making any payment to or for the credit of any person resident outside India in any manner or receiving otherwise through an authorised person any payment by order or on behalf of any person resident outside India in any manner except as provided in the Act, rules or regulations made thereunder or with the general or special permission of the Reserve Bank of India.

Section 3(d) prohibits a person to enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person, except as otherwise provided in the Act and rules or regulations made thereunder. For this purpose, financial transaction has been defined to mean making any payment to or for the credit of any person or receiving any payment for, by order or on behalf of any person. Financial transaction also includes drawing, issuing or negotiating any bill of exchange or promissory note or transferring any security or acknowledging any debt.

## CURRENT ACCOUNT TRANSACTIONS

The term current account transaction has been defined to mean a transaction other than a capital account transaction and includes payments due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business; payments due as interest on loan and as net income from investments; remittances for living expenses of parents, spouse and children residing abroad and expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Under the Act, freedom has been granted for selling and drawing of foreign exchange to or from an authorized person for undertaking current account transactions. However, the Central Government has been vested with powers in consultation with Reserve Bank to impose reasonable restrictions on current account transactions. The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000 dealing with various aspects of current account transactions.

Section 5 of the Act allows any person to sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction as defined under Section 2(j) of the Act. However, the Central Government may, in the public interest and in consultation with the Reserve Bank impose reasonable restrictions for current account transactions.

Foreign Exchange Management (Current Account Transactions) Rules, 2000 defines the term 'Drawal as to mean drawal of foreign exchange from an authorised person and includes opening of Letter of Credit or use of International Credit Card or International Debit Card or ATM Card or any other thing by whatever name called which has the effect of creating foreign exchange liability.'

Example of Current Account Transactions are payment towards private visits to any country; Gift or donation; Going abroad for employment; Emigration; Maintenance of close relatives abroad; Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up; Expenses in connection with medical treatment abroad; Studies abroad; Any other current account transaction which is not covered under the definition of current account in FEMA 1999.

### Prohibition on drawal of foreign exchange for certain transactions

Rule 3 prohibits the drawal of foreign exchange for the purposes of transactions specified in the Schedule I or a travel to Nepal and/or Bhutan or a transaction with a person resident in Nepal or Bhutan. However, in the case of transaction with a person resident in Nepal and Bhutan, the prohibition may be exempted by RBI subject to such terms and conditions as it may consider necessary. Schedule I to the Rules enumerate the situations in which the drawal of foreign exchange is prohibited. These are as follows:

Remittance out of lottery winnings.

Remittance of income from racing/riding etc., or any other body.

Remittance for purchase of lottery tickets, banned/prescribed magazine, football pools, sweep stakes, etc.

Payment of Commission on exports made towards equity investment in joint ventures/wholly owned subsidiaries abroad of Indian Companies.

Payment of Commission on exports under Rupee State Credit Route, except commission upto 10% of invoice value of exports of tea and tobacco.

Payment related to 'call back service' of telephone.

Remittance of interest income on funds held in Non-resident Special Rupee Scheme Account.

**Prior approval of Government of India for certain transactions**

Rule 4 requires prior approval of the Government of India for the transactions as specified in Schedule II. However, this does not apply to the cases where the payment is made out of funds held in Resident Foreign Currency Account (RFC) of the remitter.

**Prior approval of Reserve Bank for certain transaction**

Rule 5 of the Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015, governs every drawal of foreign exchange for transactions included in Schedule III. However, Rule 5 does not apply to those cases where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

**Transactions included in Schedule III****1. Facilities for individuals**

Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any additional remittance in excess thereof requires prior approval of the Reserve Bank of India.

- (i) Private visits to any country (except Nepal and Bhutan).
- (ii) Gift or donation.
- (iii) Going abroad for employment.
- (iv) Emigration.
- (v) Maintenance of close relatives abroad.
- (vi) Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
- (vii) Expenses in connection with medical treatment abroad.
- (viii) Studies abroad.
- (ix) Any other current account transaction.

However, the purposes mentioned at item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (Liberalised Remittance Scheme) if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

Further, if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

Further more a person who is resident but not permanently resident in India and

- (a) is a citizen of a foreign State other than Pakistan; or
- (b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary

or joint venture in India of such foreign company, may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

*Explanation:* For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident:

It is to be noted that a person other than an individual may also avail of foreign exchange facility, *mutatis mutandis*, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

## 2. Facilities for persons other than individual

The following remittances by persons other than individuals require prior approval of the Reserve Bank of India.

- (i) Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for-
  - (a) creation of Chairs in reputed educational institutes;
  - (b) contribution to funds (not being an investment fund) promoted by educational institutes; and
  - (c) contribution to a technical institution or body or association in the field of activity of the donor Company.
- (ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.
- (iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.
- (iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

## LIBERALISED REMITTANCE SCHEME (LRS)

***Liberalised Remittance Scheme (LRS) of USD 2, 50,000 for resident individuals. Under the Liberalised Remittance Scheme, Authorised Dealers may freely allow remittances by resident individuals up to USD 2, 50,000 per Financial Year (April-March) for any permitted current or capital account transaction or a combination of both. The Scheme is not available to corporates, partnership firms, HUF, Trusts, etc.***

The limit of USD 2,50,000 per Financial Year (FY) under the Scheme also includes/subsumes remittances for current account transactions (viz. private visit; gift/donation; going abroad on employment; emigration; maintenance of relatives abroad; business trip; medical treatment abroad; studies abroad) available to resident individuals under Para 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015 dated May 26, 2015. Release of foreign exchange exceeding USD 2,50,000, requires prior permission from the Reserve Bank of India.

### a. Private visits

For private visits abroad, other than to Nepal and Bhutan, any resident individual can obtain foreign exchange

up to an aggregate amount of USD 2,50,000 from an Authorised Dealer or FFMC, in any one financial year, irrespective of the number of visits undertaken during the year.

Further, all tour related expenses including cost of rail/road/water transportation; cost of Euro Rail; passes/tickets, etc. outside India; and overseas hotel/lodging expenses shall be subsumed under the LRS limit. The tour operator can collect this amount either in Indian rupees or in foreign currency from the resident traveller.

#### **b. Gift/donation**

Any resident individual may remit up-to USD 2,50,000 in one FY as gift to a person residing outside India or as donation to an organization outside India.

#### **c. Going abroad on employment**

A person going abroad for employment can draw foreign exchange up to USD 2,50,000 per FY from any Authorised Dealer in India.

#### **d. Emigration**

A person wanting to emigrate can draw foreign exchange from AD Category I bank and AD Category II up to the amount prescribed by the country of emigration or USD 250,000. Remittance of any amount of foreign exchange outside India in excess of this limit may be allowed only towards meeting incidental expenses in the country of immigration and not for earning points or credits to become eligible for immigration by way of overseas investments in government bonds; land; commercial enterprise; etc.

#### **e. Maintenance of relatives abroad**

A resident individual can remit up-to USD 2,50,000 per FY towards maintenance of relatives 'relative' as defined in Section 2(77) of the Companies Act, 2013 abroad.

#### **f. Business trip**

Visits by individuals in connection with attending of an international conference, seminar, specialised training, apprentice training, etc., are treated as business visits. For business trips to foreign countries, resident individuals can avail of foreign exchange up to USD 2,50,000 in a FY irrespective of the number of visits undertaken during the year.

However, if an employee is being deputed by an entity for any of the above and the expenses are borne by the latter, such expenses shall be treated as residual current account transactions outside LRS and may be permitted by the AD without any limit, subject to verifying the bonafides of the transaction.

#### **g. Medical treatment abroad**

Authorised Dealers may release foreign exchange up to an amount of USD 2,50,000 or its equivalent per FY without insisting on any estimate from a hospital/doctor. For amount exceeding the above limit, Authorised Dealers may release foreign exchange under general permission based on the estimate from the doctor in India or hospital/ doctor abroad. A person who has fallen sick after proceeding abroad may also be released foreign exchange by an Authorised Dealer (without seeking prior approval of the Reserve Bank of India) for medical treatment outside India.

In addition to the above, an amount up to USD 250,000 per financial year is allowed to a person for accompanying as attendant to a patient going abroad for medical treatment/check-up.

#### **h. Facilities available to students for pursuing their studies abroad.**

AD Category I banks and AD Category II, may release foreign exchange up to USD 2,50,000 or its equivalent to resident individuals for studies abroad without insisting on any estimate from the foreign university. However, AD Category I bank and AD Category II may allow remittances (without seeking prior approval of the Reserve Bank of India) exceeding USD 2,50,000 based on the estimate received from the institution abroad.

It may be noted that remittances under the Liberalised Remittance Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions. However, clubbing is not permitted by other family members for capital account transactions such as opening a bank account/ investment, if they are not the co-owners/co-partners of the overseas bank account/ investment. Remittances for purchase of property shall be in accordance with the provisions contained in Foreign Exchange Management (Overseas Investment) Rules, 2022, Foreign Exchange Management (Overseas Investment) Regulations, 2022 and Foreign Exchange Management (Overseas Investment) Directions, 2022. Further, a resident cannot gift to another resident, in foreign currency, for the credit of the latter's foreign currency account held abroad under LRS.

***The permissible capital account transactions by an individual under LRS are:***

- i. opening of foreign currency account abroad with a bank;***
- ii. acquisition of immovable property abroad, Overseas Direct Investment (ODI) and Overseas Portfolio Investment (OPI), in accordance with the provisions contained in Foreign Exchange Management (Overseas Investment) Rules, 2022, Foreign Exchange Management (Overseas Investment) Regulations, 2022 and Foreign Exchange Management (Overseas Investment) Directions, 2022;***
- iii. extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.***

### **CAPITAL ACCOUNT TRANSACTIONS**

'Capital account transaction' has been defined to mean any transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person resident outside India and includes the transactions specified in Sub-section (3) of Section 6 of the Act.

Example of Capital Account Transactions are transactions such as Indian Party making investment in equity shares/capital contribution in a foreign entity, or acquiring an immovable property outside India and a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India.

Section 6 of the FEMA allows capital account transactions subject however to certain conditions. This section empowers the Reserve Bank of India to specify, in consultation with the Central Government, any class or classes of capital account transactions permissible and the limit up to which foreign exchange shall be admissible for such transactions. However, Reserve Bank shall not impose any restrictions on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary course of business.



The Reserve Bank of India may, by regulations, prohibit, restrict or regulate the transfer or issue of any foreign security by a person resident in India or by a person resident outside India. Reserve Bank of India may also regulate, prohibit or restrict transfer or issue of any security or foreign security through any branch office, or agency in India of a person resident outside India. Any borrowing or lending in foreign exchange in whatever form or by whatever name called may also be regulated or prohibited by the Reserve Bank. Similarly, RBI may also prohibit or restrict any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India. Deposits between person's resident in India and person's resident outside India may be regulated or prohibited by the Reserve Bank of India. RBI may also regulate the export, import or holding of currency or currency notes.

Acquisition or transfer of immovable property other than on lease not exceeding five years in India by person resident in India or a person resident outside India may be prohibited or regulated by the Reserve Bank of India. RBI has also been empowered to prohibit or regulate giving of guarantee or surety in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India or by a person resident outside India.

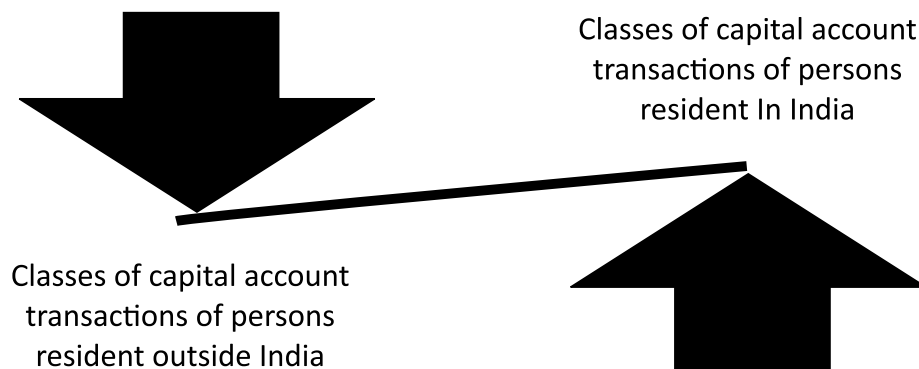
Sub-section (4) allows a person resident in India to hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India, if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India. Similarly, a person resident outside India is permitted to hold, own, transfer or invest in Indian currency, security, or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

Reserve Bank of India under sub-section (6) has been empowered to regulate, prohibit, restrict establishment in India of a branch, office or other place of business by a person resident outside India for carrying on any activity relating to such branch, office or other place of business.

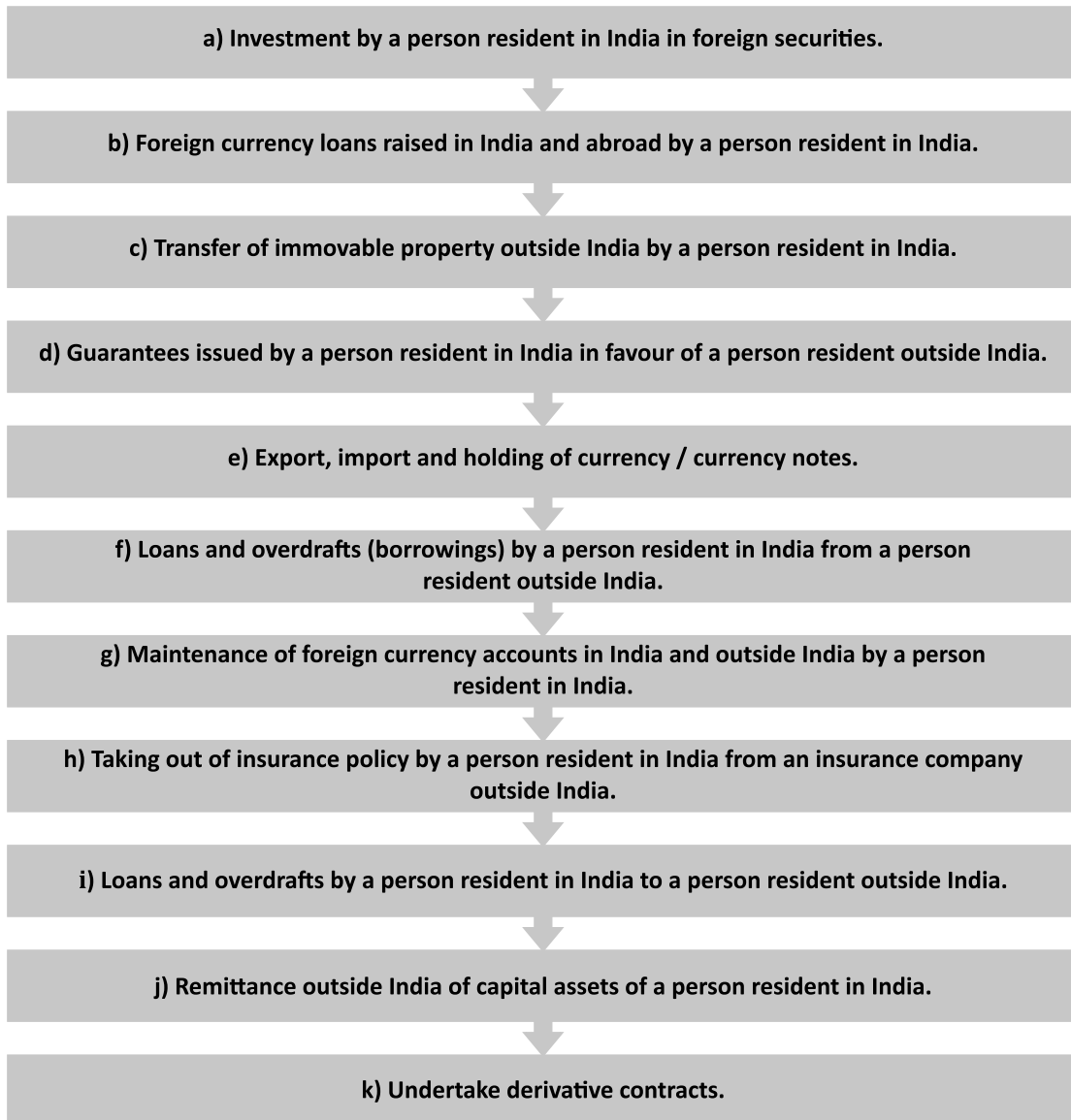
### Permissible Capital Account Transactions

Schedule I & II to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 classifies the capital account transactions of a person under the following two heads viz.:-

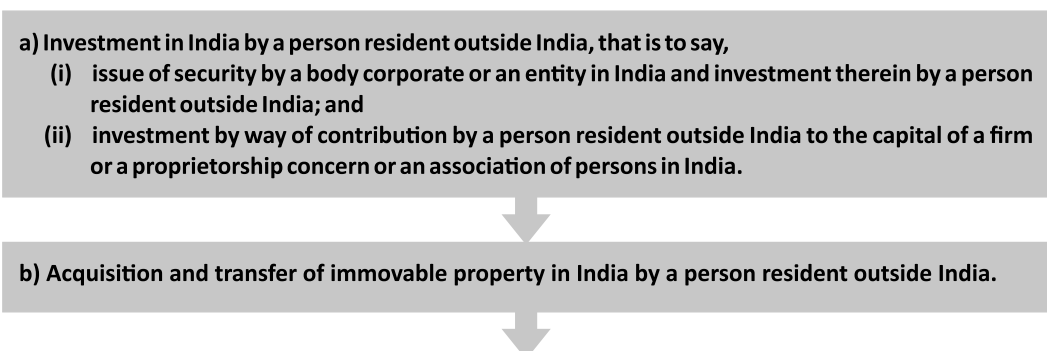
### Classes of Capital Account Transactions

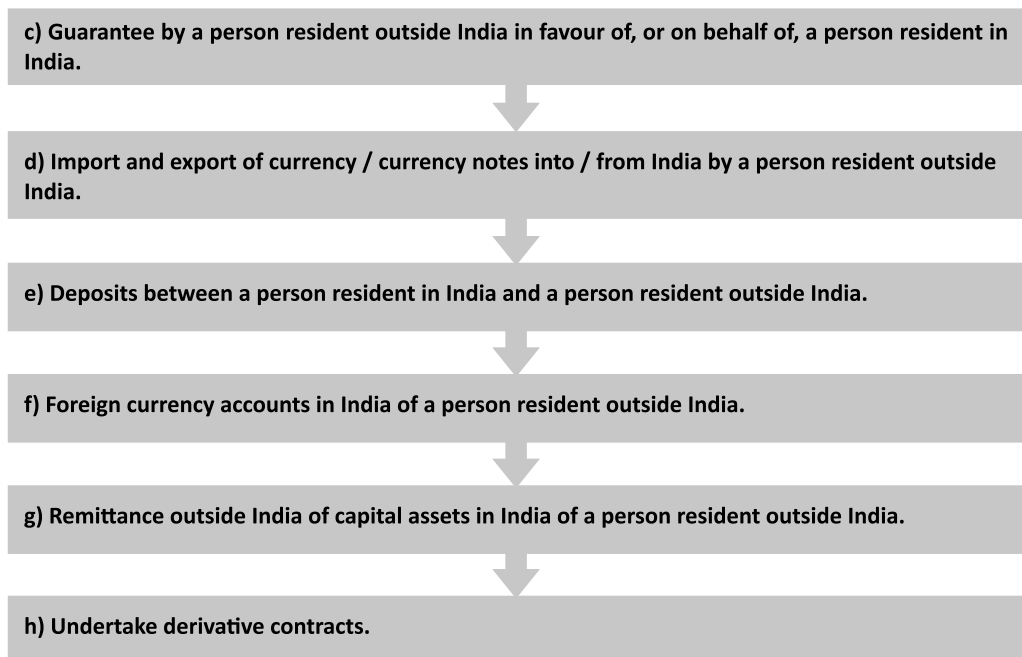


### Classes of Capital Account Transactions by Persons Resident in India



### Classes of Capital Account Transactions by Persons Resident Outside India





Subject to the provisions of the Act, or rules, or regulations or directions or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for the above mentioned capital account transactions provided the transactions are within the limit, if any, specified in the Regulations relevant to the transaction. However, no person is allowed to undertake or sell or draw foreign exchange to or from an authorised person for any capital account transaction except as provided in the Act, Rules or regulations made thereunder.

Similarly, except as otherwise provided in the Act, no person resident outside India is entitled to make investment in India, in any form, in any company or partnership firm or proprietary concern or any entity whether incorporated or not, which is engaged or proposed to engage in the business of chit funds, or Nidhi company, or in agricultural or plantation activities, or real estate business, or construction of farm houses, or trading in Transferable Development Rights (TDRs). For this purpose real estate business includes development of townships, construction of residential/ commercial premises, roads or bridges.

The payment for investment are required to be made by remittance from abroad through normal banking channels or by debit to an account of the investor maintained with an authorised person in India in accordance with the regulation made by the Reserve Bank of India. Every person selling or drawing foreign exchange to or from an authorised person for a capital account transaction is required to furnish to Reserve Bank a declaration within the time specified in the regulations relevant to the transactions.

### **REALISATION, REPATRIATION AND SURRENDER OF FOREIGN CURRENCY**

Section 8 of the of Foreign Exchange Management Act, 1999 requires the person resident in India to make all reasonable efforts to realise and repatriate the foreign exchange due or accrued as per the directions of the Reserve Bank.

In exercise of the powers conferred by Section 8, Section 10(6), Section 47(2)(c) of the Foreign Exchange Management Act, 1999, the Reserve Bank issued Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015 relating to the manner of, and the period for, realisation of foreign exchange, repatriation of realised foreign exchange to India and its surrender.

### **Duty of persons to realise foreign exchange due**

A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank, take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

- (a) that the receipt by him of the whole or part of that foreign exchange is delayed; or
- (b) that the foreign exchange ceases in whole or in part to be receivable by him.

It may be noted that 'Foreign exchange due' means the amount which a person has a right to receive or claim in foreign exchange.

### **Manner of Repatriation**

On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and -

- (a) sell it to an authorised person in India in exchange for rupees; or
- (b) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
- (c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

### **Period for surrender of realised foreign exchange**

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person, within the period specified below :-

- (i) foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;
- (ii) in all other cases within a period of ninety days from the date of its receipt.

### **Period for surrender in certain cases**

Any person not being an individual resident in India who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under sub-section (5) of Section 10 of the FEMA does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of sixty days from the date of its acquisition or purchase by him.

Where the foreign exchange acquired or purchased by any person not being an individual resident in India from an authorised person is for the purpose of foreign travel, then, the unspent balance of such foreign exchange shall, save as otherwise provided in the regulations made under the Act, be surrendered to an authorised person-

- (i) within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and

- (ii) within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques.

### **Period for surrender of received/realised/unspent/unused foreign exchange by Resident individuals**

A person being an individual resident in India shall surrender the received/ realised/ unspent/ unused foreign exchange whether in the form of currency notes, coins and travelers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/ realisation/ purchase/ acquisition or date of his return to India, as the case may be.

### **Exemption**

The Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015 does not apply to foreign exchange in the form of currency of Nepal or Bhutan.

## **REMITTANCE OF ASSETS**

In exercise of the powers conferred by Section 47 of the Foreign Exchange Management Act, the Reserve Bank issued the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 in respect of remittance outside India by a person whether resident in India or not, of assets in India.

### **Remittances by individuals not being NRIs/ PIOs**

'Remittance of assets' means remittance outside India of funds in a deposit with a bank/ firm/ company, provident fund balance or superannuation benefits, amount of claim or maturity proceeds of insurance policy, sale proceeds of shares, securities, immovable property or any other asset held in India in accordance with the provisions of the Foreign Exchange Management Act, 1999 (FEMA) or rules/ regulations made there under.

Authorised Dealer (AD) may allow remittance of assets by a foreign national where:

- (i) the person has retired from employment in India;
- (ii) the person has inherited from a person referred to in section 6(5) of the Act;
- (iii) the person is a non-resident widow/widower and has inherited assets from her/his deceased spouse who was an Indian national resident in India;

The remittance should not exceed USD one million per financial year. This limit, however, will not cover sale proceeds of assets held on repatriation basis. In case the remittance is made in more than one instalment, the remittance of all instalments should be made through the same AD on submission of documentary evidence;

- (iv) the remittance is in respect of balances held in a bank account by a foreign student who has completed his/ her studies, provided such balance represents proceeds of remittances received from abroad through normal banking channels or rupee proceeds of foreign exchange brought by such person and sold to an authorised dealer or out of stipend/ scholarship received from the Government or any organisation in India.

These facilities are not available for citizens of Nepal or Bhutan or a PIO.

### Remittances by NRIs/ PIOs

**'Non-Resident Indian' (NRI)** means a person resident outside India who is a citizen of India.

A **'Person of Indian Origin (PIO)'** is a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified by the Central Government, satisfying the following conditions:

Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955; or

- (i) Who belonged to a territory that became part of India after the 15th day of August, 1947; or
- (ii) Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b); or
- (iii) Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c).

*Explanation:* PIO will include an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955.

ADs may allow NRIs/ PIOs, on submission of documentary evidence, to remit up to USD one million, per financial year:

- (i) out of balances in their non-resident (ordinary) (NRO) accounts/ sale proceeds of assets/ assets acquired in India by way of inheritance/ legacy;
- (ii) in respect of assets acquired under a deed of settlement made by either of his/ her parents or a relative as defined in Companies Act, 2013. The settlement should take effect on the death of the settler;
- (iii) in case settlement is done without retaining any life interest in the property i.e. during the lifetime of the owner/ parent, it would tantamount to regular transfer by way of gift and the remittance of sale proceeds of such property would be guided by the extant instructions on remittance of balance in the NRO account.

In case the remittance is made in more than one instalment, the remittance of all instalments should be made through the same AD. Where the remittance is to be made from the balances held in the NRO account, the Authorised Dealer should obtain an undertaking from the account holder stating that the said remittance is sought to be made out of the remitter's balances held in the account arising from his/ her legitimate receivables in India and not by borrowing from any other person or a transfer from any other NRO account and if such is found to be the case, the account holder will render himself/ herself liable for penal action under FEMA.

### Remittances by companies/ entities

ADs may allow remittances by Indian companies under liquidation on directions issued by a Court in India/ orders issued by official liquidator in case of voluntary winding up on submission of:

- (i) Auditor's certificate confirming that all liabilities in India have been either fully paid or adequately provided for.
- (ii) Auditor's certificate to the effect that the winding up is in accordance with the provisions of the Companies Act.
- (iii) In case of winding up otherwise than by a court, an auditor's certificate to the effect that there are no legal proceedings pending in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

ADs may also allow Indian entities to remit their contribution towards the provident fund/ superannuation/ pension fund in respect of their expatriate staff resident but “not permanently resident” in India.

### Remittances/ winding up proceeds of branch/ office

ADs may permit remittance of assets on closure or remittance of winding up proceeds of branch office/ liaison office (other than project office) on submission of the following documents:

- (i) A copy of the Reserve Bank’s permission for establishing the branch/ office in India.
- (ii) Auditor’s certificate:
  - (a) indicating the manner in which the remittable amount has been arrived and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets;
  - (b) confirming that all liabilities in India including arrears of gratuity and other benefits to the employees etc., of the branch/ office have been either fully met or adequately provided for;
  - (c) confirming that no income accruing from sources outside India (including proceeds of exports) has remained un-repatriated to India;
  - (d) confirming that the branch/office has complied with all regulatory requirements stipulated by the Reserve Bank of India from time to time regarding functioning of such offices in India;
- (iii) a confirmation from the applicant that no legal proceedings are pending in any Court in India and there is no legal impediment to the remittance; and
- (iv) a report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the office in India.

### Remittance of assets requiring RBI approval

Prior approval of the Reserve Bank is necessary for remittance of assets where:

- (a) Remittance is in excess of USD 1,000,000 (US Dollar One million only) per financial year
  - (i) on account of legacy, bequest or inheritance to a citizen of foreign state, resident outside India;
  - (ii) by NRIs/ PIOs out of the balances held in NRO accounts/ sale proceeds of assets/ the assets acquired by way of inheritance/ legacy.
- (b) Hardship will be caused to a person if remittance from India is not made to such a person.

Remittance of funds from the sale of assets in India held by a person, whether resident in or outside India, not covered under the directions stipulated above will require approval of the Reserve Bank.

### Income-tax clearance

The remittances are subject to payment of applicable taxes in India. Reserve Bank of India does not issue any instructions under FEMA clarifying tax issues. It is mandatory on the part of Authorised Dealers to comply with the requirement of tax laws, as applicable.

### EXEMPTION FROM REALISATION OR REPATRIATION

Section 9 of the Act contains exemptions from the application of provisions relating to holding of foreign currency and realisation and repatriation in certain circumstances, as provided under Sections 4 and 8 of the Act respectively. Accordingly, possession of foreign currency or coins by any person or class of persons, as the Reserve Bank may specify is not prohibited. A person or class of persons may hold and operate foreign currency account within the prescribed limits as may be specified by the Reserve Bank. Foreign exchange

acquired or received before 8th July, 1947, or any income arising or accruing thereon which is held outside India, in pursuance of a general or special permission of RBI, is also exempted.

Provisions relating to holding of foreign exchange, realisation and repatriation of foreign exchange are not applicable to person resident in India upto such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from certain persons mentioned above and any income arising there from. Reserve Bank may also specify the exemption limit upto which the foreign exchange earned by a person from employment, business, trade, vocation services, honorarium, gifts, inheritance or other legitimate means may be possessed. Reserve Bank may also exempt such other receipts as it thinks fit.

### **POSSESSION AND RETENTION OF FOREIGN CURRENCY OR FOREIGN COINS**

Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 deals with limits on possession and retention of foreign currency or foreign coins. Under Regulation 3 the Reserve Bank has specified following limits for possession or retention of foreign currency or foreign coins, namely:

- (i) possession without limit of foreign currency and coins by an authorised person within the scope of his authority;
- (ii) possession without limit of foreign coins by any person;
- (iii) retention by a person resident in India of foreign currency notes, bank notes and foreign currency travelers cheques not exceeding US \$ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travelers cheques acquired during a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or from any person not resident in India and also who is on a visit to India, or as honorarium or gift or for services rendered or in settlement of any lawful obligation; or as a honorarium or gift while on a visit to any place outside India; or represents unspent amount of foreign exchange acquired from an authorised person for travel abroad.

Regulation 4 deals with possession of foreign exchange by a person resident in India but not permanently resident therein and provides that a person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and travelers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the law for the time being in force. Explanation to regulation 4 defines the term 'not permanently resident as to mean a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.

### **MANNER OF RECEIPT AND PAYMENT**

Regulation 3 of the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023 states that save as otherwise in a manner as provided in the Foreign Exchange Management Act or the rules or regulations made or directions issued under the Act, no person resident in India shall make or receive payment from a person resident outside India:

It may be noted that the Reserve Bank may, on an application made to it, permit a person resident in India to make or receive payment under the Foreign Exchange Management Act

The receipt and payment between a person resident in India and a person resident outside India shall, unless provided otherwise, be made through an Authorised Bank or Authorised Person and in the manner as specified below:

#### **I. Trade transactions –**

- (a) receipt/payment for export to or import from the countries given below of eligible goods and services shall be made as under:



- (i) *Nepal and Bhutan* - in Indian Rupees provided that in case of exports from India where the importer in Nepal has been permitted by the Nepal Rashtira Bank to make payment in foreign currency, such receipts towards the amount of the export may be in foreign currency;
- (ii) *Member countries of ACU, other than Nepal and Bhutan* - through ACU mechanism or as per the directions issued by the Reserve Bank to authorised dealer from time to time:

Provided that in case of imports where the goods are shipped to India from a member country of the ACU (other than Nepal and Bhutan) but the supplier is resident of a country other than a member country of the ACU, the payment may be made in a manner as specified at (iii) below.

- (iii) *Countries other than member countries of ACU* - In Indian Rupees or in any foreign currency.
- (b) Notwithstanding anything contained in this sub-regulation, receipts and payments may also be made in a manner as may be provided in the extant Foreign Trade Policy framed by the Central Government.

*Explanation:* The expression 'ACU' (Asian Clearing Union) shall have the same meaning assigned to it under Article I of the ACU agreement and the ACU mechanism shall be construed accordingly.

## II. Transactions other than trade transactions - receipt and payment shall be made as under:

- (i) *Nepal and Bhutan* - In Indian Rupees provided that in case of overseas investment in Bhutan, payment may also be made in foreign currency;
- (ii) *Other Countries* – In Indian Rupees or any foreign currency.

Payment and receipt in India for any current account transaction, other than a trade transaction, between any person resident in India and a person resident outside India, who is on a visit to India, may be made only in Indian Rupees.

It may be noted that any payment or receipt under regulation 3 may also be made by debit/ credit to a bank account maintained in terms of the rules, regulations or directions issued under the Act.

## ACQUISITION OR TRANSFER OF IMMOVABLE PROPERTY IN INDIA

As per section 6(5) of FEMA, a person resident outside India can hold, own, transfer or invest in any immovable property situated in India if such property was acquired, held or owned by him/ her when he/ she was resident in India or inherited from a person resident in India.

### ***Acquisition/ Transfer of immovable property by NRI or an OCI***

***A 'Non-Resident Indian' (NRI) is a person resident outside India who is a citizen of India.***

***An 'Overseas Citizen of India (OCI)' is a person resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955.***

- An NRI or an OCI can acquire by way of purchase any immovable property (other than agricultural land/ plantation property/ farm house) in India.
- An NRI or an OCI can acquire by way of gift any immovable property (other than agricultural land/ plantation property/ farm house) in India from person resident in India or from an NRI or an OCI who is a relative as defined in section 2(77) of the Companies Act, 2013.
- An NRI or an OCI can acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired the property in accordance with the provisions of the foreign exchange law in force at the time of acquisition.

- An NRI or an OCI can acquire any immovable property in India by way of inheritance from a person resident in India.
- An NRI or an OCI may transfer any immovable property in India to a person resident in India.
- An NRI or an OCI may transfer any immovable property (other than agricultural land or plantation property or farmhouse) to an NRI or an OCI. In case the transfer is by way of gift, the transferee should be a relative as defined in section 2(77) of the Companies Act, 2013.

### **Payment for Acquisition of Immovable Property**

NRIs or OCIs may make payment, if any, for transfer of immovable property out of funds received in India through banking channels by way of inward remittance from any place outside India or by debit to their NRE/ FCNR (B)/ NRO account.

Such payments cannot be made either by traveller's cheque or by foreign currency notes or by other mode except those specifically mentioned above.

### **Joint acquisition by the spouse of an NRI or an OCI**

A person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, who is a spouse of a Non-Resident Indian or an Overseas Citizen of India may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse.

Consideration for transfers should be out of funds received in India through banking channels by way of inward remittance from any place outside India or by debit to non-resident account of the person concerned maintained in accordance with the Act or the rules framed thereunder. Payments cannot be made either by traveller's cheque or by foreign currency notes or by other mode except those specifically mentioned in this para.

The marriage should have been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property.

The non-resident spouse should not otherwise be prohibited from such acquisition.

### **Acquisition by a Long-Term Visa holder**

A person being a citizen of Afghanistan, Bangladesh or Pakistan belonging to minority communities in those countries viz., Hindus, Sikhs, Jains, Buddhists, Parsis and Christians, who is residing in India and has been granted a Long-Term Visa (LTV) by the Central Government may purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for self-employment.

The property should not be located in and around restricted/ protected areas so notified by the Central Government and cantonment areas.

The person should submit a declaration to the Revenue Authority of the district where the property is located specifying the source of funds and that he/ she is residing in India on a LTV.

The registration documents of the property should mention the nationality and the fact that such person is on a LTV.

The property of such person may be attached/ confiscated in the event of his/ her indulgence in anti-India activities.

A copy of the documents of the purchased property shall be submitted to the Deputy Commissioner of Police (DCP)/ Foreigners Registration Office (FRO)/ Foreigners Regional Registration Office (FRRO) concerned and to the Ministry of Home Affairs (Foreigners Division).

Sale of the immovable property so acquired is permissible only after such person has acquired Indian citizenship. However, transfer of such immovable property before acquiring Indian citizenship requires the prior approval of the Deputy Commissioner of Police (DCP)/ Foreigners Registration Office (FRO)/ Foreigners Regional Registration Office (FRRO) concerned.

***Acquisition of immovable Property by Foreign Embassies/ Diplomats/ Consulate Generals***

***Foreign Embassy/ Diplomat/ Consulate General, may purchase/ sell immovable property (other than agricultural land/ plantation property/ farm house) in India provided –***

- ***Clearance from the Government of India, Ministry of External Affairs is obtained for such purchase/sale, and***
- ***The consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through the normal banking channels.***

***Acquisition of Immovable Property by Person Resident outside India for Carrying on a Permitted Activity***

***A branch or office or any other place of business in India, other than a liaison office, established by a person resident outside India, may acquire immovable property in India which is necessary for or incidental to the activity carried on in India by such branch or office.***

***Such a person is required to file with the Reserve Bank a declaration in the form IPI (as given in the Master Direction on Reporting), not later than ninety days from the date of such acquisition.***

***The immovable property so acquired can be mortgaged to an Authorised Dealer as a security for any borrowing.***

***However, acquisition of immovable property in India by a branch, office or other place of business of persons of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea origin/ nationality/ ownership requires the prior approval of the Reserve Bank.***

## **EXPORT OF GOODS & SERVICES**

According to the Section 7(1) of the Act, every exporter of goods shall:

- (a) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India.
- (b) furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realisation of the export proceeds by such exporter.

The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit.

Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services.

Further, in exercise of the powers conferred by clause (a) of sub-section (1), sub-section (3) of Section 7 and sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) the Reserve Bank of India issued the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 for Export of Goods and Services from India.

### **Declaration of Exports**

In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing –

- (i) the full export value of the goods or software; or
- (ii) if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.

Declarations shall be executed in sets of such number as specified.

For the removal of doubt, it is clarified that, in respect of export of services to which none of the Forms specified in these Regulations apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act and rules and regulations made thereunder.

Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

### **Manner of Payment of Export Value of Goods**

Unless otherwise authorised by the Reserve Bank, the amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 as amended from time to time.

The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time, from the date of export.

### **Project Exports**

Where an export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract, the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval of the approving authority, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank of India from time to time.

In case a guarantee is required to be given prior to post award approval, the same may be issued by an authorized dealer bank/ a person resident in India being an exporting company, for performance of a project outside India, or for availing of credit facilities, whether fund-based or non-fund based, from a bank or a financial institution outside India in connection with the execution of such project, provided that the contract / Letter of Award stipulates such requirements.

## **AUTHORISED PERSON**

Authorised Person include an authorised dealer, money changer, offshore banking unit or any other person for the time being authorised to deal in foreign exchange or foreign securities.

Chapter III of the Act containing Sections 10-12 deals with the provisions relating to authorised person. Section 10 deals with the procedure of appointing authorised person by the Reserve Bank, Section 11 specifies the powers of the RBI to issue directions to authorised person and Section 12 prescribes the power of the RBI to inspect authorised person. An Authorised Dealer is any person specifically authorized by the Reserve Bank under Section 10(1) of FEMA, 1999, to deal in foreign exchange or foreign securities.

Under Section 10, any person who has made an application to the RBI may be authorised by it to act as an authorised person to deal in foreign exchange or in foreign securities as an authorised dealer, money changer or offshore banking unit or in any other manner as the RBI deem fit. This authorisation is in writing and subject to the conditions laid down by the RBI. Basic function, organisation structure of RBI if provided at end to this lesson.

Normally, nationalised banks, leading non nationalized banks and foreign banks are appointed as authorized persons.

Authorised persons are required to comply with the directions of the Reserve Bank with regard to his dealing in foreign exchange or foreign security receipt with the previous permission of the Reserve Bank. However authorised person are required not to engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation.

Reserve Bank of India has been empowered to revoke the authorisation granted to any person at any time in the public interest. It may also revoke the authorisation after giving an opportunity, if the authorised person failed to comply with the conditions subject to which the authorisation was granted or contravened any of the provisions of the Act, rules, notifications or directions.

An authorised person, before undertaking any transaction on behalf of any person shall, require that person to make such declaration and give such information as will reasonably satisfy the authorised person that the transaction will not involve or is not intended to violate or contravene any provisions of the Act, rules, notification or directions. In case, the person refuses to comply with such requirements or makes only unsatisfactory compliances, the authorised person is duty bound to refuse in writing to act on behalf of such person in such transaction and report the matter to Reserve Bank.

Any person, other than an authorised person who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to the authorised person does not use it for such purpose, or does not surrender it to authorised person within the specified period, or uses the foreign exchange for any other purpose, which is not permitted under the provisions of the Act, such person shall be deemed to have committed contravention of the provisions of the Act.

## **Power of the Reserve Bank to issue directions to authorised person**

Section 11 of the Act empowers the RBI to issue directions to the authorised person in regard to making of payment or doing or desist from doing any act relating to foreign exchange or foreign security. Reserve Bank has also been empowered to issue directions to the authorised persons to furnish such information in such manner as it deems fit. If any authorised person contravenes any direction given by the RBI or fails to file the return as directed by RBI, he may be liable to a fine not exceeding Rs. 10,000/- and in the case of continuing contravention, with an additional penalty which may extend to Rs. 2,000 for every day during which such contravention continues. Power of Reserve Bank to inspect authorised person.

Section 12 of the Act empowers RBI to inspect the business of any authorised person for the purpose of verifying the correctness of any statement/information or particulars furnished. In case authorised person fails to furnish

the information sought, the RBI can initiate inspection of the authorised person for obtaining such information. RBI may also inspect the business of an authorised person for securing compliance with the provisions of the Foreign Exchange Management Act or any of the Rules, Regulations or directions. The Reserve Bank may make an order in writing authorising any of its officer for this purpose.

When an inspection is initiated by the Reserve Bank, it shall be the duty of every authorised person (where the authorised person is a company or firm, every director partner or officer of such a company or firm), to produce before the inspecting officer, such books, accounts and other documents in his custody and to furnish any statement or information relating to the affairs of such authorised person within the time limit and the manner in which such inspecting officer may direct.

## ADJUDICATION AND APPEAL

Chapter V containing Sections 16-35 deals with the adjudication and appeal.

### Appointment of Adjudicating Authority

Section 16 empowers the Central Government to appoint by notification in the Official Gazette as many Adjudicating Authorities as it may think fit for holding enquiries under Section 13. The Central Government is, however under obligation to specify the jurisdiction of the Adjudicating Authority. The Adjudicating Authority has been empowered to hold any enquiry on a complaint made in writing by an officer authorised by a general or special order by the Central Government.

In case, a complaint has been made in respect of a person alleged to have committed the contravention, such person shall be given a reasonable opportunity of being heard before imposing any penalty under Section 13. The Adjudicating Authority has discretion to demand from the persons against whom a complaint is made a bond or guarantee for any such amount as he thinks fit, if he is of the opinion that such persons likely to abscond or evade the payment of penalty, if imposed.

### Appeal to Special Director (Appeals)

Section 17 of the Act provides for appointment of one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities. In this context, the Central Government has been empowered to appoint by notification Special Directors (Appeals) specifying their jurisdiction over matters and places.

An appeal to the Special Director (Appeals) may be made against the orders of the Assistant Director or Deputy Director of enforcement, acting as Adjudicating Authority. The appeal against the order of Adjudicating Authority shall be made in the prescribed form along with requisite fee, within forty five days from the date of the receipt of the order by aggrieved person. The Special Director (Appeals) has however, been empowered to entertain appeal after the expiry of the said period of forty five days.

### Establishment of Appellate Tribunal

Section 18 of the Act provides that the Appellate Tribunal constituted under sub-section (1) of section 12(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act.

### Appeal to Appellate Tribunal

According to Section 19(1) the Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in section 17(1), or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal:

Provided that any person appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

Section 19 (2) states that every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

As per Section 19(3), on receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

Section 19(4) provides that the Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Special Director (Appeals), as the case may be.

Section 19(5) states that the appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing off the appeal within the said period.

As per Section 19(6) the Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the Adjudicating Authority under section 16 in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.

In the case of *Bank of Baroda v. Appellate Tribunal for Foreign Exchange*, WP(C) 2570 & CM 1848/05, the Hon'ble Delhi High Court has held as below:

*“7. From the foregoing judicial pronouncements, as noted above, the position, which emerges is that the Tribunal while considering any application for waiver of deposit is to take into account firstly the existence of a prima facie case. In case, it is found that a party has a very strong prima facie case, and/or where the errors in the impugned order are writ large on the record, in such a case, it would be competent for the court in the exercise of its jurisdiction to grant waiver of predeposit since in such a case requiring a pre-deposit itself would amount to undue hardship. What is a prima facie case is well settled? It refers to an arguable or triable case. The Tribunal once it comes to the conclusion on perusal of the pleadings, documents and on hearing of the parties that there is a good prima facie case to be considered, the next step in exercise of discretion is determining the quantum of waiver to be granted. In determination of the quantum of waiver, factors, such as, balance of convenience, financial hardship of the parties, its capacity to pay or secure the amount and irreparable loss are to be considered. The said discretion is to be exercised in accordance with well settled principles for exercise of judicial discretion.”*



In the case of *Monotosh Saha v. Special Director of Enforcement*, Civil Appeal No. 5188 of 2008 (Arising out of SLP(C.) No. 1830 of 2007 judgement dated 21.08.2008, the Apex Court has held as below:

*“11. Two significant expressions used in the provisions are “undue hardship to such person” and “safeguard the realization of penalty”. Therefore, while dealing with the application twin requirements of considerations i.e., consideration of undue hardship aspect and imposition of conditions to safeguard the realization of penalty have to be kept in view.*

*12. As noted above there are two important expressions in Section 19(1). One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva v. State of Karnataka and Ors. (AIR 1994 SC 923) that under Indian conditions expression “Undue hardship” is normally related to economic hardship. “Undue” which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.*

*13. For a hardship to be ‘undue’ it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.*

*14. The word “undue” adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.*

*15. The other aspect relates to imposition of condition to safeguard the realization of penalty. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the realization of penalty. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as required to safeguard the realization of penalty.”*

### Appeal to High Court

According to Section 35 of the Act, a right to appeal to High Court lies with the appellant who is aggrieved by the decision of the Tribunal. Such appeal must be filed within 60 days from the date of communication of the decision or order of the Tribunal. The appeal to the High Court can be made on any question of law arising out of such order. A relaxation for a maximum period of sixty days for making an appeal may be granted by the High Court, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the specified period.

### Directorate of Enforcement

Section 36 of the Act empowers the Central Government to establish a Directorate of Enforcement with a Director and other officers or class of Officers, for the purposes of the enforcement of the Act. The Central Government has also been empowered to authorise Director, Additional Director, Special Director or Deputy Director to appoint officers of enforcement below the rank of Assistant Director of Enforcement to exercise the powers and discharge the duties conferred or imposed on him under the Act.

The Central Government, may, by order and with prescribed conditions and limitations, authorise any officers of customs or Central Excise or any police officer or officers of Central or State Government to exercise such powers and discharge such duties of the Director of Enforcement or any other officer of the Enforcement as stated in the order.

### Investigation

Section 37 of the Act empowers the Director of Enforcement and other officers below the rank of Assistant Director to take up for investigation the contravention referred to in Section 13 of the Act. In addition, the Central



Government may also authorise any officer or class of officers in the Central Government, State Government, Reserve Bank of India, not below the rank of Under Secretary to Government of India, to investigate any contravention under Section 13 of the Act. The officers so appointed shall exercise the like powers which are conferred on income tax authorities under the Income Tax Act, 1961, subject to such conditions and limitations as laid down under that Act.

## CONTRAVENTION AND PENALTIES

Section 13(1) of the Act states that if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

(1A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.

(1B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.

(1C) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.

(1D) No court shall take cognizance of an offence under sub-section (1C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1B).

Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

In the case of *Union of India, through Deputy Legal Adviser, Directorate of Enforcement (Appellant) Vs. Kamal Chand (Respondent) FPA-FE-28/CHN/2020 Order dated 30.05.2023*, the Hon'ble Appellate Tribunal observed that on reading of Section 13 (1) FEMA it is obvious that the maximum amount of penalty which can be imposed under the Section is three times the amount of contravention involved. From the language of the Section, it is clear that the Section has not prescribed either a fixed amount of penalty or minimum amount of penalty. It therefore, follows that the amount of the penalty which is to be imposed by the Adjudicating Authority is a matter of discretion which, of course, is necessarily required to be exercised judiciously after taking into account the facts of the case and the evidence placed before him. The appellant has failed to place any reason in the pleadings as to show that the discretion has not been exercised judiciously by the Adjudicating Authority.

The question as to when a penalty is to be regarded as either low or high is at best answered subjectively. In

the present case it is seen that the Adjudicating Authority has not only taken notice of the facts of the case but also has evaluated the evidence on record to infer that the outward remittances in 39 tranches occurred without corresponding imports of goods. Consequently, he has upheld the two charges of contraventions and imposed slightly over hundred percent of penalty of the total amount involved in the said 35 tranches. The Adjudicating Authority has complied with the provisions of the Section by imposing penalty for contravention of section 10 (6) FEMA r/w Regulation 6 (1) of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations 2000 and as well as imposing penalty for contravention of Section 3 (b) of FEMA. For contravention of each of these Sections he has chosen to impose slightly over fifty percent thus totaling a penalty of over hundred percent. Any insistence to impose higher penalty for contraventions of each of the Section arising from the same set of transactions may introduce element of subjectivity. In any case, there is no such requirement under the statute as long as each contravention has been examined and if found established has attracted penalty. The reading of the Adjudication Order, therefore, reflects objectivity and judiciousness on the part of the Adjudicating Authority.

The Appellate Tribunal referred the case of *State of MP and Ors. Vs. Bharat Heavy Electricals [(1997) 7 Supreme Court Cases 1]* where in Hon'ble Supreme Court its order dated 14.08.1997 held that in a statute prescribing the provision for penalty equal to ten times the amount of entry tax, the statute prescribed only a maximum limit and did not prescribe an irreducible amount depriving the assessing authority of any discretion in this regard. The stand of the State in the case supra conceded that the assessing authorities are not bound to levy fixed penalty equal to ten times the amount of entry tax. In fact, in the present case the statute (FEMA) itself provides for a penalty up to thrice the sum involved in such contravention and thereby gives explicit scope to the Adjudicating Authority to exercise his discretion, albeit judiciously, for imposition of penalty.

In view of the appeal having failed to bring out the reasons that why the penalty imposed is low and as to how the Adjudicating Authority has not exercised his discretion judiciously, Appellate Tribunal observed that the order of the Adjudicating Authority cannot be interfered with. In view of the aforementioned discussions and observations, the appeal fails and is dismissed.

Further in the case of *Shri Kumar Satur Nathani (Appellant) Vs. The Special Director Directorate of Enforcement, Mumbai (Respondent), FPA-FE-41/MUM/2018 Order dated 26.07.2023*, Appellate Tribunal Under SAFEMA referred the decision dated 23.05.2006 of the Hon'ble Supreme Court in *Civil Appeal Nos. 9523-9524 of 2003* in the case of *The Chairman, SEBI vs. Shriram Mutual Fund & Ors.* His Lordships stated in para 20 of the judgment: -

*"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulation is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not."*

Appellate Tribunal observed that perusal of Section 13 of FEMA which is the Section under which penalty is imposed for contravention of any of the provisions of the Act or any rule, regulation, notification, direction, order or any condition subject to which an authorization is issued by the Reserve Bank of India makes it obvious that the language of the Section does not require mens rea for penalizing of contravention.

Thus, there is nothing in the Section which can indicate directly or indirectly requirement of mens rea. Words like "willful", "deliberately", "intentionally" etc. are missing. The Hon'ble Supreme Court in the Judgment supra has cited the judgment in *Director of Enforcement vs. MCTM Corporation Pvt. Ltd. and Ors. Manu/SC/0300/1996* wherein even for FERA 1947 it was held that the contravention shall be breach of a civil obligation which would attract penalty irrespective of the fact whether the contravention was made with any guilty intention or not. The Judgment supra cited a number of previous judgments wherein it was held that mens rea is not an essential element for imposing penalty for breach of civil obligations.

### Contravention by Companies

Section 42 of the Act deals with contravention of the provisions of the Act by the Companies and provides that where the person committing the contravention of the Act or Rules happened to be a company, every person who at the time the contravention was committed, was in charge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the contravention and liable to be proceeded against and punished accordingly. However, no such persons shall be deemed to be guilty of committing any offence if he proves that such contravention took place without his knowledge or that he exercised adequate steps to prevent such contravention.

In case the contravention is committed by a company and it is proved that such contravention is committed with the knowledge, consent and connivance or is attributed to the neglect on the part of any director, manager or secretary or other officer of the company, they will also be deemed to be guilty of contravention and liable to be proceeded against and punished accordingly.

### COMPOUNDING OF CONTRAVENTIONS

Contravention is a breach of the provisions of the Foreign Exchange Management Act (FEMA), 1999 and rules/regulations/notification/orders/directions/circulars issued there under. Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal.

The provisions of section 15 of Foreign Exchange Management Act, 1999 (42 of 1999) hereinafter referred to as FEMA, 1999, permit compounding of contraventions and, as such it empowers the Reserve Bank to compound any contravention as defined under section 13 of the FEMA, 1999, except the contraventions under section 3 (a) of FEMA, 1999, on an application made by the person committing such contravention. Foreign Exchange (Compounding Proceedings) Rules, 2000 (the Rules), as amended from time to time, lays down the basic framework for the compounding process. Willful, malafide and fraudulent transactions are, however, viewed seriously, which will not be compounded by the Reserve Bank.

Any person who contravenes any provision of the FEMA, 1999 [except section 3(a)] or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act or contravenes any condition subject to which an authorization is issued by the Reserve Bank, can apply for compounding to the Reserve Bank. Applications seeking compounding of contraventions under section 3(a) of FEMA, 1999 may be submitted to the Directorate of Enforcement.

### RESERVE BANK OF INDIA

Section 11 of the Foreign Exchange Management Act empowers the RBI to issue directions to the authorised person in regard to making of payment or doing or desist from doing any act relating to foreign exchange or foreign security. The Reserve Bank of India was established on April 1, 1935 in accordance with the provisions of the Reserve Bank of India Act, 1934. The Preamble of the Reserve Bank of India describes the basic functions of the Reserve Bank as:

“to regulate the issue of Bank notes and keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage; to have a modern monetary policy framework to meet the challenge of an increasingly complex economy, to maintain price stability while keeping in mind the objective of growth.”

### Central Board of Director

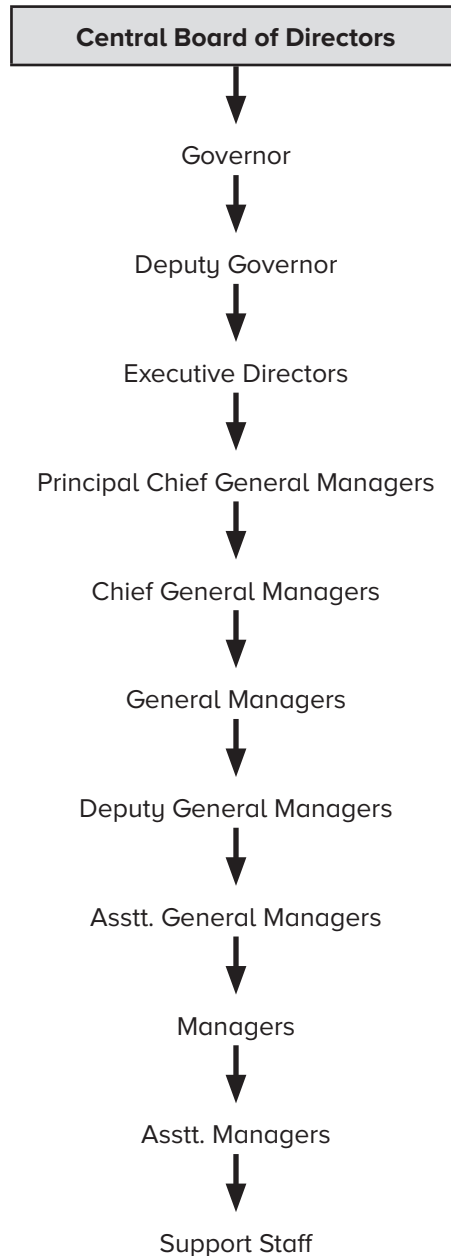
The Reserve Bank's affairs are governed by a Central Board of Directors. The board is appointed by the Government of India in keeping with the Reserve Bank of India Act. They are appointed/nominated for a period of four years. Constitution of Central Board of Directors are as under:

**Official Directors:** Full-time: Governor and not more than four Deputy Governors.

**Non-Official Directors:**

- Nominated by Government: ten Directors from various fields and two government Official
- Others: four Directors - one each from four local boards

### Organisation Structure



### Board for Financial Supervision

The Reserve Bank of India performs the supervisory function under the guidance of the Board for Financial Supervision (BFS). The Board was constituted in November 1994 as a committee of the Central Board of

Directors of the Reserve Bank of India under the Reserve Bank of India (Board for Financial Supervision) Regulations, 1994.

The primary objective of BFS is to undertake consolidated supervision of the financial sector comprising Scheduled Commercial and Co-operative Banks, All India Financial Institutions, Local Area Banks, Small Finance Banks, Payments Banks, Credit Information Companies, Non-Banking Finance Companies and Primary Dealers.

### **Main Functions Reserve Bank of India**

The main Functions of Reserve Bank of India are as follows:

#### **Monetary Authority:**

- Formulates, implements and monitors the monetary policy.
- Objective: maintaining price stability while keeping in mind the objective of growth.

#### **Regulator and Supervisor of the Financial System:**

- Prescribes broad parameters of banking operations within which the country's banking and financial system functions.
- Objective: maintain public confidence in the system, protect depositors' interest and provide cost-effective banking services to the public.

#### **Manager of Foreign Exchange:**

- Manages the Foreign Exchange Management Act, 1999.
- Objective: to facilitate external trade and payment and promote orderly development and maintenance of foreign exchange market in India.

#### **Issuer of Currency:**

- Issues, exchanges and destroys currency notes as well as puts into circulation coins minted by Government of India.
- Objective: to give the public adequate quantity of supplies of currency notes and coins and in good quality.

#### **Developmental Role:**

- Performs a wide range of promotional functions to support national objectives.

#### **Regulator and Supervisor of Payment and Settlement Systems:**

- Introduces and upgrades safe and efficient modes of payment systems in the country to meet the requirements of the public at large.
- Objective: maintain public confidence in payment and settlement system.

#### **Related Functions:**

- Banker to the Government: performs merchant banking function for the central and the state governments; also acts as their banker.
- Banker to banks: maintains banking accounts of all scheduled banks.

In the case of *Akshay N Patel (Appellant) Vs. Reserve Bank of India & Anr. (Respondents)*, Civil Appeal No. 6522 of 2021 Judgement dated December 06, 2021, Hon'ble Supreme Court of India inter alia observed that the RBI was established by the Reserve Bank of India Act, 1934. By way of an amendment in 2016, the preamble of

the statute was amended to reflect the importance of a modern monetary policy framework in an increasingly complex economy. The RBI has been entrusted with the exclusive authority to operate the monetary policy framework of India.

Further, Apex Court Constitution Bench in *Joseph Kuruvilla Vellukunnel v. Reserve Bank of India*, AIR 1962 SC 1371 considered a challenge to certain statutory provisions introduced in the Banking Companies Act 1949 which vested the RBI with the powers to file an application for winding-up of any company. Before conducting an analysis of the constitutional challenge under Articles 14 and 19, the Constitution Bench prefaced its analysis with the *raison d'être* and importance of the RBI as a regulatory body. Justice M Hidayatullah (as the learned Chief Justice then was) observed the following:

*"16. Before we consider the arguments of the two sides in detail, we wish to say a few words about the position of the Reserve Bank in the financial affairs of India and also about its place in the scheme of the law. The Reserve Bank of India was established on April 1, 1935 by the Reserve Bank of India Act, 1934. Even before the establishment of the Reserve Bank, suggestions were made that there should be a central bank in India, and the Royal Commission on Indian Currency and Finance had recommended in 1926 that the currency and credit of the country could only be put on a firm foundation, if a central bank was established. The first Bill introduced in 1927 by Sir Basil Blackett was dropped. The Indian Central Banking Inquiry Committee, however, reported in 1931 that there was a need for a central banking institution in India "for securing the development of the Indian banking and credit system on a sound and proper basis". The Committee pointed out that some of the Provincial Committees had also suggested the establishment of the Reserve Bank. The Committee ended by saying:*

*"We accordingly consider it to be a matter of supreme importance from the point of view of the development of banking facilities in India, and of her economic advancement generally, that a Central or Reserve Bank should be created at the earliest possible date. The establishment of such a bank would by mobilization of the banking and currency reserves of India in one hand tend to increase the Vol. of credit available for trade, industry and agriculture and to mitigate the evils of fluctuating and high charges for the use of such credit caused by seasonal stringency." (Vol. I, Part I. Chap. XXII, para 605)*

*The White Paper on Indian Constitutional Reforms also recommended the establishment of a Reserve Bank "free from political influence". As a result of these findings, when a fresh Bill was introduced by Sir George Schuster on September 8, 1933 it was accepted and received the assent of the Governor-General on March 6, 1934.*

*17. The functions of the Reserve Bank were generally indicated in the preamble as the regulation of the issue of the Bank notes and the keeping of the reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage. But to enable the Reserve Bank to function in this manner, it had to be given other powers, so that it may function effectively as a central bank. To this end, the Reserve Bank was given the right to hold the cash balances of important commercial banks, a right to transact Government business in India which was also its obligation, and to enter into agreements with State Governments to transact their business.*

[.....]

*18. But the most important function of the Reserve Bank is to regulate the banking system generally. The Reserve Bank has been described as a Bankers' Bank. Under the Reserve Bank of India Act, the scheduled banks maintain certain balances and the Reserve Bank can lend assistance to those banks "as a lender of the last resort". The Reserve Bank has also been given certain advisory and regulatory functions. By its position as a central bank, it acts as an agency for collecting financial information and statistics. It advises Government and other banks on financial and banking matters, and for this purpose, it keeps itself informed of the activities and monetary position of scheduled and other banks, and inspects the books and accounts of scheduled banks and advises Government after inspection whether a particular bank should be included in the Second Schedule or not. [.....]"*

**LESSON ROUND-UP**

- Foreign exchange means 'foreign currency' and includes:- (i) deposits, credits and balances payable in any foreign currency; (ii) drafts, travellers' cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency; and (iii) drafts, travellers' cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency.
- Capital Account transactions means any transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person resident outside India and includes the transactions specified in Sub-section (3) of Section 6 of the Act.
- Current Account Transaction means a transaction other than a capital account transaction and includes payments due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business; payments due as interest on loan and as net income from investments; remittances for living expenses of parents, spouse and children residing abroad and expenses in connection with foreign travel, education and medical care of parents, spouse and children.
- In exercise of the powers conferred by Section 47 of the Foreign Exchange Management Act, the Reserve Bank issued the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 in respect of remittance outside India by a person whether resident in India or not, of assets in India.
- Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal. The Reserve Bank is empowered to compound any contraventions as defined under section 13 of FEMA, 1999 except the contravention under section 3(a) for a specified sum after offering an opportunity of personal hearing to the contravener. It is a voluntary process in which an individual or a corporate seeks compounding of an admitted contravention. It provides comfort to any person who contravenes any provisions of FEMA, 1999 [except section 3(a) of the Act] by minimizing transaction costs.

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Define the Capital Account Transactions and enumerate permissible capital account transactions in relation to persons resident in India and resident outside India?
2. Discuss the Acquisition and Transfer of Immovable Property outside India under FEMA?
3. Discuss the establishment of branch or office or place of business in India under FEMA.
4. Define Authorised person? Briefly discuss the powers of RBI to give directions to Authorised persons?
5. Write short notes on the following:
  - (i) Compounding of Contraventions
  - (ii) Current Account Transactions
  - (iii) Investigation





### KEY CONCEPTS

■ FDI in an Indian Company ■ Competent Authority ■ Instruments for Investments ■ Caps on Investments ■ FDI Routes ■ Downstream Investment

### Learning Objectives

#### To understand:

- Eligible Investors under FDI
- Entry Routes for Investment i.e. Automatic Route, Government Route
- Competent Authority
- Instruments for Investments
- Prohibited and Permitted Sectors
- Conditions of FDI in Major Sector
- E-commerce Activity, Insurance etc.
- Conversion of ECB/lump sum fee/royalty etc. into Equity

### Lesson Outline

- Foreign Direct Investment
- Foreign Direct Investment Route
- Permitted Sectors/Activities
- Prohibited Sectors /Activities
- Foreign Direct Investment in Major Sectors
- Reporting Requirements
- Penalty
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- Foreign Exchange Management Act, 1999.
- Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.
- Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019.

*Foreign investment in India is regulated under codified foreign exchange regulations, sector specific policies/regulations, government policies as well as international agreements. Primarily, foreign investment is regulated through the Foreign Exchange Management Act, 1999 as amended from time to time (FEMA) and rules/regulations issued thereunder. The main objective of FEMA is to regulate, consolidate and amend the law relating to foreign exchange to facilitate foreign investment, external trade and payments and promote the orderly development and maintenance of foreign exchange market in India within the broad policy framework on foreign investment issued by the Government from time to time.*

## INTRODUCTION

Foreign Direct Investment ('FDI') means investment through equity instruments by a person resident outside India in an unlisted Indian company; or in 10% or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company.

In case an existing investment by a person resident outside India in equity instruments of a listed Indian company falls to a level below 10% of the post issue paid-up equity capital on a fully diluted basis, the investment shall continue to be treated as FDI. 'Fully diluted basis' means the total number of shares that would be outstanding if all possible sources of conversion are exercised.

*'Investment' means to subscribe, acquire, hold or transfer any security or unit issued by a person resident in India.*

*Explanation:-*

- (i) Investment shall include to acquire, hold or transfer depository receipts issued outside India, the underlying of which a security is issued by a person resident in India;*
- (i) for the purpose of LLP, investment shall mean capital contribution or acquisition or transfer of profit shares.*

Department for Promotion of Industry and Internal Trade (DPIIT) is a Central Government Department under the Ministry of Commerce and Industry in India is the nodal Department for formulation of the policy of the Government on Foreign Direct Investment (FDI). The FDI Policy is reviewed on an ongoing basis, with a view to making it more investor-friendly. To attract higher levels of FDI, Government has put in place a liberal policy on FDI, under which FDI up to 100%, is permitted, under the automatic route, in most sectors/activities. Significant changes have been made in the FDI policy regime in recent times, to ensure that India remains an increasingly attractive investment destination. The Department plays an active role in the liberalization and rationalization of the FDI policy.

Foreign investment in India is regulated under codified foreign exchange regulations, sector specific policies/regulations, government policies as well as International agreements. Primarily, foreign investment is regulated through the Foreign Exchange Management Act, 1999 as amended from time to time (FEMA) and rules/

regulations issued thereunder. The main objective of FEMA is to regulate, consolidate and amend the law relating to foreign exchange to facilitate foreign investment, external trade and payments and promote the orderly development and maintenance of foreign exchange market in India within the broad policy framework on foreign investment issued by the Government from time to time. Presently, the FDI regime in India is primarily governed by the Consolidated Foreign Direct Investment Policy Circular dated 15.10.2020, as amended through various Press Notes issued by the Department for Promotion of Industry and Internal Trade (DPIIT)(FDI Policy), sector specific policies/regulations, Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 dated 17.10.2019 notified by the Department of Economic Affairs (DEA), Ministry of Finance (FEM Non-Debt Instruments Rules 2019) which superseded the erstwhile Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 Notification No. FEMA 20(R)/2017-RB dated 07.11.2017 (FEMA 20R Regulations).

#### ***What is meant by Foreign Direct Investment (FDI)?***

***Foreign Direct Investment ('FDI') means investment through equity instruments by a person resident outside India in an unlisted Indian company; or in 10% or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company.***

***In case an existing investment by a person resident outside India in equity instruments of a listed Indian company falls to a level below 10% of the post issue paid-up equity capital on a fully diluted basis, the investment shall continue to be treated as FDI. 'Fully diluted basis' means the total number of shares that would be outstanding if all possible sources of conversion are exercised.***

### **INTENT AND OBJECTIVE**

Foreign Direct Investment (FDI) is considered as a major source of non-debt financial resource for the economic development. FDI flows into India have grown consistently since liberalization and are an important component of foreign capital since FDI infuses long term sustainable capital in the economy and contributes towards technology transfer, development of strategic sectors, greater innovation, and competition and employment creation amongst other benefits.

It is the intent and objective of the Government of India to attract and promote FDI in order to supplement domestic capital, technology and skills for accelerated economic growth and development. FDI, as distinguished from Foreign Portfolio Investment, has the connotation of establishing a 'lasting interest' in an enterprise that is resident in an economy other than that of the investor.

'Capital' means equity shares; fully, compulsorily & mandatorily convertible preference shares; fully, compulsorily & mandatorily convertible debentures and warrants.

*Note:* The equity shares issued in accordance with the provisions of the Companies Act, as applicable, shall include equity shares that have been partly paid. Preference shares and convertible debentures shall be required to be fully paid, and should be mandatorily and fully convertible. Further, 'warrant' includes Share Warrant issued by an Indian Company in accordance with the regulations by the Securities and Exchange Board of India (SEBI) and the provisions of the Companies Act, 2013.

The Government has put in place a policy framework on FDI, which is transparent, predictable and easily comprehensible. This framework is embodied in the Circular on Consolidated FDI Policy, which may be updated on an annual basis, to capture and keep pace with the regulatory changes, effected in the interregnum. The

Department for Promotion of Industry and Internal Trade (DPIIT), Ministry of Commerce & Industry, Government of India makes policy pronouncements on FDI through Consolidated FDI Policy Circular/Press Notes/Press Releases which are notified by the Department of Economic Affairs (DEA), Ministry of Finance, Government of India as amendments to the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 under the Foreign Exchange Management Act, 1999 (FEMA). These notifications take effect from the date of issue of Press Notes/ Press Releases, unless specified otherwise therein. In case of any conflict, the relevant Notification under Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 will prevail. The payment of inward remittance and reporting requirements are stipulated under the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 issued by the Reserve Bank of India (RBI). The regulatory framework, over a period of time, thus, consists of FEMA and Rules/Regulations thereunder, Consolidated FDI Policy Circular, Press Notes, Press Releases, Clarifications, etc.

The present consolidation subsumes and supersedes all Press Notes/Press Releases/Clarifications/Circulars issued by the DPIIT, which were in force as on October 15, 2020 and reflects the FDI Policy as on October 15, 2020. This Circular accordingly will take effect from October 15, 2020 and will remain in force until superseded in totality or in part thereof. Reference to any statute or legislation made in this Circular shall include modifications, amendments or re-enactments thereof.

Notwithstanding the rescission of earlier Press Notes/Press Releases/Clarifications/Circulars, anything done or any action taken or purported to have been done or taken under the rescinded Press Notes/Press Releases/Clarifications/Circulars prior to October 15, 2020, shall, in so far as it is not inconsistent with those Press Notes/Press Releases/Clarifications/Circulars, and applicable provisions under the FEMA and Rules/Regulations thereunder, be deemed to have been done or taken under the corresponding provisions of this circular and shall be valid and effective.

## GENERAL CONDITIONS ON FDI

### ELIGIBLE INVESTORS

- (a) A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

(b) In the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction/purview of the para 1(a), such subsequent change in beneficial ownership will also require Government approval.
- NRIs resident in Nepal and Bhutan as well as citizens of Nepal and Bhutan are permitted to invest in the capital of Indian companies on repatriation basis, subject to the condition that the amount of consideration for such investment shall be paid only by way of inward remittance in free foreign exchange through normal banking channels.
- OCBs have been derecognized as a class of investors in India with effect from September 16, 2003. Erstwhile OCBs which are incorporated outside India and are not under the adverse notice of RBI can make fresh investments as incorporated non-resident entities in accordance with the FDI Policy and Foreign Exchange Management (Non-Debt Instrument) Rules, 2019.

*‘Overseas Corporate Body’ (OCB) means a company, partnership firm, society and other corporate body owned directly or indirectly to the extent of at least sixty percent by non-resident Indians and includes overseas trust in which not less than sixty percent beneficial interest is held by non-resident Indians directly or indirectly but irrevocably and which was in existence on the date of commencement of the Foreign Exchange Management (Withdrawal of General Permission to Overseas Corporate Bodies (OCBs) Regulations, 2003 and immediately prior to such commencement was eligible to undertake transactions pursuant to the general permission granted under the regulations under FEMA.*

4. A company, trust and partnership firm incorporated outside India and owned and controlled by NRIs can invest in India with the special dispensation as available to NRIs under the FDI Policy.
5. Foreign Portfolio Investors (FPI) may make investments in the manner and subject to the terms and conditions specified in Schedule II of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.
6. Registered FPIs and NRIs can invest/trade through a registered broker in the capital of Indian Companies on recognised Indian Stock Exchanges as per the applicable Schedule under the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, as amended from time to time.
7. A Foreign Venture Capital Investor (FVCI) may make investments in the manner and subject to the terms and conditions specified in Schedule VII of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.
8. An NRI or an OCI may subscribe to National Pension System governed and administered by Pension Fund Regulatory and Development Authority (PFRDA), provided such subscriptions are made through normal banking channels and the person is eligible to invest as per the provisions of the PFRDA Act. The annuity/ accumulated saving will be repatriable.

*A company is considered as ‘Owned’ by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and / or Indian companies, which are ultimately owned and controlled by resident Indian citizens. A Limited Liability Partnership will be considered as owned by resident Indian citizens if more than 50% of the investment in such an LLP is contributed by resident Indian citizens and/or entities which are ultimately ‘owned and controlled by resident Indian citizens’ and such resident Indian citizens and entities have majority of the profit share.*

*‘Control’ shall include the right to appoint a majority of the directors or to control the management or policy decisions, exercisable by a person or persons acting Individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements. For the purposes of Limited Liability Partnership, ‘control’ will mean right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of the LLP.*

## ELIGIBLE INVESTEE ENTITIES



### 1. Indian Company

Indian companies can issue capital against FDI.

### 2. Partnership Firm/Proprietary Concern

- (i) **A Non-Resident Indian (NRI) can invest in the capital of a firm or a proprietary concern in India on non- repatriation basis provided:**
  - (a) Amount is invested by inward remittance or out of NRE/FCNR(B)/NRO account maintained with Authorized Dealers/Authorized banks.
  - (b) The firm or proprietary concern is not engaged in any agricultural/plantation or real estate business or print media sector.
  - (c) Amount invested shall not be eligible for repatriation outside India.
- (ii) **Investments with repatriation option:** NRIs may seek prior permission of Reserve Bank for investment in sole proprietorship concerns/partnership firms with repatriation option. The application will be decided in consultation with the Government of India.
- (iii) **Investment by non-residents other than NRIs:** A person resident outside India other than NRIs may make an application and seek prior approval of Reserve Bank for making investment in the capital of a firm or a proprietorship concern or any association of persons in India. The application will be decided in consultation with the Government of India.
- (iv) **Restrictions:** An NRI is not allowed to invest in a firm or proprietorship concern engaged in any agricultural/plantation activity or real estate business or print media.

### 3. Trusts

Investment by a person resident outside India is not permitted in Trusts other than in 'VCF' registered and regulated by SEBI and 'Investment vehicle'.

### 4. Limited Liability Partnerships (LLPs)

Foreign Investment in LLPs is permitted subject to the following conditions:

- (i) Foreign Investment is permitted under the automatic route in Limited Liability Partnership (LLPs) operating in sectors/ activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions.
- (ii) An Indian company or an LLP, having foreign investment, is also permitted to make downstream investment in another company or LLP in sectors in which 100% FDI is allowed under the automatic route and there are no FDI-linked performance conditions. Conversion of an LLP having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into a company is permitted under automatic route. Similarly, conversion of a company having foreign investment and operating in sectors/ activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into an LLP is permitted under automatic route.
- (iii) Foreign Investment in LLP is subject to the compliance of the conditions of LLP Act, 2008.

### 5. Investment Vehicle

An entity being 'investment vehicle' registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose including Real Estate Investment Trusts (REITs) governed by the SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (Invlts) governed by the SEBI (Invlts) Regulations, 2014, Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012 is permitted to receive foreign investment from a person resident outside India (other than an individual who is citizen of or any other entity which is registered / incorporated in Pakistan or Bangladesh) in the manner and subject to the terms and conditions specified under Schedule VIII of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.

### 6. Startup Companies

Start-ups can issue equity or equity linked instruments or debt instruments to FVCI against receipt of foreign remittance, as per the Schedule VII of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019. In addition, start-ups can issue convertible notes to person resident outside India subject to the following conditions:

- (i) A person resident outside India (other than an individual who is citizen of Pakistan or Bangladesh or an entity which is registered/incorporated in Pakistan or Bangladesh), may purchase convertible notes issued by an Indian startup company for an amount of twenty-five lakh rupees or more in a single tranche.

*Explanation:* For the purpose of this Regulation, a 'startup company' means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with notification number G.S.R. 127(E) dated 19th February, 2019 issued by the DPIIT, Ministry of Commerce and Industry, and as amended from time to time.

- (ii) A startup company engaged in a sector where foreign investment requires Government approval may issue convertible notes to a non-resident only with approval of the Government.

*Explanation:* For the purpose of this regulation, the issue of shares against such convertible notes shall have to be in accordance with the Schedule I of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.

- (iii) A startup company issuing convertible notes to a person resident outside India shall receive the amount of consideration by inward remittance through banking channels or by debit to the NRE / FCNR (B) / Escrow account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016, as amended from time to time.

Provided that an escrow account for the above purpose shall be closed immediately after the requirements are completed or within a period of six months, whichever is earlier. However, in no case continuance of such escrow account shall be permitted beyond a period of six months.

- (iv) NRIs may acquire convertible notes on non-repatriation basis in accordance with Schedule IV of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.
- (v) A person resident outside India may acquire or transfer, by way of sale, convertible notes, from or to, a person resident in or outside India, provided the transfer takes place in accordance applicable pricing guidelines under FEMA. Prior approval from the Government shall be obtained for such acquisitions or transfers in case the startup company is engaged in a sector which requires Government approval.
- (vi) The startup company issuing convertible notes shall be required to furnish reports as prescribed by the RBI.

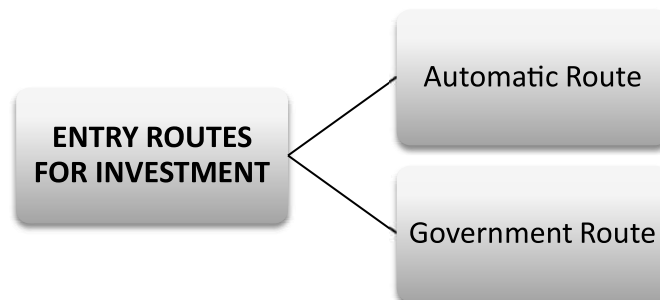
*'Convertible Note' means an instrument issued by a startup company acknowledging receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument.*

## 7. Other Entities

FDI in resident entities other than those mentioned above is not permitted.

## ENTRY ROUTES FOR INVESTMENT

Investments can be made by non-residents in the equity shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares of an Indian company, through the Automatic Route or the Government Route. Permissible FDI can be made under "Automatic route" or "Government route".





**Automatic Route:** *It means the entry route through which investment by a person resident outside India does not require the prior approval of the Reserve Bank of India or the Central Government.*

**Government Route:** *It means the entry route through which investment by person resident outside India requires prior Government approval and foreign investment received under this route shall be in accordance with the conditions stipulated by the Government in its approval.*

Besides the entry conditions on foreign investment, the investment/investors are required to comply with all relevant sectoral laws, regulations, rules, security conditions, and state/local laws/regulations. Proposals for foreign investment under Government Route are considered by respective Administrative Ministry/Department.

*'Foreign Investment' means any investment made by a person resident outside India on a repatriable basis in capital instruments of an Indian company or to the capital of a LLP.*

*Explanation: - If a declaration is made by a person as per the provisions of the Companies Act, 2013 about a beneficial interest being held by a person resident outside India, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.*

*Note:- A person resident outside India may hold foreign investment either as FDI or as FPI in any particular Indian company.*

**Foreign investment in sectors/activities under government approval route will be subject to government approval where:**

- (i) An Indian company is being established with foreign investment and is not owned by a resident entity; or
- (ii) An Indian company is being established with foreign investment and is not controlled by a resident entity; or
- (iii) The control of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/ passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non- resident entities through amalgamation, merger/demerger, acquisition etc.; or
- (iv) The ownership of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/ passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non- resident entities through amalgamation, merger/demerger, acquisition etc.;
- (v) It is clarified that foreign investment shall include all types of foreign investments, direct and indirect, regardless of whether the said investments have been made under Schedule I (FDI), II (FPI), III (NRI), VI (LLPs), VII (FVCI), VIII (Investment Vehicles) and IX (DRs) of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019. FCCBs and DRs having underlying of instruments which can be issued under Schedule IX, being in the nature of debt, shall not be treated as foreign investment. However, any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned as foreign investment;
- (vi) Investment by NRIs under Schedule IV of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 will be deemed to be domestic investment at par with the investment made by residents;
- (vii) A company, trust and partnership firm incorporated outside India and owned and controlled by non-resident Indians will be eligible for investments under Schedule IV of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 and such investment will also be deemed domestic investment at par with the investment made by residents.

*'Foreign Currency Convertible Bond' (FCCB) means a bond issued under the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993, as amended from time to time.*

*'Depository Receipt' (DR) means a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction on the back of eligible securities issued or transferred to that foreign depository and deposited with a domestic custodian and includes 'global depository receipt' as defined in the Companies Act, 2013.*

## CAPS ON INVESTMENTS

Investments can be made by person resident outside India in the capital of a resident entity only to the extent of the percentage of the total capital as specified in the FDI policy.

## ENTRY CONDITIONS ON INVESTMENT

Investments by non-residents can be permitted in the capital of a resident entity in certain sectors/activity with entry conditions. Such conditions may include norms for minimum capitalization, lock-in period, etc.

## CONDITIONS ON INVESTMENT BESIDES ENTRY CONDITIONS

1. Besides the entry conditions on foreign investment, the investment/investors are required to comply with all relevant sectoral laws, regulations, rules, security conditions, and state/local laws/regulations.
2. Establishment of branch office, liaison office or project office or any other place of business in India shall be governed by the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016. Further, acquisition or transfer of immovable property in India by citizens of certain countries shall be regulated as per the relevant provisions under the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, as amended from time to time.

## FOREIGN INVESTMENT INTO/DOWNSTREAM INVESTMENT BY ELIGIBLE INDIAN ENTITIES

*Downstream investment means investment made by an Indian entity which has total foreign investment in it, or an Investment Vehicle in the capital instruments or the capital, as the case may be, of another Indian entity. It means indirect foreign investment, by an eligible Indian entity, into another Indian Company/LLP, by way of subscription or acquisition.*

**"Indirect foreign investment"** means downstream investment received by an Indian entity from,-

- (A) another Indian Entity (IE) which has received foreign investment and
  - (i) the IE is not owned and not controlled by resident Indian citizens; or
  - (ii) is owned or controlled by persons resident outside India.
- (B) an investment vehicle whose sponsor or manager or investment manager
  - (i) is not owned and not controlled by resident Indian citizens; or
  - (ii) is owned or controlled by persons resident outside India.

Indian entity which has received indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other attendant conditions as applicable for foreign investment. The Guidelines for calculation of total foreign investment, both direct and indirect in an Indian company/LLP, at every stage of investment, including downstream investment, are as under:

#### **A. Total Foreign Investment i.e. Direct and Indirect Foreign Investment in eligible Indian entities**

Investment in an eligible Indian entity can be made both by non-resident as well as resident Indian entities. Any non-resident investment in an Indian company is direct foreign investment. Investment by resident Indian entities could again comprise of both resident and non-resident investment. Thus, such an Indian company would have indirect foreign investment if the Indian investing company has foreign investment in it. The indirect investment can also be a cascading investment i.e. through multi-layered structure.

For the purpose of computation of indirect foreign investment in an Indian company, foreign investment in an Indian company shall include all types of foreign investments, i.e., FDI; investment by FPIs (holding as on March 31); NRIs; ADRs; GDRs; Foreign Currency Convertible Debentures (FCCBs); Investment Vehicles fully, compulsorily and mandatorily convertible preference shares and fully, compulsorily and mandatorily convertible Debentures or units of an Investment Vehicle, regardless of whether the said investments have been made under Schedule I, II, III, VI, IX and X of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.

#### **Guidelines for calculation of total foreign investment i.e. direct and indirect foreign investment**

##### **(i) Counting of direct foreign investment**

All investment directly by a non-resident entity into the Indian company/LLP would be counted towards foreign investment.

##### **(ii) Counting of indirect foreign investment**

(a) The foreign investment through the investing Indian company/LLP would not be considered for calculation of the indirect foreign investment in case of Indian companies/LLPs which are 'owned and controlled' by resident Indian citizens and/or Indian Companies/LLPs which are owned and controlled by resident Indian citizens.

(aa) Indian 'owned and controlled' as defined in Regulation 14 of the principal Regulations as defined in RBI Notification No.362/2015-RB dated February 15, 2016.

Provided that for sponsors or managers or investment managers organized in a form other than companies or LLPs, SEBI shall determine whether the sponsor or manager or investment manager is foreign owned and controlled.

(b) For cases where condition (a) above is not satisfied or if the investing company is owned or controlled by 'non-resident entities', the entire investment by the investing company/LLP into the subject Indian Company would be considered as indirect foreign investment, provided that, as an exception, the indirect foreign investment in only the 100% owned subsidiaries of operating-cum-investing/investing companies, will be limited to the foreign investment in the operating-cum-investing/ investing company. This exception is made since the downstream investment of a 100% owned subsidiary of the holding company is akin to investment made by the holding company and the downstream investment should be a mirror image of the holding company. This exception, however, is strictly for those cases where the entire capital of the downstream subsidiary is owned by the holding company.

**Illustration**

To illustrate, if the indirect foreign investment is being calculated for Company X which has investment through an investing Company Y having foreign investment, the following would be the method of calculation:

- (A) Where Company Y has foreign investment less than 50%- Company X would not be taken as having any indirect foreign investment through Company Y.
- (B) Where Company Y has foreign investment of say 75% and:
  - (i) invests 26% in Company X, the entire 26% investment by Company Y would be treated as indirect foreign investment in Company X;
  - (ii) invests 80% in Company X, the indirect foreign investment in Company X would be taken as 80%;
  - (iii) Where Company X is a wholly owned subsidiary of Company Y (i.e. Company Y owns 100% shares of Company X), then only 75% would be treated as indirect foreign equity and the balance 25% would be treated as resident held equity. The indirect foreign equity in Company X would be computed in the ratio of 75:25 in the total investment of Company Y in Company X;
  - (iv) The total foreign investment would be the sum total of direct and indirect foreign investment. The above methodology of calculation would apply at every stage of investment in Indian companies and thus to each and every Indian company;
  - (v) Additional conditions:
    - (a) The full details about the foreign investment including ownership details etc. in Indian company(s) and information about the control of the company(s) would be furnished by the Company(s) to the Government of India at the time of seeking approval.
    - (b) In any sector/activity, where Government approval is required for foreign investment and in cases where there are any *inter-se* agreements between/amongst shareholders which have an effect on the appointment of the Board of Directors or on the exercise of voting rights or of creating voting rights disproportionate to shareholding or any incidental matter thereof, such agreements will have to be informed to the approving authority. The approving authority will consider such *inter-se* agreements for determining ownership and control when considering the case for approval of foreign investment.
    - (c) In all sectors attracting sectoral caps, the balance equity i.e. beyond the sectoral foreign investment cap, would specifically be beneficially owned by/held with/in the hands of resident Indian citizens and Indian companies, owned and controlled by resident Indian citizens.
    - (e) In the I & B sector where the sectoral cap is up to 49%, the company would need to be 'owned and controlled' by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens.
- (C) For this purpose, the equity held by the largest Indian shareholder would have to be at least 51% of the total equity, excluding the equity held by Public Sector Banks and Public Financial Institutions, as defined in Section 4A of the Companies Act, 1956 or Section 2 (72) of the Companies Act, 2013, as the case may be. The term 'largest Indian shareholder', used in this clause, will include any or a combination of the following:

- (i) In the case of an individual shareholder,
  - (a) The individual shareholder,
  - (b) A relative of the shareholder within the meaning of Section 2 (77) of Companies Act, 2013,
  - (c) A company/group of companies in which the individual shareholder/HUF to which he belongs has management and controlling interest.
- (ii) In the case of an Indian Company,
  - (aa) The Indian Company
  - (bb) A group of Indian companies under the same management and ownership control.
- (D) For the purpose of this Clause, “Indian company” shall be a company which must have a resident Indian or a relative as defined under Section 2 (77) of Companies Act, 2013/ HUF, either singly or in combination holding at least 51% of the shares.
- (E) Provided that, in case of a combination of all or any of the above, each of the parties shall have entered into a legally binding agreement to act as a single unit in managing the matters of the applicant company.
  - (a) If a declaration is made by persons as per section 187C of the Companies Act, 1956 or section 89 of the Companies Act, 2013, as the case may be about a beneficial interest being held by a non-resident entity, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.

The above mentioned policy and methodology would be applicable for determining the total foreign investment in all sectors, except in sectors where it is specified in a statute or rule there under. The above methodology of determining direct and indirect foreign investment therefore does not apply to the Insurance Sector which will continue to be governed by the relevant Regulation. Similarly, above methodology will also not apply to downstream investments by an Investment Vehicle. Relevant conditions of downstream investment by Investment Vehicles are as under:

- (i) Downstream investment by an Investment Vehicle shall be regarded as foreign investment if either the Sponsor or the Manager or the Investment Manager is not Indian ‘owned and controlled’ as defined in Regulation 14 of the principal Regulations as defined in RBI Notification No. 362/2015-RB dated February 15, 2016. Provided that for sponsors or managers or investment managers organized in a form other than companies or LLPs, SEBI shall determine whether the sponsor or manager or investment manager is foreign owned and controlled.

*Explanation 1:* Ownership and control is clearly determined as per the extant FDI policy. AIF is a pooled investment vehicle. ‘Control’ of the AIF should be in the hands of ‘sponsors’ and ‘managers/investment managers’, with the general exclusion of others. In case the ‘sponsors’ and ‘managers/investment managers’ of the AIF are individuals, for the treatment of downstream investment by such AIF as domestic, ‘sponsors’ and ‘managers/investment managers’ should be resident Indian citizens.

*Explanation 2:* The extent of foreign investment in the corpus of the Investment Vehicle will not be a factor to determine as to whether downstream investment of the Investment Vehicle concerned is foreign investment or not.

- (ii) Downstream investment by an Investment Vehicle that is reckoned as foreign investment shall have to conform to the sectoral caps and conditions / restrictions, if any, as applicable to the company in which the downstream investment is made as per the FDI Policy.
- (iii) Downstream investment in an LLP by an Investment Vehicle that is reckoned as foreign investment has to conform to the provisions of Schedule VIII of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 as well as the extant FDI policy for foreign investment in LLPs.
- (iv) An Alternative Investment Fund Category III with foreign investment shall make portfolio investment in only those securities or instruments in which a Registered Foreign Portfolio Investor is allowed to invest under the principal Regulations.
- (v) The Investment Vehicle receiving foreign investment shall be required to make such report and in such format to Reserve Bank of India or to SEBI as may be prescribed by them from time to time.

Any foreign investment already made in accordance with the guidelines in existence prior to February 13, 2009 (date of issue of Press Note 2 of 2009) would not require any modification to conform to these guidelines. All other investments, past and future, would come under the ambit of these new guidelines.

**B. Foreign investment into an Indian company engaged only in the activity of investing in the capital of other Indian company(ies) (regardless of its ownership or control)**

1. Foreign Investment in Investing Companies registered as Non-Banking Financial Companies (NBFC) with the RBI, being overall regulated, would be under 100% automatic route.
2. Foreign Investment in Core Investment Companies (CICs) and other investing companies, engaged in the activity of investing in the capital of other Indian company(ies)/LLPs, is permitted under Government approval route. CICs will have to additionally follow RBI's regulatory framework for CICs.
3. For undertaking activities which are under automatic route and without foreign investment linked performance conditions, Indian company which does not have any operations and also does not have any downstream investments, will be permitted to have infusion of foreign investment under automatic route. However, approval of the Government will be required for such companies for infusion of foreign investment for undertaking activities which are under Government route, regardless of the amount or extent of foreign investment. Further, as and when such a company commences business(s) or makes downstream investment, it will have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.

*Note:* Foreign investment into other Indian companies/LLPs would be in accordance/ compliance with the relevant sectoral conditions on entry route, conditionalities and caps.

**C. Downstream investment by an eligible Indian entity which is not owned and/or controlled by resident entity(ies)**

1. Downstream investment by an eligible Indian entity, which is not owned and/or controlled by resident entity(ies), into another Indian company, would be in accordance/compliance with the relevant sectoral conditions on entry route, conditionalities and caps, with regard to the sectors in which the latter Indian company is operating.

*Note:* Downstream investment/s made by a banking company, as defined in clause(c) of Section 5 of the Banking Regulation Act, 1949, incorporated in India, which is owned and/or controlled by non-residents/a non-resident entity/non-resident entities, under Corporate Debt Restructuring (CDR), or other loan restructuring mechanism, or in trading books, or for acquisition of shares due to defaults in loans, shall not count towards indirect foreign investment. However, their 'strategic downstream investment' shall count towards indirect foreign investment. For this purpose, 'strategic downstream investments' would mean investment by these banking companies in their subsidiaries, joint ventures and associates.

2. Downstream investments by eligible Indian entities/LLPs will be subject to the following conditions:
  - (i) Such an entity is required to notify its downstream investment to RBI in Form DI as well as on Foreign Investment Facilitation Portal in the form available at [www.fifp.gov.in](http://www.fifp.gov.in) within 30 days of such investment, even if capital instruments have not been allotted along with the modality of investment in new/existing ventures (with/without expansion programme);
  - (ii) Downstream investment by way of induction of foreign investment in an existing Indian Company to be duly supported by a resolution of the Board of Directors as also a shareholders agreement, if any;
  - (iii) Issue/transfer/pricing/valuation of capital shall be in accordance with applicable FEMA/SEBI guidelines;
  - (iv) For the purpose of downstream investment, the eligible Indian entities making the downstream investments would have to bring in requisite funds from abroad and not leverage funds from the domestic market. This would, however, not preclude downstream companies/LLPs, with operations, from raising debt in the domestic market. Downstream investments through internal accruals are permissible, subject to the applicable provisions. For the purposes of foreign investment policy, internal accruals will mean as profits transferred to reserve account after payment of taxes.

### COMPETENT AUTHORITY

Competent Authority means the concerned Administrative Ministry/Department empowered to grant government approval for foreign investment under the extant FDI Policy and FEMA Rules/Regulations.

Following are the Competent Authorities for grant of approval for foreign investment for sectors/activities requiring Government approval:

<b>S. No.</b>	<b>Activity/ sector</b>	<b>Administrative Ministry/ Department</b>
1	Mining	Ministry of Mines
2	Defence	
	(a) Items requiring Industrial Licence under the Industries (Development & Regulation) Act, 1951, and/or Arms Act, 1959 for which the powers have been delegated by Ministry of Home Affairs to DPIIT	Department of Defence Production, Ministry of Defence
	(b) Manufacturing of Small Arms and Ammunitions covered under Arms Act, 1959	Ministry of Home Affairs

<b>S. No.</b>	<b>Activity/ sector</b>	<b>Administrative Ministry/ Department</b>
3	Broadcasting	Ministry of Information & Broadcasting
4	Print Media/Digital Media	
5	Civil Aviation	Ministry of Civil Aviation
6	Satellites	Department of Space
7	Telecommunication	Department of Telecommunications
8	Private Security Agencies	Ministry of Home Affairs
9	(a) Applications involving investments from an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country as required in terms of Press Note 3 of 2020 read with Foreign Exchange Management (Non-debt Instruments) Amendment Rules, 2020	Concerned Administrative Ministry/Department as identified by the DPIIT
	(b) Cases pertaining to sectors/activities under Government approval route requiring security clearance as per the extant Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, FDI Policy and security guidelines, as amended from time to time	Nodal Administrative Ministries/Departments
10	Trading (Multi Brand Retail Trading and Food Product retail trading)	Department for Promotion of Industry and Internal Trade
11	FDI proposals by Non-Resident Indians (NRIs)/ Export Oriented Units requiring approval of the Government	Concerned Administrative Ministry/Department as identified by the DPIIT
12	Applications relating to issue of equity shares under the FDI policy under the Government route for import of capital goods/machinery/equipment (excluding second-hand machinery)	
13	Applications relating to issue of equity shares for pre-operative/pre-incorporation expenses (including payments of rent etc.)	
14	Financial services activity which are not regulated by any Financial Sector Regulator or where only part of the financial services activity is regulated or where there is doubt regarding the regulatory oversight	Department of Economic Affairs
15	Applications for foreign investment into a Core Investment Company or an Indian company engaged only in the activity of investing in the capital of other India Company(ies)	
16	Banking (Public and Private)	Department of Financial Services



S. No.	Activity/ sector	Administrative Ministry/ Department
17	Pharmaceuticals	Department of Pharmaceuticals

In respect of sectors/activities which are presently under automatic route but required Government approval earlier as per the extant policy during the relevant period, concerned administrative Ministry/Department would be the Competent Authorities for the grant of post-facto approval for foreign investment.

In respect of applications in which there is a doubt about the Administrative Ministry/Department concerned, DPIIT shall identify the Administrative Ministry/Department where the application will be processed.

Proposals for foreign investment would be examined by Competent Authorities as per the Standard Operating Procedure laid down by DPIIT (available at <http://www.fifp.gov.in/Forms/SOP.pdf>).

In case of proposals involving total foreign equity inflow of more than Rs. 5000 crore, competent authority shall place the same for consideration of Cabinet Committee on Economic Affairs (CCEA).

The CCEA would also consider the proposals which may be referred to it by the Minister-in-charge of the concerned competent authority.

In respect of proposals where the competent authority proposes to reject the proposals or in cases where conditions for approval are stipulated in addition to the conditions laid down in the FDI policy or sectoral laws/regulations, concurrence of DPIIT shall compulsorily be sought by the competent authority.

The monitoring of the compliance of conditions under the FDI approvals, including the past cases approved by the Government, shall be done by the concerned Administrative Ministries/Departments.

***What is the procedure and documents required to apply for Government approval for FDI?***

***Proposals for foreign investment in sectors/activities requiring Government approval as per the Consolidated FDI Policy, as amended from time to time (FDI Policy) and Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 as amended from time to time are required to be filed online through the Foreign Investment Facilitation Portal (FIFP) <https://www.fifp.gov.in> as per the guidelines and requirements prescribed under Standard Operating Procedure (SOP) for processing FDI proposals, as amended from time to time available at <http://fifp.gov.in/Forms/SOP.pdf>.***

**CASES WHICH DO NOT REQUIRE FRESH APPROVAL**

Companies may not require fresh approval of the Government for bringing in additional foreign investment into the same entity, in the following cases:

- (i) Entities, the activities of which had earlier required the prior approval of the Government and which had, accordingly, earlier obtained the prior approval of the Government for their initial foreign investment but subsequently such activities/sectors have been placed under automatic route;
- (ii) Entities, the activities of which had sectoral caps earlier and which had, accordingly, earlier obtained the prior approval of the Government for their initial foreign investment but subsequently such caps were removed/ increased and the activities placed under the automatic route; provided that such additional investment along with the initial/original investment does not exceed the sectoral caps;
- (iii) Additional foreign investment into the same entity where the prior approval of the Government had been obtained earlier for the initial/original foreign investment due to requirements of Press Note 18

of 1998 or Press Note 1 of 2005 and the prior approval of the Government under the FDI policy is not required for any other reason/purpose; and

- (iv) Additional foreign investment up to cumulative amount of Rs 5000 crore into the same entity within an approved foreign equity percentage/or into a wholly owned subsidiary.

### ONLINE FILING OF APPLICATIONS FOR GOVERNMENT APPROVAL

Proposals for foreign investment in sectors/activities requiring Government approval as per the Consolidated FDI Policy dated 15.10.2020, as amended from time to time (FDI Policy) and Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 dated 17.10.2019, as amended from time to time are required to be filed online through the Foreign Investment Facilitation Portal(FIFP) <https://www.fifp.gov.in> as per the guidelines and requirements prescribed under Standard Operating Procedure (SOP) for processing FDI proposals, as amended from time to time available at <http://fifp.gov.in/Forms/SOP.pdf>.

Guidelines for e-filing of applications, filing of amendment applications and instructions to applicants are available at the Foreign Investment Facilitation Portal ([www.fifp.gov.in](http://www.fifp.gov.in)).

### PROHIBITED SECTORS

*FDI is prohibited in:*

- a) Lottery Business including Government/private lottery, online lotteries, etc.
- b) Gambling and Betting including casinos etc.
- c) Chit funds
- d) Nidhi company
- e) Trading in Transferable Development Rights (TDRs)
- f) Real Estate Business or Construction of Farm Houses  
 'Real estate business' shall not include development of townships, construction of residential / commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014.
- g) Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
- h) Activities/ sectors not open to private sector investment e.g. (I) Atomic Energy and (II) Railway operations (other than permitted activities).

Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business, Gambling and Betting activities.

### PERMITTED SECTORS

- (a) In the sectors /activities stated below, FDI up to the limit indicated against each sector/activity is allowed, subject to applicable laws/regulations; security and other conditionalities. In sectors/activities not listed below, FDI is permitted up to 100% on the automatic route, subject to applicable laws/regulations; security and other conditionalities. Wherever there is a requirement of minimum capitalization, it shall include share premium received along with the face value of the share, only when it is received by the company upon issue of the shares to the non-resident investor. Amount paid by the transferee during post-issue transfer of shares beyond the issue price of the share, cannot be taken into account while calculating minimum capitalization requirement.

- (b) Sectoral cap i.e. the maximum amount which can be invested by foreign investors in an entity, unless provided otherwise, is composite and includes all types of foreign investments, direct and indirect, regardless of whether the said investments have been made under Schedules I (FDI), II (FPI), III (NRI), VI (LLPs), VII (FVCI), VIII (Investment Vehicles), and IX (DRs), respectively, of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019. FCCBs and DRs having underlying of instruments which can be issued under Schedule IX, being in the nature of debt, shall not be treated as foreign investment. However, any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned as foreign investment under the composite cap.
- (c) Foreign investment in sectors under Government approval route resulting in transfer of ownership and/or control of Indian entities from resident Indian citizens to non-resident entities will be subject to Government approval. Foreign investment in sectors under automatic route but with conditionalities, resulting in transfer of ownership and/or control of Indian entities from resident Indian citizens to non-resident entities, will be subject to compliance of such conditionalities.
- (d) The sectors which are already under 100% automatic route and are without conditionalities would not be affected.
- (e) Notwithstanding anything contained in paragraphs (a) and (c) above, portfolio investment, up to aggregate foreign investment level as permitted under Schedule II of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 will not be subject to either Government approval or compliance of sectoral conditions, as the case may be, if such investment does not result in transfer of ownership and/or control of Indian entities from resident Indian citizens to non-resident entities. Other foreign investments will be subject to conditions of Government approval and compliance of sectoral conditions as laid down in the FDI policy.
- (f) Total foreign investment, direct and indirect, in an entity will not exceed the sectoral/statutory cap.
- (g) Any existing foreign investment already made in accordance with the policy in existence would not require any modification to conform to amendments introduced through Press Note 8 (2015 Series).
- (h) Wherever the foreign investor wishes to specify a particular auditor/audit firm having international network for the Indian investee company, then audit of such investee companies should be carried out as joint audit wherein one of the auditors should not be part of the same network.
- (i) The onus of compliance of above provisions will be on the investee company.

### AGRICULTURE & ANIMAL HUSBANDRY

<i>Sector/Activity</i>	<i>% of Equity/ FDI Cap</i>	<i>Entry Route</i>
a) Floriculture, Horticulture, and Cultivation of Vegetables & Mushrooms under controlled conditions; b) Development and Production of seeds and planting material; c) Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture, Apiculture; and d) Services related to agro and allied sectors	100%	Automatic
<i>Note:</i> Besides the above, FDI is not allowed in any other agricultural sector/Activity		

**Other conditions:**

The term “under controlled conditions” covers the following:

‘Cultivation under controlled conditions’ for the categories of floriculture, horticulture, cultivation of vegetables and mushrooms is the practice of cultivation wherein rainfall, temperature, solar radiation, air humidity and culture medium are controlled artificially. Control in these parameters may be effected through protected cultivation under green houses, net houses, poly houses or any other improved infrastructure facilities where micro-climatic conditions are regulated anthropogenically.

**PLANTATION SECTOR**

<i>Sector/Activity</i>	<i>% of Equity/FDI Cap</i>	<i>Entry Route</i>
(i) Tea sector including tea plantations (ii) Coffee plantations (iii) Rubber plantations (iv) Cardamom plantations (v) Palm oil tree plantations (vi) Olive oil tree plantations <i>Note: Besides the above, FDI is not allowed in any other plantation sector/activity.</i>	100%	Automatic

**Other conditions:**

Prior approval of the State Government concerned is required in case of any future land use change.

**MINING**

<i>Sector/Activity</i>	<i>% of Equity/ FDI Cap</i>	<i>Entry Route</i>
<b>Mining and Exploration of metal and non-metal ores</b> including diamond, gold, silver and precious ores but excluding titanium bearing minerals and its ores; subject to the Mines and Minerals (Development & Regulation) Act, 1957.	100%	Automatic
<b>Coal &amp; Lignite</b> (1) Coal & Lignite mining for captive consumption by power projects, iron & steel and cement units and other eligible activities permitted under and subject to the provisions of Coal Mines (Special Provisions) Act, 2015 and the Mines and Minerals (Development and Regulation) Act, 1957. (2) Setting up coal processing plants like washeries subject to the condition that the company shall not do coal mining and shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing.	100%	Automatic

(3) For sale of coal, coal mining activities including associated processing infrastructure subject to the provisions of Coal Mines (Special Provisions) Act, 2015 and the Mines and Minerals (Development and Regulation) Act, 1957 as amended from time to time and other relevant Acts on the subject.		
<b>Mining and Mineral Separation of titanium bearing minerals and ores, its value addition and integrated activities</b>  Mining and mineral separation of titanium bearing minerals & ores, its value addition and integrated activities subject to sectoral regulations and the Mines and Minerals (Development and Regulation) Act, 1957.	100%	Automatic

### Other conditions

- (i) FDI for separation of titanium bearing minerals & ores will be subject to the following additional conditions viz.:
  - (A) value addition facilities are set up within India along with transfer of technology;
  - (B) disposal of tailings during the mineral separation shall be carried out in accordance with Rules framed by the Atomic Energy Regulatory Board such as Atomic Energy (Radiation Protection) Rules, 2004 and the Atomic Energy (Safe Disposal of Radioactive Wastes) Rules, 1987.
- (ii) FDI will not be allowed in mining of “prescribed substances” listed in the Notification No. S.O. 61(E), dated 18.1.2006, issued by the Department of Atomic Energy.
- (iii) “Associated Processing Infrastructure” includes coal washery, crushing, coal handling, and separation (magnetic and non-magnetic).

#### Clarification:

For titanium bearing ores such as Ilmenite, Leucosene and Rutile, manufacture of titanium dioxide pigment and titanium sponge constitutes value addition. Ilmenite can be processed to ‘produce ‘Synthetic Rutile or Titanium Slag as an intermediate value-added product.

The objective is to ensure that the raw material available in the country is utilized for setting up downstream industries and the technology available internationally is also made available for setting up such industries within the country. Thus, if with the technology transfer, the objective of the FDI Policy can be achieved, the conditions prescribed at (i) (A) above shall be deemed to be fulfilled.

### PETROLEUM & NATURAL GAS

Sector/Activity	% of Equity/FDI Cap	Entry Route
Exploration activities of oil and natural gas fields, infrastructure related to marketing of petroleum products and natural gas, marketing of natural gas and petroleum products, petroleum product pipelines, natural gas/pipelines, LNG Regasification infrastructure, market study and formulation and Petroleum refining in the private sector, subject to the existing sectoral policy and regulatory framework in the oil marketing sector and the policy of the Government on private participation in exploration of oil and the discovered fields of national oil companies.	100%	Automatic

Petroleum refining by the Public Sector Undertakings (PSU), without any disinvestment or dilution of domestic equity in the existing PSUs.	49%	Automatic
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## MANUFACTURING

Subject to the provisions of the FDI policy, foreign investment in 'manufacturing' sector is under automatic route. Manufacturing activities may be either self-manufacturing by the investee entity or contract manufacturing in India through a legally tenable contract, whether on Principal to Principal or Principal to Agent basis. Further, a manufacturer is permitted to sell its products manufactured in India through wholesale and/or retail, including through e-commerce, without Government approval.

Notwithstanding the FDI policy provisions on trading sector, 100% FDI under Government approval route is allowed for retail trading, including through e-commerce, in respect of food products manufactured and/or produced in India.

## DEFENCE

<i>Sector/Activity</i>	<i>% of Equity/ FDI Cap</i>	<i>Entry Route</i>
Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951 and Manufacturing of small arms and ammunition under the Arms Act, 1959.	100%	Automatic up to 74% Government route beyond 74% wherever it is likely to result in access to modern technology or for other reasons to be recorded.

### Other conditions:

- (i) FDI up to 74% under automatic route shall be permitted for companies seeking new industrial licenses.
- (ii) Infusion of fresh foreign investment up to 49%, in a company not seeking industrial license or which already has Government approval for FDI in Defence, shall require mandatory submission of a declaration with the Ministry of Defence in case change in equity /shareholding pattern or transfer of stake by existing investor to new foreign investor for FDI up to 49%, within 30 days of such change. Proposal for raising FDI beyond 49% from such companies will require Government approval.
- (iii) Licence applications will be considered by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce & Industry, in consultation with Ministry of Defence and Ministry of External Affairs.
- (iv) Foreign investment in the sector is subject to security clearance by the Ministry of Home Affairs and as per guidelines of the Ministry of Defence.
- (v) Investee company should be structured to be self-sufficient in the areas of product design and development. The investee/joint venture company along with the manufacturing facility, should also have maintenance and life cycle support facility of the product being manufactured in India.
- (vi) Foreign Investments in the Defence Sector shall be subject to scrutiny on grounds of National Security and Government reserves the right to review any foreign investment in the Defence Sector that affects or may affect national security.

**BROADCASTING CARRIAGE SERVICES**

<i>Sector/Activity</i>	<i>% of Equity/ FDI Cap</i>	<i>Entry Route</i>
<b>(1) Teleports</b> (setting up of up-linking HUBs/Teleports); <b>(2) Direct to Home (DTH)</b> ; <b>(3) Cable Networks</b> (Multi System operators (MSOs) operating at National or State or District level and undertaking upgradation of networks towards digitalization and addressability); <b>(4) Mobile TV</b> ; <b>(5) Headend-in-the Sky Broadcasting Service (HITS)</b>	100%	Automatic Route
Cable Networks [Other MSOs not undertaking upgradation of networks towards digitalization and addressability and Local Cable Operators (LCOs)]	100%	Automatic Route
<p><i>Note:</i></p> <p>Infusion of fresh foreign investment, beyond 49% in a company not seeking license/permission from sectoral Ministry, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, will require Government approval.</p>		

**BROADCASTING CONTENT SERVICES**

<i>Sector/Activity</i>	<i>% of Equity/ FDI Cap</i>	<i>Entry Route</i>
<b>Terrestrial Broadcasting FM (FM Radio)</b> , subject to such terms and conditions, as specified from time to time, by Ministry of Information & Broadcasting, for grant of permission for setting up of FM Radio stations	49%	Government
<b>Up-linking of 'News &amp; Current Affairs' TV Channels</b>	49%	Government
<b>Uploading/Streaming of News &amp; Current Affairs through Digital Media</b>	26%	Government
<b>Up-linking of Non- 'News &amp; Current Affairs' TV Channels/ Down-linking of TV Channels</b>	100%	Automatic

**Conditions for Broadcasting Sector**

1. FDI for Up-linking/Down-linking TV Channels will be subject to compliance with the relevant Up-linking/Down-linking Policy notified by the Ministry of Information & Broadcasting from time to time.
2. Foreign investment (FI) in companies engaged in all the aforesaid services will be subject to relevant regulations and such terms and conditions, as may be specified from time to time, by the Ministry of Information and Broadcasting.

3. The foreign investment (FI) limit in companies engaged in the aforesaid activities shall include, in addition to FDI, Foreign Portfolio Investors (FPIs), Qualified Foreign Investors (QFIs), Non-Resident Indians (NRIs), Foreign Currency Convertible Bonds (FCCBs), American Depository Receipts (ADRs), Global Depository Receipts (GDRs) and convertible preference shares held by foreign entities.
4. Foreign investment in the aforesaid broadcasting carriage services will be subject to the following security conditions/terms:

***Mandatory Requirement for Key Executives of the Company***

- (i) The majority of Directors on the Board of the Company shall be Indian citizens.
- (ii) The Chief Executive Officer (CEO), Chief Officer in-charge of technical network operations and Chief Security Officer should be resident Indian citizens.

***Security Clearance of Personnel***

- (iii) The Company, all Directors on the Board of Directors and such key executives like Managing Director/Chief Executive Officer, Chief Financial Officer (CFO), Chief Security Officer (CSO), Chief Technical Officer (CTO), Chief Operating Officer (COO), shareholders who individually hold 10% or more paid-up capital in the company and any other category, as may be specified by the Ministry of Information and Broadcasting from time to time, shall require to be security cleared.

In case of the appointment of Directors on the Board of the Company and such key executives like Managing Director/Chief Executive Officer, Chief Financial Officer (CFO), Chief Security Officer (CSO), Chief Technical Officer (CTO), Chief Operating Officer (COO), etc., as may be specified by the Ministry of Information and Broadcasting from time to time, prior permission of the Ministry of Information and Broadcasting shall have to be obtained.

It shall be obligatory on the part of the company to also take prior permission from the Ministry of Information and Broadcasting before effecting any change in the Board of Directors.

- (iv) The Company shall be required to obtain security clearance of all foreign personnel likely to be deployed for more than 60 days in a year by way of appointment, contract, and consultancy or in any other capacity for installation, maintenance, operation or any other services prior to their deployment. The security clearance shall be required to be obtained every two years.

***Permission vis-à-vis Security Clearance***

- (v) The permission shall be subject to permission holder/licensee remaining security cleared throughout the currency of permission. In case the security clearance is withdrawn, the permission granted is liable to be terminated forthwith.
- (vi) In the event of security clearance of any of the persons associated with the permission holder/licensee or foreign personnel being denied or withdrawn for any reasons whatsoever, the permission holder/licensee will ensure that the concerned person resigns or his services terminated forthwith after receiving such directives from the Government, failing which the permission/license granted shall be revoked and the company shall be disqualified to hold any such Permission/license in future for a period of five years.

***Infrastructure/Network/Software related requirement***

- (vii) The officers/officials of the licensee companies dealing with the lawful interception of services will be resident India citizens.



- (viii) Details of infrastructure/network diagram (technical details of the network) could be provided, on a need basis only, to equipment suppliers/manufactures and the affiliate of the licensee company. Clearance from the licensor would be required if such information is to be provided to anybody else.
- (ix) The Company shall not transfer the subscribers' databases to any person/place outside India unless permitted by relevant law.
- (x) The Company must provide traceable identity of their subscribers.

#### ***Monitoring, Inspection and Submission of Information***

- (xi) The Company should ensure that necessary provision (hardware/software) is available in their equipment for doing the lawful interception and monitoring from a centralized location as and when required by Government.
- (xii) The company, at its own costs, shall, on demand by the government or its authorized representative, provide the necessary equipment, services and facilities at designated place(s) for continuous monitoring or the broadcasting service by or under supervision of the Government or its authorized representative.
- (xiii) The Government of India, Ministry of Information & Broadcasting or its authorized representative shall have the right to inspect the broadcasting facilities. No prior permission/intimation shall be required to exercise the right of Government or its authorized representative to carry out the inspection. The company will, if required by the Government or its authorized representative, provide necessary facilities for continuous monitoring for any particular aspect of the company's activities and operations. Continuous monitoring, however, will be confined only to security related aspects, including screening of objectionable content.
- (xiv) The inspection will ordinarily be carried out by the Government of India, Ministry of Information & Broadcasting or its authorized representative after reasonable notice, except in circumstances where giving such a notice will defeat the very purpose of the inspection.
- (xv) The company shall submit such information with respect to its services as may be required by the Government or its authorized representative, in the format as may be required, from time to time.
- (xvi) The permission holder/licensee shall be liable to furnish the Government of India or its authorized representative or TRAI or its authorized representative, such reports, accounts, estimates, returns or such other relevant information and at such periodic intervals or such times as may be required.
- (xvii) The service providers should familiarize/train designated officials or the Government or officials of TRAI or its authorized representative(s) in respect of relevant operations/features of their systems.

#### ***National Security Conditions***

- (xviii) It shall be open to the licensor to restrict the Licensee Company from operating in any sensitive area from the National Security angle. The Government of India, Ministry of Information and Broadcasting shall have the right to temporarily suspend the permission of the permission holder/Licensee in public interest or for national security for such period or periods as it may direct. The company shall immediately comply with any directives issued in this regard failing which the permission issued shall be revoked and the company disqualified to hold any such permission in future for a period of five years.
- (xix) The company shall not import or utilize any equipment, which are identified as unlawful and/or render network security vulnerable.

**Other Conditions:**

- (xx) Licensor reserves the right to modify these conditions or incorporate new conditions considered necessary in the interest of national security and public interest or for proper provision of broadcasting services.
- (xxi) Licensee will ensure that broadcasting service installation carried out by it should not become a safety hazard and is not in contravention of any statute, rule or regulation and public policy.

**PRINT MEDIA**

<i>Sector/Activity</i>	<i>% of Equity/ FDI Cap</i>	<i>Entry Route</i>
Publishing of newspaper and periodicals dealing with news and current affairs	26%	Government
Publication of Indian editions of foreign magazines dealing with news and current affairs	26%	Government

**Other Conditions:**

- (i) 'Magazine', for the purpose of these guidelines, will be defined as a periodical publication, brought out on non- daily basis, containing public news or comments on public news.

Foreign investment would also be subject to the Guidelines for Publication of Indian editions of foreign magazines dealing with news and current affairs issued by the Ministry of Information & Broadcasting on 4.12.2008, as amended from time to time.

<i>Sector/Activity</i>	<i>% of Equity/ FDI Cap</i>	<i>Entry Route</i>
Publishing/printing of scientific and technical magazines/specialty journals/ periodicals, subject to compliance with the legal framework as applicable and guidelines issued in this regard from time to time by Ministry of Information and Broadcasting	100%	Government
Publication of facsimile edition of foreign newspapers	100%	Government

**Other Conditions:**

- (i) FDI should be made by the owner of the original foreign newspapers whose facsimile edition is proposed to be brought out in India.
- (ii) Publication of facsimile edition of foreign newspapers can be undertaken only by an entity incorporated or registered in India under the provisions of the Companies Act, as applicable.
- (iii) Publication of facsimile edition of foreign newspaper would also be subject to the Guidelines for publication of newspapers and periodicals dealing with news and current affairs and publication of facsimile edition of foreign newspapers issued by Ministry of Information & Broadcasting on 31.3.2006, as amended from time to time.

**CIVIL AVIATION SECTOR****AIRPORTS**

<i>Sector/Activity</i>	<i>% of Equity/ FDI Cap</i>	<i>Entry Route</i>
(a) Greenfield projects	100%	Automatic
(b) Existing projects	100%	Automatic

**AIR TRANSPORT SERVICES**

<i>Sector/Activity</i>	<i>% of Equity/ FDI Cap</i>	<i>Entry Route</i>
(1) (a) Scheduled Air Transport Service*/ Domestic Scheduled Passenger Airline (b) Regional Air Transport Service	100%	Automatic up to 49% (Automatic up to 100% for NRIs) Government route beyond 49%
(2) Non-Scheduled Air Transport Services	100%	Automatic
(3) Helicopter services/seaplane services requiring DGCA approval	100%	Automatic

\*As per Schedule XI of Aircraft Rules, 1937, Air Operator Certificate to operate Scheduled air transport services (including Domestic Scheduled Passenger Airline or Regional Air Transport Service) may be granted to a company or a body corporate provided that: -

- (a) it is registered and has its principal place of business within India;
- (b) the Chairman and at least two-thirds of its Directors are citizens of India; and
- (c) its substantial ownership and effective control is vested in Indian nationals.

**OTHER SERVICES UNDER CIVIL AVIATION SECTOR**

<i>Sector/Activity</i>	<i>% of Equity/ FDI Cap</i>	<i>Entry Route</i>
(1) Ground Handling Services subject to sectoral regulations and security clearance	100%	Automatic
(2) Maintenance and Repair organizations; flying training institutes; and technical training institutions.	100%	Automatic

The Civil Aviation sector includes Airports, Scheduled and Non-Scheduled domestic passenger airlines, Helicopter services/Seaplane services, Ground Handling Services, Maintenance and Repair organizations; Flying training institutes; and Technical training institutions.

For the purposes of the Civil Aviation sector:

- (i) "Airport" means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome as defined in clause (2) of section 2 of the Aircraft Act, 1934;

- (ii) “Aerodrome” means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers and other structures thereon or pertaining thereto;
- (iii) “Air transport service” means a service for the transport by air of persons, mails or any other thing, animate or inanimate, for any kind of remuneration whatsoever, whether such service consists of a single flight or series of flights;
- (iv) “Air Transport Undertaking” means an undertaking whose business includes the carriage by air of passengers or cargo for hire or reward;
- (v) “Aircraft component” means any part, the soundness and correct functioning of which, when fitted to an aircraft, is essential to the continued airworthiness or safety of the aircraft and includes any item of equipment;
- (vi) “Helicopter” means a heavier-than-air aircraft supported in flight by the reactions of the air on one or more power driven rotors on substantially vertical axis;
- (vii) “Scheduled air transport service” means an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognizably systematic series, each flight being open to use by members of the public;
- (viii) “Non-Scheduled air transport service” means any service which is not a scheduled air transport service;
- (ix) “Seaplane” means an aeroplane capable normally of taking off from and alighting solely on water;
- (x) “Ground Handling” means (i) ramp handling, (ii) traffic handling both of which shall include the activities as specified by the Ministry of Civil Aviation through the Aeronautical Information Circulars from time to time, and (iii) any other activity specified by the Central Government to be a part of either ramp handling or traffic handling.

### Other Conditions

- (a) Air Transport Services would include Domestic Scheduled Passenger Airlines; Non-Scheduled Air Transport Services, helicopter and seaplane services.
- (b) Foreign airlines are allowed to participate in the equity of companies operating Cargo airlines, helicopter and seaplane services, as per the limits and entry routes mentioned above.
- (c) Foreign airlines are also allowed to invest in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital. Such investment would be subject to the following conditions:
  - (i) It would be made under the Government approval route,
  - (ii) The 49% limit will subsume FDI and FPI investment,
  - (iii) The investments so made would need to comply with the relevant regulations of SEBI, such as the Issue of Capital and Disclosure Requirements (ICDR) Regulations/Substantial Acquisition of Shares and Takeovers (SAST) Regulations, as well as other applicable rules and regulations,
  - (iv) All foreign nationals likely to be associated with Indian scheduled and non-scheduled air transport services, as a result of such investment shall be cleared from security view point before deployment, and

- (v) All technical equipment that might be imported into India as a result of such investment shall require clearance from the relevant authority in the Ministry of Civil Aviation.
- (d) In addition to the above conditions, foreign investment in M/s Air India Ltd. shall be subject to the following conditions:
  - (i) Foreign investment(s) in M/s Air India Ltd., including that of foreign airline(s) shall not exceed 49% either directly or indirectly except in case of those NRIs, who are Indian Nationals, where foreign investment(s) is permitted up to 100% under automatic route.
  - (ii) Substantial ownership and effective control of M/s Air India Ltd. shall continue to be vested in Indian Nationals as stipulated in Aircraft Rules, 1937.
- (e) FDI in Civil Aviation is subject to provisions of Aircraft Rules, 1937, as amended from time to time.

**Note:**

- (i) The FDI limits/entry routes mentioned for Airport and Air Transport Service, are applicable in the situation where there is no investment by foreign airline. Any investment by foreign airlines in companies operating in Air Transport Services, including in M/s Air India Limited, shall be subject to para (b) and (c) above.
- (ii) The dispensation for those NRIs, who are Indian Nationals regarding FDI up to 100% will also continue in respect of the investment regime specified at para (c) (ii) and (d) above.

**CONSTRUCTION DEVELOPMENT: TOWNSHIPS, HOUSING, BUILT-UP INFRASTRUCTURE**

<b>Sector/Activities</b>	<b>% of Equity/FDI</b>	<b>Entry Route</b>
Construction-development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships)	100%	Automatic

Each phase of the construction development project would be considered as a separate project for the purposes of FDI policy. Investment will be subject to the following conditions:

- (A) (i) the investor will be permitted to exit on completion of the project or after development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage.
- (ii) Notwithstanding anything contained at (A) (i) above, a foreign investor will be permitted to exit and repatriate foreign investment before the completion of project under automatic route, provided that a lock-in-period of three years, calculated with reference to each tranche of foreign investment has been completed. Further, transfer of stake from one non-resident to another non-resident, without repatriation of investment will neither be subject to any lock-in period nor to any government approval.
- (B) The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government/Municipal/Local Body concerned.
- (C) The Indian investee company will be permitted to sell only developed plots. For the purposes of this policy “developed plots” will mean plots where trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage, have been made available.

- (D) The Indian investee company shall be responsible for obtaining all necessary approvals, including those of the building/layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/bye-laws/regulations of the State Government/Municipal/Local Body concerned.
- (E) The State Government/Municipal/Local Body concerned, which approves the building/development plans, will monitor compliance of the above conditions by the developer.

**Note:**

- (i) It is clarified that FDI is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farm houses and trading in transferable development rights (TDRs).  
 “Real estate business” means dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent/ income on lease of the property, not amounting to transfer, will not amount to real estate business.
- (ii) Condition of lock-in period at (A) above will not apply to Hotels & Tourist Resorts, Hospitals, Special Economic Zones (SEZs), Educational Institutions, Old Age Homes and investment by NRIs.
- (iii) Completion of the project will be determined as per the local bye-laws/rules and other regulations of State Governments.
- (iv) It is clarified that 100% FDI under automatic route is permitted in completed projects for operation and management of townships, malls/ shopping complexes and business centres. Consequent to foreign investment, transfer of ownership and/or control of the investee company from residents to non-residents is also permitted. However, there would be a lock-in-period of three years, calculated with reference to each tranche of FDI, and transfer of immovable property or part thereof is not permitted during this period.
- (v) “Transfer”, in relation to FDI policy on the sector, includes–
- the sale, exchange or relinquishment of the asset; or
  - the extinguishment of any rights therein; or
  - the compulsory acquisition thereof under any law; or
  - any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or
  - any transaction, by acquiring shares in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property.
- (vi) it is clarified that real-estate broking service does not amount to real estate business and 100% foreign investment is allowed in the activity under automatic route.

## INDUSTRIAL PARKS

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
Industrial Parks -new and existing	100%	Automatic

**Conditions for Industrial Parks**

- (i) “Industrial Park” is a project in which quality infrastructure in the form of plots of developed land or built up space or a combination with common facilities, is developed and made available to all the allottee units for the purposes of industrial activity.
- (ii) “Infrastructure” refers to facilities required for functioning of units located in the Industrial Park and includes roads (including approach roads), railway line/sidings including electrified railway lines and connectivities to the main railway line, water supply and sewerage, common effluent treatment facility, telecom network, generation and distribution of power, air conditioning.
- (iii) “Common Facilities” refer to the facilities available for all the units located in the industrial park, and include facilities of power, roads (including approach roads), railway line/sidings including electrified railway lines and connectivities to the main railway line, water supply and sewerage, common effluent treatment, common testing, telecom services, air conditioning, common facility buildings, industrial canteens, convention/conference halls, parking, travel desks, security service, first aid center, ambulance and other safety services, training facilities and such other facilities meant for common use of the units located in the Industrial Park.
- (iv) “Allocable area” in the Industrial Park means-
  - (a) in the case of plots of developed land- the net site area available for allocation to the units, excluding the area for common facilities.
  - (b) in the case of built up space- the floor area and built up space utilized for providing common facilities.
  - (c) in the case of a combination of developed land and built-up space- the net site and floor area available for allocation to the units excluding the site area and built up space utilized for providing common facilities.
- (v) “Industrial Activity” means manufacturing; electricity; gas and water supply; post and telecommunications; software publishing, consultancy and supply; data processing, database activities and distribution of electronic content; other computer related activities; basic and applied R&D on bio-technology, pharmaceutical sciences/life sciences, natural sciences and engineering; business and management consultancy activities; and architectural, engineering and other technical activities.

FDI in Industrial Parks would not be subject to the conditionalities applicable for construction development projects, provided the Industrial Parks meet with the under-mentioned conditions:

- (i) it would comprise of a minimum of 10 units and no single unit shall occupy more than 50% of the allocable area;
- (ii) the minimum percentage of the area to be allocated for industrial activity shall not be less than 66% of the total allocable area.

**SATELLITES- ESTABLISHMENT AND OPERATION**

<b>Sector/Activities</b>	<b>% of Equity/FDI</b>	<b>Entry Route</b>
Satellites- establishment and operation, subject to the sectoral guidelines of Department of Space/ISRO	100%	Automatic

**PRIVATE SECURITY AGENCIES**

<i>Sector/Activities</i>	<i>% of Equity / FDI</i>	<i>Entry Route</i>
Private Security Agency	74%	Automatic up to 49% Government route beyond 49% and up to 74%

**Other Conditions**

1. FDI in Private Security Agencies is subject to compliance with Private Security Agencies (Regulation) (PSAR) Act, 2005, as amended from time to time.
2. For the purposes of FDI policy on the sector, terms “Private Security Agencies”, “Private Security” and “Armoured Car Service” will have the same meaning as provided under PSAR Act, 2005, which is reproduced as under:

“Private Security Agency” means a person or body of persons other than a government agency, department or organisation engaged in the business of providing private security services including training to private security guards or their supervisor or providing private security guards to any industrial or business undertaking or a company or any other person or property;

“Private Security” means security provided by a person, other than a public servant, to protect or guard any person or property or both and includes provision of armoured car service;

“Armoured Car Service” means the service provided by deployment of armed guards along with armoured car and such other related services which may be notified by the Central Government or as the case may be, the State Government from time to time.

**TELECOM SERVICES**

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
<b>Telecom Services</b> <b>(including Telecom Infrastructure Providers Category-I)</b> All telecom services including Telecom Infrastructure Providers Category-I, viz. Basic, Cellular, United Access Services, Unified License (Access Services), Unified License, National/International Long Distance, Commercial V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS), All types of ISP licenses, Voice Mail/Audiotex/UMS, Resale of IPLC, Mobile Number Portability Services, Infrastructure Provider Category-I (providing dark fibre, right of way, duct space, tower) except Other Service Providers.	100%	Automatic

**Other Conditions**

FDI in Telecom sector is subject to observance of licensing and security conditions by licensee as well as investors as notified by the Department of Telecommunications (DoT) from time to time, except “Other Service Providers”, which are allowed 100% FDI on the automatic route.



**TRADING**

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
Cash & Carry Wholesale Trading/Wholesale Trading (including sourcing from MSEs)	100%	Automatic

Cash & Carry Wholesale trading/Wholesale trading, would mean sale of goods/merchandise to retailers, industrial, commercial, institutional or other professional business users or to other wholesalers and related subordinated service providers. Wholesale trading would, accordingly, imply sales for the purpose of trade, business and profession, as opposed to sales for the purpose of personal consumption. The yardstick to determine whether the sale is wholesale or not would be the type of customers to whom the sale is made and not the size and volume of sales. Wholesale trading would include resale, processing and thereafter sale, bulk imports with ex-port/ex-bonded warehouse business sales and B2B e-Commerce.

**Guidelines for cash & carry wholesale trading/wholesale trading (WT):-**

- (a) For undertaking WT, requisite licenses/registration/ permits, as specified under the relevant Acts/Regulations/Rules/Orders of the State Government/Government Body/Government Authority/Local Self- Government Body under that State Government should be obtained.
- (b) Except in case of sales to Government, sales made by the wholesaler would be considered as 'cash & carry wholesale trading/wholesale trading' with valid business customers, only when WT are made to the following entities:
  - (i) Entities holding applicable tax registration; or
  - (ii) Entities holding trade licenses i.e. a license/registration certificate/membership certificate/ registration under Shops and Establishment Act, issued by a Government Authority/Government Body/Local Self- Government Authority, reflecting that the entity/person holding the license/ registration certificate/ membership certificate, as the case may be, is itself/ himself/herself engaged in a business involving commercial activity; or
  - (iii) Entities holding permits/license etc. for undertaking retail trade (like tehbazari and similar license for hawkers) from Government Authorities/Local Self Government Bodies; or
  - (iv) Institutions having certificate of incorporation or registration as a society or registration as public trust for their self-consumption.

*Note:* An entity, to whom WT is made, may fulfill any one of the 4 conditions at (b) (i) to (iv) above.

- (c) Full records indicating all the details of such sales like name of entity, kind of entity, registration/ license/ permit etc. number, amount of sale etc. should be maintained on a day to day basis.
- (d) WT of goods would be permitted among companies of the same group. However, such WT to group companies taken together should not exceed 25% of the total turnover of the wholesale venture.
- (e) WT can be undertaken as per normal business practice, including extending credit facilities subject to applicable regulations.
- (f) A wholesale/cash & carry trader can undertake retail trading, subject to the conditions as applicable. An entity undertaking wholesale/cash and carry as well as retail business will be mandated to maintain separate books of accounts for these two arms of the business and duly audited by the statutory auditors. Conditions of the FDI policy for wholesale/cash and carry business and for retail business have to be separately complied with by the respective business arms.

**E-COMMERCE ACTIVITIES**

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
E –Commerce Activities	100%	Automatic

Subject to provisions of FDI Policy, e-commerce entities would engage only in Business to Business (B2B) e-commerce and not in Business to Consumer (B2C) e-commerce.

**B2B (business-to-business)** is a sort of electronic commerce (e-commerce) that involves the exchange of goods, services, or information between businesses instead of between businesses and consumers. Example – Companies like Microsoft, Salesforce, IndiaMART etc.

**B2C (business-to-consumer)** is the type of commerce transaction that involves the exchange of goods, services, or information between businesses and consumers instead of just among businesses themselves. Example – Meta, Walmart etc.

**E-commerce-** E-commerce means buying and selling of goods and services including digital products over digital & electronic network.

**E-commerce entity-** E-commerce entity means a company incorporated under the Companies Act 1956 or the Companies Act 2013 or a foreign company covered under section 2 (42) of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2 (v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business.

**Inventory based model of e-commerce-** Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

**Marketplace based model of e-commerce-** Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

**Guidelines for Foreign Direct Investment on E-Commerce Sector**

- (i) 100% FDI under automatic route is permitted in marketplace model of e-commerce.
- (ii) FDI is not permitted in inventory-based model of e-commerce.

**Other Conditions**

- i. Digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.
- ii. Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis.
- iii. E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services.
- iv. E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory-based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.
- v. An entity having equity participation by e-commerce marketplace entity or its group companies, or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity.
- vi. In marketplace model goods/services made available for sale electronically on website should clearly

provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.

- vii. In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
- viii. In marketplace model, any warrantee/ guarantee of goods and services sold will be responsibility of the seller.
- ix. E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be provided by e-commerce marketplace entity or other entities in which e-commerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and non-discriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/ marketing, payments, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For the purposes of this clause, provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.
- x. Guidelines on cash and carry wholesale trading will apply on B2B e-commerce.
- xi. E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.
- xii. E-commerce marketplace entity with FDI shall have to obtain and maintain a report of statutory auditor by 30th of September every year for the preceding financial year confirming compliance of the e-commerce guidelines.

Subject to the conditions of FDI policy on services sector and applicable laws/regulations, security and other conditionalities, sale of services through e-commerce will be under automatic route.

### **SINGLE BRAND PRODUCT RETAIL TRADING (SBRT)**

Single brand product-retail trading ("SBRT") would cover only products which are branded during manufacturing. Example – Adidas, Nike, Apple etc.

<b>Sector/Activities</b>	<b>% of Equity/FDI</b>	<b>Entry Route</b>
<b>Single Brand Product Retail Trading</b>	100%	Automatic

- (1) Foreign Investment in Single Brand product retail trading is aimed at attracting investments in production and marketing, improving the availability of such goods for the consumer, encouraging increased sourcing of goods from India, and enhancing competitiveness of Indian enterprises through access to global designs, technologies and management practices.
- (2) FDI in Single Brand product retail trading would be subject to the following conditions:
  - (a) Products to be sold should be of a 'Single Brand' only.
  - (b) Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India.
  - (c) 'Single Brand' product-retail trading would cover only products which are branded during manufacturing.
  - (d) A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, either directly by the brand owner or through a legally tenable agreement executed between the Indian entity undertaking single brand retail trading and the brand owner.

- (e) In respect of proposals involving foreign investment beyond 51%, sourcing of 30% of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company will be required to maintain. This procurement requirement would have to be met, in the first instance, as an average of five years' total value of the goods procured, beginning 1st April of the year of the commencement of SBRT business (i.e. opening of the first store or start of online retail, whichever is earlier). Thereafter, SBRT entity shall be required to meet the 30% local sourcing norms on an annual basis. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of foreign investment for the purpose of carrying out single-brand product retail trading.
- (f) For the purpose of meeting local sourcing requirement laid down at para (e) above, all procurements made from India by the SBRT entity for that single brand shall be counted towards local sourcing, irrespective of whether the goods procured are sold in India or exported. SBRT entity is also permitted to set off sourcing of goods from India for global operations against the mandatory sourcing requirement of 30%. For this purpose, 'sourcing of goods from India for global operations' shall mean value of goods sourced from India for global operations for that single brand (in INR terms) in a particular financial year directly by the entity undertaking SBRT or its group companies (resident or non-resident), or indirectly by them through a third party under a legally tenable agreement.
- (g) An SBRT entity operating through brick and mortar stores can also undertake retail trading through e-commerce. However, retail trading through e-commerce can also be undertaken prior to opening of brick and mortar stores, subject to the condition that the entity opens brick and mortar stores within 2 years from date of start of online retail.

**Note:**

- (i) Conditions mentioned at Para (2) (b) & (2) (d) will not be applicable for undertaking SBRT of Indian brands.
- (ii) Indian brands should be owned and controlled by resident Indian citizens and/or companies which are owned and controlled by resident Indian citizens.
- (iii) Sourcing norms will not be applicable up to three years from commencement of the business i.e. opening of the first store or start of online retail, whichever is earlier for entities undertaking single brand retail trading of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible. A Committee under the Chairmanship of Secretary, DPIIT, with representatives from NITI Aayog, concerned Administrative Ministry and independent technical expert(s) on the subject will examine the claim of applicants on the issue of the products being in the nature of 'state-of-art' and 'cutting-edge' technology where local sourcing is not possible and give recommendations for such relaxation.

### **MULTI BRAND RETAIL TRADING (MBRT)**

Multi-brand retail trading ("MBRT") refers to the sale of various different products from several brands using a single platform. Example – Amazon, Flipkart etc.

<b>Sector/Activities</b>	<b>% of Equity/FDI</b>	<b>Entry Route</b>
<b>Multi Brand Product Retail Trading</b>	51%	Government

- (1) FDI in multi brand retail trading, in all products, will be permitted, subject to the following conditions:
- (i) Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery and meat products, may be unbranded.
- (ii) Minimum amount to be brought in, as FDI, by the foreign investor, would be US \$ 100 million.

- (iii) At least 50% of total FDI brought in the first tranche of US \$ 100 million, shall be invested in ‘back-end infrastructure’ within three years, where ‘back-end infrastructure’ will include capital expenditure on all activities, excluding that on front-end units; for instance, back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, ware-house, agriculture market produce infrastructure etc. Expenditure on land cost and rentals, if any, will not be counted for purposes of backend infrastructure. Subsequent investment in backend infrastructure would be made by the MBRT retailer as needed, depending upon its business requirements.
- (iv) At least 30% of the value of procurement of manufactured/processed products purchased shall be sourced from Indian micro, small and medium industries, which have a total investment in plant & machinery not exceeding US \$ 2.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. The ‘small industry’ status would be reckoned only at the time of first engagement with the retailer, and such industry shall continue to qualify as a ‘small industry’ for this purpose, even if it outgrows the said investment of US \$ 2.00 million during the course of its relationship with the said retailer. Sourcing from agricultural co-operatives and farmers co-operatives would also be considered in this category. The procurement requirement would have to be met, in the first instance, as an average of five years’ total value of the manufactured/processed products purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis.
- (v) Self-certification by the company, to ensure compliance of the conditions at serial nos. (ii), (iii) and (iv) above, which could be cross-checked, as and when required. Accordingly, the investors shall maintain accounts, duly certified by statutory auditors.
- (vi) Retail sales outlets may be set up only in cities with a population of more than 10 lakh as per 2011 Census or any other cities as per the decision of the respective State Governments, and may also cover an area of 10 kms around the municipal/urban agglomeration limits of such cities; retail locations will be restricted to conforming areas as per the Master/Zonal Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking.
- (vii) Government will have the first right to procurement of agricultural products.
- (viii) The above policy is an enabling policy only and the State Governments/Union Territories would be free to take their own decisions in regard to implementation of the policy. Therefore, retail sales outlets may be set up in those States/Union Territories which have agreed, or agree in future, to allow FDI in MBRT under this policy. The list of States/Union Territories which have conveyed their agreement is at (2) below. Such agreement, in future, to permit establishment of retail outlets under this policy, would be conveyed to the Government of India through the Department for Promotion of Industry and Internal Trade and additions would be made to the list at (2) below accordingly. The establishment of the retail sales outlets will be in compliance of applicable State/Union Territory laws/ regulations, such as the Shops and Establishments Act etc.
- (ix) Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of multi-brand retail trading.

### DUTY FREE SHOPS

Sector/Activities	% of Equity/FDI	Entry Route
Duty Free Shop	100%	Automatic

- (i) Duty Free Shops would mean shops set up in custom bonded area at International Airports/International Seaports and Land Custom Stations where there is transit of international passengers.
- (ii) Foreign investment in Duty Free Shops is subject to compliance of conditions stipulated under the Customs Act, 1962 and other laws, rules and regulations.
- (iii) Duty Free Shop entity shall not engage into any retail trading activity in the Domestic Tariff Area of the country.

### RAILWAY INFRASTRUCTURE

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
<p><b>Railway Infrastructure</b></p> <p>Construction, operation and maintenance of the following:</p> <p>(i) Suburban corridor projects through PPP, (ii) High speed train projects, (iii) Dedicated freight lines, (iv) Rolling stock including train sets, and locomotives/coaches manufacturing and maintenance facilities, (v) Railway Electrification, (vi) Signaling systems, (vii) Freight terminals, (viii) Passenger terminals, (ix) Infrastructure in industrial park pertaining to railway line/sidings including electrified railway lines and connectivities to main railway line and (x) Mass Rapid Transport Systems.</p>	100%	Automatic

Note:

- (i) Foreign Direct Investment in the abovementioned activities open to private sector participation including FDI is subject to sectoral guidelines of Ministry of Railways.
- (ii) Proposals involving FDI beyond 49% in sensitive areas from security point of view, will be brought by the Ministry of Railways before the Cabinet Committee on Security (CCS) for consideration on a case to case basis.

### ASSET RECONSTRUCTION COMPANIES

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
<p>Asset Reconstruction Company' (ARC) means a company registered with the Reserve Bank of India under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act).</p>	100%	Automatic

### Other Conditions

- i. Persons resident outside India can invest in the capital of Asset Reconstruction Companies (ARCs) registered with Reserve Bank of India, up to 100% on the automatic route.
- ii. Investment limit of a sponsor in the shareholding of an ARC will be governed by the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as amended from time to time. Similarly, investment by institutional / non-institutional investors will also be governed by the said Act, as amended from time to time.

- iii. The total shareholding of an individual FPI shall be below 10% of the total paid-up capital.
- iv. FPIs can invest in the Security Receipts (SRs) issued by ARCs. /FPIs may be allowed to invest up to 100 per cent of each tranche in SRs issued by ARCs, subject to directions/guidelines of Reserve Bank of India. Such investment should be within the relevant regulatory cap as applicable.
- v. All investments would be subject to provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as amended from time to time.

### BANKING- PRIVATE SECTOR

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
Banking- Private Sector	74%	Automatic up to 49% Government route beyond 49% and up to 74%.

### Other Conditions

- i. This 74% limit will include investment under the Portfolio Investment Scheme (PIS) by /FPIs, NRIs and shares acquired prior to September 16, 2003 by erstwhile OCBs, and continue to include IPOs, Private placements, GDR/ ADRs and acquisition of shares from existing shareholders.
- ii. The aggregate foreign investment in a private bank from all sources will be allowed up to a maximum of 74 per cent of the paid-up capital of the Bank. At all times, at least 26 per cent of the paid-up capital will have to be held by residents, except in regard to a wholly-owned subsidiary of a foreign bank.
- iii. The stipulations as above will be applicable to all investments in existing private sector banks also.
- iv. Other conditions in respect of permissible limits under portfolio investment schemes through stock exchanges for/ FPIs and NRIs, setting-up of a subsidiary by foreign banks and limits in respect of voting rights.

### BANKING- PUBLIC SECTOR

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
Banking- Public Sector subject to Banking Companies (Acquisition & Transfer of Undertakings) Acts 1970/80. This ceiling (20%) is also applicable to the State Bank of India and its associate Banks.	20%	Government

### CREDIT INFORMATION COMPANIES (CIC)

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
Credit Information Company	100%	Automatic

### Other Conditions

- (1) Foreign investment in Credit Information Companies is subject to the Credit Information Companies (Regulation) Act, 2005.
- (2) Foreign investment is permitted subject to regulatory clearance from RBI.



- (3) Such /FPI investment would be permitted subject to the conditions that:
- (i) A single entity should directly or indirectly hold below 10% equity.
  - (ii) Any acquisition in excess of 1% will have to be reported to RBI as a mandatory requirement; and
  - (iii) FPIs investing in CICs shall not seek a representation on the Board of Directors based upon their shareholding.

### INFRASTRUCTURE COMPANY IN THE SECURITIES MARKET

<b>Sector/Activities</b>	<b>% of Equity/FDI</b>	<b>Entry Route</b>
Infrastructure companies in Securities Markets, namely, stock exchanges, commodity exchanges, depositories and clearing corporations, in compliance with SEBI Regulations.	49%	Automatic

### Other Conditions

Foreign investment, including investment by FPIs, will be subject to the Securities Contracts (Regulations) (Stock Exchanges and Clearing Corporations) Regulations 2012, and Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 as amended from time to time, and other Guidelines/Regulations issued by the Central Government, SEBI and the Reserve Bank of India from time to time.

Words and expressions used herein and not defined in these regulations but defined in the Companies Act, 2013 or the Securities Contracts (Regulation) Act, 1956 or the Securities and Exchange Board of India Act, 1992 or the Depositories Act, 1996 or in the concerned Regulations issued by SEBI shall have the same meanings respectively assigned to them in those Acts/ Regulations.

Futures trading in commodities are regulated under the Forward Contracts (Regulation) Act, 1952. Commodity Exchanges, like Stock Exchanges, are infrastructure companies in the commodity futures market. With a view to infuse globally acceptable best practices, modern management skills and latest technology, it was decided to allow foreign investment in Commodity Exchanges.

It may be noted that:

“*Commodity Exchange*” is a recognized association under the provisions of the Forward Contracts (Regulation) Act, 1952, as amended from time to time, to provide exchange platform for trading in forward contracts in commodities.

“*Recognized association*” means an association to which recognition for the time being has been granted by the Central Government under Section 6 of the Forward Contracts (Regulation) Act, 1952.

“*Association*” means any-body of individuals, whether incorporated or not, constituted for the purposes of regulating and controlling the business of the sale or purchase of any goods and commodity derivative.

“*Forward contract*” means a contract for the delivery of goods and which is not a ready delivery contract.

“*Commodity derivative*” means a contract for delivery of goods, which is not a ready delivery contract; or a contract for differences which derives its value from prices or indices of prices of such underlying goods or activities, services, rights, interests and events, as may be notified in consultation with SEBI by the Central Government, but does not include securities.



**INSURANCE**

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
<b>Insurance Company</b>	74%	Automatic
Intermediaries or Insurance Intermediaries including insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time to time.	100%	Automatic

**Other Conditions**

- (a) No Indian Insurance company shall allow the aggregate holdings by way of total foreign investment in its equity shares by foreign investors, including portfolio investors, to exceed seventy four percent of the paid-up equity capital of such Indian Insurance company.
- (b) The foreign investment up to seventy four percent of the total paid-up equity of the Indian Insurance Company shall be allowed on the automatic route subject to approval/verification by the Insurance Regulatory and Development Authority of India.
- (c) Foreign investment in this sector shall be subject to compliance with the provisions of the Insurance Act, 1938 and the condition that Companies receiving FDI shall obtain necessary license /approval from the Insurance Regulatory & Development Authority of India for undertaking insurance and related activities.
- (d) An Indian Insurance company having foreign investment - (i) a majority of its Directors; (ii) a Majority of its Key Managerial Persons; and (iii) at list one among the Chairperson of its Board, its MD & its CEO shall be resident Indian citizen.
- (e) Foreign portfolio investment in an Indian Insurance company shall be governed by the provisions contained in Chapter-IV, Rule 10 and 11 read with Schedule II of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 and provisions of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019.
- (f) Any increase in foreign investment in an Indian Insurance company shall be in accordance with the pricing guidelines specified by Reserve Bank of India under the FEMA Regulations.
- (g) The foreign equity investment cap of 100 percent shall apply on the same terms as above to insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time to time. However, the condition of Indian owned and controlled, as specified in Clause (d) above, shall not be applicable to Intermediaries and Insurance Intermediaries and composition of the Board of Directors and key management persons shall be as specified by the concerned regulators from time to time.
- (h) The foreign direct investment proposals shall be allowed under the automatic route subject to verification by the Authority and the foreign investment in intermediaries or insurance intermediaries shall be governed by the same terms as provided under rules 7 and 8 of the Indian Insurance Companies (Foreign Investment) Rules, 2015, as amended from time to time:

Provided that where an entity like a bank, whose primary business is outside the insurance area, is allowed by the Insurance Regulatory and Development Authority of India to function as an insurance intermediary, the foreign equity investment caps applicable in that sector shall continue to apply,

subject to the condition that the revenues of such entities from their primary (i.e., non-insurance related) business must remain above 50 percent of their total revenues in any financial year.

- (i) The insurance intermediary that has majority shareholding of foreign investors shall undertake the following:
- i. be incorporated as a limited company under the provisions of the Companies Act, 2013;
  - ii. at least one from among the Chairman of the Board of Directors or the Chief Executive Officer or Principal Officer or Managing Director of the insurance intermediary shall be a resident Indian citizen;
  - iii. shall take prior permission of the Authority for repatriating dividend;
  - iv. shall bring in the latest technological, managerial and other skills;
  - v. shall not make payments to the foreign group or promoter or subsidiary or interconnected or associate entities beyond what is necessary or permitted by the Authority;
  - vi. shall make disclosures in the formats to be specified by the Authority of all payments made to its group or promoter or subsidiary or interconnected or associate entities;
  - vii. composition of the Board of Directors and key management persons shall be as specified by the concerned regulators.
- (j) The provisions relating to 'Banking-Private Sector', shall be applicable in respect of bank promoted insurance companies.
- (k) Terms 'Control', 'Equity Share Capital', 'Foreign Direct Investment' (FDI), 'Foreign Investors', 'Foreign Portfolio Investment', 'Indian Insurance Company', 'Indian Company', 'Indian Control of an Indian Insurance Company', 'Indian Ownership', 'Non-resident Entity', 'Public Financial Institution', 'Resident Indian Citizen', 'Total Foreign Investment' will have the same meaning as provided in Notification No. G.S.R 115 (E), dated 19th February, 2015 issued by Department of Financial Services and regulations issued by Insurance Regulatory and Development Authority of India from time to time.

#### LIC (LIFE INSURANCE CORPORATION)

Sector/Activities	% of Equity/FDI cap	Entry Route
Life Insurance Corporation of India	20%	Automatic

#### Other Conditions

- (a) Foreign investment in LIC shall be subject to compliance with the provisions of the Life Insurance Corporation Act, 1956, as amended from time to time (LIC Act) and such provisions of the Insurance Act, 1938, as amended from time to time, as are applicable to LIC as per the provisions of Section 43 of the LIC Act.
- (b) Foreign portfolio investment in an Indian Insurance company shall be governed by the provisions contained in Chapter-IV, Rule 10 and 11 read with Schedule II of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, as amended from time to time and provisions of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019, as amended from time to time.
- (c) Any increase in foreign investment in an Indian Insurance company shall be in accordance with the pricing guidelines specified by Reserve Bank of India under the FEMA Regulations.

**PENSION SECTOR**

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
Pension Sector	49%	Automatic

**Other Conditions**

- (i) Foreign investment in the Pension Funds is allowed as per the Pension Fund Regulatory and Development Authority (PFRDA) Act, 2013.
- (ii) Foreign Investment in Pension Funds will be subject to the condition that entities bringing in foreign equity investment as per Section 24 of the PFRDA Act shall obtain necessary registration from the Pension Fund Regulatory and Development Authority and comply with other requirements as per the PFRDA Act, 2013 and Rules and Regulations framed under it for so participating in Pension Fund Management activities in India.
- (iii) An Indian pension fund shall ensure that its ownership and control remains at all times in the hands of resident Indian entities as determined by the Government of India/PFRDA as per the rules/regulation issued by them from time to time.

**POWER EXCHANGES**

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
Power Exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010.	49%	Automatic

**Other Conditions**

- (i) No non-resident investor/entity, including persons acting in concert, will hold more than 5% of the equity in these companies; and
- (ii) The foreign investment would be in compliance with SEBI Regulations; other applicable laws/regulations; security and other conditionalities.

**WHITE LABEL ATM OPERATIONS**

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
White Label ATM Operations	100%	Automatic

**Other Conditions**

- (i) Any non-bank entity intending to set up WLAs should have a minimum net worth of Rs. 100 crore as per the latest financial year's audited balance sheet, which is to be maintained at all times.
- (ii) In case the entity is also engaged in any 'Other Financial Services', then the foreign investment in the company setting up WLA, shall also have to comply with the minimum capitalization norms, if any, for foreign investments in such 'Other Financial Services'.
- (iii) FDI in the WLAO will be subject to the specific criteria and guidelines issued by RBI vide Circular No. DPSS.CO.PD.No. 2298/02.10.002/2011-2012, as amended from time to time.

**OTHER FINANCIAL SERVICES**

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
Financial Services activities regulated by financial sector regulators, viz., RBI, SEBI, IRDA, PFRDA, NHB or any other financial sector regulator as may be notified by the Government of India.	100%	Automatic

**Other Conditions**

- (i) Foreign investment in 'Other Financial Services' activities shall be subject to conditionalities, including minimum capitalization norms, as specified by the concerned Regulator/Government Agency.
- (ii) 'Other Financial Services' activities need to be regulated by one of the Financial Sector Regulators. In all such financial services activity which are not regulated by any Financial Sector Regulator or where only part of the financial services activity is regulated or where there is doubt regarding the regulatory oversight, foreign investment up to 100% will be allowed under Government approval route subject to conditions including minimum capitalization as may be decided by the Government.
- (iii) Any activity which is specifically regulated by an Act, the foreign investment limits will be restricted to those levels/limit that may be specified in that Act, if so mentioned.
- (iv) Downstream investments by any of these entities engaged in "Other Financial Services" will be subject to the extant sectoral regulations and provisions of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, as amended from time to time.

**PHARMACEUTICALS**

<i>Sector/Activities</i>	<i>% of Equity/FDI</i>	<i>Entry Route</i>
Greenfield	100%	Automatic
Brownfield	74% Automatic	Automatic up to 74% Government route beyond 74%

**Other Conditions**

- (i) 'Non-compete' clause would not be allowed in automatic or government approval route except in special circumstances with the approval of the Government.
- (ii) The prospective investor and the prospective investee are required to provide a certificate along with the application for foreign investment.
- (iii) Government may incorporate appropriate conditions for FDI in brownfield cases, at the time of granting approval.
- (iv) FDI in brownfield pharmaceuticals, under both automatic and government approval routes, is further subject to compliance of following conditions:
  - (a) The production level of National List of Essential Medicines (NLEM) drugs and/or consumables and their supply to the domestic market at the time of induction of FDI, being maintained over the next five years at an absolute quantitative level. The benchmark for this level would be decided with reference to the level of production of NLEM drugs and/or consumables in the three financial years, immediately preceding the year of induction of FDI. Of these, the highest level of production in any of these three years would be taken as the level.

- (b) R&D expenses being maintained in value terms for 5 years at an absolute quantitative level at the time of induction of FDI. The benchmark for this level would be decided with reference to the highest level of R&D expenses which has been incurred in any of the three financial years immediately preceding the year of induction of FDI.
- (c) The administrative Ministry will be provided complete information pertaining to the transfer of technology, if any, along with induction of foreign investment into the investee company.
- (d) The administrative Ministry (s) i.e. Ministry of Health and Family Welfare, Department of Pharmaceuticals or any other regulatory Agency/Development as notified by Central Government from time to time, will monitor the compliance of conditionalities.

**Note:**

- i. FDI up to 100%, under the automatic route is permitted for manufacturing of medical devices. The above mentioned conditions will, therefore, not be applicable to greenfield as well as brownfield projects of this industry.
- ii. Medical device means -
  - (a) any instrument, apparatus, appliance, implant, material or other article, whether used alone or in combination, including the software, intended by its manufacturer to be used specially for human beings or animals for one or more of the specific purposes of -
    - i. diagnosis, prevention, monitoring, treatment or alleviation of any disease or disorder;
    - ii. diagnosis, monitoring, treatment, alleviation or assistance for, any injury or disability;
    - iii. investigation, replacement or modification or support of the anatomy or of a physiological process;
    - iv. supporting or sustaining life;
    - v. disinfection of medical devices;
    - vi. control of conception;
    - vii. and which does not achieve primary intended action in or on the human body or animals by any pharmacological or immunological or metabolic means, but which may be assisted in its intended function by such means.
  - (b) an accessory to such an instrument, apparatus, appliance, material or other article;
  - (c) in-vitro diagnostic device which is a reagent, reagent product, calibrator, control material, kit, instrument, apparatus, equipment or system, whether used alone or in combination thereof intended to be used for examination and providing information for medical or diagnostic purposes by means of examination of specimens derived from the human bodies or animals.

***Are there any restrictions/provisions related to FDI from land bordering countries?***

***Para 3.1.1 of the FDI Policy as amended vide Press Note 3 of 2020 dated 17.04.2020 (available at [https://dpiit.gov.in/sites/default/files/pn3\\_2020.pdf](https://dpiit.gov.in/sites/default/files/pn3_2020.pdf)) enforced through the corresponding amendment under Rule 6(a) of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (available at <https://egazette.nic.in/WriteReadData/2020/219107.pdf>) states the following:-***

**3.1.1(a) A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.**

**3.1.1(b) In the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction/purview of the para 3.1.1(a), such subsequent change in beneficial ownership will also require Government approval.”**

## TYPES OF INSTRUMENTS

1. Indian companies can issue equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares subject to pricing guidelines/valuation norms prescribed under FEMA Regulations. The price/conversion formula of convertible capital instruments should be determined upfront at the time of issue of the instruments. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such instruments, in accordance with the extant FEMA rules/regulations [as per any internationally accepted pricing methodology on arm's length basis for the unlisted companies and valuation in terms of SEBI (ICDR) Regulations, for the listed companies].
- 1.1 Optionality clauses are allowed in equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares under FDI scheme, subject to the following conditions:
  - (a) There is a minimum lock-in period of one year which shall be effective from the date of allotment of such capital instruments.
  - (b) After the lock-in period and subject to FDI Policy provisions, if any, the non-resident investor exercising option/right shall be eligible to exit without any assured return, as per pricing/valuation guidelines issued under FEMA from time to time.
2. Other types of Preference shares/Debentures i.e. non-convertible, optionally convertible or partially convertible for issue of which funds have been received on or after May 1, 2007 are considered as debt. Accordingly, all norms applicable for ECBs relating to eligible borrowers, recognized lenders, amount and maturity, end-use stipulations, etc. shall apply. Since these instruments would be denominated in rupees, the rupee interest rate will be based on the swap equivalent of London Interbank Offered Rate (LIBOR) plus the spread as permissible for ECBs of corresponding maturity.
3. The inward remittance received by the Indian company vide issuance of DRs and FCCBs are treated as FDI and counted towards FDI.
4. **Acquisition of Warrants and Partly Paid Shares** - An Indian Company may issue warrants and partly paid shares to a person resident outside India subject to terms and conditions as stipulated by the Reserve Bank of India in this behalf, from time to time.
5. **Issue of Foreign Currency Convertible Bonds (FCCBs) and Depository Receipts (DRs)**
  - a) FCCBs/DRs may be issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and DR Scheme 2014 respectively, as per the guidelines issued by the Government of India there under from time to time.

*'Depository Receipt' (DR) means a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction on the back of eligible securities issued or transferred to that foreign depository and deposited with a domestic custodian and includes 'global depository receipt' as defined in the Companies Act, 2013.*

- b) DRs are foreign currency denominated instruments issued by a foreign Depository in a permissible jurisdiction against a pool of permissible securities issued or transferred to that foreign depository and deposited with a domestic custodian.
  - c) In terms of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 as amended from time to time, a person will be eligible to issue or transfer eligible securities to a foreign depository, for the purpose of converting the securities so purchased into depository receipts in terms of Depository Receipts Scheme, 2014 and guidelines issued by the Government of India thereunder from time to time.
  - d) A person can issue DRs, if it is eligible to issue eligible instruments to person resident outside India under relevant Schedules under Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, as amended from time to time.
  - e) The aggregate of eligible securities which may be issued or transferred to foreign depositories, along with eligible securities already held by persons resident outside India, shall not exceed the limit on foreign holding of such eligible securities under the relevant regulations framed under FEMA, 1999.
  - f) The pricing of eligible securities to be issued or transferred to a foreign depository for the purpose of issuing depository receipts should not be at a price less than the price applicable to a corresponding mode of issue or transfer of such securities to domestic investors under the relevant regulations framed under FEMA, 1999.
  - g) The issue of depository receipts as per DR Scheme 2014 shall be reported to the Reserve Bank by the domestic custodian as per the reporting guidelines for DR Scheme 2014.
- 6. (i) Two-way Fungibility Scheme:** A limited two-way Fungibility scheme has been put in place by the Government of India for ADRs/GDRs. Under this Scheme, a stock broker in India, registered with SEBI, can purchase shares of an Indian company from the market for conversion into ADRs/GDRs based on instructions received from overseas investors. Re-issuance of ADRs/GDRs would be permitted to the extent of ADRs/GDRs which have been redeemed into underlying shares and sold in the Indian market.
- (ii) Sponsored ADR/GDR issue:** An Indian company can also sponsor an issue of ADR/GDR. Under this mechanism, the company offers its resident shareholders a choice to submit their shares back to the company so that on the basis of such shares, ADRs/GDRs can be issued abroad. The proceeds of the ADR/GDR issue are remitted back to India and distributed among the resident investors who had offered their Rupee denominated shares for conversion. These proceeds can be kept in Resident Foreign Currency (Domestic) accounts in India by the resident shareholders who have tendered such shares for conversion into ADRs/GDRs.

## PROVISIONS RELATING TO ISSUE/ TRANSFER OF SHARES

1. The capital instruments should be issued within 60 days from the date of receipt of the inward remittance received through normal banking channels including escrow account opened and maintained for the purpose or by debit to the NRE/FCNR (B) account of the non-resident investor. In case, the capital instruments are not issued within 60 days from the date of receipt of the inward remittance or date



of debit to the NRE/FCNR (B) account, the amount of consideration so received should be refunded within fifteen days from the date of completion of sixty days to the non-resident investor by outward remittance through normal banking channels or by credit to the NRE/FCNR (B) account, as the case may be. Non-compliance with the above provision would be reckoned as a contravention under FEMA and would attract penal provisions. In exceptional cases, delay in refund of the amount of consideration may be considered by the RBI, on the merits of the case.

## 2. Issue price of shares

Price of shares issued to persons resident outside India under the FDI Policy, shall not be less than –

- a. the price worked out in accordance with the SEBI guidelines, as applicable, where the shares of the company are listed on any recognised stock exchange in India;
- b. the fair valuation of shares done by a SEBI registered Merchant Banker or a Chartered Accountant as per any internationally accepted pricing methodology on arm's length basis, where the shares of the company are not listed on any recognised stock exchange in India; and
- c. the price as applicable to transfer of shares from resident to non-resident as per the pricing guidelines laid down by the Reserve Bank from time to time, where the issue of shares is on preferential allotment.

However, where non-residents (including NRIs) are making investments in an Indian company in compliance with the provisions of the Companies Act, as applicable, by way of subscription to its Memorandum of Association, such investments may be made at face value subject to their eligibility to invest under the FDI scheme.

## 3. Foreign Currency Account

Indian companies which are eligible to issue shares to persons resident outside India under the FDI Policy may be allowed to retain the share subscription amount in a Foreign Currency Account, in accordance with RBI guidelines.

## 4. Transfer of shares and convertible debentures

- (i) Subject to FDI sectoral policy (relating to sectoral caps and entry routes), applicable laws and other conditionality's including security conditions, non-resident investors can also invest in Indian companies by purchasing/acquiring existing shares from Indian shareholders or from other non-resident shareholders. General permission has been granted to non-residents/NRIs for acquisition of shares by way of transfer subject to the following:
  - (a) A person resident outside India (other than NRI and erstwhile OCB) may transfer by way of sale or gift, the shares or convertible debentures to any person resident outside India (including NRIs). Government approval is not required for transfer of shares in the investee company from one non-resident to another non-resident in sectors which are under automatic route. In addition, approval of Government will be required for transfer of stake from one non-resident to another non-resident in sectors which are under Government approval route.
  - (b) NRIs may transfer by way of sale or gift the shares or convertible debentures held by them to another NRI.
  - (c) A person resident outside India can transfer any security to a person resident in India by way of gift.
  - (d) A person resident outside India can sell the shares and convertible debentures of an Indian company on a recognized Stock Exchange in India through a stock broker registered with stock exchange or a merchant banker registered with SEBI.



- (e) A person resident in India can transfer by way of sale, shares/ convertible debentures (including transfer of subscriber's shares), of an Indian company under private arrangement to a person resident outside India, subject to the guidelines.
  - (f) General permission is also available for transfer of shares/convertible debentures, by way of sale under private arrangement by a person resident outside India to a person resident in India, subject to the guidelines.
  - (g) The above General Permission also covers transfer by a resident to a non-resident of shares/ convertible debentures of an Indian company, engaged in an activity earlier covered under the Government Route but now falling under Automatic Route, as well as transfer of shares by a non- resident to an Indian company under buyback and/or capital reduction scheme of the company.
  - (h) The Form FC-TRS should be submitted to the AD Category-I Bank, within 60 days of transfer of capital instruments or receipt / remittance of funds whichever is earlier. The onus of submission of the Form FC-TRS within the given timeframe would be on the resident transferor/transferee or the person resident outside India holding capital instruments on a non-repatriable basis, as the case may be. Transfer of equity instruments on a recognised stock exchange by a person resident outside India shall be reported by such person in Form FC-TRS. However, in cases where the NR investor, including an NRI, acquires shares on the stock exchanges under the FDI scheme, the person resident outside India would have to file form FC-TRS with the AD Category-I bank.
- (ii) The sale consideration in respect of equity instruments purchased by a person resident outside India, remitted into India through normal banking channels, shall be subjected to a Know Your Customer (KYC) check by the remittance receiving AD Category-I bank at the time of receipt of funds. In case, the remittance receiving AD Category-I bank is different from the AD Category-I bank handling the transfer transaction, the KYC check should be carried out by the remittance receiving bank and the KYC report be submitted by the customer to the AD Category-I bank carrying out the transaction along with the Form FC-TRS.
  - (iii) A person resident outside India including a Non-Resident Indian investor who has already acquired and continues to hold the control in accordance with the SEBI (Substantial Acquisition of Shares and Takeover) Regulations can acquire shares of a listed Indian company on the stock exchange through a registered broker under FDI scheme provided that the original and resultant investments are in line with the extant FDI policy and FEMA regulations in respect of sectoral cap, entry route, mode of payment, reporting requirement, documentation, etc.
  - (iv) Escrow: AD Category-I banks have been given general permission to open Escrow account and Special account of non-resident corporate for open offers/exit offers and delisting of shares. The relevant SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (SAST) Regulations or any other applicable SEBI Regulations/provisions of the Companies Act, as applicable will be applicable. AD Category-I banks have also been permitted to open and maintain, without prior approval of RBI, non-interest bearing Escrow accounts in Indian Rupees in India on behalf of residents and/or non-residents, towards payment of share purchase consideration and/or provide Escrow facilities for keeping securities to facilitate FDI transactions subject to the terms and conditions specified by RBI. SEBI authorised Depository Participants have also been permitted to open and maintain, without prior approval of RBI, Escrow accounts for securities subject to the terms and conditions as specified by RBI. In both cases, the Escrow agent shall necessarily be an AD Category-I bank or SEBI authorised Depository Participant (in case of securities' accounts). These facilities will be applicable for both issue of fresh shares to the non- residents as well as transfer of shares from/to the non-residents.

- (v) In case of transfer of shares between a resident buyer and a non-resident seller or vice-versa, not more than twenty five per cent of the total consideration can be paid by the buyer on a deferred basis within a period not exceeding eighteen months from the date of the transfer agreement. For this purpose, if so agreed between the buyer and the seller, an escrow arrangement may be made between the buyer and the seller for an amount not more than twenty five per cent of the total consideration for a period not exceeding eighteen months from the date of the transfer agreement or if the total consideration is paid by the buyer to the seller, the seller may furnish an indemnity for an amount not more than twenty five per cent of the total consideration for a period not exceeding eighteen months from the date of the payment of the full consideration.

Provided the total consideration finally paid for the shares must be compliant with the applicable pricing guidelines.

## 5. Prior permission of RBI in certain cases for transfer of capital instruments

5.1 Except cases mentioned in paragraph 5.2 below, the following cases require prior approval of RBI:

- (i) Transfer of capital instruments from resident to non-residents by way of sale where:
- (a) Transfer is at a price which falls outside the pricing guidelines prescribed under Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 from time to time and the transaction does not fall under the exception given in para 5.2.
  - (b) Transfer of capital instruments by the non-resident acquirer involving deferment of payment of the amount of consideration. Further, in case approval is granted for a transaction, the same should be reported in Form FC-TRS, to an AD Category-I bank for necessary due diligence, within 60 days from the date of receipt of the full and final amount of consideration.
- (ii) Transfer of any capital instrument, by way of gift by a person resident in India to a person resident outside India. While forwarding applications to Reserve Bank for approval for transfer of capital instruments by way of gift, the documents mentioned in Section 2 below should be enclosed. Reserve Bank considers the following factors while processing such applications:
- (a) The proposed transferee (donee) is eligible to hold such capital instruments under the relevant Schedules under Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, as amended from time to time.
  - (b) The gift does not exceed 5 per cent of the paid-up capital of the Indian company/each series of debentures/each mutual fund scheme.
  - (c) The applicable sectoral cap limit in the Indian company is not breached.
  - (d) The transferor (donor) and the proposed transferee (donee) are close relatives as defined in Section 2 (77) of Companies Act, 2013, as amended from time to time.
  - (e) The value of capital instruments to be transferred together with any capital instruments already transferred by the transferor, as gift, to any person residing outside India does not exceed the rupee equivalent of USD 50,000 during the financial year.
  - (f) Such other conditions as stipulated by Reserve Bank in public interest from time to time.
- (iii) Transfer of shares from NRI to non-resident.

5.2 In the following cases, approval of RBI is not required:

- A. Transfer of shares from a Non-Resident to Resident under the FDI scheme where the pricing guidelines under FEMA, 1999 are not met provided that:

- (i) The original and resultant investment are in line with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation, etc.;
- (ii) The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations/guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/substantial acquisition/SEBI SAST, buy back); and
- (iii) Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations/ guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

**B. Transfer of shares from Resident to Non-Resident:**

- (i) where the transfer of shares requires the prior approval of the Government as per the extant FDI policy provided that:
  - (a) the requisite approval of the Government has been obtained; and
  - (b) the transfer of shares adheres with the pricing guidelines and documentation requirements as specified by the Reserve Bank of India from time to time.
- (ii) where the transfer of shares attract SEBI (SAST) Regulations subject to the adherence with the pricing guidelines and documentation requirements as specified by Reserve Bank of India from time to time.
- (iii) where the transfer of shares does not meet the pricing guidelines under the FEMA, 1999 provided that:
  - (a) The resultant FDI is in compliance with the extant FDI policy and FEMA rules/regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation etc.;
  - (b) The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations/guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/ substantial acquisition/SEBI SAST); and
  - (c) Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations/ guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.
- (iv) where the investee company is in the financial sector provided that:
  - (a) Any 'fit and proper/due diligence' requirements as regards the non-resident investor as stipulated by the respective financial sector regulator, from time to time, have been complied with; and
  - (b) The FDI policy and FEMA rules/regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, pricing, etc.), reporting requirements, documentation etc., are complied with.

**6. Conversion of ECB/Lump-sum Fee/Royalty etc. into Equity**

- (i) Indian companies have been granted general permission for conversion of External Commercial Borrowings (ECB) (excluding those deemed as ECB) in convertible foreign currency into equity shares/ fully compulsorily and mandatorily convertible preference shares, subject to the following conditions and reporting requirements:

- (a) The activity of the company is covered under the Automatic Route for FDI or the company has obtained Government approval for foreign equity in the company;
  - (b) The foreign equity after conversion of ECB into equity is within the sectoral cap, if any;
  - (c) Pricing of shares is as per the provision of para 2 above;
  - (d) Compliance with the requirements prescribed under any other statute and regulation in force; and
  - (e) The conversion facility is available for ECBs availed under the Automatic or Government Route and is applicable to ECBs, due for payment or not, as well as secured/unsecured loans availed from non-resident collaborators.
- (ii) General permission is also available for issue of shares/preference shares against lump sum technical know-how fee, royalty due for payment, subject to entry route, sectoral cap and pricing guidelines and compliance with applicable tax laws. Further, issue of equity shares against any other funds payable by the investee company, remittance of which does not require prior permission of the Government of India or Reserve Bank of India under FEMA, 1999 or any rules/regulations framed or directions issued thereunder, or has been permitted by the Reserve Bank under the Act or the rules and regulations framed or directions issued thereunder is permitted, provided that:
- a. The equity shares shall be issued in accordance with the extant FDI guidelines on sectoral caps, pricing guidelines etc. as amended by Reserve bank of India, from time to time;  
*Explanation:* Issue of shares/convertible debentures that require Government approval in terms of paragraph 3 of Schedule I of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 or import dues deemed as ECB or trade credit or payable against import of second hand machinery shall continue to be dealt in accordance with extant guidelines;
  - b. The issue of equity shares under this provision shall be subject to tax laws as applicable to the funds payable and the conversion to equity should be net of applicable taxes.
- (iii) A wholly owned subsidiary set up in India by a non-resident entity, operating in a sector where 100 percent foreign investment is allowed in the automatic route and there are no FDI linked conditionalities, may issue equity shares or preference shares or convertible debentures or warrants to the said non-resident entity against pre-incorporation/ pre-operative expenses incurred by the said non-resident entity up to a limit of five percent of its capital or USD 500,000 whichever is less, subject to the condition that within thirty days from the date of issue of equity instruments but not later than one year from the date of incorporation or such time as the Reserve Bank permits, the Indian company shall report the transaction to the Reserve Bank as per the reporting requirements as specified by the Reserve Bank.
- (iv) Issue of equity shares for sectors requiring Government approval under the FDI policy is allowed under the Government route for the following:
- (I) import of capital goods/ machinery/ equipment (excluding second-hand machinery), subject to compliance with the following conditions:
    - (a) Any import of capital goods/machinery etc., made by a resident in India, has to be in accordance with the Export/Import Policy issued by Government of India/as defined by DGFT/FEMA provisions relating to imports.
    - (b) The application clearly indicating the beneficial ownership and identity of the Importer Company as well as overseas entity.

- (c) Applications complete in all respects, for conversions of import payables for capital goods into FDI being made within 180 days from the date of shipment of goods.
- (II) pre-operative/pre-incorporation expenses (including payments of rent etc.), subject to compliance with the following conditions:
  - (a) Submission of FIRC for remittance of funds by the overseas promoters for the expenditure incurred.
  - (b) Verification and certification of the pre-incorporation/pre-operative expenses by the statutory auditor.
  - (c) Payments should be made by the foreign investor to the company directly or through the bank account opened by the foreign investor as provided under FEMA Regulations.
  - (d) The applications, complete in all respects, for capitalization being made within the period of 180 days from the date of incorporation of the company.

**General conditions:**

- (i) All requests for conversion should be accompanied by a special resolution of the company.
- (ii) Government's approval would be subject to applicable pricing guidelines under FEMA and appropriate tax clearance.
- (iii) For sectors under automatic route, issue of equity shares against import of capital goods/ machinery/ equipment (excluding second-hand machinery) and pre-operative/pre-incorporation expenses (including payments of rent etc.) is permitted under automatic route subject to compliance with respective conditions mentioned above, and reporting to RBI in form FC-GPR as per procedure prescribed under the FDI policy.

**TERMS AND CONDITIONS FOR TRANSFER OF SHARES/CONVERTIBLE DEBENTURES, BY WAY OF SALE, FROM A PERSON RESIDENT IN INDIA TO A PERSON RESIDENT OUTSIDE INDIA AND FROM A PERSON RESIDENT OUTSIDE INDIA TO A PERSON RESIDENT IN INDIA**

- 1.1 In order to address the concerns relating to pricing, documentation, payment/ receipt and remittance in respect of the shares/convertible debentures of an Indian company, in all sectors, transferred by way of sale, the parties involved in the transaction shall comply with the guidelines set out below:
- 1.2 Parties involved in the transaction are (a) seller (resident/non-resident), (b) buyer (resident/non-resident), (c) duly authorized agent/s of the seller and/or buyer, (d) Authorised Dealer bank (AD) branch and (e) Indian company, for recording the transfer of ownership in its books.

**2. Pricing Guidelines**

- 2.1 The under noted pricing guidelines are applicable to the following types of transactions:
  - (i) Transfer of shares by way of sale under private arrangement by a person resident in India to a person resident outside India.
  - (ii) Transfer of shares by way of sale under private arrangement by a person resident outside India to a person resident in India.
  - (ii) Exit by non-resident investor on exercising option/right in shares or compulsorily & mandatorily convertible preference shares or fully, compulsorily & mandatorily convertible debentures.
- 2.2 Transfer by Resident to Non-resident (i.e. to foreign national, NRI, , FPI and incorporated non-resident entity other than erstwhile OCB) Price of shares transferred by way of sale by resident to a non-resident where the shares of an Indian company are:

- (a) listed on a recognized stock exchange in India ,shall not be less than the price at which the preferential allotment of shares can be made under the SEBI guidelines , as applicable, provided the same is determined for such duration as specified therein, preceding the relevant date, which shall be the date of purchase or sale of shares,
- (b) not listed on a recognized stock exchange in India, shall not be less than the fair value to be determined by a SEBI registered Merchant Banker or a Chartered Accountant as per any internationally accepted pricing methodology on arm's length basis. The price per share arrived at should be certified by a SEBI registered Merchant Banker or a Chartered Accountant.

**2.3 Transfer by Non-resident (i.e. by incorporated non-resident entity, erstwhile OCB, foreign national, NRI, FPI) to Resident**

Sale of shares by a non-resident to resident shall be in accordance with the provisions of Rule 9 of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 which shall not be more than the minimum price at which the transfer of shares can be made from a resident to a non-resident as given at para 2.2 above.

**2.4 After the lock-in period, as applicable above, and subject to FDI Policy provisions, if any, in this regard, the non- resident investor exercising option/right in shares or convertible debentures issued under FDI Scheme shall be eligible to exit without any assured return, as per pricing/valuation guidelines issued by RBI from time to time.**

**3. Responsibilities / Obligations of the parties**

All the parties involved in the transaction would have the responsibility to ensure that the relevant rules/regulations under FEMA are complied with and consequent on transfer of shares, the relevant individual limit/sectoral caps/ foreign equity participation ceilings as fixed by Government are not breached. Settlement of transactions will be subject to payment of applicable taxes, if any.

**4. Method of payment and remittance/credit of sale proceeds**

- 4.1 The sale consideration in respect of the shares purchased by a person resident outside India shall be remitted to India through normal banking channels. In case the buyer is a, FPI, payment should be made by debit to its Special Non-Resident Rupee Account. In case the buyer is an NRI, the payment may be made by way of debit to his NRE/FCNR (B) accounts. However, if the shares are acquired on non-repatriation basis by NRI, the consideration shall be remitted to India through normal banking channel or paid out of funds held in NRE/FCNR (B)/NRO accounts.
- 4.2. The sale proceeds of shares (net of taxes) sold by a person resident outside India may be remitted outside India. In case of FPI, the sale proceeds may be credited to its foreign currency account or special Non-Resident Rupee Account. In case of NRI, if the shares sold were held on repatriation basis, the sale proceeds (net of taxes) may be credited to his NRE /FCNR(B) accounts and if the shares sold were held on non-repatriation basis, the sale proceeds may be credited to his NRO account subject to payment of taxes.
- 4.3 The sale proceeds of shares (net of taxes) sold by an OCB may be remitted outside India directly if the shares were held on repatriation basis and if the shares sold were held on non-repatriation basis, the sale proceeds may be credited to its NRO (Current) Account subject to payment of taxes, except in the case of OCBs whose accounts have been blocked by Reserve Bank.

**5. Documentation**

Besides obtaining a declaration in the enclosed Form FC-TRS (in quadruplicate), the AD branch should arrange to obtain and keep on record the following documents:

5.1. For sale of shares by a person resident in India:

- (i) Consent Letter duly signed by the seller and buyer or their duly appointed agent indicating the details of transfer i.e. number of shares to be transferred, the name of the investee company whose shares are being transferred and the price at which shares are being transferred. In case there is no formal Sale Agreement, letters exchanged to this effect may be kept on record.
- (ii) Where Consent Letter has been signed by their duly appointed agent, the Power of Attorney Document executed by the seller/buyer authorizing the agent to purchase/sell shares.
- (iii) The shareholding pattern of the investee company after the acquisition of shares by a person resident outside India showing equity participation of residents and non-residents category-wise (i.e. NRIs/OCBs/foreign nationals/incorporated non-resident entities/, FPIs) and its percentage of paid up capital obtained by the seller/buyer or their duly appointed agent from the company, where the sectoral cap/limits have been prescribed.
- (iv) Certificate indicating fair value of shares from a Chartered Accountant.
- (v) Copy of Broker's note if sale is made on Stock Exchange.
- (vi) Undertaking from the buyer to the effect that he is eligible to acquire shares/convertible debentures under FDI policy and the existing sectoral limits and Pricing Guidelines have been complied with.
- (vii) Undertaking from the /sub account to the effect that the individual / Sub account ceiling as prescribed by SEBI has not been breached, till it gets registered as FPI.

5.2. For sale of shares by a person resident outside India:

- (i) Consent Letter duly signed by the seller and buyer or their duly appointed agent indicating the details of transfer i.e. number of shares to be transferred, the name of the investee company whose shares are being transferred and the price at which shares are being transferred.
- (ii) Where the Consent Letter has been signed by their duly appointed agent, the Power of Attorney Document authorizing the agent to purchase/sell shares by the seller/buyer. In case there is no formal Sale Agreement, letters exchanged to this effect may be kept on record.
- (iii) If the sellers are NRIs/OCBs, the copies of RBI approvals evidencing the shares held by them on repatriation/ non-repatriation basis. The sale proceeds shall be credited NRE/NRO account, as applicable.
- (iv) Certificate indicating fair value of shares from a Chartered Accountant.
- (v) No Objection / Tax Clearance Certificate from Income Tax authority/Chartered Account.
- (vi) Undertaking from the buyer to the effect that the Pricing Guidelines have been adhered to.

## 6. Reporting requirements

- 6.1 Reporting of transfer of shares between residents and non-residents and vice versa is to be done in Form FC- TRS. The Form FC-TRS should be submitted to the AD Category-I bank, within 60 days of transfer of capital instruments or the date of receipt of the amount of consideration, whichever is earlier. The onus of reporting shall be on the resident transferor / transferee or the person resident outside India holding equity instruments on a non- repatriable basis, as the case may be. The AD Category-I bank, would forward the same to its link office. The link office would consolidate the Forms and submit a monthly report to the Reserve Bank.

For the purpose the Authorized Dealers may designate branches to specifically handle such transactions.



These branches could be staffed with adequately trained staff for this purpose to ensure that the transactions are put through smoothly. The ADs may also designate a nodal office to coordinate the work at these branches and also ensure the reporting of these transactions to the Reserve Bank.

- 6.2 When the transfer is on private arrangement basis, on settlement of the transactions, the transferee/ his duly appointed agent should approach the investee company to record the transfer in their books along with the certificate in the Form FC-TRS from the AD branch that the remittances have been received by the transferor/ payment has been made by the transferee. On receipt of the certificate from the AD, the company may record the transfer in its books.
- 6.3 The actual inflows and outflows on account of such transfer of shares shall be reported by the AD branch in the R-returns in the normal course.
- 6.4 In addition the AD branch should submit two copies of the Form FC-TRS received from their constituents/ customers together with the statement of inflows/outflows on account of remittances received/made in connection with transfer of shares, by way of sale, to IBD/FED/or the nodal office designated for the purpose by the bank in the enclosed proforma (which is to be prepared in MS-Excel format). The IBD/ FED or the nodal office of the bank will in turn submit a consolidated monthly statement in respect of all the transactions reported by their branches together with copies of the FC-TRS Forms received from their branches to Foreign Exchange Department, Reserve Bank, Foreign Investment Division, Central Office, Mumbai in soft copy (in MS- Excel) by e-mail to [fdidata@rbi.org.in](mailto:fdidata@rbi.org.in)
- 6.5 Shares purchased / sold by /FPIs under private arrangement will be by debit /credit to their Special Non- Resident Rupee Account. Therefore, the transaction should also be reported in Form LEC by the designated bank of the /FPI concerned.
- 6.6 Shares/convertible debentures of Indian companies purchased under Portfolio Investment Scheme by NRIs, OCBs cannot be transferred, by way of sale under private arrangement.
- 6.7 On receipt of statements from the AD, the Reserve Bank may call for such additional details or give such directions as required from the transferor/transferee or their agents, if need be.

#### **DOCUMENTS TO BE SUBMITTED BY A PERSON RESIDENT IN INDIA FOR TRANSFER OF SHARES TO A PERSON RESIDENT OUTSIDE INDIA BY WAY OF GIFT**

- i. Name and address of the transferor (donor) and the transferee (donee).
- ii. Relationship between the transferor and the transferee.
- iii. Reasons for making the gift.
- iv. In case of Government dated securities and treasury bills and bonds, a certificate issued by a Chartered Accountant on the market value of such security.
- v. In case of units of domestic mutual funds and units of Money Market Mutual Funds, a certificate from the issuer on the Net Asset Value of such security.
- vi. In case of shares and convertible debentures, a certificate from a Chartered Accountant on the value of such securities according to the guidelines issued by Securities & Exchange Board of India or as per any internationally accepted pricing methodology on arm's length basis for listed companies and unlisted companies, respectively.
- vii. Certificate from the concerned Indian company certifying that the proposed transfer of shares/ convertible debentures by way of gift from resident to the non-resident shall not breach the applicable sectoral cap/ FDI limit in the company and that the proposed number of shares/convertible debentures



to be held by the non-resident transferee shall not exceed 5 per cent of the paid up capital of the company.

- viii. An undertaking from the resident transferor that the value of security to be transferred together with any security already transferred by the transferor, as gift, to any person residing outside India does not exceed the rupee as prescribed by RBI from time-to-time.
- ix. A declaration from the donee accepting partly paid shares or warrants that donee is aware of the liability as regards calls in arrear and consequences thereof.

## SPECIFIC CONDITIONS IN CERTAIN CASES

### Issue of Rights/Bonus Shares

FEMA provisions allow Indian companies to freely issue Rights/Bonus shares to existing non-resident shareholders, subject to adherence to sectoral cap, if any. However, such issue of bonus/rights shares has to be in accordance with other laws/statutes like the Companies Act, as applicable, SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (in case of listed companies), etc. The offer on right basis to the persons resident outside India shall be:

- (i) in the case of shares of a company listed on a recognized stock exchange in India, at a price as determined by the company;
- (ii) in the case of shares of a company not listed on a recognized stock exchange in India, at a price which is not less than the price at which the offer on right basis is made to resident shareholders.

### Prior permission of RBI for Rights issue to erstwhile OCBs

OCBs have been de-recognised as a class of investors from September 16, 2003. Therefore, companies desiring to issue rights share to such erstwhile OCBs will have to take specific prior permission from RBI. As such, entitlement of rights share is not automatically available to erstwhile OCBs. However, bonus shares can be issued to erstwhile OCBs without the approval of RBI.

### Additional allocation of rights share by residents to non-residents

Existing non-resident shareholders are allowed to apply for issue of additional shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares over and above their rights share entitlements. The investee company can allot the additional rights share out of unsubscribed portion, subject to the condition that the overall issue of shares to non-residents in the total paid-up capital of the company does not exceed the sectoral cap.

### Acquisition of shares under Scheme of Merger/Demerger/Amalgamation

Mergers/demergers/ amalgamations of companies in India are usually governed by an order issued by a competent Court on the basis of the Scheme submitted by the companies undergoing merger/demerger/ amalgamation. Once the scheme of merger or demerger or amalgamation of two or more Indian companies has been approved by a Court in India, the transferee company or new company is allowed to issue shares to the shareholders of the transferor company resident outside India, subject to the conditions that:

- (i) the percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the sectoral cap, and
- (ii) the transferor company or the transferee or the new company is not engaged in activities which are prohibited under the FDI policy.

**Note:** Government approval would not be required in case of mergers and acquisitions taking place in sectors under automatic route.

### **Issue of Non-convertible/redeemable bonus preference shares or debentures**

Indian companies are allowed to issue non-convertible/redeemable preference shares or debentures to non-resident shareholders, including the depositories that act as trustees for the ADR/GDR holders, by way of distribution as bonus from its general reserves under a Scheme of Arrangement approved by a Court in India under the provisions of the Companies Act, as applicable, subject to no-objection from the Income Tax Authorities.

### **Issue of Employees Stock Option Scheme (ESOPs) / Sweat Equity**

An Indian company may issue “employees’ stock option” and/or “sweat equity shares” to its employees/directors or employees/directors of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries who are resident outside India, provided that :

- a. The scheme has been drawn either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the Companies (Share Capital and Debentures) Rules, 2014 notified by the Central Government under the Companies Act 2013, as the case may be.
- b. The “employee’s stock option”/ “sweat equity shares” issued to non-resident employees/directors under the applicable rules/regulations are in compliance with the sectoral cap applicable to the said company.
- c. Issue of “employee’s stock option”/ “sweat equity shares” by a company where foreign investment is under the approval route shall require prior approval of Government of India.
- d. Issue of “employee’s stock option”/ “sweat equity shares” under the applicable rules/regulations to an employee/director who is a citizen of Bangladesh/Pakistan shall require prior approval of the Government of India.
- e. The issuing company shall furnish to the Regional Office concerned of the Reserve Bank of India under whose jurisdiction the registered office of the company operates, within 30 days from the date of issue of employees’ stock option or sweat equity shares, a return as per the Form-ESOP.

### **Share Swap**

In cases of investment by way of swap of shares, irrespective of the amount, valuation of the shares will have to be made by a Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country. Approval of the Government will also be a prerequisite for investment by swap of shares for sector under Government approval route. No approval of the Government is required for investment in automatic route sectors by way of swap of shares.

### **Pledge of Shares**

The transfer of equity instruments of an Indian company or units of an investment vehicle by way of pledge is subject to the following terms and conditions, namely :-

- (i) any erosion being a promoter of a company registered in India (borrowing company), which has raised external commercial borrowing in compliance with the Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2000 may pledge the shares of the borrowing company or that of its associate resident companies for the purpose of securing the external commercial borrowing raised by the borrowing company subject to the following further conditions, namely :-

- (a) the period of such pledge shall be co-terminus with the maturity of the underlying external commercial borrowing;
  - (b) in case of invocation of pledge, transfer shall be made in accordance with these rules and directions issued by the Reserve Bank;
  - (c) the statutory auditor has certified that the borrowing company shall utilise or has utilised the proceeds of the external commercial borrowing for the permitted end-use only;
  - (d) no person shall pledge any such share unless a no-objection has been obtained from an authorised dealer bank that the above conditions have been complied with.
- (ii) any person resident outside India holding equity instruments in an Indian company or units of an investment vehicle may pledge the equity instruments or units, as the case may be:
- (a) in favour of a bank in India to secure the credit facilities being extended to such Indian company for bona fide purposes,
  - (b) in favour of an overseas bank to secure the credit facilities being extended to such person or a person resident outside India who is the promoter of such Indian company or the overseas group company of such Indian company,
  - (c) in favour of a non-banking financial company registered with the Reserve Bank to secure the credit facilities being extended to such Indian company for bona fide purposes,
  - (d) subject to the authorised dealer bank satisfying itself of the compliance of the conditions stipulated by the Reserve Bank in this regard.
- (iii) in case of invocation of pledge, transfer of equity instruments of an Indian company or units shall be in accordance with entry routes, sectoral caps or investment limits, pricing guidelines and other attendant conditions at the time of creation of pledge.

## REMITTANCE, REPORTING AND VIOLATION

### REMITTANCE AND REPATRIATION

#### Remittance of sale proceeds/Remittance on winding up/Liquidation of Companies:

- (i) Sale proceeds of shares and securities and their remittance is 'remittance of asset' governed by The Foreign Exchange Management (Remittance of Assets) Regulations, 2000 under FEMA.
- (ii) AD Category-I bank can allow the remittance of sale proceeds of a security (net of applicable taxes) to the seller of shares resident outside India, provided the security has been held on repatriation basis, the sale of security has been made in accordance with the prescribed guidelines and NOC/tax clearance certificate from the Income Tax Department has been produced.

#### Remittance on winding up/liquidation of Companies

AD Category-I banks have been allowed to remit winding up proceeds of companies in India, which are under liquidation, subject to payment of applicable taxes. Liquidation may be subject to any order issued by the court winding up the company or the official liquidator in case of voluntary winding up under the provisions of the Companies Act, as applicable. AD Category-I banks shall allow the remittance provided the applicant submits:

- (a) No objection or Tax clearance certificate from Income Tax Department for the remittance.

- (b) Auditor's certificate confirming that all liabilities in India have been either fully paid or adequately provided for.
- (c) Auditor's certificate to the effect that the winding up is in accordance with the provisions of the Companies Act, as applicable.
- (d) In case of winding up otherwise than by a court, an auditor's certificate to the effect that there are no legal proceeding pending in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

### Repatriation of Dividend

Dividends are freely repatriable without any restrictions (net after Tax deduction at source or Dividend Distribution Tax, if any, as the case may be). The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

### Repatriation of Interest

Interest on fully, mandatorily & compulsorily convertible debentures is also freely repatriable without any restrictions (net of applicable taxes). The repatriation is governed by the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

### Reporting of FDI

The reporting requirements for any investment in India by a person resident in India under Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 are specified by the RBI. Regulation 4 of the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 vide notification No. FEMA. 395/2019-RB dated 17.10.2019 issued by the RBI stipulates the reporting requirement for any investment in India by a person resident outside India.

All the reporting is required to be done through the Single Master Form (SMF) available on the Foreign Investment Reporting and Management System (FIRMS) platform at <https://firms.rbi.org.in>. The user manual for reporting is available at <https://firms.rbi.org.in/firms/faces/pages/login.xhtml>. The format of the SMF and KYC report is available in the user manual.

### Adherence to Guidelines/Orders and Consequences of Violation

FDI is a capital account transaction and thus any violation of FDI regulations are covered by the penal provisions of the FEMA. Reserve Bank of India administers the FEMA and Directorate of Enforcement under the Ministry of Finance is the authority for the enforcement of FEMA. The Directorate takes up investigation in any contravention of FEMA.

*'Capital Account Transaction' means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions as per Section 6 of FEMA.*

*"FDI is a capital account transaction and thus any violation of FDI regulations are covered by the penal provisions of the FEMA. Reserve Bank of India administers the Foreign Exchange Management Act (FEMA) and Directorate of Enforcement under the Ministry of Finance is the authority for the enforcement of FEMA. The Directorate takes up investigation in any contravention of FEMA."*

### Penalties

If a person violates/contravenes any FDI Regulations, by way of breach/non-adherence/non-compliance/contravention of any rule, regulation, notification, press note, press release, circular, direction or order issued in exercise of the powers under FEMA or contravenes any conditions subject to which an authorization is issued by the Government of India/ Reserve Bank of India, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contraventions where such amount is quantifiable, or up to two lakh Rupees where the amount is not quantifiable, and where such contraventions is a continuing one, further penalty which may extend to five thousand Rupees for every day after the first day during which the contraventions continues.

Where a person committing a contravention of any provisions of this Act or of any rule, direction or order made there under is a company (company means anybody corporate and includes a firm or other association of individuals as defined in the Companies Act), every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Any Adjudicating Authority adjudging any contraventions above, may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government.

### Adjudication and Appeals

For the purpose of adjudication of any contravention of FEMA, the Ministry of Finance as per the provisions contained in the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 appoints officers of the Central Government as the Adjudicating Authorities for holding an enquiry in the manner prescribed. A reasonable opportunity has to be given to the person alleged to have committed contraventions against whom a complaint has been made for being heard before imposing any penalty.

The Central Government may appoint as per the provisions contained in the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, an Appellate Authority/ Appellate Tribunal to hear appeals against the orders of the adjudicating authority.

### Compounding Proceedings

Under the Foreign Exchange (Compounding Proceedings) Rules 2000, the Central Government may appoint 'Compounding Authority' an officer either from Enforcement Directorate or Reserve Bank of India for any person contravening any provisions of the FEMA. The Compounding Authorities are authorized to compound the amount involved in the contravention to the Act made by the person. No contravention shall be compounded unless the amount involved in such contravention is quantifiable. Any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention. The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings. The Compounding Authority shall pass an order of compounding after affording an opportunity of being heard to all the concerns as expeditiously as and not later than 180 days from the date of application made to the Compounding Authority. Compounding Authority shall issue order specifying the provisions of the Act or of the rules, directions, requisitions or orders made there under in respect of which contravention has taken place along with details of the alleged contraventions.

## PERMISSIBLE LIMITS UNDER PORTFOLIO INVESTMENT SCHEMES THROUGH STOCK EXCHANGES FOR FPIs AND NRIs

The permissible limits under portfolio investment schemes through stock exchanges for /FPIs and NRIs will be as follows:

- (i) The total holding by each FPI or an investor group, shall be less than 10 per cent of the total paid-up capital on a fully diluted basis or less than 10 per cent of the paid up value of each series of debentures or preference shares or share warrants, aggregate limit for all /FPIs cannot exceed 24 per cent of the total paid-up capital on a fully diluted basis or paid up value of each series of debentures or preference shares or share warrants.

With effect from the 1st April, 2020, the aggregate limit shall be the sectoral caps applicable to the Indian company as laid out in sub-paragraph (b) of paragraph 3 of Schedule I of these rules, with respect to its paid-up equity capital on a fully diluted basis or such same sectoral cap percentage of paid up value of each series of debentures or preference shares or share warrants. The aggregate limit as provided above may be decreased by the Indian company concerned to a lower threshold limit of 24% or 49% or 74% as deemed fit, with the approval of its Board of Directors and its General Body through a resolution and a special resolution, respectively before 31st March, 2020.

The Indian company which has decreased its aggregate limit to 24% or 49% or 74%, may increase such aggregate limit to 49% or 74% or the sectoral cap or statutory ceiling respectively as deemed fit, with the approval of its Board of Directors and its General Body through a resolution and a special resolution, respectively. Once the aggregate limit has been increased to a higher threshold, the Indian company cannot reduce the same to a lower threshold. However, the aggregate limit with respect to an Indian company in a sector where FDI is prohibited shall be 24 per cent.

- (a) In the case of NRIs, as hitherto, individual holding is restricted to 5 per cent of the total paid-up capital on fully diluted basis or 5 percent of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company both on repatriation and non-repatriation basis and the total holdings of all NRIs and OCIs put together shall not exceed 10 per cent of the total paid-up capital both on repatriation and non-repatriation basis. However, NRI holding can be allowed up to 24 per cent of the total paid-up capital both on repatriation and non-repatriation basis provided the banking company passes a special resolution to that effect in the General Body.
  - (b) Applications for foreign direct investment in private banks having joint venture/subsidiary in insurance sector may be addressed to the Reserve Bank of India (RBI) for consideration in consultation with the Insurance Regulatory and Development Authority of India (IRDAI) in order to ensure that the 49 per cent limit of foreign shareholding applicable for the insurance sector is not being breached.
  - (c) Transfer of shares under FDI from residents to non-residents shall require approval of RBI and/or Government wherever applicable.
  - (d) The policies and procedures prescribed from time to time by RBI and other institutions such as SEBI, Ministry of Corporate Affairs and IRDAI on these matters will continue to apply.
  - (e) RBI guidelines relating to acquisition by purchase or otherwise of shares of a private bank, if such acquisition results in any person owning or controlling 5 per cent or more of the paid-up capital of the private bank will apply to non-resident investors as well.
- (ii) Setting up of a subsidiary by foreign banks

- (a) Foreign banks will be permitted to either have branches or subsidiaries but not both.
  - (b) Foreign banks regulated by banking supervisory authority in the home country and meeting Reserve Bank's licensing criteria will be allowed to hold 100 per cent paid up capital to enable them to set up a wholly-owned subsidiary in India.
  - (c) A foreign bank may operate in India through only one of the three channels viz., (i) branches (ii) a wholly-owned subsidiary and (iii) a subsidiary with aggregate foreign investment up to a maximum of 74 per cent in a private bank.
  - (d) A foreign bank will be permitted to establish a wholly-owned subsidiary either through conversion of existing branches into a subsidiary or through a fresh banking license. A foreign bank will be permitted to establish a subsidiary through acquisition of shares of an existing private sector bank provided at least 26 per cent of the paid capital of the private sector bank is held by residents at all times consistent with para (i) (b) above.
  - (e) A subsidiary of a foreign bank will be subject to the licensing requirements and conditions broadly consistent with those for new private sector banks.
  - (f) Guidelines for setting up a wholly-owned subsidiary of a foreign bank will be issued separately by RBI.
  - (g) All applications by a foreign bank for setting up a subsidiary or for conversion of their existing branches to subsidiary in India will have to be made to the RBI.
- (iii) At present there is a limit of ten per cent on voting rights in respect of banking companies, and this should be noted by potential investor. Any change in the ceiling can be brought about only after final policy decisions and appropriate Parliamentary approvals. All investments shall be subject to the guidelines prescribed for the banking sector under the Banking Regulation Act, 1949 and the Reserve Bank of India Act, 1934.

### FOREIGN EXCHANGE MANAGEMENT (NON-DEBT INSTRUMENTS) RULES, 2019

In exercise of the powers conferred under Section 46(2) (aa) and (ab) of the Foreign Exchange Management Act, 1999 and in supersession of the Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations, 2017 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, the Central Government issued Foreign Exchange Management (Non debt Instruments) Rules, 2019.

The Foreign Exchange Management (Non debt Instruments) Rules, 2019 inter alia provides the provisions relating to general conditions applicable to all investors such as restriction on investment in India by a person resident outside India, Restriction on receiving investment and permission for making investment by a person resident outside India etc.

Rule 3 of the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 provides that save as otherwise provided in the Foreign Exchange Management Act, 1999 or rules or regulations made thereunder, no person resident outside India shall make any investment in India. An investment made in accordance with the Foreign Exchange Management Act, 1999 or the rules or the regulations made thereunder and held on the date of commencement of Foreign Exchange Management (Non-debt Instruments) Rules, 2019 shall be deemed to have been made under Foreign Exchange Management (Non-debt Instruments) Rules, 2019 and shall accordingly be governed by Foreign Exchange Management (Non-debt Instruments) Rules, 2019. Reserve Bank of India may, on an application made to it and for sufficient reasons and in consultation with the Central Government, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary.



Rule 4 of the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 states that save as otherwise provided in the Foreign Exchange Management Act, 1999 or rules or regulations made thereunder, an Indian entity or an investment vehicle, or a venture capital fund or a firm or an association of persons or a proprietary concern shall not receive any investment in India from a person resident outside India or record such investment in its books: Reserve Bank of India may, on an application made to it and for sufficient reasons and in consultation with the Central Government, permit an Indian entity or an investment vehicle, or a venture capital fund or a firm or an association of persons or a proprietary concern to receive any investment in India from a person resident outside India or to record such investment subject to such conditions as may be considered necessary.

According to Rule 5 of the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, unless otherwise specified in Foreign Exchange Management (Non-debt Instruments) Rules, 2019 or the Schedules, any investment made by a person resident outside India shall be subject to the entry routes, sectoral caps or the investment limits, as the case may be, and the attendant conditionalities for such investment as laid down in the Foreign Exchange Management (Non-debt Instruments) Rules, 2019.

*The instructions on mode of payment, remittance of sale/maturity proceeds and reporting requirements are stipulated under the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 and Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019.*

## FOREIGN EXCHANGE MANAGEMENT (MODE OF PAYMENT AND REPORTING OF NON- DEBT INSTRUMENTS) REGULATIONS, 2019

### INTRODUCTION

In exercise of the powers conferred by section 47 of the Foreign Exchange Management Act, 1999 and consequent to the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019, the Reserve Bank of India issued the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 relating to mode of payment and reporting requirements for investment in India by a person resident outside India.

### MODE OF PAYMENT AND REMITTANCE OF SALE PROCEEDS

#### Purchase or Sale of Equity Instruments of an Indian Company by a Person Resident outside India

##### **Mode of payment:**

- (1) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/Escrow account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

*Explanation:* The amount of consideration shall include:

- (i) Issue of equity shares by an Indian company against any funds payable by it to the investor
  - (ii) Swap of equity instruments.
- (2) Equity instruments shall be issued to the person resident outside India making such investment within sixty days from the date of receipt of the consideration.

*Explanation:* In case of partly paid equity shares, the period of 60 days shall be reckoned from the date of receipt of each call payment.



- (3) Where such equity instruments are not issued within sixty days from the date of receipt of the consideration the same shall be refunded to the person concerned by outward remittance through banking channels or by credit to his NRE/ FCNR (B) accounts, as the case may be within fifteen days from the date of completion of sixty days.
- (4) An Indian company issuing equity instruments under this Schedule may open a foreign currency account with an Authorised Dealer in India in accordance with Foreign Exchange Management (Foreign currency accounts by a person resident in India) Regulations, 2016.

**Remittance of sale proceeds:**

The sale proceeds (net of taxes) of the equity instruments may be remitted outside India or may be credited to the NRE/ FCNR (B) of the person concerned.

**Investments by Foreign Portfolio Investors****Mode of payment:**

- (1) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a foreign currency account and/ or a Special Non-Resident Rupee (SNRR) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.  
Provided balances in SNRR account shall not be used for making investment in units of Investment Vehicles other than the units of domestic mutual fund.
- (2) The foreign currency account and SNRR account shall be used only and exclusively for transactions under this Schedule.

**Remittance of sale proceeds:**

The sale proceeds (net of taxes) of equity instruments and units of domestic mutual fund may be remitted outside India or credited to the foreign currency account or a SNRR account of the FPI.

The sale proceeds (net of taxes) of units of investment vehicles other than domestic mutual fund may be remitted outside India.

**Investments by Non Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis****Mode of payment:**

- (1) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a Non-Resident External (NRE) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.
- (2) The NRE account will be designated as an NRE (PIS) Account and the designated account shall be used exclusively for putting through transactions permitted under this Schedule.
- (3) Investment in units of domestic mutual fund shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B) account.
- (4) Subscription to National Pension System shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/NRO account.

**Remittance of sale proceeds:**

The sale proceeds (net of taxes) of equity instruments may be remitted outside India or may be credited to NRE (PIS) account of the person concerned.

The sale proceeds (net of taxes) of units of mutual funds and subscription to National Pension System may be remitted outside India or may be credited to NRE (PIS)/FCNR(B)/NRO account of the person concerned at the option of the NRI/OCI investor.

### **INVESTMENT BY NRI OR OCI ON NON REPATRIATION BASIS**

#### **Purchase or sale of equity instruments of an Indian company or units or contribution to the capital of a LLP by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on Non-repatriation basis.**

##### ***Mode of Payment:***

The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/NRO account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

##### ***Sale/maturity proceeds:***

- (1) The sale/maturity proceeds (net of applicable taxes) of equity instruments or units or disinvestment proceeds of a LLP shall be credited only to the NRO account of the investor, irrespective of the type of account from which the consideration was paid;
- (2) The amount invested in equity instruments of an Indian company or the consideration for contribution to the capital of a LLP and the capital appreciation thereon shall not be allowed to be repatriated abroad.

#### **Investment in a firm or a proprietary concern**

##### ***Mode of payment:***

The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/NRO account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

##### ***Sale/maturity proceeds:***

- (1) The disinvestment proceeds shall be credited only to the NRO account of the person concerned, irrespective of the type of account from which the consideration was paid;
- (2) The amount invested for contribution to the capital of a firm or a proprietary concern and the capital appreciation thereon shall not be allowed to be repatriated abroad.

#### **Investment by other non-resident investors**

##### ***Mode of Payment:***

The amount of consideration shall be paid out of inward remittances from abroad through banking channels.

##### ***Remittance/credit of sale/ maturity proceeds:***

The sale/ maturity proceeds (net of taxes) may be remitted abroad.

#### **Investment in a Limited Liability Partnership**

##### ***Mode of payment:***

Payment by an investor towards capital contribution of an LLP shall be made by way of an inward remittance through banking channels or out of funds held in NRE or FCNR (B) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

**Remittance of disinvestment proceeds:**

The disinvestment proceeds may be remitted outside India or may be credited to NRE or FCNR (B) account of the person concerned.

**Investment by a Foreign Venture Capital Investor****Mode of payment:**

- (1) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a foreign currency account and/or a Special Non-Resident Rupee (SNRR) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.
- (2) The foreign currency account and SNRR account shall be used only and exclusively for transactions under this Schedule.

**Remittance of sale/maturity proceeds:**

The sale/maturity proceeds (net of taxes) of the securities may be remitted outside India or may be credited to the foreign currency account or a Special Non-resident Rupee Account of the FVCI.

**Investment by a person resident outside India in an Investment Vehicle****Mode of payment:**

The amount of consideration shall be paid as inward remittance from abroad through banking channels or by way of swap of shares of a Special Purpose Vehicle or out of funds held in NRE or FCNR(B) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016. Remittance of sale/maturity proceeds:

The sale/maturity proceeds (net of taxes) of the units may be remitted outside India or may be credited to the NRE or FCNR(B) account of the person concerned.

**Issue of Indian Depository Receipts****Mode of Payment:**

NRIs or OCIs may invest in the IDRs out of funds held in their NRE/FCNR (B) account, maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

**Remittance of sale/maturity proceeds:**

Redemption/conversion of IDRs into underlying equity shares of the issuing company shall be a compliance the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004.

**Issue of Convertible Notes by an Indian start-up company**

A start-up company issuing convertible notes to a person resident outside India shall receive the amount of consideration by inward remittance through banking channels or by debit to the NRE/FCNR(B)/Escrow account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

Repayment or sale proceeds may be remitted outside India or credited to NRE/FCNR(B) account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

## REPORTING REQUIREMENTS

The reporting requirement for any Investment in India by a person resident outside India shall be as follows:

- (1) **Form Foreign Currency-Gross Provisional Return (FC-GPR):** An Indian Company issuing equity instruments to a person resident outside India and where such issue is reckoned as Foreign Direct Investment, defined under the rules, shall report such issue in Form FC-GPR, not later than thirty days from the date of issue of equity instruments. Issue of 'participating interest/rights' in oil fields shall be reported in Form FC-GPR.
- (2) **Annual Return on Foreign Liabilities and Assets (FLA):** An Indian Company which has received FDI or an LLP which has received investment by way of capital contribution in the previous year including the current year, shall submit form FLA to the Reserve Bank on or before the 15th day of July of each year.

*Explanation:* Year for this purpose shall be reckoned as April to March.

(3) **Form Foreign Currency-Transfer of Shares (FC-TRS):**

- (a) Form FCTRS shall be filed for transfer of equity instruments in accordance with the rules, between:
  - (i) a person resident outside India holding equity instruments in an Indian company on a repatriable basis and person resident outside India holding equity instruments on a non-repatriable basis; and
  - (ii) a person resident outside India holding equity instruments in an Indian company on a repatriable basis and a person resident in India,

The onus of reporting shall be on the resident transferor/transferee or the person resident outside India holding equity instruments on a non-repatriable basis, as the case may be.

*Note:* Transfer of equity instruments in accordance with the rules by way of sale between a person resident outside India holding equity instruments on a non-repatriable basis and person resident in India is not required to be reported in Form FC-TRS.

- (b) Transfer of equity instruments on a recognised stock exchange by a person resident outside India shall be reported by such person in Form FC-TRS.
- (c) Transfer of equity instruments prescribed in Rule 9(6) of the Rules, shall be reported in Form FC-TRS on receipt of every tranche of payment. The onus of reporting shall be on the resident transferor/ transferee.
- (d) Transfer of 'participating interest/rights' in oil fields shall be reported Form FC-TRS.

The form FCTRS shall be filed within sixty days of transfer of equity instruments or receipt/ remittance of funds whichever is earlier.

- (4) **Form Employees' Stock Option (ESOP):** An Indian company issuing employees' stock option to persons resident outside India who are its employees/directors or employees/directors of its holding company/ joint venture / wholly owned overseas subsidiary/subsidiaries shall file Form-ESOP, within 30 days from the date of issue of employees' stock option.
- (5) **Form Depository Receipt Return (DRR):** The Domestic Custodian shall report in Form DRR, the issue / transfer of depository receipts issued in accordance with the Depository Receipt Scheme, 2014 within 30 days of close of the issue.

- (6) **Form LLP (I):** A Limited Liability Partnerships (LLP) receiving amount of consideration for capital contribution and acquisition of profit shares shall file Form LLP (I), within 30 days from the date of receipt of the amount of consideration.
- (7) **Form LLP (II):** The disinvestment/transfer of capital contribution or profit share between a resident and a non-resident (or vice versa) shall be filed in Form LLP(II) within 60 days from the date of receipt of funds. The onus of reporting shall be on the resident transferor/transferee.
- (8) **LEC (FII):** The Authorised Dealer Category I banks shall report to the Reserve Bank in Form LEC (FII) the purchase/transfer of equity instruments by FPIs on the stock exchanges in India.
- (9) **LEC (NRI):** The Authorised Dealer Category I banks shall report to the Reserve Bank in Form LEC (NRI) the purchase/transfer of equity instruments by Non-Resident Indians or Overseas Citizens of India on stock exchanges in India.
- (10) **Form InVI:** An Investment vehicle which has issued its units to a person resident outside India shall file Form InVI within 30 days from the date of issue of units.
- (11) **Downstream Investment**
- (a) An Indian entity or an investment vehicle making downstream investment in another Indian entity which is considered as indirect foreign investment for the investee Indian entity in terms of the Rules, shall notify the Secretariat for Industrial Assistance, DPIIT within 30 days of such investment, even if equity instruments have not been allotted, along with the modality of investment in new/existing ventures (with/without expansion programme).
- (b) **Form DI:** An Indian entity or an investment Vehicle making downstream investment in another Indian entity which is considered as indirect foreign investment for the investee Indian entity in terms of Rule 22 of the Rules shall file Form DI with the Reserve Bank within 30 days from the date of allotment of equity instruments.
- (12) **Form Convertible Notes (CN):**
- (a) The Indian Start-up Company issuing Convertible Notes to a person resident outside India shall file Form CN within 30 days of such issue.
- (b) A person resident in India, who may be a transferor or transferee of Convertible Notes issued by an Indian start-up company shall report such transfers to or from a person resident outside India, as the case may be, in Form CN within 30 days of such transfer.

Provided, the format, periodicity and manner of submission of such reporting shall be as prescribed by Reserve Bank in this regard.

Provided further that unless otherwise specifically stated in Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 all reporting shall be made through or by an Authorised Dealer bank, as the case may be.

### Delays in reporting

The person/entity responsible for filing the reports shall be liable for payment of late submission fee, as may be decided by the Reserve Bank, in consultation with the Central Government, for any delays in reporting.

**LESSON ROUND-UP**

- “FDI” or “Foreign Direct Investment” means investment through equity instruments by a person resident outside India in an unlisted Indian company; or in ten per cent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company.
- A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route.
- A citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.
- Indian companies can issue capital against Foreign Direct Investment.
- Indian companies which are eligible to issue shares to person’s resident outside India under the FDI Policy may be allowed to retain the share subscription amount in a Foreign Currency Account, with the prior approval of RBI.
- FDI is permitted under the automatic route in Limited Liability Partnership (LLPs) operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions.
- FDI is allowed under the automatic route without prior approval either of the Government or the Reserve Bank of India in all activities/sectors as specified in the consolidated FDI Policy, issued by the Government of India from time to time.
- FDI in activities not covered under the automatic route requires prior approval of the Government. Proposals for foreign investment under Government route, are considered by respective Administrative Ministry/Department.
- If a person violates/contravenes any FDI Regulations, by way of breach/non-adherence/non-compliance/contravention of any rule, regulation, notification, press note, press release, circular, direction or order issued in exercise of the powers under FEMA or contravenes any conditions subject to which an authorization is issued by the Government of India/ Reserve Bank of India, he shall, upon adjudication, be liable to a penalty.

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Define Foreign Direct Investment.
2. List out the sectors/activities where Foreign Direct Investment is permitted.
3. List out the sectors/activities where Foreign Direct Investment is prohibited.
4. Discuss conditions of Foreign Direct Investment in E-Commerce activities.
5. Write short notes on: (i) Automatic Route (ii) Government Route.
6. Enumerate the mode of payment and remittance of sale proceeds in case of purchase or sale of equity instruments of an Indian company by a person resident outside India.







### KEY CONCEPTS

■ Foreign Entity ■ Strategic Sector ■ Overseas Direct Investment ■ Overseas Portfolio Investment ■ Financial Commitment

### Learning Objectives

#### To understand:

- Permission for Making Overseas Investment
- Acquisition of a Foreign Entity through Bidding
- Overseas Direct Investment (ODI) in Start-ups
- Opening of Foreign Currency Account abroad
- Financial Commitment by way of Guarantee
- Manner of making Overseas Direct Investment
- Manner of Making Overseas Portfolio Investment
- Restrictions and Prohibitions

### Lesson Outline

- Acquisition and Transfer of Foreign Securities
- Acquisition by way of Gift or Inheritance
- ODI by Registered Trust or Society
- OI by Mutual Funds or Venture Capital Funds
- Overseas Investment in IFSC
- Reporting
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- Foreign Exchange Management Act, 1999
- Foreign Exchange Management (Overseas Investment ) Rules, 2022
- Foreign Exchange Management (Overseas Investment) Regulations, 2022

### Overseas Investments Governed under:

- *Foreign Exchange Management (Overseas Investment) Rules, 2022*
- *Foreign Exchange Management (Overseas Investment) Regulations, 2022*
- *Foreign Exchange Management (Overseas Investment) Directions, 2022*

<b>Regulation Notified by RBI</b>	<b>Regulations Superseding on Notification</b>
<b>Foreign Exchange Management (Overseas Investment) Regulations, 2022</b>	Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004
	Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015

## Introduction

Overseas investments by persons resident in India enhance the scale and scope of business operations of Indian entrepreneurs by providing global opportunities for growth. Such ventures through easier access to technology, research and development, a wider global market and reduced cost of capital along with other benefits increase the competitiveness of Indian entities and boost their brand value. These overseas investments are also important drivers of foreign trade and technology transfer thus boosting domestic employment, investment and growth through such interlinkages.

In view of the evolving needs of businesses in India, in an increasingly integrated global market, there is need of Indian corporates to be part of global value chain and in keeping with the spirit of liberalisation and to promote ease of doing business, the Central Government and the Reserve Bank of India have been progressively simplifying the procedures and rationalising the rules and regulations under the Foreign Exchange Management Act, 1999. In this direction, a significant step has been taken with operationalisation of a new Overseas Investment regime. Foreign Exchange Management (Overseas Investment) Rules, 2022 have been notified by the Central Government on August 22, 2022.

### **Overseas Direct Investment (ODI) means:**

- Acquisition of any **unlisted equity capital** or **subscription** as a part of the Memorandum of Association of a foreign entity, or*
- Investment in 10% or more of the **paid-up equity capital of a listed foreign entity**, or*
- Investment with control** where investment is less than 10% of the paid-up equity capital of a listed foreign entity.*

For better understanding of Overseas Direct Investment (ODI), **foreign entity** means an entity formed or registered or incorporated outside India, including in International Financial Services Centre (IFSC) in India, that has limited liability.

Further, **Control** means the right to appoint majority of the directors or to control the management or policy

decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements that entitle them to ten percent or more of voting rights or in any other manner in the entity.

**“Overseas Investment”** means **financial commitment and Overseas Portfolio Investment** by a person resident in India.

It may be noted that **financial commitment** by a person resident in India means the aggregate amount of investment by way of ODI, debt other than Overseas Portfolio Investment (OPI) and non-fund-based facility or facilities extended by it to all foreign entities.

An Indian entity may lend or invest in any debt instruments issued by a foreign entity or extend non-fund based commitment to or on behalf of a foreign entity, including overseas SDSs of such Indian entity, subject to the following conditions:

- (i) the Indian entity is eligible to make ODI;
- (ii) the Indian entity has made ODI in the foreign entity;
- (iii) the Indian entity has acquired control in the foreign entity on or before the date of making such financial commitment.

<b>Indian Entity</b>	A Company defined under the Companies Act, 2013.
	A Body corporate incorporated by any law for the time being in force.
	A Limited Liability Partnership formed under the Limited Liability Partnership Act, 2008.
	A Partnership firm registered under the Indian Partnership Act, 1932.

**Overseas Portfolio Investment (OPI)** means investment, other than ODI, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC:

Provided that OPI by a person resident in India in the equity capital of a listed entity, even after its delisting shall continue to be treated as OPI until any further investment is made in the entity.

Debt instruments are :

- (i) Government bonds;
- (ii) corporate bonds;
- (iii) all tranches of securitisation structure which are not equity tranche;
- (iv) borrowings by firms through loans; and
- (v) depository receipts whose underlying securities are debt securities.

### Permission for Overseas Investment

A person resident in India may make or transfer any investment or financial commitment outside India under general permission/automatic route subject to the provisions contained in the Foreign Exchange Management (Overseas Investment) Rules, 2022 and Foreign Exchange Management (Overseas Investment) Regulations, 2022. Accordingly, overseas investment may be made in a foreign entity engaged in a bona fide business activity, directly or through Step Down Subsidiary (SDS) /Special-Purpose Vehicle (SPV).

Further, Subsidiary/Step Down Subsidiary (SDS) of a foreign entity means an entity in which the foreign entity has control and the structure of such subsidiary/SDS shall comply with the structural requirements of a foreign entity, i.e., such subsidiary/SDS shall also have limited liability where the foreign entity's core activity is not in strategic sector. The investee entities of the foreign entity where such foreign entity does not have control (as defined above) shall not be treated as SDSs and therefore need not be reported henceforth.

### Procedure for Making Overseas Investment

<b>1</b>	The person intending to make any financial commitment shall fill up the <b>Form FC</b> duly supported by the requisite documents and approach the designated Authorised Dealer (AD) bank for making the investment/remittance.
<b>2</b>	In respect of any case under the approval route, the applicant shall approach their designated AD bank who shall forward the proposal to the Reserve Bank after due scrutiny and with its specific recommendations. The application for overseas investment under the approval route would continue to be submitted to the Reserve Bank in physical/electronic form through email as hitherto, in addition to the online reporting.
<b>3</b>	The designated AD bank before forwarding the proposal shall submit the relevant sections of the Form FC in the online OID application and the transaction number generated by the application shall be mentioned in their reference.
<b>4</b>	The following documents shall be submitted along with the proposal: <ul style="list-style-type: none"> <li>➤ Background and brief details of the transaction.</li> <li>➤ Reason(s) for seeking approval mentioning the extant FEMA provisions.</li> <li>➤ Observations of the designated AD bank with respect to the following: <ul style="list-style-type: none"> <li>● Prima facie viability of the foreign entity;</li> <li>● Benefits which may accrue to India through such investment;</li> <li>● Financial position and business track record of the Indian entity and the foreign entity;</li> <li>● Any other material observation.</li> </ul> </li> </ul>
<b>5</b>	Recommendations of the designated AD bank with confirmation that the applicant's board resolution or resolution from an equivalent body, as applicable, for the proposed transaction(s) is in place.
<b>6</b>	Diagrammatic representation of the organisational structure indicating all the subsidiaries of the Indian entity horizontally and vertically with their stake (direct and indirect) and status (whether operating company or SPV).
<b>7</b>	Valuation certificate for the foreign entity (if applicable).
<b>8</b>	Other relevant documents properly numbered, indexed and flagged.
<b>9</b>	The proposal shall be submitted to the Reserve Bank of India.

### Approval from the Central Government

The applications for overseas investment/financial commitment in Pakistan/other jurisdiction as may be advised by the Central Government from time to time or in strategic sectors/specific geographies shall be forwarded by the AD banks from their constituents to the Reserve Bank as per the laid down procedure for onward submission to the Central Government.

It may be noted that strategic sector shall include energy and natural resources sectors such as Oil, Gas, Coal, Mineral Ores, submarine cable system and start-ups and any other sector or sub-sector as deemed fit by the Central Government. The restriction of limited liability structure of foreign entity shall not be mandatory for entities with core activity in any strategic sector. Accordingly, Overseas Direct Investment (ODI) can be made in such sectors in unincorporated entities as well. An Indian entity is also permitted to participate in a consortium with other international operators to construct and maintain submarine cable systems on co-ownership basis. AD banks may allow remittances for ODI in strategic sector after ensuring that Indian entity has obtained necessary permission from the competent authority, wherever applicable.

### Approval from the Reserve Bank

***Financial commitment by an Indian entity, exceeding USD 1 (one) billion (or its equivalent) in a financial year shall require prior approval of the Reserve Bank even when the total financial commitment of the Indian entity is within the eligible limit under the automatic route.***

### No Objection Certificate (NOC) from the lender bank/regulatory body/investigative agency

Any person resident in India having an account appearing as a Non-Performing Asset (NPA) or is classified as wilful defaulter or is under investigation by a financial sector regulator/ investigative agency shall obtain an NOC from the lender bank/regulatory body/investigative agency concerned before making financial commitment or undertaking disinvestment.

Where an Indian entity has already issued a guarantee in accordance with the FEMA provisions before an investigation has begun or account is classified as NPA/wilful defaulter and subsequently is required to honour such contractual obligation, such remittance due to the invocation will not constitute fresh financial commitment and hence NOC shall not be required.

### Mode of Payment

**A person resident in India making Overseas Investment may make payment –**

- (i) by remittance made through banking channels;***
- (ii) from funds held in an account maintained in accordance with the provisions of the Foreign Exchange Management Act;***
- (iii) by swap of securities;***
- (iv) by using the proceeds of American Depository Receipts or Global Depository Receipts or stock swap of such receipts or external commercial borrowings raised in accordance with the provisions of the Act and the rules and regulations made thereunder for making ODI or financial commitment by way of debt by an Indian entity.***

It is further provided that:

- (i) Overseas investment by way of cash is not permitted.
- (ii) An Indian entity can make remittances to its office/branch outside India only for the purpose of normal business operations of such branch or office. Accordingly, no remittance shall be made by any Indian entity to its branch/office outside India for making any overseas investment.
- (iii) A person resident in India shall not make any payment on behalf of any foreign entity other than by way of financial commitment as permitted under the OI Rules/Regulations.

- (iv) Any investment/financial commitment in Nepal and Bhutan shall be done in a manner as provided in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016. All dues receivable on investments (or financial commitment) made in freely convertible currencies, as well as their sale/winding up proceeds are required to be repatriated to India in freely convertible currencies only.

### Pricing Guidelines

The AD bank, before facilitating an overseas investment related transaction, shall ensure compliance with the provisions of Overseas Investment Rules. With respect to the documents to be taken by the AD bank, they shall be guided by their board approved policy, which may, *inter alia*, provide for taking into consideration the valuation as per any internationally accepted pricing methodology for valuation. The AD bank shall put in place a board approved policy within two months from the date of these directions.

Such policy may also provide for scenarios where the valuation may not be insisted upon, such as:

- (i) transfer on account of merger, amalgamation or demerger or liquidation, where the price has been approved by the competent Court/Tribunal as per the laws in India and/or the host jurisdiction; or
- (ii) price is readily available on a recognised stock exchange, etc.

The policy shall also clearly provide for additional documents such as the audited financial statements of the foreign entity, etc. that may be taken by the AD banks for ascertaining the bona fides in cases involving write-off of the investment.

### Transfer or Liquidation

A person resident in India holding equity capital in accordance with OI Rules may transfer such investment, in compliance with the limits and subject to the conditions for such investment or disinvestment, pricing guidelines or documentation and reporting requirements, in the manner provided in these rules and the Foreign Exchange Management (Overseas Investment) Regulations, 2022.

A person resident in India may transfer equity capital by way of sale to a person resident in India, who is eligible to make such investment under these rules, or to a person resident outside India.

In case the transfer is on account of merger, amalgamation or demerger or on account of buyback of foreign securities, such transfer or liquidation in case of liquidation of the foreign entity, shall have the approval of the competent authority as per the applicable laws in India or the laws of the host country or host jurisdiction, as the case may be.

It is clarified that where the transferor is required to repatriate all the dues before disinvestment, such requirement shall not apply to the dues that do not arise on account of investment in equity or debt like export receivables, etc.

### Restructuring

A person resident in India who has made ODI in a foreign entity may permit restructuring of the balance sheet by such foreign entity, which has been incurring losses for the previous two years as evidenced by its last audited balance sheets, subject to ensuring compliance with reporting, documentation requirements and subject to the diminution in the total value of the outstanding dues towards such person resident in India on account of investment in equity and debt, after such restructuring not exceeding the proportionate amount of the accumulated losses.

It may be noted that in case of such diminution where the amount of corresponding original investment is more than USD 10 million or in the case where the amount of such diminution exceeds twenty per cent of the

total value of the outstanding dues towards the Indian entity or investor, the diminution in value shall be duly certified on an arm's length basis by a registered valuer as per the Companies Act, 2013 or corresponding valuer registered with the regulatory authority or certified public accountant in the host country.

### Jurisdiction

The certificate dated not more than six months before the date of the transaction shall be submitted to the designated AD bank. The certificate shall mention the amount of accumulated losses as per the audited balance sheet of the foreign entity, the proportionate amount of accumulated losses based upon the share of the Indian entity/investor, the amount of diminution in the value of the outstanding dues towards the Indian entity/investor post restructuring and that such diminution does not exceed the proportionate amount of accumulated losses.

The above stated provisions shall not be used where the assets are simply revalued in the books of the Indian entity without any restructuring of the balance sheet of the foreign entity.

### Opening of Foreign Currency Account abroad by an Indian entity

An Indian entity may open, hold and maintain Foreign Currency Account (FCA) abroad for the purpose of making ODI in accordance with the provisions contained in Foreign Exchange Management (Foreign Currency Accounts by a resident in India) Regulations, 2015.

### Obligations of the Person Resident in India

<b>1</b>	A person resident in India acquiring equity capital in a foreign entity, which is reckoned as ODI, shall submit the evidence of investment to the AD bank within six months, failing which the funds remitted overseas shall be repatriated within the said period of six months.
<b>2</b>	The evidence of investment shall be retained by the designated AD bank, who shall monitor the receipt of required documents and satisfy themselves about the bona fides of the documents so received.
<b>3</b>	Form FC shall be submitted along with requisite documents to AD bank for obtaining UIN on or before making initial ODI.
<b>4</b>	The AD bank after due verification shall report the details in the OID application for allotment of UIN.
<b>5</b>	Any remittance towards a foreign entity shall be facilitated by the AD bank only after obtaining the necessary UIN for such entity.
<b>6</b>	The allotment of UIN does not constitute an approval from the Reserve Bank for the investment made/to be made in the foreign entity.
<b>7</b>	The issue of UIN only signifies taking on record of the investment for maintaining the database.

### Manner of making Overseas Direct Investment by Indian entity

#### *Manner of making ODI*

An Indian entity may make ODI by way of investment in equity capital for the purpose of undertaking bonafide business activity in the manner and subject to the limits and prescribed conditions.

The ODI may be made or held by way of,—

- (i) subscription as part of memorandum of association or purchase of equity capital, listed or unlisted;

- (ii) acquisition through bidding or tender procedure;
- (iii) acquisition of equity capital by way of rights issue or allotment of bonus shares;
- (iv) capitalisation, within the time period, if any, specified for realisation under the Act, of any amount due towards the Indian entity from the foreign entity, the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the Reserve Bank under the Act or any rules or regulations made or directions issued thereunder;
- (v) the swap of securities;
- (vi) merger, demerger, amalgamation or any scheme of arrangement as per the applicable laws in India or laws of the host country or the host jurisdiction, as the case may be.

### ***ODI in Financial Services Activity***

An Indian entity engaged in financial services activity in India may make ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, subject to the following conditions, namely:--

- (i) the Indian entity has posted net profits during the preceding three financial years;
- (ii) the Indian entity is registered with or regulated by a financial services regulator in India;
- (iii) the Indian entity has obtained approval as may be required from the regulators of such financial services activity, both in India and the host country or host jurisdiction, as the case may be, for engaging in such financial services.

An Indian entity not engaged in financial services activity in India may make ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, except banking or insurance, subject to the condition that such Indian entity has posted net profits during the preceding three financial years:

Provided that an Indian entity not engaged in the insurance sector may make ODI in general and health insurance where such insurance business is supporting the core activity undertaken overseas by such an Indian entity.

Overseas Investment by banks and non-banking financial institutions regulated by the Reserve Bank shall be subject to the conditions laid down by the Reserve Bank under applicable laws in this regard.

### ***Limit for Financial Commitment***

The total financial commitment made by an Indian entity in all the foreign entities taken together at the time of undertaking such commitment shall not exceed 400 percent of its net worth as on the date of the last audited balance sheet or as directed by the Reserve Bank, in consultation with Central Government from time to time.

The total financial commitment shall not include capitalisation of retained earnings for reckoning such limit but shall include--

- (i) utilisation of the amount raised by the issue of American Depository Receipts or Global Depository Receipts and stock-swap of such receipts; and
- (ii) utilisation of the proceeds from External Commercial Borrowings to the extent the corresponding pledge or creation of charge on assets to raise such borrowings has not already been reckoned towards the above limit.

It may be noted that the financial commitment made by Maharatna or Navratna or Miniratna or subsidiaries of such public sector undertakings in foreign entities outside India engaged in strategic sectors shall not be subject to the limits laid down above.



### Overseas Investment by Person Resident in India Other than Indian Entity and Resident Individual

#### ODI by Registered Trust or Society:

Any person being a registered Trust or a registered Society engaged in the educational sector or which has set up hospitals in India may make ODI in a foreign entity with the prior approval of the Reserve Bank, subject to the following conditions, namely:–

- (i) the foreign entity is engaged in the same sector that the Indian Trust or Society is engaged in;
- (ii) the Trust or the Society, as the case may be, should have been in existence for at least three financial years before the year in which such investment is being made;
- (iii) the trust deed in case of a Trust, and the memorandum of association or rules or bye-laws in case of a Society shall permit the proposed ODI;
- (iv) such investment have the approval of the trustees in case of a Trust and the governing body or council or managing or executive committee in case of a Society;
- (v) in case the Trust or the Society require special licence or permission either from the Ministry of Home Affairs, Central Government or from the relevant local authority, as the case may be, the special licence or permission has been obtained and submitted to the designated AD bank.

### Overseas Investment in IFSC by Person Resident in India

Subject to the provisions of the Foreign Exchange Management (Overseas Investment) Rules, 2022 and the Foreign Exchange Management (Overseas Investment) Regulations, 2022, a person resident in India may make Overseas Investment in an IFSC in India.

Provided that –

- (i) in the case of an ODI made in an IFSC, the approval by the financial services regulator concerned, wherever applicable, shall be decided within forty-five days from the date of application complete in all respects failing which it shall be deemed to be approved;
- (ii) an Indian entity not engaged in financial services activity in India, making ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, except banking or insurance, who does not meet the net profit condition as required under Overseas Investment Rules, may make ODI in an IFSC;
- (iii) a person resident in India may make contribution to an investment fund or vehicle set up in an IFSC as OPI;
- (iv) a resident individual may make ODI in a foreign entity, including an entity engaged in financial services activity, (except in banking and insurance), in IFSC if such entity does not have subsidiary or step down subsidiary outside IFSC where the resident individual has control in the foreign entity.

A recognised stock exchange in the IFSC shall be treated as a recognised stock exchange outside India for the purpose of these rules.

### Reporting

All reporting with respect to overseas investment by a person resident in India shall be made through the designated AD bank in the prescribed manner and in the format provided by the Reserve Bank.

A person resident in India who has made ODI or making financial commitment or undertaking disinvestment in a foreign entity shall report the following, namely:—

- (a) financial commitment, whether it is reckoned towards the financial commitment limit or not, at the time of sending outward remittance or making a financial commitment, whichever is earlier;
- (b) disinvestment within thirty days of receipt of disinvestment proceeds;
- (c) restructuring within thirty days from the date of such restructuring.

A person resident in India other than a resident individual making any Overseas Portfolio Investment (OPI) or transferring such OPI by way of sale shall report such investment or transfer of investment within sixty days from the end of the half-year in which such investment or transfer is made as of September or March-end.

Provided that in case of OPI by way of acquisition of shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme, the reporting shall be done by the office in India or branch of an overseas entity or a subsidiary in India of an overseas entity or the Indian entity in which the overseas entity has direct or indirect equity holding where the resident individual is an employee or director.

Any acquisition of foreign securities through conversion of Indian Depository Receipts (IDRs) shall be duly reported as ODI or OPI, as applicable.

The Annual Performance Report (APR) shall be certified by a chartered accountant where the statutory audit is not applicable, including in case of resident individuals. It is also clarified that where APR is required to be filed jointly, either one investor may be authorised by other investors for filing APR, or such persons may jointly file the APR.

### Delay in Reporting

In case a person resident in India has made a delay in filing/submitting the requisite form/return/document, such person may file/submit the requisite form/return/ document, etc. and pay the Late Submission Fee (LSF) through the designated AD bank in accordance with OI Regulations.

### Restriction on Further Financial Commitment or Transfer

A person resident in India who has made a financial commitment in a foreign entity in accordance with the Act or rules or regulations made thereunder, shall not make any further financial commitment, whether fund-based or non-fund-based, directly or indirectly, towards such foreign entity or transfer such investment till any delay in reporting is regularised.

AD bank shall not facilitate any outward remittance/further financial commitment by a person resident in India towards a foreign entity until any delay in reporting is regularised.

### Restrictions and Prohibitions

Unless otherwise provided in the FEMA or these ODI Rules, no person resident in India shall make ODI in a foreign entity engaged in –

- (a) real estate activity;
- (b) gambling in any form; and
- (c) dealing with financial products linked to the Indian rupee without specific approval of the Reserve Bank.

*Explanation.*— the expression “real estate activity” means buying and selling of real estate or trading in Transferable Development Rights but does not include the development of townships, construction of residential or commercial premises, roads or bridges for selling or leasing.

Any ODI in start-ups recognised under the laws of the host country or host jurisdiction as the case may be, shall be made by an Indian entity only from the internal accruals whether from the Indian entity or group or associate companies in India and in case of resident individuals, from own funds of such an individual.

No person resident in India shall make financial commitment in a foreign entity that has invested or invests into India, at the time of making such financial commitment or at any time thereafter, either directly or indirectly, resulting in a structure with more than two layers of subsidiaries.

It may be noted that such restriction shall not apply to the following classes of companies mentioned in Rule 2(2) of the Companies (Restriction on Number of Layers) Rules, 2017 as may be amended from time to time, namely:-

- (a) a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949;
- (b) a non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 which is registered with the Reserve Bank and considered as systematically important non-banking financial company by the Reserve Bank;
- (c) an insurance company being a company which carries on the business of insurance in accordance with provisions of the Insurance Act, 1938 and the Insurance Regulatory and Development Authority Act, 1999; and
- (d) a Government company referred to in clause (45) of section 2 of the Companies Act, 2013.

### Restriction on Acquisition or Transfer of Immovable Property Outside India

<b>(1)</b>	A person resident in India shall not acquire or transfer any immovable property situated outside India without general or special permission of the Reserve Bank. However, following property excluded—	
	(a)	held by a person resident in India who is a national of a foreign State;
	(b)	acquired by a person resident in India on or before the 8th day of July, 1947 and continued to be held by such person with the permission of the Reserve Bank;
	(c)	acquired by a person resident in India on a lease not exceeding five years.
<b>(2)</b>	A person resident in India may acquire immovable property outside India by way of inheritance or gift or purchase from a person resident in India who has acquired such property as per the foreign exchange provisions in force at the time of such acquisition. Further, a person resident in India may acquire immovable property outside India from a person resident outside India—	
	(a)	by way of inheritance;
	(b)	by way of purchase out of foreign exchange held in RFC account;
	(c)	by way of purchase out of the remittances sent under the Liberalised Remittance Scheme instituted by the Reserve Bank. Provided that such remittances under the Liberalised Remittance Scheme may be consolidated in respect of relatives if such relatives, being persons resident in India, comply with the terms and conditions of the Scheme;
	(d)	jointly with a relative who is a person resident outside India;
	(e)	out of the income or sale proceeds of the assets, other than ODI, acquired overseas under the provisions of the Act.

<b>(3)</b>	An Indian entity having an overseas office may acquire immovable property outside India for the business and residential purposes of its staff, as per the directions issued by the Reserve Bank from time to time.
<b>(4)</b>	A person resident in India who has acquired any immovable property outside India in accordance with the foreign exchange provisions in force at the time of such acquisition may–
(a)	transfer such property by way of gift to a person resident in India who is eligible to acquire such property under these rules or by way of sale;
(b)	create a charge on such property in accordance with the Act or the rules or regulations made thereunder or directions issued by the Reserve Bank from time to time.
<b>(5)</b>	The holding of any investment in immovable property or transfer thereof in any manner shall not be permitted if the initial investment in immovable property was not permitted under the Foreign Exchange Management Act.

#### LESSON ROUND-UP

- Overseas investments by persons resident in India enhance the scale and scope of business operations of Indian entrepreneurs by providing global opportunities for growth. Such ventures through easier access to technology, research and development, a wider global market and reduced cost of capital along with other benefits increase the competitiveness of Indian entities and boost their brand value.
- Foreign entity means an entity formed or registered or incorporated outside India, including in International Financial Services Centre (IFSC) in India, that has limited liability.
- Overseas Direct Investment (ODI) means (i) acquisition of any unlisted equity capital or subscription as a part of the Memorandum of Association of a foreign entity, or (ii) investment in 10% or more of the paid-up equity capital of a listed foreign entity, or (iii) investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity.
- A person resident in India may make or transfer any investment or financial commitment outside India under general permission/automatic route subject to the provisions contained in the Foreign Exchange Management (Overseas Investment) Rules, 2022 and Foreign Exchange Management (Overseas Investment) Regulations, 2022.
- Financial commitment by an Indian entity, exceeding USD 1 (one) billion (or its equivalent) in a financial year shall require prior approval of the Reserve Bank even when the total financial commitment of the Indian entity is within the eligible limit under the automatic route.
- Any Overseas Direct Investment in start-ups shall not be made out of funds borrowed from others. The AD bank, before facilitating the transaction, shall obtain necessary certificate in this regard from the statutory auditors/chartered accountant of the Indian entity/investor.
- All reporting with respect to overseas investment by a person resident in India shall be made through the designated AD bank in the manner provided in this regulation and in the format provided by the Reserve Bank.





### KEY CONCEPTS

■ External Commercial Borrowings (ECB) ■ All-in-Cost ■ ECB liability-Equity Ratio ■ Approval Route ■ Automatic Route ■ IOSCO Compliant Country

### Learning Objectives

#### To understand the:

- External Commercial Borrowings (ECB)
- Borrowing or Lending in Foreign Exchange
- Conversion of ECB into Equity
- Authorized Persons
- Security for raising ECB
- ECB facility for Startups

### Lesson Outline

- Introduction
- Available Routes for raising ECB
- Minimum Average Maturity Period
- Eligible Borrowers
- Recognised Lenders/Investors
- End-use Prescriptions
- Conversion of ECB into Equity
- Reporting Requirements
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- Foreign Exchange Management Act, 1999
- Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 as amended from time to time; and
- Foreign Exchange Management (Guarantees) Regulations, 2000 as amended from time to time.

## INTRODUCTION

The ECB Policy framework has been incrementally calibrated over time taking into account the emerging financing needs of Indian companies, especially critical requirements of infrastructure sector entities, macroeconomic developments and to promote ease of doing business; by permitting more resident entities as eligible borrowers, recognizing more entities as lenders, expanding end-uses and rationalizing the all-in-cost and minimum maturity requirements for such borrowings. The recent changes that have been brought-out in the ECB policy are a part of this continued effort and are likely to help wider set of eligible borrowers i.e. corporates and other entities to avail ECBs to meet their capital needs with the Uniform Minimum Average Maturity Period requirements, uniform all-in-cost ceilings and small negative end-use list.

***External Commercial Borrowings are commercial loans raised by eligible resident entities from recognised non- resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end- uses, maximum all-in-cost ceiling, etc.***

Transactions on account of External Commercial Borrowings (ECB) are governed by Section 6(3) (d) of the Foreign Exchange Management Act, 1999 (FEMA). Various provisions in respect of borrowings from overseas are included in the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2018 and the Foreign Exchange Management (Guarantees) Regulations, 2000 as amended from time to time framed under FEMA. Within the contours of the Regulations, Reserve Bank of India also issues directions to Authorised Persons.

## ECB Framework

The framework for raising loans through ECB comprises the following two options:

<b>Parameters</b>	<b>Foreign Currency denominated ECB</b>	<b>Indian Rupee denominated ECB</b>
<b>Currency of Borrowing</b>	<b>Any freely convertible Foreign Currency</b>	<b>Indian Rupee (INR)</b>
<b>Forms of ECB</b>	Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; Foreign Currency Convertible Bonds; Foreign Currency Exchangeable Bonds and Financial Lease.  It may be noted that Foreign Currency Convertible Bonds (FCCBs) refers to foreign currency denominated instruments which are issued in accordance with the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt	Loans including bank loans; floating/ fixed rate notes/bonds/ debentures/ preference shares (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; and Financial Lease. Also, plain vanilla Rupee denominated bonds issued overseas, which can be either placed privately or listed on exchanges as per host country regulations.



	Mechanism) Scheme, 1993, as amended from time to time. Issuance of FCCBs shall also conform to other applicable regulations. Further, FCCBs should be without any warrants attached.	
	Further, Foreign Currency Exchangeable Bonds (FCEBs) refers to foreign currency denominated instruments which are issued in accordance with the Issue of Foreign Currency Exchangeable Bonds Scheme, 2008, as amended from time to time. FCEBs are exchangeable into equity share of another company, to be called the Offered Company, in any manner, either wholly, or partly or on the basis of any equity related warrants attached to debt instruments. Issuance of FCEBs shall also conform to other applicable regulations.	
<b>Eligible Borrowers</b>	All entities eligible to receive Foreign Direct Investment (FDI). Further, the following entities are also eligible to raise ECB: <ul style="list-style-type: none"> <li>i. Port Trusts;</li> <li>ii. Units in SEZ;</li> <li>iii. SIDBI; and</li> <li>iv. EXIM Bank of India.</li> </ul>	<ul style="list-style-type: none"> <li>(a) All entities eligible to raise Foreign Currency ECB; and</li> <li>(b) Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/cooperatives and Non-Government Organisations.</li> </ul>

### Recognised Lenders

The lender should be resident of Financial Action Task Force (FATF) or International Organisation of Securities Commission's IOSCO compliant country, including on transfer of ECB. However,

- (a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders;
- (b) Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/ debentures listed abroad; and
- (c) Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for Foreign Currency ECB (except FCCBs and FCEBs). Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.

### Minimum Average Maturity Period (MAMP)

Minimum Average Maturity Period (MAMP) for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity.

However, for the specific categories mentioned below, the Minimum Average Maturity Period (MAMP) are:

<b>Category</b>	<b>Minimum Average Maturity Period (MAMP)</b>
(A) ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.	1 year
(B) ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans. It may be noted that: (i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks. (ii) the prescribed MAMP will have to be strictly complied with under all circumstances.	5 years
(C) ECB raised for (i) Working capital purposes or general corporate purposes. (ii) on-lending by NBFCs for working capital purposes or general corporate purposes. It may be noted that: (a) ECB cannot be raised from foreign branches / subsidiaries of Indian banks. (b) the prescribed MAMP will have to be strictly complied with under all circumstances.	10 years
(D) ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure. (ii) on-lending by NBFCs for the same purpose. It may be noted that: (a) ECB cannot be raised from foreign branches / subsidiaries of Indian banks. (b) the prescribed MAMP will have to be strictly complied with under all circumstances.	7 years
(E) ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure. (ii) on-lending by NBFCs for the same purpose.	10 years
<i>It may be noted that for the categories mentioned at (B) to (E) –</i> (i) <i>ECB cannot be raised from foreign branches / subsidiaries of Indian banks.</i> (ii) <i>the prescribed MAMP will have to be strictly complied with under all circumstances.</i>	

### End-uses (Negative list)

The negative list, for which the ECB proceeds cannot be utilised, would include the following:

- Real estate activities.
- Investment in capital market.
- Equity investment.

- Working capital purposes, **except** ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans **and except** ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by Non-Banking Financial Companies (NBFCs) for working capital purposes or general corporate purposes.
- General corporate purposes, **except** in case of ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans **and except** ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes.
- Repayment of Rupee loans, **except** in case of ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose **and except** ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose.
- On-lending to entities for the above activities, **except** in case of ECB raised by NBFCs for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes **and** (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose **and except** ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose.

### Exchange rate

Change of currency of Foreign Currency ECB into Indian Rupee ECB can be at the exchange rate prevailing on the date of the agreement for such change between the parties concerned or at an exchange rate, which is less than the rate prevailing on the date of the agreement, if consented to by the ECB lender.

For conversion to Rupee, the exchange rate shall be the rate prevailing on the date of settlement.

### Limit and Leverage

All eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under the automatic route. Further, in case of Foreign Currency denominated ECB raised from direct foreign equity holder, ECB liability- equity ratio for ECB raised under the automatic route cannot exceed 7:1.

However, this ratio will not be applicable if the outstanding amount of all ECB, including the proposed one, is up to USD 5 million or its equivalent. Further, the borrowing entities will also be governed by the guidelines on debt equity ratio, issued, if any, by the sectoral or prudential regulator concerned.

### Issuance of Guarantee, etc. by Indian banks and Financial Institutions

Issuance of any type of guarantee by Indian banks, All India Financial Institutions and NBFCs relating to ECB is not permitted.

Further, financial intermediaries (viz., Indian banks, All India Financial Institutions, or Non-Banking Financial Companies) shall not invest in Foreign Currency Convertible Bonds/ Foreign Currency Exchangeable Bonds in any manner whatsoever.

### Parking of ECB proceeds

ECB proceeds are permitted to be parked abroad as well as domestically in the manner given below:

*Parking of ECB proceeds abroad:* ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilisation. Till utilisation, these funds can be invested in the following liquid assets (a) deposits

or Certificate of Deposit or other products offered by banks rated not less than AA (-) by Standard and Poor/ Fitch IBCA or Aa3 by Moody's; (b) Treasury bills and other monetary instruments of one-year maturity having minimum rating as indicated above and (c) deposits with foreign branches/subsidiaries of Indian banks abroad.

*Parking of ECB proceeds domestically:* ECB proceeds meant for Rupee expenditure should be repatriated immediately for credit to their Rupee accounts with AD Category I banks in India. ECB borrowers are also allowed to park ECB proceeds in term deposits with AD Category I banks in India for a maximum period of 12 months cumulatively. These term deposits should be kept in unencumbered position.

### Procedure of raising ECB

Serial Number	Activities
1	All ECB can be raised under the automatic route if they conform to the parameters prescribed under this framework.
2	For approval route cases, the borrowers may approach the RBI with an application in prescribed format (Form ECB) for examination through their AD Category I bank.  Such cases shall be considered keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals.
3	ECB proposals received in the Reserve Bank above certain threshold limit (refixed from time to time) would be placed before the Empowered Committee set up by the Reserve Bank.
4	The Empowered Committee will have external as well as internal members and the Reserve Bank will take a final decision in the cases taking into account recommendation of the Empowered Committee.
5	Entities desirous to raise ECB under the automatic route may approach an AD Category I bank with their proposal along with duly filled in Form ECB.

#### ***Whose Responsibility is it to Ensure Compliance with ECB Guidelines?***

***The primary responsibility for ensuring that the borrowing is in compliance with the applicable ECB guidelines is that of the borrower concerned. Structures which bypass/ circumvent ECB guidelines in any manner and / or raising borrowings in any other manner which is not permitted / disguising borrowing under the wrap of other kind of transactions and / or contravening provisions of Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2018 would also invite penal action under FEMA.***

### Reporting Requirements

Borrowings under ECB Framework are subject to following reporting requirements apart from any other specific reporting required under the framework:

**Loan Registration Number (LRN):** Any draw-down in respect of an ECB should happen only after obtaining the LRN from the Reserve Bank. To obtain the LRN, borrowers are required to submit duly certified Form ECB, which also contains terms and conditions of the ECB, in duplicate to the designated AD Category I bank. In turn, the AD Category I bank will forward one copy to the Director, Reserve Bank of India, Department of Statistics and Information Management, External Commercial Borrowings Division, Bandra-Kurla Complex, Mumbai – 400 051. Copies of loan agreement for raising ECB are not required to be submitted to the Reserve Bank.

**Changes in terms and conditions of ECB:** Changes in ECB parameters in consonance with the ECB norms, including reduced repayment by mutual agreement between the lender and borrower, should be reported to the Department of Statistics and Information Management through revised Form ECB at the earliest, in any case not later than 7 days from the changes effected. While submitting revised Form ECB the changes should be specifically mentioned in the communication.

**Monthly Reporting of actual transactions:** The borrowers are required to report actual ECB transactions through Form ECB 2 Return through the AD Category I bank on monthly basis so as to reach Department of Statistics and Information Management within seven working days from the close of month to which it relates. Changes, if any, in ECB parameters should also be incorporated in Form ECB 2 Return.

**Late Submission Fee (LSF) for delay in reporting:** Any borrower, who is otherwise in compliance of ECB guidelines, can regularise the delay in reporting of drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns, by payment of prescribed late submission fees.

**Standard Operating Procedure (SOP) for Untraceable Entities:** The following SOP has to be followed by designated AD Category-I banks in case of untraceable entities who are found to be in contravention of reporting provisions for ECB by failing to submit prescribed return(s) under the ECB framework, either physically or electronically, for past eight quarters or more.

Any borrower who has raised ECB will be treated as 'untraceable entity', if entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/responsive/reply in negative over email/letters/phone for a period of not less than two quarters with documented communication/ reminders numbering 6 or more and it fulfills both of the following conditions:

- Entity not found to be operative at the registered office address as per records available with the AD Bank or not found to be operative during the visit by the officials of the AD Bank or any other agencies authorised by the AD bank for the purpose;
- Entities have not submitted Statutory Auditor's Certificate for last two years or more;

The followings actions are to be undertaken in respect of 'untraceable entities':

- File Revised Form ECB, if required, and last Form ECB 2 Return without certification from company with 'UNTRACEABLE ENTITY' written in bold on top. The outstanding amount will be treated as written-off from external debt liability of the country but may be retained by the lender in its books for recovery through judicial/ non-judicial means;
- No fresh ECB application by the entity should be examined/processed by the AD bank;
- Directorate of Enforcement should be informed whenever any entity is designated 'UNTRACEABLE ENTITY'; and
- No inward remittance or debt servicing will be permitted under auto route.

### Conversion of ECB into Equity

Conversion of ECB, including those which are matured but unpaid, into equity is permitted subject to the following conditions:

- i. The activity of the borrowing company is covered under the automatic route for Foreign Direct Investment or Government approval is received, wherever applicable, for foreign equity participation as per extant Foreign Direct Investment policy.

- ii. The conversion, which should be with the lender's consent and without any additional cost, should not result in contravention of eligibility and breach of applicable sector cap on the foreign equity holding under Foreign Direct Investment policy;
- iii. Applicable pricing guidelines for shares are complied with;
- iv. In case of partial or full conversion of ECB into equity, the reporting to the Reserve Bank will be as under:
  - For partial conversion, the converted portion is to be reported in Form FC-GPR prescribed for reporting of FDI flows, while monthly reporting to DSIM in Form ECB 2 Return will be with suitable remarks, viz., "ECB partially converted to equity".
  - For full conversion, the entire portion is to be reported in Form FC-GPR, while reporting to DSIM in Form ECB 2 Return should be done with remarks "ECB fully converted to equity". Subsequent filing of Form ECB 2 Return is not required.
  - For conversion of ECB into equity in phases, reporting through Form FC-GPR and Form ECB 2 Return will also be in phases.
- v. If the borrower concerned has availed of other credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, the applicable prudential guidelines issued by the Department of Banking Regulation of Reserve Bank, including guidelines on restructuring are complied with;
- vi. Consent of other lenders, if any, to the same borrower is available or atleast information regarding conversions is exchanged with other lenders of the borrower;
- vii. For conversion of ECB dues into equity, the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion or any lesser rate can be applied with a mutual agreement with the ECB lender. It may be noted that the fair value of the equity shares to be issued shall be worked out with reference to the date of conversion only.

### ECB facility for Oil Marketing Companies

Public Sector Oil Marketing Companies (OMCs) can raise ECB for working capital purposes with minimum average maturity period of 3 years from all recognised lenders under the automatic route without mandatory hedging and individual limit requirements. The overall ceiling for such ECB shall be USD 10 billion or equivalent. However, OMCs should have a Board approved forex mark to market procedure and prudent risk management policy, for such ECB. All other provisions under the ECB framework will be applicable to such ECB.

### ECB facility for Startups

AD Category-I banks are permitted to allow Startups to raise ECB under the automatic route as per the following framework:

- **Eligibility:** An entity recognised as a Startup by the Central Government as on date of raising ECB.
- **Maturity:** Minimum average maturity period will be 3 years.
- **Recognised lender:** Lender / investor shall be a resident of a FATF compliant country. However, foreign branches/subsidiaries of Indian banks and overseas entity in which Indian entity has made overseas direct investment as per the extant Overseas Direct Investment Policy will not be considered as recognised lenders under this framework.

- **Forms:** The borrowing can be in form of loans or non-convertible, optionally convertible or partially convertible preference shares.
- **Currency:** The borrowing should be denominated in any freely convertible currency or in Indian Rupees (INR) or a combination thereof. In case of borrowing in INR, the non-resident lender, should mobilise INR through swaps/outright sale undertaken through an AD Category-I bank in India.
- **Amount:** The borrowing per Startup will be limited to USD 3 million or equivalent per financial year either in INR or any convertible foreign currency or a combination of both.
- **All-in-cost:** Shall be mutually agreed between the borrower and the lender.
- **End uses:** For any expenditure in connection with the business of the borrower.
- **Conversion into equity:** Conversion into equity is freely permitted subject to Regulations applicable for foreign investment in Startups.
- **Security:** The choice of security to be provided to the lender is left to the borrowing entity. Security can be in the nature of movable, immovable, intangible assets (including patents, intellectual property rights), financial securities, etc. and shall comply with foreign direct investment / foreign portfolio investment / or any other norms applicable for foreign lenders / entities holding such securities. Further, issuance of corporate or personal guarantee is allowed. Guarantee issued by a non-resident(s) is allowed only if such parties qualify as lender under ECB for Startups. However, issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by Indian banks, all India Financial Institutions and NBFCs is not permitted.
- **Hedging:** The overseas lender, in case of INR denominated ECB, will be eligible to hedge its INR exposure through permitted derivative products with AD Category – I banks in India. The lender can also access the domestic market through branches/ subsidiaries of Indian banks abroad or branches of foreign bank with Indian presence on a back to back basis. Startups raising ECB in foreign currency, whether having natural hedge or not, are exposed to currency risk due to exchange rate movements and hence are advised to ensure that they have an appropriate risk management policy to manage potential risk arising out of ECB.
- **Conversion rate:** In case of borrowing in INR, the foreign currency - INR conversion will be at the market rate as on the date of agreement.
- **Other Provisions:** Other provisions like parking of ECB proceeds, reporting arrangements, powers delegated to AD banks, borrowing by entities under investigation, conversion of ECB into equity will be as included in the ECB framework.

### Borrowing by Entities under Investigation

All entities against which investigation / adjudication / appeal by the law enforcing agencies for violation of any of the provisions of the Regulations under FEMA pending, may raise ECB as per the applicable norms, if they are otherwise eligible, notwithstanding the pending investigations / adjudications / appeals, without prejudice to the outcome of such investigations / adjudications / appeals. The borrowing entity shall inform about pendency of such investigation / adjudication / appeal to the AD Category-I bank / RBI as the case may be. Accordingly, in case of all applications where the borrowing entity has indicated about the pending investigations / adjudications/ appeals, the AD Category I Banks / Reserve Bank while approving the proposal shall intimate the agencies concerned by endorsing a copy of the approval letter.

**LESSON ROUND-UP**

- Foreign Exchange Management (Guarantees) Regulations, 2000 as amended from time to time.
- External Commercial Borrowings are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc.
- External Commercial Borrowings Framework enables permitted resident entities to borrow from recognized non-resident entities.
- For conversion of ECB dues into equity, the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion or any lesser rate can be applied with a mutual agreement with the ECB lender.
- Under External Commercial Borrowings Framework, borrowers may approach the RBI with an application in prescribed format Form ECB for examination through their AD Category I bank. Such cases shall be considered keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals.
- Borrowings under ECB Framework are subject to reporting requirements Loan Registration Number, Changes in terms and conditions of ECB and Reporting of actual transactions.

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation.)*

1. What are the framework for raising ECB?
2. What precautions have to be taken before raising loan from overseas?
3. Whose responsibility is to ensure compliance with ECB guidelines?
4. Discuss the eligibility for raising ECB.
5. Enumerate the reporting requirements in respect of ECB.

**LIST OF FURTHER READINGS**

- Bare Act - Foreign Exchange Management Act, 1999 (FEMA), Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 and other rules and regulations made thereunder.
- Foreign Exchange Management Manual – Snow White

**OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)**

- <https://www.rbi.org.in/scripts/Fema.aspx>
- [https://rbi.org.in/Scripts/BS\\_FemaNotifications.aspx?id=157](https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?id=157)



### KEY CONCEPTS

■ Foreign Trade Policy ■ Amnesty Scheme ■ Status Holder ■ E-Commerce Export Hubs ■ SCOMET ■ Deemed Exports ■ National Committee on Trade Facilitation ■ Duty Exemption/ Remission Scheme ■ Duty Free Import Authorisation Scheme (DFIA)

### Learning Objectives

#### To understand:

- India's Foreign Trade Policy (FTP), 2023
- Amnesty Scheme
- Export promotion
- Duty Exemption / Remission Schemes
- Deemed Export

### Lesson Outline

- Introduction
- Key Highlights of FTP 2023
- Legal Framework and Trade Facilitation
- General Provisions Regarding Imports and Exports
- Developing Districts as Export Hubs
- Duty Exemption / Remission Schemes
- Export Promotion Capital Goods (EPCG) Scheme
- Export Oriented Units (EOUs), Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs)
- Deemed Exports
- Quality Complaints and Trade Disputes
- Promoting Cross Border Trade in Digital Economy
- SCOMET: Special Chemicals, Organisms, Materials, Equipment and Technologies
- Lesson Round- Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites/ Video Links)

## INTRODUCTION

Foreign Trade Policy (FTP) 2023 is a policy document which is based on continuity of time-tested schemes facilitating exports as well as a document which is nimble and responsive to the requirements of trade. It is based on principles of 'trust' and 'partnership' with exporters. In the FTP 2015-20, changes were done subsequent to the initial release even without announcement of a new FTP responding dynamically to the emerging situations. Hereafter, the revisions of the FTP shall be done as and when required. Incorporating feedback from Trade and Industry would also be continuous to streamline processes and update FTP, from time to time.

The FTP 2023 aims at process re-engineering and automation to facilitate ease of doing business for exporters. It also focuses on emerging areas like dual use high end technology items under SCOMET, facilitating e-commerce export, collaborating with States and Districts for export promotion. The New FTP is introducing a one-time Amnesty Scheme for exporters to close the old pending authorizations and start afresh. The FTP 2023 encourages recognition of new towns through "Towns of Export Excellence Scheme" and exporters through "Status Holder Scheme". The FTP 2023 is facilitating exports by streamlining the popular Advance Authorization and EPCG schemes, and enabling merchanting trade from India.

The Key Approach to the policy is based on these 4 pillars: (i) Incentive to Remission, (ii) Export promotion through collaboration - Exporters, States, Districts, Indian Missions, (iii) Ease of doing business, reduction in transaction cost and e-initiatives and (iv) Emerging Areas – E-Commerce Developing Districts as Export Hubs and streamlining SCOMET policy.

## KEY HIGHLIGHTS OF FTP 2023

### Process Re-Engineering and Automation

Greater faith is being reposed on exporters through automated IT systems with risk management system for various approvals in the new FTP. The policy emphasizes export promotion and development, moving away from an incentive regime to a regime which is facilitating, based on technology interface and principles of collaboration. Considering the effectiveness of some of the ongoing schemes like Advance Authorisation, EPCG etc. under FTP 2015-20, they will be continued along with substantial process re-engineering and technology enablement for facilitating the exporters. FTP 2023 codifies implementation mechanisms in a paperless, online environment, building on earlier 'ease of doing business' initiatives. Reduction in fee structures and IT-based schemes will make it easier for MSMEs and others to access export benefits.

Duty exemption schemes for export production will now be implemented through Regional Offices in a rule-based IT system environment, eliminating the need for manual interface. During the FY23-24, all processes under the Advance and EPCG Schemes, including issue, re-validation, and EO extension, will be covered in a phased manner. Cases identified under risk management framework will be scrutinized manually, while majority of the applicants are expected to be covered under the 'automatic' route initially.

### Towns of Export Excellence

Four new towns, namely Faridabad, Mirzapur, Moradabad, and Varanasi, have been designated as Towns of Export Excellence (TEE) in addition to the existing 39 towns. The TEEs will have priority access to export promotion funds under the MAI scheme and will be able to avail Common Service Provider (CSP) benefits for export fulfillment under the EPCG Scheme. This addition is expected to boost the exports of handlooms, handicrafts, and carpets.

### Recognition of Exporters

Exporter firms recognized with 'status' based on export performance will now be partners in capacity-building initiatives on a best-endeavor basis. Similar to the 'each one teach one' initiative, 2-star and above status

holders would be encouraged to provide trade-related training based on a model curriculum to interested individuals. This will help India build a skilled manpower pool capable of servicing a \$5 Trillion economy before 2030. Status recognition norms have been re-calibrated to enable more exporting firms to achieve 4 and 5-star ratings, leading to better branding opportunities in export markets.

### Promoting export from the districts

The FTP aims at building partnerships with State governments and taking forward the Districts as Export Hubs (DEH) initiative to promote exports at the district level and accelerate the development of grassroots trade ecosystem. Efforts to identify export worthy products & services and resolve concerns at the district level will be made through an institutional mechanism – State Export Promotion Committee and District Export Promotion Committee at the State and District level, respectively. District specific export action plans to be prepared for each district outlining the district specific strategy to promote export of identified products and services.

### Streamlining SCOMET Policy

India is placing more emphasis on the “export control” regime as its integration with export control regime countries strengthens. There is a wider outreach and understanding of SCOMET (Special Chemicals, Organisms, Materials, Equipment and Technologies) among stakeholders, and the policy regime is being made more robust to implement international treaties and agreements entered into by India. A robust export control system in India would provide access of dual-use High end goods and technologies to Indian exporters while facilitating exports of controlled items/technologies under SCOMET from India.

### Facilitating E-Commerce Exports

E-commerce exports are a promising category that requires distinct policy interventions from traditional offline trade. Various estimates suggest e-commerce export potential in the range of \$200 to \$300 billion by 2030. FTP 2023 outlines the intent and roadmap for establishing e-commerce hubs and related elements such as payment reconciliation, book-keeping, returns policy, and export entitlements. As a starting point, the consignment wise cap on E-Commerce exports through courier has been raised from ₹5Lakh to ₹10 Lakh in the FTP 2023. Depending on the feedback of exporters, this cap will be further revised or eventually removed. Integration of Courier and Postal exports with ICEGATE will enable exporters to claim benefits under FTP. The comprehensive e-commerce policy addressing the export/import ecosystem would be elaborated soon, based on the recommendations of the working committee on e-commerce exports and inter-ministerial deliberations. Extensive outreach and training activities will be taken up to build capacity of artisans, weavers, garment manufacturers, gems and jewellery designers to onboard them on E-Commerce platforms and facilitate higher exports.

### Facilitation under Export Promotion of Capital Goods (EPCG) Scheme

The EPCG Scheme, which allows import of capital goods at zero Customs duty for export production, is being further rationalized. Some key changes being added are:

- Prime Minister Mega Integrated Textile Region and Apparel Parks (PM MITRA) scheme has been added as an additional scheme eligible to claim benefits under CSP(Common Service Provider) Scheme of Export Promotion capital Goods Scheme(EPCG).
- Dairy sector to be exempted from maintaining Average Export Obligation – to support dairy sector to upgrade the technology.
- Battery Electric Vehicles (BEV) of all types, Vertical Farming equipment, Wastewater Treatment and Recycling, Rainwater harvesting system and Rainwater Filters, and Green Hydrogen are added to

Green Technology products – will now be eligible for reduced Export Obligation requirement under EPCG Scheme.

### Facilitation under Advance authorization Scheme

Advance authorisation Scheme accessed by DTA units provides duty-free import of raw materials for manufacturing export items and is placed at a similar footing to EOU and SEZ Scheme. However, the DTA unit has the flexibility to work both for domestic as well as export production. Based on interactions with industry and Export Promotion councils, certain facilitation provisions have been added in the present FTP such as-

- Special Advance Authorisation Scheme extended to export of Apparel and Clothing sector under para 4.07 of HBP on self-declaration basis to facilitate prompt execution of export orders – Norms would be fixed within fixed timeframe.
- Benefits of Self-Ratification Scheme for fixation of Input-Output Norms extended to 2 star and above status holders in addition to Authorised Economic Operators at present.

### Merchanting trade

To develop India into a merchanting trade hub, the FTP 2023 has introduced provisions for merchanting trade. Merchanting trade of restricted and prohibited items under export policy would now be possible. Merchanting trade involves shipment of goods from one foreign country to another foreign country without touching Indian ports, involving an Indian intermediary. This will be subject to compliance with RBI guidelines, and won't be applicable for goods/items classified in the CITES and SCOMET list. In course of time, this will allow Indian entrepreneurs to convert certain places like GIFT city etc. into major merchanting hubs as seen in places like Dubai, Singapore and Hong Kong.

### Amnesty Scheme

Finally, the government is strongly committed to reducing litigation and fostering trust-based relationships to help alleviate the issues faced by exporters. In line with “*Vivaad se Vishwaas*” initiative, which sought to settle tax disputes amicably, the government is introducing a special one-time Amnesty Scheme under the FTP 2023 to address default on Export Obligations. This scheme is intended to provide relief to exporters who have been unable to meet their obligations under EPCG and Advance Authorizations, and who are burdened by high duty and interest costs associated with pending cases. All pending cases of the default in meeting Export Obligation (EO) of authorizations mentioned can be regularized on payment of all customs duties that were exempted in proportion to unfulfilled Export Obligation. The interest payable is capped at 100% of these exempted duties under this scheme. However, no interest is payable on the portion of Additional Customs Duty and Special Additional Customs Duty and this is likely to provide relief to exporters as interest burden will come down substantially. It is hoped that this amnesty will give these exporters a fresh start and an opportunity to come into compliance.

## LEGAL FRAMEWORK AND TRADE FACILITATION

### Legal Basis of Foreign Trade Policy

The Foreign Trade Policy (FTP) 2023 is notified by Central Government, in exercise of powers conferred under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 22 of 1992) [FT (D&R) Act], as amended.

### Duration of FTP

The Foreign Trade Policy (FTP) 2023 incorporating provisions relating to export and import of goods and services, shall come into force with effect from 1<sup>st</sup> April, 2023 and shall continue to be in operation unless otherwise

specified or amended. All exports and imports made up to 31.03.2023 shall, accordingly, be governed by the relevant FTP, unless otherwise specified.

### **Amendment to FTP**

Central Government, in exercise of powers conferred by Section 3 and Section 5 of FT (D&R) Act, 1992, as amended from time to time, reserves the right to make any amendment to the FTP, by means of notification, in public interest.

### **Hand Book of Procedures (HBP) and Appendices & Aayat Niryat Forms (ANF)**

Director General of Foreign Trade (DGFT) may, by means of a Public Notice, notify Hand Book of Procedures, including Appendices and Aayat Niryat Forms or amendment thereto, if any, laying down the procedure to be followed by an exporter or importer or by any Licensing/Regional Authority or by any other authority for purposes of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and provisions of FTP.

It may be noted that-

“Importer” means a person who imports or intends to import and holds an IEC number, unless otherwise specifically exempted.

### **Specific provision to prevail over the general**

Where a specific provision is spelt out in the FTP/Hand Book of Procedures (HBP), the same shall prevail over the general provision.

### **Transitional Arrangements**

- (a) Any License/ Authorisation/ Certificate/ Scrip/ instrument bestowing financial or fiscal benefit issued before commencement of FTP 2023 shall continue to be valid for the purpose and duration for which it was issued, unless otherwise stipulated.
- (b) Item wise Import/Export Policy is delineated in the ITC (HS) Schedule I and Schedule II respectively. The importability/ exportability of a particular item is governed by the policy as on the date of import/ export. The date of import/ export is defined in para 2.17 of HBP 2023. Bill of Lading and Shipping Bill are the key documents for deciding the date of import and export respectively. In case of change of policy from ‘free’ to ‘restricted/prohibited/state trading’ or ‘otherwise regulated’, the import/export already made before the date of such regulation/restriction will not be affected. However, the import through High Sea sales will not be covered under this facility. Further, the import/export on or after the date of such regulation/restriction will be allowed for importer/ exporter who has a commitment through Irrevocable Commercial Letter of Credit (ICLC) before the date of imposition of such restriction/ regulation and shall be limited to the balance quantity, value and period available in the ICLC. For operational listing of such ICLC, the applicant shall have to register the ICLC with jurisdictional RA against computerized receipt within 15 days of imposition of any such restriction/ regulation. Whenever, Government brings out a policy change of a particular item, the change will be applicable prospectively (from the date of Notification) unless otherwise provided for.

It may be noted that -

“Free” as appearing in context of import/export policy for items means goods which do not need any ‘Authorisation’/ License or permission for being imported into the country or exported out.

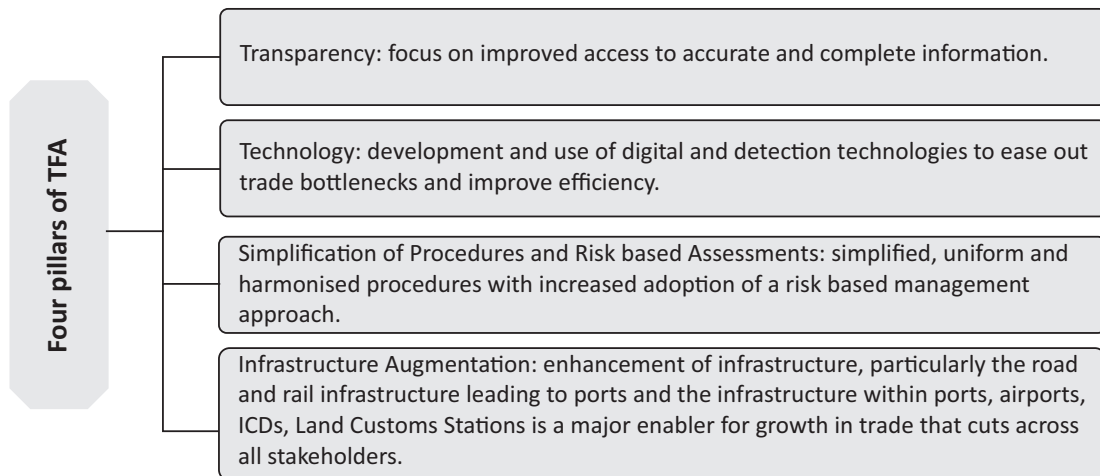
ITC (HS) refers to Indian Trade Classification (Harmonized System) at 8 digits.

“Authorisation” means permission as included in Section 2(g) of the Act to import or export as per provisions of FTP.

## TRADE FACILITATION AND EASE OF DOING BUSINESS

### National Committee on Trade Facilitation (NCTF)

India has ratified the World Trade Organization’s Trade Facilitation Agreement (TFA) in April 2016. To facilitate coordination and implementation of the TFA provisions, an inter-ministerial body i.e. National Committee on Trade Facilitation (NCTF) has been constituted.



National Trade Facilitation Action Plan aims to achieve: -

- Improvement in Ease of Doing Business through reduction in transaction cost and time
- Reduction in cargo release time
- A paperless regulatory environment
- A transparent and predictable legal regime
- Improved investment climate through better infrastructure

### DGFT as a facilitator of exports/ imports

DGFT has a commitment to function as a facilitator of exports and imports. Focus is on good governance, which depends on efficient, transparent and accountable delivery systems. In order to facilitate international trade, DGFT consults various Export Promotion Councils as well as Trade and Industry bodies from time to time.

### Free passage of Export Consignment

Consignments of items meant for exports shall not be withheld/ delayed for any reason by any agency of Central/ State Government. In case of any doubt, authorities concerned may ask for an undertaking from exporter and release such consignment.

### No seizure of export related Stock

No seizure shall be made by any agency so as to disrupt manufacturing activity and delivery schedule of exports. In exceptional cases, concerned agency may seize the stock on the basis of prima facie evidence of serious irregularity. However, such seizure should be lifted within 7 days unless the irregularities are substantiated.

### **Export of perishable agricultural Products**

To reduce transaction and handling costs, a single window system to facilitate export of perishable agricultural produce is being facilitated through Agricultural and Processed Food Products Export Development Authority (APEDA). The detailed procedure is at Appendix 1C.

### **Niryat Bandhu - Hand Holding Scheme for new export/ import entrepreneurs**

DGFT is implementing the Niryat Bandhu Scheme for mentoring new and potential exporter on the intricacies of foreign trade through counseling, training and outreach programmes including the 'Districts as Export Hubs' initiative with 'industry partners', 'knowledge partners' and other stakeholders to create vibrant District-Product-Market relevant knowledge ecosystem.

### **DGFT Online Customer Portal**

Export Import related information including Acts, Rules, Policy and Procedures etc. are available online at DGFT portal <https://dgft.gov.in/>.

### **Issue of e-IEC (Electronic-Importer Exporter Code)**

Importer Exporter Code (IEC) is mandatory for export/ import from/to India as detailed in paragraph 2.05 of this Policy. DGFT issues Importer Exporter Code in electronic form (e-IEC). For issuance of e-IEC, application can be made on DGFT website ([https://dgft.gov.in](https://dgft.gov.in/)).

### **Online facility for e-RCMC/RC Related Processes**

DGFT has created a common digital platform for application of issuance, renewal, amendment and related processes pertaining to Registration Cum Membership Certificate (RCMC)/ Registration Certificate (RC) issued by Registering Authorities in electronic form as per Chapter 2 of HBP.

### **Online facility for e-Certificate of Origin (e-CoO)**

DGFT has created a common digital platform for issue of Preferential and Non-Preferential Certificate of Origin (e-CoO) by designated agencies. The CoO Certificates are issued in an online environment without any physical interface ([https://coo.dgft.gov.in](https://coo.dgft.gov.in/)).

A unique number i.e. UDIN (Unique Document Identification Number) and a QR code is endorsed on every e-CoO for validation and authentication by user agencies.

### **Online facility to file Quality Control and Trade Disputes (QCTD)**

DGFT has created a common digital platform for handling Quality Control and Trade Disputes cases as per Chapter 8 of Foreign Trade Policy where all jurisdictional Indian Mission abroad and Regional Authorities of DGFT have been onboarded to work towards amicable resolution of disputes raised by Indian/Foreigner Importer/Exporter in online environment.

### **Electronic record of export proceeds through eBRC & EDPMS**

- (a) e-BRC (Electronic Bank Realisation Certificate) has enabled DGFT to capture details of realisation of export proceeds directly from the Banks through secured electronic mode. This has facilitated the implementation of various export promotion schemes without any physical interface with the stakeholders.
- (b) RBI has also developed a comprehensive IT-based system called Export Data Processing and

Monitoring System (EDPMS) for monitoring of export of goods and software and facilitating AD banks to report various returns through a single platform. RBI EDPMS data available in DGFT IT System can also be used by exporters on DGFT portal.

### IT Initiatives in DGFT

DGFT has undertaken a number of IT Initiatives to enable a paperless, contactless and transparent environment for availing benefits under the export promotion schemes with a view to improve the ease of doing business. The details of these initiatives have been provided in Para 1.04 of Handbook of Procedures.

#### 24 X 7 Helpdesk Facility

A dedicated 24 X 7 Helpdesk facility has been put in place to assist the exporters in filing online applications on the DGFT portal and other matters pertaining to Foreign Trade Policy.

### Trade Data and Statistics

Continuous efforts are being made for better collection, compilation and wider dissemination of Trade Data and Statistics to help the policy makers, researchers, exporters and importers to formulate their trade strategy. The trade statistics for merchandise trade is available at -

- i. Department of Commerce's portal at <https://commerce.gov.in> & data bank available at <https://tradedat.commerce.gov.in/eidb/default.asp>,
- ii. DGCI&S portal at <http://www.dgciskol.gov.in> and
- iii. NIRYAT Portal at <https://niryat.gov.in>.

### Trade Facilitation at Customs

CBIC has undertaken a number of initiatives to facilitate Trade. Some of these are as follows:

- i. 24X7 Customs clearance in 20 sea ports and 17 Airports and extended clearance in ICDs as per the needs of the Trade.
- ii. Single Window in Customs
- iii. E-Sanchit – Enabling Paperless clearance environment
- iv. Pan-India Implementation of Faceless e-Assessment in imports.
- v. TURANT Customs
- vi. Implementation of electronic messages from Document Clearance to Cargo Movement
- vii. Paperless Customs initiatives –Preparation and issuance of electronic documents like e-LEO SB, e-Gatepass/e-OOC etc.,
- viii. Contactless customs initiatives such as Turant Suvidha Kendras (TKSs).
- ix. Release of ICE-DASH–Indian Customs EoDB Monitoring Dashboard
- x. Direct Port Delivery (DPD) on imports and Direct Port Entry (DPE) on exports
- xi. Compliance Information Portal (CIP)
- xii. End to End automated and simplified procedure for Import of certain specified Goods at Concessional Rate of Duty or for specified end use.

For detailed guidelines/procedures visit <https://www.cbic.gov.in/> and <https://icegate.gov.in/>.



### Authorised Economic Operator (AEO) Programme

- a. Based upon WCO's SAFE Framework of Standards, Authorised Economic Operator (AEO) programme' has been developed by Indian Customs to enable business involved in the international trade to reap the following benefits:
  - i. Secure supply chain from point of export to import;
  - ii. (Ability to demonstrate compliance with security standards when contracting to supply overseas importers /exporters;
  - iii. Enhanced border clearance privileges in Mutual Recognition Agreement (MRA) partner countries;
  - iv. Minimal disruption to flow of cargo after a security related disruption;
  - v. Reduction in dwell time and related costs; and
  - vi. Customs advice / assistance if trade faces unexpected issues with Customs of countries with which India have MRA.
- b. The AEO programmes have been implemented by other Customs administrations that give AEO status holders preferential Customs treatment in terms of reduced examination, faster clearances and other benefits. Indian Customs has signed MRA with South Korea, Taiwan, Hong Kong and US Customs to recognize respective AEO Programmes to enable trade to get benefits on reciprocal basis.
- c. As a step further towards trust-based compliance, Indian Customs has introduced the new/revamped Authorised Economic Operator (AEO) Programme wherein extensive benefits, including greater facilitation and self-certification, have been provided to those entities who have demonstrated internal strong control system and compliance with CBIC.
- d. Under the AEO program of Indian Customs, the MSMEs are also covered.

For detailed guidelines/procedures, visit <https://www.aeindia.gov.in/> and <https://www.cbic.gov.in/>.

### Towns of Export Excellence (TEE)

- a. Objective: Development and growth of export production centres. A number of towns have emerged as dynamic industrial clusters contributing handsomely to India's exports. It is necessary to grant recognition to these industrial clusters with a view to maximize their potential and enable them to move up the value chain and also to tap new markets.
- b. Selected towns producing goods of Rs. 750 Crore or more may be notified as TEE based on potential for growth in exports. However, for TEE in Handloom, Handicraft, Agriculture and Fisheries sector, threshold limit would be Rs.150 Crore. The following facilities will be provided to such TEE:
  - i. Recognized associations of units will be provided financial assistance under MAI scheme, on priority basis, for export promotion projects for marketing, capacity building and technological services.
  - ii. Common Service Providers in these areas shall be entitled for Authorisation under EPCG scheme.
- c. Notified Towns (TEE) are listed in Appendix 1B.

### Duty Free Entitlements to Select Sectors

With a view to expand employment opportunities, certain special focus initiatives for Marine Products and Sports Goods & Toys sectors are required. These sectors are being provided the following duty free entitlements (only basic customs duty is exempted) as per the relevant Customs Notifications:



Marine Sector - Duty free import of specified specialized inputs/ chemicals and flavoring oils not exceeding 1% of FOB value of seafood exports during the preceding financial year.



Sports Goods and Toys - Duty free import of specified inputs not exceeding 3% of FOB value of sports goods exports during the preceding financial year.

For details, refer relevant Customs Notifications in this regard.

### Status Holder Certification

- The objective behind certifying certain exporter firms as “Status Holder” is to recognize such exporter firms as business leaders who have excelled in international trade and have successfully contributed to country’s foreign trade. Status Holders are expected to not only contribute towards India’s exports but also provide guidance and handholding to new entrepreneurs.
- All exporters of goods, services and technology having an import-export code (IEC) number, on the date of application, shall be eligible for recognition as a status holder based on export performance. An applicant may be categorized as status holder on achieving the threshold export performance in the current and preceding three financial years as indicated in para 1.26 of Foreign Trade Policy. However, for Gems & Jewelry Sector above export performance threshold during the current and preceding two financial years shall be required. The export performance shall be counted on the basis of FOB of export earnings in freely convertible foreign currencies or in Indian Rupees as per para 2.53 of the FTP.
- For deemed export, FOB value of exports in Indian Rupees shall be converted in USD at the exchange rate notified by CBIC, as applicable on 1st April of each Financial Year.
- For granting status, an export performance would be necessary in all the three preceding financial years (and in all the two preceding financial years for Gems & Jewelry Sector).

### Status Holder Categories

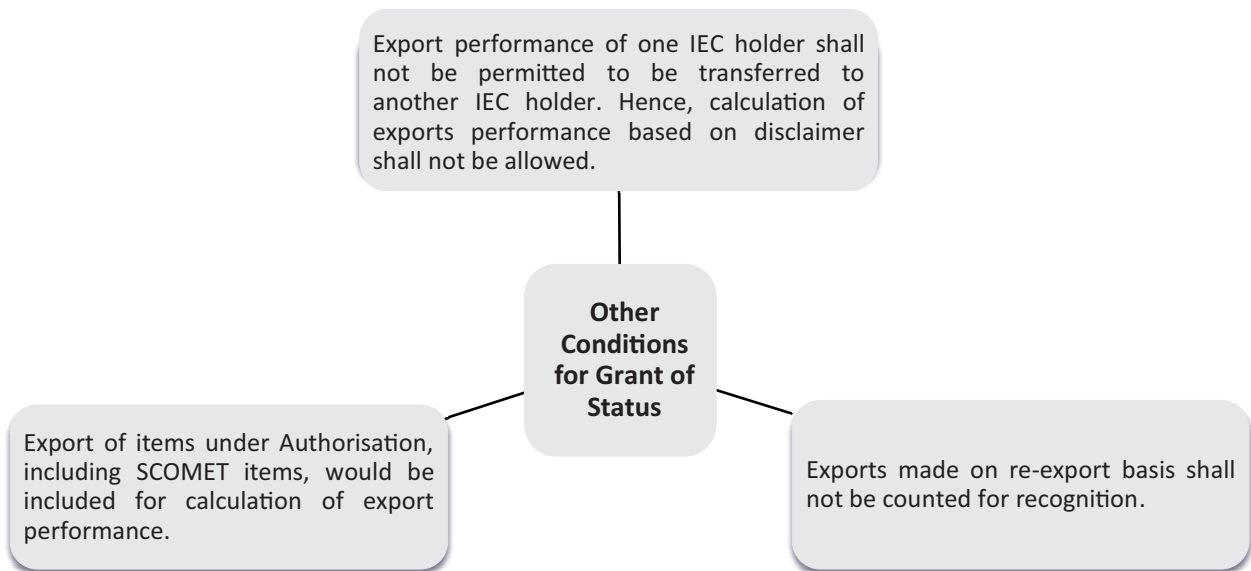
Status Category	Export Performance Threshold In USD Million
One Star Export House	3
Two Star Export House	15
Three Star Export House	50
Four Star Export House	200
Five Star Export House	800

### Grant of Double Weightage

- Double Weightage shall be available for grant of One Star Export House Status category only. Such benefit of double weightage shall not be admissible for grant of status recognition of other categories namely Two Star Export House, Three Star Export House, Four Star export House and Five Star Export

House. The exports by IEC holders under the following categories shall be granted double weightage for calculation of export performance for grant of status:

- i. Micro and Small Enterprises as defined in Micro, Small & Medium Enterprises Development (MSMED) Act, 2006.
  - ii. Manufacturing units having ISO/BIS Certification.
  - iii. Units located in North Eastern States including Sikkim, and Union Territories of Jammu , Kashmir and Ladakh.
  - iv. Export of fruits and vegetables falling under Chapters 7 and 8 of ITC HS.
- b. A merchandise shipment/ service rendered can get double weightage only once in any one of above categories.



### Privileges of Status Holders

A Status Holder shall be eligible for privileges as under:

- a. Authorisation and Customs Clearances for both imports and exports may be granted on self-declaration basis;
- b. Input-Output norms may be fixed on priority within 60 days by the Norms Committee; Special scheme in respect of Input Output Norms to be notified by DGFT from time to time, for specified status holder
- c. Exemption from furnishing of Bank Guarantee for Schemes under FTP, unless specified otherwise anywhere in FTP or HBP;
- d. Exemption from compulsory negotiation of documents through banks. Remittance / receipts, however, would be received through banking channels;
- e. Two star and above Export houses shall be permitted to establish Export Warehouses as per Department of Revenue guidelines.
- f. The status holders would be entitled to preferential treatment and priority in handling of their consignments by the concerned agencies.

- g. Manufacturers who are also status holders (Three Star/Four Star/Five Star) will be enabled to self-certify their manufactured goods (as per their IEM/IL/LOI) as originating from India with a view to qualify for preferential treatment under different preferential trading agreements (PTA), Free Trade Agreements (FTAs), Comprehensive Economic Cooperation Agreements (CECA) and Comprehensive Economic Partnership Agreements (CEPA). Subsequently, the scheme may be extended to remaining Status Holders. Manufacturer exporters who are also Status Holders shall be eligible to self-certify their goods as originating from India as per Para 2.93 (e) of Hand Book of Procedures.
- h. Status holders shall be entitled to export freely exportable items (excluding Gems and Jewelry, Articles of Gold and precious metals) on free of cost basis for export promotion subject to an annual limit of Rupees One Crore or 2% of average annual export realization during preceding three licensing years, whichever is lower. For export of pharma products by pharmaceutical companies, the annual limit would be 2% of the average annual export realisation during preceding three licensing years. In case of supplies of pharmaceutical products, vaccines and lifesaving drugs to health programmes of international agencies such as UN, WHO-PAHO and Government health programmes, the annual limit shall be upto 8% of the average annual export realisation during preceding three licensing years. Such free of cost supplies shall not be entitled to Duty Drawback or any other export incentive under any export promotion scheme.

It may be noted that-

“Manufacture” means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, re-packing, polishing, labeling, Re-conditioning repair, remaking, refurbishing, testing, calibration, re-engineering. Manufacture, for the purpose of FTP, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining.

“Manufacturer Exporter” means a person who exports goods manufactured by him or intends to export such goods.

### Skilling and Mentorship Obligations

- a. To improve the trade ecosystem by enhancing the available skilling opportunities, Status Holders are being made “partners” in providing mentoring and training in international trade. Status Holders will endeavor to provide skill upgradation/ training in international trade as detailed below:

Status	Number of Trainees per year
Two Star Export House	5
Three Star Export House	10
Four Star Export House	20
Five Star Export House	50

- b. A model training program of a minimum duration of 6 weeks would be put up in public domain for guidance.
- c. Detailed eligibility requirements, selection criteria, training curriculum etc will be at the discretion of the Status Holder.

### Inter-Ministerial Committee for MSME Trade related grievances

An inter-ministerial committee to be set up to examine MSME trade related grievances which have policy ramifications. This will expedite decision making with a 'whole of government approach'.

### Citizen's Charter

DGFT has in place a Citizen's Charter, giving time schedules for providing various services to clients. Timeline for disposal of an application is given in Chapter 11 of HBP.

## GENERAL PROVISIONS REGARDING IMPORTS AND EXPORTS

### Objectives

The general provisions governing import and export of goods and services are dealt with in this chapter.

### Policy regarding import /Exports of goods

- a. Exports and Imports shall be 'Free' except when regulated by way of 'Prohibition', 'Restriction' or 'Exclusive trading through State Trading Enterprises (STEs)' as laid down in Indian Trade Classification (Harmonized System) [ITC (HS)] of Exports and Imports. The list of 'Prohibited', 'Restricted', and STE items can be viewed under 'Regulatory Updates' at <https://dgft.gov.in>
- b. Further, there are some items which are 'Free' for import/export, but subject to conditions stipulated in other Acts or in law for the time being in force.

It may be noted that-

"Prohibited" indicates the import/export policy of an item, as appearing in ITC (HS) or elsewhere, whose import or export is not permitted.

"Restricted" is a term indicating the import or export policy of an item, which can be imported into the country or exported outside, only after obtaining an Authorisation from the offices of DGFT.

### Indian Trade Classification (Harmonised System) [ITC (HS)] of Exports and Imports

- a. ITC(HS) is a compilation of codes for all merchandise / goods for export/ import. Goods are classified based on their group or sub-group at 2/4/6/8 digits.
- b. ITC(HS) is aligned at 6-digit level with international Harmonized System goods nomenclature maintained by World Customs Organization (<http://www.wcoomd.org>). However, India maintains national Harmonized System of goods at 8-digit level notified under First Schedule of the Customs Tariff Act, 1975 which may be viewed under 'Regulatory Updates' at <http://dgft.gov.in> and at <https://www.cbic.gov.in>
- c. The import/export policies for all goods are indicated against each item as per its ITC (HS). Schedule 1 of ITC (HS) lays down the Import Policy regime while Schedule II of ITC(HS) lays down the Export Policy regime.
- d. Except where it is clearly specified, Schedule 1 of ITC (HS), Import Policy is for new goods and not for Second Hand goods. For Second Hand goods, the Import Policy regime is given under Para 2.31 of this FTP.

### Compliance of Imports with Domestic Laws

- a. Domestic Laws/ Rules/ Orders/ Regulations/ technical specifications/ environmental/safety and health norms applicable to domestically produced goods shall apply, mutatis mutandis, to imports, unless specifically exempted.

- b. However, goods to be utilized/ consumed in manufacture of export products may be exempted by DGFT from domestic standards/ quality specifications.

### Authority to specify Procedures

DGFT may, specify Procedures to be followed by an exporter or importer or by any licensing/Regional Authority (RA) or by any other authority for purposes of implementation of the provisions of FT (D&R) Act, the Rules and the Orders made there under and the FTP. Such procedures, or amendments if any, shall be published by means of a Public Notice.

### Importer-Exporter Code (IEC)

An IEC is a 10-character alpha-numeric number allotted to an entity (firm/company/LLP etc.) and is mandatory for undertaking any export/import activities. With a view to maintain the unique identity of an entity, consequent upon introduction / implementation of GST, IEC shall be same as Permanent Account Number(PAN) and shall be separately issued by DGFT based on an online application.

- (a) No export or import of goods shall be made by any person without obtaining an IEC unless specifically exempted. For export of services or technology, IEC shall be necessary on the date of rendering services for availing benefits under the Foreign Trade Policy.
- (b) Exempt categories and corresponding permanent IECs are given in Para 2.07 of Handbook of Procedures.
- (c) Application process for IEC and updation in IEC is completely online and IEC can be generated by the applicant as per the procedure detailed in the Handbook of Procedures.
- (d) An IEC holder has to ensure that details in its IEC is updated electronically every year, during the April-June period. In cases where there are no changes in IEC details same also needs to be confirmed online.
- (e) An IEC shall be de-activated, if it is not updated within the prescribed period. An IEC so de-activated may be activated, on its successful updation. This would however be without prejudice to any other action taken for violation of any other provisions of the FTP.
- (f) An IEC may also be flagged for scrutiny. IEC holder(s) are required to ensure that any risks flagged by the system are timely addressed; failing which the IEC shall be de-activated.

It may be noted that –

“Person” means both natural and legal and includes an individual, firm, society, company, corporation or any other legal person including the DGFT officials.

### Mandatory documents for export/ import of goods from/into India

- a. Mandatory documents required for export of goods from India:
  - i. Bill of Lading/ Airway Bill/ Lorry Receipt/ Railway Receipt/Postal Receipt
  - ii. Commercial Invoice cum Packing List\*
  - iii. Shipping Bill/Bill of Export/ Postal Bill of Export
- b. Mandatory documents required for import of goods into India
  - i. Bill of Lading/Airway Bill/Lorry Receipt/ Railway Receipt/Postal Receipt in form CN-22 or CN 23 as the case may be.
  - ii. Commercial Invoice cum Packing List\*\*
  - iii. Bill of Entry

[Note: \*(i) As per CBIC Circulars issued under the Customs Act, 1962 (ii) \*\*Separate Commercial Invoice and Packing List would also be accepted.]

- c. For export or import of specific goods or category of goods, which are subject to any restrictions/ policy conditions or require NOC or product specific compliances under any statute, the regulatory authority concerned may notify additional documents for purposes of export or import.
- d. In specific cases of export or import, the regulatory authority concerned may electronically or in writing seek additional documents or information, as deemed necessary to ensure legal compliance.

### Principles of Restrictions

DGFT may, through a Notification, impose 'Prohibition' or 'Restriction':

- a) on export of foodstuffs or other essential products for preventing or relieving critical shortages;
- b) on imports and exports necessary for the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
- c) on imports of fisheries product, imported in any form, for enforcement of governmental measures to restrict production of the domestic product or for certain other purposes;
- d) on import to safeguard country's external financial position and to ensure a level of reserves;
- e) on imports to promote establishment of a particular industry;
- f) for preventing sudden increases in imports from causing serious injury to domestic producers or to relieve producers who have suffered such injury;
- g) for protection of public morals or to maintain public order;
- h) for protection of human, animal or plant life or health;
- i) relating to the importations or exportations of gold or silver;
- j) necessary to secure compliance with laws and regulations including those relating to the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
- k) relating to the products of prison labour;
- l) for the protection of national treasures of artistic, historic or archaeological value;
- m) for the conservation of exhaustible natural resources;
- n) for ensuring essential quantities for the domestic processing industry;
- o) essential to the acquisition or distribution of products in general or local short supply;
- p) for the protection of country's essential security interests
  - i. relating to fissionable materials or the materials from which they are derived;
  - ii. relating to the traffic in arms, ammunition and implements of war;
  - iii. taken in time of war or other emergency in international relations; or
- q) in pursuance of country's obligations under the United Nations Charter for the maintenance of international peace and security.

### Export/Import of Restricted Goods/ Services

Any goods /service, the export or import of which is 'Restricted' may be exported or imported only in accordance with an Authorisation / Permission or in accordance with the Procedures prescribed in a Notification / Public Notice issued in this regard.

### Actual User Condition

Goods which are importable freely without any 'Restriction' may be imported by any person. However, if such imports require an Authorisation, Actual User alone may import such good(s) unless Actual User condition is specifically dispensed with by DGFT.

It may be noted that –

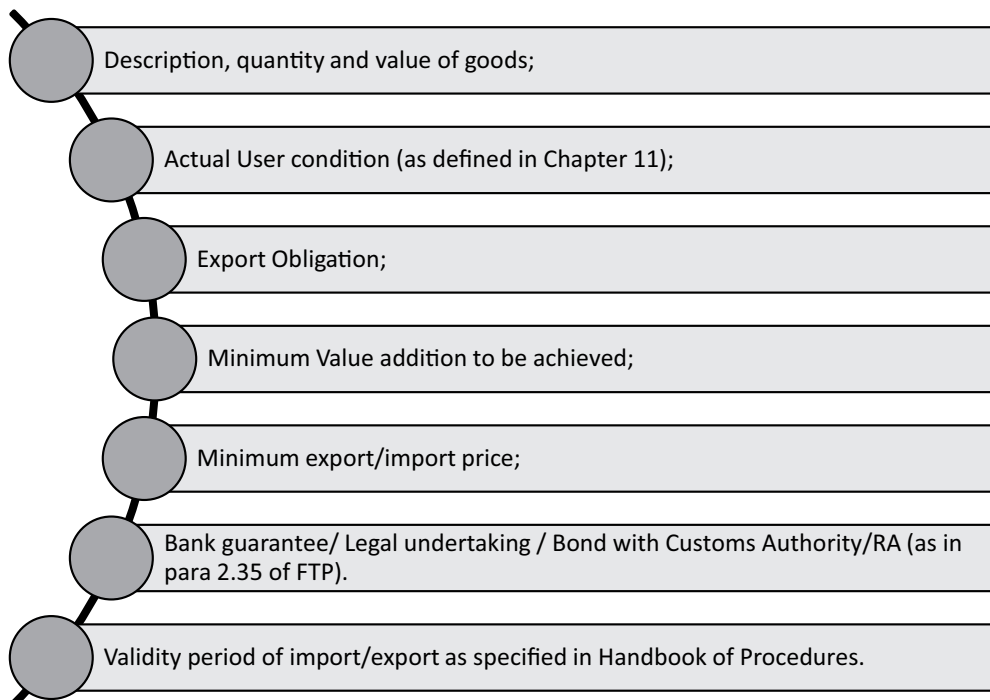
“Actual User” is a person (either natural & legal) who is authorized to use imported goods in his/ its own premise which has a definitive postal address.

- (a) “Actual User (Industrial)” is a person (either natural & legal) who utilizes imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit which has a definitive postal address.
- (b) “Actual User (Non-Industrial)” is a person (either natural & legal) who utilizes the imported goods for his own use in.
  - (i) any commercial establishment, carrying on any business, trade or profession, which has a definitive postal address; or
  - (ii) any laboratory, Scientific or Research and Development(R&D) institution, university or other educational institution or hospital which has a definitive postal address; or
  - (iii) Any service industry which has a definitive postal address.

“Jobbing” means processing or working upon of raw materials or semi-finished goods supplied to job worker, so as to complete a part of process resulting in manufacture or finishing of an article or any operation which is essential for aforesaid process.

### Terms and Conditions of an Authorisation

Every Authorisation shall, inter alia, include either all or some of the following terms and conditions (as applicable in terms of the para under which the Authorisation has been issued), in addition to such other conditions as may be specified:





### Application Fee

- a. Application for IEC/Authorisation/License/Scripts/ Registration must be accompanied by application fees as indicated in the Appendix 2K of Appendices and Aayat Niryat Forms. Fees must be paid online through any of the channels as notified under Appendix 2K, unless provided otherwise.
- b. Application fee is nothing but the fee for processing of the application. Therefore, the fee once received will not be refunded except in the circumstances and in a manner laid down in Appendix 2K.

### Clearance of Goods from Customs against Authorisation

Goods already imported / shipped / arrived, in advance, but not cleared from Customs may also be cleared against an Authorisation issued subsequently. However, such goods already imported/shipped/arrived, in advance are first warehoused against Bill of Entry for Warehousing and then cleared for home consumption against an Authorisation issued subsequently. This facility will however be not available to 'Restricted' items or items traded through STEs, unless specifically allowed by DGFT.

### Authorisation - not a Right

No person can claim an Authorisation as a right and DGFT or RA shall have power to refuse to grant or renew the same in accordance with provisions of FT (D&R) Act, Rules made there under and FTP.

### Penal action and placing of an entity in Denied Entity List (DEL)

- a. If an Authorisation holder violates any condition of such Authorisation or fails to fulfill export obligation or fails to deposit the requisite amount within the period specified in demand notice issued by Department of Revenue and /or DGFT, he shall be liable for action in accordance with FT (D&R) Act, the Rules and Orders made there under, FTP and any other law for time being in force.
- b. With a view to raising ethical standards and for ease of doing business, DGFT has provided for self-certification system under various schemes. In such cases, applicants shall undertake self-certification with sufficient care and caution in filling up information/ particulars. Any information/particulars subsequently found untrue/incorrect will be liable for action under FT (D&R) Act, 1992 and Rules therein in addition to penal action under any other Act/Order.
- c. A firm may be placed under Denied Entity List (DEL), by the concerned RA, under the provision of Rule 7 of Foreign Trade (Regulation) Rules, 1993. On issuance of such an order, for reasons to be recorded in writing, a firm may be refused grant or renewal of a licence, authorisation, certificate, scrip or any instrument bestowing financial or fiscal benefits. If a firm is placed under DEL, all new licences, authorisations, scrips, certificates, instruments etc. will be blocked from printing/ issue/renewal.
- d. DEL orders may be placed in abeyance, for reasons to be recorded in writing by the concerned RA. DEL order can be placed in abeyance, for a period not more than 60 days at a time.
- e. A firm's name can be removed from DEL, by the concerned RA for reasons to be recorded in writing, if the firm completes Export Obligation/ pays penalty/ fulfils requirement of Demand Notice(s) issued by the RA/submits documents required by the RA.

It may be noted that-

"Export Obligation" means obligation to export product or products covered by Authorisation or permission in terms of quantity, value or both, as may be prescribed or specified by Regional or competent authority.

### **Firm/company under adjudication proceeding before the National Company Law Tribunal (NCLT)**

Any firm/company coming under the adjudication proceeding before the National Company Law Tribunal (NCLT) shall inform the concerned Regional Authority (RA) and NCLT of any outstanding export obligations/liabilities under any of the schemes under FTP. The total outstanding duty saved amount/dues along with interest, and any penalty imposed under FT (D&R) Act, or any other dues, shall be counted as part of the dues to the government against the said firm/company.

### **PROHIBITIONS ON TRADE (COUNTRY, ORGANISATIONS, GROUPS, INDIVIDUALS ETC. AND PRODUCT SPECIFIC)**

#### **Prohibition on Import and Export of 'Arms and related material' from / to Iraq**

Notwithstanding the policy on Arms and related materials in Chapter 93 of ITC (HS), the import/export of Arms and related material from/to Iraq is 'Prohibited'. However, export of Arms and related material to Government of Iraq shall be permitted subject to 'No Objection Certificate' from the Department of Defence Production.

#### **Prohibition on Trade with the Islamic State in Iraq and the Levant [ISIL, also known as Daesh], Al Nusrah Front [ANF] and other individuals, groups, undertakings and entities associated with Al Qaida**

In compliance with United Nations Security Council Resolution No. 2199 [2015], trade in oil and refined oil products, modular refineries and related materials, besides items of cultural (including antiquities), scientific and religious importance is prohibited with the Islamic State in Iraq and the Levant [ISIL], Al Nusrah Front [ANF] and other individuals, groups, undertakings and entities associated, directly or indirectly, with Al Qaida.

#### **Prohibition on direct or indirect import and export from/to DPRK**

Direct or Indirect export and import of items, whether or not originating in Democratic People's Republic of Korea (DPRK) to/from DPRK is detailed in Appendix – I of this Chapter.

#### **Direct or Indirect Export/Import to/ from Iran**

- a. Direct or indirect export to Iran or import from Iran of any item, material, equipment, goods and technology mentioned in the following documents would be permitted subject to the provisions contained in Annex-B to the United Nations Security Council Resolution 2231 (2015):
  - i. Items listed in INFCIRC/254/Rev.14/Part1 and INFCIRC/254/Rev.11/Part 2 (IAEA Documents) as updated by the UNSC and IAEA from time to time.
  - ii. Items listed in S/2015/546 (UN Security Council document) as updated by the Security Council from time to time.
- b. All the UN Security Council Resolutions/Documents and IAEA Documents referred to above are available on the UN Security Council website (<https://www.un.org/security-council/>) and IAEA website (<https://www.iaea.org/>).

#### **Prohibition on Import of Charcoal from Somalia**

Direct or indirect import of charcoal is prohibited from Somalia, irrespective of whether or not such charcoal has originated in Somalia [United Nations Security Council Resolution 2036(2012)]. Importers of Charcoal shall submit a declaration to Customs that the consignment has not originated in Somalia.

**IMPORT / EXPORT THROUGH STATE TRADING ENTERPRISES****State Trading Enterprises (STEs)**

- a. State Trading Enterprises (STEs) are governmental and non-governmental enterprises, including marketing boards, which deal with goods for export and /or import. Any good, import or export of which is governed through exclusive or special privilege granted to State Trading Enterprise (STE), may be imported or exported by the concerned STE as per conditions specified in ITC (HS). The list of STEs notified by DGFT is in Appendix-2J.
- b. Such STE(s) shall make any such purchases or sales involving imports or exports solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale in a non-discriminatory manner and shall afford enterprises of other countries adequate opportunity, in accordance with customary business practices, to compete for participation in such purchases or sales.
- c. DGFT may, however, grant an authorisation to any other entity to import or export any of the goods notified for exclusive trading through STEs.

It may be noted that-

State Trading Enterprises (STEs), for the purpose of this FTP, are those entities which are granted exclusive right/privileges export and /or import as per Para 2.20 (a) of FTP.

**TRADE WITH SPECIFIC COUNTRIES****Trade with Neighbouring Countries**

DGFT may issue instructions or frame schemes as may be required to promote and regulate trade and strengthen economic ties with neighbouring countries.

**Transit Facility**

Transit of goods through India from/ or to countries adjacent to India shall be enabled and regulated in accordance with strategic and economic interests of India as well as the bilateral treaties between India and those countries. Such arrangements will be subject to conditions and restrictions as may be specified by DGFT in accordance with International Conventions/ Treaties/Agreements.

**Trade with Russia under Debt-Repayment Agreement**

In case of trade with Russia under Debt Repayment Agreement, DGFT may issue instructions or frame schemes as may be required, and anything contained in FTP, in so far as it is inconsistent with such instructions or schemes, shall not apply.

**IMPORT OF SPECIFIC CATEGORIES OF GOODS****Import of Samples**

No Authorisation shall be required for Import of bonafide technical and trade samples of items “restricted” in ITC (HS) except defence/security items, seeds, bees and new drugs. Import of samples shall be further governed by Para 2.62 of Handbook of Procedures.

### Import of Gifts

Import of goods, including those purchased from e-commerce portals, through post or courier, where Customs clearance is sought as gifts, is prohibited except for life saving drugs/ medicines and Rakhi (but not gifts related to Rakhi).

*Explanation:*

1. Rakhi (but not gifts related to Rakhi) will be covered under Section 25(6) of Customs Act, 1962 that reads that “no duty shall be collected if the amount of duty leviable is equal to or less than Rs. 100/-”
2. Import of goods as gifts with payment of full applicable duties is allowed.

### Import through Passenger Baggage

- a. Bona-fide household goods and personal effects may be imported as part of passenger baggage as per limits, terms and conditions thereof in Baggage Rules notified by Ministry of Finance.
- b. Samples of such items that are otherwise freely importable under FTP may also be imported as part of passenger baggage without an Authorisation subject to Baggage Rules as notified by Customs from time to time.
- c. Exporters coming from abroad are also allowed to import drawings, patterns, labels, price tags, buttons, belts, trimming and embellishments required for export, as part of their passenger baggage, without an authorization subject to value limit as laid down in FTP or as per the relevant Customs notification(s) in this regard.
- d. Any item(s) including Samples or Prototypes of items whose import policy is “restricted” or “prohibited” or is canalised through STEs are not permitted as part of passenger baggage except with a valid authorization/ permission issued by DGFT.

### Re-import of goods repaired abroad

Capital goods, equipment, components, parts and accessories, whether imported or indigenous, except those restricted under ITC (HS) may be sent abroad for repairs, testing, quality improvement or upgradation or standardization of technology and re-imported without an Authorisation.

It may be noted that –

“Capital Goods” means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological up-gradation or expansion. It includes packaging machinery and equipment, refrigeration equipment, power generating sets, machine tools, equipment and instruments for testing, research and development, quality and pollution control.

Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in services sector.

### Import of goods used in projects abroad

Project contractors after completion of projects abroad, may import without an Authorisation, goods including capital goods used in the project, provided they have been used for at least one year.

### Import of Prototypes

Import of new / second hand prototypes / second hand samples may be allowed on payment of duty without an Authorisation to an Actual User (industrial) engaged in production of or having industrial license / letter of intent for research in item for which prototype is sought for product development or research, as the case may be, upon a self-declaration to that effect, to the satisfaction of Customs authorities.

**IMPORT POLICY FOR SECOND HAND GOODS****Second Hand Goods**

Sl. No.	Categories of Second-Hand Goods	Import Policy	Conditions, if any
I. Second Hand Capital Goods			
I(a)	<ul style="list-style-type: none"> <li>i. Desktop Computers;</li> <li>ii. Refurbished/re-conditioned spares of re-furbished parts of Personal Computers/ Laptops;</li> <li>iii. Air Conditioners;</li> <li>iv. Diesel generating sets</li> </ul>	Restricted	Importable against Authorisation
I(b)	All electronics and IT Goods notified under the Electronics and IT Goods (Requirements of Compulsory Registration) Order, 2012 as amended from time to time	Restricted	<ul style="list-style-type: none"> <li>(i) Importable against an authorization subject to conditions laid down under Electronics and IT Goods (Requirements of Compulsory Registration) Order, 2012 as amended from time to time.</li> <li>(ii) Import of unregistered/non-compliant notified products as in CRO, 2012 as amended from time to time is "Prohibited"</li> </ul>
I(c)	Refurbished / re-conditioned spares of Capital Goods	Free	Subject to production of Chartered Engineer certificate to the effect that such spares have at least 80% residual life of original spare
I(d)	All other second-hand capital goods {other than (a) (b) & (c) above}	Free	
II	Second Hand Goods other than capital goods	Restricted	Importable against Authorisation
III	Second Hand Goods imported for the purpose of repair/refurbishing / reconditioning or re-engineering	Free	Subject to condition that waste generated during the repair / refurbishing of imported items is treated as per domestic Laws/ Rules/ Orders/ Regulations/ technical specifications/ Environmental / safety and health norms and the imported item is re-exported back as per the Customs Notification.

## IMPORT POLICY FOR METALLIC WASTE AND SCRAPS

### Import of Metallic Waste and Scrap

- a. Import of any form of metallic waste, scrap will be subject to the condition that it will not contain hazardous, toxic waste, radioactive contaminated waste/scrap containing radioactive material, any types of arms, ammunition, mines, shells, live or used cartridge or any other explosive material in any form either used or otherwise as detailed in Para 2.51 of Handbook of Procedures.
- b. The types of metallic waste and scrap which can be imported freely, and the Procedures of import in the shredded form; un-shredded, compressed and loose form is laid down in Para 2.51 of Handbook of Procedures.

### Removal of Scrap/Waste from SEZ

A SEZ unit/Developer/ Co-developer may be allowed to dispose of in DTA any waste or scrap, including any form of metallic waste and scrap, generated during manufacturing or processing activity, without an Authorisation, on payment of applicable Customs Duty.

It may be noted that –

“Developer” means a person or body of persons, company, firm and such other private or government undertaking, who develops, builds, designs, organises, promotes, finances, operates, maintains or manages a part or whole of infrastructure and other facilities in SEZ as approved by Central Government and also includes a co-developer.

## OTHER PROVISIONS RELATED TO IMPORTS

### Import under Lease Financing

No specific permission of DGFT is required for import of lease financed Capital Goods.

### Execution of Legal Undertaking (LUT) / Bank Guarantee (BG)

- a. Wherever any duty-free import is allowed or where otherwise specifically stated, importer shall execute, Legal Undertaking (LUT) / Bank Guarantee (BG) / Bond with the Customs Authority, as prescribed, before clearance of goods.
- b. In case of indigenous sourcing, Authorisation holder shall furnish LUT/BG/Bond to the RA concerned before sourcing material from indigenous supplier/ nominated agency as prescribed in Chapter 2 of Handbook of Procedures.

### Private/Public Bonded Warehouses for Imports

- a. Private/ Public bonded warehouses may be set up in DTA as per rules, regulations and notifications issued under the Customs Act, 1962. Any person may import goods except prohibited items, arms and ammunition, hazardous waste and chemicals and warehouse them in such bonded warehouses.
- b. Such goods may be cleared for home consumption in accordance with provisions of FTP and against Authorisation, wherever required. Customs duty as applicable shall be paid at the time of clearance of such goods.
- c. The clearance of the warehoused goods shall be as per the provisions of the Customs Act, 1962.

It may be noted that –

“Domestic Tariff Area (DTA)” means area within India which is outside SEZs and EOU/ EHTP/ STP/BTP.

“EOU” means Export Oriented Unit for which a letter of permit has been issued by Development Commissioner.

### Special provision for Hides Skins and semi-finished goods

Hides, Skins and semi-finished leather may be imported in the Public/ Private Bonded warehouse for the purpose of DTA sale and the unsold items thereof can be re-exported from such bonded warehouses on payment of the applicable rate of export duty.

### Sale on High Seas

Sale of goods on high seas for import into India may be made subject to FTP or any other law in force.

### Merchanting Trade

Merchanting trade involving shipment of goods from one foreign country to another foreign country without touching Indian ports, involving an Indian intermediary is allowed subject to compliance with RBI guidelines, except for goods/items in the CITES and SCOMET list.

It may be noted that-

“SCOMET” is the nomenclature for dual use items of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET). Export of dual-use items and technologies under India’s FTP is regulated. It is either prohibited or is permitted under an Authorisation.

## EXPORTS

### Free Exports

All goods may be exported without any restriction except to the extent that such exports are regulated by ITC(HS) or any other provision of FTP or any other law for the time being in force. DGFT may, however, specify through a Public Notice such terms and conditions according to which any goods, not included in ITC(HS), may be exported without an Authorisation.

### Benefits for Supporting Manufacturers

For any benefit to accrue to the supporting manufacturer (as defined in Para 11.59 of FTP), the names of both supporting manufacturer as well as the merchant exporter must figure in the concerned export documents, especially in Tax Invoice / Shipping Bill / Bill of Export/ Airway Bill.

It may be noted that –

“Merchant Exporter” means a person engaged in trading activity and exporting or in tending to export goods.

- a. “Supporting Manufacturer” is one who manufactures goods/products or any part/accessories/ components of a good/ product for a merchant exporter or a manufacturer exporter under a specific Authorisation.
- b. “Supporting Manufacturer” for the EPCG Scheme shall be one in whose premises/ factory Capital Goods imported/ procured under EPCG Authorisation is installed.

### Third Party Exports

Third party exports (except Deemed Export) as defined in Chapter 11 shall be allowed under FTP. In such cases, export documents such as shipping bill shall indicate name of both manufacturing exporter/manufacturer and

third-party exporter(s). E-Bank Realization Certificate (e-BRC) or export Realizations from RBI's EDPMS wherever available in DGFT IT Systems, Export Order and Invoice should be in the name of third-party exporter.

It may be noted that –

“Third-party exports” means exports made by an exporter or manufacturer on behalf of another exporter(s). In such cases, export documents such as shipping bills shall indicate names of both manufacturer exporter/ manufacturer and third party exporter(s). Bank Realisation Certificate (BRC), Self-Declaration Form (SDF), export order and invoice should be in the name of third party exporter.

## EXPORTS OF SPECIFIC CATEGORIES

### Export of Samples

- a. Exports of bonafide trade and technical samples of freely exportable item shall be allowed without any limit.
- b. The procedure for Export of Samples and Free of charge goods shall be governed by provisions given in Para 2.63 of Handbook of Procedures.

### Export of Gifts

Goods including edible items, of value not exceeding Rs.5, 00,000/- in a licensing year, may be exported as a gift. However, items mentioned as restricted for exports in ITC (HS) shall not be exported as a gift, without an Authorisation.

It may be noted that-

“Licensing Year” means period beginning on the 1st April of a year and ending on the 31<sup>st</sup> March of the following year.

### Export of Passenger Baggage

- a. Bona-fide personal baggage may be exported either along with passenger or, if unaccompanied, within one year before or after passenger's departure from India. However, items mentioned as restricted in ITC (HS) shall require an Authorisation. Government of India officials proceeding abroad on official postings shall, however, be permitted to carry along with their personal baggage, food items (free, restricted or prohibited) strictly for their personal consumption. The Provisions of the Para shall be subject to Baggage Rules issued under Customs Act, 1962.
- b. Samples of such items that are otherwise freely exportable under FTP may also be exported as part of passenger baggage without an Authorisation.

### Import for Export

- I. (a) Goods imported, in accordance with FTP, may be exported in same or substantially the same form without an Authorisation provided that item to be imported or exported is not in the restricted for import or export in ITC(HS) Schedules.
- (b) Goods, including capital goods (both new and second hand), may be imported for export provided:
  - i. Importer clears goods under Customs Bond;
  - ii. Goods are freely exportable, i.e., are not “Restricted” or “Prohibited” or subject to “exclusive trading through State Trading Enterprises” or any conditionality or requirement as may be required under Schedule 2 of the Export Policy of the ITC (HS);



- iii. Export is against freely convertible currency or as per para 2.52(d)(ii) of FTP.
- (c) Goods in (b) above will include 'Restricted' goods for import (except 'Prohibited' items).
- (d) Capital goods, which are freely importable and freely exportable, may be imported for export on execution of LUT/BG with the Customs Authority.
- (e) Notwithstanding the above, goods which are freely importable may be re-exported except items as in the Prohibited or SCOMET List of exports, in same or substantially same form even though such goods are under "Restricted list" for export, subject to the following conditions:
  - (i) Goods are not of Indian Origin;
  - (ii) Goods imported shall be kept in bonded warehouse under supervision of Customs;
  - (iii) Goods to be exported have never been cleared for home consumption;
  - (iv) Export of goods shall be subjected to Section 69 of Customs Act, 1962.
- II. (a) Goods imported against payment in freely convertible currency would be permitted for export only against payment in freely convertible currency, unless otherwise notified by DGFT. Goods imported under Para 2.52(d)
  - (i) would be permitted for exports only against payments as per Para 2.52(d)
  - (ii) unless otherwise notified by DGFT.
- (b) Export of such goods to the notified countries (presently only Iran) would be permitted against payment in Indian Rupees, subject to minimum 15% value addition.
- (c) However, re-export of food, medicine and medical equipment, namely, items covered under ITC(HS) Chapters 2 to 4, 7 to 11, 15 to 21, 23, 30 and items under headings 9018, 9019, 9020, 9021 & 9022 of Chapter-90 of ITC(HS) will not be subject to minimum value addition requirement for export to Iran. Exports of these items to Iran shall, however, be subject to all other conditions of FTP and ITC (HS), as applicable. Bird's eggs covered under ITC (HS) 0407 & 0408 and Rice covered under ITC (HS) 1006 are not covered under this dispensation, as at II (a) above.
- (d) Exports under this dispensation, as at I (e) and II (a), (b) and (c) above shall not be eligible for any export incentives.

### Export of Replacement Goods

Goods or parts thereof on being exported and found defective/damaged or otherwise unfit for use may be imported for replacement free of charge by the exporter in accordance with the relevant Customs Notification, and such goods shall be allowed for export by Customs authorities, provided that replacement goods are not under the restricted or SCOMET items for exports in ITC(HS). If the export item is 'Restricted' or under SCOMET list, the exporter shall require an Authorisation for export of such replacement goods.

### Export of Repaired Goods

Goods or parts thereof, except restricted under ITC (HS), on being exported and found defective, damaged or otherwise unfit for use may be imported for repair and subsequent reexport. Such goods shall be allowed clearance without an Authorisation and in accordance with the relevant customs notification. To that extent the exporter shall return the benefits/incentive availed on the returned goods. If the item is 'restricted' for import, the exporter shall require an import license. However, re-export of such defective parts/spares by the Companies/firms and Original Equipment Manufacturers shall not be mandatory if they are imported exclusively for undertaking root cause analysis, testing and evaluation purpose.

### Export of Spares

Warranty spares (whether indigenous or imported) of plant, equipment, machinery, automobiles or any other goods [except those restricted under ITC (HS)] may be exported along with main equipment or subsequently but within contracted warranty period of such goods, subject to approval of RBI.

It may be noted that-

“Spares” means a part or a sub-assembly or assembly for substitution that is ready to replace an identical or similar part or sub- assembly or assembly. Spares include a component or an accessory.

### Re-export of imported Goods found defective and unsuitable for use

Imported goods found defective after Customs clearance, or not found as per specifications or requirements may be re-exported back as per Customs Act, 1962.

### Private Bonded Warehouses for Exports

- a. Private bonded warehouses exclusively for exports may be set up in DTA as per terms and conditions of notifications issued by Department of Revenue.
- b. Such warehouses shall be entitled to procure goods from domestic manufacturers for manufacturing and other operations in accordance with Section 65 of the Customs Act, 1962.

## PAYMENTS AND RECEIPTS ON IMPORTS / EXPORTS

### Denomination of Export Contracts

- a. All export contracts and invoices shall be denominated either in freely convertible currency or Indian rupees but export proceeds shall be realized in freely convertible currency.
- b. However, export proceeds against specific exports may also be realized in rupees, provided it is through a freely convertible Vostro account of a non-resident bank situated in any country other than a member country of Asian Clearing Union (ACU) or Nepal or Bhutan. Additionally, rupee payment through Vostro account must be against payment in free foreign currency by buyer in his non-resident bank account. Free foreign exchange remitted by buyer to his non-resident bank (after deducting bank service charges) on account of this transaction would be taken as export realization under export promotion schemes of FTP.
- c. Contracts (for which payments are received through Asian Clearing Union (ACU) shall be denominated in ACU Dollar. However, participants in the ACU may settle their transactions in ACU Dollar or in ACU Euro as per RBI Notifications. Central Government may relax provisions of this paragraph in appropriate cases. Export contracts and invoices can be denominated in Indian rupees against EXIM Bank/ Government of India line of credit.
- d. Invoicing, payment and settlement of exports and imports is also permissible in INR subject to compliances as under RBI's A.P. (DIR Series) Circular No.10 dated 11th July, 2022. Accordingly, settlement of trade transactions in INR shall take place through the Special Rupee Vostro Accounts opened by AD banks in India as permitted under Regulation 7(1) of Foreign Exchange Management (Deposit) Regulations, 2016, in accordance to the following procedures:
  - i. Indian importers undertaking imports through this mechanism shall make payment in INR which shall be credited into the Special Vostro account of the correspondent bank of the partner country, against the invoices for the supply of goods or services from the overseas seller /supplier.

- ii. Indian exporters, undertaking exports of goods and services through this mechanism, shall be paid the export proceeds in INR from the balances in the designated Special Vostro account of the correspondent bank of the partner country.

### Applicability of FTP Schemes for Export Realisations in Indian Rupees

- (i) Export proceeds realized in Indian Rupees against exports to Iran are permitted to avail exports benefits/ incentives/ fulfilment of Export Obligations under the FTP, at par with export proceeds realized in freely convertible currency, subject to compliance of para 2.19 of the FTP.
- (ii) Export proceeds realized in Indian Rupees as per para 2.52(d)(ii) are permitted to avail exports benefits/ incentives / fulfilment of Export Obligations under the FTP.

### Non-Realisation of Export Proceeds

- a. If an exporter fails to realize export proceeds within time specified by RBI, he shall, without prejudice to any liability or penalty under any law in force, be liable to return all benefits / incentives availed against such exports and action in accordance with provisions of FT (D&R) Act, Rules and Orders made thereunder and the FTP.
- b. In case an Exporter is unable to realize the export proceeds for reasons beyond his control (force majeure), he may approach RBI for writing off the unrealized amount as laid down in Para 2.72 of Handbook of Procedures.
- c. The payment realized through insurance cover, would be eligible for benefits under FTP as per Procedures laid down in Para 2.71 of Handbook of Procedures.

In the case of **Chowgule & Company Limited (Appellant) vs. Assistant Director General of Foreign Trade & Others (Respondents) Civil Appeal No. 8225 of 2009** Judgement dated November 04, 2022, Hon'ble Supreme Court inter alia observed that DGFT/Union is free to change the Exim Policy and consider from time to time on which items there shall be an incentive and on which items there shall not be any incentive. To grant the benefit of an incentive is a policy decision which may be varied and/or even withdrawn. No exporter can claim the incentive as a matter of right. Under the circumstances, the doctrine of promissory estoppel shall not be applicable to such a policy decision with respect to incentive, more particularly when it is well within the right of DGFT/appropriate authority/Union to come out with a new Exim Policy. Under the circumstances, the submission on behalf of the appellant that as the appellant placed the order with NKK Corporation, Japan on 7.2.1990 when the Exim Policy 1988-91 was in force and therefore the appellant shall be entitled to the benefit of additional licence by applying the doctrine of promissory estoppel cannot be accepted. The policy and the incentive scheme are very clear. Incentive in the form of an additional licence is on actual export in the previous year. Therefore, the relevant date shall be the date on which the export is made. Under the circumstances, the decisions relied upon on behalf of the appellants on the principle of promissory estoppel shall not be of any assistance to the appellant and shall not be applicable at all on the facts of the case on hand.

### Export Credit Agencies (ECAs)

- a. Export Credit Agencies (ECAs) are policy instruments for Government to support exports. ECAs support exports by insurance, guarantee and also direct lending. Export Credit Agencies (ECAs) like Export Credit Guarantee Corporation of India Ltd. (ECGC) provides credit insurance support to exports and export credit lending. Covers issued by ECGC to exporters, protect against losses arising out of payment failures due to insolvency or default of the buyers or due to political risks. Exporters can diversify their markets in addition to protecting existing markets through such covers. ECGC also supports Medium and Long term (MLT) exports including project exports. Exim Bank is the other ECA in the business of lending for MLT exports and fronting the government's line of credit.
- b. ECGC indemnifies losses of exporters in export trade due to insolvency or default of the buyer.

Additionally, losses due to political risk like war, sudden import restriction, promulgation of law or decree after the shipment has been affected are also covered. Some of the anti-dumping measures or non-tariff barriers introduced after a shipment has been made will come under the purview of the political risk. In such cases exporter's interest are protected by ECGC.

It may be noted that-

“Project Exports” refers to export of engineering goods on deferred payment terms and execution of turnkey projects and civil construction contracts abroad collectively. Project Exports would encompass:

- i. Civil construction contracts;
- ii. Turnkey Engineering contracts including supply of Capital Goods on deferred payment terms;
- iii. Process and Engineering Consultancy Services; and
- iv. Project Construction items (excluding Steel and Cement).

## EXPORT PROMOTION COUNCILS

### Recognition of EPCs to function as Registering Authority for issue of RCMC

- a) Export Promotion Councils (EPCs) are organizations of exporters, set up with the objective to promote and develop Indian exports. Each Council is responsible for promotion of a particular group of products/projects/services.
- b) EPCs are also eligible to function as Registering Authorities to issue Registration-cum-Membership Certificate (RCMC) to its members. The criteria for EPCs to be recognized as Registering Authorities for issue of RCMC to its members are detailed in Para 2.78 of the Handbook of Procedures.

### Registration-cum-Membership Certificate (RCMC)

- a. Any person, applying for an Authorisation to import/ export under the FTP (except items listed as ‘Restricted’ items in ITC (HS)) or applying for any other benefit or concession under FTP, shall be required to provide, the RCMC granted by competent authority in accordance with Procedures specified in Handbook of Procedures unless specifically exempted under FTP.
- b. Certificate of Registration as Exporter of Spices (CRES) issued by Spices Board and Certificate of Registration as Exporter of Coir & Coir products issued by the Coir Board shall be treated as Registration-Cum-Membership Certificate (RCMC) for the purposes under this Policy.

It may be noted that –

“Competent Authority” means an authority competent to exercise any power or to discharge any duty or function under the Act or the Rules and Orders made there under or under FTP.

“Registration-Cum-Membership Certificate” (RCMC) means certificate of registration and membership granted by an Export Promotion Council/Commodity Board/Development Authority or other competent authority as prescribed in FTP or HBP.

### Interpretation of Policy

- (a) The decision of DGFT shall be final and binding on all matters relating to interpretation of Policy, or provision in Handbook of Procedures, Appendices and Aayat Niryat Forms or classification of any item for import / export in the ITC (HS).
- (b) A Policy Interpretation Committee (PIC) may be constituted to aid and advice DGFT. The composition of the PIC would be as follows:
  - (i) DGFT: Chairman

- (ii) All Additional DGFTs in Headquarters: Members
- (iii) All Joint DGFTs in Headquarters looking after Policy matters: Members
- (iv) Joint DGFT (PRC/PIC): Member Secretary
- (v) Any other person / representative of the concerned Ministry / Department, to be co-opted by the Chairman.

### Exemption from Policy/Procedures

DGFT may in public interest pass such orders or grant such exemption, relaxation or relief, as he may deem fit and proper, on grounds of genuine hardship and adverse impact on trade to any person or class or category of persons from any provision of FTP or any Procedures. While granting such exemption, DGFT may impose such conditions as he may deem fit after consulting the Committees as under:

Sl. No.	Description	Committee
1.	Fixation/modification of product norms under all schemes	Norms Committees
2.	Nexus with Capital Goods (CG) and benefits under EPCG Schemes	EPCG Committee
3.	All other issues	Policy Relaxation Committee (PRC)

It may be noted that-

“NC” means the Norms Committee in the Directorate General of Foreign Trade for approval of adhoc input – output norms in cases where SION does not exist and recommend SION to be notified in DGFT.

### Personal Hearing by DGFT for Grievance Redressal

- a) Government is committed to easy and speedy redressal of grievances from Trade and Industry. Paragraph 2.59 of FTP provides for relaxation of Policy and Procedures on grounds of genuine hardship and adverse impact on trade. If an importer/exporter is aggrieved by any decision taken by Policy Relaxation Committee (PRC), or a decision/order by any authority in the Directorate General of Foreign Trade, a specific request for Personal Hearing (PH) along with the prescribed application fee as per Appendix-2K has to be made to DGFT. DGFT may consider request for relaxation after consulting concerned Norms Committee, EPCG Committee or Policy Relaxation Committee (PRC) and the decision conveyed in pursuance to the personal hearing shall be final and binding.
- b) The opportunity for Personal Hearing will not apply to a decision/order made in any proceeding, including an adjudication proceeding, whether at the original stage or at the appellate stage, under the relevant provisions of FT (D&R) Act, 1992, as amended from time to time.

### Regularization of EO default and settlement of Customs duty and interest through Settlement Commission

With a view to providing assistance to firms who have defaulted under FTP for reasons beyond their control as also facilitating merger, acquisition and rehabilitation of sick units, it has been decided to empower Settlement Commission in Department of Revenue to decide such cases also with effect from 01.04.2005. However, in cases where the matter is under the purview of the NCLT, Para 2.15 of the FTP shall apply.

## SELF-CERTIFICATION OF ORIGINATING GOODS

### Approved Exporter Scheme for Self- Certification of Certificate of Origin

- a) Currently, Certificates of Origin under various Preferential Trade Agreements [PTA], Free Trade Agreements [FTAs], Comprehensive Economic Cooperation Agreements [CECA] and Comprehensive Economic Partnerships Agreements [CEPA] are issued by designated agencies as per Appendix 2B of Appendices and Aayat Niryat Forms. A new optional system of self-certification is being introduced with a view to reducing transaction cost.
- b) The Manufacturers who are also Status Holders shall be eligible for Approved Exporter Scheme. Approved Exporters will be entitled to self-certify their manufactured goods as originating from India with a view to qualifying for preferential treatment under different PTAs/FTAs/CECAs/CEPAs which are in operation. Self-certification will be permitted only for the goods that are manufactured as per the Industrial Entrepreneurs Memorandum (IEM) / Industrial License (IL) /Letter of Intent (LOI) issued to manufacturers.
- c) Status Holders will be recognized by DGFT as Approved Exporters for self-certification based on availability of required infrastructure, capacity and trained manpower as per the details in Para 2.94 of Handbook of Procedures read with Appendix 2F of Appendices & Aayaat Niryat Forms.
- d) The details of the Scheme, along with the penalty provisions, are provided in Appendix 2F of Appendices and Aayaat Niryat Forms and will come into effect only when India incorporates the scheme into a specific agreement with its partner/s and the same is appropriately notified by DGFT. Further the entities to whom such self-certification will be extended bilaterally under FTA/PTA will be subject to the provisions and conditions of that FTA.

It may be noted that-

“Status holder” means an exporter recognized for export performance by an RA as per para 1.25 of the FTP.

### Certification of Origin of Goods EU- GSP

Exporters can self-certify the Statement on Origin of their goods, as per the self-certification scheme, Certification of Origin of Goods for European Union Generalised System of Preferences (EU-GSP), of the European Union (EU) under the Registered Exporter System (REX) as in Para 2.89(A)(c) of the Handbook of Procedures.

## DEVELOPING DISTRICTS AS EXPORT HUBS

### Objective

To galvanise districts of the country to become export hubs by identifying products and services with export potential in the district, addressing bottlenecks for exporting these products/services, supporting local exporters/manufacturers to scale and find potential buyers outside India with the aim of promoting exports, manufacturing & services industry in the District. This is intended to bring greater level of awareness and commitment regarding exports at the district level, build capacity to create new exporters and identify new markets for the focused products and services. This will also empower MSMEs, farmers and small scale industries to get benefit of export opportunities in the overseas markets. This decentralised and focused approach will shift the focus on district led export growth for self-sufficiency and self- reliance by providing global platform to products and services from the districts.

### District Export Promotion Committees - Institutional Mechanism at District Level

Every district has products and services which are being exported, and can be further promoted, along with new products / services, to increase production, grow exports, generate economic activity and achieve the goal of Atma Nirbhar Bharat, Vocal for local and Make in India.

Products/services (GI products, agricultural clusters, toy clusters etc.) with export potential in each District have to be identified and institutional mechanism in the form of District Export Promotion Committees (DEPCs) at the district level is to be created to provide support for export promotion and address the bottlenecks for export growth in the Districts.

Each District shall constitute a District Export Promotion Committee (DEPC) chaired by Collector/DM/DC of the District and co-chaired by designated DGFT Regional Authority with various other stakeholders as its members.

The primary function of the DEPC will be to prepare and implement district specific Export Action Plans in collaboration with all the relevant stakeholders at the Central, State and the District level.

DGFT Regional Authorities will be engaging with all the relevant State and Central agencies to take forward this initiative in each district.

### **District Export Action Plans for Each District**

The District Export Action Plan (DEAP) may be prepared for each district. 2-3 high potential products/services from the districts may be prioritised and comprehensive plan for their export growth may be prepared. It may include the support required by the local industry in boosting their manufacturing and exports with impetus on supporting the industry from the production stage to the exporting stage. The DEAPs may also include specific quantifiable targets to be achieved in the short term and long term. These plans may outline the interventions that are required to promote the export of identified products and services from the district. Each DEAP may be deliberated by the DEPC and various stakeholders before it is formally adopted by the DEPC of the each District. DEAP of each District, once adopted, may be published in the public domain on a dedicated Portal.

### **State/UT Export Promotion Committees**

To synergise the efforts of the Department of Commerce/ DGFT and the State/UT governments in promotion of exports from the State, each State shall constitute a State Export Promotion Committee (SEPC) headed by Chief Secretary of the State. The designated Regional Authority of DGFT shall be the co-convenor of the committee.

### **Nodal DGFT Regional Authority**

Districts of the States/UTs have been assigned to the Jurisdictional DGFT Regional Authority and the nodal RA shall be responsible for the Districts under their jurisdiction for all activities related to Districts as Export Hubs initiative in those Districts.

### **Online Monitoring of District Export Action Plans**

DGFT would develop an online monitoring portal that may be accessed on the DGFT website to enable the States/ DGFT RAs to upload all information related to the products/services with export potential of every District. The portal may also help in monitoring the progress of District Export Action Plan and DEPC meetings in all the Districts. Each DGFT Jurisdictional RA to be primarily responsible for updating the information/progress made in implementing Export Action Plan for each District under their Jurisdiction. The information and reports may also be available in public domain for the benefit of the exporters.

### **Export Promotion Activities in Districts**

Support in the form of product/sector specific training and development needs of local industries, dissemination of information through outreach activities including buyer- seller meets, trade fairs, workshops etc. may be provided in each District. The training and development needs of District industries may be identified and trainings may be coordinated with other departments. DGFT RAs through DEPCs may facilitate such buyer-seller meets, exhibitions, trade fairs etc. in the District to encourage the industries to showcase their products/services to the world.



### Implementation of District Export Action Plans

The District Export Action Plan notified by the District Export Promotion Committee in each District may include clear identification of products (goods and services) with export potential in the District, institutional/other responsibilities, specifics of policy, regulatory and operational reform, and infrastructure/utilities/logistics interventions required across the entire chain from producer/farm to the export destination, to cover aspects like production, productivity/ competitiveness, improvements required in design, tie up of producers with exporters, aggregation, sorting, testing, certification, packaging, transportation through cold chain or otherwise, import export regulatory formalities, fulfilment of destination countries standards etc. It may also include Identifying bottlenecks/Issues in GI production, registration, marketing and its exports. The plan may also include the support required by the local industry in boosting their manufacturing and exports with impetus on supporting the industry from the production stage to the exporting stage.

Once the plan is formally adopted by the DEPC of the each District, the plan may be implemented by the DEPC by identifying the projects/activities required to be done to promote export growth from the Districts. Convergence of various schemes would be done on priority to build synergy and access the central government and State government scheme funds available for infrastructure development and skill/capacity building activities. Department of Commerce schemes such as Market Access Initiative, Niryat Bandhu scheme etc. may also give priority to district specific needs identified under the District Export Action Plan.

### DUTY EXEMPTION / REMISSION SCHEMES

#### Objective

Schemes enable duty free import of inputs for export production, including replenishment of inputs or duty remission.

#### Schemes

1. Duty Exemption Schemes.- The Duty Exemption schemes consist of the following:
  - Advance Authorisation (AA) (which will include Advance Authorisation for Annual Requirement).
  - Duty Free Import Authorisation (DFIA).
2. Duty Remission Scheme- Duty Drawback (DBK) Scheme, administered by Department of Revenue.
3. Scheme for Rebate on State and Central Taxes and Levies (RoSCTL), as notified by the Ministry of Textiles.
4. Schemes for Remission of Duties and Taxes on Exported Products (RoDTEP) notified by Department of Commerce and administered by Department of Revenue.

### Applicability of Policy & Procedures

Authorisation under this Chapter shall be issued in accordance with the Policy and Procedures in force on the date of issue of the Authorisation.

#### Advance Authorisation

- (a) Advance Authorisation is issued to allow duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is consumed/ utilized in the process of production of export product, may also be allowed.
- (b) Advance Authorisation is issued for inputs in relation to resultant product, on the following basis:
  - (i) As per Standard Input Output Norms (SION) notified (available in Hand Book of Procedures);

OR



- (ii) On the basis of self declaration as per paragraph 4.07 of Handbook of Procedures.  
OR
- (iii) Applicant-specific prior fixation of norm by the Norms Committee as per para 4.06 of Handbook of Procedures.  
OR
- (iv) On the basis of Self Ratification Scheme in terms of Para 4.06 of Foreign Trade Policy.

It may be noted that-

“SION” means Standard Input Output Norms notified by DGFT.

### **Advance Authorisation for Spices**

Duty free import of spices covered under Chapter-9 of ITC (HS) shall be permitted only for activities like crushing/grinding/sterilization/manufacture of oils or oleoresins. Authorisation shall not be available for simply cleaning, grading, re-packing, etc.

### **Special Advance Authorisation Scheme for export of Articles of Apparel and Clothing accessories**

Duty free import of fabric under ‘Special Advance Authorisation Scheme for export of Articles of Apparel and Clothing Accessories’ shall be allowed, as per Customs Notification issued for this scheme, for export of items covered under Chapter 61 and 62 of ITC(HS) Classification of Export and Import, subject to the following terms and conditions:

- a. The authorisation shall be issued based on Standard Input Output Norms (SION) or prior fixation of norms by Norms Committee.
- b. The authorisation may also be issued on the basis of self-declaration as per para 4.07 of HBP. In such cases, adhoc-norms shall be fixed within stipulated time period of 90 days.
- c. The authorisation shall be issued for the import of relevant fabrics including inter lining only as input. No other input, packing material, fuel, oil and catalyst shall be allowed for import under this authorisation.
- d. Exporters shall be eligible for All Industry Rate of Duty Drawback, for non-fabric inputs, as determined by Central Government for this scheme. For the purpose of value addition norm of Para 4.08 of FTP, the value of any other input used on which benefit of Drawback is claimed or intended to be claimed shall be equal to 22% of the FOB value of export realised. Minimum value addition shall be as per Para 4.09 of FTP.
- e. Where the exporter desires to claim drawback determined and fixed by Jurisdictional Customs Authority (brand rate), he shall follow Para 4.15 of FTP regarding declarations to be made in application for the authorisation and make export under claim for brand rate. In such cases the value addition shall be as per Para 4.08 of FTP. Minimum value addition shall be as per Para 4.09 of FTP.
- f. Authorisation, and the fabric imported, shall be subject to actual user condition. The same shall be nontransferable even after completion of export obligation. However fabric imported may be transferred for job work in terms of provisions of GST Acts under intimation to the Customs authority at the port of registration (excluding the units located in areas eligible for area based exemption from Central Excise Duty). Invalidation of the Authorisation shall not be permitted.
- g. The fabric imported shall be subject to pre-import condition and it shall be physically incorporated in the export product (making normal allowance for wastage). Only Physical exports shall fulfill the export obligation. (viii) Provisions of paragraphs 4.02, 4.05(a), 4.13(i), 4.13(ii), 4.14, 4.15, 4.17, 4.19, 4.21(i), 4.21(ii), 4.21(iii), 4.21(iv), 4.22, and 4.23 of Foreign Trade Policy shall be applicable in so far as they are not inconsistent with this scheme.

### Eligible Applicant / Export /Supply

- a. Advance Authorisation can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer.
- b. Advance Authorisation for pharmaceutical products manufactured through Non-Infringing (NI) process (as indicated in paragraph 4.18 of Handbook of Procedures) shall be issued to manufacturer exporter only.
- c. Advance Authorisation shall be issued for:
  - i. Physical export (including export to SEZ)
  - ii. Intermediate supply; and/or
  - iii. Supply of goods to the categories mentioned in paragraph 7.02 (b), (c), (d), (e), (f) and (g) of this FTP.
  - iv. Supply of 'stores' on board of foreign going vessel / aircraft, subject to condition that there is specific Standard Input Output Norms in respect of item supplied.

### Self-Ratification Scheme

- i. Where there is no SION/valid Adhoc Norms for an export product or where SION has been notified but exporter intends to use additional inputs in the manufacturing process, eligible exporter can apply for an Advance Authorisation under this scheme on self-declaration and self-ratification basis. The expression "additional inputs" refers not to additionality in terms of quantity/value of an input specified in a norm, but to another additional input. Say, if the inputs specified in the norm are X1 and X2 only, then input Y would represent an additional input. RA may issue Advance Authorisations and such cases need not be referred to Norms Committees for ratification of norms. Application under this scheme shall be made along with a Certificate from Chartered Engineer in the prescribed format.
- ii. A Certificate from a Chartered Engineer who has been not been penalised in the last five years under FT(D&R) Act 1992, Customs Act 1962, Central Excise Act 1944, GST Acts and allied acts and rules made there under shall only be accepted for grant of Authorisation under this scheme.
- iii. Detailed procedure for administering the scheme shall be prescribed in the Handbook of Procedures.
- iv. An exporter (manufacturer or merchant), who holds AEO Certificate under Common Accreditation Programme of CBEC is eligible to opt for this scheme.
- v. A status holder who is a manufacturer cum actual user and holds valid 2-star or above status under para 1.25 of FTP and who has already submitted its application for grant of AEO on CBIC's AEO portal is also eligible to apply for this scheme subject to following conditions:-
  - a) Status holder submits copy of numbered and dated acknowledgement of its application for grant of AEO.
  - b) Status holder undertakes to the DGFT that –
    1. Their application for grant of AEO certification has not yet been rejected;
    2. There is no case of infringement of Customs and allied laws against the status holder in the current year and last three FYs.
    3. Status holder has not been issued show cause notice by Customs or GST authorities in the current year and last three FYs.
    4. Status holder has positive net current assets.
    5. There are no insolvency, bankruptcy or liquidation proceedings taken against the status holder in the current year and last three FYs.

- c) If status holder is unable to obtain the AEO certification within 120 days from date of application under this scheme para, the exporter agrees that the facility under this para shall stand withdrawn and he (status holder) will be bound to approach the concerned Norms Committee of DGFT for fixation of norms and to abide by the decision of the said Committee.
  - d) In case of situation as at (c) above, no further authorisation under this scheme para will be issued.
  - e) The DGFT may deny authorisation under this scheme para to two star and above status holder based on its risk management principles.
  - f) Status holder shall be audited by the DGFT as laid down in the Handbook of Procedures.
- vi. The scheme shall not be available for the following export products:
- a) All items covered under Chapter-1 to 24 and Chapter-71 of ITC (HS) Classification;
  - b) Biotechnology items and related products; and
  - c) SCOMET items.
- vii. The scheme shall not be available for the following inputs:
- A. All vegetable / edible oils classified under Chapter-15 and all types of oilseeds classified under Chapter-12 of ITC (HS) book;
  - B. All types of cereals classified under Chapter-10 of ITC (HS) book;
  - C. Horn, hoof and any other organ of animal;
  - D. Wild animal products, organs and waste thereof;
  - E. Honey;
  - F. All items with basic customs duty of 30% or more;
  - G. All types of fruits/ nuts/ vegetables classified under Chapter-7 and Chapter-8 of ITC (HS) book;
  - H. Items covered under heading 2515, 2516, 3301, 3302, 3303, 6801 and 6802 of ITC (HS) Classification;
  - I. Items covered under Chapter 50 to 63 of ITC (HS) classification;
  - J. Acetic Anhydride, Ephedrine and Pseudoephedrine;
  - K. Vitamins;
  - L. Biotechnology items and related products;
  - M. Insecticides, Rodenticides, Fungicides, Herbicides, Anti sprouting products, and plant growth regulators, disinfectants and similar products of all forms, types and grades;
  - N. Waste/Scrap of all types; and
  - O. Second hand goods.
- viii. Inputs imported shall be subject to pre import condition and they shall be physically incorporated in the export product (making normal allowance for wastage). In case of local procurement under invalidation/ARO, the inputs shall be procured prior to manufacture of export item and shall be physically incorporated in the export product.
- ix. Wherever value of by-products and recoverable wastage generated during manufacturing process is more than 5% of CIF value, corresponding quantity of main input shall be reduced from the entitlement to the extent that value of disallowed quantity is equal to the value of by-products and recoverable wastage generated during manufacturing process.

- x. Concerned Norms Committee may conduct audit of the manufacturer. The frequency and manner of audit shall be prescribed by DGFT in Handbook of Procedures. The manufacturer shall be required to provide the necessary facility to verify the books of account/other documents as required, give information and assistance for timely completion of the audit. Non-availability of production and consumption documents/data shall be treated as misdeclaration and indulgence in fraudulent activities and shall be penalised under FT (D&R) Act, as amended and rules made there under.
- xi. Concerned Norms Committee may initiate special audit, considering the nature and complexity of the case and revenue of government, if he is of the opinion at any stage of scrutiny/enquiry/investigation that the norms have not been claimed correctly or the excess benefit has been availed. Special audit can be conducted even if the manufacturer has already been audited before.
- xii. If the audit results in detection of mis-declaration and/ or instances of claiming of inputs which are not used in manufacturing process or excess quantity of inputs than consumed, demand and recovery actions will be initiated in addition to initiation of action against the authorisation holder, manufacturer and Chartered Engineer in terms of Foreign Trade Development and Regulation Act 1992 and/or Customs Act 1962, as amended and rules made there under.
- xiii. In cases where Chartered Engineer has not exercised due diligence or has willfully become party to mis-declaration action will be initiated under against such person under FT(D&R) Act 1992, as amended and rules made there under. In addition, such cases shall also be referred to 'The Institute of Engineers India' for taking action as warranted under the bylaws of the institute
- xiv. All the provisions applicable for Advance Authorisation Scheme shall be applicable to this scheme also in so far they are not inconsistent with this scheme.

#### Advance Authorisation for Annual Requirement and Eligibility Condition

- a. Advance Authorisation for Annual Requirement shall only be issued for items notified in Standard Input Output Norms (SION). And it shall not be available in case of adhoc norms under paragraph 4.03 (b) (ii) of FTP.
- b. Advance Authorisation for Annual Requirement shall also not be available in respect of SION where any item of input appears in Appendix 4-J.
- c. Exporters having past export performance (in at least preceding two financial years) shall be entitled for Advance Authorisation for Annual requirement.
- d. Entitlement in terms of CIF value of imports shall be upto 300% of the FOB value of physical export and / or FOR value of deemed export in preceding financial year or Rs 1 Crore, whichever is higher.

#### Value Addition

Value Addition for the purpose of this Chapter (except for Gems and Jewellery sector for which value addition is prescribed in paragraph 4.37 of FTP) shall be:-

$$VA = \frac{A-B}{B} \times 100 \text{ where}$$

A =FOB value of export realized/FOR value of supply received.

B =CIF value of inputs covered by Authorisation, plus value of any other input used on which benefit of DBK is claimed or intended to be claimed.

### Minimum Value Addition

- (i) Minimum value addition required to be achieved under Advance Authorisation is 15%.
- (ii) Export Products where value addition could be less than 15% are given in Appendix 4D.
- (iii) Minimum value addition for Gems & Jewellery Sector is given in paragraph 4.60 of Handbook of Procedures.
- (iv) In case of Tea, minimum value addition shall be 50%.
- (v) In case of spices, minimum value addition shall be 25%. 4.10 Import of Mandatory Spares Import of mandatory spares which are required to be exported / supplied with the resultant product shall be permitted duty free to the extent of 10% of CIF value of Authorisation.

### Import of Mandatory Spares

Import of mandatory spares which are required to be exported / supplied with the resultant product shall be permitted duty free to the extent of 10% of CIF value of Authorisation.

### Ineligible categories of import on Self Declaration basis

- a. Import of following products shall not be permissible on self-declaration basis:
  - i. All vegetable / edible oils classified under Chapter- 15 and all types of oilseeds classified under Chapter- 12 of ITC (HS) book;
  - ii. All types of cereals classified under Chapter–10 of ITC (HS) book;
  - iii. All Spices other than light black pepper (light berries) having a basic customs duty of more than 30%, classified under Chapter-9 and 12 of ITC (HS)book;
  - iv. All types of fruits/ vegetables having a basic customs duty of more than 30%, classified under Chapter-7 and Chapter-8 of ITC(HS) book;
  - v. Horn, Hoof and any other organ of animal;
  - vi. Honey;
  - vii. Rough Marble Blocks/Slabs;
  - viii. Rough Granite;
  - ix. Vitamins except for use in pharmaceutical industry; and
  - x. All items with a basic custom duty of more than 30%.
- b. For export of perfumes, perfumery compounds and various feed ingredients containing vitamins, no Authorisation shall be issued by Regional Authority under paragraph 4.07 of Handbook of Procedures and applicants shall be required to apply under paragraph 4.06 of Hand Book of Procedures to the Norms Committee.
- c. Where export and/or import of biotechnology items and related products are involved, Authorisation under paragraph 4.07 of Handbook of Procedures shall be issued by Regional Authority only on submission of a “No Objection Certificate” from Department of Biotechnology.

### Accounting of Input

- a. Wherever SION permits use of either (a) a generic input or (b) alternative input, unless the name of the specific input together with quantity [which has been used in manufacturing the export product]

gets indicated / endorsed in the relevant shipping bill and these inputs, so endorsed, within quantity specified and match the description in the relevant bill of entry, the concerned Authorisation will not be redeemed. In other words, the name/description of the input used (or to be used) in the Authorisation must match exactly with the name/description endorsed in the shipping bill.

- b. In addition, if in any SION, a single quantity has been indicated against a number of inputs (more than one input), then quantities of such inputs to be permitted for import shall be in proportion to the quantity of these inputs actually used/consumed in production, within overall quantity against such group of inputs. Proportion of these inputs actually used/consumed in production of export product shall be clearly indicated in shipping bills.
- c. At the time of discharge of export obligation (issue of EODC) or at the time of redemption, Regional Authority shall allow only those inputs which have been specifically indicated in the shipping bill together with quantity.
- d. The above provisions will also be applicable for supplies to SEZs and supplies made under Deemed exports. Details as given above will have to be indicated in the relevant Bill of Export, ARE-3, Central Excise certified Invoice / import document / Tax Invoice for export prescribed under the GST rules.

#### **Pre-import condition in certain cases**

- i. DGFT may, by Notification, impose pre-import condition for inputs under this Chapter.
- ii. Import items subject to pre-import condition are listed in Appendix 4-J or will be as indicated in Standard Input Output Norms (SION).

#### **Details of Duties exempted**

Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c) & (f) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorisation for physical as well as deemed exports are also exempt from whole of the Integrated Tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975).

#### **Admissibility of Drawback**

Drawback as per rate determined and fixed by Customs authority in terms of DoR Rules shall be available for duty paid imported or indigenous inputs (not specified in the norms) used in the export product. For this purpose, applicant shall indicate clearly details of duty paid input in the application for Advance Authorisation. As per details mentioned in the application, Regional Authority shall also clearly endorse details of such duty paid inputs in the condition sheet of the Advance Authorisation.

#### **Actual User Condition for Advance Authorisation**

- i. Advance Authorisation and / or material imported under Advance Authorisation shall be subject to 'Actual User' condition. The same shall not be transferable even after completion of export obligation. However, Authorisation holder will have option to dispose of product manufactured out of duty free input once export obligation is completed.
- ii. In case where CENVAT/input tax credit facility on input has been availed for the exported goods, even after completion of export obligation, the goods imported against such Advance Authorisation shall

be utilized only in the manufacture of dutiable goods whether within the same factory or outside (by a supporting manufacturer). For this, the Authorisation holder shall produce a certificate from Chartered Accountant at the time of filing application for Export Obligation Discharge Certificate to Regional Authority concerned. An AEO having valid certificate has the option to produce self-declaration to this effect.

- iii. Waste / Scrap arising out of manufacturing process, as allowed, can be disposed off on payment of applicable duty even before fulfillment of export obligation.

### Validity Period for Import and its Extension

Validity period for import under Advance Authorisation shall be as prescribed in Handbook of Procedures.

### Importability / Exportability of items that are Prohibited/ Restricted / STE

- i. No export or import of an item shall be allowed under Advance Authorisation / DFIA if the item is prohibited for exports or imports respectively. Export of a prohibited item may be allowed under Advance Authorisation provided it is separately so notified, subject to the conditions given therein.
- ii. Items reserved for imports by STEs cannot be imported against Advance Authorisation / DFIA. However, those items can be procured from STEs against ARO or Invalidation letter. STEs are also allowed to sell goods on High Sea Sale basis to holders of Advance Authorisation / DFIA holder. STEs are also permitted to issue "No Objection Certificate (NOC)" for import by Advance Authorisation / DFIA holder and may charge a reasonable fee subject to a maximum of ₹5000 from the applicant.
- iii. Items reserved for export by STE can be exported under Advance Authorisation / DFIA only after obtaining a 'No Objection Certificate' from the concerned STE.
- iv. Import of restricted items shall be allowed under Advance Authorisation/DFIA unless specifically disallowed.
- v. Export of restricted / SCOMET items however, shall be subject to all conditionalities or requirements of export authorisation or permission, as may be required, under Schedule 2 of ITC (HS).

### Free of Cost Supply by Foreign Buyer

Advance Authorisation shall also be available where some or all inputs are supplied free of cost to exporter by foreign buyer. In such cases, notional value of free of cost input shall be added in the CIF value of import and FOB value of export for the purpose of computation of value addition. However, realization of export proceeds will be equivalent to an amount excluding notional value of such input.

### Domestic Sourcing of Inputs

- i. Holder of an Advance Authorisation / Duty Free Import Authorisation can procure inputs from indigenous supplier/ State Trading Enterprise/EOU/EHTP/BTP/ STP in lieu of direct import. Such procurement can be against Advance Release Order (ARO), or Invalidation Letter.
- ii. When domestic supplier intends to obtain duty free material for inputs through Advance Authorisation for supplying resultant product to another Advance Authorisation / DFIA /EPCG Authorisation, Regional Authority shall issue Invalidation Letter.
- iii. Regional Authority shall issue Advance Release Order if the domestic supplier intends to seek refund of duties exempted through Deemed Exports mechanism as per provisions under Chapter-7 of FTP.
- iv. Regional Authority may issue Advance Release Order or Invalidation Letter at the time of issue of Authorisation simultaneously or subsequently.

- v. Advance Authorisation holder under DTA can procure inputs from / SEZ units against Certificate of supply till EDI message system between SEZ and Customs is enabled.
- vi. Validity of Advance Release Order / Invalidation Letter shall be co- terminous with validity of Authorisation.

### Currency for Realisation of Export Proceeds

- i. Export proceeds shall be realized in freely convertible currency or in Indian Rupees as per para 2.53 of FTP, except otherwise specified. Provisions regarding realisation and non-realisation of export proceeds are given in paragraph 2.52, 2.53 and 2.54 of FTP.
- ii. Export to SEZ Units shall be taken into account for discharge of export obligation provided payment is realised from Foreign Currency Account of the SEZ unit.
- iii. Export to SEZ Developers / Co-developers can also be taken into account for discharge of export obligation even if payment is realised in Indian Rupees.
- iv. Authorisation holder needs to file Bill of Export for export to SEZ unit/ developer / co-developer in accordance with the procedures given in SEZ Rules, 2006.

### Export Obligation Period and its Extension

Period for fulfillment of export obligation and its extension under Advance Authorisation shall be as prescribed in Handbook of Procedures.

### Re-import of exported goods under Duty Exemption/ Remission Scheme

Goods exported under Advance Authorisation/ Duty Free Import Authorisation may be re-imported in same or substantially same form subject to such conditions as may be specified by Department of Revenue. Authorisation holder shall also inform about such re- importation to the Regional Authority which had issued the Authorisation within one month from date of re-import.

## DUTY FREE IMPORT AUTHORISATION SCHEME (DFIA)

### DFIA Scheme

1. Duty Free Import Authorisation is issued to allow duty free import of inputs. In addition, import of oil and catalyst which is consumed/ utilised in the process of production of export product, may also be allowed.
2. Provisions of paragraphs 4.12, 4.18, 4.20, 4.21 and 4.23 of FTP shall be applicable to DFIA also.
3. Import of Tyre under DFIA scheme is not allowed.

### Duties Exempted

- i. Duty Free Import Authorisation shall be exempted only from payment of Basic Customs Duty (BCD).
- ii. Drawback as per rate determined and fixed by Customs authority shall be available for duty paid inputs, whether imported or indigenous, used in the export product. However, in case such drawback is claimed for inputs not specified in SION, the applicant should have indicated clearly details of such duty paid inputs also in the application for Duty Free Import Authorisation, and as per the details mentioned in the application, the Regional Authority should also have clearly endorsed details of such duty paid inputs in the condition sheet of the Duty Free Import Authorisation.



**Eligibility**

- i. Duty Free Import Authorisation shall be issued on post export basis for products for which Standard Input Output Norms have been notified.
- ii. Merchant Exporter shall be required to mention name and address of supporting manufacturer of the export product on the export document viz. Shipping Bill/ Bill of Export / Tax Invoice for export prescribed under the GST rules.
- iii. Application is to be filed with concerned Regional Authority before effecting export under Duty Free Import Authorisation.
- iv. No Duty Free Import Authorisation shall be issued for an input which is subjected to pre-import condition or where SION prescribes 'Actual User' condition or Appendix-4J prescribes pre import condition for such an input.

**Minimum Value Addition**

Minimum value addition of 20% shall be required to be achieved.

**Validity & Transferability of DFIA**

- a. Applicant shall file online application to Regional Authority concerned before starting export under DFIA.
- b. Export shall be completed within 12 months from the date of online filing of application and generation of file number.
- c. While doing export/supply, applicant shall indicate file number on the export /supply documents viz. Shipping Bill / Bill of Export / Tax invoice for supply prescribed under GST rules.
- d. In terms of Para 4.12 of FTP, Wherever SION permits use of either (a) a generic input or (b) alternative input, the specific input together with quantity [which has been used in manufacturing the export product] should be indicated / endorsed in the relevant Shipping Bill/ Bill of Export / Tax invoice for supply prescribed under GST rules. Only such inputs may be permitted for import in the authorisation in proportion to the quantity of these inputs actually used/consumed in production, within overall quantity against such generic input/alternative input.
- e. In addition, if in any SION, a single quantity has been indicated against a number of inputs (more than one input), then quantities of such inputs to be permitted for import shall be in proportion to the quantity of these inputs actually used/consumed in production and declared in Shipping Bill / Bill of Export / Tax invoice for supply prescribed under GST rules within overall quantity against such group of inputs. Proportion of these inputs actually used/consumed in production of export product shall be clearly indicated in Shipping Bill / Bill of Export / Tax invoice for supply prescribed under GST rules.
- f. Separate DFIA shall be issued for each SION.
- g. Exports under DFIA shall be made from any port listed in Para 4.35 of Handbook of Procedures. However, separate application shall be made for EDI and non-EDI ports. In case export is made from a non-EDI port, separate application shall be made for each non-EDI port.
- h. Regional Authority shall issue transferable DFIA with a validity of 12 months from the date of issue. No further revalidation shall be granted by Regional Authority.

**Sensitive Items under Duty Free Import Authorisation**

- i. In respect of following inputs, exporter shall be required to provide declaration with regard to technical characteristics, quality and specification in Shipping Bill: "Alloy steel including Stainless Steel, Copper Alloy, Synthetic Rubber, Bearings, Solvent, Perfumes / Essential Oil/ Aromatic Chemicals, Surfactants, Relevant Fabrics, Marble, Articles made of Polypropylene, Articles made of Paper and Paper Board,

Insecticides, Lead Ingots, Zinc Ingots, Citric Acid, Relevant Glass fibre reinforcement (Glass fibre, Chopped / Stranded Mat, Roving Woven Surfacing Mat), Relevant Synthetic Resin (unsaturated Polyester Resin, Epoxy Resin, Vinyl Ester Resin, Hydroxy Ethyl Cellulose), Lining Material”.

- ii. While issuing Duty Free Import Authorisation, Regional Authority shall mention technical characteristics, quality and specification in respect of above inputs in the Authorisation.

## SCHEMES FOR EXPORTERS OF GEMS AND JEWELLERY

### Import of Input

Exporters of Gems and Jewellery can import / procure duty free (excluding Integrated Tax and Compensation Cess leviable under Section 3(7) and 3(9) of Customs Tariff Act) input for manufacture of export product.

### Items of Export

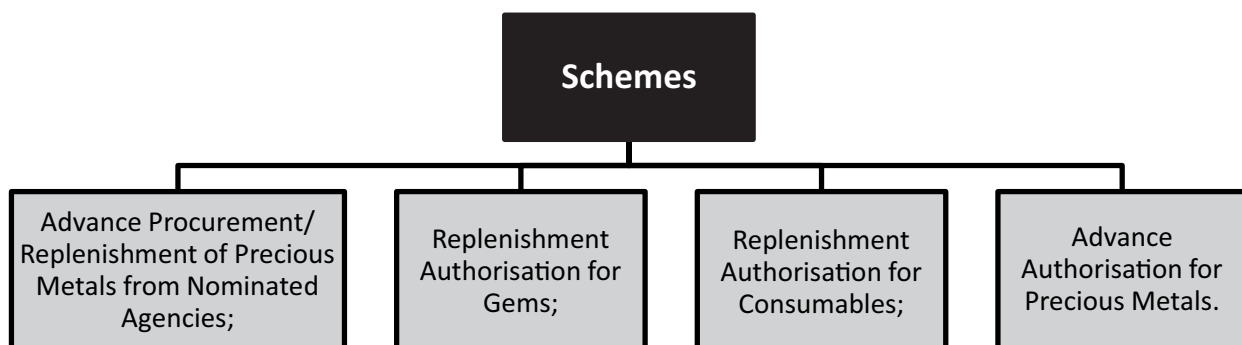
- i) “Gold jewellery, including partly processed jewellery, and articles including medallions and coins (excluding legal tender coins), whether plain or studded, containing gold of 8 carats and above up to a maximum limit of 22 carats.

Gold religious idols (only gods and goddess) of 8 carats and above (up to 24 carats) subject to the following conditions:

- a. Exports would be subject to 100% examination by the Approved Government Valuer.
  - b. Foreign remittance has to be realized within a period of 3 months from the date of export.
  - c. Exporters must submit confirmed export order before effecting export.
  - d. Distinction must be made between a religious idol and simply moulded gold article/idol.
  - e. Exports may be allowed only be actual manufactures of such idols. The findings like posts, push backs, locks which help in collating the jewellery pieces together, containing gold of 3 carats and above up to a maximum limit of 22 carats.
- ii) Silver jewellery including partly processed jewellery, silverware, silver strips and articles including medallions and coins (excluding legal tender coins and any engineering goods) containing more than 50% silver by weight;
  - iii) Platinum jewellery including partly processed jewellery and articles including medallions and coins (excluding legal tender coins and any engineering goods) containing more than 50% platinum by weight.

### Schemes

The schemes are as follows:



### Advance Procurement/ Replenishment of Precious Metals from Nominated Agencies

- (i) Exporter of gold / silver / platinum jewellery and articles thereof including mountings and findings may obtain gold/ silver / platinum as an input for export product from Nominated Agency, in advance or as replenishment after export in accordance with the procedure specified in this behalf. Replenishment of gold/silver/platinum will be subject to Customs notification No. 57/2000-Customs dated 08.05.2000, as amended.
- (ii) The export would be subject to wastage norms and minimum value addition as prescribed in paragraph 4.59 and 4.60 respectively in the Handbook of Procedures.

### Replenishment Authorisation for Gems

- (i) Exporter may obtain Replenishment Authorisation for Gems from Regional Authority in accordance with procedure specified in Handbook of Procedures as per the replenishment rate prescribed in Appendix 4F. Replenishment Authorisation for Gems shall be freely transferable.
- (ii) Replenishment Authorisation for Gems may be issued against export including that made against supply by Nominated Agency (paragraph 4.40 of FTP) and against supply by foreign buyer (paragraph 4.44 of FTP).
- (iii) In the case of studded gold/silver/platinum jewellery and articles thereof, the value of Gem Replenishment Authorisation shall be on the remaining FOB value of exports after deducting the value of gold/ silver/ platinum including admissible wastage. The scale of replenishment and the item of import will be as prescribed in Appendix 4G.

### Replenishment Authorisation for Consumables

- (i) Replenishment Authorisation for duty free (excluding Integrated Tax and Compensation Cess leviable under Section 3(7) and 3(9) of Customs Tariff Act) import of Consumables, Tools and other items namely, Tags and labels, Security censor on card, Staple wire, Poly bag (as notified by Customs) for Jewellery made out of precious metals (other than Gold & Platinum) equal to 2% and for Cut and Polished Diamonds and Jewellery made out of Gold and Platinum equal to 1% of FOB value of exports of the preceding year, may be issued on production of Chartered Accountant Certificate indicating the export performance. However, in case of Rhodium finished Silver jewellery, entitlement will be 3% of FOB value of exports of such jewellery. This Authorisation shall be non-transferable and subject to actual user condition.
- (ii) Application for import of consumables as given above shall be filed online to the concerned Regional Authority in ANF 4H.

It may be noted that –

“Consumables” means any item, which participates in or is required for a manufacturing process, but does not necessarily form part of end-product. Items, which are substantially or totally consumed during a manufacturing process, will be deemed to be consumables.

### Advance Authorisation for Precious Metals

1. Advance Authorisation shall be granted on pre-import basis with ‘Actual User’ condition for duty free (excluding Integrated Tax and Compensation Cess leviable under Section 3(7) and 3(9) of Customs Tariff Act) import of:
  - a. Gold of fineness not less than 0.995 and mountings, sockets, frames and findings of 8 carats and above;

- b. Silver of fineness not less than 0.995 and mountings, sockets, frames and findings containing more than 50% silver by weight;
  - c. Platinum of fineness not less than 0.900 and mountings, sockets, frames and findings containing more than 50% platinum by weight.
2. Advance Authorisation shall carry an export obligation which shall be fulfilled as per procedure indicated in Chapter 4 of Handbook of Procedures.
  3. Value Addition shall be as per paragraph 4.37 of FTP and 4.60 of Handbook of Procedures.
  4. Advance Authorisation Scheme is not available where the item of export is 'Gold Medallions and Coins' or 'Gold jewellery/articles manufactured by fully mechanized process'.

### Value Addition

Minimum Value Addition norms for gems and jewellery sector are given in paragraph 4.60 of Handbook of Procedures. It would be calculated as under:

$$VA = \frac{A-B}{B} \times 100 \text{ where}$$

A = FOB value of the export realised/ FOR value of supply received.

B= Value of inputs (including domestically procured) such as gold/silver/platinum content in export product plus admissible wastage along with value of other items such as gemstone etc. Wherever gold has been obtained on loan basis, value shall also include interest paid in free foreign exchange to foreign supplier.

### Wastage Norms

Wastage or manufacturing loss for gold/silver/platinum jewellery shall be admissible as per paragraph 4.59 of Handbook of Procedures.

### DFIA not available

Duty Free Import Authorisation scheme shall not be available for Gems and Jewellery sector.

### Nominated Agencies

- (i) Exporters may obtain gold / silver / platinum from Nominated Agency. Exporter in EOU and units in SEZ would be governed by the respective provisions of Chapter-6 of FTP / SEZ Rules, respectively.
- (ii) Nominated Agencies are The Handicraft and Handlooms Exports Corporation of India Ltd, MSTC Ltd., and Diamond India Limited.
- (iii) Reserve Bank of India can authorize any bank as Nominated Agency.
- (iv) Procedure for import of precious metal by Nominated Agencies shall be as per the provisions laid down in HBP. The procedure for import of precious metals by the Gems & Jewellery units operating under EOU & SEZ schemes will be as per the applicable schemes. The monitoring mechanism for the Nominated Agencies (other than banks authorised by RBI) shall be as per para 4.93 of HBP.
- (v) A bank authorised by Reserve Bank of India is allowed export of gold scrap for refining and import standard gold bars as per Reserve Bank of India guidelines.

### Import of Diamonds for Certification / Grading & Re-export

Following agencies are permitted to import diamonds to their laboratories without any import duty, for the purpose of certification / grading reports, with a condition that the same should be re-exported with the certification/grading reports, as per the procedure laid down in Hand Book of Procedures:

- (1) Gemological Institute of America (GIA), Mumbai, Maharashtra.
- (2) Indian Diamond Institute, Surat, Gujarat, India.
- (3) De Beers India Private Ltd., Surat, Gujarat, India.
- (4) HRD Diamond Institute Private Limited, Mumbai, Maharashtra, India
- (5) International Gemological Institute (India) Pvt. Ltd., Bandra Kurla Complex, Mumbai,
- (6) Gemological Science International (GSI) Pvt. Ltd., Mumbai, Maharashtra, India.

### Export of Cut & Polished Diamonds for Certification/ Grading & Re-import

List of authorized laboratories for certification / grading of diamonds of 0.25 carat and above are given in paragraph 4.73 of Handbook of Procedures.

### Export of Cut & Polished Diamonds with Re-import Facility at Zero Duty

An exporter (with annual export turnover of Rs 5 crores for each of the last three years) or the authorized offices/agencies in India of laboratories mentioned under paragraph 4.73 of Hand Book of Procedures may export cut & polished diamonds (each of 0.25 carat or above) to any of the agencies/laboratories mentioned under paragraph 4.73 of Handbook of Procedures with re-import facility at zero duty within 3 months from the date of export. Such facility of re- import at zero duty will be subject to guidelines issued by Central Board of Customs & Excise, Department of Revenue.

### Export against Supply by Foreign Buyer

- (i) Where export orders are placed on nominated agencies / status holder / exporters of three years standing having an annual average turnover of Rupees five crores during preceding three financial years, foreign buyer may supply in advance and free of charge, gold/silver/ platinum, alloys, findings and mountings of gold / silver / platinum for manufacture and export.
- (ii) Such supplies can also be in advance and may involve semi- finished jewellery including findings/ mountings / components for repairs / re-make and export subject to minimum value addition as prescribed under paragraph 4.60 of Handbook of Procedures. In such cases of export, wastage norms as per paragraph 4.59 of Handbook of Procedures shall apply.
- (iii) Exports may be made by nominated agencies directly or through their associates or by status holder / exporter. Import and Export of findings shall be on net to net basis.

It may be noted that –

“Component” means one of the parts of a sub-assembly or assembly of which a manufactured product is made up and into which it may be resolved. A component includes an accessory or attachment to another component.

### Export Promotion Tours/ Export of Branded Jewellery

- (i) Nominated Agencies and their associates, with approval of Department of Commerce and with approval of Gem & Jewellery Export Promotion Council (GJEPC), may export gold / silver / platinum jewellery and articles thereof for exhibitions abroad.

- (ii) Personal carriage of gold / silver / platinum jewellery, precious, semi-precious stones, beads and articles and export of branded jewellery is also permitted, subject to conditions as in Handbook of Procedures. 4.46 Personal Carriage of Export /Import Parcels Personal carriage of gems and jewellery export parcels by foreign bound passengers and import parcels by an Indian importer/foreign national may be permitted as per the Handbook of Procedures.

### **Export by Post**

Export of jewellery through Foreign Post Office including via Speed Post is allowed. The jewellery parcel shall not exceed 20 kgs by weight.

### **Private / Public Bonded Warehouse**

Private / Public Bonded Warehouses may be set up in SEZ/ DTA for import and re-export of cut and polished diamonds, cut and polished coloured gemstones, uncut & unset precious & semi- precious stones, subject to achievement of minimum value addition of 5% by DTA units.

### **Special Notified Zone (SNZ)**

Import, auction/sale and re-export of rough diamonds by entities, as notified vide RBI Notification 116 of 1st April, 2014, as amended from time to time, on consignment or outright basis, will be permitted in Special Notified Zone (SNZ) administered by the operator of SNZ, under supervision of Customs. The procedure of import, auction/ sale and re- export of rough diamonds (unsold) would be as specified by CBIC.

### **Diamond & Jewellery Dollar Accounts**

1. Firms and companies dealing in purchase / sale of rough or cut and polished diamonds / precious metal jewellery plain, minakari and / or studded with / without diamond and / or other stones with a track record of at least three years in import or export of diamonds / coloured gemstones / diamond and coloured gemstones studded jewellery / plain gold jewellery and having an average annual turnover of Rs. 3 crore or above during preceding three licensing years may also carry out their business through designated Diamond Dollar Accounts(DDA).
2. Dollars in such accounts available from bank finance and / or export proceeds shall be used only for:
  - a) Import / purchase of rough diamonds from overseas/ local sources;
  - b) Purchase of cut and polished diamonds, coloured gemstones and plain gold jewellery from local sources;
  - c) Import / purchase of gold from overseas / nominated agencies and repayment of dollar loans from the bank; and
  - d) Transfer to Rupee Account of exporter. Details of this DDA Scheme are given in Handbook of Procedures.
3. A non DDA holder is also permitted to supply cut and polished diamonds to DDA holder, receive payment in dollars and convert the same into Rupees within 7 days. Cut and polished diamonds and coloured gemstones so supplied by non-DDA holder will also be counted towards discharge of his export obligation and/ or entitle him to replenishment Authorisation.

### **Export of cut & polished precious and semi-precious stones for treatment and re-import**

Gems and Jewellery exporters shall be allowed to export cut and polished precious and semi-precious stones for the treatment and re- import as per customs rules and regulations. In case of re-export, the exporter shall be entitled for duty drawback as per rules.

### Re-import of rejected Jewellery

Gems & Jewellery exporters shall be allowed to re-import rejected precious metal jewellery as per paragraph 4.90 of Handbook of Procedures.

### Export and import on consignment basis

Gems & Jewellery exporters shall be allowed to export and import diamond, gemstones & jewellery on consignment basis as per Handbook of Procedures and Customs Rules and Regulations.

## SCHEME FOR REMISSION OF DUTIES AND TAXES ON EXPORTED PRODUCTS

### Scheme Objective and Operating Principles

- i. The Scheme's objective is to refund, currently unrefunded:
  - a. Duties/ taxes / levies, at the Central, State and local level, borne on the exported product, including prior stage cumulative indirect taxes on goods and services used in the production of the exported product and
  - b. Such indirect Duties/ taxes / levies in respect of distribution of exported product.
- ii. The rebate under the Scheme shall not be available in respect of duties and taxes already exempted or remitted or credited.
- iii. The determination of ceiling rates under the Scheme will be done by a Committee in the Department of Revenue/Drawback Division with suitable representation of the DoC/DGFT, line ministries and experts, on the sectors prioritized by Department of Commerce and Department of Revenue.
- iv. The overall budget/outlay for the RoDTEP Scheme would be finalized by the Ministry of Finance in consultation with Department of Commerce (DoC), taking into account all relevant factors.
- v. The Scheme will operate in a Budgetary framework for each financial year and necessary calibrations and revisions shall be made to the Scheme benefits, as and when required, so that the projected remissions for each financial year are managed within the approved Budget of the Scheme. No provision for remission of arrears or contingent liabilities is permissible under the Scheme to be carried over to the next financial year.
- vi. The sequence of introduction of the Scheme across sectors, prioritization of the sectors to be covered, degree of benefit to be given on various items within the rates recommended by the Committee and within a ceiling as may be prescribed, on the per item/total overall benefit amount permissible, within the overall budget/ outlay finalized, will be decided and notified by the Department of Commerce (DoC) in consultation with Department of Revenue.
- vii. Under the Scheme, a rebate would be granted to eligible exporters at a notified rate as a percentage of FOB value with a value cap per unit of the exported product, wherever required, on export of items which are categorized under the notified 8 digit HS Code. However, for certain export items, a fixed quantum of rebate amount per unit may also be notified. Rates of rebate / value cap per unit under RoDTEP will be notified in Appendix 4R. In addition to necessary changes which may be brought in view of budget control measures as mentioned above, efforts would be made to review the RoDTEP rates on an annual basis and to notify them well in advance before the beginning of a financial year.
- viii. The rebate allowed is subject to the receipt of sale proceeds within time allowed under the Foreign Exchange Management Act, 1999 failing which such rebate shall be deemed never to have been allowed. The rebate would not be dependent on the realization of export proceeds at the time of issue

of rebate. However, adequate safeguards to avoid any misuse on account of non-realization and other systemic improvements as in operation under Drawback Scheme, IGST and other GST refunds relating to exports would also be applicable for claims made under the RoDTEP Scheme.

- ix. Mechanism of Issuance of Rebate: Scheme would be implemented through end to end digitization of issuance of rebate amount in the form of a transferable duty credit/electronic scrip (e-scrip), which will be maintained in an electronic ledger by the Central Board of Indirect Taxes & Customs (CBIC). Necessary rules and procedure regarding grant of RoDTEP claim under the Scheme and implementation issues including manner of application, time period for application and other matters including export realization, export documentation, sampling procedures, record keeping etc. would be notified by the CBIC, Department of Revenue on an IT enabled platform with a view to end to end digitization. Necessary provisions for recovery of rebate amount where foreign exchange is not realized, suspension/withholding of RoDTEP in case of frauds and misuse, as well as imposition of penalty will also be built suitably by CBIC.
- x. The Scheme will take effect for exports from 1st January 2021. However for exports made by categories under Para 4.55 (x), (xi) and (xii), the implementation date will be decided later as per provisions of Para 4.55B.

### Ineligible Supplies/ Items/Categories under the Scheme

The following categories of exports/ exporters shall not be eligible for rebate under RoDTEP Scheme:

- i. Export of imported goods covered under paragraph 2.46 of FTP.
- ii. Exports through trans-shipment, meaning thereby exports that are originating in third country but trans-shipped through India.
- iii. Export products which are subject to Minimum export price or export duty.
- iv. Products which are restricted for export under Schedule-2 of Export Policy in ITC (HS).
- v. Products which are prohibited for export under Schedule-2 of Export Policy in ITC (HS).
- vi. Deemed Exports.
- vii. Supplies of products manufactured by DTA units to SEZ/FTWZ units.
- viii. Products manufactured in EHTP and BTP.
- ix. Products manufactured partly or wholly in a warehouse under section 65 of the Customs Act, 1962.
- x. Products manufactured or exported in discharge of export obligation against an Advance Authorisation or Duty Free Import Authorization or Special Advance Authorisation issued under a duty exemption scheme of relevant Foreign Trade Policy.
- xi. Products manufactured or exported by a unit licensed as hundred per cent Export Oriented Unit (EOU) in terms of the provisions of the Foreign Trade Policy.
- xii. Products manufactured or exported by any of the units situated in Free Trade Zones or Export Processing Zones or Special Economic Zones.
- xiii. Products manufactured or exported availing the benefit of the Notification No. 32/1997-Customs dated 1st April, 1997.
- xiv. Exports for which electronic documentation in ICEGATE EDI has not been generated/ Exports from non-EDI ports.
- xv. Goods which have been taken into use after manufacture.



Government, however, reserves the right to modify any of the categories as mentioned above for inclusion or exclusion under the scope of RoDTEP, at a later date.

Inclusion of exports made by categories mentioned in para 4.55 (x), (xi) and (xii) above and RoDTEP rates for export items under such categories would be decided based on the recommendations of the RoDTEP Committee.

### Nature of Rebate

The e-scrips would be used only for payment of duty of Customs leviable under the First Schedule to the Customs Tariff Act, 1975 viz. Basic Customs Duty.

### Monitoring, Audit and Risk Management System

For the purposes of audit and verification, the exporter would be required to keep records substantiating claims made under the Scheme. A monitoring and audit mechanism with an IT based Risk Management System (RMS) would be put in place by the CBIC, Department of Revenue to physically verify the records of the exporters on sample basis. Sample cases for physical verification will be drawn objectively by the RMS, based on risk and other relevant parameters.

For a broad level monitoring, an Output Outcome framework will be maintained and monitored at regular intervals.

### Residual Issues

Residual issues related to the Scheme arising subsequently shall be considered by an Inter-Ministerial Committee, named as “RODTEP Policy Committee (RPC)” chaired by DGFT (comprising members of Department of Commerce and Department of Revenue), whose decisions would be binding.

The Appendix 4R containing the eligible RoDTEP export items, rates and per unit value caps, wherever applicable is available at the DGFT portal [www.dgft.gov.in](http://www.dgft.gov.in) under the link ‘Regulatory Updates >RoDTEP’.

## EXPORT PROMOTION CAPITAL GOODS (EPCG) SCHEME

### Objective

The objective of the EPCG Scheme is to facilitate import of capital goods for producing quality goods and services and enhance India’s manufacturing competitiveness.

### EPCG Scheme

1. EPCG Scheme allows import of capital goods (except those specified in negative list in Appendix 5 F) for pre-production, production and post-production at zero customs duty. Capital goods imported under EPCG Authorisation for physical exports are also exempt from IGST and Compensation Cess, leviable thereon under the subsection (7) and subsection (9) respectively, of section 3 of the Customs Tariff Act, 1975, as provided in the notification issued by Department of Revenue. Alternatively, the Authorisation holder may also procure Capital Goods from indigenous sources in accordance with provisions of paragraph 5.07 of FTP. Capital goods for the purpose of the EPCG scheme shall include:
  - a) Capital Goods as defined in Chapter 11 including in CKD/SKD condition thereof;
  - b) Computer systems and software which are a part of the Capital Goods being imported;
  - c) Spares, moulds, dies, jigs, fixtures, tools & refractories; and
  - d) Catalysts for initial charge plus one subsequent charge.

2. Import under EPCG Scheme shall be subject to an Export Obligation (EO) equivalent to 6 times of duties, taxes and cess saved on capital goods, to be fulfilled in 6 years reckoned from date of issue of Authorisation.
3. Import/procurement under EPCG scheme shall also be subjected to Average Export Obligation (AEO) as given in para 5.04(c) of FTP.
4. Authorisation shall be valid for import for 24 months from the date of issue of Authorisation. Revalidation of EPCG Authorisation shall not be permitted.
5. In case Integrated Tax and Compensation Cess are paid in cash on imports under EPCG, incidence of the said Integrated Tax and Compensation Cess would not be taken for computation of net duty saved provided Input Tax Credit is not availed.
6. Import of items which are restricted for import shall be permitted under EPCG Scheme only after approval from Exim Facilitation Committee (EFC) at DGFT Headquarters.
7. If the goods proposed to be exported under EPCG Authorisation are restricted for export, the EPCG Authorisation shall be issued only after approval for issuance of Export Authorisation from Exim Facilitation Committee (EFC) at DGFT Headquarters.

### Coverage

- (a) EPCG scheme covers manufacturer exporters with or without supporting manufacturer(s), merchant exporters tied to supporting manufacturer(s) and service providers. Name of supporting manufacturer(s) shall be endorsed on the EPCG Authorisation before installation of the capital goods in the factory / premises of the supporting manufacturer(s). In case of any change in supporting manufacturer(s), the RA shall intimate such change to jurisdictional Customs Authority of existing as well as changed supporting manufacturer(s) and the Customs at port of registration of Authorisation.
- (b) Export Promotion Capital Goods (EPCG) Scheme also covers a service provider who is certified as a Common Service Provider (CSP) by the DGFT - HQs, Department of Commerce in a Town of Export Excellence or Prime Minister Mega Integrated Textile Region and Apparel Parks (PM MITRA) subject to provisions of Foreign Trade Policy/Handbook of Procedures with the following conditions:
  - (i) Common utility services like providing Electricity, Water, Gas, Sanitation, Sewerage, Telecommunication, Transportation etc. shall not considered for benefit of CSP;
  - (ii) Export by users of the common service shall be counted towards fulfillment of EO of the CSP provided the EPCG Authorisation details of the CSP is mentioned in the respective Shipping bills and concerned RA must be informed about the details of the users prior to such export;
  - (iii) Such export will not count towards fulfillment of specific export obligation in respect of other EPCG Authorisations of the user;
  - (iv) Authorisation holder shall be required to submit Bank Guarantee (BG) which shall be equivalent to the duty saved. BG can be given by CSP or by any one of the users or a combination thereof, at the option of the CSP; and (v) Capital goods shall be installed within a Town of Export Excellence or PM MITRA.

It may be noted that-

“Service Provider” means a person providing:

- (i) Supply of a ‘service’ from India to any other country; (Mode1- Cross border trade)
- (ii) Supply of a ‘service’ from India to service consumer(s) of any other country in India; (Mode 2-Consumption abroad)

- (iii) Supply of a 'service' from India through commercial presence in any other country. (Mode 3 – Commercial Presence.)
- (iv) Supply of a 'service' from India through the presence of natural persons in any other country (Mode 4- Presence of natural persons.)

### Actual User Condition

Imported capital goods shall be subject to Actual User condition till export obligation is completed and Export Obligation Discharge Certificate (EODC) is granted.

### Export obligation

Following conditions shall apply to the fulfillment of Export obligation:-

- (a) Export obligation shall be fulfilled by the Authorisation holder through export of goods which are manufactured by him or his supporting manufacturer / services rendered by him, for which the EPCG authorisation has been granted.
- (b) For export of goods, EPCG Authorisation holder may export either directly or through third party(ies).
- (c) EO under the scheme shall be, over and above, the average level of exports achieved by the applicant in the preceding three licensing years for the same and similar products within the overall EO period including extended period, if any; except for categories mentioned in paragraph 5.12(a). Such average would be the arithmetic mean of export performance in the preceding three licensing years for same and similar products. The Average Export Obligation (AEO) shall be fulfilled every financial year, till export obligation is completed. Exports/supplies made over and above AEO shall only be considered for fulfillment of Export Obligation.
- (d) In case of indigenous sourcing of Capital Goods, specific EO shall be 25% less than the EO stipulated in Para 5.01. There shall be no change in average EO imposed, if any, as stipulated in Para 5.04(c).
- (e) Exports under Advance Authorisation, DFIA, Duty Drawback, RoSCTL and RoDTEP Schemes would also be eligible for fulfilment of EO under EPCG Scheme.
- (f) Export obligation may be fulfilled both by physical exports as well as deemed exports. Deemed export supplies shall also be eligible for benefits available under paragraph 7.03 of FTP.
- (g) Exports made from DTA units shall only be counted for calculation and/or fulfillment of AEO and/or EO.
- (h) EO can also be fulfilled by the supply of ITA-I items to DTA, provided realization is in free foreign exchange.
- (i) Royalty payments received by the Authorisation holder in freely convertible currency and foreign exchange received for R&D services shall also be counted for discharge under EPCG.
- (j) Payment received in rupee terms for such Services as notified in Appendix 5D shall also be counted towards discharge of export obligation under the EPCG scheme.
- (k) Export proceeds realized in Indian Rupees as per para 2.52(d)(ii) are also counted towards fulfillment of export obligation.
- (l) Only one benefit specified in paras 5.04(d), 5.09, 5.10 and 5.11 shall be admissible.
- (m) Extension of EO period shall be permitted as prescribed in Handbook of Procedures.

### **Provision for companies admitted under the provisions of Insolvency and Bankruptcy Code 2016**

A company holding EPCG authorizations and having been admitted under the provisions of Insolvency and Bankruptcy Code 2016 for commencement of insolvency proceedings and in respect of whom the resolution plan has been approved under Section 31 of IBC 2016 by Adjudicating Authority may be permitted to relief, concessions and waivers in accordance with the resolution plan approved/ finalised by Adjudicating Authority/ Appellate Authorities as the case may be.

### **LUT/Bond/BG in case of Agro units**

LUT/Bond or 15% BG, as applicable, may be furnished for EPCG Authorisation granted to units in Agri-Export Zones provided EPCG Authorisation is taken for export of primary agricultural product(s) notified or their value added variants.

### **Indigenous Sourcing of Capital Goods and benefits to Domestic Supplier**

A person holding an EPCG Authorisation may source capital goods from a domestic manufacturer either through Invalidation Letter or through Advance Release Order. Such domestic manufacturer shall be eligible for deemed export benefits under paragraph 7.03 of FTP, and as may be provided under GST Rules under the category of deemed exports. Such domestic sourcing shall also be permitted from EOUs and these supplies shall be counted for purpose of fulfillment of positive NFE by said EOU as provided in Para 6.08 (a) of FTP.

### **Calculation of Export Obligation**

In case of direct imports, EO shall be reckoned with reference to actual duty /Taxes/Cess saved amount. In case of domestic sourcing, EO shall be reckoned with reference to notional Customs duty /Taxes/Cess saved on FOR value as indicated in ARO / Invalidation letter.

### **Incentive for early EO fulfillment**

With a view to accelerating exports, in cases where Authorisation holder has fulfilled 75% or more of specific export obligation and 100% of Average Export Obligation till date, if any, in half or less than half the original export obligation period specified, remaining export obligation shall be condoned and the Authorisation redeemed by RA concerned.

### **Reduced EO for Green Technology Products**

For exporters of Green Technology Products, Specific EO shall be 75% of EO as stipulated in Para 5.01(b). There shall be no change in average EO imposed, if any, as stipulated in Para 5.04(c). The list of Green Technology Products is given in Para 5.26 of HBP.

### **Reduced EO for North East Region and UTs of Jammu & Kashmir and Ladakh**

For manufacturing units located in Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Jammu & Kashmir and Ladakh, specific EO shall be 25% of the EO, as stipulated in Para 5.01(b). There shall be no change in average EO imposed, if any, as stipulated in Para 5.04(c).

### **Exemption from maintenance of average export obligation**

- (a) In case of export of goods relating to the following, the EPCG Authorisation holder shall not be required to maintain average export obligation.
  - (i) Handicrafts, (ii) Handlooms, (iii) Industries covered under Khadi and Village Industries Commission (KVIC) (iv) Agriculture (v) Aquaculture (including Fisheries),Pisciculture, (vi) Animal husbandry and

Dairying, (vii) Floriculture & Horticulture, (viii) Poultry, (ix) Viticulture, (x) Sericulture, (xi) Carpets, (xii) Coir, and (xiii) Jute

- (b) However, this exemption from maintenance of average export obligation shall not be allowed for import of fishing trawlers, boats, ships and other similar items.
- (c) Goods, excepting tools imported under EPCG scheme by sectors specified in sub-paragraph (a) above, shall not be allowed to be transferred for a period of five years from date of imports even in cases where export obligation has been fulfilled.

### Transitional Arrangements

Authorisations issued during various policy periods viz., 2002-07, 2004-09, 2009-14, 2015-20 issued prior to 05.12.2017 and 2015-20 RE 2017 shall be governed by corresponding Foreign Trade Policy provisions and Handbook of Procedures, unless otherwise specifically stated.

### EXPORT ORIENTED UNITS (EOUS), ELECTRONICS HARDWARE TECHNOLOGY PARKS (EHTPS), SOFTWARE TECHNOLOGY PARKS (STPS) AND BIO-TECHNOLOGY PARKS (BTPS)

#### Introduction and Objective

- (a) Units undertaking to export their entire production of goods and services (except permissible sales in DTA), may be set up under the Export Oriented Unit (EOU) Scheme, Electronics Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) Scheme for manufacture of goods, including repair, re-making, reconditioning, re-engineering, rendering of services, development of software, agriculture including agro-processing, aquaculture, animal husbandry, biotechnology, floriculture, horticulture, pisciculture, viticulture, poultry and sericulture. Trading units are not covered under these schemes.
- (b) Objectives of these schemes are to promote exports, enhance foreign exchange earnings, attract investment for export production and employment generation.

#### Export and Import of Goods

- (a) An EOU / EHTP / STP / BTP unit may export all kinds of goods and services except items that are prohibited in ITC (HS). However export of gold jewellery, including partly processed jewellery, whether plain or studded, and articles, containing gold of 8 carats and above up to a maximum limit of 22 carats only shall be permitted. The export of findings like posts, push backs, locks which help in collating the jewellery pieces together, containing gold of 3 carats and above up to a maximum limit of 22 carats only shall be allowed.
- (b) Export of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) shall be subject to fulfillment of conditions contained in the Chapter 10 of the FTP (new Chapter for SCOMET). In respect of an EOU, permission to export prohibited item(s) may be considered by BOA on a case to case basis, provided the input(s) used for the export item(s) is/are imported and there is no procurement of such inputs from DTA.
- (c) Procurement and supply of export promotion material like brochure/literature, pamphlets, hoardings, catalogues, posters etc. upto a maximum value limit of 1.5% of FOB value of previous year's exports shall also be allowed.
- (d) (i) An EOU / EHTP / STP / BTP unit may import and / or procure, from DTA or bonded warehouses in DTA / international exhibition held in India, all types of goods, including capital goods, required for its activities, provided they are not prohibited items of import in the ITC (HS) subject to conditions given at

para (ii) & (iii) below. Any permission required for import under any other law shall be applicable. Units shall also be permitted to import goods including capital goods required for approved activity, free of cost or on loan / lease from clients. Import of capital goods will be on a self-certification basis. Goods imported by a unit shall be with actual user condition and shall be utilized for export production.

(ii) The imports and/ or procurement from bonded warehouse in DTA or from international exhibition held in India shall be without payment of duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 and additional duty, if any, leviable thereon under Section 3(1), 3(3) and 3(5) of the said Customs Tariff Act. Such imports and/ or procurements shall be made without payment of integrated tax and compensation cess leviable thereon under section 3(7) and 3(9) of the Customs Tariff Act, 1975 as per notification issued by the Department of Revenue.

(iii) The procurement of goods covered under GST from DTA would be on payment of applicable GST and compensation cess. The refund of GST paid on such supply from DTA to EOU would be available to the supplier subject to such conditions and documentations as specified under GST rules and notifications issued there under. EOUs can also procure excisable goods falling under the Fourth Schedule of Central Excise Act, 1944 from DTA without payment of applicable duty of excise.

- (e) State Trading regime shall not apply to EOU manufacturing units. However, in respect of Chrome Ore/Chrome concentrate, State Trading Regime as stipulated in export policy of these items will be applicable to EOUs.
- (f) EOU/EHTP/STP/BTP units may import/procure from DTA, with or without payment of duties/taxes as provided at Para 6.01 (d) (ii) and 6.01(d) (iii) above, certain specified goods for creating a central facility. Software EOU/DTA units may use such facility for export of software.
- (g) An EOU engaged in agriculture, animal husbandry, aquaculture, floriculture, horticulture, pisciculture, viticulture, poultry or sericulture may be permitted to remove specified goods in connection with its activities for use outside the premises of the unit.
- (h) Gems and jewellery EOUs may source gold / silver / platinum through nominated agencies on loan / outright purchase basis. Units obtaining gold / silver / platinum from nominated agencies, either on loan basis or outright purchase basis shall export gold / silver / platinum within 90 days from date of release of such metals by the nominated agencies.
- (i) EOU/EHTP/STP/BTP units, other than service units, may export to Russian Federation in Indian Rupees against repayment of State Credit/ Escrow Rupee Account of buyer subject to RBI clearance, if any.
- (j) Procurement and export of spares / components, upto 5% of FOB value of exports, may be allowed to same consignee / buyer of the export article, subject to the condition that it shall not count for NFE and direct tax benefits.
- (k) Development Commissioner /Designated Officer in EOU/EHTP/STP/BTP units may allow, on a case to case basis, EOU / EHTP / STP/ BTP units in sectors other than Gems & Jewellery, for consolidation of goods related to manufactured articles and export thereof along with manufactured article. Such goods may be allowed to be imported / procured from DTA by EOU with or without payment of duty and/ or taxes as provided at Para 6.01(d) (ii) and (iii) above, as the case may be to the extent of 5% FOB value of such manufactured articles exported by the unit in preceding financial year. Details of procured / imported goods and articles manufactured by the EOU will be listed separately in the export documents. In such cases, value of procured / imported goods will not be taken into account for calculation of NFE and DTA sale entitlement. Such procured / imported goods shall not be allowed to be sold in DTA. Development Commissioner /Designated Officer may also specify any other conditions.

### Second hand Capital Goods

Second hand capital goods, without any age limit, may also be imported with or without payment of duty/ taxes as provided under Para 6.01(d)(ii) above.

### Leasing of Capital Goods

- a. An EOU / EHTP/STP/BTP unit may, on the basis of a firm contract between parties, source capital goods from a domestic / foreign leasing company with or without payment of duties/taxes as provided at Para 6.01 (d) (ii) and (iii) above, as the case may be in such a case, EOU / EHTP/STP/BTP unit and domestic / foreign leasing company shall jointly file documents to enable import/ procurement of capital goods.
- b. An EOU/ EHTP/STP/BTP unit may sell capital goods and lease back the same from a Non Banking Financial Company (NBFC), subject to the following conditions:
  - i. The unit should obtain permission from the jurisdictional Deputy/Assistant Commissioner of Customs for entering into transaction of 'Sale and Lease Back of Assets', and submit full details of the goods to be sold and leased back and the details of NBFC;
  - ii. The goods sold and leased back shall not be removed from the unit's premises;
  - iii. The unit should be NFE positive at the time when it enters into sale and lease back transaction with NBFC;
  - iv. A joint undertaking by the unit and NBFC should be given to pay duty on goods in case of violation or contravention of any provision of the notification under which these goods were imported or procured, read with Customs Act, 1962 or Central Excise Act, 1944, and that the lien on the goods shall remain with the Customs Department, which will have first charge over the said goods for recovery of sum due from the unit to Government under provision of Section 142(b) of the Customs Act, 1962 read with the Customs (Attachment of Property of Defaulters for Recovery of Govt. Dues) Rules, 1995.

It may be noted that –

“Accessory” or “Attachment” means apart, sub-assembly or assembly that contributes to efficiency or effectiveness of a piece of equipment without changing its basic functions.

### Net Foreign Exchange Earnings

EOU/EHTP/STP/BTP unit shall be a positive net foreign exchange earner. In addition sector specific provision of Appendix 6B of Appendices & ANFs, where a higher value addition and other conditions are given, shall be required to be followed. NFE Earnings shall be calculated cumulatively in blocks of five years, starting from commencement of production. Whenever a unit is unable to achieve NFE due to prohibition / restriction imposed on export of any product mentioned in LoP, the five year block period for calculation of NFE earnings may be suitably extended by BoA. Further, wherever a unit is unable to achieve NFE due to adverse market condition or any grounds of genuine hardship having adverse impact on functioning of the unit, the five year block period for calculation of NFE earnings may be extended by BoA for a period of upto one year, on a case to case basis. The method of calculation of NFE in detail is given in para 6.10 of current Handbook of Procedures.

### Applications & Approvals/Letter of Permission / Letter of Intent and Legal Undertaking

- a. (i) Application for setting up an EOU shall be considered by Unit Approval Committee (UAC)/ Board of Approval (BoA) as the case may be, as detailed in the Hand Book of Procedure. The powers of DC are defined in para 6.34 of HBP.



- (ii) In case of units under EHTP / STP schemes, necessary approval / permission under relevant paras of this Chapter shall be granted by officer designated by Ministry of Electronics & Information Technology, instead of DC, and by Inter- Ministerial Standing Committee (IMSC) instead of BOA.
  - (iii) Bio-Technology Parks (BTP) would be notified by DGFT on recommendations of Department of Biotechnology. In case of units in BTP, necessary approval / permission under relevant provisions of this chapter will be granted by designated officer of Department of Biotechnology.
  - (iv) On approval, a Letter of Permission (LoP) / Letter of Intent (LoI) shall be issued by DC / Designated officer to EOU/EHTP/STP/BTP unit. The validity of LoP/LoI shall be given in the Hand Book of Procedures.
- b. LoP / LoI issued to EOU/EHTP/STP/BTP units by concerned authority, subject to compliance of provision in Para 6.01 above, would be construed as an Authorisation for all purposes.
  - c. Unit shall execute an LUT with DC concerned. Failure to ensure positive NFE or to abide by any of the terms and conditions of LoP / LoI / IL / LUT shall render the unit liable to penal action under provisions of the FT (D&R) Act, as amended, and Rules and Orders made thereunder, without prejudice to action under any other law / rules and cancellation or revocation of LoP / LoI / IL.

### Investment Criteria

Only projects having a minimum investment of Rs.1 Crore in plant & machinery shall be considered for establishment as EOUs. However, this shall not apply to existing units, units in EHTP / STP/ BTP, and EOUs in Handicrafts/Agriculture/ Floriculture/Aquaculture/Animal Husbandry/Information Technology, Services, Brass Hardware and Handmade jewellery sectors. BoA may allow establishment of EOUs with a lower investment criteria.

### DTA Sale of Finished Products/Rejects/ Waste/Scrap/Remnants and By- products

Entire production of EOU/EHTP/STP/BTP units shall be exported. However, the following are allowed as exceptions subject to the conditions specified.

- a. (i) Units, other than those of gems and jewellery may sell finished goods manufactured by them as specified in LoP (including by-products, rejects, waste and scraps arising in the course of production, manufacture, processing or packaging of such goods) which are freely importable under FTP in DTA, subject to fulfillment of positive NFE, on payment of excise duty, if applicable, and/ or payment of GST and compensation cess along with reversal of duties of Custom leviable under First Schedule to the Customs Tariff Act, 1975 availed as exemption, if any on the inputs utilized for the purpose of manufacturing of such finished goods (including by-products, rejects, waste and scraps arising in the course of production, manufacture, processing or packaging of such goods). No DTA sale shall be permissible in respect of, pepper & pepper products, marble and such other items as may notified from time to time. This reversal of Customs Duty would be as per prevailing SION norms or norms fixed by Norms Committee (where no SION norms are fixed).
- (ii) Such DTA sale shall also not be permissible to units engaged in activities of packaging / labeling / segregation / refrigeration / compacting / micronisation / pulverization / granulation / conversion of monohydrate form of chemical to anhydrous form or vice-versa.
- (iii) Sales made to a unit in SEZ shall also be taken into account for purpose of arriving at FOB value of export by EOU provided payment for such sales are made from Foreign Currency Account of SEZ unit. Sale to DTA would also be subject to mandatory requirement of registration of pharmaceutical products (including bulk drugs).
- (iv) An amount equal to Anti Dumping duty under section 9A of the Customs Tariff Act, 1975 leviable at the time of import, shall be payable on the goods used for the purpose of manufacture or processing of the goods cleared into DTA from the unit.



- (v) Such DTA sale shall also be subject to refund of any benefits under Chapter 7 of FTP availed by the EOU/supplier as per FTP, on the goods used for manufacture of the goods cleared into the DTA.
- b. For services, including software units, sale in DTA in any mode, including on line data communication, shall also be permissible up to 50% of FOB value of exports and /or 50% of foreign exchange earned, where payment of such services is received in foreign exchange. However, sale in DTA in respect of services classified under Chapter Heading 9988 and 9989 under GST, but covered in LOP/para 11.31 of FTP as manufacturing of goods, will continue to be covered under para 6.07(a) above. At the time of DTA clearance, applicable GST and compensation cess as per GST classification would apply.
  - c. Gems and jewellery units may sell upto 10% of FOB value of exports of the preceding year in DTA, subject to fulfillment of positive NFE. The unit shall pay applicable GST and compensation cess along with reversal of duties of Customs leviable under First Schedule of the Customs Tariff Act, 1975 availed as exemption, on inputs used in such jewellery.
  - d. Unless specifically prohibited in LoP, rejects may be sold in DTA on payment of excise duty, if applicable, and/or payment of GST and compensation cess along with reversal of duties of Customs leviable under First Schedule of the Customs Tariff Act, 1975 availed as exemption on inputs on prior intimation to Customs authorities. Sale of rejects upto 5% of FOB value of exports shall not be subject to achievement of NFE.
  - e. Scrap / waste / remnants arising out of production process or in connection therewith may be sold in DTA, as per SION notified under Duty Exemption Scheme, on payment of applicable duties and/or taxes and compensation cess. Such sales of scrap / waste / remnants shall not be subject to achievement of positive NFE. In respect of items not covered by norms, DC may fix ad-hoc norms for a period of six months and within this period, norms should be fixed by Norms Committee. Ad-hoc norms will continue till such time norms are fixed by Norms Committee. Scrap / waste / remnants may also be exported.
  - f. There shall be no duties / taxes on scrap / waste / remnants, in case same are destroyed with permission of Customs authorities. The expression “no duties/ taxes” shall not include applicable taxes and cess under the GST laws.
  - g. By-products included in LoP may also be sold in DTA subject to achievement of positive NFE, on payment of excise duty, if applicable, and/or payment of GST and compensation cess along with reversal of duties of Custom leviable under First Schedule to the Customs Tariff Act, 1975, if availed on inputs.
  - h. In case of units manufacturing electronics hardware and software, NFE and DTA sale entitlement shall be reckoned separately for hardware and software.
  - i. In case of new EOUs, advance DTA sale will be allowed not exceeding 50% of its estimated exports for first year, except pharmaceutical units where this will be based on its estimated exports for first two years.
  - j. Procurement of spares / components, up to 2% of the value of manufactured articles, cleared into DTA, during the preceding year, may be allowed for supply to the same consignee / buyer for the purpose of after-sale-service. The same can be cleared in DTA on payment of applicable GST and compensation cess along with reversal of duties of Customs leviable under First Schedule of the Customs Tariff Act, 1975 availed as exemption if any.

#### Other Supplies counted for fulfilment of NFE

Following supplies effected from EOU / EHTP / STP / BTP units will be counted for fulfillment of positive NFE. Such supplies shall not include “marble”, except if such supply of marble is an inter unit supply as provided at Sub-Para(c) below:

- (a) Supplies effected in DTA to holders of Advance Authorization / Advance Authorization for annual requirement / DFIA under duty exemption / remission scheme / EPCG scheme. However, printing sector EOUs (or any other sector that may be notified in HBP), can't supply goods, where basic customs duty and CVD is nil or exempted otherwise, to holders of Advance Authorization / Advance Authorization for annual requirement.
- (b) Supplies effected in DTA against foreign exchange remittance received from overseas.
- (c) Supplies to other EOU / EHTP / STP / BTP / SEZ units, provided that such goods are permissible for procurement in terms of Para 6.01 of FTP.
- (d) Supplies made to bonded warehouses set up under FTP and / or under section 65 of Customs Act and free trade and warehousing zones, where payment is received in foreign exchange.
- (e) Supplies of goods and services to such organizations which are entitled for duty free import of such items in terms of general exemption notification issued by MoF, as may be provided in HBP.
- (f) Supplies of Information Technology Agreement (ITA1) items and notified zero duty telecom / electronics items.
- (g) Supplies of items like tags, labels, printed bags, stickers, belts, buttons or hangers to DTA unit for export.
- (h) Supply of LPG produced in an EOU refinery to Public Sector domestic oil companies for being supplied to household domestic consumers at subsidized prices under the Public Distribution System (PDS) Kerosene and Domestic LPG Subsidy Scheme, 2002, as notified by the Ministry of Petroleum and Natural Gas vide notification No. E-20029/18/2001-PP dated 28.01.2003 (hereinafter referred to as PDS Scheme) subject to the following conditions:-
  - a. Only supply of such quantity of LPG would be eligible for which Ministry of Petroleum and Natural Gas declines permission for export and requires the LPG to be cleared in DTA; and
  - b. The Ministry of Finance by a notification has permitted duty free imports of LPG for supply under the aforesaid PDS Scheme.

### Export through others

An EOU/EHTP/STP/BTP unit may export goods manufactured/ software developed by it through another exporter or any other EOU/EHTP/STP/BTP/SEZ unit subject to conditions mentioned in Para 6.19 of HBP.

### Entitlement for Supplies from the DTA

- a. Supplies from DTA to EOU/EHTP/STP/ BTP units for use in their manufacture for exports will be eligible for "benefits under Chapter 7 of FTP". DTA supplier shall be eligible for relevant entitlements under chapter 7 of FTP, besides discharge of export obligation, if any, on the supplier. The refund of GST paid on such supply from DTA to EOU would be available to the supplier subject to such conditions and documentations as specified under GST rules and notifications issued there under.
- b. Suppliers of precious and semi-precious stones, synthetic stones and processed pearls from DTA to EOU shall be eligible for grant of Replenishment Authorizations at rates and for items mentioned in HBP.
- c. In addition, EOU/EHTP/STP/BTP units shall be entitled to following :-
  - i. Reimbursement of Central Sales Tax (CST) on goods manufactured in India, wherever applicable. Simple interest @ 6% per annum will be payable on delay in refund of CST, if the case is not settled within 30 days of receipt of complete application (as in Para 11.10 of HBP).

- ii. Exemption from payment of Central Excise Duty on goods, falling in Fourth Schedule of Central Excise Act, procured from DTA on such goods manufactured in India.

### Other Entitlements

Other entitlements of EOU/EHTP/STP/BTP units are as under:

- (a) Exemption from industrial licensing for manufacture of items reserved for micro and small enterprises.
- (b) Export proceeds will be realized within nine months.
- (c) Units will be allowed to retain 100% of its export earnings in the EEFC account.
- (d) Unit will not be required to furnish bank guarantee at the time of import or going for job work in DTA, where:
  - i. the unit has turnover of Rs. 5 crore or above; and
  - ii. the unit is in existence for at least three years; and
  - iii. the unit has achieved positive NFE / export obligation wherever applicable; and has not been issued a show cause notice or a confirmed demand, during the preceding 3 years, on grounds other than procedural violations, under the penal provision of the Customs Act, CGST/ SGST/ UTGST//IGST Acts, the Central Excise Act, the Foreign Trade (Development & Regulation) Act, 1992, the Foreign Exchange Management Act, the Finance Act, 1994 covering Service Tax or any allied Acts or the rules made thereunder, on account of fraud / collusion / willful mis-statement / suppression of facts or contravention of any of the provisions thereof.
- (e) Unit will also not be required to furnish bank guarantee at the time of import or going for job work in DTA, if it has achieved necessary certification as an Authorised Economic Operator (AEO) and has not been issued a show cause notice or a confirmed demand, during the preceding 3 years, on grounds other than procedural violations, under the penal provision of the Foreign Trade (Development & Regulation) Act, 1992 and the Foreign Exchange Management Act.
- (f) 100% FDI investment permitted through automatic route similar to SEZ units.
- (g) The Units Approval Committee may consider on a case-to-case basis request for sharing of infrastructural facilities among EOUs and it shall forward its recommendation to the Board of Approval for its consideration. While accepting such proposals, the NFE obligations of the units shall not be altered. Such facilities will be available to units in EHTP / STP after getting approval from IMSC. However, sharing of facilities between EOUs and SEZ Units shall not be permitted.

### Inter Unit Transfer

- a. Transfer of manufactured goods from one EOU/ EHTP/STP/BTP unit to another EOU / EHTP/ STP/ BTP unit is allowed on payment of applicable GST and compensation cess with prior intimation to concerned Development Commissioners of the transferor and transferee units as well as concerned Customs authorities, as per following procedure for movement of goods:
  - i. The supplier unit shall endorse on usual commercial documents, such as, tax invoice and delivery challan, the amount of duties of Custom leviable under First Schedule to the Customs Tariff Act, 1975 availed as exemption on inputs used in the manufacture of such finished goods (including by-products, rejects, waste and scraps arising in the course of production, manufacture, processing or packaging of such goods) supplied to another unit. The recipient unit shall pay such endorsed Customs duty besides his own liability of reversal of Customs duty as provided in Para 6.07

- above, before clearance of such finished goods in DTA and as provided under DoR notifications/ circulars/ guidelines in this regard.
- ii. Upon receipt of goods, the recipient unit shall submit endorsed copies of tax invoice to their jurisdictional Customs authority as well as to the jurisdictional Customs authorities of the supplier unit.
  - b. Capital goods may be transferred or given on loan to other EOU/EHTP/STP/BTP/SEZ units, with prior intimation to concerned DC and Customs authorities on payment of applicable GST and compensation cess. Such transferred goods may also be returned by the second unit to the original unit in case of rejection or for any reason on payment of applicable GST and compensation cess.
  - c. Goods supplied by one unit of EOU/EHTP/STP/ BTP to another unit shall be treated as imported goods for second unit for payment of duty, on DTA sale by second unit.
  - d. In respect of a group of EOUs/EHTPs/STPs/BTP units which source inputs centrally in order to obtain bulk discount and / or reduce cost of transportation and other logistics cost and / or to maintain effective supply chain, inter unit transfer of goods and services may be permitted on a case-to-case basis by the Unit Approval Committee. In case inputs so sourced are imported and then transferred to another unit, then value of the goods so transferred shall be taken as inflow for the unit transferring these goods and as outflow for the unit receiving these goods, for the purpose of calculation of NFE.

### Sub-Contracting

- (a) (i) EOU/EHTP/STP/BTP units, including gems and jewellery units, may be on the basis of annual permission from Customs authorities, subcontract production processes to DTA through job work which may also involve change of form or nature of goods, through job work by units in DTA.
  - (ii) These units may sub-contract upto 50% of overall production of previous year in value terms in DTA with permission of Customs authorities.
- (b) (i) EOU may, with annual permission from Customs authorities, under take job work for export, on behalf of DTA exporter, provided that goods are exported directly from EOU and export document shall jointly be in name of DTA/ EOU. For such exports, DTA units will be entitled for refund of duty paid on inputs by way of brand rate of duty drawback. However, such brand rate of drawback shall be as per Customs and Central Excise Duties Drawback Rules, 2017 and shall be limited to Customs duties and Central Excise Duties (in respect of eligible items covered under Schedule IV of Central Excise Act, 1944).
  - (ii) Import of goods for execution of export order placed on EOU by foreign supplier on job work basis, would be allowed with or without payment of duties and/or taxes as provided under Para 6.01(d)(ii) above subject to condition that no DTA clearance shall be allowed.
  - (iii) Sub-contracting of both production and production processes may also be under taken without any limit through other EOU/EHTP/STP/ BTP/SEZ units, on the basis of records maintained in unit.
  - (iv) EOU/EHTP/STP/BTP units may sub-contract part of production process abroad and send intermediate products abroad as mentioned in LoP. No permission would be required when goods are sought to be exported from sub-contractor premises abroad. When goods are sought to be brought back, prior intimation to concerned DC and Customs authorities shall be given.
- (c) Scrap/waste/remnants generated through job work may either be cleared from job worker's premises on payment of applicable duty and/or taxes, as provided under Para 6.07 above on transaction value or destroyed in presence of Customs authority or returned to unit. Destruction shall not apply to gold, silver, platinum, diamond, precious and semi-precious stones.

- (d) Sub-contracting/ exchange by gems and jewellery EOUs through other EOUs or SEZ units or units in DTA, shall be as per procedure indicated in HBP.

### Sale of Unutilized Material and Capital Goods

- (a) In case an EOU / EHTP/ STP/BTP unit is unable to utilize goods and services imported or procured from DTA, it may be:
- (i) Transferred to another EOU/EHTP/STP/BTP/ SEZ unit; or
  - (ii) Disposed of in DTA with intimation to Customs authorities on payment of applicable duties and/or taxes and compensation cess. In addition, exemption of duties of Customs leviable under First Schedule of the Customs Tariff Act, 1975 availed, if any on the goods, at the time of import will also be payable. This sale would be further subject to compliance of applicable import conditions such as requirement of import Authorisation; or
  - (iii) Exported.
  - (iv) Such transfer from EOU/EHTP/STP/BTP unit to another such unit would be treated as import for receiving unit.
- (b) Capital goods and spares that have become obsolete/ surplus, may be exported or transferred to SEZ unit, transferred to another EOU/EHTP/STP/BTP/on payment of applicable GST and compensation cess or disposed of in DTA on payment of applicable GST and compensation cess and duties of Customs leviable under First Schedule of the Customs Tariff Act, 1975. Benefit of depreciation will be available in case of disposal in DTA only when the unit has achieved positive NFE taking into consideration the depreciation allowed. No duty shall be payable other than the applicable taxes under GST laws in case capital goods, raw material consumables, spares, goods manufactured, processed or packaged, and scrap/ waste/remnants /rejects are destroyed within unit after intimation to Customs authorities or destroyed outside unit with permission of Customs authorities. Destruction as stated above shall not apply to gold, silver, platinum, diamond, precious and semi-precious stones.
- (c) In case of textile sector, disposal of left over material/ fabrics upto 2% of CIF value or quantity of import, whichever is lower, on payment of duty on transaction value, may be allowed, subject to certification of Central Excise/Customs officers that these are left over items.
- (d) Disposal of used packing material will be allowed on payment of duty on transaction value.

It may be noted that-

“Raw material” means input(s) needed for manufacturing of goods. These inputs may either be in a raw/natural/unrefined/unmanufactured or manufactured state.

### Reconditioning/Repair and Re-engineering

- (a) EOUs shall be set up with approval of UAC to carry out reconditioning, repair, remaking, testing, calibration, quality improvement, upgradation of technology and re-engineering activities for export in foreign currency. Provisions of paragraphs 6.07, 6.08, 6.09, 6.12, 6.13 of FTP and para 6.29(a), (b), (c) and (d) of HBP shall not, however, apply to such activities.
- (b) EHTP/STP/BTP units shall be set up with approval of IMSC to carry out reconditioning, repair, remaking, testing, calibration, quality improvement, upgradation of technology and re-engineering activities for export in foreign currency. Provisions of paragraphs 6.07, 6.08, 6.09, 6.12, 6.13 of FTP and para 6.29(a), (b), (c) and (d) of HBP shall not, however, apply to such activities.

### Replacement / Repair of Imported / Indigenous Goods

- (i) General provisions of FTP relating to export /import of replacement/repair of goods would also apply equally to EOU/EHTP/STP/BTP units. Cases not covered by these provisions shall be considered on merits by DC.
- (ii) Goods sold in DTA and not accepted for any reasons, may be brought back for repair/replacement, under intimation to concerned jurisdictional customs authorities.
- (iii) Goods or parts thereof, on being imported / indigenously procured and found defective or otherwise unfit for use or which have been damaged or become defective subsequently, may be returned against refund of purchase value/ against replacement or destruction. In the event of replacement, goods may be received from foreign suppliers or their authorized agents in India or indigenous suppliers. The unit can take free of cost replacement (duty paid) from the authorized agents in India of foreign suppliers, provided the defective part is re-exported or destroyed. However, destruction shall not apply to precious and semi-precious stones and precious metals.

### Exit from the Scheme

- (a) With approval of DC/Designated officer of EHTP/ STP/BTP, an EOU/EHTP/STP/BTP unit may opt out of scheme. Such exit shall be subject to payment of applicable Excise and Customs duties and on payment of applicable IGST/ CGST/ SGST/ UTGST and compensation cess, if any, and industrial policy in force.
- (b) If unit has not achieved obligations, it shall also be liable to penalty at the time of exit.
- (c) In the event of a gems and jewellery unit ceasing its operation, gold and other precious metals, alloys, gems and other materials available for manufacture of jewellery, shall be handed over to an agency nominated by DoC, at price to be determined by that agency.
- (d) An EOU / EHTP / STP / BTP unit may also be permitted by DC to exit from the scheme at any time on payment of applicable duties and taxes and compensation cess on capital goods under the prevailing EPCG Scheme for DTA Units. This will be subject to fulfillment of positive NFE criteria under EOU scheme, eligibility criteria under EPCG scheme and standard conditions indicated in HBP.
- (e) Unit proposing to exit out of the scheme shall intimate DC of EOU/Designated officer of EHTP/STP/BTP and Customs authorities in writing. Unit shall assess duty liability arising out of exit and submit details of such assessment to Customs authorities. Customs authorities shall confirm duty liabilities on priority basis, subject to the condition that the unit has achieved positive NFE, taking into consideration the depreciation allowed.

After payment of duty and clearance of all dues, unit shall obtain “No Dues Certificate” from Customs authorities. On the basis of “No Dues Certificate” so issued by the Customs authorities, unit shall apply to DC/Designated officer for final exit. In case there is no proceeding pending under FT(D&R) Act, as amended, DC/Designated officer shall issue final exit order within a period of 7 working days. Between “No Dues Certificate” issued by Customs authorities and final exit order by DC/Designated officer, unit shall not be entitled to claim any exemption for procurement of capital goods or inputs. However, unit can claim Advance Authorization / DFIA/ Duty Drawback as per its eligibility. In case the duty calculations and dues are disputed and take a long time, a BG / Bond / Installment processes backed by BG shall be provided for expediting the exit process.

- (f) In cases where a unit is initially established as DTA unit with machines procured from abroad after payment of applicable import duty, or from domestic market after payment of excise duty/GST, and unit is subsequently converted to EOU, in such cases removal of such capital goods to DTA after exit would

be without payment of duty. Similarly, in cases where a DTA unit imported capital goods under EPCG Scheme and after completely fulfilling export obligation gets converted into EOU, unit would not be charged customs duty on capital goods at the time of removal of such capital goods in DTA upon exit.

- (g) An EOU / EHTP / STP / BTP unit may also be permitted by DC to exit under Advance Authorisation as one time option. This will be subject to fulfillment of positive NFE criteria.
- (h) A simplified procedure may be provided to fast track the De-bonding/ Exit of the STP / EHTP Unit which has not availed any duty benefit on procurement of raw material, capital goods etc.

### Conversion

- (a) Existing DTA units may also apply for conversion into an EOU / EHTP / STP/ BTP unit.
- (b) Existing EHTP / STP units may also apply for conversion / merger to EOU unit and vice-versa. In such cases, units will avail exemptions in duties and taxes as applicable.
- (c) Applications for conversion into an EOU / EHTP / STP / BTP unit from existing DTA units, having an investment of Rs. 50 crores and above in plant and machinery or exporting Rs. 50 crores and above annually, shall be placed before BOA for a decision.

### Monitoring of NFE

Performance of EOU/EHTP/STP/ BTP units shall be monitored by Units Approval Committee as per guidelines in HBP.

### Export through Exhibitions/ Export Promotion Tours/ Showrooms Abroad /Duty Free Shops

EOU / EHTP / STP / BTP are permitted to:

- (i) Export goods for holding/participating in Exhibitions abroad with permission of DC /Designated officer.
- (ii) Personal carriage of gold / silver / platinum jewellery, precious, semi-precious stones, beads and articles.
- (iii) Export goods for display / sale in permitted shops set up abroad.
- (iv) Display / sell in permitted shops set up abroad, or in showrooms of their distributors / agents.
- (v) Set up showrooms / retail outlets at International Airports.

### Personal Carriage of Import / Export Parcels including through Foreign Bound Passengers

Import/ export through personal carriage of gems and jewellery items may be undertaken as per Customs procedure. However, export proceeds shall be realized through normal banking channel. Import/ export through personal carriage by units, other than gems and jewellery units, shall be allowed provided goods are not in commercial quantity. An authorized person of Gems & Jewellery EOU may also import gold in primary form, upto 10 Kgs in a financial year through personal carriage, as per guidelines prescribed by RBI and DoR.

### Export /Import by Post/ Courier

Goods including free samples, may be exported/imported by air freight or through foreign post office or through courier, as per Customs procedure.

### Administration of EOU / EHTP / STP / BTP units and Powers of DC/Designated Officer of EOU/ EHTP/STP/SEZ

Details of administration of EOUs / EHTP / STP / BTP units and powers of DC/Designated Officer are given in HBP.



## DEEMED EXPORTS

### Objective

To provide a level-playing field to domestic manufacturers and to promote Make in India, in certain specified cases, as may be decided by the Government from time to time.

### Deemed Exports

- (i) "Deemed Exports" for the purpose of this FTP refer to those transactions in which goods supplied do not leave country, and payment for such supplies is received either in Indian rupees or in free foreign exchange. Supply of goods as specified in Paragraph 7.02 below shall be regarded as "Deemed Exports" provided goods are manufactured in India.
- (ii) "Deemed Exports" for the purpose of GST would include only the supplies notified under Section 147 of the CGST/SGST Act, on the recommendations of the GST Council. The benefits of GST and conditions applicable for such benefits would be as specified by the GST Council and as per relevant rules and notification.

### Categories of Supply

Supply of goods under following categories (a) to (c) by a manufacturer and under categories (d) to (g) by main/sub-contractors shall be regarded as 'Deemed Exports':

#### A. Supply by manufacturer:

- a) Supply of goods against Advance Authorisation / Advance Authorisation for annual requirement / DFIA.
- b) Supply of goods to EOU / STP / EHTP / BTP.
- c) Supply of capital goods against EPCG Authorisation.

#### B. Supply by main / sub-contractor(s):

- (a) (i) Supply of goods to projects financed by multilateral or bilateral Agencies / Funds as notified by Department of Economic Affairs (DEA), MoF, where legal agreements provide for tender evaluation without including customs duty.
- (ii) Supply and installation of goods and equipment (single responsibility of turnkey contracts) to projects financed by multilateral or bilateral Agencies/Funds as notified by Department of Economic Affairs (DEA), MoF, for which bids have been invited and evaluated on the basis of Delivered Duty Paid (DDP) prices for goods manufactured abroad.
- (iii) Supplies covered in this paragraph shall be under International Competitive Bidding (ICB) in accordance with procedures of those Agencies / Funds.
- (iv) A list of agencies, covered under this paragraph, for deemed export benefits, is given in Appendix-7A.
- (b) (i) Supply of goods to any project or for any purpose in respect of which the Ministry of Finance by Customs Notification No. 50/2017-Customs dated 30.6.2017, as amended from time to time, permits import of such goods at zero basic customs duty subject to conditions mentioned therein. Benefits of deemed exports shall be available only if the supply is made under procedure of ICB.
- (ii) Supply of goods required for setting up of any mega power project, as specified in the list 31 at Sl. No. 598 of Department of Revenue Notification No. 50/2017-Customs dated 30.6.2017, as amended from time to time and subject to conditions mentioned therein, shall be eligible for deemed export



benefits provided such mega power project conforms to the threshold generation capacity specified in the above said Notification.

(iii) For mega power projects, ICB condition would not be mandatory if the requisite quantum of power has been tied up through tariff based competitive bidding or if the project has been awarded through tariff based competitive bidding.

- (c) Supply of goods to United Nations or International organization for their official use or supplied to the projects financed by the said United Nations or an International organization approved by Government of India in pursuance of Section 3 of United Nations (Privileges and Immunities Act), 1947. List of such organization and conditions applicable to such supplies is given in the Customs Notification No. 84/97-Customs dated 11.11.1997, as amended from time to time. A list of Agencies, covered under this paragraph, is given in Appendix-7B.
- (d) Supply of goods to nuclear power projects provided:
- i) Such goods are required for setting up of any Nuclear Power Project as specified in the list 32 at Sl. No. 602, Customs notification No. 50/2017- Customs dated 30.6.2017, as amended from time to time and subject to conditions mentioned therein.
  - ii) The project should have a capacity of 440 MW or more.
  - iii) A certificate to the effect is required to be issued by an officer not below the rank of Joint Secretary to Government of India, in Department of Atomic Energy.
  - iv) Tender is invited through National competitive bidding (NCB) or through ICB.

### Benefits for Deemed Exports

Deemed exports shall be eligible for any / all of following benefits in respect of manufacture and supply of goods, qualifying as deemed exports, subject to terms and conditions as given in HBP and ANF-7A:

- (a) Advance Authorisation / Advance Authorisation for annual requirement / DFIA.
- (b) Deemed Export Drawback.
- (c) Refund of terminal excise duty for excisable goods mentioned in Schedule 4 of Central Excise Act, 1944 provided the supply is eligible under that category of deemed exports and there is no exemption.

It may be noted that –

“Excisable goods” means any goods produced or manufactured in India and subject to duty of excise under Central Excise and Salt Act 1944(1of 1944).

### Benefits to the Supplier/Recipient

Categories of supplies as per Para 7.02	Benefits on supplies, as given in Para 7.03 above, whichever is applicable.		
	Para 7.03 (a) Advance Authorisation	Para 7.03 (b) Duty Drawback	Para 7.03 (c) Terminal Excise Duty
(a)	Yes (for intermediate supplies against an invalidation letter)	Yes (against ARO)	Yes

(b)	Yes	Yes	Yes
(c)	Yes	Yes	NA
(d)	Yes	Yes	NA
(e)	Yes	Yes	NA
(f)	Yes	Yes	NA
(g)	Yes	Yes	NA

### Conditions for refund of Terminal Excise Duty

Supply of goods will be eligible for refund of terminal excise duty as per Para 7.03 (c) of FTP, provided recipient of goods does not avail CENVAT credit/rebate on such goods.

### Conditions for refund of Deemed Export drawback

Supplies will be eligible for deemed export drawback as per para 7.03 (b) of FTP, as under:

Refund of drawback on the inputs used in manufacture and supply under the said category can be claimed on 'All Industry Rate' of Duty Drawback Schedule notified by Department of Revenue from time to time provided no CENVAT credit has been availed by supplier of goods on excisable inputs or on 'Brand Rate Basis' upon submission of documents evidencing actual payment of basic custom duties.

### Common conditions for deemed export benefits

- (i) Supplies shall be made directly to entities listed in the Para 7.02. Third party supply shall not be eligible for benefits/exemption.
- (ii) In all cases, supplies shall be made directly to the designated Projects / Agencies/ Units/ Advance Authorisation/ EPCG Authorisation holder. Sub-contractors may, however, make supplies to main contractor instead of supplying directly to designated Projects/ Agencies. Payments in such cases shall be made to sub-contractor by main-contractor and not by project Authority.
- (iii) Supply of domestically manufactured goods by an Indian Subcontractor to any Indian or foreign main contractor, directly at the designated project's/ Agency's site, shall also be eligible for deemed export benefit provided name of sub- contractor is indicated either originally or subsequently (but before the date of supply of such goods) in the main contract. In such cases payment shall be made directly to sub-contractor by the Project Authority.
- (iv) Steel manufacturers supplying steel against Advance Authorization under Para 7.02 (a), through their Service Centers/ Distributors/ Dealers/ Stock yards, shall also be eligible to claim duty drawback provided such supplies are made in accordance with Ministry of Steel O.M. No. S-21016/3/2020-TRADE-TAX-Part(1) dated 27.5.2020 read with O.M. dated 24.6.2020, as amended from time to time. However, the invoice against such supplies would be raised by the manufacturer on the Advance Authorization holder. Delivery of such supplies can be made through their Service Centers/ Distributors/ Dealers/ Stock yards, who in turn will raise the tax invoice on the steel manufacturer bearing a cross reference for such supplies.

### Benefits on specified supplies

- (i) Deemed export benefits shall be available for supplies of “Cement” under Para 7.02(d) only.
- (ii) Deemed export benefit shall be available on supply of “Steel”:
  - (a) As an inputs to Advance Authorisation/ Annual Advance Authorisation/DFIA holder/ an EOU.
  - (b) To multilateral/ bilateral funded Agencies as per sub-para 7.02(d).
- (iii) Deemed export benefit shall be available on supply of “Fuel” (in respect of eligible fuel items covered under Schedule 4 of Central Excise Act, 1944) provided supplies are made to:
  - (a) EOUs.
  - (b) Advance Authorisation holder / Annual Advance Authorisation holder.

### Liability of Interest

Incomplete/deficient application is liable to be rejected. However, simple interest @ 6% per annum will be payable on delay in refund of duty drawback and terminal excise duty under the scheme, provided the claim is not settled within 30 days from the date of issue of final Approval Letter by RA.

### Risk Management and Internal Audit mechanism

- (a) A Risk Management system shall be in operation, wherein every month, Computer system in DGFT headquarters, on random basis, will select 10% of cases, for each RA, where benefit(s) under this Chapter has/have already been granted. Such cases shall be scrutinized by an internal Audit team, headed by a Joint DGFT, in the office of respective Zonal Addl. DGFT. The team will be responsible to audit claims of not only for its own office but also the claims of all RAs falling under the jurisdiction of the Zone.
- (b) The respective RA may also, either on the basis of report from Internal Audit/ External Audit Agency (ies) or suo-motu, re-assess any case, where any erroneous/ in-eligible payment has been made/claimed. RA will take necessary action for recovery of payment along with interest at the rate of 15% per annum on the recoverable amount.

### Penal Action

In case, claim is filed by submitting mis-declaration/ mis-representation of facts, then in addition to effecting recovery under Para 7.10(b) above, the applicant shall be liable for penal action under the provisions of FT (D&R) Act, Rules and orders made there under.

## QUALITY COMPLAINTS AND TRADE DISPUTES

### Objective

Exporters need to project a good image of the country abroad to promote exports. Maintaining an enduring relationship with foreign buyers is of utmost importance, and complaints or trade disputes, whenever they arise, need to be settled amicably as soon as possible. Importers too may have grievances as well.

In an endeavour to resolve such complaints or trade disputes and to create confidence in the business environment of the country, a mechanism is being laid down to address such complaints and disputes in an amicable way.

Complaints/Disputes between two or more Indian entities are not covered under this mechanism. Similarly, complaints/disputes between two or more foreign entities are also not covered.

### Quality Complaints/ Trade disputes

The following type of complaints may be considered:

- (a) Complaints received from foreign buyers in respect of quality of goods or services or technology supplied by exporters from India;
- (b) Complaints of importers against foreign suppliers in respect of quality of the goods or services or technology supplied; and
- (c) Complaints of unethical commercial dealings categorized mainly as non-supply/ partial supply of goods or services or technology after confirmation of order; supplying goods or services or technology other than the ones as agreed upon; non- payment; non-adherence to delivery schedules, etc.

### Obligation on the part of importer/ exporter

- (a) Rule 11 of the Foreign Trade (Regulation) Rules, 1993, requires that on the importation into, or exportation out of, any customs ports of any goods or services or technology, whether liable to duty or not, the owner of such goods or services or technology shall in the Bill of Entry or the Shipping Bill or any other documents prescribed under the Customs Act, 1962, state the value, quality and description of such goods or services or technology to the best of his knowledge and belief and in case of exportation of goods or services or technology, certify that the quality and specification of the goods or services or technology as stated in those documents, are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods or services or technology are being exported and shall subscribe a declaration of the truth of such statement at the foot of such Bill of Entry or Shipping Bill or any other documents. Violation of this provision renders the exporter liable for penal action;
- (b) Certain export commodities have been notified for Compulsory Quality Control & Pre-shipment Inspection prior to their export. Penal action can be taken under the Export (Quality Control & Inspection) Act, 1963 as amended in 1984, against exporters who do not conform to these standards and/ or provisions of the Act as laid down for such products.

### Provisions in FT (D&R) Act, 1992, as amended & FT (Regulation) Rules, 1993, as amended for necessary action against erring exporters/ importers

Action against erring exporters/importers can be taken under the Foreign Trade (Development and Regulation) Act, 1992, as amended and under Foreign Trade (Regulation) Rules, 1993, as amended, as follows:-

- (a) Section 8 of the Act empowers the Director General of Foreign Trade or any other officer authorized by him to suspend or cancel the Importer Exporter Code Number for the reasons as given therein;
- (b) Section 9 (2) of the Act empowers the Director General of Foreign Trade or an officer authorised by him to refuse to grant or renew a license, certificate, scrip or any other instrument bestowing financial or fiscal benefit granted under the Act;
- (c) Section 9(4) of the Act empowers the Director General of Foreign Trade or the officer authorized by him to suspend or cancel any License, certificate, scrip or any instrument bestowing financial or fiscal benefit granted under the Act;
- (d) Section 11(2) of the Act provides for imposition of fiscal penalty in cases where a person makes or abets or attempts to make any import or export in contravention of any provision of the Act, any Rules or Orders made there under or the Foreign Trade Policy.

**Mechanism for handling of Complaints/ Disputes**

(a) Committee on Quality complaints and Trade Disputes (CQCTD) To deal effectively with the increasing number of complaints and disputes, a 'Committee on Quality Complaints and Trade Disputes' (CQCTD) will be constituted in the Regional Authorities (RAs) of DGFT. Names of RAs, where CQCTD has been constituted and jurisdiction of CQCTD is given in Chapter 8 of the Handbook of Procedures.

(b) Composition of the CQCTD

The CQCTD would be constituted under the Chairpersonship of the Head of Office. The constitution of CQCTD is given in Chapter 8 of the Hand Book of Procedures.

(c) Functions of CQCTD

The Committee (CQCTD) will be responsible for enquiring and investigating into all Quality related complaints and other trade related complaints falling under the jurisdiction of the respective RAs. It will take prompt and effective steps to redress and resolve the grievances of the importers/ exporters and overseas buyers/ sellers preferably within three months of receipt of the complaint. Wherever required, the Committee (CQCTD) may take the assistance of the Export Promotion Councils/FIEO/Commodity Boards or any other agency as considered appropriate for settlement of these disputes.

CQCTD will hold its meetings at regular intervals and at least four in a year given the pendency of complaints/ disputes.

**Proceedings under CQCTD**

CQCTD proceedings are conciliatory in nature and the aggrieved party, whether the foreign entity or the Indian entity, is free to pursue any legal recourse against the other erring party.

**Procedures to deal with complaints and trade disputes**

The procedure for making an application for such complaints or trade disputes and the procedure to deal with such quality complaints and disputes is given in the Handbook of Procedures.

**Corrective Measures**

- a) The Committee at RA level can authorize the Export Inspection Agency or any technical authority to assess whether there has been any technical failure of not meeting the standards, manufacturing/ design defects, etc. for which complaints have been received;
- b) Initially, efforts will be made to settle the complaint/ dispute amicably. In case the matter is not settled amicably, action may be taken against the erring Indian entity in terms of the Foreign Trade (Development & Regulation) Act, 1992, as amended, and the Foreign Trade (Regulation) Rules, 1993, as amended;
- c) Complaints against foreign entities would be taken up for settlement by the respective 'Foreign Trade Division' in the Department of Commerce, Vanijya Bhavan, New Delhi through Indian Missions abroad. Indian Missions Abroad will take up the complaints against the foreign entities with authorities concerned;
- d) In case, the Indian Missions abroad are satisfied about the malafide of any foreign entity, they shall send such information to DGFT for circulation amongst the EPCs/Commodity Boards, ECGC and other regulatory authorities.

**Case Officer**

A Case Officer will be assigned for monitoring purposes in the designated Regional Authorities for resolving complaints and trade disputes in a time bound manner.

**Nodal Officer**

Director General of Foreign Trade would appoint an officer, not below the rank of Joint Director General, in the Headquarters, to function as the 'Nodal Officer' for monitoring the trade disputes and coordinating with Regional Authorities of DGFT, Foreign Trade Divisions of Department of Commerce, Indian Missions and other agencies.

**PROMOTING CROSS BORDER TRADE IN DIGITAL ECONOMY****Objective**

The objective of this chapter is to provide a framework for cross-border trade of goods and services from India in the digital economy and the promotion of e-Commerce and other emerging channels of exports from India.

It may be noted that –

“e-commerce” means buying and selling of goods through the internet on an e-commerce platform, the payment for which shall be done through international credit or debit cards, or other authorised electronic payment channels and as specified by the Reserve Bank of India from time to time.

**E-Commerce Exports of Goods**

Export of goods where selling is through the internet on an e-Commerce platform, the payment for which shall be done through international credit or debit cards, or other authorised electronic payment channels and as specified by the RBI from time to time.

**E-Commerce Exports of Services**

Exports of services where selling is through the internet on an e-Commerce platform, the payment for which shall be done through international credit or debit cards, or other authorised electronic payment channels and as specified by the RBI from time to time.

**E-Commerce Platform**

E-Commerce platform is an electronic platform, including a web-portal, that enables the commercial process of buying and selling through the internet.

**E-Commerce Export Logistics Provider**

Any service provider who provides logistics services towards exports of goods or services for e-Commerce Exports.

**Export through Courier Service/Post**

Exports through a registered courier service/Foreign Post Office is permitted as per Notification(s) issued under Customs Act, 1962. However, exportability of such items shall be regulated in accordance with FTP/Export Policy in ITC(HS) as notified. The value limit for exports through courier service shall be Rs. 10,00,000 per consignment.

**Import through courier service/Post**

- i. Imports through a registered courier service or Post are permitted as per Notification(s) issued under the Customs Act, 1962. However, importability of such items shall be regulated in accordance with FTP and the ITC(HS) based Import Policy as notified.

- ii. Exports by courier mode of precious Metal Jewellery through E-commerce and re-import of such export shipments returned by the buyer shall be allowed as per the Notification(s) issued and procedures prescribed under the Customs Act, 1962.

## **A. PROMOTION OF E-COMMERCE EXPORTS**

### **Handholding and outreach to promote e-Commerce Exports**

- i. The Niryat Bandhu Scheme (NBS) as defined under Chapter 1 of the Policy shall have a component for the promotion of e-Commerce and other emerging channels of exports. Under the given NBS component, DGFT shall organise outreach activities/workshops in partnership with Customs Authorities, Department of Post, 'Industry Partners' and 'Knowledge Partners' for promotion of e-Commerce exports. Besides outreach/ workshops, specific focus may be on creation of electronic content as well.
- ii. In addition to increasing awareness on e-Commerce related rules and processes, actions may be undertaken under the said NBS component for capacity building and skill development for promotion of e-Commerce exports, in partnership with Customs Authorities, Department of Post, 'Industry Partners' or the 'Knowledge Partners'.

## **B. E-COMMERCE EXPORT HUBS (ECEHS)**

### **Objective of E-Commerce Export Hubs**

The objective is to establish designated areas as E-Commerce Export Hubs (hereafter called "ECEH"), which would act as a centre for favourable business infrastructure and facilities for Cross Border E-Commerce activities.

### **Creation of ECEH**

- i. The ECEH shall ordinarily be setup through private initiative. It may also be setup in Public-Private-Partnership (PPP) mode in partnership with the State governments/Central government. Request for approval of an ECEH proposed shall be submitted to the notified committee to be constituted by DGFT.
- ii. Existing facility with the required infrastructure may also apply to be designated as ECEH.

### **Nature of ECEH Operations**

- i. ECEH will function to achieve agglomeration benefits for e-commerce exporters. The ECEH may provide for storage (including cold storage facilities), packaging, labelling, certification & testing and other common facilities for the purposes of export.
- ii. The ECEH shall also provide for dedicated logistics infrastructure for connecting to and leveraging the services of the nearest Logistics hub(s).
- iii. All goods, including SCOMET and Restricted goods (subject to suitable compliance of regulations and conditions) and except goods which are prohibited or otherwise disallowed, may be handled at ECEH.
- iv. Capital goods brought to a ECEH shall be utilized only for activities as mentioned at (i) above on payment of the duties and taxes, as applicable, in terms of extant laws.

### **Entitlement under ECEHs**

ECEH may be provided financial assistance under MAI scheme, for e-Commerce export promotion projects for marketing, capacity building and technological services such as imaging, cataloguing, product video creation of e-Commerce Goods.

## C. PROMOTION OF E-COMMERCE EXPORTS THROUGH POSTAL ROUTE

### Dak Niryat Kendras

Dak Ghar Niryat Kendras shall be operationalised throughout the country to work in a hub-and-spoke model with Foreign Post Offices (FPOs) to facilitate cross-border e-Commerce and to enable artisans, weavers, craftsmen, MSMEs in the hinterland and land-locked regions to reach international markets.

## SCOMET: SPECIAL CHEMICALS, ORGANISMS, MATERIALS, EQUIPMENT AND TECHNOLOGIES

### Objective

The general provisions governing the export of dual use items, munitions and nuclear related items, including software and technology viz. SCOMET, are dealt with in this Chapter.

### Brief Background

India is a signatory to international conventions on disarmament and non-proliferation, viz. the Chemical Weapons Convention (CWC) and Biological and Toxin Weapons Convention (BWC). The United Nations Security Council Resolution 1540 obliges all countries to prohibit access of weapons and mass destruction and their delivery systems to non-state actors (in particular for terrorist purposes); and prescribed measures and controls on weapons of mass destruction, their delivery systems and related materials, equipment and technology. India is also a member of the major multilateral export control regimes, viz. the Missile Technology Control Regime (MTCR), Wassenaar Arrangement (WA) and Australia Group (AG); and has harmonized its guidelines and control lists with that of the Nuclear Suppliers Group (NSG). In consonance with the guidelines and control lists of these international conventions and obligations as well as multilateral export control regimes, India has regulated the exports of dual use items, nuclear related items, including software and technology.

In respect of controls on export of specified goods, services and technology, the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 (21 of 2005) shall apply to exports, transfers, re-transfers, brought in transit, trans-shipment of, and brokering in specified goods, technology or services. These provisions have been incorporated in Chapter IVA of Foreign Trade (Development & Regulation) Act, 1992, as amended in 2010.

### SCOMET List

Export of dual-use items, including software and technologies, having potential civilian / industrial applications as well as use in weapons of mass destruction is regulated. It is either prohibited or is permitted under an Authorization unless specifically exempted.

SCOMET is an acronym for Special Chemicals, Organisms, Materials, Equipment and Technologies. Accordingly, the SCOMET list is our National Export Control List of dual use items munitions and nuclear related items, including software and technology and is aligned to the control lists of the all the multilateral export control regimes and conventions. The SCOMET List has been notified under Appendix 3 to Schedule 2 of ITC (HS) Classification of Export and Import Items, which is available on the website of DGFT.

### Classification of SCOMET categories and Licensing jurisdiction

The SCOMET List is divided into nine categories of items from Category 0 to Category 8. However, Category 7 is presently 'Reserved' and has not been populated. The broad classification of different categories under SCOMET List and their jurisdictional licensing authorities are tabulated as under:



**Table: SCOMET Categories and Licensing Jurisdiction**

SCOMET Category	SCOMET items	Jurisdictional Licensing Authority	Remark
0	Nuclear materials, nuclear-related other materials, equipment and technology	Department of Atomic Energy (DAE)	Including items mentioned in Note 2 of CIN of SCOMET List
1	Toxic chemical agents and other chemicals	Directorate General of Foreign Trade (DGFT)	
2	Micro-organisms, Toxins	DGFT	
3	Materials, Materials Processing Equipment and related Technologies	DGFT	
4	Nuclear-related other equipment and technology, not controlled under Category '0'	DGFT	
5	Aerospace systems, equipment, including production and test equipment, and related Technology and specially designed components and accessories thereof.	DGFT	
6	Munitions List	Department of Defence Production (DDP)/ Ministry of Defence	Excluding those covered under Note 2 and 3 of CIN and Sub- category 6A007, 6A008
7	'Reserved'	DGFT	
8	Special Materials and Related Equipment, Material Processing, Electronics, Computers, Telecommunications, Information Security, Sensors and Lasers, Navigation and Avionics, Marine, Aerospace and Propulsion.	DGFT	

*CIN : Commodity Identification Note of SCOMET List*

*Note: DGFT to be licensing authority for above specified categories/sub-categories and any other sub-category as may be specified.*

### Export of SCOMET Items

Procedure for grant of export authorization for SCOMET items in respect of Categories 1 to 5 and 8, is specified under Chapter 10 of Hand Book of Procedures (HBP). Export of SCOMET items under Category 0 and Note 2 of the Commodity Identification Note (CIN) of SCOMET will be permitted against an authorization issued by the Department of Atomic Energy (DAE) as per the guidelines for Nuclear Transfers (Exports) and Notification of schedule of Prescribed Substances, Prescribed Equipment and Technology” issued under Atomic Energy Act 1962 and Atomic Energy (Working of Mines, Minerals and Handling of Prescribed Substance) Rules 1984. Export of SCOMET items under Category 6 (Munitions List) [except those covered under Note 2 and 3 of CIN and items under Category 6A007, 6A008], irrespective of end use of the items, whether military or civil will be permitted against an authorization to be issued by Department of Defence Production (DDP)/ Ministry of Defence under the extant guidelines /Standing Operating Procedure (SOP) issued by the DDP, time to time.

### Additional controls on Non-SCOMET items for dual use (Catch-all controls)

Export of items not in the SCOMET List may also be regulated under provisions of the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005. If the exporter has been notified in writing by DGFT or he knows or has reason to believe that an item not covered in the SCOMET list has a potential risk of use in or diversion to weapons of mass destruction (WMD) or in their missile system or military end use (including by terrorists and non-state actors), the export of such an item may be denied or permitted subject to the grant of a license, as per the procedure provided for SCOMET items in Para 10.05 and 10.06 of HBP.

### Supply of SCOMET Items from DTA to SEZ/EoU and outside the country

Export authorisation is not required for supply of SCOMET items from DTA to SEZ /EoU. However, all supplies of SCOMET items from DTA to SEZ/EoU will be reported to the Development Commissioner (DC) of the respective SEZ/EoU by the supplier in the prescribed performa within one week of the supplies getting effected. Export Authorisation is, however, required if the SCOMET items are to be physically exported outside the country from SEZ/ EoU, i.e. to another country (Rule 26 of the SEZ Rules, 2006 may be referred).

### Export of imported SCOMET items

Imported goods covered under the SCOMET list are not permitted for export, even from the Customs bonded ware house, without an export authorization, unless specifically exempted.

### Different types of export authorizations for SCOMET items

- (i) Direct export to ultimate end user: Export to the ultimate end users abroad after due verification process;
- (ii) Export for repeat orders of same SCOMET items: Repeat export of items of same technical specifications which have earlier been allowed for export to the same countries/entities after due verification process;
- (iii) Export for Stock and Sale purpose: Export of items initially to the stockist abroad and then from the stockist to the ultimate end users in the same country or approved countries;
- (iv) Export of spare parts under SCOMET under Stock and Sale: Export of spare parts along with main item/ equipment under stock and sale;
- (v) Export for/after repair / replacement of defective SCOMET items: Export authorizations for repair/ replacement of imported items on being found defective and export authorization after repair of indigenous/third party items imported for repair;
- (vi) Temporary export of SCOMET items: Export authorization for demo/display/exhibition/tenders/ RFP/

RFQ/NIT abroad or for return abroad after demo/ display/ exhibition/ tenders/ RFP/ RFQ/ NIT etc. in India;

- (vii) Export of imported items to the same foreign entity or to its OEM: Export of imported items to its foreign supplier or its OEM on obsolescence of technology, dead on arrival, cancellation of order, calibration, testing, etc.;
- (viii) Global Authorization for Intra-Company Transfers (GAICT) of SCOMET Items including Software/ Technology :Only one time authorization will be required, for export and/or re-export of SCOMET items including software and technology under SCOMET Category 8 (except items listed in Appendix 10M), where the export is an Intra-company transfer from the Indian parent company (applicant exporter) to its foreign subsidiary company or from the Indian subsidiary of foreign company (applicant exporter) to its foreign parent/another subsidiary of foreign parent company and; based on a Master Service Agreement / Contract between the Indian parent company/Indian subsidiary of foreign company and foreign subsidiary of Indian company/foreign parent company of Indian subsidiary for carrying out certain services but not limited to design, encryption, research, development, delivery, validation, calibration, testing, related services, etc. in specified countries for the one time validity of 3 years subject to the post export reporting of all the exports done under the authorisation.
- (ix) General Authorization for export of Chemicals and related equipments(GAEC) except software and technology : Export of chemicals (Excluding Software and Technology) listed in 1C,1D, 3D001 and 3D004 sub-categories is allowed to Australian Group(AG) countries and those listed in 1E sub-category allowed for export to State Parties to the Chemical Weapons Convention (CWC) on the basis of a onetime General authorization for export of Chemicals and related equipments (GAEC) issued by DGFT with one time validity of 5 years subject to the post export reporting of all the exports done under the authorisation.
- (x) General Authorization for export after repair in India(GAER): Export of imported SCOMET items to the same entity abroad after repair in India will be allowed on the basis of a one-time General authorization for Export after Repair in India (GAER) issued by DGFT subject to post reporting on quarterly basis and other conditions as specified in para 10.12(D) of the Hand Book of Procedures.

### **Issue, amendment and revalidation of SCOMET authorizations**

Export authorization for SCOMET items will be issued centrally by the DGFT (HQrs). Amendments, including revalidation, etc. on such authorization will also be done by the DGFT (HQrs) only. The procedure for Revalidation is prescribed in Para 10.20 of Handbook of Procedures.

### **Outreach Programmes on SCOMET and Export Control Framework**

DGFT in association with Administrative Ministries/ Departments and Trade Associations will organize Industry Outreach Programmes on regular basis for effective awareness among the exporters/importers dealing with trade and manufacture, in particular, of SCOMET items. Institutional mechanism will be adopted to organize sector specific / region specific outreach programmes with focus on MSMEs and Startups.

### **Voluntary Self Disclosure of export of dual use items**

DGFT recognizes that there may be occasions where responsible exporters, occasionally did not comply with the export control provisions of the FTDR Act, WMD Act, Customs Act, or any regulation, order, license, or other authorization on export controls issued by DGFT. DGFT encourages voluntary self-disclosures of failure to comply with the export control provisions, and supports raising awareness among exporters to avoid any incidents of non-compliance while taking strict action under FTDR Act for violation of SCOMET policy in cases other than voluntary self-disclosure.

**LESSON ROUND-UP**

- Foreign Trade Policy (FTP) 2023 is a policy document which is based on continuity of time-tested schemes facilitating exports as well as a document which is nimble and responsive to the requirements of trade.
- The FTP 2023 aims at process re-engineering and automation to facilitate ease of doing business for exporters. It also focuses on emerging areas like dual use high end technology items under SCOMET, facilitating e-commerce export, collaborating with States and Districts for export promotion.
- The New FTP is introducing a one-time Amnesty Scheme for exporters to close the old pending authorizations and start afresh. The FTP 2023 encourages recognition of new towns through “Towns of Export Excellence Scheme” and exporters through “Status Holder Scheme”.
- The Key Approach to the policy is based on these 4 pillars: (i) Incentive to Remission, (ii) Export promotion through collaboration - Exporters, States, Districts, Indian Missions, (iii) Ease of doing business, reduction in transaction cost and e-initiatives and (iv) Emerging Areas – E-Commerce Developing Districts as Export Hubs and streamlining SCOMET policy.
- Amnesty Scheme is intended to provide relief to exporters who have been unable to meet their obligations under EPCG and Advance Authorizations, and who are burdened by high duty and interest costs associated with pending cases.
- Projects having a minimum investment of Rs.1 Crore in plant & machinery shall be considered for establishment as EOUs. However, this shall not apply to existing units, units in EHTP / STP/ BTP, and EOUs in Handicrafts/Agriculture/ Floriculture/Aquaculture/Animal Husbandry/Information Technology, Services, Brass Hardware and Handmade jewellery sectors.
- The objective of deemed exports is to provide a level-playing field to domestic manufacturers and to promote Make in India, in certain specified cases, as may be decided by the Government from time to time.
- Exporters need to project a good image of the country abroad to promote exports. Maintaining an enduring relationship with foreign buyers is of utmost importance, and complaints or trade disputes, whenever they arise, need to be settled amicably as soon as possible. Importers too may have grievances as well.
- The objective E-Commerce Export Hubs is to establish designated areas as E-Commerce Export Hubs (hereafter called “ECEH”), which would act as a centre for favourable business infrastructure and facilities for Cross Border E-Commerce activities.
- SCOMET is an acronym for Special Chemicals, Organisms, Materials, Equipment and Technologies. Accordingly, the SCOMET list is our National Export Control List of dual use items munitions and nuclear related items, including software and technology and is aligned to the control lists of the all the multilateral export control regimes and conventions.
- DGFT recognizes that there may be occasions where responsible exporters, occasionally did not comply with the export control provisions of the FTDR Act, WMD Act, Customs Act, or any regulation, order, license, or other authorization on export controls issued by DGFT.





### KEY CONCEPTS

■ Special Economic Zone (SEZ) ■ Offshore Banking Unit ■ Developer ■ International Financial Services Centre (IFSC)

### Learning Objectives

#### To understand:

- Establishment of Special Economic Zones
- Approval and Authorization to Operate SEZ
- Setting up of Unit
- Domestic Tariff Area
- Special Economic Zone Authority

### Lesson Outline

- Objective of SEZ Act, 2005
- Salient Features of the SEZ Act, 2005
- Developers – Infrastructure Facilities
- International Financial Service Centre
- Establishment of SEZ
- Guidelines for notifying SEZ
- Board of Approval
- Development Commissioner
- Setting of Unit
- Offshore Banking Unit
- SEZ Authority
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- Special Economic Zones Act, 2005.
- Special Economic Zones Rules, 2006.

### *What is Special Economic Zone?*

***Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs.***

## INTRODUCTION

While the policy relating to the Special Economic Zones is contained in the Foreign Trade Policy, incentives and other facilities offered to the Special Economic Zone developer and units are implemented through various notifications and circulars issued by the concerned Ministries/Departments. The system, therefore, did not lend enough confidence for investors to commit substantial funds for development of infrastructure and for setting up of the units in the Zones for export of goods and services. In order to give a long term and stable policy framework with minimum regulatory regime and to provide expeditious and single window clearance mechanism, the Government enacted Special Economic Zones Act, 2005.

The salient features of the Act are as under:—

- (i) matters relating to establishment of Special Economic Zone and for setting up of units therein, including requirements, obligations and entitlements;
- (ii) matters relating to requirements for setting up of off-shore banking units and units in International Financial Service Center in Special Economic Zone, including fiscal regime governing the operation of such units;
- (iii) the fiscal regime for developers of Special Economic Zones and units set up therein;
- (iv) single window clearance mechanism at the Zone level;
- (v) establishment of an Authority for each Special Economic Zone set up by the Central Government to impart greater administrative autonomy; and
- (vi) designation of special courts and single enforcement agency to ensure speedy trial and investigation of notified offences committed in Special Economic Zones.

## ESTABLISHMENT OF SPECIAL ECONOMIC ZONE

### *Who can set up SEZs?*

***Any private/public/joint sector or State Government or its agencies can set up Special Economic Zone (SEZ).***



Section 3 of the Act provides that the Central Government, State Government, or any other person, jointly or severally, may establish a Special Economic Zone. Any person who, intends to set up a Special Economic Zone, may, after identifying the area, make a proposal to the State Government concerned for the purposes of setting up a Special Economic Zone.

It also allows a person, at his option to make a proposal directly to the Board for the purpose of setting up Special Economic Zone. In cases where such proposal has been received directly from a person, the Board may grant approval and after receipt of such approval, the person concerned, is required to obtain the concurrence of the State Government within prescribed time.

In case a State Government intends to set up the Special Economic Zone, it may after identifying the area, forward the proposal directly to the Board of Approval for setting up of Special Economic Zone.

Central Government has been empowered to set up and notify the Special Economic Zone without consulting the State Government concerned; without referring the proposal to the Board.

The State Government may, on receipt of the proposal for setting up a Special Economic Zone forward the proposal together with its recommendations to the Board of Approval within the specified time.

The Board of Approval may, after receipt of the proposal for setting up a Special Economic Zone either approve the proposal or, approve the proposal subject to such terms and conditions as it may deem fit to impose. It can also modify or reject the proposal for setting up a Special Economic Zone.

The Central Government has been empowered to specify the minimum area of land for setting up a Special Economic Zone and other terms and conditions subject to which the Board may approve, modify or reject any such proposal received by it.

If the Board approves the proposal without any modification, it shall communicate the same to the Central Government. If it approves the proposal with modification, it shall, communicate the same to the person or the State Government concerned if the modifications are accepted by the person or State Government, the Board of Approval shall communicate the approval to the Central Government, If it rejects the proposal, it shall record the reasons therefor and communicate the rejection to the person or the State Government concerned.

Central Government to grant on receipt of communication from the Board of Approval, a letter of approval on such terms and conditions and obligations and entitlements, as approved by Board of Approval, to the person or the State Government concerned. However the Central Government may, on the basis of approval of the Board, approve more than one developer in one Special Economic Zone in cases where one Developer does not have in his possession the minimum area of contiguous land, as may be prescribed, for setting up a Special Economic Zone. In all such cases, each Developer is considered as a Developer in respect of the land in his possession.

Any person or a State Government, who intends to provide any infrastructure facilities in the identified area or undertaken any authorised operations may, after entering into an agreement with the Developer, make a proposal for the same to the Board of Approval, for its approval.

Every such person or State Government, whose proposal has been approved by the Board and who, or which, has been granted letter of approval by the Central Government, shall be considered a Co-Developer of the Special Economic Zone.

It may be noted that person includes an individual, whether resident in India or outside India, a Hindu undivided family, co-operative society, a company, whether incorporated in India or outside India, a firm, proprietary concern, or an association of persons or body of individuals, whether incorporated or not, local authority, trust or any entity as may be notified by the Central Government and any agency, office or branch owned or controlled by such individual, Hindu undivided family, co-operative, association, body, authority, company, trust or entity.

#### ***What is Infrastructure Facilities?***

***Infrastructure facilities means industrial, commercial or social infrastructure or other facilities necessary for the development of a Special Economic Zone or such other facilities which may be prescribed.***

#### **Establishment, Approval and Authorization to Operate Special Economic Zone**

Section 4 of the SEZ Act requires the Developer to submit, after the grant of letter of approval, the exact particulars of the identified area to the Central Government which after satisfying that the specified requirements are fulfilled, notify the specifically identified area in the State as a Special Economic Zone. However, the Central Government has been empowered to notify any additional area as a part of a Special Economic Zone. This section empowers the Central Government to authorise the Developer to undertake such operations in a Special Economic Zone, as it may prescribe.

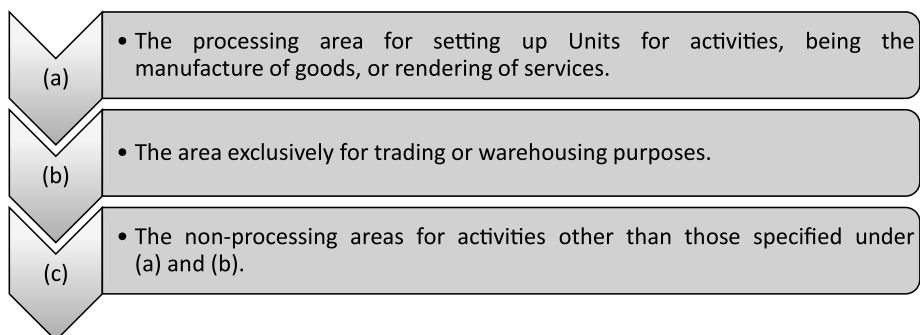
#### **Guidelines for notifying Special Economic Zone**

Section 5 stipulates broader guidelines to be considered by the Central Government, while notifying any area as a Special Economic Zone or an area to be included in the SEZ and in discharging its functions under the Act. These include:

- (a) generation of additional economic activity;
- (b) promotion of exports of goods and services;
- (c) promotion of investment from domestic and foreign sources;
- (d) creation of employment opportunities;
- (e) development of infrastructure facilities; and
- (f) maintenance of sovereignty and integrity of India, the security of the State and friendly relations with foreign States.

#### **The Processing and Non-Processing areas**

Section 6 empowers the Central Government or any specified authority to demarcate the areas falling within the Special Economic Zones as –



### Exemption from taxes, duties or cess

Section 7 exempts all goods or services exported out of, or imported into, or procured from the Domestic Tariff Area, by a Unit or Developer in a Special Economic Zone from the payment of taxes, duties or cess under all enactments specified in the First Schedule. The enactments specified in the First Schedule generally relate to levy and payment of cess.

*It may be noted that:*

*“Export” means—*

- (i) taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise; or
- (ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or
- (iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone.

*“Import” means—*

- (i) bringing goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other mode, whether physical or otherwise; or
- (ii) receiving goods, or services by a Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone.

*“Services” means such tradable services which.—*

- (i) are covered under the General Agreement on Trade in Services annexed as IB to the Agreement establishing the World Trade Organisation concluded at Marrakesh on the 15th day of April, 1994;
- (ii) may be prescribed by the Central Government for the purposes of this Act; and
- (iii) earn foreign exchange.

### Constitution of Board of Approval

Section 8 empowers the Central Government to constitute, by notification, the Board of Approval within fifteen days of the commencement of the Act. This section also provides for composition of Board, term of office of Members, co-option of certain persons as Members of the Board, its meetings and quorum, etc.

### Duties, powers and functions of Board of Approval

Section 9 casts upon the Board the duty to promote and ensure orderly development of the Special Economic Zones.

*The powers and functions of the Board, inter alia, include:*

- (a) granting of approval or rejecting proposal or modifying such proposals for establishment of the Special Economic Zones;
- (b) granting approval of authorised operations to be carried out in the Special Economic Zones by the Developer;

- (c) granting of approval to the Developers or Units (other than the Developers or the Units which are exempt from obtaining approval under any law or by the Central Government) for foreign collaborations and foreign direct investments (including investments by a person resident outside India) in the Special Economic Zone for its development, operation and maintenance;
- (d) granting of approval or rejecting proposal for providing infrastructure facilities in a Special Economic Zone or modifying such proposals;
- (e) granting, a licence to an industrial undertaking referred to in section 3(d) of IDR Act, if such undertaking is established, as a whole or part thereof, or proposed to be established, in a Special Economic Zone;
- (f) suspension of the letter of approval granted to a Developer and appointment of an Administrator under Section 10(1) of the Act;
- (g) disposing of appeals preferred under Section 15(4) and Section 16(4) of the Act;
- (h) performing such other functions as may be assigned to it by the Central Government.

Section 9(3) empowers the Board of Approval to delegate such powers and functions as it may deem fit to one or more Development Commissioners for effective and proper discharge of the functions of the Board. Section 9(5) stipulates that the Board in exercise of its powers and performance of its functions be bound by such directions on questions of policy, as the Central Government may give in writing to it from time to time.

#### **Suspension of letter of approval and transfer of Special Economic Zone in certain cases**

Section 10 empowers the Board to suspend the letter of approval granted to the Developer for a whole or part of his area established as Special Economic Zone for a period not exceeding one year and appoint an Administrator to discharge the functions of the developer in accordance with the terms and conditions of the letter of approval and manage the Special Economic Zone accordingly. The suspension may be ordered by the Board, if in its opinion following circumstances exist:

	The developer is unable to discharge the functions for perform the duties imposed on him
	The developer has persistently defaulted in complying with the directions of the Board
	The financial position of the developer is such that he is unable fully and efficiently discharge the duties and obligations imposed on him by the letter of approval

However, no letter of approval can be suspended unless the Board has given to the Developer not less than three months' notice, in writing, stating the grounds on which it proposes to suspend the letter of approval, and has considered any cause shown by the Developer within the period of that notice, against the proposed suspension.

It has been further provided that the Board may, instead of suspending the letter of approval permit it to remain

in force subject to such further terms and conditions as it thinks fit to impose. Section 10(4) makes any further terms or conditions so imposed binding upon the Developer. These terms and conditions have the force and effect as if they were contained in the letter of approval.

In case the Board suspends a letter of approval, it has been put under obligation to serve a notice of suspension upon the Developer and fix a date for suspension to take effect. Upon suspension of the letter of approval, the Special Economic Zone of the Developer vests in the Administrator for a period not exceeding one year or up to the date on which the letter of approval for such Special Economic Zone is transferred, whichever is earlier. This section also contains provisions for transfer of the Special Economic Zone of a Developer whose licence has been suspended and take other actions consequent upon the suspension of the letter of approval. The Board of Approval has been empowered to issue such directions or formulate such scheme as it may consider necessary for operation of such Special Economic Zone.

### Development Commissioner

Section 11 empowers the Central Government to appoint the Development Commissioner for one or more Special Economic Zones and such Officers and other employees as it considers necessary to assist every Development Commissioner. It also contains provisions for salary and allowances and other terms and conditions of service in respect of leave, pension, provident fund and other matters of the Development Commissioner, officers and other employees.

### Functions of the Development Commissioner

Section 12 dealing with the functions of the Development Commissioner requires every Development Commissioner to take steps in order to discharge his functions to ensure speedy development of the Special Economic Zone and promotion of exports therefrom.

*The functions of the Development Commissioner include :*

- (a) guide the entrepreneurs for setting up of Units in the Special Economic Zone;
- (b) ensure and take suitable steps for effective promotion of exports from the Special Economic Zone;
- (c) ensure proper coordination with the Central Government or State Government Departments concerned or agencies with respect to, or for above purposes;
- (d) monitor the performance of the Developer and the Units in SEZ;
- (e) discharge such other functions as may be assigned to him by the Central Government under this Act or any other law for the time being in force; and
- (f) any other functions as may be delegated to him by the Board of approval.

This section entitles the Development Commissioner to be overall in charge of the Special Economic Zone and to exercise administrative control and supervision over the officers and employees. Every Development Commissioner is also required to discharge such functions and exercise such powers as may be delegated to him by a general or special order by the Central Government or the State Government concerned, as the case may be. The section further empowers the Development Commissioner to call for such information from a Developer or Unit from time to time as may be necessary to monitor the performance of the Developer and the Unit. The Development Commissioner has been authorised to delegate any or all of his powers or functions to any of the officers employed under him.

### Constitution of Approval Committee

Section 13 empowers the Central Government to constitute by notification, a Committee for every Special Economic Zone, to be called the Approval Committee to exercise the powers and perform the functions as specified. In the case of existing Special Economic Zones, the Approval Committee is required to be constituted within six months from the date of commencement of the Act and in case of other Special Economic Zones established after the commencement of the Act within six months from the date of establishment of such Special Economic Zone. This section also contains provisions relating to composition of meetings and its quorum and requires all orders and decisions and instructions of the Approval Committee to be authenticated by the signature of the Chairperson or any other Member as may be authorised by the Approval Committee.

### Powers and Functions of Approval Committee

Section 14 empowers every Approval Committee to discharge the functions and exercise the powers in respect of the following matters:

- (a) approve, the import or procurement of goods from the Domestic Tariff Area, for carrying on the authorised operations by a Developer in the Special Economic Zone;
- (b) approve providing of services by a service provider from outside India or from the Domestic Tariff Area for carrying on the authorised operations by the Developer, in the Special Economic Zone;
- (c) monitor the utilisation of goods or services or warehousing or trading in the Special Economic Zone;
- (d) approve, modify or reject proposals for setting up Units for manufacturing or rendering of services or warehousing or trading in SEZ in accordance with the provisions of Section 15(8) of the Act;
- (e) allow on receipt of approval foreign collaborations and foreign direct investments, including investments by a person outside India for setting up a Unit;
- (f) monitor and supervise compliance of conditions subject to which the letter of approval or permission, if any, is granted to the Developer or entrepreneur; and
- (g) perform any other functions as may be entrusted to it by the Central Government or the State Government concerned, as the case may be.

In case the developer is Central Government, the approval committee has been empowered to exercise all powers of the approval committee, until the constitution of Approval Committee.

### Setting up of Unit

Section 15 entitles any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, to submit a proposal to the Development Commissioner concerned. The Development Commissioner in turn place the proposal before the Approval Committee for its approval. The Approval Committee may, approve the proposal with or without modification, and subject to such terms and conditions as it may deem fit, or reject the same. In case of modification or rejection of a proposal, the Approval Committee has been put under obligation to afford a reasonable opportunity of being heard to the person concerned and after recording the reasons therefor, either modify or reject the proposal. Sub-section (4) entitles a person aggrieved by an order of the Approval Committee, to make an appeal to the Board of Approvals, within the prescribed time and specified manner. Sub-section (8) empowers the Central Government to prescribe the requirements (including the period for which a unit may be set up) subject to which the Approval Committee may approve, modify or reject the proposal. The Development Commissioner may, after the approval of the proposal, grant a letter of approval to the person concerned to set up a Unit and undertake in the Unit such operations which the Development Commissioner may authorise and every such operation so authorised is mentioned in the letter of approval.

### Cancellation of letter of approval granted to entrepreneur

Section 16 empowers the Approval Committee to cancel the letter of approval of an entrepreneur after reasonable opportunity of being heard has been afforded to the entrepreneur. The Approval Committee may, at any time, cancel the letter of approval if it has any reason or cause to believe that the entrepreneur has persistently contravened any of the terms and conditions or its obligation subject to which the letter of approval was granted to the entrepreneur. It further provides that where the letter of approval has been cancelled, the Unit shall not, from the date of such cancellation, be entitled to any exemption, concession, benefit or deduction available to it as such and such Unit shall remit the exemption, concession, drawback and any other benefit availed by the entrepreneur in respect of the capital goods, finished goods lying in the stock and unutilised raw materials in the prescribed manner. Sub-section (4) entitles any person aggrieved from an order of the Approval Committee to make an appeal to the Board of Approval within the prescribed time.

### Setting up and operation of Offshore Banking Unit

#### *What do you mean by Offshore Banking Unit?*

***“Offshore Banking Unit” means a branch of a bank located in a Special Economic Zone and which has obtained the permission under clause (a) of sub-section (1) of Section 23 of the Banking Regulation Act, 1949.***

Section 17 dealing with setting up and operation of offshore Banking Unit provides that an application for setting up and operation of an Offshore Banking Unit in a Special Economic Zone may be made to the Reserve Bank, in the prescribed form and manner. The Reserve Bank of India may, on being satisfied that the applicant fulfills all the specified conditions, grant permission to such applicant for setting up and operation of an Offshore Banking Unit in a Special Economic Zone. Sub-section (3) empowers the Reserve Bank to specify, by notification, the terms and conditions subject to which an Offshore Banking Unit may be set up and operated in the Special Economic Zone.

### Setting up of International Financial Services Centre

#### *What is International Financial Services Centre?*

***“International Financial Services Centre” means an International Financial Services Centre which has been approved by the Central Government under Section 18(1).***

Section 18 empowers the Central Government to approve setting up of an International Financial Services Centre in a Special Economic Zone and to specify requirements for setting up the operation of such Centre. However, the Central Government may approve only one international Financial Services Centre in a Special Economic Zone. The Central Government may subject to the guidelines as may be framed by the Reserve Bank, the Security and Exchange Board of India, the Insurance Regulatory and Development Authority and such other authority as it may deem fit, prescribe the requirement for setting up and terms and conditions of the operation of International Financial Services Center.

### Single application form, return, etc.

Section 19 empowers the Central Government to prescribe single application form for obtaining any licence, permission or registration or approval by a Developer or an entrepreneur under one or more Central Acts. Section 19(b) empowers the Central Government to authorise the Board, the Development Commissioner and the approval Committee to exercise its powers on matters relating to the development of SEZ or setting up or operation of units. Section 19(c) empowers the Central Government to prescribe single form for furnishing returns or information by a developer or an entrepreneur under one or more Central Acts.



**Agency to inspect**

Section 20 empowers the Central Government to specify, by notification, any officer or agency for carrying out surveys or inspections for securing the compliance with the provisions of any Central Act by a Developer or an entrepreneur, as the case may be, and such officer or agency is required to submit verification or compliance report, in such manner and within such time as may be specified in the said notification.

**Single enforcement officer or agency for notified offences**

Section 21 empowers the Central Government to specify by notification, any act or omission made punishable under any Central Act, as notified offence for purposes of the proposed legislation. It further empowers the Central Government to authorise any officer or agency to be the enforcement officer or agency in respect of any notified offence committed in a Special Economic Zone. Every officer or agency so authorised has been granted all the corresponding powers of investigation, inspection, search or seizure as provided under the relevant Central Act in respect of the notified offences.

**Investigation, Inspection, Search or Seizure**

Section 22 empowers the agency or officer, with prior intimation to the Development Commissioner concerned to carry out the investigation, inspection, search or seizure in the Special Economic Zone or in a Unit if such agency or officer has reason to believe (reasons to be recorded in writing) that a notified offence has been committed or is likely to be committed in the Special Economic Zone. However, no investigation, inspection, search or seizure is allowed to be carried out in a SEZ by any agency or officer other than those referred to in Section 21(2) or (3), without prior intimation or approval of the concerned Development Commissioner. It is further provided that an officer or agency, if so authorised by the Central Government, may carry out the investigation, inspection, search or seizure in the Special Economic Zone or Unit without prior intimation or approval of the Development Commissioner.

**Designated Courts to try suits and notified offences**

Section 23 empowers the concerned State Government, in which SEZ is situated, to designate, with the concurrence of the Chief Justice of the High Court of that State, one or more Courts to try all suits of a civil nature arising out of offences committed in the Special Economic Zone. Section 23(2) provides that no court, other than the designated court shall try any suit or conduct the trial of any notified offence.

**Appeal to High Court**

Section 24 entitles any person aggrieved by any decision or order of the designated Court to file an appeal to the High Court within sixty days from the date of communication of the decision or order of the said court to him on any question of fact or law arising out of such orders. However the High Court can, if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the prescribed period of sixty days allow it to be filed within a further period not exceeding sixty days.

**Offences by Companies**

Section 25 dealing with offences by companies provides that where an offence has been committed by a company, every person who at the time the offence was committed was in charge of and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However such person shall not be liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.



Section 25(2) provides that where an offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall, also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

### **Exemptions, drawbacks and concessions to every Developer and entrepreneur**

Section 26 contains provisions relating to exemptions, drawbacks and concessions to Developer and entrepreneur from any duty of customs under the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force, exemption from the service tax under Chapter V of the Finance Act, 1994 and exemption from levy of taxes on sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 if such goods are meant to carrying on authorised operations by the developer or entrepreneur. The developer or entrepreneur has also been entitled to drawback or such other benefits as may be admissible from time to time on goods brought or services provided from DTA into SEZ or unit or services provided in SEZ or unit by service providers located outside India to carry on the authorised operations by the Developer or entrepreneur. The Central Government has also been empowered to specify the manner in which and the terms and conditions subject to which, the exemptions, concessions, drawbacks or other benefits are to be granted to developer or entrepreneur.

### **Application of the provisions of the Income Tax Act, 1961 with certain modifications in relation to Developers and entrepreneurs**

Section 27 provides for application of the provisions of the Income Tax Act, 1961 to the Developer and entrepreneur for carrying on the authorised operations in the Special Economic Zones or Unit subject to modifications specified in the second schedule.

### **Duration of goods & services in Special Economic Zones**

Section 28 empowers the Central Government to specify, the period during which any goods brought into, or services provided in, any Unit or Special Economic Zone without payment of taxes, duties, levies or cess, shall remain or continue to be provided in such Unit or Special Economic Zone.

### **Transfer of ownership and removal of goods**

Section 29 allows the transfer of ownership in any goods brought into, or produced or manufactured in, any Unit or Special Economic Zone or removal thereof from such Unit or Zone, subject to such terms and conditions as specified by the Central Government.

It may be noted that Manufacture means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, re-engineering and includes agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining.

### **Domestic clearance by Units**

Section 30 provides that any goods removed from a Special Economic Zone to the Domestic Tariff Area be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported. This section further provides that the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty. This section empowers the Central Government to make rules specifying conditions in this regard.

### Special Economic Zone Authority

Section 31 dealing with the Constitution of Authority empowers the Central Government to constitute by notification in the Official Gazette, an Authority for every SEZ to exercise powers conferred on and discharge the functions assigned to it.

In the case of an existing SEZ established by the Central Government the Central Government has been empowered to establish such authority within six months from the date of commencement of the Act. It is further provided that the person or authority (including Development Commissioner) which is exercising control over an existing SEZ, shall continue to do so till the authority is constituted. Section 31(2) provides that every authority shall be a body corporate by name as assigned, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable and to contract and shall sue and be sued. Section 31(9) stipulates that no act or proceedings of an authority shall be invalidated merely by reason of:

- (a) any vacancy in or any defect;
- (b) any defect in the appointment of a person as its member; or
- (c) any irregularity in the procedure of the authority not affecting the merits of the case.

### Functions of Authority

Section 34 casts upon the Authority a duty to undertake such measures as it thinks fit for the development, operation and management of the respective Special Economic Zone. Section 34(2) provides for following measures :

- (a) the development of infrastructure in the Special Economic Zone;
- (b) promoting exports from the Special Economic Zone;
- (c) reviewing the functioning and performance of the Special Economic Zone;
- (d) levy user or service charges or fees or rent for the use of properties belonging to the Authority;
- (e) performing such other functions as may be prescribed.

### Directions by the Central Government

Section 38 empowers the Central Government to give directions to the authority and makes it binding for every Authority of the Special Economic Zone to carry out the directions issued from time to time in this regard.

### Returns and reports by the Authority

Section 39 casts upon every Authority of the Special Economic Zone a duty to furnish to the Central Government such returns and statements and such particulars in regard to the promotion and development of exports and the operation and maintenance of the Special Economic Zone and Units as it may require from time to time. This section further requires every authority to submit to the Central Government after the end of each financial year a report in form and before specified date, giving a true and full account of its activities, policy and programmes during the previous financial year. Section 39(3) requires a copy of every such report to be laid before each House of Parliament, soon after its receipt.

### Power of the Central Government to Supersede Authority

Section 40 empowers the Central Government to supersede an Authority for a maximum period of six months if at any time, it is of the opinion that an Authority is unable to perform, or has persistently made

default in the performance of the duty imposed on it or has exceeded or abused its powers, or has wilfully or without sufficient cause, failed to comply with any direction issued by it. However, before issuing a notification superseding an authority, the Central Government is required to give reasonable time to that Authority to make representation against the proposed suppression and consider the representations, if any, of the Authority. Section 40(2) dealing with the consequences of publication of the notification superseding the Authority, provides that,

- (a) the Chairperson and other Members of the Authority shall, notwithstanding that their term of office has not expired as from the date of supersession, vacate their offices as such;
- (b) all the powers, functions and duties which may, by or under the provisions of the Act, be exercised or discharged by or on behalf of the Authority shall, during the period of supersession, be exercised and performed by such person or persons as the Central Government may direct;
- (c) all property vested in the Authority shall, during the period of supersession, vest in the Central Government.

Section 40(3) also provides that on the expiration of the period of supersession specified in the notification, the Central Government may extend the period of supersession for such further period not exceeding six months or reconstitute the Authority in the prescribed manner.

### Reference of Dispute and Limitation

Section 42 requires any dispute of civil nature arising among two or more entrepreneurs or two or more Developers or between the entrepreneur and Developer in the Special Economic Zone to be referred to arbitration provided, the court or the courts to try suits in respect of such dispute had not been designated. However no dispute should be referred to the arbitration on or after the date of the designation of court or courts under section 23(1). It further provides that where a dispute has been referred to arbitration, the same shall be settled or decided by the arbitrator to be appointed by the Central Government and the provisions of the Arbitration and Conciliation Act, 1996 shall apply to all arbitrations.

Section 43 stipulates that the period of limitation in the case of any dispute which is required to be referred to arbitration shall be regulated by the provisions of the Limitation Act, 1963, as if the dispute was a suit and the arbitrator is civil court. Section 43(2), however, empowers the arbitrator to admit, a dispute after the expiry of the period of limitation, if the arbitrator is satisfied that the applicant had sufficient cause for not referring the dispute within specified period.

### Person to whom a communication to be sent

Section 45 provides that a communication by any competent authority or person may be sent to the person who has the ultimate control over the affairs of the Special Economic Zone or Unit or where the said affairs are entrusted to a manager, director, chairperson, or managing director, or to any other officer, by whatever name called, such communication may be sent to such manager, director, chairperson, or managing director or any other officer.

### Identity card

***Section 46 requires that every person whether employed or residing or required to be present in a Special Economic Zone be provided an identity card by every Development Commissioner in prescribed form and containing specified particulars.***

### Power of the Central Government to modify provisions of the Act or other enactments in relation to Special Economic Zones

Section 49 empowers the Central Government to direct, by notification in the Official Gazette, that any of the provision of the Act or any other Central Act, any rules or regulations made thereunder or any notification or order issued or direction given thereunder specified in the notification shall not apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones; or shall apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones only with such exceptions, modification and adaptation, as may be specified in the notification. Sub section (2) requires a copy of every notification proposed to be issued to be laid in draft before each House of Parliament. The notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses of Parliament.

### Power of State Government to grant exemption

Section 50 empowers the State Government to notify policies for Developers and Units and to take suitable steps for enactment of any law -

- (a) granting exemption from the State taxes, levies and duties to the Developer or the entrepreneur;
- (a) delegating the powers conferred upon any person or authority under any State Act to the Development Commissioner in relation to the Developer or the entrepreneur.

### SEZ Act to have overriding effect

***Section 51 giving overriding effect to this Act provides that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.***

### Special Economic Zones to be ports, airports inland container depots, land stations etc. in certain cases

Section 53 provides that a Special Economic Zone, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorised operations. This section further provides that a Special Economic Zone shall, with effect from such date as the Central Government may notify, be deemed to be a port, airport, inland container depot, land station and land customs stations under section 7 of the Customs Act, 1962. The Central Government has been empowered to notify different dates for different Special Economic Zones.

### SPECIAL ECONOMIC ZONES RULES, 2006

Section 55 empowers the Central Government to make rules in respect of specified matters and requires that the same be published in the Official Gazette and be laid before each House of Parliament. In this context, the Central Government has notified the Special Economic Zones Rules, 2006 on February 10, 2006.

### Rights of Appellant to Appear before the Board

According to Rules 61 of the Special Economic Zones Rules, 2006 every appellant may appear before the Board in person or authorize one or more Chartered Accountants or **Company Secretaries** or Cost Accountants or legal practitioners or any of his or its officers to present his or its case before the Board.

It may be noted that company secretary means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act.

**LESSON ROUND-UP**

- Special Economic Zones (SEZ) are growth engines that can boost manufacturing, augment exports and generate employment. The SEZs require special fiscal and regulatory regime in order to impart a hassle free operational regime encompassing the state of the art infrastructure and support services.
- Special Economic Zone (SEZ) is a specifically delineated duty free enclave and is deemed to be foreign territory for the purposes of trade operations and duties and tariffs.
- SEZ units are governed by Special Economic Zones Act, 2005.
- Central Government, State Government, or any other person, jointly or severally, may establish a Special Economic Zone. Any person who, intends to set up a Special Economic Zone, may, after identifying the area, make a proposal to the State Government concerned for the purposes of setting up a Special Economic Zone.
- Board of Approval granting of approval or rejecting proposal or modifying such proposals for establishment of the Special Economic Zones.
- Every Development Commissioner to take steps in order to discharge his functions to ensure speedy development of the Special Economic Zone and promotion of exports there from.
- The Central Government to constitute by notification, a Committee for every Special Economic Zone to be called the Approval Committee to exercise the powers and perform the functions as specified.
- Any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, to submit a proposal to the Development Commissioner concerned.
- An application for setting up and operation of an Offshore Banking Unit in a Special Economic Zone may be made to the Reserve Bank of India.
- SEZ Act casts upon the SEZ Authority a duty to undertake such measures as it thinks fit for the development, operation and management of the respective Special Economic Zone.
- Every person whether employed or residing or required to be present in a Special Economic Zone shall be provided an identity card by every Development Commissioner in prescribed form and containing specified particulars.
- Provisions of the SEZ Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
- Any person aggrieved by any decision or order of the designated Court may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the said court to him on any question of fact or law arising out of such orders.

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Special Economic Zones are growth engines. Discuss.
2. Discuss in detail the salient features of SEZ Act, 2005.
3. Explain the procedure for establishment of SEZ.



### KEY CONCEPTS

■ Foreign Contribution ■ Foreign Source ■ Foreign Hospitality ■ Political Party

### Learning Objectives

#### To understand:

- Regulation of Foreign contribution, Foreign Source and Foreign Hospitality
- Who can and cannot receive foreign contribution
- Registration

### Lesson Outline

- Foreign Contribution
- Regulation of Foreign Contribution and Foreign Hospitality
- Registration
- Certificate of Registration
- Cancellation of Certificate
- Application for Renewal
- Management of Foreign Contribution
- Renewal of Certificate
- Offences and Penalties
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- Foreign Contribution (Regulation) Act, 2010
- Foreign Contribution (Regulation) Rules, 2011

## INTRODUCTION

The Foreign Contribution (Regulation) Act, 1976 was originally enacted to regulate the acceptance and utilization of foreign contribution or hospitality with a view to ensuring that the Parliamentary institutions, political associations, academic and other voluntary organizations as well as individuals working in important areas of national life may function in a manner consistent with the values of sovereign democratic republic.

The Act was amended in the year 1984 to extend its provisions to cover second and subsequent recipients of foreign contribution and to the members of higher judiciary, besides introducing the system of grant of registration to the association receiving foreign contribution.

Significant developments have taken place since 1984 such as change in internal security scenario, an increased influence of voluntary organizations, spread of use of communication and information technology, quantum jump in the amount of foreign contribution being received, and large scale growth in the number of registered organizations. This has necessitated large scale changes in the Act of 1976 and therefore, it was thought appropriate to replace the FCRA, 1976 by a new legislation Foreign Contribution (Regulation) Act, 2010 to regulate the acceptance and utilization of foreign contribution and foreign hospitality by a person or association.

The Foreign Contribution (Regulation) Act, 2010 has come into effect from May 1, 2011. The Ministry of Home Affairs had issued the necessary Gazette Notification vide S.O. 999 (E) dated the 29th April, 2011 in this regard. The Ministry of Home Affairs also issued a Gazette Notification vide G.S.R. 349 (E) dated the 29th April, 2011 notifying the Foreign Contribution (Regulation) Rules, 2011 made under section 48 of FCRA, 2010. The FCR Rules, 2011 have come into force simultaneously with FCRA, 2010.

### ***The Foreign Contribution (Regulation) Act, 2010 was enacted to***

- ***regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance; and***
- ***utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.***

In the case of *Noel Harper & Ors vs. Union of India & Anr* judgement dated April 08, 2022, the Hon'ble Supreme Court while upholding the constitutional validity of Amendment Act 2020 observed that "philosophically, foreign contribution (donation) is akin to gratifying intoxicant replete with medicinal properties and may work like a nectar. However, it serves as a medicine so long as it is consumed (utilised) moderately and discreetly, for serving the larger cause of humanity. Otherwise, this artifice has the capability of inflicting pain, suffering and turmoil as being caused by the toxic substance (potent tool) – across the nation. In that, free and uncontrolled flow of foreign contribution has the potentials of impacting the sovereignty and integrity of the nation, its public order and also working against the interests of the general public."

To eradicate misuse and abuse of foreign contribution in the past, despite the firm regime in place in terms of the 2010 Act, the Parliament in its wisdom has now (vide Amendment Act of 2020) adopted the path of moderation by making it mandatory for all to accept foreign contribution only through one channel and to utilise the same "itself" for the purposes for which permission has been accorded. Undeniably, the sovereignty and integrity of India ought to prevail and the rights enshrined in Part III of the Constitution must give way to the interests of general public much less public order and the sovereignty and integrity



of the nation. It must be borne in mind that the legislation under consideration must be understood in the context of the underlying intent of insulating the democratic polity from the adverse influence of foreign contribution remitted by foreign sources.

Further, in order to streamline the provisions of the Foreign Contribution (Regulation) Act, 2010 by strengthening the compliance mechanism, enhancing transparency and accountability in the receipt and utilisation of foreign contribution worth thousands of crores of rupees every year and facilitating genuine non-Governmental organisations or associations who are working for the welfare of the society, Parliament enacted the Foreign Contribution (Regulation) Amendment Act, 2020.

*The salient features of the Foreign Contribution (Regulation) Amendment Act, 2020 inter alia, are asunder: –*

- (a) Amended Section 3(1) (c) of the Act to include “public servant” also within its ambit, to provide that no foreign contribution shall be accepted by any public servant;
- (b) Amended Section 7 of the Act to prohibit any transfer of foreign contribution to any association/ person;
- (c) Amended section 8(1) of the Act to reduce the limit for defraying administrative expenses from existing “fifty per cent.” to “twenty per cent.”;
- (d) Inserted of a new Section 12A empowering the Central Government to require Aadhaar number, etc., as identification document;
- (e) Inserted of a new Section 14A enabling the Central Government to permit any person to surrender the certificate granted under the Act;
- (f) Amended Section 17 of the Act to provide that every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as “FCRA Account” which shall be opened by him in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify and for other consequential matters relating thereto.

According to Section 2(2) of the Act, words and expressions used herein and not defined in this Act but defined in the Representation of the People Act, 1950 or the Representation of the People Act, 1951 or the Foreign Exchange Management Act, 1999 shall have the meanings respectively assigned to them in those Acts.

## REGULATION OF FOREIGN CONTRIBUTION AND FOREIGN HOSPITALITY

### *What is foreign contribution?*

**“Foreign Contribution” means the donation, delivery or transfer made by any foreign source, –**

- (i) of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf;**
- (ii) of any currency, whether Indian or foreign;**
- (iii) of any security as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 and includes any foreign security as defined in clause (o) of section 2 of the Foreign Exchange Management Act, 1999.**

**Explanation 1. – A donation, delivery or transfer of any article, currency or foreign security referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution within the meaning of this clause.**

**Explanation 2.** – *The interest accrued on the foreign contribution deposited in any bank referred to in sub-section (1) of section 17 or any other income derived from the foreign contribution or interest thereon shall also be deemed to be foreign contribution within the meaning of this clause.*

**Explanation 3.** – *Any amount received, by any person from any foreign source in India, by way of fee (including fees charged by an educational institution in India from foreign student) or towards cost in lieu of goods or services rendered by such person in the ordinary course of his business, trade or commerce whether within India or outside India or any contribution received from an agent of a foreign source towards such fee or cost shall be excluded from the definition of foreign contribution within the meaning of this clause.*

**Example-**

*A company 'XYZ' based in United States transferred Rs. 20,000 to a company 'ABC' in India by way of donation. The amount of Rs 20,000 shall be considered as foreign contribution in this case.*

#### **What is foreign source?**

**"Foreign Source" includes,—**

- i. the Government of any foreign country or territory and any agency of such Government;**
- ii. any international agency, not being the United Nations or any of its specialised agencies, the World Bank, International Monetary Fund or such other agency as the Central Government may, by notification, specify in this behalf;**
- iii. a foreign company;**
- iv. a corporation, not being a foreign company, incorporated in a foreign country or territory;**
- v. a multi-national corporation referred to in sub-clause (iv) of clause (g);**
- vi. a company within the meaning of the Companies Act, 1956, and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely:—**
  - a) the Government of a foreign country or territory;**
  - b) the citizens of a foreign country or territory;**
  - c) corporations incorporated in a foreign country or territory;**
  - d) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;**
- vii. a trade union in any foreign country or territory, whether or not registered in such foreign country or territory;**
- viii. a foreign trust or a foreign foundation, by whatever name called, or such trust or foundation mainly financed by a foreign country or territory;**
- ix. a society, club or other association of individuals formed or registered outside India;**
- x. a citizen of a foreign country.**

**Example –**

*A company 'XYZ' based in United States transferred Rs. 20,000 to a company 'ABC' in India. The amount of company 'XYZ' based in United States shall be considered as foreign source in this case.*

**What is a foreign company?**

**“Foreign Company” means any company or association or body of individuals incorporated outside India and includes—**

- (i) a foreign company within the meaning of section 591 of the Companies Act, 1956 ;**
- (ii) a company which is a subsidiary of a foreign company;**
- (iii) the registered office or principal place of business of a foreign company referred to in sub-clause (i) or company referred to in sub-clause (ii);**
- (iv) a multi-national corporation.**

**Example-**

**A company ‘XYZ’ a multi-national corporation having its office in United States transferred Rs. 20,000 to a company ‘ABC’ in India. The company ‘XYZ’ shall be considered a foreign company in this case.**

**Who can receive Foreign Contribution?**

Any “Person” can receive foreign contribution subject to the following conditions:-

- It must have a definite cultural, economic, educational, religious or social programme.
- It must obtain the FCRA registration/prior permission from the Central Government
- It must not be prohibited under Section 3 of FCRA, 2010.

It maybe noted that –

“Person” includes –

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) an association;
- (iv) a company registered under section 25 of the Companies Act, 1956. [Section 2(m)]

**Who cannot receive Foreign Contribution?**

Section 3(1) prohibits following person to accept foreign contribution:

- (a) candidate for election;
- (b) correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;
- (c) public servant, Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government;
- (d) member of any Legislature;
- (e) political party or office-bearer thereof;
- (f) organisation of a political nature as may be specified under section 5(1) by the Central Government;
- (g) association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in section 2(1)(r) of the Information Technology Act, 2000 or any other mode of mass communication;
- (h) correspondent or columnist, cartoonist, editor, owner of the association or company referred to in clause (g).

*Explanation 1* – For the purpose of clause (c), “public servant” means a public servant as defined in section 21 of the Indian Penal Code.

*Explanation 2.* – In clause (c) and section 6, the expression “corporation” means a corporation owned or controlled by the Government and includes a Government company as defined in clause (45) of section 2 of the Companies Act, 2013.

Section 3(2) states that:

- (a) No person, resident in India, and no citizen of India resident outside India, shall accept any foreign contribution, or acquire or agree to acquire any currency from a foreign source, on behalf of any political party, or any person referred to in sub-section (1), or both.
- (b) No person, resident in India, shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to any person if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to any political party or any person referred to in sub-section (1), or both.
- (c) No citizen of India resident outside India shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to –
  - (i) any political party or any person referred to in sub-section (1), or both; or
  - (ii) any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a political party or to any person referred to in sub-section (1), or both.

According to Section 3(3) of the Act, no person receiving any currency, whether Indian or foreign, from a foreign source on behalf of any person or class of persons, referred to in section 9, shall deliver such currency –

- (a) to any person other than a person for which it was received; or
- (b) to any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a person other than the person for which such currency was received.

### **Persons to Whom Section 3 Shall Not Apply**

According to Section 4 of the Act, nothing contained in section 3 shall apply to the acceptance, by any person specified in that section, of any foreign contribution where such contribution is accepted by him, subject to the provisions of section 10, –

- (a) by way of salary, wages or other remuneration due to him or to any group of persons working under him, from any foreign source or by way of payment in the ordinary course of business transacted in India by such foreign source; or
- (b) by way of payment, in the course of international trade or commerce, or in the ordinary course of business transacted by him outside India; or
- (c) as an agent of a foreign source in relation to any transaction made by such foreign source with the Central Government or State Government; or
- (d) by way of a gift or presentation made to him as a member of any Indian delegation, provided that such gift or present was accepted in accordance with the rules made by the Central Government with regard to the acceptance or retention of such gift or presentation; or
- (e) from his relative; or

- (f) by way of remittance received, in the ordinary course of business through any official channel, post office, or any authorised person in foreign exchange under the Foreign Exchange Management Act, 1999; or
- (g) by way of any scholarship, stipend or any payment of like nature.

It may be noted that in case any foreign contribution received by any person specified under section 3, for any of the purposes other than those specified under this section, such contribution shall be deemed to have been accepted in contravention of the provisions of section 3.

### Procedure to Notify an Organisation of a Political Nature

According to Section 5(1) the Central Government may, having regard to the activities of the organisation or the ideology propagated by the organisation or the programme of the organisation or the association of the organisations with the activities of any political party, by an order published in the Official Gazette, specify such organisation as an organisation of a political nature not being a political party, referred to in clause (f) of sub-section (1) of section 3. The Central Government may, by rules made by it, frame the guidelines specifying the ground or grounds on which an organisation shall be specified as an organisation of a political nature.

As per Section 5(2) of the Act, before making an order under sub-section (1), the Central Government shall give the organisation in respect of whom the order is proposed to be made, a notice in writing informing it of the ground or grounds, on which it is proposed to be specified as an organisation of political nature under that sub-section.

Section 5(3) states that the organisation to whom a notice has been served under sub-section (2), may, within a period of thirty days from the date of the notice, make a representation to the Central Government giving reasons for not specifying such organisation as an organisation under sub-section (1). The Central Government may entertain the representation after the expiry of the said period of thirty days, if it is satisfied that the organisation was prevented by sufficient cause from making the representation within thirty days.

Section 5(4) provides that the Central Government may, if it considers it appropriate, forward the representation referred to in sub-section (3) to any authority to report on such representation.

The Central Government may, after considering the representation and the report of the authority referred to in sub-section (4), specify such organisation as an organisation of a political nature not being a political party and make an order under sub-section (1) accordingly.

Every order under sub-section (1) shall be made within a period of one hundred and twenty days from the date of issue of notice under sub-section (2). In case no order is made within the said period of one hundred and twenty days, the Central Government shall, after recording the reasons therefor, make an order under sub-section (1) within a period of sixty days from the expiry of the said period of one hundred and twenty days.

It may be noted that “Political Party” means—

- (i) an association or body of individual citizens of India—
  - (a) to be registered with the Election Commission of India as a political party under section 29A of the Representation of the People Act, 1951; or
  - (b) which has set up candidates for election to any Legislature, but is not so registered or deemed to be registered under the Election Symbols (Reservation and Allotment) Order, 1968;
- (ii) a political party mentioned in column 2 of Table 1 and Table 2 to the notification of the Election Commission of India No. 56/J&K/02, dated the 8th August, 2002, as in force for the time being.

In the case of *Indian Social Action Forum (INSAF) vs. Union of India in Civil Appeal No.1510 of 2020* (Arising out of SLP (C) No.33928 of 2011) judgement dated March 06, 2020, Hon'ble Supreme Court of India inter-alia observed that "the object sought to be achieved by the Act is to ensure that Parliamentary institutions, political associations and academic and other voluntary organisations as well as individuals working in the important areas of national life should function in a manner consistent with the values of a sovereign democratic republic without being influenced by foreign contributions or foreign hospitality. The long title of the Act makes it clear that the regulation of acceptance and utilisation of foreign contribution is for the purpose of protecting national interest. Candidates for election and political parties or office bearers of political parties are barred from accepting any foreign contribution. The legislative intent is also to prohibit organisations of a political nature from receiving foreign contributions. It is clear that preventing foreign contribution into the political arena is the object sought to be achieved by the Act."

Further, Hon'ble Supreme Court of India inter-alia observed that prevention of foreign contributions routed through voluntary organisations which are not connected to party politics is the reason behind introduction of Section 3 (1) (f) and Section 5 of the Act. The Central Government is required to take into account the activities, ideology or the programme of the organisation including the association of the organisation with activities of any political party before declaring an organisation as an organisation of political nature not being a political party. Guidelines that are prescribed by the Rules indicate that only those organisations which are actively involved in politics or associated with political parties can be declared as organisations of a political nature. The question that falls for our consideration is whether the guidelines in Rule 3 suffer from vagueness and ambiguity and whether they can be stated to be conferring uncanalised power on the executive. According to Rule 3 (i) an organisation having avowed political objectives in its memorandum of association or bye laws is an organisation of a political nature. As the intention of the legislature is to prohibit foreign funds in active politics, an Association with avowed political objectives (i.e. to play a role in active politics or party politics) cannot be permitted access to foreign funds. There is no ambiguity in the provision and hence, cannot be termed as vague. Therefore, we find no substance in the contention of the Appellant that Rule 3 (i) is ultra vires the Act. A balance has to be drawn between the object that is sought to be achieved by the legislation and the rights of the voluntary organisations to have access to foreign funds. The purpose for which the statute prevents organisations of a political nature from receiving foreign funds is to ensure that the administration is not influenced by foreign funds. Prohibition from receiving foreign aid, either directly or indirectly, by those who are involved in active politics is to ensure that the values of a sovereign democratic republic are protected. On the other hand, such of those voluntary organisations which have absolutely no connection with either party politics or active politics cannot be denied access to foreign contributions. Therefore, such of those organisations which are working for the social and economic welfare of the society cannot be brought within the purview of the Act or the Rules by enlarging the scope of the term 'political interests'. We are of the opinion that the expression 'political interests' in Rule 3 (v) has to be construed to be in connection with active politics or party politics.

### **Restriction on Acceptance of Foreign Hospitality**

According to Section 6 of the Act, no member of a Legislature or office-bearer of a political party or Judge or Government servant or employee of any corporation or any other body owned or controlled by the Government shall, while visiting any country or territory outside India, accept, except with the prior permission of the Central Government, any foreign hospitality:

Provided that it shall not be necessary to obtain any such permission for an emergent medical aid needed on account of sudden illness contracted during a visit outside India, but, where such foreign hospitality has been

received, the person receiving such hospitality shall give, within one month from the date of receipt of such hospitality an intimation to the Central Government as to the receipt of such hospitality, and the source from which, and the manner in which, such hospitality was received by him.

#### ***What is foreign hospitality?***

***Foreign Hospitality means any offer, not being a purely casual one, made in cash or kind by a foreign source for providing a person with the costs of travel to any foreign country or territory or with freeboard, lodging, transport or medical treatment.***

***State the categories of persons requires prior approval from Ministry of Home Affairs before accepting Foreign Hospitality?***

***The following categories of persons require prior approval from Ministry of Home Affairs before accepting Foreign Hospitality:-***

- ***Members of a Legislature***
- ***Office bearers of political parties***
- ***Judges***
- ***Government servants, Public Servants***
- ***Employees of any corporation or any other body owned or controlled by the Government.***

***Provided that it shall not be necessary to obtain any such permission for an emergent medical aide needed on account of sudden illness contracted during a visit outside India. But, where such foreign hospitality has been received, the person receiving such hospitality shall give an intimation to the Central Government as to the receipt of such hospitality within one month from the date of receipt of such hospitality, and the source from which, and the manner in which, such hospitality was received.***

#### **Prohibition to Transfer Foreign Contribution to Other Person**

Section 7 of the Act provides that person who:-

- (a) is registered and granted a certificate or has obtained prior permission under the Act; and
- (b) receives any foreign contribution,

shall not transfer such foreign contribution to any other person.

#### **Restriction to Utilise Foreign Contribution for Administrative Purpose**

According to Section 8 of the Act, every person, who is registered and granted a certificate or given prior permission under the Act and receives any foreign contribution, –

- (a) shall utilise such contribution for the purposes for which the contribution has been received:

Provided that any foreign contribution or any income arising out of it shall not be used for speculative business:

Provided further that the Central Government shall, by rules, specify the activities or business which shall be construed as speculative business for the purpose of this section;

- (b) shall not defray as far as possible such sum, ***not exceeding twenty percent*** of such contribution, received in a financial year, to meet administrative expenses:



Provided that administrative expenses exceeding twenty percent of such contribution may be defrayed with prior approval of the Central Government.

The Central Government may prescribe the elements which shall be included in the administrative expenses and the manner in which the administrative expenses shall be calculated.

### **Power of Central Government to Prohibit Receipt of Foreign Contribution, etc., in Certain Cases**

According to Section 9 of the Act, the Central Government may –

- (a) prohibit any person or organisation not specified in section 3, from accepting any foreign contribution;
- (b) require any person or class of persons, not specified in section 6, to obtain prior permission of the Central Government before accepting any foreign hospitality;
- (c) require any person or class of persons not specified in section 11, to furnish intimation within such time and in such manner as may be prescribed as to the amount of any foreign contribution received by such person or class of persons as the case may be, and the source from which and the manner in which such contribution was received and the purpose for which and the manner in which such foreign contribution was utilised;
- (d) without prejudice to the provisions of sub-section (1) of section 11, require any person or class of persons specified in that sub-section to obtain prior permission of the Central Government before accepting any foreign contribution;
- (e) require any person or class of persons, not specified in section 6, to furnish intimation, within such time and in such manner as may be prescribed, as to the receipt of any foreign hospitality, the source from which and the manner in which such hospitality was received;

Provided that no such prohibition or requirement shall be made unless the Central Government is satisfied that the acceptance of foreign contribution by such person or class of persons, as the case may be, or the acceptance of foreign hospitality by such person, is likely to affect prejudicially –

- (i) the sovereignty and integrity of India; or
- (ii) public interest; or
- (iii) freedom or fairness of election to any Legislature; or
- (iv) friendly relations with any foreign State; or
- (v) harmony between religious, racial, social, linguistic or regional groups, castes or communities.

### **Power to Prohibit Payment of Currency Received in Contravention of the Act**

Section 10 provides that where the Central Government is satisfied, after making such inquiry as it may deem fit, that any person has in his custody or control any article or currency or security, whether Indian or foreign, which has been accepted by such person in contravention of any of the provisions of this Act, it may, by order in writing, prohibit such person from paying, delivering, transferring or otherwise dealing with, in any manner whatsoever, such article or currency or security save in accordance with the written orders of the Central Government and a copy of such order shall be served upon the person so prohibited in the prescribed manner, and thereupon the provisions of sub-sections (2), (3), (4) and (5) of section 7 of the Unlawful Activities (Prevention) Act, 1967 shall, so far as may be, apply to, or in relation to, such article or currency or security and references in the said sub-sections to moneys, securities or credits shall be construed as references to such article or currency or security.



**REGISTRATION***How does a person obtain permission to accept Foreign Contribution?*

**There are two modes of obtaining permission to accept foreign contribution according to FCRA, 2010:**

- i. Registration**
- ii. Prior Permission**

**Eligibility Criteria for Grant of Registration**

For grant of registration under FCRA, 2010, the association should:

- i. be registered under an existing statute like the Societies Registration Act, 1860 or the Indian Trusts Act, 1882 or section 25 of the Companies Act, 1956 (Now Section 8 of Companies Act, 2013) etc;
- ii. be in existence for at least three years and has undertaken reasonable activity in its chosen field for the benefit of the society for which the foreign contribution is proposed to be utilised. The applicant NGO/ association will be free to choose its items of expenditure (excluding the administrative expenditure as defined in Rule 5 of FCRR, 2011) to become eligible for the minimum threshold of Rs. 15.00 lakh spent during the last three years. If the association wants inclusion of its capital investment in assets like land, building, other permanent structures, vehicles, equipments etc, then the Chief Functionary shall have to give an undertaking that these assets shall be utilized only for the FCRA activities and they will not be diverted for any other purpose till FCRA registration of the NGO holds.

**Eligibility Criteria for Grant of Prior Permission**

An organization in formative stage is not eligible for certificate of registration. Such organization may apply for grant of prior permission under FCRA, 2010. Prior permission is granted for receipt of a specific amount from specific donor/donors for carrying out specific activities/projects. For this purpose, the association should meet following criteria:

- i. be registered under an existing statute like the Societies Registration Act, 1860 or the Indian Trusts Act, 1882 or section 25 of the Companies Act, 1956 (Now Section 8 of Companies Act, 2013) etc;
- ii. submit a specific commitment letter from the donor indicating the amount of foreign contribution and the purpose for which it is proposed to be given; and
- iii. For Indian recipient organizations and foreign donor organizations having common members.

FCRA Prior Permission shall be granted to the Indian recipient organizations subject to its satisfying the following:

- i. The Chief Functionary of the recipient Indian organization should not be a part of the donor organization.
- ii. At least 75% of the office-bearers/ members of the Governing body of the Indian recipient organization should not be members/employees of the foreign donor organization.
- iii. In case of foreign donor organization being a single person/individual that person should not be the Chief Functionary or office bearer of the recipient Indian organization.
- iv. In case of a single foreign donor, at least 75% office bearers/members of the governing body of the recipient organization should not be the family members and close relatives of the donor.

### Conditions for the Grant of Registration and Prior Permission

In terms of Section 12 (4) of FCRA, 2010, the following shall be the conditions for the grant of registration and prior permission:

- a) The 'person' making an application for registration or grant of prior permission-
  - i. is not fictitious or benami;
  - ii. has not been prosecuted or convicted for indulging in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another;
  - iii. has not been prosecuted or convicted for creating communal tension or disharmony in any specified district or any other part of the country;
  - iv. has not been found guilty of diversion or mis-utilisation of its funds;
  - v. is not engaged or likely to engage in propagation of sedition or advocate violent methods to achieve its ends;
  - vi. is not likely to use the foreign contribution for personal gains or divert it for undesirable purposes;
  - vii. has not contravened any of the provisions of this Act;
  - viii. has not been prohibited from accepting foreign contribution;
  - ix. the person being an individual, such individual has neither been convicted under any law for the time being in force nor any prosecution for any offence is pending against him;
  - x. the person being other than an individual, any of its directors or office bearers has neither been convicted under any law for the time being in force nor any prosecution for any offence is pending against him.
- b) the acceptance of foreign contribution by the association/ person is not likely to affect prejudicially–
  - i. the sovereignty and integrity of India;
  - ii. the security, strategic, scientific or economic interest of the State;
  - iii. the public interest;
  - iv. freedom or fairness of election to any Legislature;
  - v. friendly relation with any foreign State;
  - vi. harmony between religious, racial, social, linguistic, regional groups, castes or communities.
- c) the acceptance of foreign contribution-
  - i. shall not lead to incitement of an offence;
  - ii. shall not endanger the life or physical safety of any person.

### Power of Central Government to require Aadhaar number, etc., as identification document

Section 12A provides that notwithstanding anything contained in the Act, the Central Government may require that any person who seeks prior permission or prior approval under section 11, or makes an application for grant of certificate under section 12, or, as the case may be, for renewal of certificate under section 16, shall provide as identification document, the Aadhaar number of all its office bearers or Directors or other key functionaries, by whatever name called, issued under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, or a copy of the Passport or Overseas Citizen of India Card, in case of a foreigner.

### **Suspension of Certificate**

According to Section 13 of the Act, where the Central Government, for reasons to be recorded in writing, is satisfied that pending consideration of the question of cancelling the certificate on any of the grounds mentioned in section 14(1), it is necessary so to do, it may, by order in writing, suspend the certificate for a period of one hundred and eighty days, or such further period, not exceeding one hundred and eighty days, as may be specified in the order.

Every person whose certificate has been suspended shall not receive any foreign contribution during the period of suspension of certificate.

It may be noted that the Central Government, on an application made by such person, if it considers appropriate, allow receipt of any foreign contribution by such person on such terms and conditions as it may specify.

Every person whose certificate has been suspended shall utilise, in the prescribed manner, the foreign contribution in his custody with the prior approval of the Central Government.

### **Cancellation of Certificate**

Section 14 provides that the Central Government may, if it is satisfied after making such inquiry as it may deem fit, by an order, cancel the certificate if –

- (1) the holder of the certificate has made a statement in, or in relation to, the application for the grant of registration or renewal thereof, which is incorrect or false; or
  - (i) the holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof; or
  - (ii) in the opinion of the Central Government, it is necessary in the public interest to cancel the certificate; or
  - (iii) the holder of certificate has violated any of the provisions of this Act or rules or order made thereunder; or
  - (iv) if the holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for two consecutive years or has become defunct.
- (2) No order of cancellation of certificate under this section shall be made unless the person concerned has been given a reasonable opportunity of being heard.
- (3) Any person whose certificate has been cancelled under this section shall not be eligible for registration or grant of prior permission for a period of three years from the date of cancellation of such certificate.

### **Surrender of Certificate**

Section 14A states that on a request being made in this behalf, the Central Government may permit any person to surrender the certificate granted under this Act, if, after making such inquiry as it deems fit, it is satisfied that such person has not contravened any of the provisions of this Act, and the management of foreign contribution and asset, if any, created out of such contribution has been vested in the authority as provided in section 15(1).

### **Management of Foreign Contribution of Person Whose Certificate has been Cancelled or Surrendered**

Section 15(1) of the Act provides that the foreign contribution and assets created out of the foreign contribution in the custody of every person whose certificate has been cancelled under section 14 or surrendered under section 14A shall vest in such authority as may be prescribed.

The authority referred to in section 15 (1) above may, if it considers necessary and in public interest, manage the activities of the person referred to in that sub-section for such period and in such manner, as the Central Government may direct and such authority may utilise the foreign contribution or dispose of the assets created out of it in case adequate funds are not available for running such activity.

The authority referred to in section 15(1) shall return the foreign contribution and the assets vested upon it under that sub-section to the person referred to in the said sub-section if such person is subsequently registered under this Act.

### Renewal of Certificate

Section 16 of the Act provides that every person who has been granted a certificate under section 12 shall have such certificate renewed within six months before the expiry of the period of the certificate.

It may be noted that the Central Government may, before renewing the certificate, make such inquiry, as it deems fit, to satisfy itself that such person has fulfilled all conditions specified in section 12(4).

The application for renewal of the certificate shall be made to the Central Government in such form and manner and accompanied by such fee as may be prescribed.

The Central Government shall renew the certificate, ordinarily within ninety days from the date of receipt of application for renewal of certificate subject to such terms and conditions as it may deem fit and grant a certificate of renewal for a period of five years.

In case, the Central Government does not renew the certificate within the said period of ninety days, it shall communicate the reasons therefor to the applicant.

The Central Government may refuse to renew the certificate in case where a person has violated any of the provisions of this Act or rules made thereunder.

### Foreign Contribution through Scheduled Bank

According to Section 17(1) of the Act, every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf:

Provided that such person may also open another "FCRA Account" in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from his "FCRA Account" in the specified branch of State Bank of India at New Delhi.

Provided further that such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his "FCRA Account" in the specified branch of the State Bank of India at New Delhi or kept by him in another "FCRA Account" in a scheduled bank of his choice.

Provided also that no funds other than foreign contribution shall be received or deposited in any such account.

Section 17 (2) states that the specified branch of the State Bank of India at New Delhi or the branch of the scheduled bank where the person referred to in sub-section (1) has opened his foreign contribution account or the authorised person in foreign exchange, shall report to such authority as may be specified, –

- (a) the prescribed amount of foreign remittance;
- (b) the source and manner in which the foreign remittance was received; and
- (c) other particulars;
- (d) in such form and manner as may be prescribed.

**OFFENCES AND PENALTIES****Making of False Statement, Declaration or Delivering False Accounts**

As per Section 33 of the Act, any person, subject to this Act, who knowingly, –

- (i) gives false intimation under clause (c) of section 9 or section 18; or
- (ii) seeks prior permission or registration by means of fraud, false representation or concealment of material fact, shall, on conviction by a court, be liable to imprisonment for a term which may extend to six months or with fine or with both.

**Penalty for Article or Currency or Security Obtained in Contravention of section 10**

Section 34 provides that any person, on whom any prohibitory order has been served under section 10, pays, delivers, transfers or otherwise deals with, in any manner whatsoever, any article or currency or security, whether Indian or foreign, in contravention of such prohibitory order, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both; and notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the court trying such contravention may also impose on the person convicted an additional fine equivalent to the market value of the article or the amount of the currency or security in respect of which the prohibitory order has been contravened by him or such part thereof as the court may deem fit.

**Punishment for contravention of any provision of the Act**

Section 35 states that whoever accepts, or assists any person, political party or organisation in accepting, any foreign contribution or any currency or security from a foreign source, in contravention of any provision of this Act or any rule or order made thereunder, shall be punished with imprisonment for a term which may extend to five years, or with fine, or with both.

**Power to Impose Additional Fine where Article or Currency or Security is not Available for Confiscation**

As per Section 36 of the Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973, the court trying a person, who, in relation to any article or currency or security, whether Indian or foreign, does or omits to do any act which act or omission would render such article or currency or security liable to confiscation under this Act, may, in the event of the conviction of such person for the act or omission aforesaid, impose on such person a fine not exceeding five times the value of the article or currency or security or one thousand rupees, whichever is more, if such article or currency or security is not available for confiscation, and the fine so imposed shall be in addition to any other fine which may be imposed on such person under this Act.

**Penalty for Offences Where No Separate Punishment Has Been Provided**

As per Section 37 of the Act, whoever fails to comply with any provision of this Act for which no separate penalty has been provided in this Act shall be punished with imprisonment for a term which may extend to one year, or with fine or with both.

**Prohibition of Acceptance of Foreign Contribution**

Section 38 provides that notwithstanding anything contained in this Act, whoever, having been convicted of any offence under section 35 or section 37, in so far as such offence relates to the acceptance or utilisation of foreign contribution, is again convicted of such offence shall not accept any foreign contribution for a period of five years from the date of the subsequent conviction.

### Offences by Companies

Section 39 provides that where an offence under this Act or any rule or order made thereunder has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Notwithstanding anything contained above, where an offence under this Act or any rule or order made thereunder has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation.* – For the purposes of this section, –

- (i) “company” means any body corporate and includes a firm, society, trade union or other association of individuals; and
- (ii) “director”, in relation to a firm, society, trade union or other association of individuals, means a partner in the firm or a member of the governing body of such society, trade union or other association of individuals.

### Bar on Prosecution of Offences under the Act

Section 40 states that no court shall take cognizance of any offence under this Act, except with the previous sanction of the Central Government or any officer authorised by that Government in this behalf.

### Composition of Certain Offences

According to Section 41(1) of the Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence punishable under this Act (whether committed by an individual or association or any officer or employee thereof), not being an offence punishable with imprisonment only, may, before the institution of any prosecution, be compounded by such officers or authorities and for such sums as the Central Government may, by notification in the Official Gazette, specify in this behalf.

Section 41(2) provides that nothing in sub-section (1) shall apply to an offence committed by an individual or association or its officer or other employee within a period of three years from the date on which a similar offence committed by it or him was compounded under this section.

*Explanation.* – For the purposes of this section, any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence.

As per Section 41(3), every officer or authority referred to in sub-section (1) shall exercise the powers to compound an offence, subject to the direction, control and supervision of the Central Government.

Every application for the compounding of an offence shall be made to the officer or authority referred to in sub-section (1) in such form and manner along with such fee as may be prescribed.

Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, against the offender in relation to whom the offence is so compounded.

Every officer or authority referred to in sub-section (1), while dealing with a proposal for the compounding of an offence for a default in compliance with any provision of this Act which requires by an individual or association or its officer or other employee to obtain permission or file or register with, or deliver or send to, the Central Government or any prescribed authority any return, account or other document, may, direct, by order, if he or it thinks fit to do so, any individual or association or its officer or other employee to file or register with, such return, account or other document within such time as may be specified in the order.

In the case of *Association for Democratic Reforms & Anr (Petitioners) Vs. Union of India (Respondent)*, W.P.(C) 9592/2015, Neutral Citation Number: 2023/DHC/000161 Date of decision: 10th January, 2023, Hon'ble Delhi High Court inter-alia observed that a perusal of the scheme of the Act shows that the Central Government plays an important role in enforcing and bringing into action the provisions of the FCRA. It has the power to delineate what organisations qualify as 'political' in nature so as to prohibit them from receiving foreign contribution. It also designates the authority which investigates offences under the FCRA. It is trite law that decisions taken by the Central Government are assumed to be bona fide in nature, unless something to the contrary is placed on record. It goes without saying the authority designated by the Central Government to investigate offences exercises a statutory power. It is trite law that when a body or person, as prescribed by the Central Government, passes an order under the FCRA, the law presumes that such order is bona fide. This Court cannot assume mala fides and misuse of power in such a situation, unless material to the contrary is placed on record. (*Refer to: MCD v. Qimat Rai Gupta, (2007) 7 SCC 309*). It is well settled that there is a presumption of constitutionality in favour of a Statute and mere apprehension that an Act is capable of being misused is no ground for replacing the wisdom of the legislature with that of the judiciary. The Apex Court on a number of occasions has reiterated that sweeping attacks made on the likelihood of misuse of a Statute, in the future, cannot succeed, and the occasion to complain only arises when such alleged misuse occurs. Hence, the mere possibility of a law being administered in a manner which may conflict with constitutional requirements does not render it invalid. The judiciary always circumspect in substituting its wisdom with that of the legislature. In light of this, the prayer made by the Writ Petitioner seeking a direction to constitute an independent Tribunal Committee to oversee the enforcement of FCRA cannot be accepted.

#### LESSON ROUND-UP

- FCRA, 2010 regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.
- In order to streamline the provisions of the Foreign Contribution (Regulation) Act, 2010 by strengthening the compliance mechanism, enhancing transparency and accountability in the receipt and utilisation of foreign contribution worth thousands of crores of rupees every year and facilitating genuine non-Governmental organisations or associations who are working for the welfare of the society, Parliament enacted the Foreign Contribution (Regulation) Amendment Act, 2020.
- The Act provides that persons having definite cultural, economic, educational, religious and social programmes should get themselves registered with the Government of India before accepting any 'foreign contribution'. In case a person falling in the above category is not registered with the Central Government, it can accept foreign contribution only after obtaining prior permission of the Central Government.

- Central Government is empowered to prohibit any person or organisation not specified in the Act from accepting any foreign contribution and to require any person or class of persons, not specified in it to obtain prior permission of the Central Government before accepting any foreign hospitality.
- Associations which were granted certificates of registration, such registration shall be valid for a period of five years.
- Any offence punishable under this Act (whether committed by an individual or association or any officer or employee thereof), not being an offence punishable with imprisonment only, may, before the institution of any prosecution, be compounded by such officers or authorities and for such sums as the Central Government may, by notification in the official gazette, specify in this behalf.

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. How does the FCRA, 2010 seeks to regulate the receipt of foreign contribution and foreign hospitality?
2. Define ‘foreign contribution’ and ‘foreign source’.
3. Discuss the provisions of FCRA relevant to exemptions from acceptance of foreign contribution.
4. Explain the concept of ‘organisation of a political nature’ under the Foreign Contribution (Regulation) Act, 2010.
5. Discuss the powers of Central Government under FCRA to prohibit receipt of foreign contribution.

**LIST OF FURTHER READINGS**

- Bare Act - Foreign Contribution (Regulation) Act, 2010 and rules made thereunder.
- Foreign Contribution Regulation Law Manual – Taxmann Publications Private Limited

**OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)**

- <https://www.mha.gov.in/en/divisionofmha/foreigners-division/foreign-contribution-regulation-act-fcra>
- <https://fcraonline.nic.in/home/index.aspx>



### KEY CONCEPTS

- Placement ■ Layering ■ Integration ■ Money Laundering ■ Reporting Entity

### Learning Objectives

#### To understand:

- Problem and Adverse Effect of Money Laundering
- Methods of Money Laundering
- Offence of Money Laundering
- Attachment, Adjudication and Confiscation
- General Assembly of the United Nations to Prevent Money Laundering

### Lesson Outline

- Concept of Money Laundering
- Money Laundering Process
- Impact of Money Laundering on Economic Development
- Global initiatives for prevention of Money Laundering
- FATF Recommendation
- Overview of Prevention of Money Laundering Act, 2002
- Adjudication and Adjudicating Authority
- Obligation of Banking Companies, Financial Institutions and Intermediaries
- Summon, Searches, Seizures
- Retention of Property
- Retention of Record
- Appellate Tribunal
- Special Court
- KYC Guidelines
- KYC Policy
- Power of Central Government
- Agreement with Foreign Countries
- Attachment of Property
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- The Prevention of Money- laundering Act, 2002

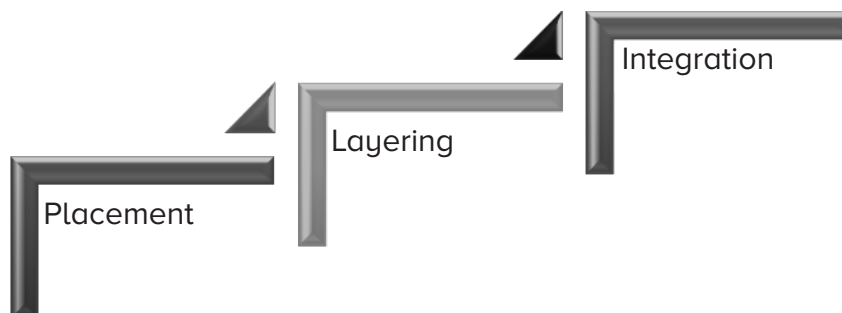
## INTRODUCTION

Money laundering is the processing of criminal proceeds to disguise its illegal origin. Terrorism, illegal arms sales, financial crimes, smuggling, and the activities of organised crime, including drug trafficking and prostitution rings etc., generate huge sums. Embezzlement, insider trading, bribery and computer fraud also produce large profits and create an incentive to legitimise the ill-gotten gains through money laundering. When a criminal activity generates substantial profits, the individual or group involved in such activities route the funds to safe heavens by disguising the sources, changing the form, or moving the funds to a place where they are less likely to attract attention.

*Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generates it. In essence, the laundering enables criminal activity to continue.*

## Process of Money Laundering

The process of money laundering can be classified into three stages, namely, placement, layering and integration.



In the initial or placement stage of money laundering, the launderer introduces his illegal profits into the financial system, by breaking up large amounts of cash into less conspicuous smaller sums that are then deposited directly into a bank account, or by purchasing a series of monetary instruments that are later collected and deposited into accounts at another location.

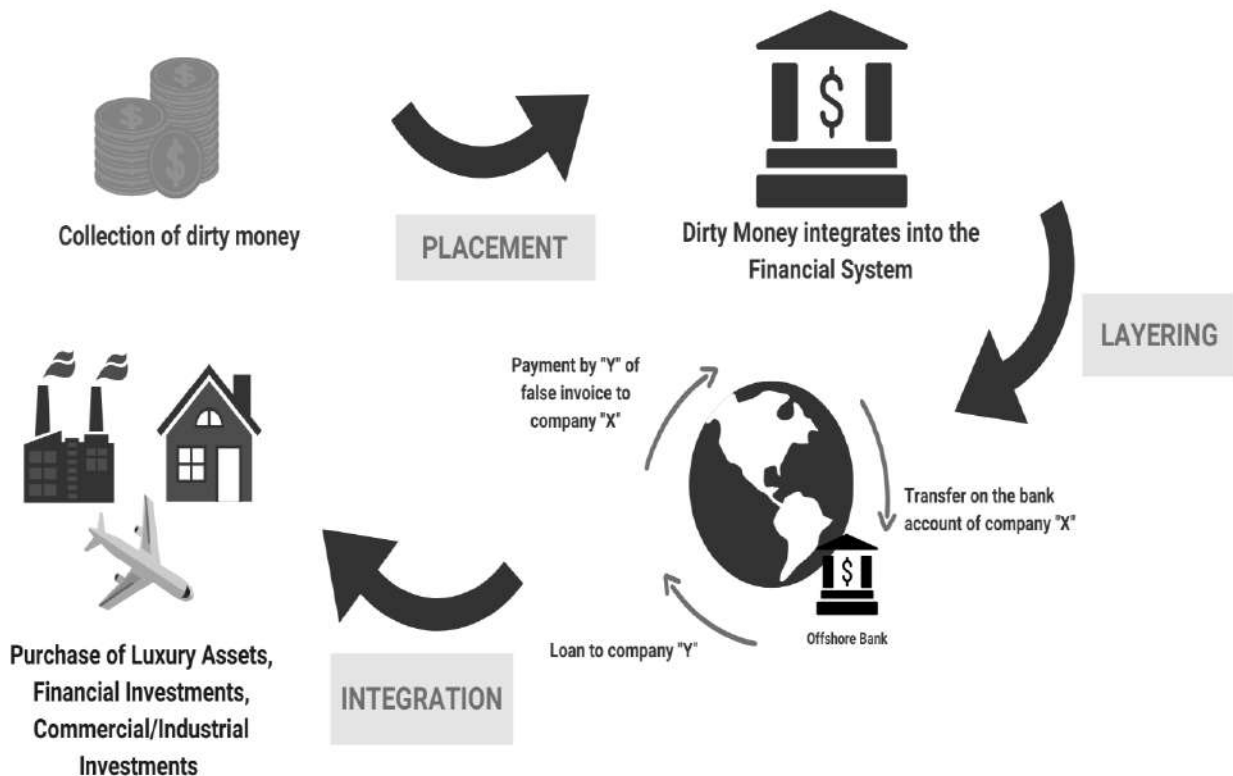
After the funds enter into the financial system, the layering takes place. In this stage, the launderer engages in a series of conversions or movements of the funds to distance them from their source. The funds might be channeled through the purchase and sale of investment instruments, or the launderer might simply wire the funds through a series of accounts at various banks across the globe.

After successful processing of criminal profits through the first two phases of the money laundering process, the launderer moves them to integration. In this stage the funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures.

Money laundering is a process which typically follows three stages to finally release laundered funds into the legal financial system. Three Stages of Money Laundering are:

- Placement (i.e. moving the funds from direct association with the crime)
- Layering (i.e. disguising the trail to foil pursuit)
- Integration (i.e. making the money available to the criminal from what seem to be legitimate sources)

# Money Laundering Cycle



Source: <https://www.unodc.org/unodc/en/money-laundering/overview.html>

## Impact of Money Laundering on Development

Economies with growing or developing financial centers, but inadequate controls are particularly vulnerable to money laundering, as against the established financial center countries, which implement comprehensive anti-money laundering regimes. The gaps in a national anti-money laundering protecting system are exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective counter measures. As with the damaged integrity of an individual financial institution, there is a damping effect on foreign direct investment when a country's commercial and financial sectors are perceived to be subject to the control and influence of organised crime.

In times of decelerating growth, an infusion of hard currency can bolster a country's foreign reserves; ease the hardship associated with budget tightening policies and moderate foreign indebtedness. While these are short-term benefits associated with an inflow of criminal monies, the long-term effects are mostly negative. One difference between official borrowing and laundered funds is that the former can be controlled by Government, whereas the funds owned by criminals escape the government's ability to control and regulate the economy.

The possible social, economic and political effects of money laundering, if left unchecked or dealt with ineffectively, are serious. Through the process of money laundering, organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments. Thus, the economic and political influence of criminal organisations can weaken the social fabric, ethical standards and ultimately the democratic institutions of society.

***What is the connection of money laundering with society at large?***

***The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. Organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments.***

***The economic and political influence of criminal organisations can weaken the social fabric, collective ethical standards, and ultimately the democratic institutions of society.***

***In countries transitioning to democratic systems, this criminal influence can undermine the transition. Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generated it. Laundering enables criminal activity to continue.***

***In the case of Vijay Madanlal Choudhary vs. Union of India, Special Leave Petition (Criminal) No. 4634 of 2014 judgement dated 27 July, 2022, Supreme Court of India inter alia observed that the rudimentary understanding of ‘money-laundering’ is that there are three generally accepted stages to money-laundering, they are:***

- (a) Placement: which is to move the funds from direct association of the crime.***
- (b) Layering: which is disguising the trail to foil pursuit.***
- (c) Integration: which is making the money available to the criminal from what seem to be legitimate sources.***

***It is common experience world over that money-laundering can be a threat to the good functioning of a financial system. However, it is also the most suitable mode for the criminals to deal in such money. It is the means of livelihood of drug dealers, terrorist, white collar criminals and so on. Tainted money breeds discontent in any society and in turn leads to more crime and civil unrest. Thus, the onus on the Government and the people to identify and seize such money is heavy. If there are any proactive steps towards such a cause, we cannot but facilitate the good steps. However, passions aside we must first balance the law to be able to save the basic tenets of the fundamental rights and laws of this country. After all, condemning an innocent man is a bigger misfortune than letting a criminal go.***

## **PREVENTION OF MONEY LAUNDERING – GLOBAL INITIATIVES**

The process of money laundering involves cleansing of money earned through illegal activities like extortion, drug trafficking and gun running etc. The tainted money is projected as clean money through intricate processes of placement, layering and laundering. The serious threat posed by money laundering to the financial systems and sovereignty was being progressively realized by various countries of the world. As a consequence of this realization, the international community took the following initiatives to curb the menace of money laundering: -

- (i)** The 1998 United Nations Convention against illicit traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention of 1998), provided a comprehensive legal definition of money laundering. This definition has formed the basis of subsequent legislations on Money Laundering Laws of various countries;
- (ii)** The Basle statement of principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money laundering; and

- (iii) The Financial Action Task Force on money laundering (FATF), 1989 made 40 recommendations, which provide the foundation for comprehensive legislation to combat the problem of money laundering. The recommendations were classified under various heads. Some of the important heads are:-
- (a) Declaration of laundering of moneys earned through serious crimes should be treated a criminal offence;
  - (b) to work out modalities of disclosure by financial institutions regarding suspicious transactions;
  - (c) Confiscation of the proceeds of crime;
  - (d) declaring money laundering to be an extraditable offence; and
  - (e) promoting international cooperation in investigation of money laundering.

### The Vienna Convention

The first major initiative in the prevention of money laundering was the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in December 1988 (popularly known as Vienna Convention). This convention laid the groundwork for efforts to combat money laundering by obliging the member states to criminalize the laundering of money from drug trafficking and confiscation of proceeds derived from such offence. It promotes international cooperation in investigations and makes extradition between member states applicable to money laundering. The convention also establishes the principle that domestic bank secrecy provisions should not interfere with international criminal investigations. UN Vienna 1988 Convention Article 3.1 describing Money Laundering as: ***“the conversion or transfer of property, knowing that such property is derived from any offense(s), for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such offense(s) to evade the legal consequences of his actions”.***

### Council of Europe Convention

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime, 1990 establishes a common policy on money laundering. It sets out a common definition of money laundering and common measures for dealing with it. The Convention lays down the principles for international cooperation among the member states, which may also include states outside the Council of Europe. This convention came into force in September 1993. One of the purposes of the convention is to facilitate international cooperation as regards investigative assistance, search, seizure and confiscation of the proceeds of all types of criminality, particularly serious crimes, such as, drug offences, arms dealing, terrorist offences etc. and other offences which generate large profits.

### European Union Money Laundering Directive

In response to the new opportunities for money laundering opened up by the liberalization of capital movements and cross-border financial services in the European Union, the Council of the European Communities in June, 1991 issued a directive on the Prevention of Use of the Financial System for the Purpose of Money Laundering. The directive requires member states to outlaw money laundering. The member states have been put under obligation to require financial institutions to establish and maintain internal systems to prevent laundering, to obtain the identification of customers with whom they enter into transaction of more than a particular amount and to keep proper records for at least five years. The financial institutions are also required to report suspicious transactions and ensure that such reporting does not result in liability for the institution or its employees.

### Basle Committee's Statement of Principles

In December 1988 the Basle Committee on Banking Regulation Supervisory Practices issued a statement of principles to be complied by the international banks of member states. These principles include identifying customers, avoiding suspicious transactions, and cooperating with law enforcement agencies. The statement aims at encouraging the banking sector to adopt common position in order to ensure that banks are not used to hide or launder funds acquired through criminal activities.

The International Organization of Securities Commissions (IOSCO) adopted, in October 1992, a resolution encouraging its members to take necessary steps to combat money laundering in securities and futures markets.

### Global Programme against Money Laundering (GPML)

The Global Programme against Money Laundering (GPML) was established in 1997 in response to the mandate given by the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The broad objective of GPML, as a unit within the United Nations Office on Drugs and Crime (UNODC), is to strengthen the ability of UN Member States to implement measures in anti-money laundering and countering the financing of terrorism (AML/CFT) and to assist them in detecting, seizing and confiscating illicit proceeds.

GPML fulfils its mandate principally through technical cooperation and assistance. It commits itself to providing a repository of best practices and information on AML/CFT and to promoting dissemination through its various initiatives. It focuses on assisting legal, financial, law enforcement and judicial authorities, as well as the private sector, to develop the necessary AML/CFT infrastructure. Over the years, GPML has developed and maintained strategic relationships and conducted many joint activities with partner international organizations working in this field.

In response to countries or group of countries requesting more specialized and in –depth assistance, GPML continues to deploy professional expertise in the form of mentors in the field to train people and build institutions, delivering direct technical assistance in states and regions to improve AML/CFT capacity. The reaction to mentoring, from assisted states and donors alike, has been extremely positive. Mentors don't directly exercise sovereign national powers but they can advise, pass on the know-how and train those officials who are empowered to do so.

GPML has specifically been tasked by the United Nations General Assembly, most recently in resolutions 74/177 (2019), 73/186 (2018), 72/196 (2017), and 71/209 (2016) to:

*"...continue providing technical assistance to Member States to combat money laundering and the financing of terrorism in accordance with United Nations related instruments and internationally accepted standards, including, where applicable, recommendations of relevant intergovernmental bodies, inter alia, the Financial Action Task Force on Money Laundering, and relevant initiatives of regional, interregional and multilateral organizations against money laundering."*

### The Financial Action Task Force (FATF)

The Financial Action Task Force (FATF) was established in July 1989 by a Group of Seven (G-7) Summit in Paris, initially to examine and develop measures to combat money laundering.

The Financial Action Task Force (FATF) is the global money laundering and terrorist financing watchdog. The inter-governmental body sets international standards that aim to prevent these illegal activities and the harm they cause to society. As a policy-making body, the FATF works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

In October 2001, the FATF expanded its mandate to incorporate efforts to combat terrorist financing, in addition to money laundering. In April 2012, it added efforts to counter the financing of proliferation of weapons of mass

destruction. Since its inception, the FATF has operated under a fixed life-span, requiring a specific decision by its Ministers to continue. Three decades after its creation, in April 2019, FATF Ministers adopted a new, open-ended mandate for the FATF.

The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. Starting with its own members, the FATF monitors countries' progress in implementing the FATF Recommendations; reviews money laundering and terrorist financing techniques and counter-measures; and, promotes the adoption and implementation of the FATF Recommendations globally.

The FATF's decision making body, the FATF Plenary, meets three times per year. With more than 200 countries and jurisdictions committed to implementing them, the FATF has developed the FATF Recommendations, or FATF Standards, which ensure a co-ordinated global response to prevent organised crime, corruption and terrorism. They help authorities go after the money of criminals dealing in illegal drugs, human trafficking and other crimes. The FATF also works to stop funding for weapons of mass destruction.

The FATF reviews money laundering and terrorist financing techniques and continuously strengthens its standards to address new risks, such as the regulation of virtual assets, which have spread as cryptocurrencies gain popularity. The FATF monitors countries to ensure they implement the FATF Standards fully and effectively, and holds countries to account that do not comply.

### **Egmont Group**

The Egmont Group serves as an international network fostering improved communication and interaction among Financial Intelligence Units (FIUs). Egmont Group is named after the venue in Brussels where the first such meeting of FIUs was held in June of 1995. The goal of the Egmont Group is to provide a forum for FIUs around the world to improve support to their respective governments in the fight against money laundering, terrorist financing and other financial crimes. This support includes:

- expanding and systematizing international cooperation in the reciprocal exchange of financial intelligence information;
- increasing the effectiveness of FIUs by offering training and personnel exchanges to improve the expertise and capabilities of personnel employed by FIUs;
- fostering better and secure communication among FIUs through the application of technology, presently via the Egmont Secure Web (ESW); and
- promoting the establishment of FIUs in those jurisdictions without a national anti-money laundering/terrorist financing program in place, or in areas with a program in the beginning stages of development.

### **The Asia/Pacific Group on Money Laundering (APG)**

The Asia/Pacific Group on Money Laundering (APG) was officially established as an autonomous regional anti-money laundering body in February 1997 at the Fourth (and last) Asia/Pacific Money Laundering Symposium in Bangkok, Thailand. The purpose of the APG is to facilitate the adoption, implementation and enforcement of internationally accepted anti-money laundering and anti-terrorist financing standards set out in the recommendations of the Financial Action Task Force (FATF).

The APG's role includes assisting jurisdictions in the region to enact laws dealing with the proceeds of crime, mutual legal assistance, confiscation, forfeiture and extradition. It also includes the provision of guidance in setting up systems for reporting and investigating suspicious transactions and helping in the establishment of financial intelligence units. The APG undertakes studies of methods and trends of money laundering and the financing of terrorism in the Asia/Pacific region. The APG allows for regional factors to be taken into account



in the implementation of anti-money laundering and anti-terrorist financing measures and provides for peer review by means of a mutual evaluation process.

The APG is a voluntary and co-operative international body established by agreement among its members and is autonomous. It does not derive from an international treaty nor is it part of any international organisation. However, it keeps itself informed of action taken or formal agreements made by relevant international and regional organisations or bodies in order to promote a consistent global response to money laundering and terrorist financing. The work to be done by the APG and its procedures is decided by consensus agreement among its members.

### **Eurasian Group on Combating Money Laundering and Financing of Terrorism (EAG)**

The Eurasian Group on Combating Money Laundering and financing of terrorism is an FATF-style regional body. The EAG was established in 2004 and is currently an associate member of the FATF.

The EAG was created for the countries of the Eurasian region not included in the existing FATF-style regional groups and is intended to play an important role in reducing the threat of international terrorism and ensure the transparency, reliability and security of the financial systems of states and their further integration into the international infrastructure for combating money laundering and terrorism financing (AML/CFT).

The primary goal of the EAG is to ensure effective interaction and cooperation at the regional level and integration of EAG member-states into the international system of anti-money laundering and combating financing of terrorism in accordance with the Recommendations of the FATF and the anti-money laundering and combating financing of terrorism standards of other international organizations, to which EAG member-states are party.

#### ***What influence does money laundering have on economic development?***

***Launderers are continuously looking for new routes for laundering their funds. Economies with growing or developing financial centres, but inadequate controls are particularly vulnerable as established financial centre countries implement comprehensive anti-money laundering regimes.***

***Differences between national anti-money laundering systems will be exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective countermeasures.***

***Some might argue that developing economies cannot afford to be too selective about the sources of capital they attract. But postponing action is dangerous. The more it is deferred, the more entrenched organised crime can become.***

***As with the damaged integrity of an individual financial institution, there is a damping effect on foreign direct investment when a country's commercial and financial sectors are perceived to be subject to the control and influence of organised crime. Fighting money laundering and terrorist financing is therefore a part of creating a business friendly environment which is a precondition for lasting economic development.***

### **PREVENTION OF MONEY LAUNDERING – INDIAN INITIATIVES**

Money laundering is posing threat to the financial systems and social order and integrity of the country and the same needs to be tackled by way of a separate legislation in view of the very fact that no comprehensive legislation is in force at present which can effectively deal with the problem. There is an urgent need for the enactment of a comprehensive legislation providing, inter alia, for preventing and punishing offences relating to money-laundering and connected activities, confiscation of proceeds of crime, disclosure of such transactions by financial institutions, setting up of agencies and mechanisms for co-ordinating measures necessary for combating money laundering, etc.



In view of an urgent need for the enactment of a comprehensive legislation for preventing money-laundering and connected activities, confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money laundering etc., the Prevention of Money Laundering Bill, 1998 was introduced in the Parliament on the 4th August, 1998. The Bill was referred to the Standing Committee on Finance, which presented its report on the 4th March, 1999 to Lok Sabha. After incorporating the recommendations of the Standing Committee, the Government introduced the Prevention of Money Laundering Bill 1999 in the Parliament on October 29, 1999. The Bill received the assent of the President and became Prevention of Money Laundering Act, 2002 on 17th January 2003. The Act has come in force with effect from July 1, 2005.

## PREVENTION OF MONEY LAUNDERING ACT, 2002

### Regulatory Framework

<b>Chapter I</b>	<b>Preliminary</b>
<b>Chapter II</b>	<b>Offence of Money Laundering</b>
<b>Chapter III</b>	<b>Attachment, Adjudication and Confiscation</b>
<b>Chapter IV</b>	<b>Obligations of Banking Companies, Financial Institutions and Intermediaries</b>
<b>Chapter V</b>	<b>Appellate Tribunal</b>
<b>Chapter VII</b>	<b>Special Courts</b>
<b>Chapter VIII</b>	<b>Authorities</b>
<b>Chapter IX</b>	<b>Attachment and Confiscation of Property in Contracting State</b>
<b>Chapter X</b>	<b>Miscellaneous</b>

The Prevention of Money Laundering Act, 2002 consists of ten chapters containing 75 sections and one Schedule. Chapter I containing section 1 and 2 deals with short title, extent and commencement and definitions. Chapter II containing sections 3 and 4 provides for offences and punishment for money laundering. Chapter III (Section 5-11) provides for attachment, adjudication and confiscation and Chapter IV (Sections 12-15) deals with obligations of banking companies, financial institutions and intermediaries. Chapter V (Sections 16-24) relates to Summons, Searches and Seizures etc.

The Act provides for establishment of Appellate Tribunal and thus sections 25-42 under Chapter VI provides for composition, procedure, power, jurisdiction etc. of the Appellate Tribunal. Chapter VII (Sections 43-47) deals with Special Courts, and Chapter VIII (Sections 48-54) provides for establishment of various authorities under the Act, their appointment, powers, jurisdiction etc. Chapter IX (Sections 55-61) deals with reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property. Chapter X containing Sections 62-75 deals with miscellaneous provisions including punishment for, vexatious search, false information etc., cognizance of offences, and offences by companies, among others.

In the case of *Nikesh Tarachand Shah (Petitioner) vs. Union of India & Anr (Respondents)*, Writ Petition (Criminal) No. 67 of 2017, Judgement dated November 23, 2017, Supreme Court of India observed that the Prevention of Money Laundering Act, 2002 was introduced, as its Statement of Objects and Reasons mentions, to make money laundering an offence, and to attach property involved in money laundering, so that this serious threat to the financial system of India is adequately dealt with. It is worth setting out the Statement of Objects and Reasons of the Act in full.

“STATEMENT OF OBJECTS AND REASONS

*It is being realised, world over, that money laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty. Some of the initiatives taken by the international community to obviate such threats are outlined below:—*

- (a) *the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party, calls for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence.*
- (b) *the Basle Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money-laundering.*
- (c) *the Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from 14th to 16th July, 1989, to examine the problem of money-laundering has made forty recommendations, which provide the foundation material for comprehensive legislation to combat the problem of money-laundering. The recommendations were classified under various heads. Some of the important heads are—*
  - (i) declaration of laundering of monies carried through serious crimes a criminal offence;
  - (ii) to work out modalities of disclosure by financial institutions regarding reportable transactions;
  - (iii) confiscation of the proceeds of crime;
  - (iv) declaring money-laundering to be an extraditable offence; and
  - (v) promoting international co-operation in investigation of money-laundering.
- (d) *the Political Declaration and Global Programme of Action adopted by United Nations General Assembly by its Resolution No. S-17/2 of 23<sup>rd</sup> February, 1990, inter alia, calls upon the member States to develop mechanism to prevent financial institutions from being used for laundering of drug related money and enactment of legislation to prevent such laundering.*
- (e) *the United Nations in the Special Session on Countering World Drug Problem Together concluded on the 8th to the 10th June, 1998 has made another declaration regarding the need to combat money-laundering. India is a signatory to this declaration.*

2. In view of an urgent need for the enactment of a comprehensive legislation inter alia for preventing money-laundering and connected activities confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money-laundering, etc., the Prevention of Money-Laundering Bill, 1998 was introduced in the Lok Sabha on the 4th August, 1998. The Bill was referred to the Standing Committee on Finance, which presented its report on the 4th March, 1999 to the Lok Sabha. The recommendations of the Standing Committee accepted by the Central Government are that

- (a) the expressions “banking company” and “person” may be defined;
- (b) in Part I of the Schedule under Indian Penal Code the word offence under section 477A relating to falsification of accounts should be omitted;
- (c) ‘knowingly’ be inserted in clause 3(b) relating to the definition of money-laundering;
- (d) the banking companies, financial institutions and intermediaries should be required to furnish information of transactions to the Director instead of Commissioner of Income-tax (e) the banking companies should also be brought within the ambit of clause II relating to obligations of financial institutions and intermediaries;

- (f) a definite timelimit of 24 hours should be provided for producing a person about to be searched or arrested person before the Gazetted Officer or Magistrate;
- (g) the words “unless otherwise proved to the satisfaction of the authority concerned” may be inserted in clause 22 relating to presumption on interconnected transactions;
- (h) vacancy in the office of the Chairperson of an Appellate Tribunal, by reason of his death, resignation or otherwise, the seniormost member shall act as the Chairperson till the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill the vacancy, enters upon his office;
- (i) the appellant before the Appellate Tribunal may be authorised to engage any authorised representative as defined under section 288 of the Income-tax Act, 1961,
- (j) the punishment for vexatious search and for false information may be enhanced from three months imprisonment to two years imprisonment, or fine of rupees ten thousand to fine of rupees fifty thousand or both;
- (k) the word ‘good faith’ may be incorporated in the clause relating to Bar of legal proceedings. The Central Government have broadly accepted the above recommendations and made provisions of the said recommendations in the Bill.

3. In addition to above recommendations of the standing committee the Central Government proposes to

- (a) relax the conditions prescribed for grant of bail so that the Court may grant bail to a person who is below sixteen years of age, or woman, or sick or infirm,
- (b) levy of fine for default of non-compliance of the issue of summons, etc.
- (c) make provisions for having reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property so as to facilitate the transfer of funds involved in money laundering kept outside the country and extradition of the accused persons from abroad.

4. The Bill seeks to achieve the above objects.”

***In the case of Vijay Madanlal Choudhary vs. Union of India, Special Leave Petition (Criminal) No. 4634 of 2014 judgement dated 27 July, 2022, Supreme Court of India inter alia observed that:***

***The Preamble of the 2002 Act reads thus:***

***“An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.***

***WHEREAS the Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its seventeenth special session on the twenty-third day of February, 1990;***

***AND WHEREAS the Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 calls upon the Member States to adopt national money-laundering legislation and programme;***

***AND WHEREAS it is considered necessary to implement the aforesaid resolution and the Declaration.”***

***Even the Preamble of the Act reinforces the background in which the Act has been enacted by the Parliament being commitment of the country to the international community. It is crystal clear from the Preamble that the Act has been enacted to prevent money-laundering and to provide for confiscation of property derived from or involved in money-laundering and for matters connected therewith or incidental thereto. It is neither a pure regulatory legislation nor a pure penal legislation. It is amalgam***

*of several facets essential to address the scourge of money-laundering as such. In one sense, it is a sui generis legislation.*

*As aforesaid, it is a comprehensive legislation dealing with all the related issues concerning prevention of money-laundering, attachment of proceeds of crime, adjudication and confiscation thereof including vesting of it in the Central Government, setting up of agencies and mechanisms for coordinating measures for combating money-laundering and also to prosecute the persons indulging in the process or activity connected with the proceeds of crime. While considering the challenge to the relevant provision(s) of the 2002 Act, we cannot be oblivious to the objects and reasons for enacting such a special legislation and the seriousness of the issues to be dealt with thereunder including having transnational implications. Every provision in the 2002 Act will have to be given its due significance while keeping in mind the legislative intent for providing a special mechanism to deal with the scourge of money-laundering recognised world over and with the need to deal with it sternly.*

## MAJOR PROVISIONS OF THE ACT

### Important Definitions

Section 2 of the Act defines various terms used in the Act. Some of the important definitions are given below:

#### Attachment

Sub-section 1(d) defines attachment as to mean prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III.

#### Proceeds of Crime

Section 2(1)(u) defines the term 'proceeds of crime' as to mean any property derived or obtained, directly or indirectly by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

#### Property

The term 'property used in sub-section 1(v) of Section 2 means any property or assets of every description, whether, corporeal or incorporeal, movable or immovable, tangible or intangible and includes, deeds and instruments evidencing title to, or interest in such property or assets wherever located.

#### Beneficial Owner

The term Beneficial Owner under Section 2 (1) (fa) means an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person.

#### Intermediary

The term intermediary under sub-section 1(n) of Section 2 has been defined as to mean a stock broker, sub-broker, share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment advisor, and any other intermediary associated with securities market and registered under Section 12 of the SEBI Act, 1992 or an association recognised or registered under the Forward Contracts (Regulation) Act, 1952 or any member of such association; intermediary registered by the

Pension Fund Regulatory and Development Authority; a recognised stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956.

### Investigation

Sub-section 2(1)(na) defines investigation to include all the proceedings under the Act conducted by the Director or by an authority authorized by the Central Government under this Act for the collection of evidence.

### “Reporting entity”

As per Section 2(1)(wa) “Reporting entity” means a banking company, financial institution, intermediary or a person carrying on a designated business or profession.

### Scheduled offence

Section 2(1) (y) defines Scheduled Offence to include the offences specified under Part A of the Schedule, the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; the offences specified under Part C of the Schedule.

### Special Court

Section 2(1) (z) defines Special Court to mean a Court of Session designated as Special Court under sub-section (1) of section 43.

### Transfer

Section 2(1) (za) defines transfer to includes sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

### Value

Section 2(1) (zb) defines value to mean the fair market value of any property on the date of its acquisition by any person, or if such date cannot be determined, the date on which such property is possessed by such person.

#### ***What are Proceeds of Crime?***

***Proceeds of crime means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.***

***Proceeds of crime include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relating to the scheduled offence.***

### Money Laundering

Section 3 of the Act states that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it is an untainted property shall be guilty of offence of money laundering.

Section 4 provides that any person who commits the offence of money laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years

and also liable to fine. However, where the proceeds of crime involved in money laundering relates to any offence specified under the Narcotic Drugs and Psychotropic Substances Act, the punishment may extend to rigorous imprisonment for ten years.

#### ***What is a Money Laundering Offence?***

***A person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:— (a) concealment; or (b) possession; or (c) acquisition; or (d) use; or (e) projecting as untainted property; or (f) claiming as untainted property, in any manner whatsoever.***

***The process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.***

***In the case of Vijay Madanlal Choudhary vs. Union of India( Special Leave Petition (Criminal) No. 4634 of 2014 judgement dated 27 July, 2022) Supreme Court of India inter alia observed that tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression “derived or obtained” is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause “proceeds of crime”, as it obtains as of now.***

***Directorate of Enforcement {Appellant(s)} vs. Padmanabhan Kishore {Respondent(s)} (Arising out of SLP (Crl.) No. 2668 of 2022) Judgement dated October 31, 2022, Supreme Court of India inter-alia observed that the definition of “proceeds of crime” in PML Act, inter alia, means any property derived or obtained by any person as a result of criminal activity relating to a scheduled offence. The offences punishable under Sections 7, 12 and 13 are scheduled offences, as is evident from paragraph 8 of Part-A of the Schedule to the PML Act. Any property thus derived as a result of criminal activity relating to offence mentioned in said paragraph 8 of Part-A of the Schedule would certainly be “proceeds of crime”. Section 3 states, inter alia, that whoever knowingly assists or knowingly is a party or is actually involved in any process or activity connected with proceeds of crime including its concealment, possession, acquisition or use shall be guilty of offence of money-laundering.***

***It is true that so long as the amount is in the hands of a bribe giver, and till it does not get impressed with the requisite intent and is actually handed over as a bribe, it would definitely be untainted money. If the money is handed over without such intent, it would be a mere entrustment. If it is thereafter appropriated by the public servant, the offence would be of misappropriation or species thereof but certainly not of bribe. The crucial part therefore is the requisite intent to hand over the amount as bribe and normally such intent must necessarily be antecedent or prior to the moment the amount is handed over. Thus, the requisite intent would always be at the core before the amount is handed over. Such***

*intent having been entertained well before the amount is actually handed over, the person concerned would certainly be involved in the process or activity connected with “proceeds of crime” including inter alia, the aspects of possession or acquisition thereof. By handing over money with the intent of giving bribe, such person will be assisting or will knowingly be a party to an activity connected with the proceeds of crime. Without such active participation on part of the person concerned, the money would not assume the character of being proceeds of crime. The relevant expressions from Section 3 of the PML Act are thus wide enough to cover the role played by such person.*

*Further, Supreme Court of India held that on a bare perusal of the complaint made by the Enforcement Directorate, it is quite clear that the respondent was prima facie involved in the activity connected with the proceeds of crime.*

### Attachment of property involved in money laundering

Section 5 of the Act authorises the Director or any officer not below the rank of Deputy Director authorised by him and who has reason to believe on the basis of material in his possession that any person is in possession of any proceeds of money laundering; such person has been charged of having committed a scheduled offence and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime to, provisionally attach by order in writing such property for a period not exceeding 180 days from the date of the order.

The said provisional attachment does not debar the person who has the possession of the property from enjoying the same but the said person is prohibited from creating any third party interest in the said property.

The Director or any other officer who provisionally attaches any property is required to forward a copy of the order along with material in his possession to the Adjudicating Authority immediately and thereafter required to file, within a period of thirty days from such attachment file a complaint, stating the facts of such attachment before the Adjudicating Authority.

### Adjudicating Authority

Section 6 empowers the Central Government to appoint, by notification, one or more persons not below the prescribed rank or designation or having prescribed experience, as the Adjudicating Authority to exercise the jurisdiction, powers and authority conferred on or under the Act.

### Adjudication

Section 8 dealing with the adjudication. Section 8(1) states that on receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, it may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized or frozen under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government.

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person.

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.



According to Section 8(2) the Adjudicating Authority shall, after— (a) considering the reply, if any, to the notice issued under sub-section (1); (b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and (c) taking into account all relevant materials placed on record before him, by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering: Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

Section 8(3) provides that where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall –

- (a) continue during investigation for a period not exceeding three hundred and sixty-five days or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and
- (b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Special Court.

*Explanation.*—For the purposes of computing the period of three hundred and sixty-five days under clause (a), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.

Section 8(4) states that where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed.

Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.

As per Section 8(5) where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

Section 8(6) states that where on conclusion of a trial under this Act, the Special Court finds that the offence of money laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.

According to Section 8(7) where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it.

Section 8(8) provides that where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be prescribed, may also direct the Central



Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering: Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering. Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.

### **Vesting of Property in Central Government**

Section 9 provides that Where an order of confiscation has been made under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 in respect of any property of a person, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances: Where the Special Court or the Adjudicating Authority, as the case may be, after giving an opportunity of being heard to any other person interested in the property attached under this Chapter, or seized or frozen under Chapter V, is of the opinion that any encumbrance on the property or lease-hold interest has been created with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or lease-hold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrances or lease-hold interest.

It may be noted that nothing in this section shall operate to discharge any person from any liability in respect of such encumbrances which may be enforced against such person by a suit for damages.

### **Obligation of Banking Companies, Financial Institutions and Intermediaries**

Chapter IV of the Act deals with obligations of Banking companies, financial institutions and intermediaries. According to Section 12(1) requires every reporting entity shall—

- (a) maintain a record of all transactions, including information relating to transactions covered under clause (b), in such manner as to enable it to reconstruct individual transactions;
- (b) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;
- (c) maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

Section 12(2) provides that every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force, shall be kept confidential.

Section 12(3) states that the records referred to in clause (a) of sub-section (1) shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

The records referred to in clause (e) of sub-section (1) shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this Chapter.

Section 13 states that the Director may, either on his own motion, or on an application made by any authority, officer, or person, call for records of all transactions and make such inquiry or cause such inquiry to be made, as he thinks fit. In the course of any inquiry, if the Director finds that a banking company, financial institution or

an intermediary or any of its officers has failed to maintain or retain records in accordance with the provisions of the Act, he may, by an order, levy a fine on such banking company, financial institution or intermediary.

Section 15 empowers the Central Government to prescribe, in consultation with the Reserve Bank of India, the procedure and the manner of maintaining and furnishing information for the purpose of implementation of the provisions of the Act.

### **Summon, Searches and Seizures, etc.**

Section 16 empowers an authority to enter, on having reason to believe that an offence under Section 3 has been committed, any place within the limits of the area assigned to him or in respect of which he is authorised. Section 16(3) requires such authority to place marks of identification on the records inspected by him and make or cause to be made extracts or copies therefrom, make an inventory of any property checked or verified by him and record the statement of any person present in the place which may be useful for, or relevant to, any proceedings under the Act. Section 17 empowers authority to search and seizure.

Section 18 of the Act deals with search of persons and provides that if an authority authorised in this behalf by the Central Government by general or special order has reason to believe that any person has secreted about his person or in anything under his possession, ownership or control any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, he may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act.

### **Power to Arrest**

Section 19(1) of the Act states that if the Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession, reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

The Director, Deputy Director, Assistant Director or any other officer shall, immediately after arrest of such person under sub-section (1), forward a copy of the order along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such order and material for such period, as may be prescribed.

Every person arrested under sub-section (1) shall, within twenty-four hours, be taken to a Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction: Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the 2 [Special Court or] Magistrate's Court.

In the case of *Pankaj Bansal v. Union of India & Ors. Criminal Appeal Nos. 3053-3054 of 2023* [Special Leave Petition (Crl.) Nos. 9275-76 of 2023] judgement dated 03.10.2023, Hon'ble Supreme Court of India noted that the language of Section 19 of the Act of 2002 puts it beyond doubt that the authorized officer has to record in writing the reasons for forming the belief that the person proposed to be arrested is guilty of an offence punishable under the Act of 2002. Section 19(2) requires the authorized officer to forward a copy of the arrest order along with the material in his possession, referred to in Section 19(1), to the Adjudicating Authority in a sealed envelope. Though it is not necessary for the arrested person to be supplied with all the material that is forwarded to the Adjudicating Authority under Section 19(2), he/she has a constitutional and statutory right to be 'informed' of the grounds of arrest, which are compulsorily recorded in writing by the authorized officer in keeping with the mandate of Section 19(1) of the Act of 2002. As already noted hereinbefore, It seems that the mode of informing this to the persons arrested is left to the option of the ED's authorized officers in different parts of the country, i.e., to either furnish such grounds of arrest in writing or to allow such grounds to be read by the arrested person or be read over and explained to such person.

Further the Apex Court noted that the grounds of arrest recorded by the authorized officer, in terms of Section 19(1) of the Act of 2002, would be personal to the person who is arrested and there should, ordinarily, be no risk of sensitive material being divulged therefrom, compromising the sanctity and integrity of the investigation. In the event any such sensitive material finds mention in such grounds of arrest recorded by the authorized officer, it would always be open to him to redact such sensitive portions in the document and furnish the edited copy of the grounds of arrest to the arrested person, so as to safeguard the sanctity of the investigation.

On the above analysis, to give true meaning and purpose to the constitutional and the statutory mandate of Section 19(1) of the Act of 2002 of informing the arrested person of the grounds of arrest, Supreme Court of India hold that it would be necessary, henceforth, that a copy of such written grounds of arrest is furnished to the arrested person as a matter of course and without exception. The decisions of the *Delhi High Court in Moin Akhtar Qureshi (supra)* and the *Bombay High Court in Chhagan Chandrakant Bhujbal (supra)*, which hold to the contrary, do not lay down the correct law. In the case on hand, the admitted position is that the ED's Investigating Officer merely read out or permitted reading of the grounds of arrest of the appellants and left it at that, which is also disputed by the appellants. As this form of communication is not found to be adequate to fulfil compliance with the mandate of Article 22(1) of the Constitution and Section 19(1) of the Act of 2002, we have no hesitation in holding that their arrest was not in keeping with the provisions of Section 19(1) of the Act of 2002. Further, as already noted supra, the clandestine conduct of the ED in proceeding against the appellants, by recording the second ECIR immediately after they secured interim protection in relation to the first ECIR does not commend acceptance as it reeks of arbitrary exercise of power. In effect, the arrest of the appellants and, in consequence, their remand to the custody of the ED and, thereafter, to judicial custody, cannot be sustained.

### Retention of Property

Section 20 of the Act deals with retention of property.

1. Where any property has been seized under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the officer authorised by the Director in this behalf has, on the basis of material in his possession, reason to believe (the reason for such belief to be recorded by him in writing) that such property is required to be retained for the purposes of adjudication under section 8, such property may, if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such property was seized or frozen, as the case may be.
2. The officer authorised by the Director shall, immediately after he has passed an order for retention or continuation of freezing of the property for purposes of adjudication under section 8, forward a copy of the order along with the material in his possession, referred to in sub-section (1), to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.
3. On the expiry of the period specified in sub-section (1), the property shall be returned to the person from whom such property was seized or whose property was ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such property beyond the said period.
4. The Adjudicating Authority, before authorising the retention or continuation of freezing of such property beyond the period specified in sub-section (1), shall satisfy himself that the property is prima facie involved in money-laundering and the property is required for the purposes of adjudication under section 8.
5. After passing the order of confiscation under sub-section (5) or sub-section (7) of section 8, the Special Court shall direct the release of all property other than the property involved in money-laundering to the person from whom such property was seized or the persons entitled to receive it.

6. Where an order releasing the property has been made by the Special Court under sub-section (6) of section 8 or by the Adjudicating Authority under section 58B or sub-section (2A) of section 60, the Director or any officer authorised by him in this behalf may withhold the release of any such property for a period of ninety days from the date of such order, if he is of the opinion that such property is relevant for the appeal proceedings under the Act.

### Retention of records

Section 21 deals with retention of records.

- (1) Where any records have been seized, under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the Investigating Officer or any other officer authorised by the Director in this behalf has reason to believe that any of such records are required to be retained for any inquiry under this Act, such records may if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such records were seized or frozen, as the case may be.
- (2) The person, from whom records seized or frozen, shall be entitled to obtain copies of records.
- (3) On the expiry of the period specified under sub-section (1), the records shall be returned to the person from whom such records were seized or whose records were ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such records beyond the said period.
- (4) The Adjudicating Authority, before authorising the retention or continuation of freezing of such records beyond the period specified in sub-section (1), shall satisfy himself that the records are required for the purposes of adjudication under section 8.
- (5) After passing of an order of confiscation or release under sub-section (5) or subsection (7) of section 8 or Section 58B, the Adjudicating Authority shall direct the release of the records to the person from whom such records were seized.
- (6) Where an order releasing the records has been made by the Court, Adjudicating Authority under section 21(5), the Director or any officer authorised by him in this behalf may withhold the release of any such record for a period of ninety days from the date of such order, if he is of the opinion that such record is relevant for the appeal proceedings under the Act.

### Presumption in Inter-connected Transactions

Section 23 of the Act deals with presumption in inter-connected transactions and provides that where money laundering involves two or more transactions and one or more such transactions is or are proved to be involved in money laundering, then for the purposes of adjudication or confiscation under Section 8, it shall be presumed that the remaining transactions form part of such interconnected transactions, unless otherwise proved to the satisfaction of the Adjudicating Authority.

### Appellate Tribunal

Chapter VI of the Act deals with Appellate Tribunal. Section 25 empowers the Central Government, to establish an Appellate Tribunal to hear appeals against the orders of Adjudicating Authority and other authorities under the Act.

The Appellate Tribunal constituted under sub-section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against the orders of the Adjudicating Authority and the other authorities under this Act. Section 26 lays down the matters where appeal lies to the Appellate Tribunal and which include orders made by Adjudicating Authority, reporting

authority aggrieved by the order of the Director, etc. Further appeal from the orders of the Appellate Tribunal would lie to the High Court under Section 42 of the Act.

### Special Courts

Sections 43 to 47 of the Act deal with provisions relating to Special Courts. Section 43(1) empowers the Central Government to designate, in consultation with the Chief Justice of the High Court, one or more Courts of Session as Special Courts or Court for such area or areas or for such case or class or group of cases as may be specified in the notification, for trial of offence punishable under Section 4.

### Offences Triable by Special Courts

Section 44(1) provides that the offence punishable under Section 4, shall be triable only by the Special Court constituted for the area in which the offence has been committed or a special court may, upon a complaint made by an authority authorised in this behalf take cognizance of the offence for which the accused is committed to it for trial.

### Offences to be cognizable and Non-bailable

Section 45 declares every offence punishable under the Act to be cognizable. It provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence under this Act shall be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity to oppose the application for such release; and where the Public Prosecutor opposes the application, unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while in bail.

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees may be released on bail, if the Special Court so directs.

However the special court shall not take cognizance of any offence punishable under Section 4, except upon a complaint in writing made by (i) the Director or (ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or special order made by that Government.

Section 45(1A) provides that notwithstanding anything contained in Code of Criminal Procedure, 1973 or any other provision of this Act, no police officer shall investigate into an offence under this Act, unless specifically authorized, by the Central Government by a general or special order, and subject to such conditions as may be prescribed.

It may be noted that "Offences to be cognizable and non-bailable" shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfillment of conditions under section 19 and subject to the conditions enshrined under this section.

### Power of Central Government to Issue Directions

Section 52 empowers the Central Government to issue, from time to time, such orders, instructions and directions to the authorities as it may deem fit for the proper administration of this Act. The authorities and all other persons employed in execution of the Act have been put under obligation to observe and follow such orders, instructions and directions of the Central Government. However, no such orders, instructions or directions shall

be issued so as to require any authority to decide a particular case in a particular manner or interfere with the discretion of the Adjudicating Authority in exercise of his functions.

### **Agreement with Foreign Countries**

Section 56 empowers the Central Government to enter into an agreement with the Government of any country for enforcing the provisions of the Act and also for exchange of information for the prevention of any offence under the this Act or under the corresponding law in force in that country or investigation of cases relating to any offence under the Act.

### **Assistance to a Contracting State in Certain Cases**

Section 58 provides that, where a letter of request is received by the Central Government, from a court or authority in a contracting State requesting for investigation into an offence or proceedings under the Act and forwarding to such court or authority any evidence connected therewith, the Central Government may forward such letter of request to the Special Court or to any authority as it thinks fit for execution of such request in accordance with the provisions of the Act or as the case may be, any other law for the time being in force. Section 58A empowering Special Court to release the property.

### **Reciprocal Arrangements for Processes and Assistance for Transfer of Accused Persons**

Section 59(1) prescribes that where Special Court, in relation to an offence punishable under Section 4 desires that a summon to an accused person; or a warrant for the arrest of an accused person; or a summon to any person requiring him to attend and produce a document or other thing, or to produce a document or other things or to produce it; or a search warrant issued by it, shall be served or executed at any place in any contracting state, it shall send such summons or warrant in duplicate in such form, to such court, Judge or Magistrate through such authorities as the Central Government may by notification, specify in that behalf and that court, Judge or Magistrate, as the case may be, shall cause the same to be executed.

Sub-Section (2) stipulates that where a Special Court, in relation to an offence punishable under Section 4 has received for service or execution, summon to an accused person; or a warrant for the arrest of an accused person; or a summon to any person requiring him to attend and produce a document or other things or to produce it; or a search warrant; issued by a court, Judge or Magistrate in a contracting State, it shall cause the same to be served or executed as if it were a summon or warrant received by it from another court in the said territories for service or execution within its jurisdiction. Where a warrant of arrest has been executed, the person arrested shall, so far as possible be dealt with in accordance with the procedure specified under Section 19 and where a search warrant has been executed, the things found in the search shall so far as possible be dealt with in accordance with the procedure specified under Section 17 or 18.

However, where a summon or search warrant received from a contracting state has been executed, the documents or other things produced or things found in the search shall be forwarded to the court issuing the summon or search warrant through such authority as the Central Government may by notification specify in this behalf.

### **Authorities under PMLA**

There shall be the following classes of authorities namely:

- (a) Director or Additional Director or Joint Director,
- (b) Deputy Director,

- (c) Assistant Director, and
- (d) such other class of officers as may be appointed for the purposes of this Act.

### **Jurisdiction of Authorities**

The authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, as the case may be, to such authorities by or under this Act or the rules framed thereunder in accordance with such directions as the Central Government may issue for the exercise of powers and performance of the functions by all or any of the authorities.

In issuing the directions or orders by the Central Government may have regard to any one or more of the following criteria:

- (a) territorial area;
- (b) classes of persons;
- (c) classes of cases; and
- (d) any other criterion specified by the Central Government in this behalf.

### **Attachment, Seizure and Confiscation of Property, etc.**

Section 60(1) provides that where the Director has made an order for attachment of any property under Section 5 or for freezing under sub-section (1A) of section 17 or where an Adjudicating Authority has made an order relating to a property under section 8 or where a Special Court has made an order of confiscation relating to a property under sub-section (5) or sub section (6) of section 8 and such property is suspected to be in a contracting state, the Special Court on an application by the Director or the Administrator appointed under Section 10(1) as the case may be, may issue a letter of request to a court or an authority in the contracting state for execution of such order.

Section 60(2) prescribes that where a letter of request is received by the Central Government from a court or an authority in a contracting State requesting attachment, seizure, freezing or confiscation of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence under a corresponding law committed in that contracting State, the Central Government may forward such letter of request to the Director, as it thinks fit, for execution in accordance with the provisions of this Act.

Section 60(2A) states that where on closure of the criminal case or conclusion of trial in a criminal court outside India under the corresponding law of any other country, such court finds that the offence of money-laundering under the corresponding law of that country has been committed, the Special Court shall, on receipt of an application from the Director for execution of confiscation under sub-section (2), order, after giving notice to the affected persons, that such property involved in money-laundering or which has been used for commission of the offence of money-laundering stand confiscated to the Central Government.

Sub-Section (3) stipulates that the Director shall on receipt of a letter of request under Section 58 or Section 59 direct any authority under the Act to take all steps necessary for tracing and identifying such property.

### **RBI Master Direction - Know Your Customer (KYC) Direction**

#### **The objective of KYC Norms/ AML Measures/ CFT Guidelines**

The objective of Know Your Customer (KYC) Norms/Anti-Money Laundering (AML) Measures/Combating of Financing of Terrorism (CFT) guidelines is to prevent banks from being used, intentionally or unintentionally, by criminal elements for money laundering or terrorist financing activities. KYC procedures also enable banks to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently.



In terms of the provisions of Prevention of Money-Laundering Act, 2002 and the Prevention of Money-Laundering (Maintenance of Records) Rules, 2005, as amended from time to time by the Government of India as notified by the Government of India, Regulated Entities (REs) are required to follow certain customer identification procedures while undertaking a transaction either by establishing an account-based relationship or otherwise and monitor their transactions. REs shall take steps to implement the provisions of the aforementioned Act and Rules, including operational instructions issued in pursuance of such amendment(s).

It may be noted that **“Regulated Entities” (REs)** means:

- a. all Scheduled Commercial Banks (SCBs)/ Regional Rural Banks (RRBs)/ Local Area Banks (LABs)/ All Primary (Urban) Co-operative Banks (UCBs) /State and Central Co-operative Banks (StCBs / CCBs) and any other entity which has been licenced under Section 22 of Banking Regulation Act, 1949, which as a group shall be referred as ‘banks’.
- b. All India Financial Institutions (AIFIs).
- c. All Non-Banking Finance Companies (NBFCs), Miscellaneous Non-Banking Companies (MNBCs) and Residuary Non-Banking Companies (RNBCs).
- d. All Payment System Providers (PSPs)/ System Participants (SPs) and Prepaid Payment Instrument Issuers (PPI Issuers).
- e. All authorised persons (APs) including those who are agents of Money Transfer Service Scheme (MTSS), regulated by the Regulator.

#### **Know Your Customer (KYC) Policy of Regulated Entities (REs)**

According to the RBI Master Direction - Know Your Customer (KYC) Direction, there shall be a Know Your Customer (KYC) policy duly approved by the Board of Directors of Regulated Entities (Res) or any committee of the Board to which power has been delegated. The KYC policy shall include following four key elements:



#### **Money Laundering and Terrorist Financing Risk Assessment by Regulated Entities (REs)**

- (a) REs shall carry out ‘Money Laundering (ML) and Terrorist Financing (TF) Risk Assessment’ exercise periodically to identify, assess and take effective measures to mitigate its money laundering and terrorist financing risk for clients, countries or geographic areas, products, services, transactions or delivery channels, etc.

The assessment process should consider all the relevant risk factors before determining the level of overall risk and the appropriate level and type of mitigation to be applied. While preparing the internal risk assessment, REs shall take cognizance of the overall sector-specific vulnerabilities, if any, that the regulator/supervisor may share with REs from time to time.



- (b) The risk assessment by the RE shall be properly documented and be proportionate to the nature, size, geographical presence, complexity of activities/structure, etc. of the RE. Further, the periodicity of risk assessment exercise shall be determined by the Board of the RE, in alignment with the outcome of the risk assessment exercise. However, it should be reviewed at least annually.
- (c) The outcome of the exercise shall be put up to the Board or any committee of the Board to which power in this regard has been delegated, and should be available to competent authorities and self-regulating bodies.
- (d) REs shall apply a Risk Based Approach (RBA) for mitigation and management of the identified risk and should have Board approved policies, controls and procedures in this regard. Further, REs shall monitor the implementation of the controls and enhance them if necessary.

### Financial Intelligence Unit – India (FIU-IND)

Financial Intelligence Unit - India (FIU-IND) is the central, national agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions to enforcement agencies and foreign FIUs. Financial Intelligence Unit – India (FIU-IND) was set by the Government of India vide O.M. dated 18th November 2004 as the central national agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions. FIU-IND is also responsible for coordinating and strengthening efforts of national and international intelligence, investigation and enforcement agencies in pursuing the global efforts against money laundering and financing of terrorism. FIU-IND is an independent body reporting directly to the Economic Intelligence Council (EIC) headed by the Finance Minister.

The main function of FIU-IND is to receive cash/suspicious transaction reports, analyse them and, as appropriate, disseminate valuable financial information to intelligence/enforcement agencies and regulatory authorities. The functions of FIU-IND are:

- *Collection of Information:* Act as the central reception point for receiving Cash Transaction reports (CTRs), Non-Profit Organisation Transaction Report (NTRs), Cross Border Wire Transfer Reports (CBWTRs), Reports on Purchase or Sale of Immovable Property (IPRs) and Suspicious Transaction Reports (STRs) from various reporting entities.
- *Analysis of Information:* Analyse received information in order to uncover patterns of transactions suggesting suspicion of money laundering and related crimes.
- *Sharing of Information:* Share information with national intelligence/law enforcement agencies, national regulatory authorities and foreign Financial Intelligence Units.
- *Act as Central Repository:* Establish and maintain national data base on the basis of reports received from reporting entities.
- *Coordination:* Coordinate and strengthen collection and sharing of financial intelligence through an effective national, regional and global network to combat money laundering and related crimes.
- *Research and Analysis:* Monitor and identify strategic key areas on money laundering trends, typologies and developments.

### The Directorate of Enforcement (ED)

The Directorate of Enforcement or the ED is a multi-disciplinary organization mandated with investigation of economic crimes and violations of foreign exchange laws. The origin of this Directorate goes back to 1st May, 1956, when an 'Enforcement Unit' was formed in the Department of Economic Affairs for handling Exchange

Control Laws violations under Foreign Exchange Regulation Act, 1947 (FERA '47). This Unit with Delhi as Headquarters was headed by a Legal Service Officer, as Director of Enforcement, assisted by an Officer drawn on deputation from Reserve Bank of India (RBI) and 03 Inspectors of Special Police Establishment. There were 02 branches – at Bombay and Calcutta.

In the year 1957, this Unit was renamed as 'Enforcement Directorate', and another branch was opened at Madras. In 1960, the administrative control of the Directorate was transferred from the Department of Economic Affairs to the Department of Revenue. With the passage of time, FERA' 47 was repealed and replaced by FERA, 1973. For a short period of 04 years (1973 – 1977), the Directorate remained under the administrative jurisdiction of the Department of Personnel & Administrative Reforms. Presently, the Directorate is under the administrative control of Department of Revenue, Ministry of Finance, and Government of India.

With the onset of the process of economic liberalization, FERA, 1973, which was a regulatory law, was repealed and in its place, a new law viz. the Foreign Exchange Management Act, 1999 (FEMA) came into operation w.e.f. 1st June 2000. Further, in tune with the International Anti Money Laundering regime, the Prevention of Money Laundering Act, 2002 (PMLA) was enacted and ED was entrusted with its enforcement w.e.f. 1st July 2005. Recently, with the increase in number of cases relating to economic offenders taking shelter in foreign countries, the Government has passed the Fugitive Economic Offenders Act, 2018 (FEOA) and ED is entrusted with its enforcement with effect from 21st April, 2018. The Directorate of Enforcement is a multi-disciplinary organization mandated with investigation of offence of money laundering and violations of foreign exchange laws. The statutory functions of the Directorate include enforcement of following Acts:

- The Prevention of Money Laundering Act, 2002 (PMLA)
- The Foreign Exchange Management Act, 1999 (FEMA)
- The Fugitive Economic Offenders Act, 2018 (FEOA)

### **Freezing of Assets under Section 51A of Unlawful Activities (Prevention) Act, 1967**

The Unlawful Activities (Prevention) Act, 1967 (UAPA) enacted by the Parliament for the more effective prevention of certain unlawful activities of individual and association and for dealing with terrorist activities. According to the UAPA, unlawful activity in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise), – (i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or (iii) which causes or is intended to cause disaffection against India.

In terms of Section 51A, the Central Government is empowered to freeze, seize or attach funds and other financial assets or economic resources held by, on behalf of or at the direction of the individuals or entities Listed in the Schedule to the Order, or any other person engaged in or suspected to be engaged in terrorism and prohibit any individual or entity from making any funds, financial assets or economic resources or related services available for the benefit of the individuals or entities Listed in the Schedule to the Order or any other person engaged in or suspected to be engaged in terrorism.

**LESSON ROUND-UP**

- Money laundering is the processing of criminal proceeds to disguise its illegal origin.
- The process of money laundering can be classified into three stages, namely, placement, layering and integration.
- The Prevention of Money-laundering Act, 2002 was enacted to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto.
- The Act also addresses the international obligations under the Political Declaration and Global Programme of Action adopted by the General Assembly of the United Nations to prevent money laundering.
- The Act contains provisions pertaining to offences and punishment for money laundering, attachment, adjudication and confiscation, obligations of banking companies, financial institutions and intermediaries, Summons, Searches and Seizures etc.
- The Act states that whoever, acquires, owns, possesses, or transfers any proceeds of crime or knowingly enters into any transaction which is related to proceeds of crime directly or indirectly or conceals or aids in the concealment of the proceeds of crime, shall be guilty of offence of money laundering.
- Every banking company, financial institution and intermediary is required to maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions legally connected to each other, and when such series of transactions take place within a month.
- The objective of Know Your Customer (KYC) Norms/Anti-Money Laundering (AML) Measures/ Combating of Financing of Terrorism (CFT) guidelines is to prevent banks from being used, intentionally or unintentionally, by criminal elements for money laundering or terrorist financing activities. KYC procedures also enable banks to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently.

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Define the term money laundering and explain the process of money laundering.
2. Briefly discuss the international efforts in preventing the money laundering.
3. Offences under the Prevention of Money Laundering Act, 2002 are cognizable and non –bailable. Comment.
4. Write short note on the following:
  - (a) Financial Asset Task Force.
  - (b) Maintenance and preservation of records of clients by banking companies, financial institutions and intermediaries.
  - (c) Recourse available to a person aggrieved by any decision or order of the Appellate Tribunal under the Act.
5. Discuss the power of Enforcement Directorate regarding arrest of person under the PMLA, 2002.



### KEY CONCEPTS

- Fugitive Economic Offender
- Key Managerial Personnel
- Proceeds of Crime

### Learning Objectives

#### To understand:

- Who is a Fugitive Economic Offender
- Procedure for Declaration of Fugitive Economic Offender
- Attachment of Property
- Search and Seizure
- Search of Person
- Appeal

### Lesson Outline

- Declaration of Fugitive Economic Offender
- Power to Disallow Civil Claims
- Power To Survey
- Rule of Evidence
- Bar of Jurisdiction
- Overriding Effect
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## INTRODUCTION

There have been several instances of economic offenders fleeing the jurisdiction of Indian courts anticipating the commencement of criminal proceedings or sometimes during the pendency of such proceedings. The absence of such offenders from Indian courts has several deleterious consequences, such as, it obstructs investigation in criminal cases, it wastes precious time of courts and it undermines the rule of law in India. Further, most of such cases of economic offences involve non-repayment of bank loans thereby worsening the financial health of the banking sector in India. The existing civil and criminal provisions in law are inadequate to deal with the severity of the problem.

In order to address the said problem and lay down measures to deter economic offenders from evading the process of Indian law by remaining outside the jurisdiction of Indian courts, Parliament enacted a legislation, namely, the Fugitive Economic Offenders Bill, 2018 to ensure that fugitive economic offenders return to India to face the action in accordance with law.

***Fugitive Economic Offenders Act, 2018 provides for measures to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India.***

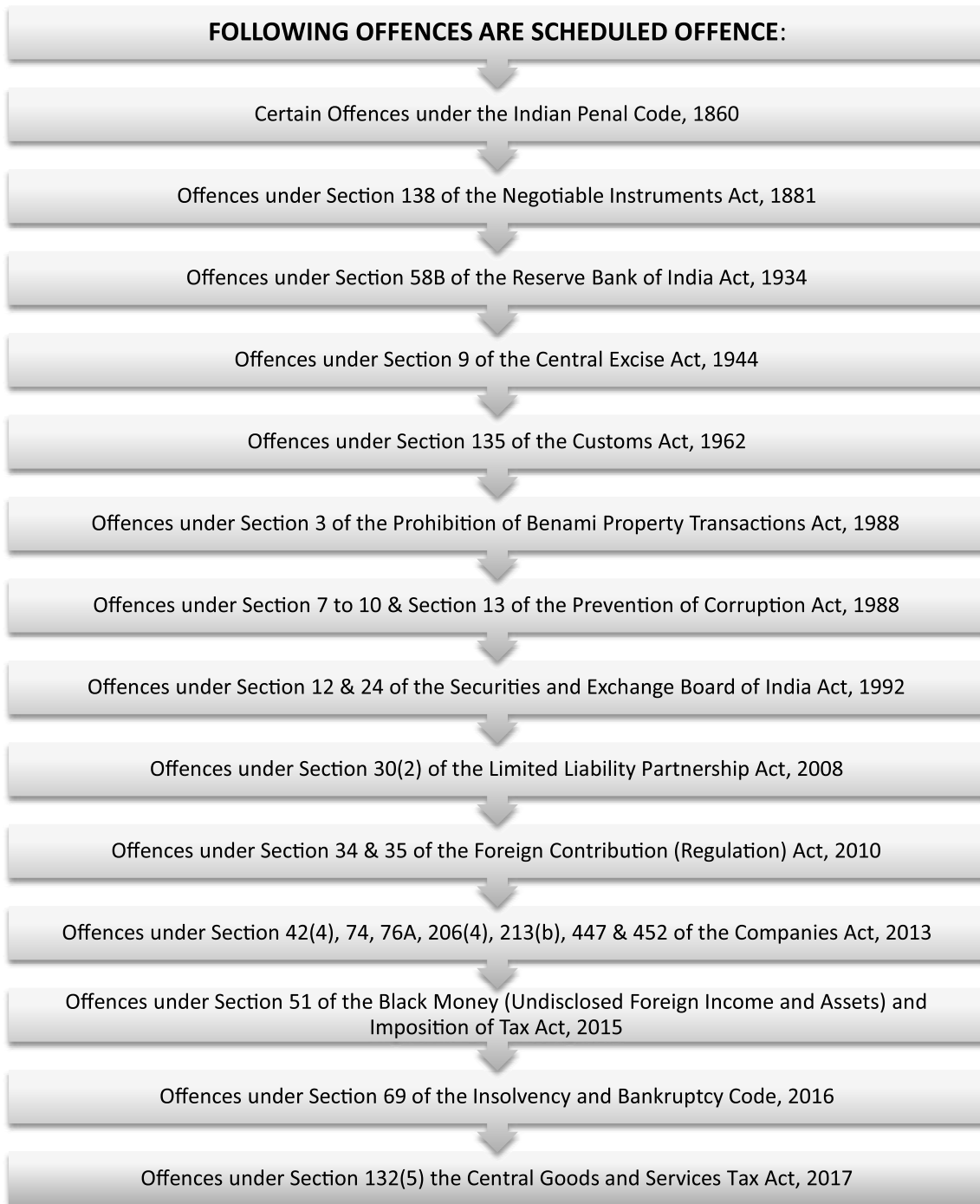
## Salient Features of the Act

- Defines the term such as “Fugitive Economic Offender”, “Key Managerial Personnel”, “Proceeds of Crime”.
- Provisions for attachment of the property of a fugitive economic offender and proceeds of crime.
- Empowers Director relating to survey, search and seizure and search of persons.
- Confiscation of the property of a fugitive economic offender and proceeds of crime.
- Disentitlement of the fugitive economic offender from putting forward or defending any civil claim.
- Appointment of an Administrator.
- Appeal to the High Court against the orders issued by the Special Court.

## FUGITIVE ECONOMIC OFFENDER

***Any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who – (i) has left India so as to avoid criminal prosecution; or (ii) being abroad, refuses to return to India to face criminal prosecution is a fugitive economic offender.***

It may be noted that Scheduled Offence means an offence specified in the Schedule appended to the Fugitive Economic Offenders Act, 2018 if the total value involved in such offence or offences is one hundred crore rupees or more.



### Procedure for Declaration of Fugitive Economic Offender

- (1) Where the Director appointed for the purposes of the Prevention of Money-laundering Act, 2002 or any other officer not below the rank of Deputy Director authorised by the Director, has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that any individual is a fugitive economic offender, he may file an application in such form and prescribed manner in the Special Court that such individual may be declared as a fugitive economic offender.

- (2) The application shall contain—
- (a) reasons for the belief that an individual is a fugitive economic offender;
  - (b) any information available as to the whereabouts of the fugitive economic offender;
  - (c) a list of properties or the value of such properties believed to be the **proceeds of crime**, including any such property outside India for which confiscation is sought;
  - (d) a list of properties or benami properties owned by the individual in India or abroad for which confiscation is sought; and
  - (e) a list of persons who may have an interest in any of the properties listed under clauses (c) and (d) above.

***Proceeds of Crime means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a Scheduled Offence, or the value of any such property, or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.***

- (3) Where an application has been duly filed, the Special Court shall issue a notice to an individual who is alleged to be a fugitive economic offender.
- (4) The notice shall also be issued to any other person who has any interest in the property mentioned in the application.
- (5) A notice of Special Court shall—
- (a) require the individual to appear at a specified place and time not less than six weeks from the date of issue of such notice; and
  - (b) state that failure to appear on the specified place and time shall result in a declaration of the individual as a fugitive economic offender and confiscation of property under the Act.
- (6) A notice shall also be forwarded to such authority, as the Central Government may notify, for effecting service in a contracting State. The authority shall make efforts to serve the notice within a period of two weeks in such prescribed manner.

***Contracting State means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise.***

- (7) A notice may also be served to the individual alleged to be a fugitive economic offender by electronic means to—
- (a) his electronic mail address submitted in connection with an application for allotment of Permanent Account Number under section 139A of the Income-tax Act, 1961;
  - (b) his electronic mail address submitted in connection with an application for enrolment under section 3 of the Aadhaar ; or
  - (c) any other electronic account as may be prescribed, belonging to the individual which is accessed by him over the internet, subject to the satisfaction of the Special Court that such account has been recently accessed by the individual and constitutes a reasonable method for communication of the notice to the individual.
- (8) Where any individual to whom notice has been issued by the Special Court shall appears in person at



the place and time specified in the notice, the Special Court may terminate the proceedings under the Act.

- (9) Where any individual to whom notice has been issued fails to appear at the place and time specified in the notice, but enters appearance through counsel, the Special Court may in its discretion give a period of one week to file a reply to the application.
- (10) Where any individual to whom notice has been issued fails to enter appearance either in person or through counsel, and the Special Court is satisfied—
- (a) that service of notice has been effected on such party; or
  - (b) that notice could not be served in spite of best efforts because such individual has evaded service of notice, it may, after recording reasons in writing, proceed to hear the application.

### Declaration of Fugitive Economic Offender

<b>(1)</b>	After hearing the application, if the Special Court is satisfied that an individual is a fugitive economic offender, it may, by an order, declare the individual as a fugitive economic offender for reasons to be recorded in writing.
<b>(2)</b>	On a declaration, the Special Court may order that any of the following properties stand confiscated to the Central Government—
<b>(a)</b>	the proceeds of crime in India or abroad, whether or not such property is owned by the fugitive economic offender; and
<b>(b)</b>	any other property or benami property in India or abroad, owned by the fugitive economic offender.
<b>(3)</b>	The confiscation order of the Special Court shall, to the extent possible, identify the properties in India or abroad that constitute proceeds of crime which are to be confiscated and in case such properties cannot be identified, quantify the value of the proceeds of crime.
<b>(4)</b>	The confiscation order of the Special Court shall separately list any other property owned by the fugitive economic offender in India which is to be confiscated.
<b>(5)</b>	Where the Special Court has made an order for confiscation of any property and such property is in a contracting State, the Special Court may issue a letter of request to a Court or authority in the contracting State for execution of such order.
<b>(6)</b>	Every letter of request to be transmitted to a contracting State shall be transmitted in such form and manner as the Central Government may, by notification, specify in this behalf.
<b>(7)</b>	The Special Court may, while making the confiscation order, exempt from confiscation any property which is a proceed of crime in which any other person, other than the fugitive economic offender, has an interest if it is satisfied that such interest was acquired bona fide and without knowledge of the fact that the property was proceeds of crime.
<b>(8)</b>	All the rights and title in the confiscated property shall, from the date of the confiscation order, vest in the Central Government, free from all encumbrances.

(9)	Where on the conclusion of the proceedings, the Special Court finds that the individual is not a fugitive economic offender, the Special Court shall order release of property or record attached or seized under this Act to the person entitled to receive it.
(10)	Where an order releasing the property has been made by the Special Court, the Director or any other officer authorised by him in this behalf may withhold the release of any such property or record for a period of ninety days from the date of receipt of such order, if he is of the opinion that such property is relevant for the appeal proceedings under the Act.

### Power to Disallow Civil Claims

Notwithstanding anything contained in any other law for the time being in force,

- (a) on a declaration of an individual as a fugitive economic offender, any Court or tribunal in India, in any civil proceeding before it, may, disallow such individual from putting forward or defending any civil claim; and
- (b) any Court or tribunal in India in any civil proceeding before it, may, disallow any company or limited liability partnership from putting forward or defending any civil claim, if an individual filing the claim on behalf of the company or the limited liability partnership, or any promoter or key managerial personnel or majority shareholder of the company or an individual having a controlling interest in the limited liability partnership has been declared as a fugitive economic offender.

*It may be noted that:*

“*Key Managerial Personnel*” shall have the same meaning as assigned to it under Section 2(51) of the Companies Act, 2013.

“*Company*” means any body corporate and includes a firm, or other association of persons;

“*Limited Liability Partnership*” shall have the same meaning as assigned to it under Section 2(1)(n) of the Limited Liability Partnership Act, 2008.

### Attachment of property

The Director or any other officer authorised by the Director, not below the rank of Deputy Director, may, with the permission of the Special Court, attach any by an order in writing in prescribed manner.

Director or any other officer, not below the rank of Deputy Director, authorised by the Director, may, by an order in writing, at any time prior to the filing of the application to the Special Court, attach any property—

- for which there is a reason to believe that the property is proceeds of crime, or is a property or benami property owned by an individual who is a fugitive economic offender; and
- which is being or is likely to be dealt with in a manner which may result in the property being unavailable for confiscation.

Director or any other officer who provisionally attaches any property shall within a period of thirty days from the date of such attachment, file an application before the Special Court.

The attachment of any property shall continue for a period of one hundred and eighty days from the date of order of attachment or such other period as may be extended by the Special Court before the expiry of such period.

### Power of Survey

Where a Director or any other officer authorised by the Director, on the basis of material in his possession, has reason to believe (the reasons for such belief to be recorded in writing), that an individual may be a fugitive economic offender, he may enter any place:

- (i) within the limits of the area assigned to him; or
- (ii) in respect of which he is authorised for the purposes of this section, by such other authority, who is assigned the area within which such place is situated.

Where the Director or any other officer authorised by him, on the basis of material in his possession, has reason to believe (the reasons for such belief to be recorded in writing) that an individual may be a fugitive economic offender and it is necessary to enter any place, he may request any proprietor, employee or any other person who may be present at that time, to—

- (a) afford him the necessary facility to inspect such records as he may require and which may be available at such place;
- (b) afford him the necessary facility to check or verify the proceeds of crime or any transaction related to proceeds of crime which may be found therein; and
- (c) furnish such information as he may require as to any matter which may be useful for, or relevant to any proceedings .

The Director, or any other officer acting under this section may:

- (i) place marks of identification on the records inspected by him and make or cause to be made extracts or copies therefrom;
- (ii) make an inventory of any property checked or verified by him; and
- (iii) record the statement of any person present at the property which may be useful for, or relevant to, any proceeding .

### Search and Seizure

Where the Director or any other officer not below the rank of Deputy Director authorised by him, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person:

- (i) may be declared as a fugitive economic offender;
- (ii) is in possession of any proceeds of crime;
- (iii) is in possession of any records which may relate to proceeds of crime; or
- (iv) is in possession of any property related to proceeds of crime, then, subject to any rules made in this behalf, he may authorise any officer subordinate to him to—
  - (a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;
  - (b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;

- (c) seize any record or property found as a result of such search;
- (d) place marks of identification on such record or property, if required or make or cause to be made extracts or copies therefrom;
- (e) make a note or an inventory of such record or property; and
- (f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act.

Where an authority, upon information obtained during survey, is satisfied that any evidence shall be or is likely to be concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is located and seize that evidence.

### Search of Persons

Notwithstanding anything contained in any other law for the time being in force—

- (a) if an authority, authorised in this behalf by the Central Government by general or special order, has reason to believe (the reason for such belief to be recorded in writing) that any person has secreted about his person or anything under his possession, ownership or control, any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, he may search that person and seize such record or property which may be useful for or relevant to any proceedings under the Act;
- (b) where an authority is about to search any person, he shall, if such person so requires, take such person within twenty-four hours to the nearest Gazetted Officer, superior in rank to him, or a Magistrate;
 

It may be noted that the period of twenty-four hours shall exclude the time necessary for the journey undertaken to take such person to the nearest Gazetted Officer, superior in rank to him, or the Magistrate's Court;
- (c) if the requisition under clause (b) is made, the authority shall not detain the person for more than twenty-four hours prior to taking him before the Gazetted Officer, superior in rank to him, or the Magistrate referred to in that clause: Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of detention to the office of the Gazetted Officer, superior in rank to him, or the Magistrate's Court;
- (d) the Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge such person but otherwise shall direct that search be made;
- (e) before making the search, the authority shall call upon two or more persons to attend and witness the search and the search shall be made in the presence of such persons;
- (f) the authority shall prepare a list of record or property seized in the course of the search and obtain the signatures of the witnesses on the list;
- (g) no female shall be searched by anyone except a female; and
- (h) the authority shall record the statement of the person searched in respect of the records or proceeds of crime found or seized in the course of the search.

### RULES OF EVIDENCE

The burden of proof for establishing (a) that an individual is a fugitive economic offender; or (b) that a property is the proceeds of crime or any other property in which the individual alleged to be a fugitive economic offender has an interest, shall be on the Director or the person authorised by the Director to file the application.	Notwithstanding anything contained in any other law for the time being in force, where any person claims that any interest in any property was acquired bona fide and without knowledge of the fact that, such property constitutes proceeds of crime, the burden of proving such fact shall lie upon him.	The standard of proof applicable to the determination of facts by the Special Court under the Act shall be preponderance of probabilities.
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### Appeal

(1)	An appeal shall lie from any judgment or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.
(2)	Every appeal shall be preferred within a period of thirty days from the date of the judgment or order appealed from.
(3)	High Court may entertain an appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days.
(4)	No appeal shall be entertained after the expiry of period of ninety days.

### Bar of Jurisdiction

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Special Court is empowered by or under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

#### ***Overriding Effect.***

***The provisions of Fugitive Economic Offender Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.***

### LESSON ROUND-UP

- Fugitive Economic Offenders Act, 2018 provides for measures to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India.
- Any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who— (i) has left India so as to avoid criminal prosecution; or (ii) being abroad, refuses to return to India to face criminal prosecution is a fugitive economic offender.

- Proceeds of Crime means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a Scheduled Offence, or the value of any such property, or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.
- The Director or any other officer authorised by the Director, not below the rank of Deputy Director, may, with the permission of the Special Court, attach any by an order in writing in prescribed manner.
- The provisions of Fugitive Economic Offender Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. What is the objectives of the Fugitive Economic Offenders Act, 2018?
2. What is the Proceeds of Crime under the Fugitive Economic Offenders Act, 2018?
3. Discuss the procedure to be followed to declare a person as Fugitive Economic Offenders.
4. Discuss the procedure to be followed by Director to search a person.
5. What is the minimum value of the amount that the Act of Fugitive offence?

**LIST OF FURTHER READINGS**

- Bare Act - Fugitive Economic Offenders Act, 2018

**OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)**

- <https://dea.gov.in/>
- <https://www.indiacode.nic.in/bitstream/123456789/4035/1/A2018-17.pdf>

# Law relating to Benami Transactions & Prohibition

## Lesson 10

### KEY CONCEPTS

- Benami Property ■ Benami Transaction ■ Prohibition of Benami Transaction

### Learning Objectives

#### To understand:

- Prohibition of Benami Transaction
- Adjudication of Benami Property
- Securities held by a Depository
- Confiscation of Benami Property
- Punishment

### Lesson Outline

- Benami Property
- Benami Transaction
- Prohibition of Benami Transaction
- Authority & Adjudication of Benami Property
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- The Benami Transactions (Prohibition) Act, 1988
- Depositories Act, 1996

## INTRODUCTION

In the case of *Union of India & Anr. Vs. M/s. Ganpati Dealcom Pvt. Ltd.*, [Civil Appeal No. 5783 of 2022, Special Leave Petition (C) No. 2784/2020] judgement dated August 23, 2022, the Hon'ble Supreme Court of India *inter alia* observed that the term 'benami transaction' generally implies that one purchases the property in the name of somebody else, i.e., a name lender, and the purchaser does not hold beneficial interest in the property. Literally, 'benami' means 'without a name'. The simplest example is if person 'A' (real owner) purchases a property from 'B' in the name of 'C' (benamidar/ostensible owner), wherein 'A' exercise rights/interest over the property.

*The term 'benami', which was alien to statutory law during the colonial regime and in the early days of the Republic, was known in the legal parlance of lawyers. Even in Mohammedan law, such transactions were commonly referred as furzee or farzi, derived from Arabic word furaz. Over the passage of time, this nebulous concept appeared in cases without much clarity with respect to its basic contours. Conceptually, there are two views which arise from the Doctrine of Benami. The first view is that the benamidar does not hold title over the property, and the second view is that although the title passes to the benamidar, he holds it in trust.*

*Eventually, there developed two loose categories of transactions that were colloquially termed as benami, which can be explained through the following examples:*

- (i) Tripartite: 'B' sells a property to 'A' (real owner), but the sale deed mentions 'C' as the owner/benamidar.*
- (ii) Bipartite: 'A' sells property to 'B' without intending to pass the title to 'B'.*

*The first instance was usually termed as a real benami transaction, and the second transaction was considered either as a sham transaction or "loosely" benami transaction.*

Though the Benami Transactions (Prohibition) Act, 1988 has been on the statute book since more than 28 years, the same could not be made operational because of certain inherent defects. With a view to providing effective regime for prohibition of benami transactions, the said Act was amended through the Benami Transactions (Prohibition) Amended Act, 2016. The amended law empowers the specified authorities to provisionally attach benami properties which can eventually be confiscated. Besides, if a person is found guilty of offence of benami transaction by the competent court, he shall be punishable with rigorous imprisonment for a term not less than one year but which may extend to 7 years and shall also be liable to fine which may extend to 25% of the fair market value of the property. The Benami Transactions (Prohibition) Amendment Act, 2016 came into effect from 1st November, 2016.

*The preamble of the Act reads as under:*

*An Act to prohibit benami transactions and the right to recover properly held benami and for matters corrected therewith or incidental thereto.*



**Salient Features of the Benami Transactions (Prohibition) Act, 1988**

It defines a benami transaction and benami property and also provides for exclusions and transactions which shall not be construed benami.
It provides the consequences of entering into a prohibited benami transactions.
It lays down the procedure for determination and related penal consequences in the case of a prohibited benami transaction.
It also provides that the powers of civil court shall be available to authorities under the said Act.
Miscellaneous Provisions have been provided for service of notice, protection of action taken in good faith, etc.
Central Government empowers to make rules for the implementation of the provisions of the Act.
It enables the Central Government in consultation with the Chief Justice of the High Court to designate one or more Courts of Session as Special Court or Special Courts for the purpose of the Act.
It provides penalty for entering into benami transactions and for furnishing any false documents in any proceeding under the Act.
It provides for transfer of any suit or proceeding in respect of a benami transaction pending in any court (other than High Court) or Tribunal or before any authority to the Appellate Tribunal.

**IMPORTANT DEFINITIONS****“Attachment”**

Attachment means the prohibition of transfer, conversion, disposition or movement of property, by an order issued under the Act. [Section 2(5)]

**“Benami Property”**

Benami Property means any property which is the subject matter of a benami transaction and also includes the proceeds from such property. [Section 2(8)]

**“Benami Transaction”**

As per Section 2 (9) of the benami transaction means-

- (A) a transaction or an arrangement –
- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
  - (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

Except when the property is held by –

- (i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;
- (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands

in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose;

- (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;
- (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or
- (B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name (For Example: Mr. X purchases a property in the name of Mr. Y, who is non-existent.); or
- (C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership (Mr. X is holding a flat in the name of Mr. Y. Upon inquiry by authorities, Mr. Y denies the ownership of the flat);
- (D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious (Mr. A purchased a flat, payment of which was made by an unknown person)

*Explanation.* – For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force, –

- (i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;
- (ii) stamp duty on such transaction or arrangement has been paid; and
- (iii) the contract has been registered.

#### **“Benamidar”**

Benamidar means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name. [Section 2(10)]

#### **“Beneficial Owner”**

“Beneficial Owner” means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar. [Section 2(10)]

#### **“Fair Market Value”**

Fair market value in relation to a property, means – (i) the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and (ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with such manner as may be prescribed. [Section 2(16)]

#### **“Firm”**

Firm shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932 and

shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008. [Section 2(17)]

#### “Partner”

Partner shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932, and shall include, –

- (a) any person who, being a minor, has been admitted to the benefits of partnership; and
- (b) a partner of a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008. [Section 2(22)]

#### “Partnership”

Partnership shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932, and shall include a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008. [Section 2(23)]

#### “Person”

Person shall include –

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) a company;
- (iv) a firm;
- (v) an association of persons or a body of individuals, whether incorporated or not;
- (vi) every artificial juridical person, not falling under sub-clauses (i) to (v). [Section 2(23)]

#### “Property”

Property means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property. [Section 2(26)]

#### “Transfer”

Transfer includes sale, purchase or any other form of transfer of right, title, possession or lien. [Section 2(26)]

### Prohibition of benami transactions-

As per Section 3(1) of the Act, no person shall enter into any benami transaction.

Section 3(2) provides that whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

According to Section 3(3) where any person enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall be punishable in accordance with the provisions contained in Chapter VII.

Chapter VII deals with offences and prosecution. It provides that if a person is found guilty of offence of benami transaction by the competent court, he shall be punishable with rigorous imprisonment for a term not less than one year but which may extend to 7 years and shall also be liable to fine which may extend to 25% of the fair market value of the property.

### Prohibition of the right to recover property held benami

Section 4(1) provides that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

Further, Section 4(2) provides that no defense based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

### Property held benami liable to confiscation

As per section 5 of the Act any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government.

*Hon'ble Supreme Court of India in the case of Union of India & Anr. Vs. M/s. Ganpati Dealcom Pvt. Ltd, [Civil Appeal No. 5783 of 2022, Special Leave Petition (C) No. 2784/2020] judgement dated August 23, 2022, held that Section 3(2) of the 2016 Act is unconstitutional as it is violative of Article 20(1) of the Constitution. In rem forfeiture provision under Section 5 of the 2016 Act, being punitive in nature, can only be applied prospectively and not retroactively. The 2016 Amendment Act was not merely procedural, rather, prescribed substantive provisions.*

### Prohibition on re-transfer of property by benamidar

Section 6 provides that a person, being a benamidar shall not re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf.

Where any property is re-transferred in contravention of the above the transaction of such property shall be deemed to be null and void.

### Authorities and Jurisdiction

The following shall be the Authorities for the purposes of Benami Transactions Prohibition Act

- (a) The Initiating Officer;
- (b) The Approving Authority;
- (c) The Administrator; and
- (d) The Adjudicating Authority.

The authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, as the case may be, to it. The authorities shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit.

Every proceeding shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code.

The following officers shall assist the authorities in the enforcement of the Act, namely:

- (a) income-tax authorities appointed under section 117(1) of the Income-tax Act, 1961;
- (b) officers of the Customs and Central Excise Departments;
- (c) officers appointed under section 5(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985;

- (d) officers of the stock exchange recognised under section 4 of the Securities Contracts (Regulation) Act, 1956 ;
- (e) officers of the Reserve Bank of India constituted under section 3(1) of the Reserve Bank of India Act, 1934;
- (f) police;
- (g) officers of enforcement appointed under section 36(1) of the Foreign Exchange Management Act, 1999;
- (h) officers of the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992;
- (i) officers of any other body corporate constituted or established under a Central or a State Act; and
- (j) such other officers of the Central Government, State Government, local authorities or banking companies as the Central Government may, by notification, specify, in this behalf.

### Notice and attachment of property involved in benami transaction

Section 24 relates to notice and attachment of property involved in benami transaction. Sub-section (1) of this section provides that where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to such person to show cause within such time as may be specified in the notice why the property should not be treated as benami property. Sub-section (2) of this section provides that a copy of the notice may also be served upon such other person who is a beneficial owner.

Sub-section (3) of this section provides that where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate such property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally such property in the manner as may be prescribed, for a period not exceeding ninety days from the date of issue of notice under sub-section (1).

Sub-section (4) of this section provides that the Initiating Officer, after making such inquires and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice under sub-section (1), -

- (a) where the provisional attachment has been made under sub-section (3), -
  - (i) pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section (3) of section 26; or
  - (ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority;
- (b) where provisional attachment has not been made under sub-section (3), -
  - (i) pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order made by the Adjudicating Authority under sub-clause (3) of section 26; or
  - (ii) decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

Sub-section (5) of this section provides that where the Initiating Officer passes an order continuing the provisional attachment of the property under sub-clause (i) of clause (a) of sub-section (4) or passes an order provisionally attaching the property under sub-clause (i) of clause (b) of that sub-section, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.

It may be noted that Initiating Officer means an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the Income-tax Act, 1961.

### Manner of service of notice

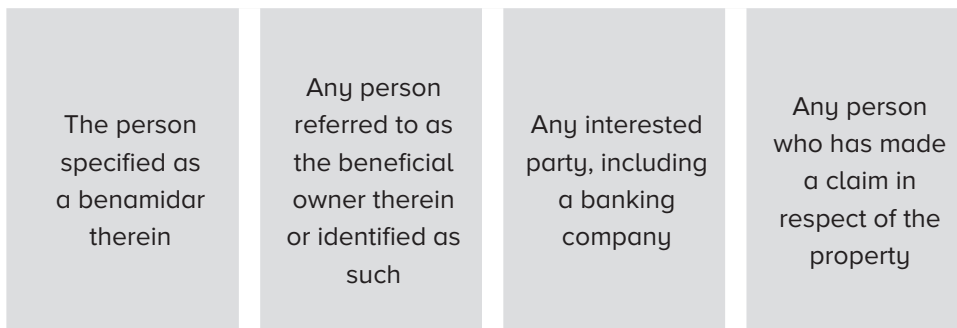
Section 25 deals with the manner of service of notice. Sub-section (1) of this section provides that a notice under sub-clause (1) of section 24 may be served on the person named therein either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, 1908.

Sub-section (2) of this section provides that any notice referred to above may be addressed-

- (i) in case of an individual, to such individual;
- (ii) in the case of a firm, to the managing partner or the manager of the firm;
- (iii) in the case of a Hindu undivided family, to karta or any member of such family;
- (iv) in the case of a company, to the principal officer thereof;
- (v) in the case of any other association or body of individuals, to the principal officer or any member thereof;
- (vi) in the case of any other person (not being an individual), to the person who manages or controls his affairs.

### Adjudication of benami property

Section 26 relates to adjudication of benami property. Sub-section (1) of this section provides that on receipt of a reference under sub-section (5) of section 24, the Adjudicating Authority shall issue notice, to furnish such documents, particulars or evidence as is considered necessary on a date to be specified therein, on the following persons:-



However, the Adjudicating Authority shall issue notice within a period of thirty days from the date on which a reference has been received. Further, the notice shall provide a period of time of not less than thirty days to the person to whom such notice is issued to furnish the information sought.

Sub-section (2) of this section provides that where such property is held jointly by more than one person, the Adjudicating Authority shall make endeavours to serve notice to all persons holding such property. However, where the notice is served on one of the aforesaid persons the service of notice shall not be invalid on the ground that the said notice was not served to all the persons holding the property.

Sub-section (3) of this section provides that the Adjudicating Authority shall, after considering the reply, if any, to

the notice issued under sub-section(1);making or causing to be made such inquiries and calling for such reports or evidence as it deems fit; and taking into account all relevant materials, provide an opportunity of being heard to the person specified as a benamidar therein, the Initiating Officer, and any other person who claims to be the owner of such property. Thereafter, the Adjudicating Authority shall pass an order holding the property not to be a benami property and revoking the attachment order; or holding the property to be a benami property and confirming the attachment order in all other cases.

Sub-section (4) of this section provides that where the Adjudicating Authority is satisfied that some part of the properties in respect of which reference has been made to him is benami property, but is not able to specifically identify such part, he shall record a finding to the best of his judgment as to which part or properties is held benami.

Sub-section (5) of this section provides that where in the course of proceedings before it, the Adjudicating Authority has reason to believe that a property, other than a property referred to him by the Initiating Officer is benami property, it shall provisionally attach the property and the property shall be deemed to be a property referred to it on the date of receipt of the reference under sub-section (5) of section 24.

Sub-section (6) of this section provides that the Adjudicating Authority may, at any stage of the proceedings, either on the application of any party, or suo moto, strike out the name of any party improperly joined or add the name of any person whose presence before the Adjudicating Authority may be necessary to enable it to adjudicate upon and settle all the questions involved in the reference.

Sub-section (7) of this section provides that no order under sub-section (3) shall be passed after the expiry of one year from the end of the month in which the reference under section 24 was received.

As per section 7 of the Act, the Central Government shall, by notification, appoint one or more Adjudicating Authorities to exercise jurisdiction, powers and authority conferred by or under this Act. An Adjudicating Authority shall consist of a Chairperson and at least two other Members.

### **Confiscation and vesting of benami property**

Section 27 deals with confiscation and vesting of benami property. Sub-section (1) of this section provides that where an order is passed in respect of any property under sub-section (3) of section 26 holding such property to be a benami property, the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating the property held to be a benami property. However, where an appeal has been filed against the order of the Adjudicating Authority, the confiscation of property shall be made subject to the order passed by the Appellate Tribunal under section 46. Further, confiscation of the property shall be made in accordance with such procedure as may be prescribed.

Sub-section (2) of this section provides that the above shall not apply to a property held or acquired by a person from the benamidar for adequate consideration, prior to the issue of notice under sub-section (1) of section 24 without his having knowledge of the benami transaction.

Sub-section (3) of this section provides that where an order of confiscation has been made, all the rights and title in such property shall vest absolutely in the Central Government free of all encumbrances and no compensation shall be payable in respect of such confiscation.

Sub-section (4) of this section provides that any right of any third person created in such property with a view to defeat the purposes of this Act shall be null and void.

Sub-section (5) of this section provides that where no order of confiscation is made upon the proceedings under this Act attaining finality, no claim shall lie against the Government.

### Management of properties confiscated

Section 28 relates to management of properties confiscated under this Act. Sub-section (1) of this section provides that the Administrator shall have the power to receive and manage the property, in relation to which an order of confiscation under sub-section (1) of section 27 has been made, in such manner and subject to such conditions, as may be prescribed.

Sub-section (2) of this section provides that the Central Government may, by order published in the Official Gazette, notify as many of its officers as it thinks fit, to perform the functions of Administrators.

Sub-section (3) of this section provides that the Administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is vested in the Central Government under sub-section (2) of section 27 in such manner and subject to such conditions as may be prescribed.

### Possession of the property

Section 29 relates to possession of the property. Sub-section (1) of this section provides that where an order of confiscation in respect of a property under subsection (1) of section 27 has been made, the Administrator shall proceed to take the possession of such property.

Sub-section (2) of this section provides that the Administrator shall, -

- (a) by notice in writing, order within seven days of the date of the service of notice any person, who may be in possession of the benami property, to surrender or deliver possession thereof to the Administrator or any other person duly authorised in writing by him in this behalf;
- (b) in the event of non-compliance of the order referred to in clause (a), or if in his opinion, taking over of immediate possession is warranted, for the purpose of forcibly taking over possession, requisition the service of any police officer to assist him and it shall be the duty such officer to comply with the requisition.

It may be noted that “Administrator” means an Income-tax Officer as defined in clause (25) of section 2 of the Income-tax Act, 1961

### Appellate Tribunal

Chapter V deals with the provisions relating to the Appellate Tribunal. Section 30 deals with establishment of Appellate Tribunal. The said section seeks to provide that the Central Government shall, by notification, establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authority and the authorities under this Act.

Section 40 lays down the procedure and powers of Appellate Tribunal. Subsection (1) of this section provides that the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.

### Appeal to High Court

Section 49 relates to appeal to High Court. Sub-section (1) of this section provides that any party aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

Sub-section (2) of this section provides that the High Court may entertain any appeal after the said period of



sixty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the period specified in sub-section (1).

Sub-section (3) of this section provides that where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

Sub-section (4) of this section provides that the appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Sub-section (5) of this section provides that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

Sub-section (6) of this section provides that the High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

Sub-section (7) of this section provides that the High Court may determine any issue which – (a) has not been determined by the Appellate Tribunal; or (b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

Sub-section (8) of this section provides that save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

### Special Courts

Section 50 relates to Special Courts. Sub-section (1) of this section provides that the Central Government, in consultation with the Chief Justice of the High Court, shall for trial of an offence punishable under this Act, by notification, designate one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification.

Sub-section (2) of this section provides that while trying an offence under this Act, a Special Court shall also try an offence other than an offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

Sub-section (3) of this section provides that the Special Court shall not take cognizance of any offence punishable under this Act except upon a complaint in writing made by - (i) the authority; or (ii) any officer of the Central Government or State Government authorised in writing by that Government by a general or special order made in this behalf.

Sub-section (4) of this section provides that every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made by the Special Court to conclude the trial within six months from the date of filing of the complaint.

### Offences and Prosecution

Chapter VII deals with the provisions relating to offences and prosecution. Section 53 relates to penalty for benami transaction. Sub-section (1) of this section provides that where any person enters into a benami transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, the beneficial owner, benamidar and any other person who abets or induces any person to enter into such benami transaction, shall be guilty of the offence of benami transaction.

Sub-section (2) of this section provides that whoever is found guilty of the offence of benami transaction referred to above shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five per cent. of the fair market value of the property.

Section 54 relates to penalty for false information. This section provides that any person who is required to furnish information under this Act knowingly gives false information to any authority or furnishes any false document in any proceeding under this Act, shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to five years and shall also be liable to fine which may extend to ten per cent. of the fair market value of the property.

Section 55 relates to previous sanction. This section provides that no prosecution shall be instituted against any person in respect of any offence under sections 3, 53 or section 54 without the previous sanction of the Board.

### Offences by Companies

Section 62 relates to consequences in case of offences by companies. Subsection (1) of this section provides that where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Sub-section (2) of this section provides that nothing contained in subsection (1) of this section shall render any person liable to punishment, if he proves that the contravention took place without his knowledge.

Sub-section (3) of this section provides that notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

It may be noted that for the purpose of section 62, a “Company” means a body corporate, and includes

- (i) A firm; and
- (ii) An association of persons or a body of individuals whether incorporated or not; and

“Director”, in relation to –

- (i) A firm, means a partner in the firm;
- (ii) Any association of persons or a body of individuals, means any member controlling the affairs thereof.

### LESSON ROUND-UP

- The Benami Transactions (Prohibition) Act, 1988 prohibits benami transactions and consequently prevent circumvention of law through unfair practices. It empowers the Government to confiscate benami property by following due procedure. It therefore promotes equity across all citizens. However, those who declare their benami properties under income declaration scheme will get immunity under the Benami Act.

- The Benami Transactions (Prohibition) Amendment Act, 2016 received the assent of the President on the 10th August, 2016 and came into effect from 1st November, 2016.
- Where any person enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall be punishable in accordance with the provisions contained in Chapter VII.
- Any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government.

### TEST YOURSELF

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. State the Salient Features of the Benami Transactions (Prohibition) Act, 1988
2. What is a Benami Transaction?
3. Discuss the attachment of property involved in benami transaction.
4. What are the penalties for Benami Property?
5. Write short notes on: (i) Benamidar (ii) Beneficial Owner.

### LIST OF FURTHER READINGS

- Bare Act - Benami Transactions (Prohibition) Act, 1988
- Bare Act - Depositories Act, 1996

### OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- <https://dea.gov.in/>
- <https://www.indiacode.nic.in/bitstream/123456789/1840/2/A198845.pdf>



### KEY CONCEPTS

■ Competition ■ Cartel ■ Consumer ■ Bid rigging ■ Enterprise ■ Anti-Competitive Agreement ■ Dominant Position ■ Combination ■ Competition Commission of India

### Learning Objectives

#### To understand:

- Competition Policy
- Anti-Competitive Agreements
- Abuse of Dominant Position
- Overview of Combination
- Regulation of Combinations
- Competition Advocacy
- Competition Commission of India
- Right to Legal Representation

### Lesson Outline

- Competition Law and Policy
- Competition Regime in India
- Anti-Competitive Agreement
- Abuse of Dominant Position
- Combination
- Director General
- Enquiry into Certain Agreements
- Enquiry into Dominant Position of Enterprise
- Enquiry into Combination by Commission
- Competition Commission of India
- Competition Advocacy
- Offences and penalties
- Appeal to Supreme Court
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Websites/ Video Links)

## REGULATORY FRAMEWORK

- Competition Act, 2002
- Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011
- Competition Commission of India (Lesser Penalty) Regulations, 2009
- Competition Commission of India (Determination of Cost of Production) Regulations, 2009
- Competition (Amendment) Act, 2023

## INTRODUCTION

There is a growing recognition that a flexible, dynamic and competitive private sector is essential to fostering sustained economic development. Promoting effective competition spurs firms to focus on efficiency and improves consumer welfare by offering greater choice of higher-quality products and services at lower prices. It also promotes greater accountability and transparency in government-business relations and decision making, helps reduce corruption, lobbying, and rent seeking. In addition, it provides opportunities for broadly based participation in the economy and for sharing in the benefits of economic growth.

The idea of competition has had, for two centuries or more, a powerful influence on the way we think about our society, the way we organise things and the way we conduct our own economic and personal lives. The competition being an essential element in the efficient working of markets encourages enterprise and efficiency and widens choice. By encouraging efficiency in industry, competition in the domestic market whether between domestic companies alone or between those and overseas companies also contribute to international competitiveness. The full benefits of competition are, however, felt in markets that are open to trade and investment.

Economic theory suggests that prices and quantities in a competitive market equilibrate to levels that generate efficient outcomes at a given point of time. Competition is therefore, beneficial as it provides to consumers wider choice and provides sellers with stronger incentives to minimize costs, so eliminating waste. Competition increases the likelihood that cost savings resulting from efficiency gains will be passed on to a firm's customers, who may be either final consumers or intermediary customers (in which case costs of those firms are also lowered). Ample empirical evidence supports these arguments. The importance of competition for achieving a higher rate of innovation and adoption of new technologies over time is critical for sustaining rapid growth. Yet it is not automatic and is not the same as *laissez faire*.

In fact, there are reasons to believe that less mature markets tend to be more, rather than less, vulnerable to anti-competitive practices than the markets of developed countries. Reasons include: (a) high "natural" entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; (b) asymmetries of information in both product and credit markets; and (c) a greater proportion of local (non-tradable) markets. Competition also serves to diffuse socio-economic power, broadening participation in economic, social, and political advances while ensuring opportunities for new entrepreneurs. Moreover, it can facilitate realization of the benefits for the domestic economy of integrating into international trade and investment patterns.

Several studies have demonstrated the stimulating effects of competitive markets in terms of growth and prosperity. William Lewis in his book, *The Power of Productivity* underlines this point forcefully with his observations on the growth of productivity in the late 1990s in the United States. The author has argued that more than technology and other factors, what matters above all is competition. Similarly, economist Paul London in his book, *The Competition Solution* concludes that heightened competition in the US over-shadowed tax cuts or new technologies in explaining the prosperity of the 1990s. Competitive pressures helped suppress inflation and

raise living standards through improved productivity. The author noted that competition from imports forced the steel and auto industry, among other manufacturers, to streamline, thereby pushing manufacturing productivity up by 4% a year. Competition has brought down real air fares, telephone rates and several other costs. Where jobs have been lost in one industry, these have been more than compensated by jobs created elsewhere; thus employment has not suffered but has shifted from losers to winners. This argument underlines across the board, the benefits of competition to a wide sections of society, including consumers, workers and many others.

### Competition and Economic Efficiency

A number of empirical studies found a positive relationship between competition and innovation, productivity and economic growth. P. Aghion and P. Howitt in *Endogenous Growth Theory* offered several theoretical situations where competition is conducive to innovation – Intensified product market competition could force managers to speed up the adoption of new technologies; Intensive product market competition with incumbent firms engaged in step by step innovative activities could enhance each firms incentive to acquire or increase its technological lead over its rivals and, if labour markets are flexible, competition will induce skilled workers to move to opportunities employing best practices and technologies. Competition also reduces slack by providing more incentives for managers and workers to increase efforts and improve efficiency. Therefore, the product market competition disciplines firms into efficient operation.

Nickel et. al. in his article *Competition and Corporate Performance* suggested three different channels of incentives – competition creates greater opportunities for comparing performance; a more competitive environment where price elasticity of demand tends to be higher, induces greater efforts among workers and managers for cost reducing improvements in productivity since improvements could generate larger increase in revenue and profits; and a more competitive environment forces managers to improve efficiency, because more intense the competition, greater the chances for inefficient to be extinguished.

*UK White Paper on World Class Competition Regime* clearly brings out the importance of competition in an increasingly innovative and globalised economy. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production.

Empirical evidences show that strong competition is closely linked to dynamic and efficient markets. The benefits of competitive forces for economic growth and consumer welfare are widely recognized and evidenced by several studies. Recently, an empirical study in the U.K. by the Centre for Competition Policy, University of East Anglia showed that prices were more than halved through competition in international telephony and airfares, and were significantly reduced in other areas. The survey also brought home the point that competition is not just about prices but is typically multi-faceted, bringing new ways of doing business and leading to technological and other advances.

Michel Porter in his recent work *Can Japan Compete?* shows that in Japan only those sectors characterized by strong domestic competition remain internationally competitive following the country's recent economic downturn, examples include cameras, automobiles and audio equipment. Many leading competition experts believe in the premise that, in the presence of competition, the market will achieve the objective of maximising welfare.

### COMPETITION, COMPETITION LAW AND COMPETITION POLICY

Competition is a complex and technical subject which does not lend itself to easy summary or concise clarification. Of late, with globalisation and opening of the markets worldwide, it has become a subject of great practical importance. It involves the establishment and development of concepts, legal principles and policies for the benefit of consumer interest. The principles and policies are applied to a wide range of private

agreements and arrangements, which commercial undertakings enter into for themselves or with each other. In addition, they also apply to the policies and directions of the Government.

In the absence of a generally accepted definition of the phenomenon of competition, it has to be regarded as the object fostered and protected by competition policy and law. The World Bank and OECD in its Report *A Framework for the Design and Implementation of Competition Law and Policy*, broadly defines the competition is “a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective, for example, profits, sales or market share.”

Competition can also be defined as a process of economic rivalry between market players to attract customers. These market players can be multinational or domestic companies, wholesalers, retailers, or even the neighborhood shopkeeper. In their pursuit to outdo rival enterprises, market players either adopt fair means (producing quality goods, being cost efficient, adopting appropriate technologies, etc.) or indulge in unfair measures (carrying out restrictive business practices – such as predatory pricing, exclusive dealing, tied selling, collusion, cartelisation, abuse of dominant position, etc.). However, in the interest of consumers, and the economy as a whole, it is necessary to promote an environment that facilitates fair competitive outcomes in the market, curb anti-competitive behaviour and discourage market players from adopting unfair measures.

#### ***What is competition in the market?***

***In common parlance, competition in the market means sellers striving independently for buyers’ patronage to maximize profit (or other business objectives). A buyer prefers to buy a product at a price that maximizes his benefits whereas the seller prefers to sell the product at a price that maximizes his profit.***

Competition refers to a situation in a market place in which firms/ entities or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, such as profits, sales, market share etc. By responding to demand for goods and services with lower prices and higher quality, competing businesses are pressured to reduce costs, innovate in processes and products, invest in technology and better managerial practices and increase productivity. This process leads to achievement of static, dynamic as also resource/ allocative efficiencies, sustainable economic growth, development, and poverty alleviation.

Competition is not an end unto itself, rather a means to achieve economic efficiency and welfare objectives. Importantly, competition is not automatic, and requires to be promoted, protected and nurtured through appropriate regulatory frameworks, by minimising market restrictions and distortions, and provision of related productive inputs such as infrastructure services, finance, human capital etc. However, a Competition Policy has to be evolved to imbibe the principles of competition in various endeavours of the Government, of course in alignment with the national strategic objectives, alongwith social, environmental, public safety, and other considerations.

Competition Policy means government measures, policies, statutes, and regulations including a competition law, aimed at promoting competitive market structure and behavior of entities in an economy. Competition Law is but a sub-set of the Competition Policy. The Raghavan Committee had observed that “*Competition law must emerge out of a national competition policy, which must be evolved to serve the basic goals of economic reforms by building a competitive market economy.*”

Following the Government’s resolve to enact a new competition law, a High Level Committee on Competition Policy and Law (the Raghavan Committee Report) was set up, which in its report recognised the need for a National Competition Policy and noted that:

*“An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation, and in which the abuse of market power is prevented mainly through competition. Where this is not possible, it requires the creation of a suitable regulatory*



*framework for achieving efficiency. In addition, competition law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities. Trade liberalisation alone is not sufficient to promote competition and there is a need for a separate competition policy.”*

The World Trade Organisation (WTO) defines competition policy as: “*the full range of measures that may be used to promote competitive market structures and behaviour, including but not limited to a comprehensive competition law dealing with anti-competitive practices of enterprises*”. World Bank also provides a definition of competition policy as: “*government measures that directly affect the behaviour of enterprises and the structure of industry. An appropriate competition policy includes both: (a) policies that enhance competition in local and national markets, and (b) competition law, also referred to as antitrust or antimonopoly law.*”

Competition Policy is a broader term which includes all government policies and laws whereas competition law is specific statute with a pre-defined mandate to adjudicate on violation(s) of the law. In the case of India, the Competition Act, 2002 deals with anti-competitive agreements such as price fixing, bid rigging, joint boycotts, etc; abusive practices undertaken by dominant entities such as predatory pricing, abusive conditions of supply, etc, and regulation of combinations. It would be seen that a competition law is a regulatory instrument to check the prevalence of anti-competitive practices whereas a competition policy is a proactive and positive effort to build a competition culture in an economy.

The World Bank and OECD in its Report *A Framework for the Design and Implementation of Competition Law and Policy* pointed out that a dynamic and competitive environment, underpinned by sound competition law and policy, is an essential characteristic of a successful market economy. Effective enforcement of competition law and active competition advocacy can also be powerful catalysts for successful economic restructuring. This in turn fosters flexibility and mobility of resources, which in the current global business environment are critical elements for the competitiveness of firms and industries across nations. Although the field of competition law and policy is evolving rapidly and includes many different viewpoints on specific issues, recognition is growing that effective competition law is important in shaping business culture and that its proper implementation needs to allow for the education of business people, government officials, the judiciary, and the interested public.

***The basic purpose of Competition Policy and law is to preserve and promote competition as a means of ensuring efficient allocation of resources in an economy. Competition policy typically has two elements: one is a set of policies that enhance competition in local and national markets. The second element is legislation designed to prevent anti-competitive business practices with minimal Government intervention, i.e., a competition law. Competition law by itself cannot produce or ensure competition in the market unless this is facilitated by appropriate Government policies. On the other hand, Government policies without a law to enforce such policies and prevent competition malpractices would also be incomplete.***

Competition policies cover a much broader set of instruments than competition law and typically include all policies aimed at increasing the intensity of competition or rivalry in local and national markets by lowering entry barriers and opportunities for harmful coordination, to ensure that markets work effectively and serve the interests of all citizens. Competition law is only a subset of a nation’s competition policies. Competition policies typically include pro-competition approaches to trade, investment, sectoral regulation, and consumer protection. The barriers to international or interregional trade, restrictions on Foreign Direct Investment (FDI) and technology transfers, restrictions on entry in regulated network utility industries, regulations affecting the registration of new enterprises and the taxation and corporate governance of existing enterprises and rules on marketing practices all influence the extent of competitive pressures in markets and so are appropriate concerns of competition policies. In many countries, competition authorities have become the focal point for consultations and putting forward pro-competition viewpoints across a broad range of policy areas.

Asian Development Bank in “During economic transition or reforms”, observed that “the benefits of an open market economy cannot be fully realized unless restrictions on competition are removed. Opening markets is not enough by itself for countries to begin reaping the benefits of competition; firms will still find incentives to engage in anti- competitive practices. Thus, the intended benefits of trade reforms may not be realized without active enforcement of competition law. This highlights the importance of having faith in the benefits of competition from an early stage of economic growth and of incorporating competition policy into the broader economic policy framework.”

Prof. Paul Geroski, former Chairman, Competition Commission of the United Kingdom observed that “Competition policy is about ensuring that markets are, and remain, competitive. This brings benefits to consumers eventually in all the ways. However, eliminating anti-competitive practices and dismantling monopoly positions that lead to abuses also benefit firms whose business suffers from these practices and abuses. It is worth emphasizing that many of the benefits that emanate from proper application of competition policy are felt in the first instance by firms. This is important for those who seem to think of competition policy as an added and unnecessary burden on business. Competition policy is sometimes a burden on business, but only on those businesses that try to unfairly disadvantage their rivals in ways that reduce their competitive abilities or incentives to compete vigorously”.

Hence, competition policy and competition law need to be distinguished. The former can be regarded as a genus, of which, the latter is specie.

## COMPETITION REGIME IN INDIA

### Historical Perspective

The Indian economy remained subject to controls and regulations for several decades, such as industrial licensing, foreign exchange restrictions, small scale industry protection, control on foreign investment and technologies, quantitative restrictions on imports, administered prices, and control on capital issues. The domestic industry was thus insulated from competition.

The economic consequences of this policy regime, though initially beneficial, were reflected in a poor rate of economic growth, low levels of productivity and efficiency, absence of international competitiveness, sub-optimal size of businesses, and outdated and inefficient technologies in various sectors.

India has therefore witnessed two phases of development process with different policy regimes and institutional frameworks. In the first phase, since independence, the transformation and development of the Indian economy took place within a planned, rigidly regulated and relatively closed economic framework. In the second phase, since 1991, when the country embarked upon reform process and embraced market oriented policies.

In the late 1980s and early 1990s, need for liberalization policies was recognized and a range of policy and regulatory reforms were initiated, such as delicensing of industry, shrinking the monopoly of the public sector industries (other than those where strategic and security concerns dominated), removal of quantitative restrictions on imports, market determined exchange rate, liberalization of foreign direct investment, capital market reforms, liberalizing the financial markets, reduction in small scale industry reservations, and a much greater role for the private sector in infrastructure industries such as power, port, transport and communications.

### Economic Reforms and Competition

The world economy has been experiencing a progressive international economic integration for the last half a century. There has been a marked acceleration in this process of globalisation and also liberalisation during the last three decades.

Since 1991, the Government of India has introduced a series of economic reforms, including policies of liberalisation, deregulation, disinvestment and privatisation. The seriousness of macroeconomic imbalances and unanimity towards reform rendered this possible. The broad thrust of the new policies was a move away from the centralised allocation of resources in some key sectors by the government to allocation by market forces. Private participation in economic development has emerged as an alternative to the state-oriented development strategy in the reform period.

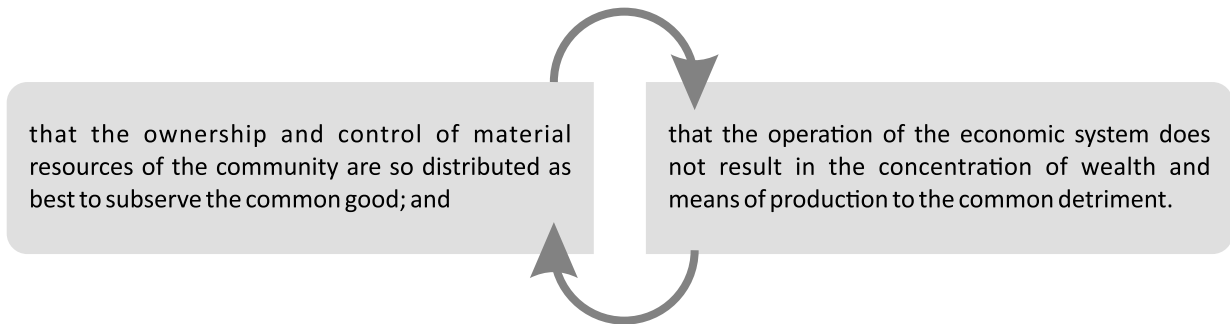
After a decade of reforms, restraints to competition such as state monopolies and protective measures and controls have been replaced by relatively more competitive and de-regulated open market policies. In the post reform period, the private sector participation in production and supply of utility services has increased substantially. Independent regulators have been established for many sectors such as road, power, telecommunications and insurance. These sectoral regulators have been empowered to determine sector specific entry conditions and eventually the level of competition. In nutshell, post reforms period witnessed an open market orientation in industrial policy, foreign trade policy, foreign investment policy and financial sector policy, infrastructure policy, etc.

After Independence, India pursued a strategy of planned economic development, with the objective of developing a broad industrial base to achieve speedy economic self-reliance and promoting social justice. The industrial policy assigned commanding heights of the economy to the public sector. The State exercised control over the direction, pattern and quantum of investments through the Industries (Development & Regulation) Act, 1951 and the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). A major part of the financial sector was also kept under Government control while a number of products were also subjected to price and distribution controls coupled with extensive reservations and concessions in favour of small-scale industry. The trade policy too affected competition by providing a high level of protection to domestic industry. These restrictions, which were in consonance with the National Strategic Policies at that time and relevant in the context of limited resources and need of checking monopolies and concentration of economic power, did nevertheless, impacted competition. However, gradually, and from 1980 onwards, incremental changes were brought in to usher in greater competition. The Industrial Policy Statement of 1980 introduced greater competition in the domestic market, technological up-gradation and modernisation. The major reforms initiated from 1991 onwards were, however, on a much broader scale, sweep and scope, and provided a new paradigm shift to economic growth in India, releasing new entrepreneurial energy and dynamism in the Indian industry, diversification of domestic production and stimulating exports, adding to the GDP growth.

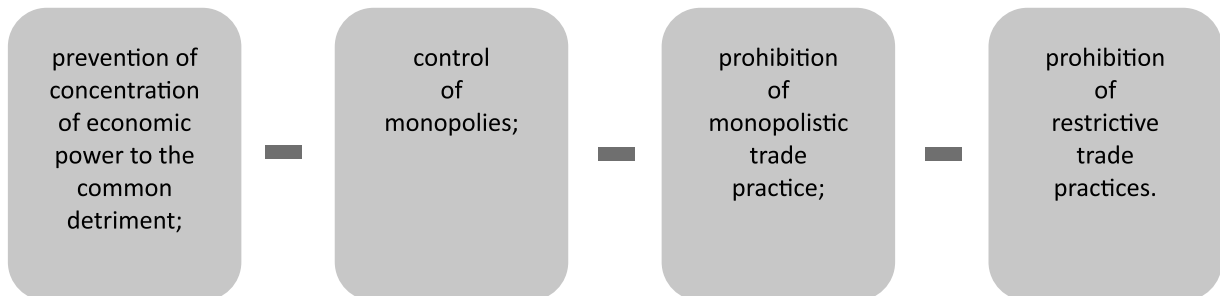
Since 1991 have witnessed significant changes in terms of opening of markets, factor mobility and regulatory environment. The benefits have been substantial and manifested in various segments of economy, e.g. telecom, civil aviation, transport, manufacturing, etc. However, the progress has been somewhat uneven, and so also the trickledown effects on the common man. Underlying this success is a structural shift in India's growth trajectory. Further, like many other similar economies under transition, there have been residual restraints and anti-competitive traits in several areas of economy. While the process of reforms is a continuing one, the pace and direction necessitates the introduction of an overarching National Competition Policy to realise the fuller growth potential of the economy.

### **Competition Law-Evolution and Development**

The first Indian competition law was enacted in 1969 and was christened as the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). The genesis of the MRTP Act, 1969 is traceable to Articles 38 and 39 of the Constitution of India. The Directive Principle of State Policy in those Articles lays down, inter-alia that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice - social, economic and political- shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing:



The principal objectives of the Act, as spelt out in the preamble were:



The MRTP Act, 1969 underwent amendments in 1974, 1980, 1982, 1984, 1986, 1988 and 1991. Major changes introduced in the 1982 and 1984 Amendment Acts were based on the recommendations of the Sachar Committee. The 1984 amendment introduced the concept of unfair trade practice under the Act. Far-reaching changes have been brought about by the 1991 amendment and these were made in the wake of new industrial policy of July, 1991 which is wedded to liberalisation, globalisation and de-regulation.

### Recommendations of Sachar Committee

The Government of India appointed a Committee in August, 1977 under the Chairmanship of Justice Rajinder Sachar to look into the simplification of the working of the companies and the MRTP Act. The Committee submitted its report in the year 1978 and as far as recommendations pertaining to the MRTP Act are concerned, far reaching changes were suggested by the Committee. For the first time, the Committee highlighted the need for introduction of suitable provisions to curb unfair trade practices.

In its view, the assumption that curbing monopolistic and restrictive trade practices and thereby preventing distortion of competition automatically results in the consumers getting a fair deal was only partly true. It was felt necessary to protect the consumers from practices adopted by trade and industry to mislead or dupe them.

The Committee pointed out that advertisements and sales promotion having become well established modes of modern business techniques, representations through such advertisements to the consumer should not become deceptive. If a consumer was falsely induced to enter into buying goods which do not possess the quality and did not have the cure for the ailment advertised, it was apparent that the consumer was being made to pay for quality of things on false representation. Such a situation could not be accepted.

Therefore, an obligation is to be cast on the seller to speak the truth when he advertises and also to avoid half-truths, the purpose being preventing false or misleading advertisements.

The Committee also noted that fictitious bargain was another common form of deception and many devices were used to lure buyers into believing that they were getting something for nothing or at a nominal value for

their money. The Committee observed: Prices may be advertised as greatly reduced and cut when in reality the goods may be sold at sellers regular prices. Advertised statements that could have two meanings, one of which is false, are also considered misleading. In America, it was held that statement that a tooth paste fights decay could be interpreted as a promise of complete protection and was thus deceptive. Mock-ups on television put up by companies including Colgate Palmolive had also received the attention of the Enforcement Agencies in America and have been held to be deceptive.

We cannot say that the type of misleading and deceptive practices which are to be found in other countries are not being practised in our country. Unfortunately our Act is totally silent on this aspect. The result is that the consumer has no protection against false or deceptive advertisements. Any misrepresentation about the quality of a commodity or the potency of a drug or medicine can be projected without much risk. This has created a situation of a very safe haven for the suppliers and a position of frustration and uncertainty for the consumers.

It should be the function of any consumer's legislation to meet this challenge specifically. Consumer protection must have a positive and active role.

Accordingly, the Committee specified certain unfair trade practices which were notorious and suggested prohibition of such practices. The main category of unfair trade practices recommended for prohibition by the Sachar Committee were: (a) misleading advertisements and false representations (b) bargain sale, bait and switch selling; (c) offering gifts or prizes with the intention of not providing them and conducting promotional contests; (d) supplying goods not conforming to safety standards; and (e) hoarding and destruction of goods.

In India, by an amendment to the MRTP Act in the year 1984 Part B Unfair Trade Practices was added to Chapter V. It may be recalled that Part A of Chapter V deals with registration of agreements relating to restrictive trade practices. Section 36A, 36B, 36C, 36D and 36E are relevant for the purposes of understanding the main provisions relating to unfair trade practices.

### Recommendations of Raghavan Committee

As India moved steadily on the path of reforms comprising of Liberalisation, Privatisation and Globalisation, it did away with the MRTP Act, 1969 as it was realised that the Act had outlived its utility and control of monopoly was not appropriate to support the growth aspirations of more than 1 billion Indians. Indeed, need was felt to promote and sustain competition in the market place. The then Finance Minister (Shri.Yashwant Sinha) in the budget speech in 1999 had announced:

*“The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. Government has decided to appoint a Committee to examine this range of issues and propose a modern Competition Law suitable for our conditions.”*

Accordingly, a High Level Committee on Competition Policy and Law was constituted under Chairmanship of Mr. S.V.S Raghavan. The Committee submitted its report on 22nd May 2000 recommending replacement of the MRTP Act with a modern competition law for fostering competition and for eliminating anticompetitive practices in the economy. After consulting the stakeholders, Competition Bill, 2001 was introduced in the Parliament which eventually became the Competition Act, 2002.

The purpose of the Competition Act, as stated in its preamble is: *“An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.”*

### *Why do we need competition in the market?*

*Competition is now universally acknowledged as the best means of ensuring that consumers have access to the broadest range of services at the most competitive prices. Producers will have maximum incentive to innovate, reduce their costs and meet consumer demand. Competition thus promotes allocative and productive efficiency. But all this requires healthy market conditions and governments across the globe are increasingly trying to remove market imperfections through appropriate regulations to promote competition.*

## COMPETITION ACT, 2002

*The Competition Act, 2002 has been enacted to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participant in the markets in India and for matters connected therewith or incidental thereto.*

The provisions relating to prohibition of anti-competitive agreements and abuse of dominant position came into effect from May 20, 2009 and the merger regulation regime has been enforced with effect from June 1, 2011. The Competition Act, 2002 last amended by Competition (Amendment) Act, 2023.

### Scheme of the Act

The Scheme of the Act has been split into nine chapters indicated hereunder: Chapter I contains preliminary provisions viz. Short title, extent and Definition clauses; Chapter II provides for substantive laws i.e. Anti-Competitive Agreements, Abuse of Dominance and Regulation of Combinations; Chapter III contains provisions relating to Establishment of Commission, Composition of Commission, Selection of Committee for Chairperson and other Members, Term of Office of Chairperson etc. Chapter IV elaborately provides the Duties, Powers and Functions of the Commission; Chapter V provides for the Duties of Director General; Chapter VI stipulates Penalties for Contravention of Orders of Commission, Failure to Comply with Directions of Commission and Director-General, Making False Statement or Omission to Furnish Material Information etc; Chapter VII deals with Competition Advocacy; Chapter VIII contains provisions relating to Finance, Accounts and Audit, Chapter VIII A contains provisions relating to “Appellate Tribunal” and Chapter IX contains Miscellaneous provisions.

Hon’ble Supreme Court in **CCI v. Bharati Airtel Civil Appeals arising out of SLP (C) No. 35574 of 2017 & Ors December 05, 2018** observed that in the wake of globalisation and keeping in view the economic development of the country, responding to opening of its economy and resorting to liberalisation, need was felt to enact a law that ensures fair competition in India by prohibiting trade practices which cause an appreciable adverse effect on competition within markets in India and for establishment of an expert body in the form of Competition Commission of India, which would discharge the duty of curbing negative aspects of competition, the Competition Act, 2002 has been enacted by the Parliament.

The Act deals with three kinds of practices which are treated as anti-competitive and are prohibited. These are:

- a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;
- b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and



- c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain.

Hon'ble Supreme Court in ***Competition Commission of India v. SAIL (2010) 10 SCC 744*** observed that it is well settled that the Competition Act, 2002 is a regulatory legislation enacted to maintain free market so that the Adam Smith's concept of invincible hands operate unhindered in the background. Further it is clear from the Statement of objects and reason that this law was foreseen as a tool against concentration of unjust monopolistic powers at the hands of private individuals which might be detrimental for freedom of trade. Competition law in India aims to achieve highest sustainable levels of economic growth, entrepreneurship, employment, higher standards of living for citizens, protect economic rights for just, equitable, inclusive and sustainable economic and social development, promote economic democracy, and support good governance by restricting rent seeking practices.

Therefore an interpretation should be provided which is in consonance with the aforesaid objectives.

As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

In the case of ***Excel Crop Care Limited v. Competition Commission of India and Another (Civil Appeal No. 2480 of 2014) judgement dated May 08, 2017*** the Hon'ble Supreme Court of India observed that the Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. It is to ensure that there is a healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure 'level playing field' for all market players that helps markets to be competitive. It sets 'rules of the game' that protect the competition process itself, other than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare. How these benefits accrue is explained in ASEAN Regional Guidelines on Competition Policy.

## ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY

In the case of ***Excel Crop Care Limited v. Competition Commission of India and Another*** the Hon'ble Supreme Court of India observed that the Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. The benefits of which are explained in ASEAN Regional Guidelines on Competition Policy and are as follows:

### “2.2 Main Objectives and Benefits of Competition Policy”

**2.2.1 Economic efficiency:** *Economic efficiency refers to the effective use and allocation of the economy's resources. Competition tends to bring about enhanced efficiency, in both a static and a dynamic sense, by disciplining firms to produce at the lowest possible cost and pass these cost savings on to consumers, and motivating firms to undertake research and development to meet customer needs.*

**2.2.1.2 Economic growth and development:** *Economic growth—the increase in the value of goods and services produced by an economy – is a key indicator of economic development. Economic development refers to a broader definition of an economy’s well-being, including employment growth, literacy and mortality rates and other measures of quality of life. Competition may bring about greater economic growth and development through improvements in economic efficiency and the reduction of wastage in the production of goods and services. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth. Over time, sustained economic growth tends to lead to an enhanced quality of life and greater economic development.*

**2.2.1.3 Consumer Welfare:** *Competition policy contributes to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Consumer welfare protection may be required in order to redress a perceived imbalance between the market power of consumers and producers. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction costs. Competition policy may serve as a complement to consumer protection policies to address such market failures.”*

**The aforesaid guidelines also spell out few more benefits of such laws incorporating competition policies by highlighting the following advantages:**

*“2.2.2 In addition, competition policy is also beneficial to developing countries. Due to worldwide deregulation, privatisation and liberalisation of markets, developing countries need a competition policy, in order to monitor and control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies.*

*2.2.3 Besides contributing to trade and investment policies, competition policy can accommodate other policy objectives (both economic and social) such as the integration of national markets and promotion of regional integration, the promotion or protection of small businesses, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environment protection, fighting inflation, job creation, equal treatment of workers according to race and gender or the promotion of welfare of particular consumer groups.*

*In particular, competition policy may have a positive impact on employment policies, reducing redundant employment (which often results from inefficiencies generated by large incumbents and from the fact that more dynamic enterprises are prevented from entering the market) and favouring jobs creation by new efficient competitors.*

*2.2.4 Competition policy complements trade policy, industrial policy and regulatory reform. Competition policy targets business conduct that limits market access and which reduces actual and potential competition, while trade and industrial policies encourage adjustment to the trade and industrial structures in order to promote productivity-based growth and regulatory reform eliminates domestic regulation that restricts entry and exit in the markets. Effective competition policy can also increase investor confidence and prevent the benefits of trade from being lost through anticompetitive practices. In this way, competition policy can be an important factor in enhancing the attractiveness of an economy to foreign direct investment, and in maximizing the benefits of foreign investment.”*

**Further, the Apex Court inter alia observed that in fact, there is broad empirical evidence supporting the proposition that competition is beneficial for the economy. Economists agree that it has an important role to play in improving productivity and, therefore, the growth prospects of an economy. It is achieved in the following manner:**

**“International Competition Network - Economic Growth and Productivity:**

Competition contributes to increased productivity through:



**Pressure on firms to control costs:** *In a competitive environment, firms must constantly strive to lower their production costs so that they can charge competitive prices, and they must also improve their goods and services so that they correspond to consumer demands.*

**Easy market entry and exit:** *Entry and exit of firms reallocates resources from less to more efficient firms. Overall productivity increases when an entrant is more efficient than the average incumbent and when an exiting firm is less efficient than the average incumbent. Entry – and the threat of entry –incentivizes firms to continuously improve in order not to lose market share to or be forced out of the market by new entrants.*

**Encouraging innovation:** *Innovation acts as a strong driver of economic growth through the introduction of new or substantially improved products or services and the development of new and improved processes that lower the cost and increase the efficiency of production. Incentives to innovate are affected by the degree and type of competition in a market.*

**Pressure to Improve Infrastructure:** *Competition puts pressure on communities to keep local producers competitive by improving roads, bridges, docks, airports, and communications, as well as improving educational opportunities.*

**Benchmarking:** *Competition also can contribute to increased productivity by creating the possibility of benchmarking. The productivity of a monopolist cannot be measured against rivals in the same geographic market, but a dose of competition quickly will expose inferior performance. A monopolist may be content with mediocre productivity but a firm battling in a competitive market cannot afford to fall behind, especially if the investment community is benchmarking it against its rivals.” Productivity is increased through competition by putting pressure on firms to control costs as the producers strive to lower their production costs so that they can charge competitive prices. It also improves the quality of their goods and services so that they correspond to consumers’ demands. Competition law enforcement deals with anti-competitive practices arising from the acquisition or exercise of undue market power by firms that result in consumer harm in the forms of higher prices, lower quality, limited choices and lack of innovation. Enforcement provides remedies to avoid situations that will lead to decreased competition in markets. Effective enforcement is important not only to sanction anti-competitive conduct but also to deter future anti-competitive practices.*

Keeping in view the aforesaid objectives that need to be achieved, Indian Parliament enacted Competition Act, 2002. Need to have such a law became all the more important in the wake of liberalisation and privatisation as it was found that the law prevailing at that time, namely, Monopolistic Restrictive Trade Practices Act, 1969 was not equipped adequately enough to tackle the competition aspects of the Indian economy. The law enforcement agencies, which include CCI and COMPAT, have to ensure that these objectives are fulfilled by curbing anti-competitive agreements.

## IMPORTANT DEFINITIONS

**“Acquisition”** means, directly or indirectly, acquiring or agreeing to acquire—

- i. shares, voting rights or assets of any enterprise; or
- ii. control over management or control over assets of any enterprise. [Section 2(a)]

**“Agreement”** includes any arrangement or understanding or action in concert, —

- i. whether or not, such arrangement, understanding or action is formal or in writing; or
- ii. whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings. [Section 2(b)]

**“Appellate Tribunal”** means the National Company Law Appellate Tribunal referred to in sub-section (1) of section 53A. [Section 2(ba)]

**“Cartel”** includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services. [Section 2(c)]

The nature of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelisation results in higher prices, poor quality and less or no choice for goods or/and services.

An international cartel is said to exist, when not all of the enterprises in a cartel are based in the same country or when the cartel affects markets of more than one country.

An import cartel comprises enterprises (including an association of enterprises) that get together for the purpose of imports into the country.

An export cartel is made up of enterprises based in one country with an agreement to cartelize markets in other countries. In the Competition Act, cartels meant exclusively for exports have been excluded from the provisions relating to anti-competitive agreements. This is because such cartels do not adversely affect markets in India and are hence outside the purview of the Competition Act. If there is effective competition in the market, cartels would find it difficult to be formed and sustained.

Some of the conditions that are conducive to cartelization are:

- high concentration - few competitors
- high entry and exit barriers
- homogeneity of the products (similar products)
- similar production costs
- excess capacity
- high dependence of the consumers on the product
- history of collusion

**“Chairperson”** means the Chairperson of the Commission appointed under sub-section (1) of section 8. [Section 2(d)]

**“Commission”** means the Competition Commission of India established under sub-section (1) of section 7. [Section 2(e)]

**“Commitment”** means the commitment referred to in section 48B. [Section 2(ea)]

**“Consumer”** means any person who—

- i. buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;
- ii. hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised,

or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use. [Section 2(f)]

**“Director General”** means the Director General appointed under sub-section (1) of section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section. [Section 2(g)]

**“Enterprise”** means a person or a department of the Government, including units, divisions, subsidiaries, who or which is, or has been, engaged in any economic activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

*Explanation.* – For the purposes of this clause, —

- a. “activity” includes profession or occupation;
- b. “article” includes a new article and “service” includes a new service;
- c. “unit” or “division”, in relation to an enterprise, includes—
  - a. a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
  - b. any branch or office established for the provision of any service. [Section 2(h)]

**“Goods”** means goods as defined in the Sale of Goods Act, 1930 and includes—

- a. products manufactured, processed or mined;
- b. debentures, stocks and shares after allotment;
- c. in relation to goods supplied, distributed or controlled in India, goods imported into India. Section 2(i)]

**“Member”** means a Member of the Commission appointed under sub-section (1) of section 8 and includes the Chairperson. [Section 2(j)]

**“Notification”** means a notification published in the Official Gazette. [Section 2(k)]

**“Party”** includes a consumer or an enterprise or a person or an information provider, or a consumer association or a trade association, or the Central Government or any State Government or any statutory authority, as the case may be, and shall include an enterprise or a person against whom any inquiry or proceeding is instituted; and any enterprise or person impleaded by the Commission to join the proceedings. [Section 2(ka)]

**“Person”** includes—

- i. an individual;
- ii. a Hindu undivided family;
- iii. a company;
- iv. a firm;
- v. an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- vi. any corporation established by or under any Central, State or Provincial Act or a Government company

as defined in clause (45) of section 2 of the Companies Act, 2013;

- vii. any body corporate incorporated by or under the laws of a country outside India;
- viii. a co-operative society registered under any law relating to co-operative societies;
- ix. a local authority;
- x. every artificial juridical person, not falling within any of the preceding sub-clauses. [Section 2(l)]

**“Practice”** includes any practice relating to the carrying on of any trade by a person or an enterprise. [Section 2(m)]

**“Prescribed”** means prescribed by rules made under this Act. [Section 2(n)]

**“Price”**, in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing. [Section 2(o)]

**“Public Financial Institution”** means public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013 and includes a State Financial Corporation, State Industrial Corporation or State Investment Corporation. [Section 2(p)]

**“Regulations”** means the regulations made by the Commission under section 64. [Section 2(q)]

**“Relevant Market”** means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. [Section 2(r)]

**“Relevant Geographic Market”** means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. [Section 2(s)]

**“Relevant Product Market”** means a market comprising of all those products or services—

- i. which are regarded as inter-changeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use; or
- ii. the production or supply of, which are regarded as interchangeable or substitutable by the supplier, by reason of the ease of switching production between such products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. [Section 2(t)]

**“Service”** means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising. [Section 2(u)]

**“Settlement”** means the settlement referred to in section 48A. [Section 2(ua)]

**“Shares”** means shares in the share capital of a company carrying voting rights and includes—

- i. any security which entitles the holder to receive shares with voting rights;
- ii. stock except where a distinction between stock and share is expressed or implied. [Section 2(v)]

**“Statutory Authority”** means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production

or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto. [Section 2(w)]

**“Trade”** means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services. [Section 2(x)]

**“Turnover”** includes value of sale of goods or services. [Section 2(y)]

**Words and Expressions used but not defined in this Act and defined in the Companies Act, 2013 shall have the same meanings respectively assigned to them in that Act. [Section 2(z)]**

## PROHIBITION OF CERTAIN AGREEMENTS

Section 3 deals with anti-competitive agreements. Section 3(1) provides that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

As per Section 3(2) any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

Section 3(3) states that any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

- a) directly or indirectly determines purchase or sale prices;
- b) limits or controls production, supply, markets, technical development, investment or provision of services;
- c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition.

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it participates or intends to participate in the furtherance of such agreement.

*Explanation.* —For the purposes of this sub-section, “*bid rigging*” means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

### Bid rigging is anti-competitive

Bidding, as a practice, is intended to enable the procurement of goods or services on the most favourable terms and conditions. Invitation of bids is resorted to both by Government (and Government entities) and private

bodies (companies, corporations, etc.). But the objective of securing the most favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.

Some of the most commonly adopted ways in which collusive bidding or bid rigging may occur are:

- agreements to submit identical bids
- agreements as to who shall submit the lowest bid, agreements for the
- submission of cover bids (voluntarily inflated bids)
- agreements not to bid against each other,
- agreements on common norms to calculate prices or terms of bids
- agreements to squeeze out outside bidders
- agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis.

If bid rigging takes place in Government tenders, it is likely to have severe adverse effects on its purchases and on public spending. Bid rigging or collusive bidding is treated with severity in the law. The presumptive approach reflects the severe treatment.

Section 3(4) provides that any other agreement amongst enterprises or persons including but not restricted to agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including –

- a) tie-in arrangement;
- b) exclusive dealing agreement;
- c) exclusive distribution agreement;
- d) refusal to deal;
- e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Provided that nothing contained in this sub-section shall apply to an agreement entered into between an enterprise and an end consumer.

*Explanation.* —For the purposes of this sub-section, —

- a) **“Tie-In Arrangement”** includes any agreement requiring a purchaser of goods or services, as a condition of such purchase, to purchase some other distinct goods or services;
- b) **“Exclusive Dealing Agreement”** includes any agreement restricting in any manner the purchaser or the seller, as the case may be, in the course of his trade from acquiring or selling or otherwise dealing in any goods or services other than those of the seller or the purchaser or any other person, as the case may be;
- c) **“Exclusive Distribution Agreement”** includes any agreement to limit, restrict or withhold the output or supply of any goods or services or allocate any area or market for the disposal or sale of the goods or services;

- d) **“Refusal to Deal”** includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods or services; are sold or from whom goods or services are bought;
- e) **“Resale Price Maintenance”** includes, in case of any agreement to sell goods or provide services, any direct or indirect restriction that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

***It may be noted that Section 3 shall not restrict —***

- i. the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—
  - a. the Copyright Act, 1957;
  - b. the Patents Act, 1970;
  - c. the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
  - d. the Geographical Indications of Goods (Registration and Protection) Act, 1999;
  - e. the Designs Act, 2000;
  - f. the Semi-conductor Integrated Circuits Layout-Design Act, 2000;
  - g. any other law for the time being in force relating to the protection of other intellectual property rights.
- ii. the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

***What Is an Anti-Competitive Agreement?***

***An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include, but are not limited to:-***

- ***agreement to limit production and/or supply;***
- ***agreement to allocate markets;***
- ***agreement to fix price;***
- ***bid rigging or collusive bidding;***
- ***conditional purchase/ sale (tie-in arrangement);***
- ***exclusive supply / distribution arrangement;***
- ***resale price maintenance; and***
- ***refusal to deal.***

**PROHIBITION OF ABUSE OF DOMINANT POSITION**

According to Section 4(1) of the Act, no enterprise or group shall abuse its dominant position.

Section 4(2) states that there shall be an abuse of dominant position under sub-section (1), if an enterprise or a group, —

- a. directly or indirectly, imposes unfair or discriminatory—
  - i. condition in purchase or sale of goods or service; or
  - ii. price in purchase or sale (including predatory price) of goods or service.
- b. limits or restricts—
  - i. production of goods or provision of services or market therefor; or
  - ii. technical or scientific development relating to goods or services to the prejudice of consumers; or

*Explanation.* —For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such condition or price which may be adopted to meet the competition; or

- c. indulges in practice or practices resulting in denial of market access in any manner; or
- d. makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- e. uses its dominant position in one relevant market to enter into, or protect, other relevant market.

*Explanation.* — For the purposes of this section, the expression—

“Dominant Position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

- i. operate independently of competitive forces prevailing in the relevant market; or
- ii. affect its competitors or consumers or the relevant market in its favour.

“Predatory Price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

“Group” means two or more enterprises where one enterprise is directly or indirectly, in a position to—

- i. exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
- ii. appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
- iii. control the management or affairs of the other enterprise.

#### ***What Constitutes Abuse of Dominance?***

***Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumers or the market in its favour. Abuse of dominant position impedes fair competition between firms, exploits consumers and makes it difficult for the other players to compete with the dominant undertaking on merit. Abuse of dominant position includes:***

- i. imposing unfair conditions or price,***
- ii. predatory pricing,***
- iii. limiting production/market or technical development ,***



- iv. creating barriers to entry,*
- v. applying dissimilar conditions to similar transactions,*
- vi. denying market access, and*
- vii. using dominant position in one market to gain advantages in another market.*

In the case of *Mr. Umar Javeed and Others v. Google LLC and Another in Case No. 39 of 2018*, the Competition Commission of India (CCI) vide its Order dated 20th October, 2022 inter alia observed that the Commission has carefully perused the provisions of Section 4 of the Act and on a holistic consideration thereof, it is observed that “dominant position” under the Act has been defined as meaning a position of strength, enjoyed by an enterprise, in the relevant market which enables it to operate independently of competitive forces or to affect its competitors or consumers in its favour. Thus, once an entity is found to be dominant in the relevant market, the Act recognizes its ability to adversely affect competition in the market unilaterally through its conducts. As such, the dominant enterprise is clothed with a special responsibility not to indulge in the conducts which are enumerated in Section 4(2) of the Act. Resultantly, once a dominant undertaking is found to have indulged in any of the acts provided in Section 4(2) of the Act, the contravention of the Act stands established. This is further evident from the phraseology used in Section 4(2) of the Act which, inter alia, provides that there shall be an abuse of dominant position if an enterprise directly or indirectly “imposes” unfair or discriminatory condition/ price in purchase or sale of goods or services. The moment there is any imposition of any unfair or discriminatory condition by a dominant player, the statutory prohibitions shall trigger. The same is true for other instances of abuse as enshrined in Section 4(2) of the Act as well and the same also have to be read in this manner, which is consistent with the avowed objectives of the Act..... .

## COMBINATION

The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if –

- a. any acquisition where –
  - i. the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have, –
    - A. either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
  - ii. the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have, –
    - A. either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

- B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or
- b. acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—
  - i. the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have, —
    - A. either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
  - ii. the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have, —
    - A. either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or
- c. any merger or amalgamation in which—
  - i. the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have, —
    - A. either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
  - ii. the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have, —
    - A. either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India.
- d. value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds rupees two thousand crore:

Provided that the enterprise which is being acquired, taken control of, merged or amalgamated has such substantial business operations in India as may be specified by regulations.

- e. notwithstanding anything contained in clause (a) or clause (b) or clause (c), where either the value of assets or turnover of the enterprise being acquired, taken control of, merged or amalgamated in India is not more than such value as may be prescribed, such acquisition, control, merger or amalgamation, shall not constitute a combination under section 5.

*Explanation.* —For the purposes of section 5 —

- a. “Control”** means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—
- i. one or more enterprises, either jointly or singly, over another enterprise or group; or
  - ii. one or more groups, either jointly or singly, over another group or enterprise;
- b. “Group”** means two or more enterprises where one enterprise is directly or indirectly, in a position to —
- i. exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
  - ii. appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
  - iii. control the management or affairs of the other enterprise;
- c. “Turnover”** means the turnover certified by the statutory auditor on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6 and such turnover in India shall be determined by excluding intra-group sales, indirect taxes, trade discounts and all amounts generated through assets or business from customers outside India, as certified by the statutory auditor on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6;
- d. “Value of Transaction”** includes every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation;
- e. the Value of Assets** shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed combination falls and if such financial statement has not yet become due to be filed with the Registrar under the Companies Act, 2013 then as per the statutory auditor’s report made on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights under the laws provided in sub-section (5) of section 3;
- f.** where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets or turnover or value of transaction as may be applicable, of the said portion or division or business or attributable to it, shall be the relevant assets or turnover or relevant value of transaction for the purpose of applicability of the thresholds under section 5.

**What is Combination?**

**Broadly, combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and outside India. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination shall be void.**

**THRESHOLDS FOR COMBINATION**

On March 4, 2016, the Central Government issued notifications pertaining to the statutory thresholds for the purposes of “combinations” under Section 5 of the Competition Act, 2002 (“Act”).

However, pursuant to Notification No. S.O. 675(E) dated March 4, 2016, the value of assets and the value of turnover has been enhanced by 100% for the purposes of Section 5 of the Act. Accordingly, the revised thresholds for notification to the Competition Commission of India (“CCI/ or Commission”) are:

THRESHOLDS FOR FILING NOTICE				
		Assets		Turnover
Enterprise Level	India	>2000 INR crore	OR	>6000 INR crore
	Worldwide with India Leg	>USD 1 bn with at least > 1000 INR crore in India		>USD 3 bn with at least > 3000 INR crore in India
OR				
Group Level	India	>8000 INR crore	OR	>24000 INR crore
	Worldwide with India leg	>USD 4 bn with at least >1000 INR crore in India		>USD 12 bn with at least > 3000 INR crore in India

*De Minimis Exemption/ Target Exemption:* Pursuant to Notification No. S.O. 988(E) dated March 27, 2017, the Central Government, in public interest, has exempted the enterprises being parties to — (a) any acquisition referred to in clause (a) of section 5 of the Competition Act; (b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in clause (b) of section 5 of the Competition Act; and (c) any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act, where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty (350) crores in India or turnover of not more than rupees one thousand (1000) crores in India, from the provisions of section 5 of the said Act for a period of five years from the date of publication of this notification in the official gazette. Aforesaid Notification was published on March 29, 2017 in official gazette. De Minimis/Target Exemption was first notified by Central Government in 2011 and was initially applicable to acquisitions only. Thereafter, De Minimis/Target Exemption was revised in 2016 by the Central Government. De Minimis/Target Exemption was further revised vide aforesaid Notification dated March 27, 2017 by increasing the scope of Target Exemption to include acquisitions, mergers and amalgamations.

Aforesaid revised De Minimis/Target Exemption issued by the Central Government vide Notification dated March 27, 2017 also clarifies that where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. Revised De Minimis/Target Exemption further provides that the value of the said portion or division or business shall be determined by taking the book value of the assets as shown, in the audited books of accounts of the enterprise or as per statutory auditor’s report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout design or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The said revised De Minimis/Target Exemption also provides that the turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

Accordingly, the revised threshold for availing of the De Minimis/Target exemption for acquisitions, mergers and amalgamations are:

THRESHOLDS FOR AVAILING OF DE MINIMISE EXEMPTION FOR ACQUISITIONS, MERGERS AND AMALGAMATIONS				
		Assets		Turnover
Target Enterprise	In India	≤ 350 INR crore	OR	≤ 1000 INR crore

### REGULATION OF COMBINATIONS

Section 6(1) provides that no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

Section 6(2) states that subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, after any of the following, but before consummation of the combination of—

- a. approval of the proposal relating to merger or amalgamation, referred to in clause (c) and clause (d) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
- b. execution of any agreement or other document for acquisition referred to in clause (a) and clause (d) of section 5 or acquiring of control referred to in clause (b) of that section.

*‘Explanation.* – For the purposes of this sub-section, **“Other Document”** means any document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets or if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights or where a public announcement has been made in accordance with the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 made under the Securities and Exchange Board of India Act, 1992 for acquisition of shares, voting rights or control such public document.

According to Section 6(2A), no combination shall come into effect until one hundred and fifty days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier.

Section 6(3) provides that the Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 29A, 30 and 31.

Section 6(4) states that notwithstanding anything contained in sub-sections (2A) and (3) and section 43A, if a combination fulfils such criteria as may be prescribed and is not otherwise exempted under this Act from the requirement to give notice to the Commission under sub-section (2), then notice for such combination may be given to the Commission in such form and on payment of such fee as may be specified by regulations, disclosing the details of the proposed combination and thereupon a separate notice under sub-section (2) shall not be required to be given for such combination.

As per Section 6(5) upon filing of a notice under sub-section (4) and acknowledgement thereof by the Commission, the proposed combination shall be deemed to have been approved by the Commission under sub-section (1) of section 31 and no other approval shall be required under sub-section (2) or sub-section (2A).

Section 6(6) provides that if within the period referred to in sub-section (1) of section 20, the Commission finds that the combination notified under sub-section (4) does not fulfil the requirements specified under that sub-section or the information or declarations provided are materially incorrect or incomplete, the approval under sub-section (5) shall be void ab initio and the Commission may pass such order as it may deem fit:

Provided that no such order shall be passed unless the parties to the combination have been given an opportunity of being heard.

Section 6(7) states that notwithstanding anything contained in this section and section 43A, upon fulfilment of such criteria as may be prescribed, certain categories of combinations shall be exempted from the requirement to comply with sub-sections (2), (2A) and (4).

Section 6(8) provides that notwithstanding anything contained in sub-sections (4), (5), (6) and (7)—

- i. the rules and regulations made under this Act on the matters referred to in these sub-sections as they stood immediately before the commencement of the Competition (Amendment) Act, 2023 and in force at such commencement, shall continue to be in force, till such time as the rules or regulations, as the case may be, made under this Act; and
- ii. any order passed or any fee imposed or combination consummated or resolution passed or direction given or instrument executed or issued or thing done under or in pursuance of any rules and regulations made under this Act shall, if in force at the commencement of the Competition (Amendment) Act, 2023, continue to be in force, and shall have effect as if such order passed or such fee imposed or such combination consummated or such resolution passed or such direction given or such instrument executed or issued or done under or in pursuance of this Act.

According to Section 6(9) the provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign portfolio investor, bank or Category I alternative investment fund, pursuant to any covenant of a loan agreement or investment agreement.

*Explanation.* – For the purposes of section 6, the expression –

- (a) **“Category I alternative investment fund”** has the same meaning as assigned to it under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 made under the Securities and Exchange Board of India Act, 1992;
- (b) **“foreign portfolio investor”** has the same meaning as assigned to it under the Securities and Exchange

Board of India (Foreign Portfolio Investors) Regulations, 2019 made under the Securities and Exchange Board of India Act, 1992.

### Open Offers, etc

Section 6A of the Act provides that nothing contained in section 6(2A) and section 43A shall prevent the implementation of an open offer or an acquisition of shares or securities convertible into other securities from various sellers, through a series of transactions on a regulated stock exchange from coming into effect, if—

- (a) the notice of the acquisition is filed with the Commission within such time and in such manner as may be specified by regulations; and
- (b) the acquirer does not exercise any ownership or beneficial rights or interest in such shares or convertible securities including voting rights and receipt of dividends or any other distributions, except as may be specified by regulations, till the Commission approves such acquisition in accordance with the provisions of sub-section (2A) of section 6 of the Act.

*Explanation.* — For the purposes of this section, “**open offer**” means an open offer made in accordance with the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 made under the Securities and Exchange Board of India Act, 1992.

## COMPETITION COMMISSION OF INDIA

### Establishment of Commission

Section 7 of the Act empowers the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the “Competition Commission of India”.

The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

The head office of the Commission shall be at such place as the Central Government may decide from time to time. The Commission may establish offices at other places in India.

### Composition of Commission

According to Section 8 the Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.

The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, technology, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.

The Chairperson and other Members shall be whole-time Members.

### Selection Committee for Chairperson and Members of Commission

Section 9 provides that the Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of—



The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.

#### **Term of office of Chairperson and other Members**

Section 9 of the Act states that the Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment:

Provided that the Chairperson or other Members shall not hold office as such after he has attained the age of sixty-five years.

A vacancy caused by the resignation or removal of the Chairperson or any other Member under section 11 or by death or otherwise shall be filled by fresh appointment in accordance with the provisions of sections 8 and 9.

The Chairperson and every other Member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in such form, manner and before such authority, as may be prescribed.

In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson, until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions.

#### **Resignation, Removal and Suspension of Chairperson and other Members**

Section 10(1) provides that the Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office:

It may be noted that the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.



As per Section 10(2) notwithstanding anything contained in sub-section (1), the Central Government may, by order, remove the Chairperson or any other Member from his office if such Chairperson or Member, as the case may be, –

- a) is, or at any time has been, adjudged as an insolvent; or
- b) has engaged at any time, during his term of office, in any paid employment; or
- c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
- d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or
- e) has so abused his position as to render his continuance in office prejudicial to the public interest; or has become physically or mentally incapable of acting as a Member.

(2) Notwithstanding anything contained in sub-section (2), no Member shall be removed from his office on the ground specified in clause (d) or clause (e) of that sub-section unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the Member, ought on such ground or grounds to be removed.

### **Restriction on Employment of Chairperson and other Members**

According to Section 12(1) of the Act, Chairperson and other Members shall, for a period of two years from the date on which they cease to hold office, not accept any employment in or advise as a consultant, retainer or in any other capacity whatsoever, or be connected with the management or administration of–

- a) any enterprise which is or has been a party to a proceeding before the Commission under this Act; or
- b) any person who appears or has appeared before the Commission under section 35.

Section 12(2) provides that notwithstanding anything contained in section 35, the Chairperson or any other Member after retirement or otherwise ceasing to be in service for any reason shall not represent for any person or enterprise before the Commission:

Provided that nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act, 2013.

### **Appointment of Director General**

Section 16 empowers the Commission with the prior approval of the Central Government appoint a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are, or may be, provided by or under this Act.

The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees shall be such as may be prescribed.

Every Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General.

The salary, allowances and other terms and conditions of service of the Director General and Additional, Joint, Deputy and Assistant Directors General or, such officers or other employees, shall be such as may be prescribed.

The Director General and Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall be appointed from amongst persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed.

### **Appointment of Secretary, Experts, Professionals and Officers and other Employees of Commission**

Section 17 empower the Commission to appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act.

The salaries and allowances payable to, and other terms and conditions of service of, the Secretary and officers and other employees of the Commission and the number of such officers and other employees shall be such as may be prescribed.

The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under this Act.

## **DUTIES, POWERS AND FUNCTIONS OF COMMISSION**

### **Duties and functions of Commission**

Section 18 of the Act deals with duties and functions of the Commission. It states that subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:

Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country:

Provided further that, the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with any statutory authority or department of Government.

### **Inquiry into Certain Agreements and Dominant Position of Enterprise**

Section 19(1) provides that the Commission may inquire into any alleged contravention of the provisions contained in section 39(1) or section 4(1) either on its own motion or on—

- a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
- b) a reference made to it by the Central Government or a State Government or a statutory authority.

It may be noted that the Commission shall not entertain an information or a reference unless it is filed within three years from the date on which the cause of action has arisen.

Provided further that an information or a reference may be entertained after the period specified in the first proviso if the Commission is satisfied that there had been sufficient cause for not filing the information or the reference within such period after recording its reasons for condoning such delay.

As per Section 19(2), without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

**The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:–**

- a) creation of barriers to new entrants in the market;
- b) driving existing competitors out of the market;
- c) foreclosure of competition;
- d) benefits or harm to consumers;
- e) improvements in production or distribution of goods or provision of services;
- f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

**The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:–**

- a) market share of the enterprise;
- b) size and resources of the enterprise;
- c) size and importance of the competitors;
- d) economic power of the enterprise including commercial advantages over competitors;
- e) vertical integration of the enterprises or sale or service network of such enterprises;
- f) dependence of consumers on the enterprise;
- g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- i) countervailing buying power;
- j) market structure and size of market;
- k) social obligations and social costs;
- l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
- m) any other factor which the Commission may consider relevant for the inquiry.

For determining whether a market constitutes a “relevant market” for the purposes of this Act, the Commission shall have due regard to the “relevant geographic market” and “relevant product market”.

**The Commission shall, while determining the “relevant geographic market”, have due regard to all or any of the following factors, namely: –**

- a) regulatory trade barriers;
- b) local specification requirements;

- c) national procurement policies;
- d) adequate distribution facilities;
- e) transport costs;
- f) language;
- g) consumer preferences;
- h) need for secure or regular supplies or rapid after-sales services;
- i) characteristics of goods or nature of services;
- j) costs associated with switching supply or demand to other areas.

**The Commission shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely: –**

- a) physical characteristics or end-use of goods <sup>1</sup>[or the nature of services];
- b) price of goods or service;
- c) consumer preferences;
- d) exclusion of in-house production;
- e) existence of specialised producers;
- f) classification of industrial products;
- g) costs associated with switching demand or supply to other goods or services;
- h) categories of customers.

In ***Competition Commission of India v. Coordination Committee of Artistes and Technicians of West Bengal Film and Television and Ors. – (2017) 5 SCC 17***, the Hon’ble Supreme Court referring to Section 3(4) of the Act, 2002 observed that while inquiring into any alleged contravention, whether by the Commission or by the Director General, and determining whether any agreement has an appreciable adverse effect on competition under Section 3, factors which are to be taken into consideration are mentioned in Section 19, which are creation of barriers to new entrants in the market; driving existing competitors out of the market; foreclosure of competition by hindering entry into the market; accrual of benefits to consumers; improvements in production or distribution of goods or provision of services; or promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services; relevant product market; relevant geographic market.

Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings behaviour and of preventing them from behaving independently of effective competitive pressure.

Therefore, the purpose of defining the “relevant market” is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specific use of such product is concerned. The relevant market within which to analyse market power or assess a given competition concern has both a product dimension and a geographic dimension. In this context, the relevant product market comprises all those products which are considered interchangeable or substitutable by buyers because of the products’ characteristics, prices and intended use. The relevant geographic market comprises all those regions or areas where buyers would be able or willing to find substitutes for the products in question. The relevant product and geographic market for a particular product may vary depending on the nature of the buyers and suppliers concerned by the conduct under examination and their position in the supply chain. For example, if the questionable conduct is concerned at the wholesale level, the relevant market has to be defined from the perspective of the wholesale buyers. On the other hand, if the concern is to examine the conduct at the retail level, the relevant market needs to be defined from the perspective of buyers of retail products.

### **Inquiry into Combination by Commission**

Section 20(1) states that the Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section 5 or acquisition of any control, shares, voting right or assets of an enterprise, merger or amalgamation referred to in clause (d) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India:

Provided that the Commission shall not initiate any inquiry under this sub-section after the expiry of one year from the date on which such combination has taken effect.

Section 20(2) provides that the Commission shall, on receipt of a notice under section 6(2) inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India.

According to Section 20(3) of the Act, notwithstanding anything contained in section 5, the Central Government shall, on the expiry of a period of two years from the date of commencement of this Act and thereafter every two years, in consultation with the Commission, <sup>4</sup>[enhance or reduce by notification, or keep at the same level, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, or such factors that in its opinion are relevant in this matter, the value of assets or the value of turnover or value of transaction], for the purposes of that section.

As per Section 20(4), for the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely: —

- a) actual and potential level of competition through imports in the market;
- b) extent of barriers to entry into the market;
- c) level of concentration in the market;
- d) degree of countervailing power in the market;

- e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- f) extent of effective competition likely to sustain in a market;
- g) extent to which substitutes are available or are likely to be available in the market;
- h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- j) nature and extent of vertical integration in the market;
- k) possibility of a failing business;
- l) nature and extent of innovation;
- m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

### Reference by Statutory Authority

Section 21 provides that where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission:

It may be noted that any statutory authority, may, suo motu, make a reference to the Commission on any issue that involves any provision of this Act or is related to promoting the objectives of this Act, as the case may be.

On receipt of a reference, the Commission shall give its opinion, within sixty days of receipt of such reference, to such statutory authority which shall consider the opinion of the Commission and thereafter, give its findings recording reasons therefor on the issues referred to in the said opinion.

### Reference by Commission

Section 21A states that where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of <sup>5</sup>[an Act] whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:

It may be noted that the Commission, may, suo motu, make a reference to a statutory authority on any issue that involves provisions of an Act whose implementation is entrusted to that statutory authority.

On receipt of a reference, the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.

### Procedure for Inquiry into Certain Agreements and Dominant Position of Enterprise

Section 26 deals with procedure for Inquiry into Certain Agreements and Dominant Position of Enterprise. It states that:

- 1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion

that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:

It may be noted that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

- 2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

In the case of ***Shrikant Ishwar Mendke (Informant) And Insurance Regulatory and Development Authority of India and Indian Institute of Insurance Surveyors and Loss Assessors (Opposite Parties) Competition Commission of India Case No. 15 of 2023 order dated July 26, 2023*** Hon'ble Competition Commission of India in its Order under Section 26(2) of the Competition Act, 2002 inter alia observed that IRDAI is a statutory body created under the IRDAI Act, 1999 and IISLA is a body promoted by IRDAI in the discharge of its functions under Section 14(2) (k) of the IRDAI Act, 1999. Further, membership of IISLA has been made mandatory by IRDAI for grant and renewal of licences for Surveyors and Loss Assessors. Such functions, being regulatory in nature, are not per se amenable within the jurisdiction of the Commission as held by the Hon'ble Delhi High Court in its judgment dated 02.06.2023 in the case of *Institute of Chartered Accountants of India v. Competition Commission of India & Ors.* The relevant extracts of the decision are as follows:

*"55..... The statutory authority, which is vested with the regulatory powers can alone exercise such powers. The Competition Act does not contemplate the CCI to act as an appellate court or a grievance redressal forum against such decisions, which are taken by other regulators, in exercise of their statutory powers and are not interfaced with trade or commerce. A statutory body may in course of its functions, also make decisions which involve trade and commerce. As an illustration, the concerned body may purchase equipment and consumables or avail services of professionals. There is no cavil that any decision in this regard may, if it falls foul of the provisions of the Competition Act, be examined by the CCI."*

*"62. It is relevant to state that there are several statutory corporations and bodies, which are constituted under legislative enactments and are charged with specific functions. Some of them may also involve providing of services. If those economic activities are not a part of its regulatory functions, the same would obviously be subject to scrutiny by the CCI. However, a decision in exercise of regulatory powers, is required to be taken by the regulator and its discretion to do so can only be fettered by the provisions of the statute, which clothes the regulator with such powers. The regulatory powers are not subject to review by the CCI."*

*"66. It is important to note that the CCI's power is for regulating of markets; it does not extend to addressing any grievance regarding arbitrary action by any statutory authority...." Resultantly, the Commission is of the opinion that the alleged anti-competitive conduct by the Opposite Parties are outside the ambit of the provisions of the Act and no case of contravention of the provisions of the Act is made out. The Information filed is directed to be closed forthwith in terms of the provisions of Section 26(2) of the Act. Consequently, no case for grant of relief(s) as sought under Section 33 of the Act arises and the prayer for the same is also rejected.*

- 2A) The Commission may not inquire into agreement referred to in section 3 or conduct of an enterprise or group under section 4, if the same or substantially the same facts and issues raised in the information received under section 19 or reference from the Central Government or a State Government or a statutory authority has already been decided by the Commission in its previous order.
- 3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.
- 3A) If, after consideration of the report of the Director General referred to in sub-section (3), the Commission is of the opinion that further investigation is required, it may direct the Director General to investigate further into the matter.
- 3B) The Director General shall, on receipt of direction under sub-section (3A), investigate the matter and submit a supplementary report on his findings within such period as may be specified by the Commission.
- 4) The Commission may forward a copy of the report referred to in <sup>sub-</sup>section (3) and (3B) to the parties concerned.

Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-section (3) and (3B) to the Central Government or the State Government or the statutory authority, as the case may be.

- 5) If the report of the Director General referred to in sub-section (3) and (3B) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.
- 6) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.
- 7) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission is of the opinion that further investigation is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.
- 8) If the report of the Director General referred to in sub-section (3) and (3B) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.
- 9) Upon completion of the investigation or inquiry under sub-section (7) or sub-section (8), as the case may be, the Commission may pass an order closing the matter or pass an order under section 27, and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

Provided that before passing such order, the Commission shall issue a show-cause notice indicating the contraventions alleged to have been committed and such other details as may be specified by regulations and give a reasonable opportunity of being heard to the parties concerned.



In ***Competition Commission of India v. Steel Authority of India (Civil Appeal No. 7779 of 2010, judgment dated September 09, 2010)***, looked into the ambit and scope of power vested with the Commission under Section 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the prima facie case. With regard to notice and/or hearing at the stage of forming prima facie decision by the Commission under Section 26(1) of the Act, Supreme Court of India held that neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor any party can claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter. However, the Commission, being a statutory body exercising, inter alia, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the concerned party(s) to render required assistance or produce requisite information, as per its directive. Supreme Court also observed that the Commission is expected to form such prima facie view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion without any assistance from any quarter or even with assistance of experts or others. The Commission has the power in terms of Regulation 17 (2) of the Regulations to invite not only the information provider but even 'such other person' which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be 'preliminary conference', for whose conduct of business the Commission is entitled to evolve its own procedure.

In the aforesaid context, Supreme Court noted kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. Supreme court observed that at the face of it, this is an inquisitorial and regulatory power. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Accordingly, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), Supreme Court observed that the right of notice or hearing is not contemplated under the provisions of Section 26(1) of the Act.

Supreme Court in the case of ***Competition Commission of India v. Steel Authority of India*** also looked into the issue whether it is obligatory for the Commission to record reasons for formation of a prima facie opinion in terms of Section 26(1) of the Act. Supreme Court held that in consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reason even while forming a prima facie view. However, while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity, it is required of the Commission to pass speaking orders, upon due application of mind, responding to all the contentions raised before it by the rival parties.

In the aforesaid context, Supreme Court of India noted that the proposition of law whether an administrative or quasi-judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent judgment of this Court in the case of Assistant Commissioner, C.T.D.W.C. v. M/s Shukla & Brothers [JT 2010 (4) SC 35]. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions.

By practice adopted in all courts and by virtue of judge made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and in fact, is a mandatory requirement of the procedural law. Supreme Court noted that recording reasons in support of decisions or orders is consistent with the settled canons of law and would apply to Section 26, under its different sub-sections, which requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Supreme Court also noted that even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.

### Orders by Commission after Inquiry into Agreements or Abuse of Dominant Position

Section 27 of the Act provides that where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:

- a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
- b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover or income, as the case may be, for the last three preceding financial years, upon each of such person or enterprise which is a party to such agreement or has abused its dominant position.

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover or income, as the case may be, for each year of the continuance of such agreement, whichever is higher.

*Explanation 1.* – For the purposes of this clause, the expression “turnover” or “income”, as the case may be, shall be determined in such manner as may be specified by regulations.

*Explanation 2.* – For the purposes of this clause, “turnover” means global turnover derived from all the products and services by a person or an enterprise.’

- c) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
- d) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;
- e) pass such other order or issue such directions as it may deem fit:

It may be noted that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b)

of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

In ***Excel Crop Care Limited vs. Competition Commission of India & Another (Civil Appeal No. 2480 of 2014, judgment dated May 08, 2017)***, Hon'ble Supreme Court of India observed that a plain reading of Section 27 (b) elucidates that the commission is empowered to impose penalty and to the extent as it deems fit but not exceeding ten percent of the turnover. Section 27 (b) emphasize that penalty is to be levied on 'person or enterprise' who have contravened Section 3 or Section 4 of the Act. Supreme Court emphasized on the usage of the phrase 'as it may deem fit' as occurring under Section 27 of the Act. At the outset this phrase is indicative of the discretionary power provided for the fining authority under the Act. As the law abhors absolute power and arbitrary discretion, this discretion provided under Section 27 needs to be regulated and guided so that there is uniformity and stability with respect to imposition of penalty. This discretion should be governed by rule of law and not by arbitrary, vague or fanciful considerations. Supreme Court noted that any penal law imposing punishment is made for general good of the society. As a part of equitable consideration, we should strive to only punish those who deserve it and to the extent of their guilt. Further it is well established by this Court that the principle of proportionality requires the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued.

In the aforesaid context, Hon'ble Supreme Court observed that in consonance of established jurisprudence, the principle of proportionality needs to be imbibed into any penalty imposed under Section 27 of the Act. Otherwise excessively high fines may over-deter, by discouraging potential investors, which is not the intention of the Act. Therefore the fine under Section 27(b) of the Act should be determined on the basis of the relevant turnover. Supreme Court laid out a two-step calculation that has to be followed while imposing the penalty under Section 27 of the Act. Under Step 1 relating to determination of relevant turnover, Hon'ble Supreme Court observed that at this point of time it needs to be clarified that relevant turnover is the entity's turnover pertaining to products and services that have been affected by such contravention. The aforesaid definition is not exhaustive. The authority should have regard to the entity's audited financial statements. Where audited financial statements are not available, the Commission may consider any other reliable records reflecting the entity's relevant turnover or estimate the relevant turnover based on available information. However the Tribunal is free to consider facts and circumstances of a particular case to calculate relevant turnover as and when it is seized with such matter. Under Step 2 relating to determination of appropriate percentage of penalty based on aggravating and mitigating circumstances, Hon'ble Supreme Court observed that after such initial determination of relevant turnover, commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer, the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc.

These factors are only illustrative for the tribunal to take into consideration while imposing appropriate percentage of penalty. Accordingly, Supreme Court observed that at the cost of repetition it should be noted that starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter the tribunal should calculate appropriate percentage of penalty based on facts and circumstances of the case taking into consideration various factors while determining the quantum. But such penalty should not be more than the overall cap of 10% of the entity's relevant turnover. Such interpretation of Section 27 (b) of the Act, wherein the discretion of the commission is guided by principles established by law would subserve the intention of the enactment.

### Division of Enterprise Enjoying Dominant Position

Section 28(1) of the Act provides that the Commission may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

Section 28(2) states that in particular, and without prejudice to the generality of the foregoing powers, the order referred to in sub-section (1) may provide for all or any of the following matters, namely: —

- a. the transfer or vesting of property, rights, liabilities or obligations;
- b. the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
- c. the creation, allotment, surrender or cancellation of any shares, stocks or securities;
- d. the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;
- e. the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;
- f. any other matter which may be necessary to give effect to the division of the enterprise.

Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise shall not be entitled to claim any compensation for such cesser.

### Procedure for Investigation of Combinations

Section 29 of the Act deals with procedure of investigation of Combinations. It provides that:

- (1) Where the Commission is of the prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within fifteen days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.
- (1A) After receipt of the response of the parties to the combination under sub-section (1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.
- (1B) The Commission shall, within thirty days of receipt of notice under sub-section (2) of section 6, form its prima facie opinion referred to in sub-section (1).
- (2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven days from the date of receipt of the response of the parties to the combination, or the receipt of the report from Director General called under sub section (1A), whichever is later, direct the parties to the said combination to publish details of the combination within seven days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.
- (3) The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within ten days from the date on which the details of the combination were published under sub-section (2).
- (4) The Commission may, within seven days from the expiry of the period specified in sub-section (3), call for such additional or other information as it may deem fit from the parties to the said combination.

- (5) The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within ten days from the expiry of the period specified in sub-section (4).
- (6) After receipt of all information, the Commission shall proceed to deal with the case in accordance with the provisions contained in section 29A or section 31, as the case may be.

Notwithstanding anything contained in this section, the Commission may accept appropriate modifications offered by the parties to the combination or suo motu propose modifications, as the case may be, before forming a prima facie opinion under sub-section (1).

### **Issue of Statement of Objections by Commission and Proposal of Modifications**

Section 29A (1) of the Act provides that upon completion of the process under section 29, where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall issue a statement of objections to the parties identifying such appreciable adverse effect on competition and direct the parties to explain within twenty-five days of receipt of the statement of objections, why such combination should be allowed to take effect.

As per Section 29A (2) where the parties to the combination consider that such appreciable adverse effect on competition can be eliminated by suitable modification to such combination, they may submit an offer of appropriate modification to the combination along with their explanation to the statement of objections issued under sub-section (1) in such manner as may be specified by regulations.

Section 29A(3) states that if the Commission does not accept the modification submitted by the parties under sub-section (2) it shall, within seven days from the date of receipt of the proposed modifications under that sub-section, communicate to the parties as to why the modification is not sufficient to eliminate the appreciable adverse effect on competition and call upon the parties to furnish, within twelve days of the receipt of the said communication, revised modification, if any, to eliminate the appreciable adverse effects on competition.

Provided that the Commission shall evaluate such proposal for modification within twelve days from receipt of such proposal:

Provided further that the Commission may suo motu propose appropriate modifications to the combination which may be considered by the parties to the combination.

### **Procedure in case of Notice under Section 6(2)**

Section 30 provides that where any person or enterprise has given a notice under section 6(2) the Commission shall examine such notice and form its prima facie opinion as provided in section 29(1) and proceed as per provisions contained in that section.

### **Orders of Commission on Combinations**

Section 31 deals with order of the commission on combination. It states that:

- 1) Where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination in respect of which a notice has been given under sub-section (2) of section 6.

It may be noted that if the Commission does not form a prima facie opinion as provided under sub-section (1B) of section 29, the combination shall be deemed to have been approved and no separate order shall be required to be passed.

- 2) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.

- 3) Where the Commission is of the opinion that any appreciable adverse effect on competition that the combination has, or is likely to have, can be eliminated by modification proposed by the parties or the Commission, as the case may be, under sub-section (7) of section 29 or sub-section (2) or sub-section (3) of section 29A, it may approve the combination subject to such modifications as it thinks fit.
- 4) Where a combination is approved by the Commission under sub-section (3), the parties to the combination shall carry out such modification within such period as may be specified by the Commission.
- 5) Where –
  - i. the Commission has directed under sub-section (2) that the combination shall not take effect; or
  - ii. the parties to the combination, fail to carry out the modification within such period as may be specified by the Commission under sub-section (4); or
  - iii. the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition which cannot be eliminated by suitable modification to such combination,

then, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, the Commission may order that such combination shall not be given effect to, or be declared void, or frame a scheme to be implemented by the parties to address the appreciable adverse effect on competition, as the case may be.

- 6) If no order is passed or direction issued by the Commission in accordance with the provisions of sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5), as the case may be, within a period of one hundred and fifty days from the date of notice given to the Commission under sub-section (2) of section 6, the combination shall be deemed to have been approved by the Commission.

### Acts Taking Place outside India but Having an Effect on Competition in India

According to Section 32 of the Act, the Commission shall, notwithstanding that, —

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- an agreement referred to in section 3 has been entered into outside India; or
  - any party to such agreement is outside India; or
  - any enterprise abusing the dominant position is outside India; or
  - a combination has taken place outside India; or
  - any party to combination is outside India; or
  - any other matter or practice or action arising out of such agreement or dominant position or combination is outside India,

have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29, 29A and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.

In the case of ***Mr. Umar Javeed and Others Vs. Google LLC and Another in Case No. 39 of 2018***, the Competition Commission of India (CCI) vide its Order dated 20th October, 2022 inter alia observed that Commission also observes that Section 32 of the Act which deals with “Acts taking place outside India but having an effect on competition in India”, clearly inter alia provides that the Commission shall notwithstanding that any enterprise abusing the dominant position is outside India, have the power to inquire into abuse of dominant position by such player if such dominant position has or is likely to have an appreciable adverse effect on competition in India. That being the statutory scheme in respect of anti-competitive acts taking place outside India, there cannot be any higher threshold for examining the abusive conduct which has taken place within the municipal limits of India.

### Power to Issue Interim Orders

Section 33 provides that where during an inquiry, the Commission is satisfied that an act in contravention of section 3(1) or section 4(1) or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.

In ***Competition Commission of India v. Steel Authority of India (Civil Appeal No. 7779 of 2010***, judgment dated September 09, 2010), Supreme Court observed that during an inquiry and where the Commission is satisfied that the act is in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders without giving notice to such party, where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order inter alia should : (a) record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) It is necessary to issue order of restraint and (c) from the record before the Commission, it is apparent that there is every likelihood of the party to the lis, suffering irreparable and irretrievable damage or there is definite apprehension that it would have adverse effect.

### Appearance before Commission

Section 35(1) states that a party or the Director General may either appear in person or authorise one or more chartered accountants or ***Company Secretaries*** or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

*Explanation.* —For the purposes of this section, —

- a) “Chartered Accountant” means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;



- b) **“Company Secretary”** means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- c) **“Cost Accountant”** means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- d) **“Legal Practitioner”** means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.

As per Section 35(2) without prejudice to sub-section (1), a party may call upon experts from the fields of economics, commerce, international trade or from any other discipline to provide an expert opinion in connection with any matter related to a case.

### Power of Commission to Regulate its Own Procedure

Section 36 provides that in the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.

The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely: —

summoning and enforcing the attendance of any person and examining him on oath;

requiring the discovery and production of documents;

receiving evidence on affidavit;

issuing commissions for the examination of witnesses or documents;

requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, any public record or document or copy of such record or document from any office.

The Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist the Commission in the conduct of any inquiry by it.



The Commission may direct any person—



to produce before the Director General or the Secretary or an officer authorised by it, such books or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;



to furnish to the Director General or the Secretary or any other officer authorised by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person as may be required for the purposes of this Act.

### Rectification of Orders

With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of the Act. Subject to the other provisions of this Act, the Commission may make –

an amendment for rectifying any such mistake which has been brought to its notice by any party to the order.



an amendment under sub-section (1) of its own motion;

*Explanation.* —For the removal of doubts, it is hereby declared that the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

### Execution of orders of Commission Imposing Monetary Penalty

1. If a person fails to pay any monetary penalty imposed on him under the Act, the Commission shall proceed to recover such penalty in such manner as may be specified by the regulations.
2. In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961, it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.
3. Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income-tax Act, 1961 and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income-tax and sums imposed by way of penalty, fine and interest under the Income-tax Act, 1961 and to the Commission instead of the Assessing Officer.

## DUTIES OF DIRECTOR GENERAL

Section 41 of the Act empowers the Director General to investigate contraventions. It provides that:

- (1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.
- (2) The Director General shall have all the powers as are conferred upon the Commission under sub-section (2) of section 36.
- (3) Without prejudice to sub-section (2), it shall be the duty of all officers, other employees and agents of a party which are under investigation—
  - a. to preserve and to produce all information, books, papers, other documents and records of, or relating to, the party which are in their custody or power to the Director General or any person authorised by it in this behalf; and
  - b. to give all assistance in connection with the investigation to the Director General.
- (4) The Director General may require any person other than a party referred to in sub-section (3) to furnish such information or produce such books, papers, other documents or records before it or any person authorised by it in this behalf if furnishing of such information or the production of such books, papers, other documents or records is relevant or necessary for the purposes of its investigation.
- (5) The Director General may keep in his custody any information, books, papers, other documents or records produced under sub-section (3) or sub-section (4) for a period of one hundred and eighty days and thereafter shall return the same to the person by whom or on whose behalf the information, books, papers, other documents or records were produced:

Provided that the information, books, papers, other documents or records may be called for by the Director General if they are needed again for a further period of one hundred and eighty days by an order in writing:

Provided further that the certified copies of the information, books, papers, other documents or records, as may be applicable, produced before the Director General may be provided to the party or person on whose behalf the information, books, papers, other documents or records are produced at their own cost.

- (6) The Director General may examine on oath—
  - a. any of the officers and other employees and agents of the party being investigated; and
  - b. with the previous approval of the Commission, any other person, in relation to the affairs of the party being investigated and may administer an oath accordingly and for that purpose may require any of those persons to appear before it personally.
- (7) The examination under sub-section (6) shall be recorded in writing and shall be read over to or by, and signed by, the person examined and may thereafter be used in evidence against it.
- (8) Where in the course of investigation, the Director General has reasonable grounds to believe that information, books, papers, other documents or records of, or relating to, any party or person, may be destroyed, mutilated, altered, falsified or secreted, the Director General may make an application to the Chief Metropolitan Magistrate, Delhi for an order for seizure of such information, books, papers, other documents or records.

- (9) The Director General may make requisition of the services of any police officer or any officer of the Central Government to assist him for all or any of the purposes specified in sub-section (10) and it shall be the duty of every such officer to comply with such requisition.
- (10) The Chief Metropolitan Magistrate, Delhi may, after considering the application and hearing from the Director General, by order, authorise the Director General—
- a. to enter, with such assistance, as may be required, the place or places where such information, books, papers, other documents or records are kept;
  - b. to search that place or places in the manner specified in the order; and
  - c. to seize information, books, papers, other documents or records as it considers necessary for the purpose of the investigation:

Provided that certified copies of the seized information, books, papers, other documents or records, as the case may be, may be provided to the party or person from whose place or places such documents have been seized at its cost.

- (11) The Director General shall keep in his custody such information, books, papers, other documents or records seized under this section for such period not later than the conclusion of the investigation as it considers necessary and thereafter shall return the same to the party or person from whose custody or power they were seized and inform the Chief Metropolitan Magistrate, of such return:

Provided that the Director General may, before returning such information, books, papers, other documents or records take copies of, or extracts thereof or place identification marks on them or any part thereof.

- (12) Save as otherwise provided in this section, every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973, relating to search or seizure made under that Code.

*Explanation.* —For the purposes of this section, —

- a) “Agent”, in relation to any person, means any one acting or purporting to act for or on behalf of such person, and includes the bankers, and persons employed as auditors and legal advisors, by such person;
- b) “Officers”, in relation to any company or body corporate, includes any trustee for the debenture holders of such company or body corporate;
- c) any reference to officers and other employees or agents shall be construed as a reference to past as well as present officers and other employees or agents, as the case may be.

Hon'ble Supreme Court in **CCI v. SAIL (2010) 10 SCC 744** observed that the DG appointed under Section 16(1) of the Act is a specialized investigating wing of the Commission. DG, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself to whom the investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the DG and to pass appropriate orders after hearing the parties concerned.

Hon'ble Supreme Court in SAIL judgment clearly observed that the 'inquiry' shall be deemed to have commenced when direction to the DG is issued to conduct investigation in terms of Regulation 18(2) of the General Regulations. In other words, the law shall presume that an 'inquiry' is commenced when the Commission, in exercise of its powers under Section 26(1) of the Act, issues a direction to the DG. Further it was observed that the DG is expected to conduct an investigation only in terms of the directive of the Commission and thereafter, inquiry shall be deemed to have commenced, which continues with the submission of the report by the DG.

As per the scheme of the Competition Act, 2002 the DG is a fact finding body, whose duty is to collect evidence, analyse such information and present its opinion on the basis of such evidence to the Commission. However, the conclusion/findings of the DG are mere recommendatory and are not final. The Investigation Report as prepared by the DG is never binding upon the Commission and it is always for the Commission to decide whether the alleged conduct is in contravention of the provisions of the Act or not.

## PENALTIES

### Contravention of Orders of Commission

According to Section 42 of the Act, the Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.

If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under sections 6, 27, 28, 31, 32, 33, 42A, 43, 43A, 44 and 45 of the Act, he shall be liable to a penalty which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

If any person does not comply with the orders or directions issued, or fails to pay the penalty imposed, he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit.

It may be noted that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorised by it.

### Compensation in case of Contravention of Orders of Commission

Section 42A provides that without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 6, 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.

### Penalty for Failure to comply with directions of Commission and Director General

As per Section 43 of the Act, if any person fails to comply, without reasonable cause, with a direction given by—

- a. the Commission under sub-sections (2) and (4) of section 36; or
- b. the Director General while exercising powers referred to in sub-section (2) of section 41,

such person shall be liable to a penalty which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission.

### Power to Impose Penalty for Non-Furnishing of Information on Combination

According to Section 43A if any person or enterprise fails to give notice to the Commission under sub-section (2) or sub-section (4) of section 6 or contravenes sub-section (2A) of section 6 or submit information pursuant to an inquiry under sub-section (1) of section 20, the Commission may impose on such person or enterprise, a penalty which may extend to one per cent., of the total turnover or assets or the value of transaction referred to in clause (d) of section 5, whichever is higher, of such a combination:

It may be noted that in case any person or enterprise has given a notice under sub-section (4) of section 6 and such notice is found to be void ab initio under sub-section (6) of section 6, then a notice under sub-section (2) of section 6 may be given by the acquirer or parties to the combination, as may be applicable, within a period of thirty days of the order of the Commission under sub-section (6) of that section and no action under this section shall be taken by the Commission till the expiry of such period of thirty days.

### Power to Impose Lesser Penalty

Section 46(1) provides that the Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations, than leviable under this Act or the rules or the regulations made under the Act.

Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure:

Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section.

Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to co-operate with the Commission till the completion of the proceedings before the Commission.

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings, —

- (a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
- (b) had given false evidence; or
- (c) the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the contravention with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

(2) The Commission may allow a producer, seller, distributor, trader or service provider included in the cartel, to withdraw its application for lesser penalty under this section, in such manner and within such time as may be specified by regulations.

(3) The Director General and the Commission shall be entitled to use for the purposes of this Act, any evidence submitted by a producer, seller, distributor, trader or service provider in its application for lesser penalty, except its admission.

(4) Where during the course of the investigation, a producer, seller, distributor, trader or service provider who has disclosed a cartel under sub-section (1), makes a full, true and vital disclosure under sub-section (1) with respect to another cartel in which it is alleged to have violated section 3, which enables the Commission to form

a prima facie opinion under sub-section (1) of section 26 that there exists another cartel, then the Commission may impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations, in respect of the cartel already being investigated, without prejudice to the producer, seller, distributor, trader or service provider obtaining lesser penalty under sub-section (1) regarding the newly disclosed cartel.

## CONTRAVENTION BY COMPANIES

Section 48(1) states that where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be in contravention of this Act and unless otherwise provided in this Act, the Commission may impose such penalty on such persons, as it may deem fit which shall not be more than ten per cent. of the average of the income for the last three preceding financial years.

Provided that in case any agreement referred to in section 3(3) has been entered into by a cartel, the Commission may unless otherwise provided in this Act, impose upon such persons referred to in sub-section (1), a penalty of up to ten per cent. of the income for each year of the continuance of such agreement.

Section 48(2) provides that nothing contained in sub-section (1) shall render any such person liable to any penalty if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

As per Section 48(3) notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officers of the company, such director, manager, secretary or other officers shall also be deemed to be in contravention of the provisions of this Act and unless otherwise provided in this Act, the Commission may impose such penalty on such persons, as it may deem fit which shall not be more than ten per cent. of the average of the income for the last three preceding financial years:

Provided that in case any agreement referred to in section 3(3) has been entered into by a cartel, the Commission may, unless otherwise provided under this Act, impose upon such person a penalty as it may deem fit which shall not exceed ten per cent. of the income for each year of the continuance of such agreement.

*Explanation.* —For the purposes of this section, —

- a. “company” means a body corporate and includes a firm or other association of individuals;
- b. “director”, in relation to a firm, means a partner in the firm;
- c. “income”, in relation to a person, shall be determined in such manner as may be specified by regulations.

## Settlement

According to Section 48A of the Act, any enterprise, against whom any inquiry has been initiated under section 26(1) for contravention of section 3(4) or section 4, may, for settlement of the proceeding initiated for the alleged contraventions, submit an application in writing to the Commission in such form and upon payment of such fee as may be specified by regulations.

An application may be submitted at any time after the receipt of the report of the Director General under section 26(4) but prior to such time before the passing of an order under section 27 or section 28 as may be specified by regulations.

The Commission may, after taking into consideration the nature, gravity and impact of the contraventions, agree to the proposal for settlement, on payment of such amount by the applicant or on such other terms and manner of implementation of settlement and monitoring as may be specified by regulations.

While considering the proposal for settlement, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their objections and suggestions, if any.

If the Commission is of the opinion that the settlement offered above is not appropriate in the circumstances or if the Commission and the party concerned do not reach an agreement on the terms of the settlement within such time as may be specified by regulations, it shall, by order, reject the settlement application and proceed with its inquiry under section 26.

The procedure for conducting the settlement proceedings under this section shall be such as may be specified by regulations.

No appeal shall lie under section 53B against any order passed by the Commission under this section.

All settlement amounts, realised under this Act shall be credited to the Consolidated Fund of India.

### **Commitment**

As per Section 48B of the Act, any enterprise, against whom any inquiry has been initiated under section 26(1) for contravention of section 3(4) or section 4, as the case may be, may submit an application in writing to the Commission, in such form and on payment of such fee as may be specified by regulations, offering commitments in respect of the alleged contraventions stated in the Commission's order under section 26(1).

An offer for commitments may be submitted at any time after an order under section 26(1) has been passed by the Commission but within such time prior to the receipt by the party of the report of the Director General under section 26(4) as may be specified by regulations.

The Commission may, after taking into consideration the nature, gravity and impact of the alleged contraventions and effectiveness of the proposed commitments, accept the commitments offered on such terms and the manner of implementation and monitoring as may be specified by regulations.

While considering the proposal for commitment, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their objections and suggestions, if any.

If the Commission is of the opinion that the commitment offered above is not appropriate in the circumstances or if the Commission and the party concerned do not reach an agreement on the terms of the commitment, it shall pass an order rejecting the commitment application and proceed with its inquiry under section 26 of the Act.

The procedure for commitments offered under this section shall be such as may be specified by regulations.

No appeal shall lie under section 53B against any order passed by the Commission under this section.

### **Revocation of the Settlement or Commitment Order and Penalty**

Section 48C provides that if an applicant fails to comply with the order passed under section 48A or section 48B or it comes to the notice of the Commission that the applicant has not made full and true disclosure or there has been a material change in the facts, the order passed under section 48A or section 48B, as the case may be, shall stand revoked and withdrawn and such enterprise shall be liable to pay legal costs incurred by the Commission which may extend to rupees one crore and the Commission may restore or initiate the inquiry in respect of which the order under section 48A or section 48B was passed.

## **COMPETITION ADVOCACY**

Section 49 deals with Competition Advocacy. It provides that the Central Government may, in formulating a policy on competition (including review of laws related to competition) or on any other matter, and a State



Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.

The opinion given by the Commission shall not be binding upon the Central Government or the State Government, as the case may be, in formulating such policy.

The Commission shall take suitable measures for the promotion of competition or culture advocacy, creating awareness and imparting training about competition issues.

## APPELLATE TRIBUNAL

According to Section 53A of the Act, the National Company Law Appellate Tribunal constituted under section 410 of the Companies Act, 2013 shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall—

hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub - section (6) of section 6, sub-sections (2), (2A), (6) and (9) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of this Act ; and

adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42 A or under sub - section ( 2 ) of section 53 Q of this Act, and pass orders for the recovery of compensation under section 53 N of this Act .

### Appeal to Appellate Tribunal

Section 53B provides that the Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

Every appeal shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed.

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the Commission, shall be entertained by the Appellate Tribunal unless the appellant has deposited twenty-five per cent. of that amount in the manner as directed by the Appellate Tribunal.

On receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.



The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

The appeal filed before the Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

In ***Samir Agrawal vs. Competition Commission of India & Ors (Civil Appeal No. 3100 of 2020)*** judgement dated December 15, 2020, Supreme Court held that a reading of the provisions of the Act and the 2009 Regulations would show that “any person” may provide information to the CCI, which may then act upon it in accordance with the provisions of the Act. In this regard, the definition of “person” in section 2(l) of the Act, set out hereinabove, is an inclusive one and is extremely wide, including individuals of all kinds and every artificial juridical person. This may be contrasted with the definition of “consumer” in section 2(f) of the Act, which makes it clear that only persons who buy goods for consideration, or hire or avail of services for a consideration, are recognised as consumers.

The expressions used in sections 53B and 53T of the Act are “any person”, thereby signifying that all persons who bring to the CCI information of practices that are contrary to the provisions of the Act, could be said to be aggrieved by an adverse order of the CCI in case it refuses to act upon the information supplied. By way of contrast, section 53N(3) speaks of making payment to an applicant as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II of the Act, having been committed by an enterprise. By this sub-section, clearly, therefore, “any person” who makes an application for compensation, under sub-section (1) of section 53N of the Act, would refer only to persons who have suffered loss or damage, thereby, qualifying the expression “any person” as being a person who has suffered loss or damage.

Thus, the preliminary objections against the Informant/Appellant filing Information before the CCI and filing an appeal before the NCLAT are rejected.

When the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purpose of the Act.

### Right to Legal Representation

According to Section 53-S of the Act, a person preferring an appeal to the Appellate Tribunal may either appear in person or authorise one or more chartered accountants or ***company secretaries*** or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal.

The Central Government or a State Government or a local authority or any enterprise preferring an appeal to the Appellate Tribunal may authorise one or more chartered accountants or ***company secretaries*** or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorised may present the case with respect to any appeal before the Appellate Tribunal.

The Commission may authorise one or more chartered accountants or ***company secretaries*** or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorised may present the case with respect to any appeal before the Appellate Tribunal.

### APPEAL TO SUPREME COURT

Section 53T provides that the Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them:

It may be noted that the Supreme court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

### COMPOUNDING OF CERTAIN OFFENCES

Section 59A states that notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence punishable under this Act, not being an offence punishable with imprisonment only or imprisonment and also with fine, may either before or after the institution of any proceeding, be compounded by the Appellate Tribunal or a court before which such proceeding is pending.

#### LESSON ROUND-UP

- Competition Act, 2002 seeks to provide, keeping in view the economic development of the country, for the establishment of Competition Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto besides repeal of MRTP Act and the dissolution of the MRTP Commission.
- No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition.
- Competition Act expressly prohibits any enterprise or group from abusing its dominant position. Dominant Position meaning thereby a position of strength, enjoyed by an enterprise or group, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.
- Competition Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed it shall be void.
- While formulating a policy on the competition the Central/State Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition.
- Competition Appellate Tribunal to hear and dispose of appeals against the direction issued or decision made or orders passed by the Commission under the Act, and to adjudicate on claim of compensation.
- The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court.

#### TEST YOURSELF

*(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation)*

1. Define and discuss the Bid Rigging and Cartel.
2. What are anti-competitive agreements? Discuss the procedure for enquiry into anti-competitive agreements.
3. The Competition Act does not prohibit dominance, but the abuse of dominant position. Explain.

4. Discuss the composition and functions of Competition Commission of India.
5. Write short notes on:
  - (i) Combinations.
  - (ii) Competition Advocacy.

**LIST OF FURTHER READINGS**

- Bare Act - Competition Act, 2002 and amendments made therein.
- Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011

**OTHER REFERENCES**

- <https://www.cci.gov.in/>
- <https://www.cci.gov.in/legal-framework/act>

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### KEY CONCEPTS

■ Consumer Rights ■ Consumer ■ Commercial Purpose ■ E-Commerce ■ Electronic Service Provider ■ Express Warranty ■ Misleading Advertisement ■ Product Liability ■ Restrictive Trade Practice

### Learning Objectives

#### To understand:

- Consumer Protection in India
- Rights of Consumers
- Consumer Dispute Redressal Forums
- Central Consumer Protection Authority
- Nature and Scope of Remedies
- Consumer Disputes Redressal Commission

### Lesson Outline

- Consumer Rights
- Meaning of Consumer
- Commercial purpose
- Defect in Goods
- Deficiency in Service
- Contract of Service
- Contract for Service
- District Forum
- State Consumer Protection Council
- Central Consumer Protection Council
- Jurisdiction of Protection Council
- Limitation Period for Filing Complaint
- Administrative Control
- Appeal
- Nature and Scope of Remedies
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- Consumer Protection Act, 2019
- Consumer Protection (Consumer Disputes Redressal Commissions) Rules, 2020
- Consumer Protection (General) Rules, 2020
- Consumer Protection (Central Consumer Protection Council) Rules, 2020
- Consumer Protection (E-Commerce) Rules, 2020
- Consumer Protection (Consumer Commission Procedure) Regulations, 2020
- Central Consumer Protection Authority (Allocation and Transaction of Business) Regulations, 2020.
- Consumer Protection (Administrative Control over the State Commission and the District Commission) Regulations, 2020
- Consumer Protection (Mediation) Regulations, 2020
- Consumer Protection (Qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the State Commission and District Commission) Rules, 2020

## INTRODUCTION

Consumer justice is a part of social and economic justice enshrined in the Constitution. India has been a pioneer in consumer advocacy with the Consumer Protection Act, 1986, enacted in 1986, a path breaking socio economic legislation and most important milestones in the area of consumer movement in India. The Act provides the legislative framework to promote and protect the rights of consumers and a three-tier quasi-judicial consumer disputes redressal machinery at the District, State and National levels, popularly known as Consumer Courts aimed at providing simple, speedy and affordable redress to consumers. The consumer courts adjudicate complaints relating to defects in goods and deficiencies in services and are meant to provide simple, inexpensive and speedy redressal of consumers' grievances. The Consumer Protection Act, 1986 also provides for establishment of Consumer Protection Councils at the Central, State and District levels to function as Advisory Bodies on consumer advocacy. Based on the experience gained from implementation on the ground, the Act has been amended thrice in the years 1991, 1993 and 2002. Although, the working of the consumer dispute redressal agencies has served the purpose to a considerable extent, the disposal of cases has not been fast due to various constraints. Several shortcomings have been noticed while administering the various provisions of the Consumer Protection Act, 1986.

Consumer markets for goods and services have undergone drastic transformation since the enactment of the Consumer Protection Act in 1986. The modern market place contains a plethora of products and services. The emergence of global supply chains, rise in international trade and the rapid development of e-commerce have led to new delivery systems for goods and services and have provided new options and opportunities for consumers. Equally, this has rendered the consumer vulnerable to new forms of unfair trade and unethical business practices. Misleading advertisements, tele-marketing, multi-level marketing, direct selling and e-commerce pose new challenges to consumer protection and will require appropriate and swift executive interventions to prevent consumer detriment and to counter unfair trade practices. Therefore, it has become inevitable to modernise the Consumer Protection Act in 1986 to address the myriad and constantly emerging vulnerabilities of the consumer in the market economy extant.

In this backdrop, the Consumer Protection Bill, 2019 was passed by the Lok Sabha on 30th July, 2019 and by Rajya Sabha on 06th August, 2019. The Consumer Protection Act, 2019 received the assent of the President on the 9th August, 2019. The Consumer Protection Act, 2019 replaced the more than three decades old Consumer Protection Act, 1986.

***Preamble of the Consumer Protection Act, 2019 provides for protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumers' disputes and for matters connected therewith or incidental thereto.***

***Consumer Protection Act, 2019, certainly create a consumer-friendly ecosystem in the country and strengthen the consumer rights with timely and effective administration of consumer disputes.***

In the case of *Om Prakash vs. Reliance General Insurance and Anr. Civil Appeal No. 15611 of 2017, (Arising out of SLP (C) No.742 of 2015)* Judgement dated October 4, 2017 Civil Appellate Jurisdiction of the Hon'ble Supreme Court of India inter-alia observed that it needs no emphasis that the Consumer Protection Act aims at providing better protection of the interest of consumers. It is a beneficial legislation that deserves liberal construction. This laudable object should not be forgotten while considering the claims made under the Act.

In the case of *M/S Emaar Mgf Land Limited vs. Aftab Singh Review Petition (C) Nos. 2629-2630 of 2018 in Civil Appeal Nos. 23512-23513 of 2017 Civil Appellate Jurisdiction, Judgement dated 10 December, 2018* the Hon'ble Supreme Court of India held that the Consumer Protection Act, 1986 has been enacted to provide for better protection of the interests of consumers and for the purpose, to make provision for the establishment of Consumer Councils and other authorities for the settlement of consumer disputes and for matter connected therewith. This Court had occasion to consider the object and purpose of the Act in *Lucknow Development Act vs. M.K. Gupta, (1994) 1 SCC 243*, this Court elaborately noticed the object and purpose of the Act in the following words:

*“To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, to provide for the protection of the interest of consumers. Use of the word protection furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a heaven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, a network of rackets or a society in which, producers have secured power to rob the rest and the might of public bodies which are degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting against it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot”.*

In the case of *Alpha G184 Owners Association (Appellant) Vs. Magnum International Trading Company Pvt. Ltd (Respondent) Civil Appeal No. 4718 of 2022 with Civil Appeal Nos. 329-332 OF 2023 judgement dated May 15th, 2023*, Hon'ble Supreme Court of India inter alia observed that the Consumer Protection Act, 1986; 68 of

1986 (hereinafter referred to as “the 1986 Act”) and the Consumer Protection Act, 2019; 35 of 2019 (hereinafter referred to as “the 2019 Act”) have got a laudable objective. The 2019 Act facilitates the consumers to approach the forums by providing a very flexible procedure. It is meant to encourage consumerism in the country. Any technical approach in construing the provisions against the consumer would go against the very objective behind the enactment. Hon’ble Supreme Court of India placed reliance on the recent decision of this Court in *National Insurance Co. Ltd. v. Harsolia Motors, 2023 SCC OnLine SC 409*,

**“21. The Act, 1986 is a social benefit-oriented legislation and, therefore, the Court has to adopt a constructive liberal approach while construing the provisions of the Act. To begin with the Preamble of the Act, 1986 which can afford useful assistance to ascertain the legislative intention, it was enacted to provide for the protection of the interests of consumers. Use of the word “protection” furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled law that a Preamble cannot control otherwise plain meaning of a provision.**

**22. In fact, the law meets long felt necessity of protecting the common man from such wrong for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interests of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively and inefficiently for reasons which are not necessary to be stated.**

**23. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. A scrutiny of various definitions such as “consumer”, “service”, “trader”, “unfair trade practice” indicates that legislature has attempted to widen the ambit and reach of the Act. Each of these definitions are in two parts, one explanatory and the other inclusive. The explanatory or the main part itself uses expressions of amplitude indicating clearly its wide sweep within its ambit to widen such things which otherwise would have been beyond its natural import. 24. The provisions of the Act, 1986 thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit-oriented legislation. The primary duty of the Court/Commission while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to attempted objective of the enactment.”**

#### **Main Features of Consumer Protection Act, 2019**

- E- commerce
- Direct selling
- Establishment of Central Consumer Protection Authority (CCPA)
- Strict Norms for Misleading Advertisement
- Strict Norms for product liability
- Pecuniary Jurisdiction
- Unfair Trade Practice
- Unfair Contract
- Alternate Dispute Resolution through mediation



**IMPORTANT DEFINITION****Complainant**

Complainant means –

- (i) a consumer; or
- (ii) any voluntary consumer association registered under any law for the time being in force; or
- (iii) the Central Government or any State Government; or
- (iv) the Central Authority; or
- (v) one or more consumers, where there are numerous consumers having the same interest; or
- (vi) in case of death of a consumer, his legal heir or legal representative; or
- (vii) in case of a consumer being a minor, his parent or legal guardian. [Section 2(5)]

**Complaint**

Complaint means any allegation in writing, made by a complainant for obtaining any relief provided by or under this Act, that –

- (i) an unfair contract or unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;
- (ii) the goods bought by him or agreed to be bought by him suffer from one or more defects;
- (iii) the services hired or availed of or agreed to be hired or availed of by him suffer from any deficiency;
- (iv) a trader or a service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price –
  - (a) fixed by or under any law for the time being in force; or
  - (b) displayed on the goods or any package containing such goods; or
  - (c) displayed on the price list exhibited by him by or under any law for the time being in force; or (d) agreed between the parties.
- (v) the goods, which are hazardous to life and safety when used, are being offered for sale to the public –
  - (a) in contravention of standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;
  - (b) where the trader knows that the goods so offered are unsafe to the public.
- (vi) the services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by a person who provides any service and who knows it to be injurious to life and safety;
- (vii) a claim for product liability action lies against the product manufacturer, product seller or product service provider, as the case may be. [Section 2(6)]

**How to Make the Complaint?**

- **Every complaint filed before District Commission/ State Commission/ National Commission.**
- **Accompanied by a fee as specified, in the form of crossed Demand Draft drawn on a nationalized bank or through a crossed Indian Postal Order drawn in favour of the Registrar of the State Commission and payable at the respective place where the State Commission or the National Commission is situated.**
- **Name, description and address of the complainant.**
- **Name, description and address of the opposite party or parties.**
- **Facts relating the complaint and when and where it arose.**
- **Documents, if any in support of allegations.**

**Consumer**

Consumer means any person who –

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (ii) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose.

*Explanation.* – For the purposes of this clause, –

- a. the expression “commercial purpose” does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;
- b. the expressions “buys any goods” and “hires or avails any services” includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing. [Section 2(7)]

It may be noted that a Person includes, –

- (i) an individual;
- (ii) a firm whether registered or not;
- (iii) a Hindu undivided family;
- (iv) a co-operative society;
- (v) an association of persons whether registered under the Societies Registration Act, 1860 or not;

- (vi) any corporation, company or a body of individuals whether incorporated or not;
- (vii) any artificial juridical person, not falling within any of the preceding sub-clauses. [Section 2(31)]

A purchase of goods can be said to be for a 'commercial purpose only if the goods have been purchased for being used in some profit making activity on a large-scale, and there is close and direct nexus between the purchase of goods and the profit-making activity.

In *Laxmi Engineering Works vs. P.S.G. Industrial Institute*, Supreme Court held that the explanation to Section 2(1)(d) is clarificatory in nature. It observed that whether the purpose for which a person has bought goods is a 'commercial purpose' is always a question of facts and to be decided in the facts and circumstances of each case. If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self-employment such purchaser of goods would yet be a consumer. The Supreme Court further observed that if a person purchased a machine to operate it himself for earning his livelihood, he would be a consumer. If such person took the assistance of one or two persons to assist him in operating the machine, he would still be a consumer. But if a person purchases a machine and appoint or engage another person exclusively to operate the machine, then such person would not be a consumer.

In *Bhupendra Jang Bahadur Guna vs. Regional Manager and Others (II 1995 CPJ 139)*, the National Commission held that a tractor purchased primarily to till the land of the purchaser and let out on hire during the idle time to till the lands of others would not amount to commercial use.

The question as to whether the widow of the deceased policy holder was a 'consumer' under the Act was decided in the affirmative by the State Commission in Andhra Pradesh in the case of *A Narasamma vs. LIC of India*. The State Commission held that as the term 'consumer' includes any beneficiary of service other than the person who hires the services for consideration, the widow being the beneficiary of services is a 'consumer' under the Act entitled to be compensated for the loss suffered by her due to negligence of the LIC.

In *Laxmiben Laxmichand Shah v. Sakerben Kanji Chandan and others 2001 CTJ 401 (Supreme Court) (CP)*, the Supreme Court held that the tenant entering into lease agreement with the landlord cannot be considered as consumer under Section 2(1)(d) of the Act. Where there was no provision in the lease agreement in respect of cleaning, repairing and maintaining the building, the rent paid by tenant is not the consideration for availing these services and therefore, no question of deficiency in service.

*Supreme Court in Northern Western Railway and Another vs. Sanjay Shukla judgement dated September 8, 2021, held that railways are liable to pay compensation for late arrival of trains if delay is not explained or justifiable. The railways were required to lead the evidence and explain the late arrival of train to establish and prove that delay occurred because of the reasons beyond their control. At least the railways were required to explain the delay which the railways failed. It cannot be disputed that every passenger's time is precious and they might have booked the tickets for further journey, like in the present case from Jammu to Srinagar and thereafter further journey.*

*Therefore, unless and until the evidence is laid explaining the delay and it is established and proved that delay occurred which was beyond their control and/or even there was some justification for delay, the railway is liable to pay the compensation for delay and late arrival of trains.*

*"The Apex Court observed that these are the days of competition and accountability. If the public transportation has to survive and compete with private players, they have to improve the system and their working culture. Citizens/passengers cannot be at the mercy of the authorities/administration. Somebody has to accept the responsibility."*

## Goods

In terms of Section 2(1)(i) goods has been defined to mean goods as defined in the Sale of Goods Act, 1930. As per Section 2(7) of the Sale of Goods Act, 1930 Goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale. Therefore, most consumer products come under the purview of this definition.

In *Morgan Stanley Mutual Fund v. Kartik Das (1994) 3 CLJ 27*, the Supreme Court held that an application for allotment of shares cannot constitute goods. It is after allotment, rights may arise as per the articles of association of the company. At the stage of application there is no purchase of goods for consideration and again the purchaser cannot be called the hirer of services for consideration.

### Who is a not a Consumer?

**A person who :-**

- obtains goods free of charge.
- obtains avails services free of charge.
- obtains goods for resale or for any commercial purposes.
- who avails services for any commercial purposes.
- who avails services under contract of service.

*{As per the provisions of the Act, commercial purpose does not include use by a person of goods bought and used by him exclusively for the purposes of earning his livelihood by means of self-employment.}*

### What are the Consumer Rights?

**Consumer Rights include –**

- (i) *the right to be protected against the marketing of goods, products or services which are hazardous to life and property;*
- (ii) *the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices;*
- (iii) *the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices;*
- (iv) *the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate fora;*
- (v) *the right to seek redressal against unfair trade practice or restrictive trade practices or unscrupulous exploitation of consumers; and*
- (vi) *the right to consumer awareness.*

### Defect

Defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression “defective” shall be construed accordingly. [Section 2(10)]

### Deficiency

Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes –

- (i) any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and
- (ii) deliberate withholding of relevant information by such person to the consumer. [Section 2(11)]

*In the case of SGS India vs. Dolphin International Ltd. (CA 5759 of 2009) judgement dated 6 October 2021, Hon'ble Supreme Court of India inter alia observed that the onus of proof that there was deficiency in service is on the complainant. If the complainant is able to discharge its initial onus, the burden would then shift to the respondent in the complaint. The rule of evidence before the civil proceedings is that the onus would lie on the person who would fail if no evidence is led by the other side. Therefore, the initial burden of proof of deficiency in service was on the complainant.*

*The Hon'ble Supreme Court. Dr. Harish Kumar Khurana vs. Joginder Singh (CA 7380 of 2009) judgement dated September 8, 2021 held that medical professionals cannot be held negligent merely because the treatment is not successful or patient dies during surgery. Every death of a patient cannot on the face of it be considered as death due to medical negligence unless there is material on record to suggest to that effect. It is necessary that the hospital and the doctors are required to exercise sufficient care in treating the patient in all circumstance. However, in unfortunate cases though death may occur and if it is alleged to be due to medical negligence and a claim in that regard is made, it is necessary that sufficient material or medical evidence should be available before the adjudicating authority to arrive at a conclusion. The accident during the course of medical or surgical treatment has a wider meaning. Ordinarily an accident means an unintended and unforeseen injurious occurrence, something that does not occur in the usual course of events or that could not be reasonably anticipated.*

### Restrictive Trade Practice

Restrictive trade practice means a trade practice which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include –

- (i) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;
- (ii) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent for buying, hiring or availing of other goods or services. [Section 2(41)]

## Service

Service means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. [Section 2(42)]

The Supreme Court in the case of *Indian Merchants Association vs. V P Shantha*, (CA No. 688 of 1993 decided on 13th November 1995) observed that a contract for service implies a contract whereby one party undertakes to render services e.g. professional or technical services to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. A contract of service on the other hand implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The Parliamentary draftsman was well aware of this well-accepted distinction between 'contract of service' and 'contract for services' and had deliberately chosen the expression 'contract of service' instead of the expression 'contract for service' in the exclusionary part of the definition of 'service', this being the reason being that an employer could not be regarded as a consumer in respect of the services rendered by his employee in pursuance of contract of employment. By affixing the adjective 'personal' to the word 'service' the nature of the contracts which were excluded were not altered. The adjective only emphasised that what was sought to be excluded was personal service only. The expression contract of personal service in the exclusionary part of Section 2(1)(o) must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service free from the ambit of the expression service.

## Unfair Trade Practice

Unfair Trade Practice means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely: –

- (i) making any statement, whether orally or in writing or by visible representation including by means of electronic record, which –
  - (a) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
  - (b) falsely represents that the services are of a particular standard, quality or grade;
  - (c) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
  - (d) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
  - (e) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
  - (f) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

- (g) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof:

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

- (h) makes to the public a representation in a form that purports to be –
- (A) a warranty or guarantee of a product or of any goods or services; or
  - (B) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out.
- (i) materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;
- (j) gives false or misleading facts disparaging the goods, services or trade of another person.

*Explanation.* – For the purposes of this sub-clause, a statement that is, –

- (A) expressed on an article offered or displayed for sale, or on its wrapper or container; or;
- (B) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or
- (C) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained.

- (ii) permitting the publication of any advertisement, whether in any newspaper or otherwise, including by way of electronic record, for the sale or supply at a bargain price of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

*Explanation.* – For the purpose of this sub-clause, “bargain price” means, –

- (A) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise; or
- (B) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold.

## (iii) Permitting –

- (a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged, in the transaction as a whole;
- (b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest, except such contest, lottery, game of chance or skill as may be prescribed;
- (c) withholding from the participants of any scheme offering gifts, prizes or other items free of charge on its closure, the information about final results of the scheme.

*Explanation.* – For the purpose of this sub-clause, the participants of a scheme shall be deemed to have been informed of the final results of the scheme where such results are within a reasonable time published, prominently in the same newspaper in which the scheme was originally advertised.

- (iv) permitting the sale or supply of goods intended to be used, or are of a kind likely to be used by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by the competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;
- (v) permitting the hoarding or destruction of goods, or refusal to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services;
- (vi) manufacturing of spurious goods or offering such goods for sale or adopting deceptive practices in the provision of services;
- (vii) not issuing bill or cash memo or receipt for the goods sold or services rendered in such manner as may be prescribed;
- (viii) refusing, after selling goods or rendering services, to take back or withdraw defective goods or to withdraw or discontinue deficient services and to refund the consideration thereof, if paid, within the period stipulated in the bill or cash memo or receipt or in the absence of such stipulation, within a period of thirty days;
- (ix) disclosing to other person any personal information given in confidence by the consumer unless such disclosure is made in accordance with the provisions of any law for the time being in force. [Section 2(47)]

### Councils and Dispute Redressal Commission

<b>CONSUMER PROTECTION COUNCIL</b>	<b>COMMISSIONS DISPUTE REDRESSAL COMMISSION</b>
District Consumer Protection Council	District Consumer Dispute Redressal Commission
State Consumer Protection Council	State Consumer Dispute Redressal Commission
Central Consumer Protection Council	National Consumer Dispute Redressal Commission



## CONSUMER PROTECTION COUNCIL

### Central Consumer Protection Council

The Central Government is empowered to establish the Central Consumer Protection Council to be known as the Central Council. The Central Council shall be an advisory council and consist of the Minister-in-charge of the Department of Consumer Affairs in the Central Government, who shall be the Chairperson; and such number of other official or non-official members representing such interests as may be prescribed.

The Central Council shall meet as and when necessary, but at least one meeting of the Council shall be held every year. The Central Council shall meet at such time and place as the Chairperson may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed.

***The objects of the Central Council shall be to render advice on promotion and protection of the consumers' rights under the Act.***

### State Consumer Protection Councils

Every State Government is empowered to establish a State Consumer Protection Council for such State to be known as the State Council. The State Council shall be an advisory council and consist of the Minister-in-charge of Consumer Affairs in the State Government who shall be the Chairperson; such number of other official or non-official members representing such interests as may be prescribed and such number of other official or non-official members, not exceeding ten, as may be nominated by the Central Government.

The State Council shall meet as and when necessary but not less than two meetings shall be held every year. The State Council shall meet at such time and place as the Chairperson may think fit and shall observe such procedure in regard to the transaction of its business, as may be prescribed.

***The objects of every State Council shall be to render advice on promotion and protection of consumer rights under the Act within the State.***

### District Consumer Protection Council

The State Government is empowered to establish for every District with effect from such date as it may specify in such notification, a District Consumer Protection Council to be known as the District Council. The District Council shall be an advisory council and consist the Collector of the district (by whatever name called), who shall be the Chairperson; and such number of other official and non-official members representing such interests as may be prescribed.

The District Council shall meet as and when necessary but not less than two meetings shall be held every year. The District Council shall meet at such time and place within the district as the Chairperson may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed.

***The objects of every District Council shall be to render advice on promotion and protection of consumer rights under the Act within the district.***

### Establishment of Central Consumer Protection Authority

Section 10 empowers the Central Government to establish a Central Consumer Protection Authority to be known as the Central Authority to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class.

The Central Authority shall consist of a Chief Commissioner and such number of other Commissioners as may be prescribed, to be appointed by the Central Government to exercise the powers and discharge the functions under the Act.

The headquarters of the Central Authority shall be at such place in the National Capital Region of Delhi, and it shall have regional and other offices in any other place in India as the Central Government may decide.

### **Qualifications, method of recruitment, etc., of Chief Commissioner and Commissioners**

The Central Government may, by notification, make rules to provide for the qualifications for appointment, method of recruitment, procedure for appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of the service of the Chief Commissioner and Commissioners of the Central Authority.

### **Vacancy, etc., not to invalidate proceedings of Central Authority**

No act or proceeding of the Central Authority shall be invalid merely by reason of –

- (a) any vacancy in, or any defect in the constitution of, the Central Authority; or
- (b) any defect in the appointment of a person acting as the Chief Commissioner or as a Commissioner; or
- (c) any irregularity in the procedure of the Central Authority not affecting the merits of the case.

### **Appointment of officers, experts, professionals and other employees of Central Authority**

Section 13 of the Act deals with Appointment of officers, experts, professionals and other employees of Central Authority. It states that:

- (1) The Central Government shall provide the Central Authority such number of officers and other employees as it considers necessary for the efficient performance of its functions under this Act.
- (2) The salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the Central Authority appointed under this Act shall be such as may be prescribed.
- (3) The Central Authority may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and ability, who have special knowledge and experience in the areas of consumer rights and welfare, consumer policy, law, medicine, food safety, health, engineering, product safety, commerce, economics, public affairs or administration, as it deems necessary to assist it in the discharge of its functions under this Act.

### **Procedure of Central Authority**

The Central Authority shall regulate the procedure for transaction of its business and allocation of its business amongst the Chief Commissioner and Commissioners as may be specified by regulations. The Chief Commissioner shall have the powers of general superintendence, direction and control in respect of all administrative matters of the Central Authority.

Chief Commissioner may delegate such of his powers relating to administrative matters of the Central Authority, as he may think fit, to any Commissioner (including Commissioner of a regional office) or any other officer of the Central Authority.

### **Investigation Wing of Central Authority**

- The Central Authority shall have an Investigation Wing headed by a Director General for the purpose of conducting inquiry or investigation under this Act as may be directed by the Central Authority.

- The Central Government may appoint a Director General and such number of Additional Director General, Director, Joint Director, Deputy Director and Assistant Director, from amongst persons who have experience in investigation and possess such qualifications, in such manner, as may be prescribed.
- Every Additional Director General, Director, Joint Director, Deputy Director and Assistant Director shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director-General.
- The Director General may delegate all or any of his powers to the Additional Director General or Director, Joint Director or Deputy Director or Assistant Director, as the case may be, while conducting inquiries or investigations under this Act.
- The inquiries or the investigations made by the Director General shall be submitted to the Central Authority in such form, in such manner and within such time, as may be specified by regulations.

### Power of District Collector

Section 16 of the Act provides that the District Collector (by whatever name called) may, on a complaint or on a reference made to him by the Central Authority or the Commissioner of a regional office, inquire into or investigate complaints regarding violation of rights of consumers as a class, on matters relating to violations of consumer rights, unfair trade practices and false or misleading advertisements, within his jurisdiction and submit his report to the Central Authority or to the Commissioner of a regional office, as the case may be.

### Complaints to Authorities

A complaint relating to violation of consumer rights or unfair trade practices or false or misleading advertisements which are prejudicial to the interests of consumers as a class, may be forwarded either in writing or in electronic mode, to any one of the authorities, namely, the District Collector or the Commissioner of regional office or the Central Authority.

### Powers and functions of Central Authority

According to section 18(1), the Central Authority empowers to:

- (a) protect, promote and enforce the rights of consumers as a class, and prevent violation of consumers rights under this Act;
- (b) prevent unfair trade practices and ensure that no person engages himself in unfair trade practices;
- (c) ensure that no false or misleading advertisement is made of any goods or services which contravenes the provisions of this Act or the rules or regulations made thereunder;
- (d) ensure that no person takes part in the publication of any advertisement which is false or misleading.

Section 18(2) states that without prejudice to the generality of the provisions contained in Section 18 (1), the Central Authority may, for any of the purposes aforesaid –

- (a) inquire or cause an inquiry or investigation to be made into violations of consumer rights or unfair trade practices, either *suo motu* or on a complaint received or on the directions from the Central Government;
- (b) file complaints before the District Commission, the State Commission or the National Commission, as the case may be, under this Act;
- (c) intervene in any proceedings before the District Commission or State Commission or National Commission, as the case may be, in respect of any allegation of violation of consumer rights or unfair trade practices;

- (d) review the matters relating to, and the factors inhibiting enjoyment of, consumer rights, including safeguards provided for the protection of consumers under any other law for the time being in force and recommend appropriate remedial measures for their effective implementation;
- (e) recommend adoption of international covenants and best international practices on consumer rights to ensure effective enforcement of consumer rights;
- (f) undertake and promote research in the field of consumer rights;
- (g) spread and promote awareness on consumer rights;
- (h) encourage non-Governmental organisations and other institutions working in the field of consumer rights to co-operate and work with consumer protection agencies;
- (i) mandate the use of unique and universal goods identifiers in such goods, as may be necessary, to prevent unfair trade practices and to protect consumers' interest;
- (j) issue safety notices to alert consumers against dangerous or hazardous or unsafe goods or services;
- (k) advise the Ministries and Departments of the Central and State Governments on consumer welfare measures;
- (l) issue necessary guidelines to prevent unfair trade practices and protect consumers' interest.

#### **Power of Central Authority to refer matter for investigation or to other Regulator**

Section 19(1) of the Act provides that the Central Authority may, after receiving any information or complaint or directions from the Central Government or of its own motion, conduct or cause to be conducted a preliminary inquiry as to whether there exists a prima facie case of violation of consumer rights or any unfair trade practice or any false or misleading advertisement, by any person, which is prejudicial to the public interest or to the interests of consumers and if it is satisfied that there exists a prima facie case, it shall cause investigation to be made by the Director General or by the District Collector.

According to Section 19(2) where, after preliminary inquiry, the Central Authority is of the opinion that the matter is to be dealt with by a Regulator established under any other law for the time being in force, it may refer such matter to the concerned Regulator along with its report.

Section 19 (3) states that for the purposes of investigation, the Central Authority, the Director General or the District Collector may call upon a person referred to in Section 19(1) and also direct him to produce any document or record in his possession.

#### **Power of Central Authority to recall goods**

As per section 20 of the Act, where the Central Authority is satisfied on the basis of investigation that there is sufficient evidence to show violation of consumer rights or unfair trade practice by a person, it may pass such order as may be necessary, including –

- (a) recalling of goods or withdrawal of services which are dangerous, hazardous or unsafe;
- (b) reimbursement of the prices of goods or services so recalled to purchasers of such goods or services; and
- (c) Discontinuation of practices which are unfair and prejudicial to consumers' interest: Provided that the Central Authority shall give the person an opportunity of being heard before passing an order under this section.

### Power of Central Authority to issue directions and penalties against false or misleading advertisements

Section 21 provides that where the Central Authority is satisfied after investigation that any advertisement is false or misleading and is prejudicial to the interest of any consumer or is in contravention of consumer rights, it may, by order, issue directions to the concerned trader or manufacturer or endorser or advertiser or publisher, as the case may be, to discontinue such advertisement or to modify the same in such manner and within such time as may be specified in that order.

If the Central Authority is of the opinion that it is necessary to impose a penalty in respect of such false or misleading advertisement, by a manufacturer or an endorser, it may, by order, impose on manufacturer or endorser a penalty which may extend to ten lakh rupees. The Central Authority may, for every subsequent contravention by a manufacturer or endorser, impose a penalty, which may extend to fifty lakh rupees.

Where the Central Authority deems it necessary, it may, by order, prohibit the endorser of a false or misleading advertisement from making endorsement of any product or service for a period which may extend to one year. Central Authority may, for every subsequent contravention, prohibit such endorser from making endorsement in respect of any product or service for a period which may extend to three years.

Where the Central Authority is satisfied after investigation that any person is found to publish, or is a party to the publication of, a misleading advertisement, it may impose on such person a penalty which may extend to ten lakh rupees.

Misleading Advertisement in relation to any product or service, means an advertisement, which –

- (i) falsely describes such product or service; or
- (ii) gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or
- (iii) conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or
- (iv) deliberately conceals important information. [Section 2(28)]

No endorser shall be liable to a penalty, if he has exercised due diligence to verify the veracity of the claims made in the advertisement regarding the product or service being endorsed by him.

No person shall be liable to such penalty if he proves that he had published or arranged for the publication of such advertisement in the ordinary course of his business: Provided that no such defence shall be available to such person if he had previous knowledge of the order passed by the Central Authority for withdrawal or modification of such advertisement.

#### While determining the penalty, regard shall be had to the following, namely:–

- (a) the population and the area impacted or affected by such offence;
- (b) the frequency and duration of such offence;
- (c) the vulnerability of the class of persons likely to be adversely affected by such offence; and
- (d) the gross revenue from the sales effected by virtue of such offence.

The Central Authority shall give the person an opportunity of being heard before an order under this section is passed.

Endorsement in relation to an advertisement, means –

- (i) any message, verbal statement, demonstration; or
- (ii) depiction of the name, signature, likeness or other identifiable personal characteristics of an individual; or
- (iii) depiction of the name or seal of any institution or organisation, which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement. [Section 2(18)]

### Search and Seizure

According to section 22 of the Act, for the purpose of conducting an investigation after preliminary inquiry under section 19(1), the Director General or any other officer authorised by him in this behalf, or the District Collector, as the case may be, may, if he has any reason to believe that any person has violated any consumer rights or committed unfair trade practice or causes any false or misleading advertisement to be made, shall, –

- (a) enter at any reasonable time into any such premises and search for any document or record or article or any other form of evidence and seize such document, record, article or such evidence;
- (b) make a note or an inventory of such record or article; or
- (c) require any person to produce any record, register or other document or article.

The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure shall apply, as far as may be, for search and seizure under this Act.

Every document, record or article seized or produced shall be returned to the person, from whom they were seized or who produced the same, within a period of twenty days of the date of such seizure or production, as the case may be, after copies thereof or extracts therefrom certified by that person, in such manner as may be prescribed, have been taken.

Where any article seized are subject to speedy or natural decay, the Director General or such other officer may dispose of the article in such manner as may be prescribed. In the case of articles other than the articles of speedy or natural decay, provisions contained in section 38(2) shall *mutatis mutandis* apply in relation to analysis or tests.

Section 38(2)(c) provides that if the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, obtain a sample of the goods from the complainant, seal it and authenticate it in the manner as may be prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory to make an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District Commission within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by it.

#### Vexatious Search

The Director General or any other officer, exercising powers under section 22, who knows that there are no reasonable grounds for so doing, and yet–

- (a) Searches, or causes to be searched any premises; or
- (b) Seizes any record, register or other document or article, shall, for every such offence, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees or with both.

### Designation of any statutory authority or body to function as Central Authority

Section 23 empowers the Central Government which may, if it considers necessary, by notification, designate any statutory authority or body to exercise the powers and perform the functions of the Central Authority referred to in section 10.

### Appeal

Section 24 provides that a person aggrieved by any order passed by the Central Authority under sections 20 and 21 may file an appeal to the National Commission within a period of thirty days from the date of receipt of such order.

### DISTRICT CONSUMER DISPUTES REDRESSAL COMMISSION

Section 28 of the Act, empowers the State Government to establish a District Consumer Disputes Redressal Commission, to be known as the District Commission, in each district of the State. State Government may also, if it deems fit, establish more than one District Commission in a district.

Each District Commission shall consist of – (a) a President; and (b) not less than two and not more than such number of members as may be prescribed, in consultation with the Central Government.

### Qualifications of President and members of District Commission

The Central Government may, by notification, make rules to provide for the qualifications, method of recruitment, procedure for appointment, term of office, resignation and removal of the President and members of the District Commission.

### Jurisdiction of District Commission

According to section 34, the District Commission shall have jurisdiction to entertain complaints where the value of the goods or services paid as consideration does not exceed one crore rupees.

A complaint shall be instituted in a District Commission within the local limits of whose jurisdiction, –

- (a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, ordinarily resides or carries on business or has a branch office or personally works for gain; or
- (b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain, provided that in such case the permission of the District Commission is given; or
- (c) the cause of action, wholly or in part, arises; or
- (d) the complainant resides or personally works for gain.

The District Commission shall ordinarily function in the district headquarters and may perform its functions at such other place in the district, as the State Government may, in consultation with the State Commission, notify in the Official Gazette from time to time.

### Manner in which complaint shall be made

Section 35 provides that a complaint, in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided, may be filed with a District Commission by –

- (a) the consumer, –
  - (i) to whom such goods are sold or delivered or agreed to be sold or delivered or such service is provided or agreed to be provided; or

- (ii) who alleges unfair trade practice in respect of such goods or service.
- (b) any recognised consumer association, whether the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service is provided or agreed to be provided, or who alleges unfair trade practice in respect of such goods or service, is a member of such association or not;
- (c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Commission, on behalf of, or for the benefit of, all consumers so interested; or
- (d) The Central Government, the Central Authority or the State Government, as the case may be.

It may be noted that the **complaint may be filed electronically** in the prescribed manner.

Every complaint filed shall be accompanied with such fee and payable in such manner, including electronic form, as may be prescribed.

#### ***What is the Procedure for Filing the Complaint before Consumer Commission?***

##### **A complaint:**

- **Should be in writing**
- **Can be filed in a regular way (offline)**
- **Can be filed online – <http://edaakhil.nic.in/>**

***A complaint can be presented by the complainant in person or by his agent. It can even be sent by registered post along with the court fee.***

***Normally three copies of the complaint are required to be submitted out of which one retained for the official purpose, one is forwarded to the opposite party and one is the for the complainant. In case the number of opposite parties is more correspondingly more copies of the complaint are required.***

*“Recognised Consumer Association” means any voluntary consumer association registered under any law for the time being in force.*

*In the case of Sobha Hibiscus Condominium vs. MW Soshha Developer’s Ltd., judgement dated February 2020, Hon’ble Supreme Court observed that in essence voluntary consumer association will be a body formed by group of person’s coming together, of their own will and without any pressure or influence from anyone and without being mandated by any other provisions of law.*

#### **Proceedings before District Commission**

According to Section 36, every proceeding before the District Commission shall be conducted by the President of that Commission and at least one member thereof, sitting together.

It may be noted that where a member, for any reason, is unable to conduct a proceeding till it is completed, the President and the other member shall continue the proceeding from the stage at which it was last heard by the previous member.

On receipt of a complaint made under section 35, the District Commission may, by order, admit the complaint for being proceeded with or reject the same.



A complaint shall not be rejected unless an opportunity of being heard has been given to the complainant. The admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint was filed.

Where the District Commission does not decide the issue of admissibility of the complaint within the period so specified, it shall be deemed to have been admitted.

### Reference to mediation

According to Section 37, at the first hearing of the complaint after its admission, or at any later stage, if it appears to the District Commission that there exists elements of a settlement which may be acceptable to the parties, except in such cases as may be prescribed, it may direct the parties to give in writing, within five days, consent to have their dispute settled by mediation in accordance with the provisions of Chapter V.

Where the parties agree for settlement by mediation and give their consent in writing, the District Commission shall, **within five days of receipt** of such consent, refer the matter for mediation, and in such case, the provisions of Chapter V, relating to mediation, shall apply.

### Procedure on admission of complaint

Section 38 deals with procedure on admission of complaint by the District Commission. Section 38 provides that:

- (1) The District Commission shall, on admission of a complaint, or in respect of cases referred for mediation on failure of settlement by mediation, proceed with such complaint.
- (2) Where the complaint relates to any goods, the District Commission shall, –
  - (a) refer a copy of the admitted complaint, within twenty-one days from the date of its admission to the opposite party mentioned in the complaint directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by it;
  - (b) if the opposite party on receipt of a complaint referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Commission, proceed to settle the consumer dispute in the manner specified in clauses (c) to (g);
  - (c) if the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, obtain a sample of the goods from the complainant, seal it and authenticate it in the manner as may be prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory to make an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District Commission within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by it;
  - (d) before any sample of the goods is referred to any appropriate laboratory under clause (c), require the complainant to deposit to the credit of the Commission such fees as may be specified, for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question;

- (e) remit the amount deposited to its credit under clause (d) to the appropriate laboratory to enable it to carry out the analysis or test mentioned in clause (c) and on receipt of the report from the appropriate laboratory, it shall forward a copy of the report along with such remarks as it may feel appropriate to the opposite party;
  - (f) if any of the parties disputes the correctness of the findings of the appropriate laboratory, or disputes the correctness of the methods of analysis or test adopted by the appropriate laboratory, require the opposite party or the complainant to submit in writing his objections with regard to the report made by the appropriate laboratory;
  - (g) give a reasonable opportunity to the complainant as well as the opposite party of being heard as to the correctness or otherwise of the report made by the appropriate laboratory and also as to the objection made in relation thereto under clause (f) and issue an appropriate order under section 39.
- (3) The District Commission shall, if the complaint admitted by it under section 36 relates to goods in respect of which the procedure specified in sub-section (2) cannot be followed, or if the complaint relates to any services, –
- (a) refer a copy of such complaint to the opposite party directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Commission;
  - (b) if the opposite party, on receipt of a copy of the complaint, referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Commission, it shall proceed to settle the consumer dispute –
    - (i) on the basis of evidence brought to its notice by the complainant and the opposite party, if the opposite party denies or disputes the allegations contained in the complaint, or
    - (ii) ex parte on the basis of evidence brought to its notice by the complainant, where the opposite party omits or fails to take any action to represent his case within the time given by the Commission.
  - (c) decide the complaint on merits if the complainant fails to appear on the date of hearing.
- (4) For the purposes of sub-sections (2) and (3), the District Commission may, by order, require an electronic service provider to provide such information, documents or records, as may be specified in that order.
- (5) No proceedings complying with the procedure laid down in sub-sections (1) and (2) shall be called in question in any court on the ground that the principles of natural justice have not been complied with.
- (6) Every complaint shall be heard by the District Commission on the basis of affidavit and documentary evidence placed on record: Provided that where an application is made for hearing or for examination of parties in person or through video conferencing, the District Commission may, on sufficient cause being shown, and after recording its reasons in writing, allow the same.
- (7) Every complaint shall be disposed of as expeditiously as possible and endeavour shall be made to decide the complaint within a period of three months from the date of receipt of notice by opposite party where the complaint does not require analysis or testing of commodities and within five months if it requires analysis or testing of commodities. Provided that no adjournment shall ordinarily be granted by the District Commission unless sufficient cause is shown and the reasons for grant of adjournment have been recorded in writing by the Commission. Provided further that the District Commission shall make such orders as to the costs occasioned by the adjournment as may be specified by regulations.

Provided also that in the event of a complaint being disposed of after the period so specified, the District Commission shall record in writing, the reasons for the same at the time of disposing of the said complaint.

- (8) Where during the pendency of any proceeding before the District Commission, if it appears necessary, it may pass such interim order as is just and proper in the facts and circumstances of the case.
- (9) For the purposes of this section, the District Commission shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely: –
  - (a) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;
  - (b) requiring the discovery and production of any document or other material object as evidence;
  - (c) receiving of evidence on affidavits;
  - (d) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
  - (e) issuing of commissions for the examination of any witness, or document; and
  - (f) any other matter which may be prescribed by the Central Government.
- (10) Every proceeding before the District Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code, and the District Commission shall be deemed to be a criminal court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.
- (11) Where the complainant is a consumer referred to in sub-clause (v) of clause (5) of section 2, the provisions of Order I Rule 8 of the First Schedule to the Code of Civil Procedure, 1908 shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to a complaint or the order of the District Commission thereon.
- (12) In the event of death of a complainant who is a consumer or of the opposite party against whom the complaint has been filed, the provisions of Order XXII of the First Schedule to the Code of Civil Procedure, 1908 shall apply subject to the modification that every reference therein to the plaintiff and the defendant shall be construed as reference to a complainant or the opposite party, as the case may be.

*In the case of Brigade Enterprises Limited v. Anil Kumar Virmani & Ors. Civil Appeal No.1779 of 2021 dated December 17, 2021, Supreme Court inter alia observed that Section 35(1)(c) enables one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Commission, to file a complaint, on behalf of or for the benefit of all consumers so interested. It is needless to point out that the sine qua non for invoking Section 35(1)(c) is that all consumers on whose behalf or for whose benefit the provision is invoked, should have the same interest. Interestingly, Section 35(1)(c) uses the disjunction “or” in between two sets of words, namely, (i) “on behalf of”; and (ii) “for the benefit of”. Therefore, a complaint filed under Section 35(1)(c) could either be “on behalf of” or “for the benefit of” all consumers having the same interest.*

*Section 38(11) of the Consumer Protection Act, 2019 makes the provisions of Order I Rule 8 of the First Schedule to the Code of Civil Procedure, 1908 applicable to cases where the complainant is a consumer referred to in Section 2(5)(v), which defines a ‘complainant’ to mean one or more consumers, where there are numerous consumers having the same interest.*

*Order I Rule 8, CPC, unlike Section 35(1)(c) operates both ways and contains provisions for a twoway traffic. It not only permits plaintiffs to sue in a representative capacity but also permits people to be sued and to be defended in an action, in a representative capacity.*

*In simple terms, the salient features of the stipulations contained in Order I Rule 8 CPC can be summed up as follows:*

- (i) where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue on behalf of or for the benefit of all persons so interested;*
- (ii) where there are numerous persons having the same interest in one suit, one or more of such persons may be sued or one or more such persons may defend such suit, on behalf of or for the benefit of all persons so interested;*
- (iii) the Court itself may, without the plaintiffs or defendants seeking any permission under Order I Rule 8(1)(a), direct that one or more such persons may sue or be sued or may defend the suit on behalf of and for the benefit of all persons interested;*
- (iv) notice of the institution of the suit to all persons so interested either by personal service or by public advertisement should be ordered by the Court in both categories of cases, namely, where permission is given by the Court on the application of the individuals or direction is issued by the Court itself;*
- (v) any person on whose behalf or for whose benefit the suit is instituted or defended may seek to be made a party to the suit;*
- (vi) abandonment of the whole or part of the claim, withdrawal of the suit or the recording of any agreement, compromise or satisfaction shall not be allowed by the Court unless notice to all persons interested in the matter is issued either by personal service or by public advertisement;*
- (vii) the Court may at any time substitute the person suing or defending in a representative capacity, with any other person, if the former was not prosecuting the suit or defence with due diligence;*
- (viii) the decree passed in the suit covered by this Rule will be binding on all persons.*

Further in the case of *Brigade Enterprises Limited v. Anil Kumar Virmani & Ors.* Civil Appeal No.1779 of 2021 judgement dated December 17, 2021, Hon'ble Supreme Court inter alia observed that a careful reading of the provisions of Section 35(1) would show that there is no scope for the contention that wherever there are more consumers than one, they must only take recourse to Order I Rule 8 CPC, even if the complaint is not on behalf of or for the benefit of, all the consumers interested in the matter. There may be cases where only "a few consumers" and not "numerous consumers" have the same interest. There is nothing in the Act to prohibit these few consumers from joining together and filing a joint complaint. A joint complaint stands in contrast to a complaint filed in a representative capacity. For attracting the provisions of Section 35(1)(c), the complaint filed by one or more consumers should be on behalf of or for the benefit of numerous consumers having same interest. It does not mean that where there are only very few consumers having the same interest, they cannot even join together and file a single complaint, but should take recourse only to independent and separate complaints. (Para 34)

Therefore, the proper way of interpreting Section 35(1) read with section 2(5), would be to say that a complaint may be filed: (i) by a single consumer; (ii) by a recognised consumer Association; (iii) by one or more consumers jointly, seeking the redressal of their own grievances without representing other consumers who may or may not have the same interest; (iv) by one or more consumers on behalf of or for the benefit of numerous consumers; and (v) the Central Government, Central Authority or State Authority. (Para 38)

It must be remembered that the provisions of the Consumer Protection Act are in addition to and not in derogation of the provisions of any other law for the time being in force, by virtue of Section 100. Even Section 38 which prescribes the procedure to be followed by the Commission for enquiring into the complaint, does not expressly exclude the application of the provisions of CPC. Though Subsections (9), (11) and (12) of Section 38 make specific reference only to a few provisions of the Code of Civil Procedure, the principle behind Order I Rule 1 enabling more than one person to join in a suit as plaintiff is not expressly excluded. (Para 39)

Therefore, Supreme Court is of the considered view that while the National Commission was wrong in this case, in the peculiar facts and circumstances in permitting an application under Section 35(1)(c) read with Order I Rule 8 CPC, it does not mean that the complaint filed by the respondents itself is liable to be thrown out. The complaint filed by the respondents may have to be treated as a joint complaint and not a complaint in a representative capacity on behalf of 1134 purchasers. The purchasers of other flats, such as the intervenors herein may join as parties to the consumer complaint, if they so desire. As a matter of fact, it is stated by the intervenors that pursuant to the impugned order, advertisements were issued and the intervenors have already filed impleadment application before the National Commission. They are entitled to be impleaded. (Para 40)

### Findings of District Commission

Section 39(1) of the Act states that where the District Commission is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services or any unfair trade practices, or claims for compensation under product liability are proved, it shall issue an order to the opposite party directing him to do one or more of the following, namely: –

- (a) to remove the defect pointed out by the appropriate laboratory from the goods in question;
- (b) to replace the goods with new goods of similar description which shall be free from any defect;
- (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant along with such interest on such price or charges as may be decided;
- (d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party: Provided that the District Commission shall have the power to grant punitive damages in such circumstances as it deems fit;
- (e) to pay such amount as may be awarded by it as compensation in a product liability action under Chapter VI;
- (f) to remove the defects in goods or deficiencies in the services in question;
- (g) to discontinue the unfair trade practice or restrictive trade practice and not to repeat them;
- (h) not to offer the hazardous or unsafe goods for sale;
- (i) to withdraw the hazardous goods from being offered for sale;
- (j) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;
- (k) to pay such sum as may be determined by it, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently. It may be noted that the minimum amount of sum so payable shall not be less than twenty-five per cent. of the value of such defective goods sold or service provided, as the case may be, to such consumers;

- (l) to issue corrective advertisement to neutralise the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;
- (m) to provide for adequate costs to parties; and
- (n) to cease and desist from issuing any misleading advertisement.

Section 39(2) provides that any amount obtained shall be credited to such fund and utilised in such manner as may be prescribed.

According to Section 39(3), in any proceeding conducted by the President and a member and if they differ on any point or points, they shall state the point or points on which they differ and refer the same to another member for hearing on such point or points and the opinion of the majority shall be the order of the District Commission. However, the other member shall give his opinion on such point or points referred to him within a period of one month from the date of such reference.

Every order made by the District Commission shall be signed by the President and the member who conducted the proceeding. Provided that where the order is made as per majority opinion under sub-section (3), such order shall also be signed by the other member.[Section 39(4)]

### Review by District Commission in Certain Case

Section 40 empowers the District Commission to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within thirty days of such order.

### Appeal against order of District Commission

According to Section 41 of the Act, any person aggrieved by an order made by the District Commission may prefer an appeal against such order to the State Commission on the grounds of facts or law within a period of **forty-five days** from the date of the order, in such form and manner, as may be prescribed. It may be noted that the State Commission may entertain an appeal after the expiry of the said period of forty-five days, if it is satisfied that there was sufficient cause for not filing it within that period.

#### There are certain restriction on appeal, unless the person fulfil the following conditions namely-

- No appeal by a person, who is required to pay any amount in terms of an order of the District Commission, shall be entertained by the State Commission unless the appellant has deposited fifty per cent. of that amount in the manner as may be prescribed.
- No appeal shall lie from any order passed under sub-section (1) of section 81 by the District Commission pursuant to a settlement by mediation under section 80.

### STATE CONSUMER DISPUTES REDRESSAL COMMISSION

Section 42 empowers the State Government to establish a State Consumer Disputes Redressal Commission, to be known as the State Commission, in the State. The State Commission shall ordinarily function at the State capital and perform its functions at such other places as the State Government may in consultation with the State Commission notify in the Official Gazette. State Government also empowers to establish regional benches of the State Commission, at such places, as it deems fit.

#### Each State Commission shall consist of–

- (a) a President; and
- (b) not less than four or not more than such number of members as may be prescribed in consultation with the Central Government.

### Jurisdiction of State Commission

According to Section 47(1) of the Act, State Commission shall have jurisdiction –

- (a) to entertain –
  - (i) complaints where the value of the goods or services paid as consideration, exceeds rupees one crore, but does not exceed rupees ten crore: Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;
  - (ii) complaints against unfair contracts, where the value of goods or services paid as consideration does not exceed ten crore rupees;
  - (iii) appeals against the orders of any District Commission within the State; and
- (b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Commission within the State, where it appears to the State Commission that such District Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

Unfair contract means a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely: –

- (i) requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or
- (ii) imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or
- (iii) refusing to accept early repayment of debts on payment of applicable penalty; or
- (iv) entitling a party to the contract to terminate such contract unilaterally, without reasonable cause; or
- (v) permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; or
- (vi) imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage.

Section 47(2) provides that the jurisdiction, powers and authority of the State Commission may be exercised by Benches thereof, and a Bench may be constituted by the President with one or more members as the President may deem fit. It may be noted that the senior-most member shall preside over the Bench.

Section 47(3) states that where the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it. The President or the other members, as the case may be, shall give opinion on the point or points so referred within a period of one month from the date of such reference.



According to Section 47(4), a complaint shall be instituted in a State Commission within the limits of whose jurisdiction,—

- (a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, ordinarily resides or carries on business or has a branch office or personally works for gain; or
- (b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided in such case, the permission of the State Commission is given; or
- (c) the cause of action, wholly or in part, arises; or
- (d) the complainant resides or personally works for gain.

### Review by State Commission in Certain Case

Section 50 empowers the State Commission to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within thirty days of such order.

### Appeal to National Commission

Section 51(1) provides that any person aggrieved by an order made by the State Commission in exercise of its powers conferred by Section 47(1)(a)(i) or section 47(1)(a)(ii) may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed. National Commission shall not entertain the appeal after the expiry of the said period of thirty days unless it is satisfied that there was sufficient cause for not filing it within that period. Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited fifty per cent. of that amount in the manner as may be prescribed.

Section 51 (2) states that save as otherwise expressly provided under this Act or by any other law for the time being in force, an appeal shall lie to the National Commission from any order passed in appeal by any State Commission, if the National Commission is satisfied that the case involves a substantial question of law.

According to Section 51(3), in an appeal involving a question of law, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

Section 51(4) provides that where the National Commission is satisfied that a substantial question of law is involved in any case, it shall formulate that question and hear the appeal on that question. Further, nothing in this sub-section shall be deemed to take away or abridge the power of the National Commission to hear, for reasons to be recorded in writing, the appeal on any other substantial question of law, if it is satisfied that the case involves such question of law.

*An appeal may lie to the National Commission from an order passed ex parte by the State Commission.*

*The Hon'ble Supreme Court in the case of Manohar Infrastructure and Constructions Private Limited vs. Sanjeev Kumar Sharma & Ors. dated December 07, 2021 held that the condition of pre-deposit for entertaining appeal under Section 51 of the Consumer Protection Act, 2019 is mandatory. Section 51 of the Consumer Protection Act, 2019 provides that no appeal by a person, who is required to pay any amount in terms of order of the State Commission shall be entertained by the NCDRC unless the appellant has deposited 50 percent of that amount.*



*The Court in answering the question laid down the following:*

1. *Pre-deposit of 50 per cent of amount as ordered by the State Commission under second proviso to Section 51 of the Consumer Protection Act, 2019 is mandatory for entertainment of an appeal by the National Commission;*
2. *The object of the said pre-deposit condition is to avoid frivolous appeals;*
3. *The said pre-deposit condition has no nexus with the grant of stay by the NCDRC.*

*It then held that the NCDRC can grant a conditional stay directing the appellant to deposit the entire amount and/or any amount higher than 50 per cent of the amount determined by the State Commission.*

*However, while doing so, the NCDRC has to assign some cogent reasons and pass a speaking order either as an ex parte order or after hearing both sides and considering the facts and circumstances of the case.*

*"It must reflect an application of mind by the National Commission why the order passed by the State Commission is to be stayed on condition of deposit of the entire amount and/or any amount higher than 50 per cent of the amount awarded by the State Commission," the Court ruled.*

### **Hearing of appeal by State Commission or National Commission**

According to Section 52 of the Act, an appeal filed before the State Commission or the National Commission, as the case may be, shall be heard as expeditiously as possible and every endeavour shall be made to dispose of the appeal within a period of **ninety days** from the date of its admission.

Adjournment shall not ordinarily be granted by the State Commission or the National Commission, as the case may be, unless sufficient cause is shown and the reasons for grant of adjournment have been recorded in writing by such Commission.

State Commission or the National Commission, as the case may be, shall make such orders as to the costs occasioned by the adjournment, as may be specified by regulations.

In the event of an appeal being disposed of after the period so specified, the State Commission or the National Commission, as the case may be, shall record in writing the reasons for the same at the time of disposing of the said appeal.

### **NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION**

Section 53 empowers the Central Government to establish a National Consumer Disputes Redressal Commission, to be known as the National Commission. The National Commission shall ordinarily function at the National Capital Region and perform its functions at such other places as the Central Government may in consultation with the National Commission notify in the Official Gazette. Central Government may also establish regional Benches of the National Commission, at such places, as it deems fit.

#### **Composition of National Commission**

Section 54 provides that the National Commission shall consist of—

- (a) a President; and
- (b) not less than four and not more than such number of members as may be prescribed.

### Jurisdiction of National Commission

Section 58(1) of the Act provides that subject to the other provisions of this Act, the National Commission shall have jurisdiction –

- (a) to entertain –
  - (i) Complaints where the value of the goods or services paid as consideration **exceeds rupees ten crore**. Further, where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;
  - (ii) Complaints against unfair contracts, where the value of goods or services paid as consideration exceeds ten crore rupees;
  - (iii) Appeals against the orders of any State Commission;
  - (iv) Appeals against the orders of the Central Authority; and
- (b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

According to Section 58(2), the jurisdiction, powers and authority of the National Commission may be exercised by Benches thereof and a Bench may be constituted by the President with one or more members as he may deem fit. The senior-most member of the Bench shall preside over the Bench.

Section 58(3) states that where the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it. The President or the other member, as the case may be, shall give opinion on the point or points so referred within a period of two months from the date of such reference.

### Procedure Applicable to National Commission

Section 59 provides that the provisions relating to complaints under sections 35, 36, 37, 38 and 39 shall, with such modifications as may be considered necessary, be applicable to the disposal of complaints by the National Commission.

National Commission may also declare any terms of contract, which is unfair to any consumer to be null and void.

### Review by National Commission in Certain Cases

Section 60 empowers the National Commission to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within thirty days of such order.

### Power to set aside ex parte Orders

Where an order is passed by the National Commission ex parte, the aggrieved party may make an application to the Commission for setting aside such order.

### Procedures for Service of Notice

Section 65(1) states that all notices, required by this Act to be served, shall be served by delivering or transmitting a copy thereof by registered post acknowledgment due addressed to opposite party against whom complaint is made or to the complainant by **speed post or by such courier service**, approved by the District Commission, the State Commission or the National Commission, as the case may be, or by any other mode of transmission of documents including electronic means.

Section 65 (2) provides that without prejudice to the provisions contained in sub-section (1), the notice required by this Act may be served on an electronic service provider at the address provided by it on the **electronic platform** from where it provides its services as such and for this purpose, the electronic service provider shall designate a nodal officer to accept and process such notices.

According to Section 65 (3), when an acknowledgment or any other receipt purporting to be signed by the opposite party or his agent or, as the case may be, by the complainant is received by the District Commission, the State Commission or the National Commission, as the case may be, or postal article containing the notice is received back by such District Commission, State Commission or the National Commission, with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the opposite party or his agent or complainant had refused to take delivery of the postal article containing the notice or had refused to accept the notice by any other means specified in sub-section when tendered or transmitted to him, the District Commission or the State Commission or the National Commission, as the case may be, shall declare that the notice has been duly served on the opposite party or to the complainant, as the case may be.

Provided that where the notice was properly addressed, pre-paid and duly sent by registered post acknowledgment due, a declaration referred to in this sub-section shall be made notwithstanding the fact that the acknowledgment has been lost or misplaced, or for any other reason, has not been received by the District Commission, the State Commission or the National Commission, as the case may be, within thirty days from the date of issue of notice.

Section 65 (4) states that all notices required to be served on an opposite party or to complainant, as the case may be, shall be deemed to be sufficiently served, if addressed in the case of the opposite party, to the place where business or profession is carried on, and in case of the complainant, the place where such person actually and voluntarily resides.

### Experts to Assist National Commission or State Commission

Section 66 of the Act provides that where the National Commission or the State Commission, as the case may be, on an application by a complainant or otherwise, is of the opinion that it involves the larger interest of consumers, it may direct any individual or organisation or expert to assist the National Commission or the State Commission, as the case may be.

### Appeal against Order of National Commission

According to Section 67 of the Act, any person, aggrieved by an order made by the National Commission may prefer an appeal against such order to the Supreme Court within a period of thirty days from the date of the order.

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

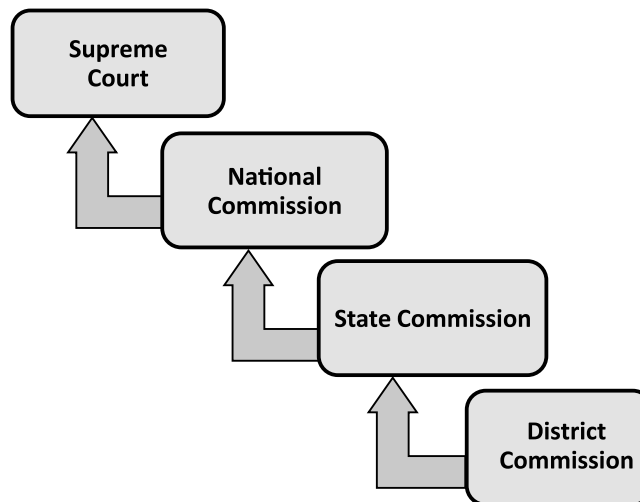
Provided further that no appeal by a person who is required to pay any amount in terms of an order of the National Commission shall be entertained by the Supreme Court unless that person has deposited fifty per cent. of that amount in the manner as may be prescribed.

***What if the Consumer is Not Satisfied with the Order of the Consumer Commission?***

***Any consumer who is aggrieved by the order of a commission can prefer an appeal in the higher commission within a period of thirty days from the date of the order. The appeal can be preferred***

- ***Against order of the District Commission before the State Commission within 30 days***
- ***Against order of the State Commission before the National Commission within 30 days***
- ***Against order of the National Commission before the Supreme Court, within 45 days***

### Appeal



### Finality of Orders

Section 68 states that every order of a District Commission or the State Commission or the National Commission, as the case may be, shall, if no appeal has been preferred against such order under the provisions of this Act, be final.

### Limitation Period

Section 69 provides that the District Commission, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

A complaint may be entertained after the period specified above, if the complainant satisfies the District Commission, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period.

A complaint shall not be entertained unless the District Commission or the State Commission or the National Commission, as the case may be, records its reasons for condoning such delay.

***What is the Time Limit for Filing the Complaint?***

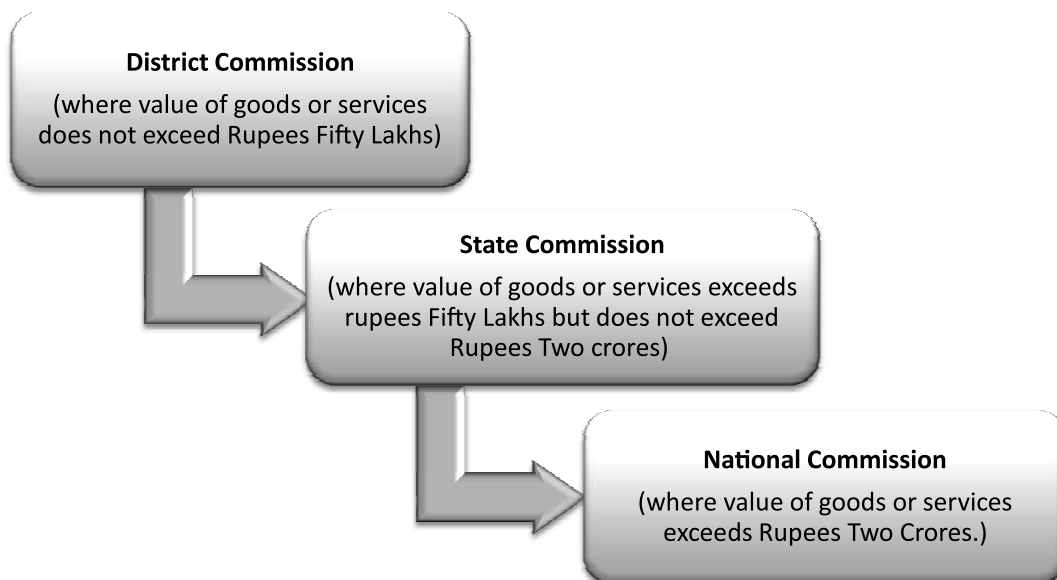
- ***The complaint shall be filed within two years from the date on which the cause of action has arisen.***
- ***This would mean two years from the day the deficiency in service or defect in goods has arisen/detected.***
- ***This is also known as the limitation period for filing the complaint.***

Pecuniary jurisdiction of Commissions	
Commissions	Pecuniary jurisdiction
District Commission	Upto 1 cr
State Commission	1 cr – Upto 10 cr
National Commission	Above 10 cr

**According to Consumer Protection (Jurisdiction of the District Commission, the State Commission and the National Commission) Rules, 2021 Vide Notification dated 30th December, 2021 prescribed the following Pecuniary Jurisdiction:**

- **District Commission: Does not exceed fifty lakh rupees.**
- **State Commission: Exceeds fifty lakhs but does not exceed two crore rupees.**
- **National Commission: Exceed two crore rupees.**

**Pecuniary Jurisdiction under Consumer Protection (Jurisdiction of the District Commission, the State Commission and the National Commission) Rules, 2021**



**Enforcement of Orders of District Commission, State Commission and National Commission**

According to the Section 71 of the Act, every order made by a District Commission, State Commission or the National Commission shall be enforced by it in the same manner as if it were a decree made by a Court in a suit before it and the provisions of Order XXI of the First Schedule to the Code of Civil Procedure, 1908 shall, as far as may be, applicable, subject to the modification that every reference therein to the decree shall be construed as reference to the order made under the Act.

### ***What Reliefs are Provided by Consumer Commissions?***

- ***Removal of defects from the goods;***
- ***Replacement of the goods;***
- ***Refund of the price paid;***
- ***Removal of defects or deficiencies in the services;***
- ***Award of compensation for the loss or injury suffered;***
- ***Discontinue and not to repeat unfair trade practice or restrictive trade practice;***
- ***To withdraw hazardous goods from being offered for sale;***
- ***To cease manufacture of hazardous goods and desist from offering services which are hazardous in nature;***
- ***If the loss or injury has been suffered by a large number of consumers who are not identifiable conveniently, to pay such sum (not less than 25% of the value of such defective goods or services provided) which shall be determined by the Commission;***
- ***To issue corrective advertisement to neutralize the effect of misleading advertisement;***
- ***To provide adequate costs to parties.***

### **Penalty for Noncompliance of Order**

Section 72(1) provides that whoever fails to comply with any order made by the District Commission or the State Commission or the National Commission, as the case may be, shall be punishable with imprisonment for a term which shall not be less than one month, but which may extend to three years, or with fine, which shall not be less than twenty-five thousand rupees, but which may extend to one lakh rupees, or with both.

According to Section 72(2) of the Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973, the District Commission, the State Commission or the National Commission, as the case may be, shall have the power of a Judicial Magistrate of First Class for the trial of offences under sub-section (1), and on conferment of such powers, the District Commission or the State Commission or the National Commission, as the case may be, shall be deemed to be a Judicial Magistrate of First Class for the purposes of the Code of Criminal Procedure, 1973.

Section 72(3) states that save as otherwise provided, the offences under sub-section (1) shall be tried summarily by the District Commission or the State Commission or the National Commission, as the case may be.

### **Appeal against Order Passed under Section 72**

Section 73 provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, where an order is passed under section 72(1), an appeal shall lie, both on facts and on law from –

- (a) the order made by the District Commission to the State Commission;
- (b) the order made by the State Commission to the National Commission; and
- (c) the order made by the National Commission to the Supreme Court.

Every appeal shall be preferred within a period of thirty days from the date of order of a District Commission or a State Commission or the National Commission, as the case may be.

It may be noted that the State Commission or the National Commission or the Supreme Court, as the case may be, may entertain an appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period of thirty days.

Appeal shall not lie before any court, from any order of a District Commission or a State Commission or the National Commission, as the case may be.

## MEDIATION

### Establishment of Consumer Mediation Cell

Section 74 empowers the State Government to establish a consumer mediation cell to be attached to each of the District Commissions and the State Commissions of that State.

Further the Central Government is empowered to establish a consumer mediation cell to be attached to the National Commission and each of the regional Benches.

A consumer mediation cell shall consist of such persons as may be prescribed. Every consumer mediation cell shall maintain—

- (a) a list of empanelled mediators;
- (b) a list of cases handled by the cell;
- (c) record of proceeding; and
- (d) any other information as may be specified by regulations.

Every consumer mediation cell shall submit a quarterly report to the District Commission, State Commission or the National Commission to which it is attached, in the manner specified by regulations.

### Duty of Mediator to Disclose Certain Fact

According to the Section 77 of the Act, it shall be the duty of the mediator to disclose—

- (a) any personal, professional or financial interest in the outcome of the consumer dispute;
- (b) the circumstances which may give rise to a justifiable doubt as to his independence or impartiality; and
- (c) such other facts as may be specified by regulations.

### Replacement of Mediator in Certain Cases

Section 78 of the Act provides that where the District Commission or the State Commission or the National Commission, as the case may be, is satisfied, on the information furnished by the mediator or on the information received from any other person including parties to the complaint and after hearing the mediator, it shall replace such mediator by another mediator.

### Procedure for Mediation

Section 79 states that the mediation shall be held in the consumer mediation cell attached to the District Commission, the State Commission or the National Commission, as the case may be.

Where a consumer dispute is referred for mediation by the District Commission or the State Commission or the National Commission, as the case may be, the mediator nominated by such Commission shall have regard to the rights and obligations of the parties, the usages of trade, if any, the circumstances giving rise to the consumer dispute and such other relevant factors, as he may deem necessary and shall be guided by the principles of natural justice while carrying out mediation.

The mediator so nominated shall conduct mediation within such time and in such manner as may be specified by regulations.

### Settlement through Mediation

Section 80(1) provides that pursuant to mediation, if an agreement is reached between the parties with respect to all of the issues involved in the consumer dispute or with respect to only some of the issues, the terms of such agreement shall be reduced to writing accordingly, and signed by the parties to such dispute or their authorised representatives.

Section 80(2) states that the mediator shall prepare a settlement report of the settlement and forward the signed agreement along with such report to the concerned Commission.

Where no agreement is reached between the parties within the specified time or the mediator is of the opinion that settlement is not possible, he shall prepare his report accordingly and submit the same to the concerned Commission.

### Recording Settlement and Passing of Order

According to Section 81(1) the District Commission or the State Commission or the National Commission, as the case may be, shall, within seven days of the receipt of the settlement report, pass suitable order recording such settlement of consumer dispute and dispose of the matter accordingly.

Section 81(2) provides that where the consumer dispute is settled only in part, the District Commission or the State Commission or the National Commission, as the case may be, shall record settlement of the issues which have been so settled and continue to hear other issues involved in such consumer dispute.

Where the consumer dispute could not be settled by mediation, the District Commission or the State Commission or the National Commission, as the case may be, shall continue to hear all the issues involved in such consumer dispute.

## PRODUCT LIABILITY

Chapter VI contains Section 82 to 87 deal with Product Liability. According to section 82 Chapter VI shall apply to every claim for compensation under a product liability action by a complainant for any harm caused by a defective product manufactured by a product manufacturer or serviced by a product service provider or sold by a product seller.

Harm in relation to a product liability, includes –

- (i) damage to any property, other than the product itself;
- (ii) personal injury, illness or death;
- (iii) mental agony or emotional distress attendant to personal injury or illness or damage to property; or
- (iv) any loss of consortium or services or other loss resulting from a harm referred to in sub-clause (i) or sub-clause (ii) or sub-clause (iii);

but shall not include any harm caused to a product itself or any damage to the property on account of breach of warranty conditions or any commercial or economic loss, including any direct, incidental or consequential loss relating thereto. [Section 2(22)]

### Product Liability Action

According to Section 83 of the Act, a product liability action may be brought by a complainant against a **product manufacturer or a product service provider or a product seller**, as the case may be, for any harm caused to him on account of a defective product.



**Liability of Product Manufacturer**

Section 84 states that a product manufacturer shall be liable in a product liability action, if –

- (a) the product contains a manufacturing defect; or
- (b) the product is defective in design; or
- (c) there is a deviation from manufacturing specifications; or
- (d) the product does not conform to the express warranty; or
- (e) the product fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage.

A product manufacturer shall be liable in a product liability action even if he proves that he was not negligent or fraudulent in making the express warranty of a product.

**Liability of Product Service Provider**

Section 85 provides that a product service provider shall be liable in a product liability action, if –

- (a) the service provided by him was faulty or imperfect or deficient or inadequate in quality, nature or manner of performance which is required to be provided by or under any law for the time being in force, or pursuant to any contract or otherwise; or
- (b) there was an act of omission or commission or negligence or conscious withholding any information which caused harm; or
- (c) the service provider did not issue adequate instructions or warnings to prevent any harm; or
- (d) the service did not conform to express warranty or the terms and conditions of the contract.

**Liability of Product Sellers**

Section 86 states that a product seller who is not a product manufacturer shall be liable in a product liability action, if –

- (a) he has exercised substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused harm; or
- (b) he has altered or modified the product and such alteration or modification was the substantial factor in causing the harm; or
- (c) he has made an express warranty of a product independent of any express warranty made by a manufacturer and such product failed to conform to the express warranty made by the product seller which caused the harm; or
- (d) the product has been sold by him and the identity of product manufacturer of such product is not known, or if known, the service of notice or process or warrant cannot be effected on him or he is not subject to the law which is in force in India or the order, if any, passed or to be passed cannot be enforced against him; or
- (e) he failed to exercise reasonable care in assembling, inspecting or maintaining such product or he did not pass on the warnings or instructions of the product manufacturer regarding the dangers involved or proper usage of the product while selling such product and such failure was the proximate cause of the harm.

### Exceptions to Product Liability Action

According to Section 87, of the Act a product liability action cannot be brought against the product seller if, at the time of harm, the product was misused, altered, or modified.

In any product liability action based on the failure to provide adequate warnings or instructions, the product manufacturer shall not be liable, if –

- (a) the product was purchased by an employer for use at the workplace and the product manufacturer had provided warnings or instructions to such employer;
- (b) the product was sold as a component or material to be used in another product and necessary warnings or instructions were given by the product manufacturer to the purchaser of such component or material, but the harm was caused to the complainant by use of the end product in which such component or material was used;
- (c) the product was one which was legally meant to be used or dispensed only by or under the supervision of an expert or a class of experts and the product manufacturer had employed reasonable means to give the warnings or instructions for usage of such product to such expert or class of experts; or
- (d) the complainant, while using such product, was under the influence of alcohol or any prescription drug which had not been prescribed by a medical practitioner.

A product manufacturer shall not be liable for failure to instruct or warn about a danger which is obvious or commonly known to the user or consumer of such product or which, such user or consumer, ought to have known, taking into account the characteristics of such product.

## OFFENCES AND PENALTIES

### Penalty for Non-compliance of Direction of Central Authority

Section 88 provides that whoever, fails to comply with any direction of the Central Authority under sections 20 and 21, shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to twenty lakh rupees, or with both.

It may be noted that Sections 20 deals with power of Central Authority to recall goods, etc. and Sections 21 deals with power of Central Authority to issue directions and penalties against false or misleading advertisements.

### Punishment for False or Misleading Advertisement

Section 89 states that any manufacturer or service provider who causes a false or misleading advertisement to be made which is prejudicial to the interest of consumers shall be punished with imprisonment for a term which may extend to two years and with fine which may extend to ten lakh rupees; and for every subsequent offence, be punished with imprisonment for a term which may extend to five years and with fine which may extend to fifty lakh rupees.

### Punishment for False or Misleading Advertisement

Section 92 provides that no cognizance shall be taken by a competent court of any offence under sections 88 and 89 except on a complaint filed by the Central Authority or any officer authorised by it in this behalf.

### Compounding of Offences

According to Section 96(1) of the Act, any offence punishable under sections 88 and 89, may, either before or after the institution of the prosecution, be compounded, on payment of such amount as may be prescribed.

It may be noted that no compounding of such offence shall be made without the leave of the court before which a complaint has been filed under section 92.

Further, such sum shall not, in any case, exceed the maximum amount of the fine, which may be imposed under this Act for the offence so compounded.

Section 96(2) provides that the Central Authority or any officer as may be specially authorised by him in this behalf, may compound offences under sub-section (1).

Section 96(3) states that nothing in sub-section (1) shall apply to person who commits the same or similar offence, within a period of three years from the date on which the first offence, committed by him, was compounded.

Any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence.

Section 96(4) provides that where an offence has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded.

Section 96(5) states that the acceptance of the sum of money for compounding an offence in accordance with sub-section (1) by the Central Authority or an officer of the Central Authority empowered in this behalf shall be deemed to amount to an acquittal within the meaning of the Code of Criminal Procedure, 1973.

### **Punishment for Manufacturing for Sale or Storing, Selling or Distributing or Importing Products Containing Adulterant**

Section 90(1) provides that whoever, by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any product containing an adulterant shall be punished, if such act –

- (a) does not result in any injury to the consumer, with imprisonment for a term which may extend to six months and with fine which may extend to one lakh rupees;
- (b) causing injury not amounting to grievous hurt to the consumer, with imprisonment for a term which may extend to one year and with fine which may extend to three lakh rupees;
- (c) causing injury resulting in grievous hurt to the consumer, with imprisonment for a term which may extend to seven years and with fine which may extend to five lakh rupees; and
- (d) results in the death of a consumer, with imprisonment for a term which shall not be less than seven years, but which may extend to imprisonment for life and with fine which shall not be less than ten lakh rupees.

Section 90(2) states that the offences under clauses (c) and (d) of sub-section (1) shall be cognizable and non-bailable.

Notwithstanding the punishment under sub-section (1), the court may, in case of first conviction, suspend any licence issued to the person referred to in that sub-section, under any law for the time being in force, for a period up to two years, and in case of second or subsequent conviction, cancel the licence.

Explanation.– for the purposes of this section,–

- (a) “Adulterant” means any material including extraneous matter which is employed or used for making a product unsafe;
- (b) “Grievous hurt” shall have the same meaning as assigned to it in section 320 of the Indian Penal Code.

### **Punishment for Manufacturing for Sale or for Storing or Selling or Distributing or Importing Spurious Goods**

Section 91(1) provides that whoever, by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any spurious goods shall be punished, if such act –

- (a) causing injury not amounting to grievous hurt to the consumer, with imprisonment for a term which may extend to one year and with fine which may extend to three lakh rupees;
- (b) causing injury resulting in grievous hurt to the consumer, with imprisonment for a term which may extend to seven years and with fine which may extend to five lakh rupees;
- (c) results in the death of a consumer, with imprisonment for a term which shall not be less than seven years, but may extend to imprisonment for life and with fine which shall not be less than ten lakh rupees.

Section 91(2) states that the offences under clauses (b) and (c) of sub-section (1) shall be cognizable and non-bailable.

Notwithstanding the punishment under sub-section (1), the court may, in case of first conviction, suspend any licence issued to the person referred to in that sub-section, under any law for the time being in force, for a period up to two years, and in case of second or subsequent conviction, cancel the licence.

### **Measures to Prevent Unfair Trade Practices in E-Commerce, Direct Selling**

Section 94 empowers the Central Government to take such measures in the prescribed manner for the purposes of preventing unfair trade practices in e-commerce, direct selling and also to protect the interest and rights of consumers.

## **E-COMMERCE**

***E-Commerce means buying or selling of goods or services including digital products over digital or electronic network.***

In exercise of the powers conferred by section 101(1)(zg) of the Consumer Protection Act, 2019 Central Government notified the Consumer Protection (E-Commerce) Rules, 2020.

### **Scope and Applicability of the Consumer Protection (E-Commerce) Rules, 2020 :**

- all goods and services bought or sold over digital or electronic network including digital products;
- all models of e-commerce, including marketplace and inventory models of e-commerce;
- all e-commerce retail, including multi-channel single brand retailers and single brand retailers in single or multiple formats; and
- all forms of unfair trade practices across all models of e-commerce.

***Consumer Protection (E-Commerce) Rules, 2020 shall not apply to any activity of a natural person carried out in a personal capacity not being part of any professional or commercial activity undertaken on a regular or systematic basis.***

### **Duties of E-Commerce Entities**

“E-Commerce Entity” means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity.

**An e-commerce entity shall:**

1. Where an e-commerce entity is a company incorporated under the Companies Act, 1956 (1 of 1956) or under the Companies Act, 2013 or a foreign company covered under clause (42) of section 2 of the Companies Act, 2013 or an office, branch or agency outside India owned or controlled by a person resident in India as provided in sub-clause (iv) of clause (v) of section 2 of the Foreign Exchange Management Act, 1999, it shall appoint a nodal officer or an alternate senior designated functionary who is resident in India, to ensure compliance with the provisions of the Act or the rules made thereunder.
2. Every e-commerce entity shall provide the following information in a clear and accessible manner on its platform, displayed prominently to its users, namely:--
  - i. legal name of the e-commerce entity;
  - ii. principal geographic address of its headquarters and all branches;
  - iii. name and details of its website; and
  - iv. contact details like e-mail address, fax, landline and mobile numbers of customer care as well as of grievance officer.
3. No e-commerce entity shall adopt any unfair trade practice, whether in the course of business on its platform or otherwise.
4. Every e-commerce entity shall establish an adequate grievance redressal mechanism having regard to the number of grievances ordinarily received by such entity from India, and shall appoint a grievance officer for consumer grievance redressal, and shall display the name, contact details, and designation of such officer on its platform.
5. Every e-commerce entity shall ensure that the grievance officer referred to in sub-rule (4) acknowledges the receipt of any consumer complaint within forty-eight hours and redresses the complaint within one month from the date of receipt of the complaint.
6. Where an e-commerce entity offers imported goods or services for sale, it shall mention the name and details of any importer from whom it has purchased such goods or services, or who may be a seller on its platform.
7. Every e-commerce entity shall endeavour on a best effort basis to become a partner in the convergence process of the National Consumer Helpline of the Central Government.
8. No e-commerce entity shall impose cancellation charges on consumers cancelling after confirming purchase unless similar charges are also borne by the e-commerce entity, if they cancel the purchase order unilaterally for any reason.
9. Every e-commerce entity shall only record the consent of a consumer for the purchase of any good or service offered on its platform where such consent is expressed through an explicit and affirmative action, and no such entity shall record such consent automatically, including in the form of pre-ticked checkboxes.
10. Every e-commerce entity shall effect all payments towards accepted refund requests of the consumers as prescribed by the Reserve Bank of India or any other competent authority under any law for the time being in force, within a reasonable period of time, or as prescribed under applicable laws.
11. No e-commerce entity shall--
  - (a) manipulate the price of the goods or services offered on its platform in such a manner as to gain unreasonable profit by imposing on consumers any unjustified price having regard to the prevailing market conditions, the essential nature of the good or service, any extraordinary

circumstances under which the good or service is offered, and any other relevant consideration in determining whether the price charged is justified;

- (b) Discriminate between consumers of the same class or make any arbitrary classification of consumers affecting their rights under the Act.

### Liabilities of Marketplace E-Commerce Entities

*Marketplace E-Commerce Entity means an e-commerce entity which provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers.*

- (1) A marketplace e-commerce entity which seeks to avail the exemption from liability under sub-section (1) of section 79 of the Information Technology Act, 2000.
- (2) Every marketplace e-commerce entity shall require sellers through an undertaking to ensure that descriptions, images, and other content pertaining to goods or services on their platform is accurate and corresponds directly with the appearance, nature, quality, purpose and other general features of such good or service.
- (3) Every marketplace e-commerce entity shall provide the following information in a clear and accessible manner, displayed prominently to its users at the appropriate place on its platform:

- (a) details about the sellers offering goods and services, including the name of their business, whether registered or not, their geographic address, customer care number, any rating or other aggregated feedback about such seller, and any other information necessary for enabling consumers to make informed decisions at the pre-purchase stage.

Provided that a marketplace e-commerce entity shall, on a request in writing made by a consumer after the purchase of any goods or services on its platform by such consumer, provide him with information regarding the seller from which such consumer has made such purchase, including the principal geographic address of its headquarters and all branches, name and details of its website, its email address and any other information necessary for communication with the seller for effective dispute resolution;

- (b) a ticket number for each complaint lodged through which the consumer can track the status of the complaint;
  - (c) information relating to return, refund, exchange, warranty and guarantee, delivery and shipment, modes of payment, and grievance redressal mechanism, and any other similar information which may be required by consumers to make informed decisions;
  - (d) information on available payment methods, the security of those payment methods, any fees or charges payable by users, the procedure to cancel regular payments under those methods, charge-back options, if any, and the contact information of the relevant payment service provider;
  - (e) all information provided to it by sellers under sub-rule (5) of rule 6; and
  - (f) an explanation of the main parameters which, individually or collectively, are most significant in determining the ranking of goods or sellers on its platform and the relative importance of those main parameters through an easily and publicly available description drafted in plain and intelligible language.
- (4) Every marketplace e-commerce entity shall include in its terms and conditions generally governing its relationship with sellers on its platform, a description of any differentiated treatment which it gives or might give between goods or services or sellers of the same category.

- (5) Every marketplace e-commerce entity shall take reasonable efforts to maintain a record of relevant information allowing for the identification of all sellers who have repeatedly offered goods or services that have previously been removed or access to which has previously been disabled under the Copyright Act, 1957 the Trade Marks Act, 1999 or the Information Technology Act, 2000.

Provided that no such e-commerce entity shall be required to terminate the access of such seller to its platform pursuant to this sub-rule but may do so on a voluntary basis.

### Duties and Liabilities of Inventory E-Commerce Entities

*Inventory E-Commerce Entity means an e-commerce entity which owns the inventory of goods or services and sells such goods or services directly to the consumers and shall include single brand retailers and multi-channel single brand retailers.*

- (1) Every inventory e-commerce entity shall provide the following information in a clear and accessible manner, displayed prominently to its users:
- (a) accurate information related to return, refund, exchange, warranty and guarantee, delivery and shipment, cost of return shipping, mode of payments, grievance redressal mechanism, and any other similar information which may be required by consumers to make informed decisions;
  - (b) all mandatory notices and information required by applicable laws;
  - (c) information on available payment methods, the security of those payment methods, the procedure to cancel regular payments under those methods, any fees or charges payable by users, charge back options, if any, and the contact information of the relevant payment service provider;
  - (d) all contractual information required to be disclosed by law;
  - (e) total price in single figure of any good or service along with the breakup price for the good or service, showing all the compulsory and voluntary charges, such as delivery charges, postage and handling charges, conveyance charges and the applicable tax; and
  - (f) a ticket number for each complaint lodged, through which the consumer can track the status of their complaint.
- (2) No inventory e-commerce entity shall falsely represent itself as a consumer and post reviews about goods and services or misrepresent the quality or the features of any goods or services.
- (3) Every inventory e-commerce entity shall ensure that the advertisements for marketing of goods or services are consistent with the actual characteristics, access and usage conditions of such goods or services.
- (4) No inventory e-commerce entity shall refuse to take back goods, or withdraw or discontinue services purchased or agreed to be purchased, or refuse to refund consideration, if paid, if such goods or services are defective, deficient spurious, or if the goods or services are not of the characteristics or features as advertised or as agreed to, or if such goods or services are delivered late from the stated delivery schedule.

Provided that in the case of late delivery, this sub rule shall not apply if such late delivery was due to force majeure.

- (5) Any inventory e-commerce entity which explicitly or implicitly vouches for the authenticity of the goods or services sold by it, or guarantees that such goods or services are authentic, shall bear appropriate liability in any action related to the authenticity of such good or service.

## DIRECT SELLING

*Direct Selling means marketing, distribution and sale of goods or provision of services through a network of sellers, other than through a permanent retail location.*

In exercise of the powers conferred by Section 101(2)(zg) read with Section 94 of the Consumer Protection Act, 2019, the Central Government notified the Consumer Protection (Direct Selling) Rules, 2021.

### Applicability

- (a) all goods and services bought or sold through direct selling;
- (b) all models of direct selling;
- (c) all direct selling entities offering goods and services to consumers in India;
- (d) all forms of unfair trade practices across all models of direct selling.

*Consumer Protection (Direct Selling) Rules, 2021 shall also apply to a direct selling entity which is not established in India, but offers goods or services to consumers in India.*

### Mandatory Maintenance of Records

Every direct selling entity shall maintain at its registered office, either manually or electronically, all such documents as are required under any law for the time being in force, including the following documents or records, as may be applicable, namely:–

- (a) Certificate of Incorporation;
- (b) Memorandum of Association and Articles of Association;
- (c) Permanent Account Number and Tax Deduction and Collection Account Number;
- (d) Goods and Services Tax registration;
- (e) Income Tax Returns;
- (f) Balance Sheet, Audit Report and such other relevant reports;
- (g) Register of direct sellers;
- (h) Certificate of Importer-Exporter code (in case of imported goods);
- (i) License issued under the Food Safety and Standards Authority of India Act, 2006 (34 of 2006) for the purposes of manufacture or sale of food items;
- (j) License and Registration Certificate issued under the Drugs and Cosmetics Act, 1940 (23 of 1940) for the purposes of manufacture or sale of drugs, including Ayurvedic, Siddha and Unani drugs and Homoeopathic Medicines;
- (k) Certificate of Registration of Trademark.

### Obligations of Direct Selling Entity

*Direct Selling Entity means the principal entity which sells or offers to sell goods or services through direct sellers, but does not include an entity which is engaged in a Pyramid Scheme or money circulation scheme.*



- (1) Every direct selling entity shall—
  - (a) if a company, be incorporated under the Companies Act, 2013 or if a partnership firm, be registered under the Partnership Act, 1932 or if a limited liability partnership, be registered under the Limited Liability Partnership Act, 2008;
  - (b) have a minimum of one physical location as its registered office within India;
  - (c) make self-declaration to the effect that it has complied with the provisions of these rules and is not involved in any Pyramid Scheme or money circulation scheme;
  - (d) maintain proper and updated website with all relevant details of that entity, including the documents or records specified in rule 4, the self-declaration specified in clause (c), contact information which is current and updated, details of its nodal officer, grievance redressal officer, its management, products, product information, price and grievance redressal mechanism for consumers;
  - (e) own, hold or be the licensee of a trademark, service mark or any other identification mark which identifies that entity with the goods or services to be sold or supplied, but shall not give commissions, bonus or incentives on sale of goods or services of which it is not the owner, holder or licensee of trademark, service mark or other identification marks;
  - (f) obtain all applicable trade registrations and licenses, including Permanent Account Number and Goods and Services Tax Registration;
  - (g) **get all information provided by it on its website duly certified by a Company Secretary. It may be noted that “Company Secretary” means a person as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980;**
  - (h) have a prior written contract with its direct sellers in order to authorize them to sell or offer to sell its goods or services, and the terms of such agreement shall be just, fair and equitable;
  - (i) ensure that all its direct sellers have verified identities and physical addresses and issue identity cards and documents only to such direct sellers;
  - (j) create adequate safeguards to ensure that goods and services offered by its direct sellers conform to applicable laws;
  - (k) be liable for the grievances arising out of the sale of goods or services by its direct sellers.
- (2) Every direct selling entity shall provide the following information on its website in a clear and accessible manner, which shall be displayed prominently to its users, namely:—
  - (a) registered name of the direct selling entity;
  - (b) registered address of the direct selling entity and of its branches;
  - (c) contact details, including e-mail address, fax, land line and mobile numbers of its customer care and grievance redressal officers;
  - (d) a ticket number for each complaint lodged through which the complainant can track the status of the complaint;
  - (e) information relating to return, refund, exchange, warranty and guarantee, delivery and shipment, modes of payment, grievance redressal mechanism and such other information which may be required by the consumers to make informed decisions;
  - (f) information on available payment methods, the security of those payment methods, the fees or charges payable by users, the procedure to cancel regular payments under those methods, charge-back options, if any, and the contact information of the relevant payment service provider;

- (g) total price of any goods or service in single figure, along with its break-up price showing all compulsory and voluntary charges, including delivery charges, postage and handling charges, conveyance charges and the applicable tax;
- (h) provide correct and complete information at pre-purchase stage to enable buyers to make informed purchase decisions, and such information shall, in addition to the mandatory declarations to be provided under the Legal Metrology (Packaged Commodities) Rules, 2011, contain the following information, namely:–
  - (i) the name of purchaser and seller;
  - (ii) description of goods or services;
  - (iii) quantity of goods or services;
  - (iv) the estimated delivery date of goods or services;
  - (v) the process of refund;
  - (vi) warranty of the goods;
  - (vii) exchange or replacement of goods in case of it being defective;
  - (viii) all contractual information required to be disclosed by or under any law for the time being in force.
- (3) No direct selling entity shall adopt any unfair trade practice in the course of its business or otherwise, and shall abide by the requirements specified in any law for the time being in force.
- (4) All products of a direct selling entity shall comply with the declarations to be made under the Legal Metrology Act, 2009.
- (5) Every direct selling entity shall store sensitive personal data within the jurisdiction of India, in accordance with the applicable law for the time being in force and shall take appropriate steps to ensure protection of such data provided by a consumer and also ensure adequate safeguards to prevent access or misuse of such data by any unauthorized person.
- (6) Every direct selling entity shall, having regard to the number of grievances ordinarily received by such entity from persons in India, establish an adequate grievance redressal mechanism and appoint one or more grievance redressal officers for redressal of consumers' grievances and display the current and updated name, contact details including telephone number, email address and designation of such officer on its website, and the details of its website shall also be prominently printed on the product information sheet or pamphlet.
- (7) Every direct selling entity shall ensure that the grievance redressal officer referred to in sub-rule (6) acknowledges the receipt of any consumer complaint within forty-eight working hours of receipt of such complaint and redresses the complaint normally within a period of one month from the date of receipt of the complaint and in case of delay of more than a month, reasons for the delay, and the actions taken on the complaint, are informed to the complainant in writing.
- (8) Every direct selling entity shall appoint a nodal officer who shall be responsible for ensuring compliance with the provisions of the Act and the rules made thereunder, and to ensure compliance with any order, or requisition, made in accordance with the provisions of any other law for the time being in force or the rules made thereunder.
- (9) Every direct selling entity shall establish a mechanism for filing of complaints by consumers through its offices or branches or direct sellers, either in person or through post, telephone, e-mail or website.
- (10) Every direct selling entity shall maintain a record of all its direct sellers, including their identity proof, address proof, e-mail and such other contact information.

- (11) Every direct selling entity shall, on the request in writing made by a consumer after the purchase of any goods or services, provide him with the information regarding any direct seller from whom such consumer has made a purchase, and such information shall include the name, address, e-mail, contact number and any other information which is necessary for making communication with such direct seller for effective dispute resolution.
- (12) Every direct selling entity shall ensure that the advertisements for marketing of goods or services are consistent with the actual characteristics, access and usage conditions of such goods or services.
- (13) No direct selling entity shall, directly or indirectly, falsely represent itself as a consumer and post reviews about its goods or services or misrepresent the quality or features of any of its goods or services.
- (14) A direct selling entity which explicitly or implicitly vouches for the authenticity of the goods or services sold, or guarantees that such goods or services are authentic, shall bear the liability in any action related to the authenticity of such goods or services.
- (15) Notwithstanding the distribution system adopted by it, a direct selling entity shall monitor the practices adopted by its direct sellers and ensure compliance with these rules by means of legally binding contract with such direct sellers.
- (16) Every direct selling entity shall maintain a record of relevant information allowing for the identification of all direct sellers who have been delisted by the direct selling entity and such list shall be publicly shared on its website.
- (17) Every direct selling entity shall become a partner in the convergence process of the National Consumer Helpline of the Central Government.

### Obligations of Direct Seller

*Direct Seller means a person authorized by a direct selling entity through a legally enforceable written contract to undertake direct selling business on principal to principal basis.*

- (1) Every direct seller shall—
  - (a) have a prior written contract with the direct selling entity for undertaking sale of, or offer to sell, any goods or services of such entity;
  - (b) at the initiation of any sale representation, truthfully and clearly identify himself, disclose the identity of the direct selling entity, the address of place of business, the nature of goods or services sold and the purpose of such solicitation to the prospect;
  - (c) make an offer to the prospect providing accurate and complete information, demonstration of goods and services, prices, credit terms, terms of payment, return, exchange, refund policy, return policy, terms of guarantee and after-sale service;
  - (d) provide an order form to the consumer at or prior to the time of the initial sale, which shall identify the direct selling entity and the direct seller and shall contain the name, address, registration number or enrollment number, identity proof and contact number of the direct seller, complete description of the goods or services to be supplied, the country of origin of the goods, the order date, the total amount to be paid by the consumer, the time and place for inspection of the sample and delivery of goods, consumer's rights to cancel the order or to return the product in saleable condition and avail full refund on sums paid and complete details regarding the complaint redressal mechanism of the direct selling entity;
  - (e) obtain goods and service tax registration, Permanent Account Number registration, all applicable trade registrations and licenses and comply with the requirements of applicable laws, rules and regulations for sale of a product;

- (f) ensure that actual product delivered to the buyer matches with the description of the product given;
  - (g) take appropriate steps to ensure the protection of all sensitive personal information provided by the consumer in accordance with the applicable laws for the time being in force and ensure adequate safeguards to prevent access to, or misuse of, data by unauthorized persons.
- (2) A direct seller shall not–
- (a) visit a consumer’s premises without identity card and prior appointment or approval;
  - (b) provide any literature to a prospect, which has not been approved by the direct selling entity;
  - (c) require a prospect to purchase any literature or sales demonstration equipment;
  - (d) in pursuance of a sale, make any claim that is not consistent with claims authorized by the direct selling entity.

It may be noted that the direct sellers as well as the direct selling entities using e-commerce platforms for sale shall comply with the requirements of the Consumer Protection (e- Commerce) Rules, 2020.

### **Duties of Direct Selling Entity and Direct Seller**

Subject to the provisions of Chapter VI of the Consumer Protection Act, relating to Product Liability, the following shall be the duties of direct selling entity and direct seller, as may be applicable, namely:–

- (i) Every direct selling entity and every direct seller shall ensure that–
  - (a) the terms of the offer are clear, so as to enable the consumer to know the exact nature of offer being made and the commitment involved in placing any order;
  - (b) the presentations and other representations used in direct selling shall not contain any product description, claim, illustration or other element which, directly or by implication, is likely to mislead the consumer;
  - (c) the explanation and demonstration of the goods or services offered are accurate and complete, particularly with regard to price and, if applicable, to credit conditions, terms of payment, cooling-off periods or right to return, terms of guarantee, after-sales service and delivery;
  - (d) the descriptions, claims, illustrations or other elements relating to verifiable facts are capable of substantiation;
  - (e) any misleading, deceptive or unfair trade practices are not used;
  - (f) direct selling is not represented to the consumer as being a form of market research;
  - (g) the promotional literature, advertisement or mail contain the name and address or telephone number of the direct selling company, and include the mobile number of the direct seller;
  - (h) direct selling shall not state or imply that a guarantee, warranty or other expression having substantially the same meaning, offers to the consumer any rights in addition to those provided by law, when it does not;
  - (i) the terms of any guarantee or warranty, including the name and address of the guarantor, shall be easily available to the consumer and limitations on consumer rights or remedies, where permitted by law, shall be clear and conspicuous;
  - (j) the remedial action open to the consumer shall be clearly set out in the order form or other accompanying literature provided with the goods or service;

- (k) the presentation of the offer does not contain or refer to any testimonial, endorsement or supportive documentation unless it is genuine, verifiable and relevant;
  - (l) when after-sales service is offered, details of the service are included in the guarantee or stated elsewhere in the offer and if the consumer accepts the offer, information shall be given on how the consumer can activate the service and communicate with the service agent;
  - (m) products, including, where applicable, samples, are suitably packaged for delivery to the consumer and for possible return, in compliance with the appropriate health and safety standards;
  - (n) unless otherwise stipulated in the offer, orders shall be fulfilled within the delivery date proposed to the consumer at the time of purchase and the consumer shall be informed of any undue delay as soon as it becomes apparent or comes within the knowledge of the direct selling entity or the concerned direct seller;
  - (o) in cases of delay under clause (n), any request for cancellation of the order by the consumer shall be granted, irrespective of whether the consumer has been informed of the delay, and the deposit, if any, shall be refunded as per the cancellation terms proposed to the consumer at the time of purchase, and if it is not possible to prevent delivery, the consumer shall be informed of the right to return the product at the direct selling company's or the direct seller's cost as per the procedure for return of the goods proposed to the consumer at the time of purchase;
  - (p) right of return offered by that entity shall be in writing;
  - (q) whether payment for the offer is on an immediate sale or installment basis, the price and terms of payment shall be clearly stated in the offer together with the nature of any additional charges such as postage, handling and taxes and, whenever possible, the amounts of such charges;
  - (r) in the case of sales by installment, the credit terms, including the amount of any deposit or payment on account, the number, amount and periodicity of such installments and the total price compared with the immediate selling price, if any, shall be clearly shown in the offer;
  - (s) any information needed by the consumer to understand the cost, interest and terms of any other form of credit is provided either in the offer or when the credit is offered;
  - (t) unless the duration of the offer and the price are clearly stated in the offer, prices shall be maintained for a reasonable period of time;
  - (u) the procedure for payment and debt collection shall be determined in writing before any contract is signed and it shall be such as to avoid undue inconvenience to the consumer, making due allowance for delays outside the consumer's control;
  - (v) the provisions of the Legal Metrology Act, 2009 and the rules framed thereunder shall be followed.
- (ii) A direct selling entity or direct seller shall not–
- (a) indulge in fraudulent activities or sales and shall take reasonable steps to ensure that participants do not indulge in false or misleading representations or any other form of fraud, coercion, harassment, or unconscionable or unlawful means;
  - (b) engage in, or cause or permit, any conduct that is misleading or likely to mislead with regard to any material particulars relating to its direct selling business, or to the goods or services being sold by itself or by the direct seller;
  - (c) indulge in mis-selling of products or services to consumers;
  - (d) use, or cause or permit to be used, any fraudulent, coercive, unconscionable or unlawful means, or cause harassment, for promoting its direct selling business, or for sale of its goods or services;

- (e) refuse to take back spurious goods or deficient services and refund the consideration paid for goods and services provided;
- (f) charge any entry fee or subscription fee.
- (iii) A direct selling entity and a direct seller shall comply with the requirements of all relevant laws, including payment of taxes and deductions thereunder.
- (iv) A direct selling entity and a direct seller shall not induce consumers to make a purchase based upon the representation that they can reduce or recover the price by referring prospective customers to the direct sellers for similar purchases.

*It may be noted that "Miss-Selling" means selling a product or service by misrepresenting in order to successfully complete a sale and includes providing consumers with misleading information about a product or service or omitting key information about a product or providing information that makes the product appear to be something it is not.*

### Prohibition of Pyramid Scheme and Money Circulation Scheme

Direct Selling Entity or Direct Seller shall not–

- (a) promote a Pyramid Scheme or enroll any person to such scheme or participate in such arrangement in any manner whatsoever in the garb of doing direct selling business;
- (b) participate in money circulation scheme in the garb of doing direct selling business.

***Money Circulation Scheme means the schemes defined in clause (c) of section 2 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978.***

***"Pyramid Scheme" means a multi layered network of subscribers to a scheme formed by subscribers enrolling one or more subscribers in order to receive any benefit, directly or indirectly, as a result of enrolment or action or performance of additional subscribers to the scheme, in which the subscribers enrolling further subscribers occupy a higher position and the enrolled subscribers a lower position, resulting in a multi-layered network of subscribers with successive enrolments.***

### Protection of Action Taken in Good Faith

According to Section 98 of the Act, no suit, prosecution or other legal proceeding shall lie against the Presidents and members of the District Commission, the State Commission and the National Commission, the Chief Commissioner, the Commissioner, any officer or employee and other person performing any duty under this Act, for any act which is in good faith done or intended to be done in pursuance of this Act or under any rule or order made thereunder.

### Act not in derogation of any other law

Section 100 states that the provisions of Consumer Protection Act, 2019 shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

### LESSON ROUND-UP

- Consumer Protection Act, 2019 provides for protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumers' disputes and for matters connected therewith or incidental thereto.

- Consumer means any person who (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (ii) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose.
- The expression “commercial purpose” does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment and the expressions “buys any goods” and “hires or avails any services” includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing.
- Direct selling means marketing, distribution and sale of goods or provision of services through a network of sellers, other than through a permanent retail location.
- E-Commerce means buying or selling of goods or services including digital products over digital or electronic network.
- Electronic service provider means a person who provides technologies or processes to enable a product seller to engage in advertising or selling goods or services to a consumer and includes any online market place or online auction sites.
- Endorsement in relation to an advertisement, means any message, verbal statement, demonstration; or depiction of the name, signature, likeness or other identifiable personal characteristics of an individual; or depiction of the name or seal of any institution or organisation, which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement.
- Express warranty means any material statement, affirmation of fact, promise or description relating to a product or service warranting that it conforms to such material statement, affirmation, promise or description and includes any sample or model of a product warranting that the whole of such product conforms to such sample or model.
- Product liability means the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto.
- Section 10 empowers the Central Government to establish a Central Consumer Protection Authority to be known as the Central Authority to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class.
- District Commission shall have jurisdiction to entertain complaints where the value of the goods or services paid as consideration does not exceed one crore rupees.
- State Commission shall have jurisdiction to entertain complaints where the value of the goods or services paid as consideration, exceeds rupees one crore, but does not exceed rupees ten crore.
- National Commission shall have jurisdiction to entertain Complaints where the value of the goods or services paid as consideration exceeds rupees ten crore.

- Product liability action may be brought by a complainant against a product manufacturer or a product service provider or a product seller, as the case may be, for any harm caused to him on account of a defective product.

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Discuss in detail the objects of Consumer Protection Act, 2019.
2. Briefly discuss the jurisdiction of the various District, State and National Commissions under the Consumer Protection Act, 2019?
3. Discuss the power of Central Consumer Protection Authority?
4. Write short note on the following:
  - (i) Express Warranty
  - (ii) Product Liability
  - (iv) Consumer.
5. Discuss unfair trade practice under Consumer Protection Act, 2019.

**LIST OF FURTHER READINGS**

- Bare Act - Consumer Protection Act, 2019 and rules made thereunder.
- Consumer Protection Law and Practice- Dr. V.K. Aggarwal

**OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)**

- <https://consumeraffairs.nic.in/>



### KEY CONCEPTS

■ Legal Metrology ■ International Organization of Legal Metrology ■ Pre-packed Commodity ■ Counterfeit

### Learning Objectives

#### To understand:

- Standard Weights and Measures
- Enforce Standards of Weights and Measures
- Power of Inspection and Seizure
- Declarations on Pre-packaged Commodities
- Offences and Penalties

### Lesson Outline

- Legal Metrology
- International Organisation of Legal Metrology
- Standard Weight and Measure
- Appointment and powers of Director and Legal Metrology Officer
- Verification and Stamping of Weight and Measure
- Maintain Records and Registers
- Pre-packed Commodities
- Declaration on Pre-packed Commodities
- Forfeiture
- Power of the Central Government to make Rules
- Power of the State Government to make Rules
- Compounding Offence
- Penalty for Counterfeiting
- Offences by Companies
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- Legal Metrology Act, 2009
- Legal Metrology (Packaged Commodities) Rules, 2011
- Essential Commodities Act, 1955

## INTRODUCTION

Legal metrology is the application of legal requirements to measurements and measuring instruments. Very often, small errors in either direction average out over a large number of measurements. But biased errors can create considerable financial prejudice and can have serious economic consequences for the end consumer.

Legal Metrology is the name by which the law relating to weights and measures is known in international parlance. Legal Metrology is very vital for scientific, technological and industrial progress of any country. The establishment of national standards of weights and measures and their proper enforcement aim at ensuring accuracy of measurements and measuring instruments and thus legal metrology strengthens the national economy in a broader sense besides being a potential instrument of consumer protection. The scope of legal metrology according to international practice extends to three broad fields of human activities, namely, commercial transactions, industrial measurements and measurements needed to ensure public health and human safety. The coverage of legal metrology varies from country to country. In some, almost all practical measurements are brought under the purview of legal metrology, whereas in other countries legal metrology finds restricted application in a few quantities like mass, length and volume used in trade and commerce. In most of the countries, however, legal metrology encompasses measurements which have a bearing on the protection of individuals from the financial and environmental points of view.

**Legal metrology can be defined as that part of metrology which deals with units of measurement, methods of measurement and measuring instruments in so far as they concern statutory, technical and legal requirements which have the ultimate object of assuring public guarantee from the point of view of security and of appropriate accuracy of measurements.**

## International Organization of Legal Metrology (OIML)

The International Organization of Legal Metrology (OIML) is an intergovernmental treaty organization whose membership includes Member States, countries which participate actively in technical activities, and Corresponding Members, countries which join the OIML as observers. It was established in 1955 in order to promote the global harmonization of legal metrology procedures. Since that time, the OIML has developed a worldwide technical structure that provides its Members with metrological guidelines for the elaboration of national and regional requirements concerning the manufacture and use of measuring instruments for legal metrology applications.

**According to OIML, Legal Metrology is the entirety of the legislative, administrative and technical procedures established by, or by reference to public authorities, and implemented on their behalf in order to specify and to ensure, in a regulatory or contractual manner, the appropriate quality and credibility of measurements related to official controls, trade, health, safety and the environment.**

The OIML develops model regulations, International Recommendations, which provide Members with an internationally agreed-upon basis for the establishment of national legislation on various categories of measuring instruments. Given the increasing national implementation of OIML guidelines, more and more manufacturers are referring to OIML International Recommendations to ensure that their products meet international specifications for metrological performance and testing.

***The International Organization of Legal Metrology is an intergovernmental treaty organization which:***

- develops model regulations, standards and related documents for use by legal metrology authorities and industry;
- provides mutual recognition systems which reduce trade barriers and costs in a global market;
- represents the interests of the legal metrology community within international organizations and forums concerned with metrology, standardization, testing, certification and accreditation;
- promotes and facilitates the exchange of knowledge and competencies within the legal metrology community worldwide;
- cooperates with other metrology bodies to raise awareness of the contribution that a sound legal metrology infrastructure can make to a modern economy.

### **OIML Certificate System for Measuring Instruments**

The OIML Certificate System for Measuring Instruments was introduced in 1991 to facilitate administrative procedures and lower the costs associated with the international trade of measuring instruments subject to legal requirements. The System provides the possibility for a manufacturer to obtain an OIML Certificate and a Test Report indicating that a given instrument type (pattern) complies with the requirements of the relevant OIML International Recommendations. Certificates are delivered by OIML Member States that have established one or several Issuing Authorities responsible for processing applications by manufacturers wishing to have their instrument types (patterns) certified.

Certificates issued by OIML are accepted by national metrology services on a voluntary basis, and as the climate for mutual confidence and recognition of test results develops between OIML Members, the System serves to simplify the type (pattern) approval process for manufacturers and metrology authorities by eliminating costly duplication of application and test procedures.

***The objectives of the OIML Certification System are:***

- (a) to promote the global harmonization, uniform interpretation and implementation of legal metrological requirements for measuring instruments and/or modules;***
- (b) to avoid unnecessary re-testing when obtaining national type evaluations and approvals, and to support the recognition of measuring instruments and/or modules under legal metrological control, while achieving and maintaining confidence in the results in support of facilitating the global trade of individual instruments; and***
- (c) to establish rules and procedures for fostering mutual confidence among participating OIML Member States and Corresponding Members in the results of type evaluations that indicate conformity of measuring instruments and/or modules, under legal metrological control, to the metrological and technical requirements established in the applicable OIML Recommendation(s).***

### **DEFINITIONS**

Section 2 contains definitions of various terms used in the Legal Metrology Act. Some of the important definitions are reproduced hereunder.

#### **Dealer**

According to section 2(b) Dealer in relation to any weight or measure, means a person who, carries on, directly or otherwise, the business of buying, selling, supplying or distributing any such weight or measure, whether for

cash or for deferred payment or for commission, remuneration or other valuable consideration; and includes a commission agent, an importer, a manufacturer, who sells, supplies, distributes or otherwise delivers any weight or measure manufactured by him to any person other than a dealer.

### **Export**

According to section 2(d) “export” with its grammatical variations and cognate expressions, means taking out of India to a place outside India.

### **Import**

According section 2(e) “import” with its grammatical variations and cognate expressions, means bringing into India from a place outside India.

### **Label**

Under clause (j) of section 2 “label” means any written, marked, stamped, printed or graphic matter affixed to, or appearing upon any pre-packaged commodity.

### **Legal Metrology**

As per section 2(g) “legal metrology” means that part of metrology which treats units of weighment and measurement, methods of weighment and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weighments and measurements.

### **Manufacture**

As per section 2(i) “manufacturer” in relation to any weight or measure, means a person who-

- (i) manufactures weight or measure;
- (ii) manufactures one or more parts, and acquires other parts, of such weight or measure and, after assembling those parts, claims the end product to be a weight or measure manufactured by himself or itself, as the case may be;
- (iii) does not manufacture any part of such weight or measure but assembles parts thereof manufactured by others and claims the end product to be a weight or measure manufactured by himself or itself, as the case may be;
- (iv) puts, or causes to be put, his own mark on any complete weight or measure made or manufactured by any other person and claims such product to be a weight or measure made or manufactured by himself or itself, as the case may be.

### **Protection**

Section 2(k) define “protection” as to mean the utilisation of reading obtained from any weight or measure, for the purpose of determining any step which is required to be taken to safeguard the well-being of any human being or animal, or to protect any commodity, vegetation or thing, whether individually or collectively.

### **Pre-packed Commodity**

Section 2(l) define “pre-packaged commodity” as to mean a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity.

**Person**

As per section 2(m) the term “person” includes,-

- (i) a Hindu undivided family;
- (ii) every department or office;
- (iii) every organisation established or constituted by Government;
- (iv) every local authority within the territory of India;
- (v) a company, firm and association of individuals;
- (vi) trust constituted under an Act;
- (vii) every co-operative society, constituted under an Act;
- (viii) every other society registered under the Societies Registration Act, 1860.

**Premises**

As per section 2 (n) the term “premises” includes—

- (i) a place where any business, industry, production or transaction is carried on by a person, whether by himself or through an agent, by whatever name called, including the person who carries on the business in such premises;
- (ii) a warehouse, godown or other place where any weight or measure or other goods are stored or exhibited;
- (iii) a place where any books of account or other documents pertaining to any trade or transaction are kept;
- (iv) a dwelling house, if any part thereof is used for the purpose of carrying on any business, industry, production or trade;
- (v) a vehicle or vessel or any other mobile device, with the help of which any transaction or business is carried on.

**Repairer**

Section 2 (P) defines “repairer” as to mean a person who repairs a weight or measure and includes a person who adjusts, cleans, lubricates or paints any weight or measure or renders any other service to such weight or measure to ensure that such weight or measure conforms to the standards established by or under this Act.

**Sale**

“Sale”, with its grammatical variations and cognate expressions, means transfer of property in any weight, measure or other goods by one person to another for cash or for deferred payment or for any other valuable consideration and includes a transfer of any weight, measure or other goods on the hire-purchase system or any other system of payment by instalments, but does not include a mortgage or hypothecation of, or a charge or pledge on, such weight, measure or other goods. [Section 2 (r)]

**Seal**

As per section 2(s) “seal” means a device or process by which a stamp is made, and includes any wire or other accessory which is used for ensuring the integrity of any stamp.

### Stamp

Section 2(t) defines “stamp” as to mean a mark, made by impressing, casting, engraving, etching, branding, affixing pre-stressed paper seal or any other process in relation to, any weight or measure with a view to-

- (i) certifying that such weight or measure conforms to the standard specified by or under this Act, or
- (ii) indicating that any mark which was previously made thereon certifying that such weight or measure conforms to the standards specified by or under this Act, has been obliterated.

### Transaction

Under section 2(u) “transaction” means,-

- (i) any contract, whether for sale, purchase, exchange or any other purpose, or
- (ii) any assessment of royalty, toll, duty or other dues, or
- (iii) the assessment of any work done, wages due or services rendered.

### Verification

As per section 2(v) “verification”, with its grammatical variations and cognate expressions, includes, in relation to any weight or measure, the process of comparing, checking, testing or adjusting such weight or measure with a view to ensuring that such weight or measure conforms to the standards established by or under this Act and also includes re-verification and calibration.

### Weight and measure

Under section 2(w) “weight or measure” means a weight or measure specified by or under this Act and includes a weighing or measuring instrument.

## STANDARD WEIGHTS AND MEASURES

Chapter II of the Act containing sections 4 to 12 deals with standard weight and measure. Section 4 provides units of weights and measures to be based on metric system. Section 5 provides the base unit of weights and measures. Section 6 deals with base unit of numeration. Section 7 provides the standard units of weights and measures. Section 8 states standard weight, measure or numeral. Section 9 provides the reference, secondary and working standard. Section 10 deals with use of weight or measure for particular purposes. Section 11 contains prohibition of quotation, etc., otherwise than in terms of standard units of weight, measure or numeration.

Section 4 of the Act provides that every unit of weight or measure shall be in accordance with the metric system based on the international system of units.

Section 5 of the Act provides that the base unit of length shall be the meter; mass shall be the kilogram; time shall be the second; electric current shall be the ampere; thermodynamic temperature shall be the Kelvin; luminous intensity shall be the candela; and amount of substance shall be the mole.

Section 6 states that the base unit of numeration shall be the unit of the international form of Indian numeral. Every numeration shall be made in accordance with the decimal system. The decimal multiples and sub-multiples of the numerals shall be of such denominations and be written in such manner as may be prescribed.

As per section 7 of the Act the base units of weights and measures specified in section 5 shall be the standard units of weights and measures. The base unit of numeration specified in section 6 shall be the standard unit of numeration. For the purpose of deriving the value of base, derived and other units mentioned in section 5, the Central Government shall prepare or cause to be prepared objects or equipments in such manner as

may be prescribed. The physical characteristics, configuration, constructional details, materials, equipments, performance, tolerances, period of re-verification, methods or procedures of tests shall be such as may be prescribed.

Section 8 provides that any weight or measure which conforms to the standard unit of such weight or measure and also conforms to such of the provisions of section 7 as are applicable to it shall be the standard weight or measure. Any numeral which conforms to the provisions of section 6 shall be the standard numeral.

No weight, measure or numeral, other than the standard weight, measure or numeral, shall be used as a standard weight, measure or numeral. No weight or measure, shall be manufactured or imported unless it conforms to the standards of weight or measure specified under section 8.

However, the aforesaid provisions shall not apply for manufacture done exclusively for export or for the purpose of any scientific investigation or research.

Section 11 of the Act provides that no person shall, in relation to any goods, things or service, quote, or make announcement of, whether by word of mouth or otherwise, any price or charge, or issue or exhibit any price list, invoice, cash memo or other document, or prepare or publish any advertisement, poster or other document, or indicate the net quantity of a pre-packaged commodity, or express in relation to any transaction or protection, any quantity or dimension, otherwise than in accordance with the standard unit of weight, measure or numeration.

It may be noted that the provisions mentioned above shall not be applicable for export of any goods, things or service.

Section 12 provides that any custom, usage, practice or method of whatever nature which permits a person to demand, receive or cause to be demanded or received, any quantity of article, thing or service in excess of or less than, the quantity specified by weight, measure or number in the contract or other agreement in relation to the said article, thing or service, shall be void.

### **Appointment and Power of Director, Controller and legal metrology officers**

Chapter III of the Act containing sections 13 to 23 of the Act deals with appointment and powers of director, controller and legal metrology officers.

Section 13 of the Act empowers the Central Government to appoint (by Notification) a Director of legal metrology, Additional Director, Joint Director, Deputy Director, Assistant Director and other employees for exercising the powers and discharging the duties conferred or imposed on them by or under this Act in relation to inter-State trade and commerce.

The Director and every legal metrology officer, appointed, shall exercise such powers and discharge such functions in respect of such local limits as the Central Government may, by notification, specify. Every legal metrology officer shall exercise powers and discharge duties under the general superintendence, direction and control of the Director.

The Director, the Controller and every legal metrology officer authorised to perform any duty by or under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code. No suit, prosecution or other legal proceeding shall lie against the Director, the Controller and legal metrology officer authorised to perform any duty by or under this Act in respect of anything which is in good faith done or intended to be done under this Act or any rule or order made there under.

The Central Government may, with the consent of the State Government and subject to such conditions, limitations and restrictions as it may specify in this behalf, delegate such of the powers of the Director under this Act as it may think fit to the Controller of legal metrology in the State, and such Controller may, if he is of opinion

that it is necessary or expedient in the public interest so to do, delegate such of the powers delegated to him as he may think fit to any legal metrology officer and where any such delegation of powers is made by such Controller, the person to whom such powers are delegated shall exercise those powers in the same manner and with the same effect as if they had been conferred on him directly by this Act and not by way of delegation.

Section 14 of the Act, provides that the State Government may, by notification, appoint a Controller of legal metrology, Additional Controller, Joint Controller, Deputy Controller, Assistant Controller, Inspector and other employees for the State for exercising the powers and discharging the duties conferred or imposed on them by or under this Act in relation to intra State trade and commerce.

The Controller and every legal metrology officer so appointed shall exercise such powers and discharge such functions in respect of such local limits as the State Government may, by notification, specify. Every legal metrology officer shall exercise and discharge the duties under the general superintendence, direction and control of the Controller.

### **Power of inspection, seizure**

Section 15 of the Act confer powers of inspection on the Director, Controller or any legal metrology officer may, if he has any reason to believe, whether from any information given to him by any person and taken down in writing or from personal knowledge or otherwise, that any weight or measure or other goods in relation to which any trade and commerce has taken place or is intended to take place and in respect of which an offence punishable under this Act appears to have been, or is likely to be, committed are either kept or concealed in any premises or are in the course of transportation.

The powers include entry at any reasonable time into any such premises and search for and inspect any weight, measure or other goods in relation to which trade and commerce has taken place, or is intended to take place and any record, register or other document relating thereto. The power also include seizure of any weight, measure or other goods and any record, register or other document or article which he has reason to believe may furnish evidence indicating that an offence punishable under the Act has been, or is likely to be, committed in the course of or in relation to, any trade and commerce.

Where any goods seized are subject to speedy or natural decay, the Director, Controller or legal metrology officer may dispose of such goods in such manner as may be prescribed. Every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973, relating to searches and seizures.

### **Forfeiture**

Every non-standard or unverified weight or measure and every package used in the course of, or in relation to, any trade and commerce and seized under section 15, shall be liable to be forfeited, to the State Government. However, such unverified weight or measure shall not be forfeited to the State Government if the person from whom such weight or measure was seized gets the same verified and stamped within such time as may be prescribed. Every weight, measure or other goods seized under section 15 but not forfeited shall be disposed of by such authority and in such manner as may be prescribed.

### **Manufacturers, etc., to maintain records and registers**

Section 17 of the Act provides that every manufacturer, repairer or dealer of weight or measure shall maintain such records and registers as may be prescribed. The records and registers maintained shall be produced at the time of inspection to the persons authorised for the purpose of Inspection.



**Under the Legal Metrology (Packaged Commodities) Rules, 2011 certain mandatory declarations are required to be made on all pre-packaged commodities in the interest of consumers like name and address of the manufacturer/packer/importer, country of origin, name of the commodity, net quantity, month and year of manufacturing, retail sale price in the form of Maximum Retail Price (MRP) Rs. (inclusive of all taxes) and consumer care details etc.**

**The penalty provisions are made under section 36(1) of the Legal Metrology Act, 2009 for the violation in respect of the mandatory declarations on the label. Under the provisions of the Legal Metrology Act, 2009 and the Legal Metrology (Packaged Commodities) Rules, 2011, State Governments take action for violations of the Rules.**

**What is Pre-Packaged Commodity?**

**“Pre-packaged commodity” means a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity.**

<b>Declarations on Pre-Packaged Commodities</b>	<b>Manner in which Declaration Shall be Made</b>
<p>Section 18 states that no person shall manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packaged commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed. Any advertisement mentioning the retail sale price of a pre-packaged commodity shall contain a declaration as to the net quantity or number of the commodity contained in the package in such form and manner as may be prescribed.</p>	<p>Rule 9 of the Legal Metrology (Packaged Commodities) Rules, 2011 deals with manner in which declaration shall be made. It provides that:</p> <ol style="list-style-type: none"> <li>(1) Every declaration which is required to be made on a package under these rules shall be:                             <ol style="list-style-type: none"> <li>(a) legible and prominent;</li> <li>(b) numerals of the retail sale price and net quantity declaration shall be printed, painted or inscribed on the package in a colour that contrasts conspicuously with the background of the label.</li> </ol> <p>It may be noted that (i) where any label information is blown, formed or molded on a glass or plastic surface such information need not be required to be presented in a contrasting colour; (ii) where any declaration on a package is printed either in the form of hand-writing or hand-script, such declaration shall be clear, unambiguous and legible.</p> </li> <li>(2) No declaration shall be made so as to require it to be read through any liquid commodity contained in the package.</li> <li>(3) Where a package is provided with an outside container or wrapper such container or wrapper shall also contain all the declarations which are required to appear on the package except where such container or wrapper itself is transparent and the declarations on the package itself are easily readable through such outside wrapper. Provided that no such declarations on the inner package is required if the inner package does not contain any declaration on its outer cover.</li> </ol>

- (4) The particulars of the declarations required to be specified under this rule on a package shall either be in Hindi in Devnagri script or in English.

It may be noted that nothing contained in this sub-rule shall prevent the use of any other language in addition to Hindi or English language.

#### ***What is Principal Display Panel?***

***In relation to a package means the total surface area of package where the information required under these rules are to be given in the following manner:***

- (i) All the information could be grouped together and given at one place; or***
- (ii) The pre-printed information could be grouped together and given in one place and on-line information grouped together in other place.***

#### ***What is the Area prescribed for Principal Display Panel for Declaration?***

***The area not including the top, bottom, flange at top and bottom of cans, and shoulders and neck of bottle and jar shall be determined as follows:***

- (i) In the case of a rectangular package, where one entire side can properly be considered to be the principal display panel side, the product of the height multiplies by the width of that side.***
- (ii) In the case of a cylindrical or nearly cylindrical package, prescribed percent of the product of the height of the package multiplied by the circumference.***
- (iii) In the case of any other shaped package, prescribed percent of the total surface of the package, or an area considered to be a principle display panel of the package.***

### **Registration for importer of weight or measure**

Section 19 provides that no person shall import any weight or measure unless he is registered with the Director in such manner and on payment of such fees, as may be prescribed. No weight or measure, whether singly or as a part or component of any machine shall be imported unless it conforms to the standards of weight or measure established by or under this Act (Section 20).

### **Approval of model**

Every person, before manufacturing or importing any weight or measure shall seek the approval of model of such weight or measure in such manner, on payment of such fee and from such authority as may be prescribed. However, such approval of model may not be required in respect of any cast iron, brass, bullion, or carat weight or any beam scale, length measures (not being measuring tapes) which are ordinarily used in retail trade for measuring textiles or timber, capacity measures, not exceeding twenty litre in capacity, which are ordinarily used in retail trade for measuring kerosene, milk or potable liquors.

It may be noted that the prescribed authority may, if he is satisfied that the model of any weight or measure which has been approved in a country outside India conforms to the standards established by or under this Act, approve such model without any test or after such test as he may deem fit.

### **Prohibition on manufacture, repair or sale of weight or measure without licence**

Section 23 of the Act provides that no person shall manufacture, repair or sell, or offer, expose or possess for repair or sale, any weight or measure unless he holds a licence issued by the Controller. However, no licence to repair shall be required by a manufacturer for repair of his own weight or measure in a State other than the State of manufacture of the same. The Controller shall issue a licence in such form and manner, on such conditions, for such period and such area of jurisdiction and on payment of such fee as may be prescribed.

Section 24 provides for verification and stamping of weight or measure. Every person having any weight or measure in his possession, custody or control in circumstances indicating that such weight or measure is being, or is intended or is likely to be, used by him in any transaction or for protection, shall, before putting such weight or measure into such use, have such weight or measure verified at such place and during such hours as the Controller may, by general or special order, specify in this behalf, on payment of such fees as may be prescribed.

The Central Government may prescribe the kinds of weights and measures for which the verification is to be done through the Government approved Test Centre. The Government approved Test Centre shall be notified by the Central Government or the State Government, as the case may be, in such manner, on such terms and conditions and on payment of such fee as may be prescribed.

### **Offences and Penalties**

Chapter V of the Act deals with offences and penalties.

Section 25 of the Act provides for penalty for use of non-standard weight or measure. The section stipulates that whoever uses or keeps for use any weight or measure or makes use of any numeration otherwise than in accordance with the standards of weight or measure or the standard of numeration, as the case may be, specified by or under this Act, shall be punished with fine which may extend to twenty-five thousand rupees and for the second or subsequent offence, with imprisonment for a term which may extend to six months and also with fine.

Under section 26 whoever tampers with, or alters in any way, any reference standard, secondary standard or working standard or increases or decreases or alters any weight or measure with a view to deceiving any person or knowing or having reason to believe that any person is likely to be deceived thereby, except where such alteration is made for the correction of any error noticed therein on verification, shall be punished with fine which may extend to fifty thousand rupees and for the second and subsequent offence with imprisonment for a term which shall not be less than six months but which may extend to one year or with fine or with both.

Section 27 provides that every person who manufactures or causes to be manufactured or sells or offers, exposes or possesses for sale, any weight or measure which does not conform to the standards of weight or measure specified by or under this Act; or which bears thereon any inscription of weight, measure or number which does not conform to the standards of weight, measure or numeration specified by or under this Act, except where he is permitted to do so under this Act, shall be punished with a fine which may extend to twenty thousand rupees and for the second or subsequent offence with imprisonment for a term which may extend to three years or with fine or with both.

Section 30 dealing with penalty for transaction in contravention of standard weight or measure provides that whoever, in selling any article or thing by weight, measure or number, delivers or causes to be delivered to the purchaser any quantity or number of that article or thing less than the quantity or number contracted for or paid for; or in rendering any service by weight, measure or number, renders that service less than the service contracted for or paid for; or in buying any article or thing by weight, measure or number, fraudulently receives, or causes to be received any quantity or number of that article or thing in excess of the quantity or number contracted for or paid for; or in obtaining any service by weight, measure or number, obtains that service in

excess of the service contracted for or paid for, shall be punished with fine which may extend to ten thousand rupees, and; for the second or subsequent offence, with imprisonment for a term which may extend to one year, or with fine, or with both.

Under section 31, Whoever, being required by or under this Act or the rules made thereunder to submit returns, maintain any record or register, or being required by the Director or the Controller or any legal metrology officer to produce before him for inspection any weight or measure or any document, register or other record relating thereto, omits or fails without any reasonable excuse, so to do, shall be punished with fine which may extend to five thousand rupees and for the second or subsequent offence, with imprisonment for a term which may extend to one year and also with fine.

Section 35 provides that whoever renders or causes to be rendered, any service through means other than the weight or measure or numeration or in terms of any weight, measure or number other than the standard weight or measure, shall be punished with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees and for the second or subsequent offence, with imprisonment for a term which shall not be less than three months but which may extend to one year, or with fine, or with both.

Under section 36 whoever manufactures, packs, imports, sells, distributes, delivers or otherwise transfers, offers, exposes or possesses for sale, or causes to be sold, distributed, delivered or otherwise transferred, offered, exposed for sale any pre-packaged commodity which does not conform to the declarations on the package as provided in this Act, shall be punished with fine which may extend to twenty-five thousand rupees, for the second offence, with fine which may extend to fifty thousand rupees and for the subsequent offence, with fine which shall not be less than fifty thousand rupees but which may extend to one lakh rupees or with imprisonment for a term which may extend to one year or with both. Whoever manufactures or packs or imports or causes to be manufactured or packed or imported, any pre-packaged commodity, with error in net quantity as may be prescribed shall be punished with fine which shall not be less than ten thousand rupees but which may extend to fifty thousand rupees and for the second and subsequent offence, with fine which may extend to one lakh rupees or with imprisonment for a term which may extend to one year or with both.

Section 42 provides for vexatious search and empowers the Director, the Controller or any legal metrology officer, exercising powers under this Act or any rule made thereunder, who knows that there are no reasonable grounds for so doing, and yet searches, or causes to be searched, any house, conveyance or place; or searches any person; or seizes any weight; measure or other movable property shall, for every such offence, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees or with both.

### Penalty for counterfeiting or seal

Section 44 provides that whoever counterfeits any seal specified by or under this Act or the rules made thereunder, or sells or otherwise disposes of any counterfeit seal or possesses any counterfeit seal, or counterfeits or removes or tampers with any stamp, specified by or under this Act or rules made thereunder, or affixes the stamp so removed on, or inserts the same into, any other weight or measure, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

**“Counterfeit” shall have the meaning assigned to it in section 28 of the Indian Penal Code.**

A person is said to “counterfeit” who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.

Whoever obtains, by unlawful means, any seal specified by or under this Act or the rules made thereunder and uses, or causes to be used, any such seal for making any stamp on any weight or measure with a view to representing that the stamp made by such seal is authorised by or under this Act or the rules made thereunder shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

Whoever, being in lawful possession of a seal specified by or under this Act or the rules made thereunder, uses, or causes to be used, such seal without any lawful authority for such use, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

Whoever sells or offers or exposes for sale or otherwise disposes of any weight or measure which, he knows or has reason to believe, bears thereon a counterfeit stamp, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and for the second or subsequent offence, with imprisonment for a term which shall not be less than six months but which may extend to five years.

**Explanation 1.** It is not essential to counterfeiting that the imitation should be exact.

**Explanation 2.** When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practice deception or knew it to be likely that deception would thereby be practiced.

### Compounding of offence

In terms of offence punishable under section 25, sections 27 to 39, sections 45 to 47 either before or after the institution of the prosecution, be compounded, on payment for credit to the Government of such sum as may be prescribed.

However, the Director or legal metrology officer as may be specially authorised by him in this behalf, may compound offences punishable under section 25, sections 27 to 39, or any rule made under sub-section (3) of section 52. The Controller or legal metrology officer specially authorised by him, may compound offences punishable under section 25, sections 27 to 31, sections 33 to 37, sections 45 to 47, and any rule made under sub-section (3) of section 52:

Provided that such sum shall not, in any case, exceed the maximum amount of the fine, which may be imposed under this Act for the offence so compounded.

### Offences by companies

Section 49 provides that where an offence under this Act has been committed by a company, the person, if any, who has been nominated to be in charge of, and responsible to, the company for the conduct of the business of the company (hereinafter in this section referred to as a person responsible); or where no person has been nominated, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company; and the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

However, such person shall not be liable to any punishment, if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

Any company may, by order in writing, authorise any of its directors to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under this Act and may give notice to the Director or the concerned Controller or any legal metrology officer authorised

in this behalf by such Controller in such form and in such manner as may be prescribed, that it has nominated such director as the person responsible, along with the written consent of such director for being so nominated.

It may be noted that where a company has different establishments or branches or different, units in any establishment or branch, different persons may be nominated under this subsection in relation to different establishments or branches or units and the person nominated in relation to any establishment, branch or unit shall be deemed to be the person responsible in respect of such establishment, branch or unit.

Where an offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to the neglect on the part of, any director, manager, secretary or other officer, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Where any company is convicted under the Act for contravention of any of the provisions thereof, it shall be competent for the court convicting the company to cause the name and place of business of the company, nature of the contravention, the fact that the company has been so convicted and such other particulars as the court may consider to be appropriate in the circumstances of the case, to be published at the expense of the company in such newspaper or in such other manner as the court may direct. No publication shall be made until the period for preferring an appeal against the orders of the court has expired without any appeal having been preferred, or such an appeal, having been preferred, has been disposed of. The expenses of any publication shall be recoverable from the company as if it were a fine imposed by the court.

**Explanation.-**

- (a) "company" means any body corporate and includes a firm or other association of individuals; and
- (b) "director", in relation to a firm, means a partner in the firm but excludes nominated directors, honorary directors, Government nominated directors.

### Power of the Central Government to make rules

Section 52 of the Act empowers the Central Government to make rules, by notification, for carrying out the provisions of the Act.

In making any rule the Central Government may provide that a breach thereof shall be punishable with fine which may extend to five thousand rupees.

Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

### Power of State Government to make rule

Section 53 empowers the State Government to make rules, by notification, and after consultation with the Central Government, to carry out the provisions of the Act.

In making any rule under this section, the State Government may provide that a breach thereof shall be punishable with fine which may extend to five thousand rupees. The power to make rules under this section shall be subject to the condition of the rules being made after previous publication in Official Gazette. Every



rule made under this section shall, as soon as may be after it is made, be laid before each House of State Legislature, where there are two Houses and where there is one House of State Legislature, before that House.

### **THE ESSENTIAL COMMODITIES ACT, 1955**

The Essential Commodities Act, 1955 was enacted to regulate the production, supply and distribution of, and trade and commerce in, certain commodities which are declared as essential commodities and specified in the Schedule to that Act.

Schedule to the Act lists out following commodities: (1) drugs: The explanation clarifies that for the purposes of this Schedule, “drugs” has the meaning assigned to it in clause (b) of Section 3 of the Drugs and Cosmetics Act, 1940; (2) fertilizer, whether inorganic, organic or mixed; (3) foodstuffs, including edible oilseeds and oils; (4) hank yarn made wholly from cotton; (5) petroleum and petroleum products; (6) raw jute and jute textiles; (7) (i) seeds of food-crops and seeds of fruits and vegetables; (ii) seeds of cattle fodder; and (iii) jute seeds.

The Essential Commodities Act, 1955 was enacted to ensure easy availability of essential commodities to the consumers and to protect them from exploitation by unscrupulous traders. The Act provides for regulation and control of production, distribution and pricing of commodities, which are declared as essential for maintaining or increasing supplies or for securing their equitable distribution and availability at fair prices. The Essential Commodities Act is being implemented by the State Governments/UT Administrations by availing of the delegated powers under the Act. The State Governments/ UT Administrations have issued various Control Orders for regulation, production and distribution of Essential Commodities such as food grains, edible oils, pulses kerosene, sugar etc. The Central Government regularly monitors the action taken by State Governments/ UT Administrations to implement the provisions of the Essential Commodities Act, 1955. The items declared as essential commodities under the Essential Commodities Act, 1955 are reviewed from time to time in the light of liberalized economic policies in consultation with the Ministries/ Departments administering the essential commodities and particularly with regard to their production, demand, and supply.

***The Preamble to the Act says that it is an Act to provide in the interest of the general public for the control of the production, supply and distribution of, and trade and commerce in, certain commodities. The dominant object and intendment of the Act is to secure equitable distribution and availability at fair prices of essential commodities in the interest of the general public. The interest of the general public necessarily connotes the interest of the consuming public and not the interest of the dealer (1958 Andh. LT587).***

The Central Government having been vested with power under Section 3 can issue order in the following circumstances providing for regulating or prohibiting the production, supply and distribution of essential commodities and trade and commerce therein: (i) when it is necessary or expedient for maintaining or increasing supplies of any essential commodity; (ii) for securing the equitable distribution and availability of essential commodities at fair price; or (iii) for securing any essential commodity for the defence of India or the efficient conduct of military operations.

The Essential Commodities Act, 1955 envisages two independent proceedings against a person charged with contravention of the provisions of the Act. Under the Act, the Collector can confiscate the seized commodity. Confiscation of essential commodities is a sharp weapon which the Act has provided to the Central Government under of the Act. Any person aggrieved by an order of confiscation may appeal to the State Government.

The Act declares that notwithstanding anything contained in the Criminal Procedure Code, 1971, every offence punishable under the Act shall be cognizable. A cognizable offence is one, where, under the Criminal Procedure Code or any other law in force, a police officer may arrest a person without a warrant. Court can take cognizance

of any offence punishable under the Act, the following three conditions must be satisfied, viz. (i) there must be a report in writing, (ii) the report must be made by a public servant, as defined in Section 21 of Indian Penal Code, or any aggrieved person or any recognised consumer association.

The Act provides that if the person contravening an order under Section 3 is, a company, every person who, at the time of the contravention, was in charge of, and was responsible to, the company for the conduct of the business of the company, shall be deemed to be guilty of the contravention, and shall be liable to be punished accordingly. In such cases, the company itself is also liable to be proceeded against. Any such person, can, however, escape liability if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent it. It may be noted that the term 'company' as used above, refers to anybody corporate, and even includes a firm or other association or individuals. In the case of a firm, the term 'Director' would mean a partner in the firm.

#### LESSON ROUND-UP

- Weights and measures may be ranked among the necessities of life to every individual of human society. They enter into the economical arrangements and daily concerns of every family.
- Legal metrology Act, 2009 intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.
- "Legal Metrology" means that part of metrology which treats units of weighment and measurement, methods of weighment and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weighments and measurements.
- Every unit of weight or measure to be in accordance with the metric system based on the international system of units.
- A person shall not manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packaged commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed.
- Any advertisement mentioning the retail sale price of a pre-packaged commodity shall contain a declaration as to the net quantity or number of the commodity contained in the package in such form and manner as may be prescribed.
- Legal Metrology Act provides for penalty for use of non-standard Weight or measure.
- Label means any written, marked, stamped, printed or graphic matter affixed to, or appearing upon any pre-packaged commodity.
- A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.
- Legal Metrology Act empowers the Central Government and State Governments to make rules for carrying out the provisions of this Act.
- The Essential Commodities Act, 1955 was enacted to regulate the production, supply and distribution of, and trade and commerce in, certain commodities which are declared as essential commodities and specified in the Schedule to that Act.







### KEY CONCEPTS

■ Agreement for sale ■ Allottee ■ Promoter ■ Carpet area ■ Common areas ■ Planning area ■ Commencement certificate ■ Completion certificate

### Learning Objectives

#### To understand:

- Registration of Real Estate Project
- Registration of Real Estate Agents
- Functions of real estate agents
- Functions of Promoter
- Obligation of Promoters
- Rights of Allottees
- Establishment of Real Estate Regulatory Authority
- Real Estate Appellate Tribunal

### Lesson Outline

- Real Estate Project
- Registration of Real Estate Agents
- Functions and Duties of Promoter
- Duties of Allottees
- Real Estate Regulatory Authority
- Central Advisory Council
- Real Estate Appellate Tribunal
- Adjudication
- Offences & Penalties
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## INTRODUCTION

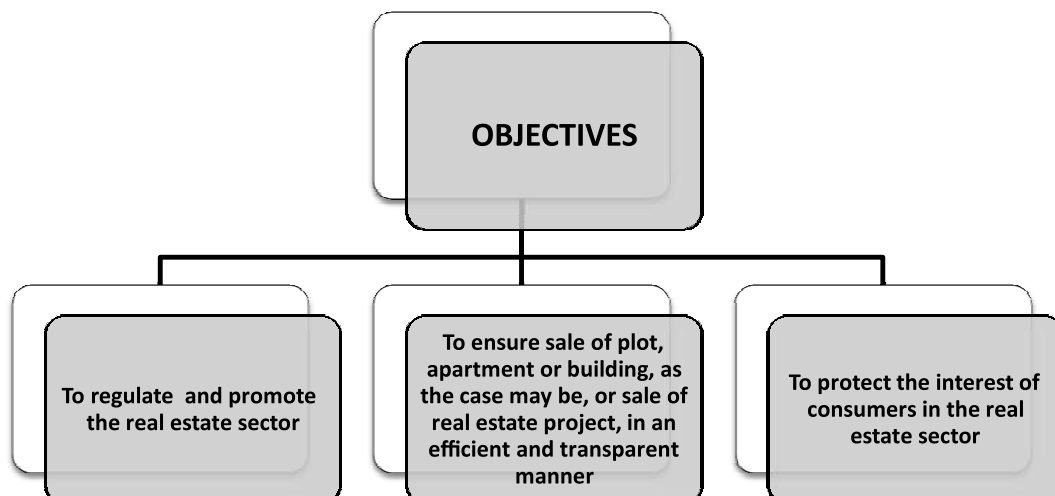
Real estate sector plays a catalytic role in fulfilling the needs and demand for housing and infrastructure in the country and is an important pillar of the economy. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection. It has no sectoral regulator like there are for other specific sectors like insurance, telecom, stock markets etc. History is witness to the fact that whenever sectoral regulators like SEBI, IRDAI, TRAI etc have been formed, they have helped in deepening the market and made it more robust. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardisation has been a constraint to the healthy and orderly growth of industry. Therefore, since more than a decade the need for regulating the sector was being emphasised in various forums.

In view of the above, Parliament enacted the Real Estate (Regulation and Development) Act, 2016 which aims at protecting the rights and interests of consumers and promotion of uniformity and standardization of business practices and transactions in the real estate sector. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism.

This Act will be put in operation just like the Motor Vehicles Act passed by the Central Government, pursuant to which respective State Governments (“SG”) and Union Territories (“UT”) are required to notify their own Rules, which would be in the lines of the Central Act and accordingly administer their own State Rules. Accordingly, every SG and UT are to required to promulgate their own Real Estate Rules which would be based on the lines of the central Real Estate (Regulation and Development) Act 2016, and establish a Real Estate Regulatory Authority (“RERA”) pursuant to the Rules, which will administer the respective Real Estate Rules of the State or UT.

Importance of a house in a developing country like India can be gauged from the data which shows that about more than 77% of total assets of an average Indian household are held in real estate and it’s the single largest investment of an individual in his lifetime. The real estate in India has a peculiar feature. The buyer borrows money to pay for a house and simultaneously plays the role of a financier as building projects collect money upfront and this puts the buyer in a very vulnerable position-the weakest stakeholder with a high financial exposure. The amendment to the Insolvency and Bankruptcy Code, 2018 recognized the home buyers as financial creditors.

The objectives of the Act are as under:



*In the case of M/s. Newtech Promoters and Developers Pvt. Ltd. vs. State of UP & Ors. Etc, Civil Appeal No(s). 6745-6749 of 2021 (Arising out of SLP (Civil) No(s). 3711-3715 of 2021) judgement dated 11th November, 2021 Supreme Court of India inter-alia observed that:*

*It was introduced with an object to ensure greater accountability towards consumers, to significantly reduce frauds & delays and also the current high transaction costs, and to balance the interests of consumers and promoters by imposing certain responsibilities on both, and to bring transparency of the contractual conditions, set minimum standards of accountability and a fast track dispute resolution mechanism. It also proposes to induct professionalism and standardization in the sector, thus paving the way for accelerated growth and investments in the long run.*

*To meet out different nature of exigencies, it was noticed by the Parliament that Pan India, large number of real estate projects where the allottees did not get possession for years together and complaints being filed before different forums including under the Consumer Protection Act has failed to deliver adequate/satisfactory results to the consumer/allottees and their life savings is locked in and sizable sections of allottees had invested their hardearned money, money obtained through loans or financial institutions with the belief that they will be able to get a roof in the form of their apartments/flats/unit.*

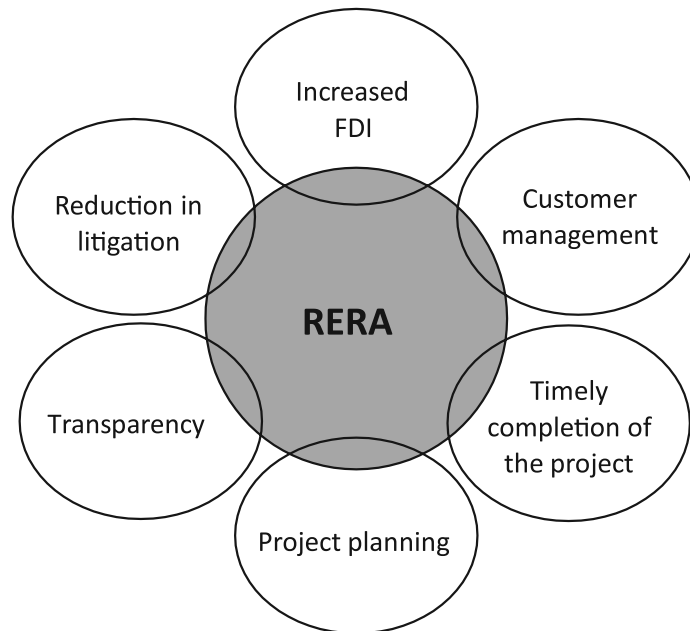
*At the given time, there was no law regulating the real estate sector, development works/obligations of promoter and allottee, it was badly felt that such of the ongoing projects to which completion certificate has not been issued must be brought within the fold of the Act 2016 in securing the interests of allottees, promoters, real estate agents in its best possible way obviously, within the parameters of law. Merely because enactment as prayed is made retroactive in its operation, it cannot be said to be either violative of Articles 14 or 19(1)(g) of the Constitution of India. To the contrary, the Parliament indeed has the power to legislate even retrospectively to take into its fold the pre-existing contract and rights executed between the parties in the larger public interest.*

### SALIENT FEATURES OF THE ACT

- Establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector.
- Ensure sale of plot, apartment of building, as the case may be, or sale of real estate project, in an efficient and transparent manner.
- Ensure protection the interest of consumers in the real estate sector.
- Establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority (RERA).
- Regulates transactions between buyers and promoters of residential real estate projects.
- Establishes state level regulatory authorities called Real Estate Regulatory Authorities (RERAs).
- Residential real estate projects, with some exceptions, need to be registered with RERAs.
- Promoters cannot book or offer these projects for sale without registering them. Real estate agents dealing in these projects also need to register with RERAs.
- Registration of the project, the promoter must upload details of the project on the website of the RERA.
- These include the site and layout plan, and schedule for completion of the real estate project.
- Amount collected from buyers for a project must be maintained in a separate bank account and must only be used for construction of that project.

- Right to Legal Representation on behalf of client by Company Secretaries or chartered accountants or cost accountants or legal practitioners.
- Imposes stringent penalty on promoter, real estate agent and also prescribes imprisonment.

### ADVANTAGES OF RERA (REAL ESTATE REGULATION & DEVELOPMENT ACT)



### IMPORTANT DEFINITIONS

RERA has brought in uniformity in definitions for important components of real estate, like, “carpet area”, “common areas” etc. which will prevent malpractices like changes in area, specifications etc.

In this Act, Section 2 provides following definitions with opening words...unless the context otherwise requires:-

**“Advertisement”** means any document described or issued as advertisement through any medium and includes any notice, circular or other documents or publicity in any form, informing persons about a real estate project, or offering for sale of a plot, building or apartment or inviting persons to purchase in any manner such as plot, building or apartment or to make advances or deposits for such purposes. {Section 2(b)}

**“Agreement for sale”** means an agreement entered into between the promoter and the allottee. {Section 2(c)}

**“Allottee”** in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent. {Section 2(d)}

*In Pioneer Urban Land and Infrastructure Limited vs. Union of India, the Supreme Court upheld the constitutional validity of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, which included ‘real estate allottees’ within the definition of ‘financial creditors’ under Section 5(8)(f) of the Insolvency and Bankruptcy Code.*

**“Apartment”** whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property,

including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified. *{Section 2(e)}*

**“Building”** includes any structure or erection or part of a structure or erection which is intended to be used for residential, commercial or for the purpose of any business, occupation, profession or trade, or for any other related purposes. *{Section 2(j)}*

**“Carpet area”** means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment. *{Section 2(k)}*

*Explanation.*– The expression “exclusive balcony or verandah area” means the area of the balcony or verandah, as the case may be, which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee; and “exclusive open terrace area” means the area of open terrace which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee;

**“Commencement certificate”** means the commencement certificate or the building permit or the construction permit, by whatever name called issued by the competent authority to allow or permit the promoter to begin development works on an immovable property, as per the sanctioned plan. *{Section 2(m)}*

**“Common areas”** mean–

- (i) the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;
- (ii) the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings;
- (iii) the common basements, terraces, parks, play areas, open parking areas and common storage spaces;
- (iv) the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;
- (v) installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;
- (vi) the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;
- (vii) all community and commercial facilities as provided in the real estate project;
- (viii) all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use. *{Section 2(n)}*

**“Company”** means a company incorporated and registered under the Companies Act, 2013 and includes,–

- (i) a corporation established by or under any Central Act or State Act;
- (ii) a development authority or any public authority established by the Government in this behalf under any law for the time being in force. *{Section 2(o)}*

**“Competent authority”** means the local authority or any authority created or established under any law for the time being in force by the appropriate Government which exercises authority over land under its jurisdiction, and has powers to give permission for development of such immovable property. *{Section 2(p)}*

**“Completion certificate”** means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the

sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws. {Section 2(q)}

**“Interest”** means the rates of interest payable by the promoter or the allottee, as the case may be. {Section 2(za)}

*Explanation.*—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the, allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid.

**“Internal development works”** means roads, footpaths, water supply, sewers, drains, parks, tree planting, street lighting, provision for community buildings and for treatment and disposal of sewage and sullage water, solid waste management and disposal, water conservation, energy management, fire protection and fire safety requirements, social infrastructure such as educational health and other public amenities or any other work in a project for its benefit, as per sanctioned plans. {Section 2(zb)}

**“Local authority”** means the Municipal Corporation or Municipality or Panchayats or any other Local Body constituted under any law for the time being in force for providing municipal services or basic services, as the case may be, in respect of areas under its jurisdiction. {Section 2(zc)}

**“Occupancy certificate”** means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity. {Section 2(zf)}

**“Person”** includes,—

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) a company;
- (iv) a firm under the Indian Partnership Act, 1932 or the Limited Liability Partnership Act, 2008, as the case may be;
- (v) a competent authority;
- (vi) an association of persons or a body of individuals whether incorporated or not;
- (vii) a co-operative society registered under any law relating to co-operative societies;

any such other entity as the appropriate Government may, by notification, specify in this behalf. {Section 2(zg)}

**“Planning area”** means a planning area or a development area or a local planning area or a regional development plan area, by whatever name called, or any other area specified as such by the appropriate Government or any competent authority and includes any area designated by the appropriate Government or the competent authority to be a planning area for future planned development, under the law relating to Town and Country Planning for the time being in force and as revised from time to time. {Section 2(zh)}

**“Prospectus”** means any document described or issued as a prospectus or any notice, circular, or other document offering for sale or any real estate project or inviting any person to make advances or deposits for such purposes. {Section 2(zi)}



**“Appropriate Government”**

Section 2(g) of the Act defines ‘Appropriate Government’ to mean as follows:

For the Union territory without Legislature,	● Central Government;
For the Union territory of Puducherry,	● Union Territory Government;
For the Union territory of Delhi,	● Central Ministry of Urban Development;
For the State,	● State Government.

**Responsibilities of the Appropriate Government**

- (a) As per section 84 of the Act, the appropriate Government is required to notify Rules for the implementation of the Act.
- (b) As per section 20 of the Act, the appropriate Government is required to establish the Regulatory Authority.
- (c) As per section 43 of the Act, the appropriate Government is required to establish the Appellate Tribunal.
- (d) The Chairperson and Members of the Regulatory Authority and the Members of the Appellate Tribunal are required to be appointed based on recommendations of a Selection Committee, thus the appropriate Government is required to constitute the Selection Committee.
- (e) As per section 28 and section 51, the appropriate Government is required to appoint officers and other employees of Regulatory Authority and the Appellate Tribunal.
- (f) As per section 41, the Central Government (i.e. the Ministry of HUPA) is required to establish the Central Advisory Council.
- (g) As per section 75, the appropriate Government is required to constitute a ‘Real Estate Regulatory Fund’.

**REGISTRATION OF REAL ESTATE PROJECT AND REGISTRATION OF REAL ESTATE AGENTS**

Many developers across India follow a common practice of pre-launching a project without securing requisite approvals for the project from the local authorities, which is termed as “soft launch”, “pre-launch” etc. Buyers also gets tapped into this opportunity as they get discounted prices during the pre-launches period. But if it is from a developer who is unscrupulous or a fly by night operator, then it carries a great risk. Hence, to plug this gap, registration of every project with the regulatory authority has been made mandatory before it is launched for sale and for registration, the basic pre-requisite is that the developer must have all the requisite approvals. Thus, the buyer is protected as the project is ring-fenced from the vagaries of non-approvals or delays in approvals which are one of the major causes of delay for the project.

**Prior Registration of Real Estate project with Real Estate Regulatory Authority (Section 3)**

A promoter shall not advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under section 20 of the Act.

It may be noted that –

**“Promoter”** means, –

- (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or
- (ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or
- (iii) any development authority or any other public body in respect of allottees of–
  - (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or
  - (b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or
- (iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its members or in respect of the allottees of such apartments or buildings; or
- (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or
- (vi) such other person who constructs any building or apartment for sale to the general public.

*Explanation.*– where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made there under. {Section 2(zk)}

*The very purpose and object of enacting the Act, 2016 was to safeguard the interest of the home buyers from the project which was launched by the promoter and was not completed in time. The legislature does not leave any individual, association, or organization as an exception to the word ‘promoter’. The use of the word ‘a person’ at the outset of the definition clause of the word ‘promoter’ clearly signifies that it embraces all types of individuals, associations, corporations, and authorities dealing in the real estate sector and does not exclude any organization though it may be “no profit no loss” organization but is registered under the Act. (Air Force Naval Housing Board Air Force Station vs. U.P. RERA and others)*

**“Real estate project”** means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto. {Section 2(zn)}

The projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act.

Authority in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made there under, shall apply to such projects from that stage of registration where the real estate project is to be developed in phases, every such

phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

### Projects exempt from the ambit of the Act

The following projects do not require to be registered under the Act:

- (a) area of land proposed to be developed does not exceed 500 Sq. Meters or No. of apartments proposed to be developed does not exceed eight inclusive of all phases:

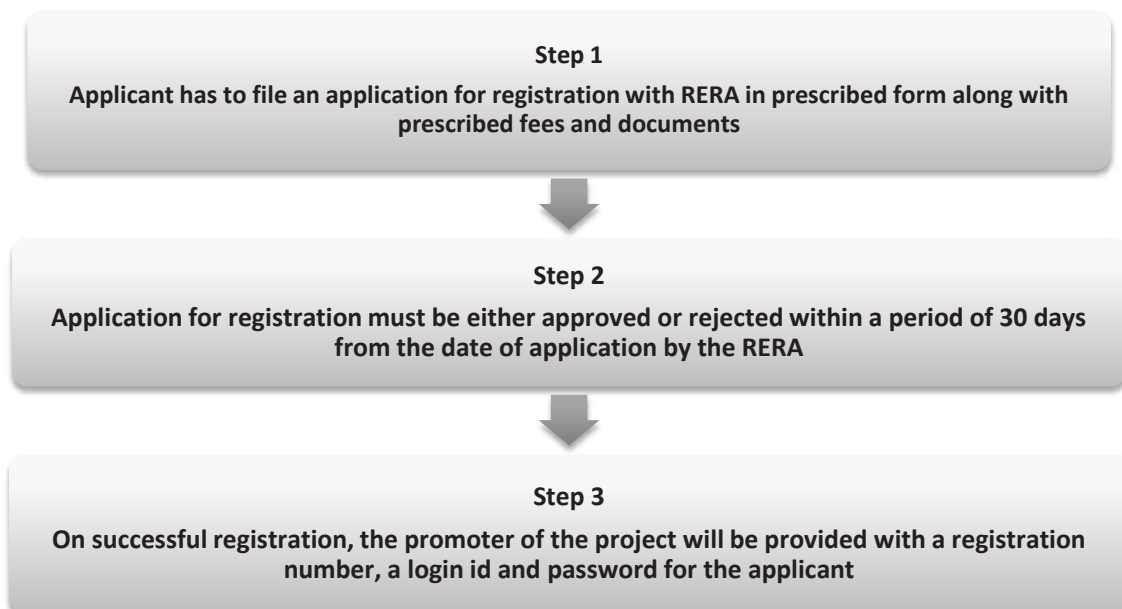
Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

- (b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;
- (c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

*In the case of M/s. Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP & Ors. etc, Civil Appeal No(s). 6745-6749 of 2021 [Arising out of SLP (Civil) No(s). 3711-3715 of 2021] Supreme Court of India inter-alia observed that from the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the ongoing projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016.*

### Application for Registration of Real Estate Projects (Section 4)

Every promoter shall make an application to the Authority for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be specified by the regulations made by the Authority.



The promoter shall enclose the following documents along with the application, namely:–

- (a) a brief details of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies, competent authority), and the particulars of registration, and the names and photographs of the promoter;
- (b) a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any delay in its completion, details of cases pending, details of type of land and payments pending;
- (c) an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;
- (d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;
- (e) the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including firefighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy;
- (f) the location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project;
- (g) proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;
- (h) the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas apartment with the apartment, if any;
- (i) the number and areas of garage for sale in the project;
- (j) the names and addresses of his real estate agents, if any, for the proposed project;
- (k) the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project;
- (l) a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:–
  - A. that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;
  - B. that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;
  - C. the time period within which he undertakes to complete the project or phase thereof, as the case may be;
  - D. that seventy per-cent of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose.

The promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project. The amounts from the separate account shall be withdrawn by

the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project.

The promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilised for the project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

The promoter shall take all the pending approvals on time, from the competent authorities and furnished such other documents as may be prescribed by the rules or regulations made under.

The Authority shall operationalise a web based online system for submitting applications for registration of projects within a period of one year from the date of its establishment.

### Granting of Registration by the Authority (Section 5)

On receipt of the application, the Authority shall within a period of thirty days-

- (a) grant registration subject to the provisions of the Act and the rules and regulations made thereunder. A registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or
- (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the rules or regulations made thereunder. Application shall not be rejected unless the applicant has been given an opportunity of being heard in the matter.

If the Authority fails to grant the registration or reject the application, as provided above, the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period of thirty days, provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.

The registration granted shall be valid for a period declared by the promoter for completion of the project or phase thereof, as the case may be.

### Extension of Registration (Section 6)

Delay in handing over of projects by the developer within the stipulated time frame has been a major woe of the buyers and hence has been a major trigger for promulgation of this Act. Hence, at the time of registration, a developer has to specify a time line during which he will complete and handover the project to the buyer. The timeline is very sacrosanct because if he fails to do so within the stated time, then there are rigorous provisions in the Act as prescribed in section 7 & 8 whereby his registration would be revoked and his project would be usurped by the Regulator. Though as per section 6, an extension of registration may be granted at the sole discretion of the Regulator due to Force Majeure conditions or if there are reasonable circumstances which merit extension.

The registration granted may be extended by the Authority on an application made by the promoter due to force majeure, in such form and on payment of such fee as may be specified by regulations made by the Authority.

**“Force majeure”** shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

The Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year.

Application for extension of registration shall not be rejected unless the applicant has been given an opportunity of being heard in the matter.

### Revocation of Registration (Section 7)

The Authority may, on receipt of a complaint or *suo moto* in this behalf or on the recommendation of the competent authority, revoke the registration granted, after being satisfied that—

- (a) the promoter makes default in doing anything required by or under this Act or the rules or the regulations made there under;
- (b) the promoter violates any of the terms or conditions of the approval given by the competent authority;
- (c) the promoter is involved in any kind of unfair practice or irregularities.

The term “unfair practice means” a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

- A. the practice of making any statement, whether in writing or by visible representation which,—
  - (i) falsely represents that the services are of a particular standard or grade;
  - (ii) represents that the promoter has approval or affiliation which such promoter does not have;
  - (iii) makes a false or misleading representation concerning the services;
- B. the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;
- (d) the promoter indulges in any fraudulent practices.

The registration granted to the promoter shall not be revoked unless the Authority has given to the promoter not less than thirty days’ notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation.

The Authority may, instead of revoking the registration, permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.

The Authority, upon the revocation of the registration-

- Debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;
- Facilitate the remaining development works to be carried out in accordance with the provisions of section 8;
- Direct the bank holding the project back account to freeze the account, and thereafter take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8;
- To protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.

### Obligation of Authority consequent upon Lapse of or on Revocation of Registration (Section 8)

Upon lapse of the registration or on revocation of the registration under the Act, the authority, may consult the appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority.

The direction, decision or order of the Authority shall not take effect until the expiry of the period of appeal provided under the provisions of the Act.

In case of revocation of registration of a project under the Act, the association of allottees shall have the first right of refusal for carrying out of the remaining development works.

### Registration of Real Estate Agents

**“Real estate agent”** means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called. {Section 2(zm)}

Real estate broking is one of the easiest business in India as there are no specific qualification or experience requirements and also there is no code of practice which sets accountability, transparency and professional benchmarks. Hence, there are thousands of non-professional agents/ brokers in every city operating without any accountability. Hence, to bring in transparency and accountability, agents have also been covered under the ambit of RERA and registration requirement has been mandatory for them as per section 9 of the Act.

Without obtaining registration, real estate agent shall not facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being the part of the real estate project registered, being sold by the promoter in any planning area.

Every real estate agent shall make an application to the Authority for registration in such form, manner, within such time and accompanied by such fee and documents as may be prescribed.

The Authority shall, within such period, in such manner and upon satisfying itself of the fulfilment of such conditions, as may be prescribed—

- (a) grant a single registration to the real estate agent for the entire State of Union territory, as the case may be;
- (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of the Act or the rules or regulations made there under.

Application shall not be rejected unless the applicant has been given an opportunity of being heard in the matter.

Whereon the completion of the period prescribed under the Act, if the applicant does not receive any communication about the deficiencies in his application or the rejection of his application, he shall be deemed to have been registered.

Every real estate agent who is registered as per the provisions of this Act or the rules and regulations made there under, shall be granted a registration number by the Authority, which shall be quoted by the real estate agent in every sale facilitated by him under this Act.

Every registration shall be valid for such period as may be prescribed, and shall be renewable for a period in such manner and on payment of such fee as may be prescribed.

Where any real estate agent who has been granted registration under this Act commits breach of any of the conditions thereof or any other terms and conditions specified under this Act or any rules or regulations made there under, or where the Authority is satisfied that such registration has been secured by the real estate agent through misrepresentation or fraud, the Authority may, without prejudice to any other provisions under this Act, revoke the registration or suspend the same for such period as it thinks fit:

Provided that no such revocation or suspension shall be made by the Authority unless an opportunity of being heard has been given to the real estate agent.

### **Functions of Real Estate Agents (Section 10)**

Every real estate agent which is not registered with the Authority shall not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area. So, firstly they require to register themselves with the authority under section 9 of the Act.

Every real estate agent maintains and preserves such books of account, records and documents as may prescribed. Every real estate agent not to involve himself in any unfair trade practices, namely:—

- (i) the practice of making any statement, whether orally or in writing or by visible representation which—
  - falsely represents that the services are of a particular standard or grade;
  - represents that the promoter or himself has approval or affiliation which such promoter or himself does not have;
  - makes a false or misleading representation concerning the services.
- (ii) permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.

Every real estate agent shall facilitate the possession of all the information and documents, as the allottee, is entitled to, at the time of booking of any plot, apartment or building, as the case may be and discharge such other functions as may be prescribed.

### **FUNCTIONS AND DUTIES OF PROMOTER**

The most important duty of the promoter which has been mandated by the Act is to provide complete details of the project so that a layman who does not even know the legal requirements is able to check the legal sanctity of the project. The promoter has also been debarred from advertising and selling his project until he has procured the requisite approvals from the authorities and got his project registered with RERA.

### **Functions and Duties of Promoter (Section 11)**

The promoter shall, upon receiving his Login Id and password, as the case may be, create his web page on the website of the Authority and enter all details of the proposed project for public viewing, including—

- (a) details of the registration granted by the Authority;
- (b) quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;
- (c) quarterly up-to-date the list of number of garages booked;
- (d) quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;



- (e) quarterly up-to-date status of the project; and
- (f) such other information and documents as may be specified by the regulations made by the Authority.

The advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.

The promoter at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:–

- A. sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;
- B. the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

The promoter shall–

- (a) be responsible for all obligations, responsibilities and functions under the provisions of the Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

- (b) be responsible to obtain the completion certifi or the occupancy certifi or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;
- (c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;
- (d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;
- (e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable:

Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;

- (f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act;
- (g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefore by such authority or person;

- (h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be.

The promoter may cancel the allotment only in terms of the agreement for sale. However, the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause.

The promoter shall prepare and maintain all such other details as may be specified, from time to time, by regulations made by the Authority.

### **Obligations of Promoter regarding veracity of the Advertisement or Prospectus (Section 12)**

Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under the Act.

If the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under the Act.

### **No Deposit or Advance to be taken by Promoter without First Entering into Agreement for Sale**

According to Section 13, a promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

The agreement for sale shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

### **Adherence to Sanctioned Plans and Project Specifications by the Promoter**

According to Section 14, the proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans

and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—

- (a) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:

The promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

“minor additions or alterations” excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

- (b) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

The allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

It may be noted that –

**“Sanctioned plan”** means the site plan, building plan, service plan, parking and circulation plan, landscape plan, layout plan, zoning plan and such other plan and includes structural designs, if applicable, permissions such as environment permission and such other permissions, which are approved by the competent authority prior to start of a real estate project. {Section 2(zq)}

### Structural Defect

Section 14 provides that in case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter’s failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under the Act.

### Obligations of Promoter in case of Transfer of a Real Estate Project to a Third Party

Section 15 of the Act provides that the promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority.

However such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

The allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

On the transfer or assignment being permitted by the allottees and the authority, the intending promoter shall be required to independently comply with all the pending obligations under the provisions of the Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.

Any transfer or assignment permitted shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder.

### **Obligations of Promoter regarding Insurance of Real Estate Project**

Section 16 casts an obligation on the promoter to obtain all such insurances as may be notified by the appropriate Government, including but not limited to insurance in respect of –

- (i) title of the land and building as a part of the real estate project; and
- (ii) construction of the real estate project.

The promoter shall be liable to pay the premium and charges in respect of the insurance and shall pay the same before transferring the insurance to the association of the allottees.

The insurance shall stand transferred to the benefit of the allottee or the association of allottees, as the case may be, at the time of promoter entering into an agreement for sale with the allottee. On formation of the association of the allottees, all documents relating to the insurance shall be handed over to the association of the allottees.

### **Transfer of Title (Section 17)**

The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment or building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws.

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

After obtaining the occupancy certificate and handing over physical possession to the allottees, it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws.

Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the occupancy certificate.

### Return of Amount and Compensation (Section 18)

Section 18(1) provides that if the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

*The Hon'ble Supreme Court of India while interpreting Section 18 of the Act, in the case of Imperia Structures Ltd. Vs. Anil Patni and Another [2020(10) SCC 783 ] held that in terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is up to the allottee to proceed either under Section 18(1) or under proviso to Section 18(1). The case of Himanshu Giri came under the latter category. The RERA Act thus definitely provides a remedy to an allottee who wishes to withdraw from the Project or claim return on his investment."*

## RIGHTS AND DUTIES OF ALLOTTEES

### Rights and Duties of Allottees

Though the Act is pro-consumer, yet it has struck a balance by specifying the duties of the Allottees. Allottees who do not pay their instalments, maintenance dues in time will also be subjected to the rigours of this Act.

Section 19 provides for the various rights and duties of the allottees.

1. The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided

in the Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.

2. The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.
3. The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter.
4. The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under the Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of the Act or the rules or regulations made thereunder.
5. The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.
6. Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.
7. The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).
8. The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.
9. Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.
10. Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.
11. Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act.

## THE REAL ESTATE REGULATORY AUTHORITY

As stated earlier, though this sector has seen unprecedented growth since Independence, it has remained unregulated till now. We have witnessed that whenever a regulator is appointed for a sector, like SEBI, IRDAI, TRAI etc, it widens the sectors. Accordingly, this Act mandates that RERA would be established by each of the State and UT for administering the real estate sector in the respective State/UT. A state can have more than one RERA or two states can have the same authority.

### **Establishment and Incorporation of Real Estate Regulatory Authority (Section 20)**

The appropriate Government shall establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under the Act.

The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority. Further, the appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be.

Until the establishment of a Regulatory Authority under this section, the appropriate Government shall, by order, designate any Regulatory Authority or any officer preferably the Secretary of the department dealing with Housing, as the Regulatory Authority for the purposes under the Act. After the establishment of the Regulatory Authority, all applications, complaints or cases pending with the Regulatory Authority designated, shall stand transferred to the Regulatory Authority so established and shall be heard from the stage such applications, complaints or cases are transferred.

The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with the power, subject to the provisions of the Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

### **Composition of Authority**

The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. (Section 21)

### **Qualifications of Chairperson and Members of Authority (Section 22)**

The Chairperson and other Members of the Authority shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department dealing with Housing and the Law Secretary, in such manner as may be prescribed, from amongst persons having adequate knowledge of and professional experience of at-least twenty years in case of the Chairperson and fifteen years in the case of the Members in urban development, housing, real estate development, infrastructure, economics, technical experts from relevant fields, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration.

It may be noted that a person who is, or has been, in the service of the State Government shall not be appointed as a Chairperson unless such person has held the post of Additional Secretary to the Central Government or any equivalent post in the Central Government or State Government. Further, a person who is, or has been, in the service of the State Government shall not be appointed as a member unless such person has held the post of Secretary to the State Government or any equivalent post in the State Government or Central Government.

### **Term of office of Chairperson and Members (Section 23)**

1. The Chairperson and Members shall hold office for a term not exceeding five years from the date on which they enter upon their office, or until they attain the age of sixty-five years, whichever is earlier and shall not be eligible for re-appointment.
2. Before appointing any person as a Chairperson or Member, the appropriate Government shall satisfy itself that the person does not have any such financial or other interest as is likely to affect prejudicially his functions as such Member.



### **Filing of Complaints with the Authority or the Adjudicating Officer (Section 31)**

Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of the Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

It may be noted that “person” shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

### **Functions of Authority for Promotion of Real Estate Sector (Section 32)**

The Authority shall in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector make recommendations to the appropriate Government of the competent authority, as the case may be, on,—

- protection of interest of the allottees, promoter and real estate agent;
- creation of a single window system for ensuring time bound project approvals and clearances for timely completion of the project;
- creation of a transparent and robust grievance redressal mechanism against acts of omission and commission of competent authorities and their officials;
- measures to encourage investment in the real estate sector including measures to increase financial assistance to affordable housing segment;
- measures to encourage construction of environmentally sustainable and affordable housing, promoting standardisation and use of appropriate construction materials, fixtures, fittings and construction techniques;
- measures to encourage grading of projects on various parameters of development including grading of promoters;
- measures to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations;
- measures to facilitate digitization of land records and system towards conclusive property titles with title guarantee;
- to render advice to the appropriate Government in matters relating to the development of real estate sector;
- any other issue that the Authority may think necessary for the promotion of the real estate sector.

### **Advocacy and Awareness Measures (Section 33)**

The appropriate Government may, while formulating a policy on real estate sector (including review of laws related to real estate sector) or any other matter, make a reference to the Authority for its opinion on possible effect, of such policy or law on real estate sector and on the receipt of such a reference, the Authority shall within a period of sixty days of making such reference, give its opinion to the appropriate Government which may thereafter take further action as it deems fit.

The opinion given by the Authority shall not be binding upon the appropriate Government in formulating such policy or laws.

The Authority shall take suitable measures for the promotion of advocacy, creating awareness and imparting training about laws relating to real estate sector and policies.



### Functions of Authority (Section 34)

The functions of the Authority shall include—

- to register and regulate real estate projects and real estate agents registered under the Act;
- to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;
- to maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;
- to maintain a database, on its website, for public viewing, and enter the names and photographs of real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked;
- to fix through regulations for each areas under its jurisdiction the standard fees to be levied on the allottees or the promoter or the real estate agent, as the case may be;
- to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the Act and the rules and regulations made thereunder;
- to ensure compliance of its regulations or orders or directions made in exercise of its powers under the Act;
- to perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of the Act.

### Powers of Authority to Call for Information, Conduct Investigation (Section 35)

Where the Authority considers it expedient to do so, on a complaint or *suo motu*, relating to the Act or the rules of regulations made thereunder, it may, by order in writing and recording reasons therefor call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require and appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be.

Notwithstanding anything contained in any other law for the time being in force, while exercising the powers, the Authority shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:—

- (i) the discovery and production of books of account and other documents, at such place and at such time as may be specified by the Authority;
- (ii) summoning and enforcing the attendance of persons and examining them on oath;
- (iii) issuing commissions for the examination of witnesses or documents;
- (iv) any other matter which may be prescribed.

### Power to issue Interim Orders (Section 36)

Where during an inquiry, the Authority is satisfied that an act in contravention of the Act, or the rules and regulations made thereunder, has been committed and continues to be committed or that such act is about to be committed, the Authority may, by order, restrain any promoter, allottee or real estate agent from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where the Authority deems it necessary.

### **Powers of Authority to Issue Directions (Section 37)**

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

### **Powers of Authority (Section 38)**

1. The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.
2. The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.
3. Where an issue is raised relating to agreement, action, omission, practice or procedure that—
  - (a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or
  - (b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India.

### **Rectification of Orders (Section 39)**

The Authority may, at any time within a period of two years from the date of the order made under the Act, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties.

It may be noted that no such amendment shall be made in respect of any order against which an appeal has been preferred under the Act:

### **Recovery of Interest or Penalty or Compensation and Enforcement of Order, etc. (Section 40)**

Section 40(1) states that if a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.

According to Section 40(2) if any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed.

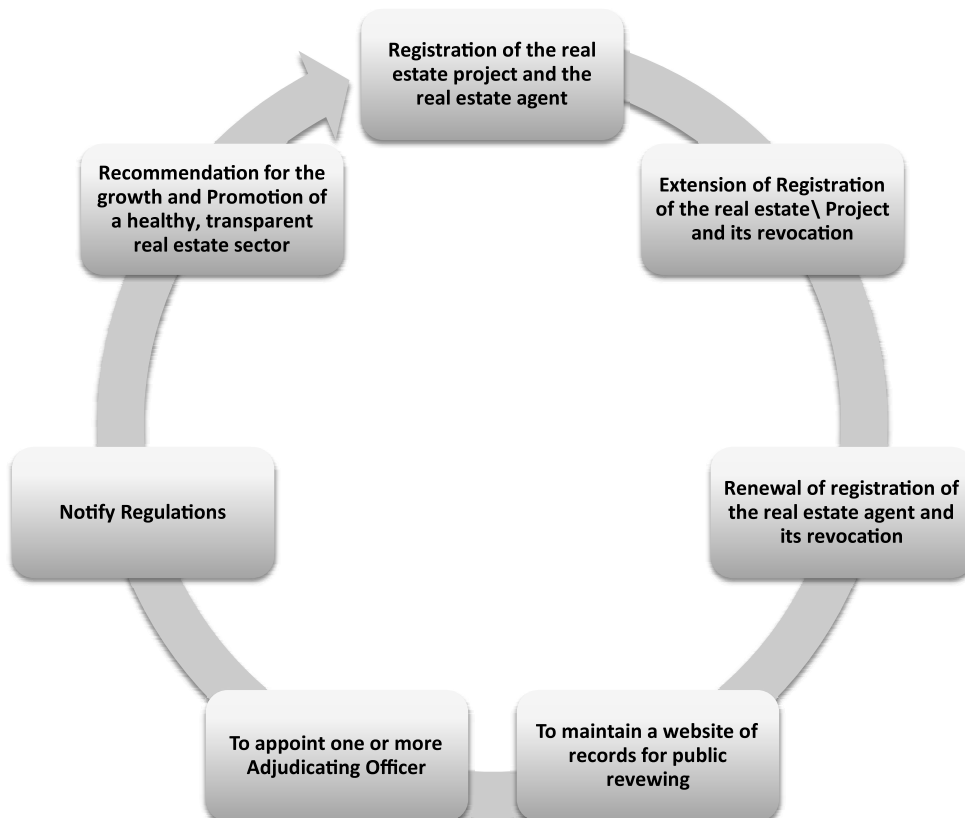
**Whether the authority has the power to issue recovery certificates for recovery of the principal amount under Section 40(1) of the Act?**

*In the case of M/s. Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP & Ors. Etc, Civil Appeal No(s). 6745-6749 of 2021 (Arising out of SLP(Civil) No(s). 3711-3715 OF 2021) judgement dated 11th November, 2021, Supreme Court of India held that:*

*“It is settled principle of law that if the plain interpretation does not fulfil the mandate and object of the Act, this Court has to interpret the law in consonance with the spirit and purpose of the statute. There is indeed a visible inconsistency in the powers of the authority regarding refund of the amount received by the promoter and the provision of law in Section 18 and the text of the provision by which such refund can be referred under Section 40(1). While harmonising the construction of the scheme of the Act with the right of recovery as mandated in Section 40(1) of the Act keeping in mind the intention of the legislature to provide for a speedy recovery of the amount invested by the allottee along with the interest incurred thereon is self-explanatory. However, if Section 40(1) is strictly construed and it is understood to mean that only penalty and interest on the principal amount are recoverable as arrears of land revenue, it would defeat the basic purpose of the Act.”*

*Taking into consideration the scheme of the Act what is to be returned to the allottee is his own life savings with interest on computed/quantified by the authority becomes recoverable and such arrear becomes enforceable in law. There appears some ambiguity in Section 40(1) of the Act that in our view, by harmonising the provision with the purpose of the Act, is given effect to the provisions is allowed to operate rather running either of them redundant, noticing purport of the legislature and the above stated principle into consideration, we make it clear that the amount which has been determined and refundable to the allottees/home buyers either by the authority or the adjudicating officer in terms of the order is recoverable within the ambit of Section 40(1) of the Act.*

**Responsibilities of the ‘Regulatory Authority’**



## CENTRAL ADVISORY COUNCIL

### Establishment of Central Advisory Council (Section 41)

1. The Central Government may, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Central Advisory Council.
2. The Minister to the Government of India in charge of the Ministry of the Central Government dealing with Housing shall be the ex officio Chairperson of the Central Advisory Council.
3. The Central Advisory Council shall consist of representatives of the Ministry of Finance, Ministry of Industry and Commerce, Ministry of Urban Development, Ministry of Consumer Affairs, Ministry of Corporate Affairs, Ministry of Law and Justice, Niti Aayog, National Housing Bank, Housing and Urban Development Corporation, five representatives of State Governments to be selected by rotation, five representatives of the Real Estate Regulatory Authorities to be selected by rotation, and any other Central Government department as notified.
4. The Central Advisory Council shall also consist of not more than ten members to represent the interests of real estate industry, consumers, real estate agents, construction labourers, non-governmental organisations and academic and research bodies in the real estate sector.

### Functions of Central Advisory Council (Section 42)

The Central Advisory Council is required to advise the Central Government on matters relating to implementation of the Act, questions of policy, protection of consumer interest, foster growth and development of the real estate sector, and other matters as may be assigned to it by the Central Government.

The Central Government may specify the rules to give effect to the recommendations of the Central Advisory Council on above matters.

## THE REAL ESTATE APPELLATE TRIBUNAL

Real Estate Appellate Tribunal (REAT) is to be formed by appropriate government to ensure faster resolution of disputes. Parties aggrieved by the RERA order can appeal before REAT and REAT has to adjudicate such cases within 60 days. Civil Courts have been prevented from exercising jurisdiction on such matters. If any of the parties is not satisfied with the REAT order, they can file an appeal against the REAT order to the High Court within 60 days.

### Establishment of Real Estate Appellate Tribunal (Section 43)

1. The appropriate Government shall, establish an Appellate Tribunal to be known as the – (name of the State/ Union territory) Real Estate Appellate Tribunal.
2. The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union territory, as the case may be.
3. Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.
4. The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal.
5. Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under the Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter.

It may be noted that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

“Person” shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

***Whether the condition of predeposit under proviso to Section 43(5) of the Act for entertaining substantive right of appeal is sustainable in law?***

***In the case of M/s. Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP & Ors. Etc, Civil Appeal No(S). 6745 6749 of 2021 (Arising out of SLP(Civil) No(s). 37113715 of 2021) judgement dated 11th November, 2021, Supreme Court of India held that:***

***“To safeguard the interests of the parties, on being decided by the regulatory authority/adjudicating officer, it is always subject to appeal before the Tribunal under Section 43(5) provided condition of predeposit being complied with can be further challenged in appeal before the High Court under Section 58 of the Act and, thus, the legislature has put reasonable restriction and safeguards at all stages. In our considered view, the obligation cast upon the promoter of predeposit under Section 43(5) of the Act, being a class in itself, and the promoters who are in receipt of money which is being claimed by the home buyers/allottees for refund and determined in the first place by the competent authority, if legislature in its wisdom intended to ensure that money once determined by the authority be saved if appeal is to be preferred at the instance of the promoter after due compliance of predeposit as envisaged under Section 43(5) of the Act, in no circumstance can be said to be onerous as prayed for or in violation of Articles 14 or 19(1)(g) of the Constitution of India.”***

### **Application for settlement of Disputes and Appeals to Appellate Tribunal**

Section 44 of the Act deals with application for settlement of disputes and appeals to Appellate Tribunal. It provides that-

The appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal.

Every appeal made to the Appellate Tribunal shall be preferred within a period of sixty days from the date on which a copy of the direction or order or decision made by the Authority or the adjudicating officer is received by the appropriate Government or the competent authority or the aggrieved person and it shall be in such form and accompanied by such fee, as may be prescribed.

The Appellate Tribunal may entertain any appeal after the expiry of sixty days if it is satisfied that there was sufficient cause for not filling it within that period.

On receipt of an appeal, the Appellate Tribunal may after giving the parties an opportunity of being heard, pass such orders, including interim orders, as it thinks fit.

The Appellate Tribunal shall send a copy of every order made by it to the parties and to the Authority or the adjudicating officer, as the case may be.

The appeal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within a period of sixty days from the date of receipt of appeal.

Provided that where any such appeal could not be disposed of within the said period of sixty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within that period.

The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any order or decision of the Authority or the adjudicating officer, on its own motion or otherwise, call for the records relevant to deposing of such appeal and make such orders as it thinks fit.

### **Restrictions on Chairperson or Judicial Member or Technical or Administrative Member on Employment after Cessation of Office (Section 50)**

The Chairperson or Judicial Member or Technical or Administrative Member, ceasing to hold office as such shall not:—

- (a) Accept any employment in, or connected with, the management or administration of, any person or organisation which has been associated with any work under this Act, from the date on which he ceases to hold office.

Provided that nothing contained in this clause shall apply to any employment under the appropriate Government or a local authority or in any statutory authority or any corporation established by or under any Central, State or provincial Act or a Government Company as defined under clause (45) of section 2 of the Companies Act, 2013, which is not a promoter as per the provisions of the Act;

- (b) Act, for or on behalf of any person or organisation in connection with any specific proceeding or transaction or negotiation or a case to which the Authority is a party and with respect to which the Chairperson or Judicial Member or Technical or Administrative Member had, before cessation of office, acted for or provided advice to the Authority;
- (c) Give advice to any person using information which was obtained in his capacity as the Chairperson or Judicial Member or Technical or Administrative Member and being unavailable to or not being able to be made available to the public;
- (d) Enter into a contract of service with, or accept an appointment to a board of directors of, or accept an offer of employment with, an entity with which he had direct and significant official dealings during his term of office as such.

The Chairperson or Judicial Member or Technical or Administrative Member shall not communicate or reveal to any person any matter which has been brought under his consideration or known to him while acting as such.

### **Powers of Tribunal (Section 53)**

1. The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice.
2. Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure.
3. The Appellate Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872.
4. The Appellate Tribunal shall have, for the purpose of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:—
  - (a) summoning and enforcing the attendance of any person and examining him on oath;
  - (b) requiring the discovery and production of documents;

- (c) receiving evidence on affidavits;
  - (d) issuing commissions for the examinations of witnesses or documents;
  - (e) reviewing its decisions;
  - (f) dismissing an application for default or directing it ex parte; and
  - (g) any other matter which may be prescribed.
5. All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 for the purposes of section 196 of the Indian Penal Code, and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

### Right to Legal Representation (Section 56)

Section 56 deals with Right to legal representation. It provides that

The applicant or appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be.

*Explanation.*—For the purposes of this section,—

- (a) “chartered accountant” means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (b) “company secretary” means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (c) “cost accountant” means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- (d) “legal practitioner” means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.

### Orders passed by Appellate Tribunal to be executable as a Decree (Section 57)

Every order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court, and for this purpose, the Appellate Tribunal shall have all the powers of a civil court.

The Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by the court.

### Appeal to High Court (Section 58)

Any person aggrieved by any decision or order of the Appellate Tribunal may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908.

The High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

*Explanation.*— “High Court” means the High Court of a State or Union territory where the real estate project is

situated. No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

**Real Estate Regulatory Authority and Appellate Tribunal**



**ROLE OF COMPANY SECRETARIES**



India is witnessing a phenomenal growth and expansion in the corporate sector. The growing demand for specialists in almost every sphere of the corporate functions has led to emergence of professionals who can perform specialized skills with near perfection in their respective fields. A company secretary is one such professional who is responsible for efficient management of the corporate sector. He ensures compliance of various company legislations and advises directors on statutory requirements of the company. Apart from carrying out these functions, he also looks after finance, accounts, legal, secretarial, personnel and administrative functions in private as well as public sectors.

The Companies Act, 2013 confers a special status to Company Secretary as the key managerial personnel and has bracketed him along with Managing Director (MD) or Chief Executive Officer (CEO) or Manager, Whole-time director(s) or Chief Financial Officer (CFO). Every listed company and every other public company having a paid up share capital of ten crore rupees or more has to appoint a whole time Key Managerial Personnel. Every private company which has a paid up share capital of ten crore rupees or more shall have a whole-time company secretary.



Almost every kind of organization whose affairs are conducted by boards, councils or other corporate structures, be it a company, trust, association, federation, authority, commission or the like find it useful to appoint a person who holds the qualification of Company Secretaryship in key administrative position. Practising Company Secretaries have been authorized to issue Certificate regarding compliance of conditions of Corporate Governance. Practising Company Secretaries have also been recognized to appear before various Tribunals such as NCLT, NCLAT, Securities Appellate Tribunal, Competition Commission of India, Telecom Disputes Settlement and Appellate Tribunal, Consumer Forums, Tax Tribunals etc. Reserve Bank of India has also recognized the Practising Company Secretaries to undertake Diligence Report for Banks.

The rapid change in Indian Legislative has brought about a sea change in the role and profile of a company secretary. They are now being seen as corporate development planners. Besides embarking upon traditional areas of practice, Company Secretaries in Practice are increasingly required to advise and guide on legal aspects of business which intimately concern areas such as registration under RERA, production, drafting of various documents, sales, marketing and administration for identifying expansion opportunities, issuing due diligence or compliance certificate, arranging foreign collaborations, amalgamations, mergers, acquisition, takeovers, setting up of subsidiaries and joint ventures within and outside India etc. The new opportunities offered by the growing capital markets and financial services have greatly contributed to the development of the practice side of the profession.

### **Company Secretaries – One Stop Professional Advisory Services for Real Estate Projects**

Company Secretaries holding Certificate of Practice by becoming an expert in the act can indulge in providing advice in respect of:

- Financial Advisory Services;
- Various applicable provision particular on real estate project;
- Registration and extension procedure of real estate project with competent authority;
- Various obligation, functions and duties of promoter in a real estate project;
- Penal Provisions under the Act;
- Funding Options for Real Estate Project;
- Taxation aspects for Real Estate Project;
- Legal & Regulatory Compliances.

### **Company Secretaries – As a Legal Representative**

As per Section 56 of the Act, a Company Secretary holding certificate of practice can appear before Appellate Tribunal or a Regulatory Authority or Adjudicating Officer on behalf of applicant or appellant as the case may be.

Hence a Company Secretary holding certificate of practice can –

- Represent a person (promoter) before any real estate regulatory authority for registration of real estate project,
- Represent a person before real estate appellate tribunal.
- Represent a person before any other competent authority for any other purpose under Real Estate (Regulation and Development) Act, 2016.

## OFFENCES, PENALTIES AND ADJUDICATION

Punishment prescribed for non-registration of a project under the Act

As per section 59, where under the Act, it is obligatory for the promoter to register a project with the Authority, and the promoter fails to do the same, he shall be liable to a penalty upto ten percent of the estimated cost of the real estate project.

However, in case the promoter consistently defaults or does not comply with the directions orders of the Authority as regards registration of the project with the Authority, he shall be liable to additional fine of ten percent of the estimated cost of the real estate project or imprisonment upto 3 years or both.

### Penalty for contravention of section 4

If any promoter provides false information or contravenes the provisions of section 4, he shall be liable to a penalty, under section 60 of the Act, which may extend up to five per cent of the estimated cost of the real estate project, as determined by the Authority.

### Penalty for contravention of other provisions of the Act (Section 61)

If any promoter contravenes any other provisions of the Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project as determined by the Authority.

### Penalty for non-registration and contravention under sections 9 and 10 (Section 62)

If any real estate agent fails to comply with or contravenes the provisions of section 9 or section 10, he shall be liable to a penalty of ten thousand rupees for every day during which such default continues, which may cumulatively extend up to five per cent of the cost of plot, apartment or buildings, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority.

### Penalty for failure to comply with orders of Authority by Promoter (Section 63)

If any promoter, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent., of the estimated cost of the real estate project as determined by the Authority.

### Penalty for failure to comply with orders of Appellate Tribunal by promoter (Section 64)

If any promoter, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend up to three years or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the estimated cost of the real estate project, or with both.

### Penalty for failure to comply with orders of Authority by real estate agent (Section 65)

If any real estate agent, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent., of the estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated and as determined by the Authority.

### Penalty for failure to comply with orders of Appellate Tribunal by real estate agent (Section 66)

If any real estate agent, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend up to one year or

with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated, or with both.

### **Penalty for failure to comply with orders of Authority by allottee (Section 67)**

If any allottee, who fails to comply with, or contravenes any of the orders, decisions or directions of the Authority he shall be liable to a penalty for the period during which such default continues, which may cumulatively extend up to five per cent. of the plot, apartment or building cost, as the case may be, as determined by the Authority.

### **Penalty for failure to comply with orders of Appellate Tribunal by allottee(Section 68)**

If any allottee, who fails to comply with, or contravenes any of the orders or directions of the Appellate Tribunal, as the case may be, he shall be punishable with imprisonment for a term which may extend up to one year or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent of the plot, apartment or building cost, as the case may be, or with both.

### **Offences by companies (Section 69)**

Where an Offence under the Act has been committed by a company, every person who, at the time, the offence was committed was in charge of, or was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

However nothing contained in this sub-section, shall render any such person liable to any punishment under the Act if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Where an offence under the Act has been committed by a company, and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation.-*

- (a) "company" means any body corporate and includes a firm, or other association of individuals; and
- (b) "director" in relation to a firm, means a partner in the firm.

### **Compounding of offences (Section 70)**

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, if any person is punished with imprisonment under the Act, the punishment may, either before or after the institution of the prosecution, be compounded by the court on such terms and conditions and on payment of such sums as may be prescribed.

However the sum prescribed shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded.

### **Power to adjudicate (Section 71)**

For the purpose of adjudging compensation under sections 12, 14, 18 and section 19 (Section 12 deals with obligations of promoter regarding veracity of the advertisement or prospectus, Section 14 deals with Adherence to sanctioned plans and project specifications by the promoter, Section 18 deals with Return of amount and compensation, Section 19 deals with Rights and duties of allottees), the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a

District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard.

Any person whose complaint in respect of matters covered under section(s) 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of the Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

The application for adjudging compensation shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application. Where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections i.e., sections 12, 14, 18 and section 19, he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections.

***Whether the authority has jurisdiction to direct return/refund of the amount to the allottee under Sections 12, 14, 18 and 19 of the Act or the jurisdiction exclusively lies with the adjudicating officer under Section 71 of the Act?***

***In the case of M/s. Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP & Ors. Etc, Civil Appeal No(S). 6745 6749 of 2021 (Arising out of SLP (Civil) No(s). 37113715 OF 2021) judgement dated 11th November, 2021 Supreme Court of India held that:***

***“The legislature in its wisdom has made a specific provision delineating power to be exercised by the regulatory authority/adjudicating officer. “Refund of the amount” and “compensation” are two distinct components which the allottee or the person aggrieved is entitled to claim if the promoter has not been able to hand over possession with a nature of enquiry and mechanism provided under the Act. So far as the claim with respect to refund of amount on demand under Sections 18(1) and 19(4) of the Act is concerned, it vests within the jurisdiction of the regulatory authority. Section 71 carves out the jurisdiction of the adjudicating officer to adjudge compensation under Sections 12, 14, 18 and 19 after holding enquiry under Section 71(3) of the Act keeping in view the broad contours referred to under Section 72 of the Act.***

***From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like ‘refund’, ‘interest’, ‘penalty’ and ‘compensation’, a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016.”***

### Factors to be taken into account by the adjudicating officer (Section 72)

While adjudging the quantum of compensation or interest, as the case may be, under section 71, the adjudicating officer shall have due regard to the following factors, namely:— (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; (b) the amount of loss caused as a result of the default; (c) the repetitive nature of the default; (d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

## MISCELLANEOUS

### Bar of Jurisdiction (Section 79)

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the Adjudicating officer or the Appellate Tribunal is empowered by or under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

### Cognizance of Offences (Section 80)

No court shall take cognizance of any offence punishable under this Act or the rules or regulations made thereunder save on a complaint in writing made by the Authority or by any officer of the Authority duly authorised by it for this purpose.

No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

### Delegation (Section 81)

The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to make regulations under section 85), as it may deem necessary.

***Whether Section 81 of the Act authorizes the authority to delegate its powers to a single member of the authority to hear complaints instituted under Section 31 of the Act?***

***In the case of M/s. Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP & Ors. Etc., Civil Appeal No(S). 6745 6749 of 2021 (Arising out of SLP(Civil) No(s). 3711-3715 of 2021) judgement dated 11<sup>th</sup> November, 2021 Supreme Court of India held that:***

***“Section 81 of the Act 2016 empowers the authority, by general or special order in writing, to delegate its powers to any member of the authority, subject to conditions as may be specified in the order, such of the powers and functions under the Act. What has been excluded is the power to make regulations under Section 85, rest of the powers exercised by the authority can always be delegated to any of its members obviously for expeditious disposal of the applications/complaints including complaints filed under Section 31 of the Act and exercise of such power by a general and special order to its members is always permissible under the provisions of the Act.***

***It is a well-established principle of interpretation of law that the court should read the section in literal sense and cannot rewrite it to suit its convenience; nor does any canon of construction permit the court to read the section in such a manner as to render it to some extent otiose. Section 81 of the Act positively empowers the authority to delegate such of its powers and functions to any member by a general or a special order with an exception to make regulations under Section 85 of the Act. As a consequence, except the power to make regulations under Section 85 of the Act, other powers***

*and functions of the authority, by a general or special order, if delegated to a single member of the authority is indeed within the fold of Section 81 of the Act.*

*That scheme of the Act, 2016 provides an inbuilt mechanism and any order passed on a complaint by the authority under Section 31 is appealable before the tribunal under Section 43(5) and further in appeal to the High Court under Section 58 of the Act on one or more ground specified under Section 100 of the Code of Civil Procedure, 1908, if any manifest error is left by the authority either in computation or in the amount refundable to the allottee/home buyer, is open to be considered at the appellate stage on the complaint made by the person aggrieved.*

*In view of the remedial mechanism provided under the scheme of the Act 2016, in our considered view, the power of delegation under Section 81 of the Act by the authority to one of its member for deciding applications/complaints under Section 31 of the Act is not only well defined but expressly permissible and that cannot be said to be de hors the mandate of law.”*

### **Application of other laws not barred (Section 88)**

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

### **Act to have overriding effect (Section 89)**

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

### **Protection of action taken in good faith (Section 90)**

No suit, prosecution or other legal proceedings shall lie against the appropriate Government or the Authority or any officer of the appropriate Government or any member, officer or other employees of the Authority for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

### **LESSON ROUND-UP**

- On and from the coming into force of the RERA, all real estate projects (as defined) would first have to be registered with the real estate regulatory authority, which, before registering such projects, would look into all relevant details, including delay in completion of other projects by the developer.
- Importantly, the promoter is now to make a declaration supported by an affidavit, that he undertakes to complete the project within a certain time period, and that 70% of the amounts realised for the project from allottees, from time to time, shall be deposited in a separate account, which would be spent only to defray the cost of construction and land cost for that particular project.
- Registration is granted by the authority only when it is satisfied that the promoter is a bona fide promoter who is likely to perform his part of the bargain satisfactorily.
- Registration of the project is only for a certain period and can only be extended due to force majeure events for a maximum period of one year by the authority, on being satisfied that such events have, in fact, taken place.

- Registration once granted, may be revoked if it is found that the promoter defaults in complying with the various statutory requirements or indulges in unfair practices or irregularities. Importantly, upon revocation of registration, the authority is to facilitate the remaining development work, which can then be carried out either by the competent authority as defined by the RERA or by the association of allottees or otherwise.
- The promoter at the time of booking and issue of allotment letters has to make available to the allottees information, inter alia, as to the stage-wise time schedule of completion of the project.
- Deposits or advances beyond 10% of the estimated cost as advance payment cannot be taken without first entering into an agreement for sale. Importantly, the agreement for sale will now no longer be a one-sided contract of adhesion, but in such form as may be prescribed, which balances the rights and obligations of both the promoter and the allottees.
- Under section 18, if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale, he must return the amount received by him in respect of such apartment etc. with such interest as may be prescribed and must, in addition, the agreement for sale. In addition, all allottees are to be responsible for making necessary payments in instalments within the time specified in the agreement for sale and shall be liable to pay interest at such rate as may be prescribed for any delay in such payment.
- Under section 31, any aggrieved person may file a complaint with the authority or the adjudicating officers set up by such authority against any promoter, allottee or real estate agent, as the case may be, for violation or contravention of the RERA, and rules and regulations made thereunder.
- Also, if after adjudication a promoter, allottee or real estate agent fails to pay interest, penalty or compensation imposed on him by the authorities under the RERA, the same shall be recoverable as arrears of land revenue.
- Appeals may be filed to the real estate appellate tribunal against decisions or orders of the authority or the adjudicating officer. From orders of the appellate tribunal, appeals may thereafter be filed to the High Court. Stiff penalties are to be awarded for breach and/or contravention of the provisions of the RERA.
- Importantly, under section 72, the adjudicating officer must first determine that the complainant has established default on the part of the respondent, after which consequential orders may then follow.
- Under section 88, the provisions of RERA are in addition to and not in derogation of the provisions of any other law for time being in force and under section 89, RERA is to have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

### TEST YOURSELF

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Define following:
  - (i) Carpet Area
  - (ii) Occupancy certificate
2. When is registration of real estate project not required under the Act?
3. What happens if the Authority fails to grant the registration or reject the application within a period of thirty days on receipt of the application for registration of the project under the Act?







### KEY CONCEPTS

■ Industrial Property ■ Patents ■ Trade Marks ■ Copyright ■ Geographical Indication ■ Industrial Design

### Learning Objectives

#### To understand:

- Concept of Industrial Property
- Nature of Intellectual Property
- Intellectual Property Right Laws
- General Agreement on Trade in Services
- World Intellectual Property Organization
- TRIPS Agreement
- IPR Policy

### Lesson Outline

- Scope of Intellectual Property Right
- Need of Intellectual Property Right
- Generation of Intellectual Property Right
- Administration and Management
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## INTRODUCTION

As the term intellectual property relates to the creations of human mind and human intellect, this property is called Intellectual property. Creators can be given the right to prevent others from using their inventions, designs or other creations and to use that right to negotiate payment in return for others using them. These are Intellectual Property Rights. The creation of Intellectual Property Rights (IPR) is increasingly being recognised in today's global economy and society. Intellectual Property Rights are considered to be the backbone of any economy and their creation and protection is essential for sustained growth of a nation. The intellectual property rights are now not only being used as a tool to protect the creativity and generate revenue but also to build strategic alliances for the socio-economic and technological growth.

Intellectual Property is the Property, which has been created by exercise of Intellectual Faculty. It is the result of persons Intellectual Activities. Thus Intellectual Property refers to creation of mind such as inventions, designs for industrial articles, literary, artistic work, symbols which are ultimately used in commerce. Intellectual Property rights allow the creators or owners to have the benefits from their works when these are exploited commercially. These rights are statutory rights governed in accordance with the provisions of corresponding legislations. Intellectual Property rights reward creativity & human endeavor which fuel the progress of humankind.

***The areas of intellectual property that it covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.***

Intellectual property is a vital component of economic growth and a tool for corporate competitiveness in today's highly competitive global market. Intellectual property rights serve as a catalyst for the development of innovations and inventions. Ideas, innovations, and creative expressions on the basis of which there is a public desire to grant the status of property are referred to as intellectual property rights (IPR). In order for the inventors or developers of that property to profit commercially from their creative efforts or reputation, IPR grant them specific exclusive rights. There are various forms of intellectual property protection, including trademark, copyright, and patent.

Technology management is to promote the effective and efficient use of created technology. Intellectual property rights (IPR) are ideas, inventions, and creative expressions on which the public is ready to bestow the status of property. It is increasingly important to manage technology, including efficient commercialization plans that take use of IPR benefits, in a dynamic global context with shifting industry and competitor landscapes.

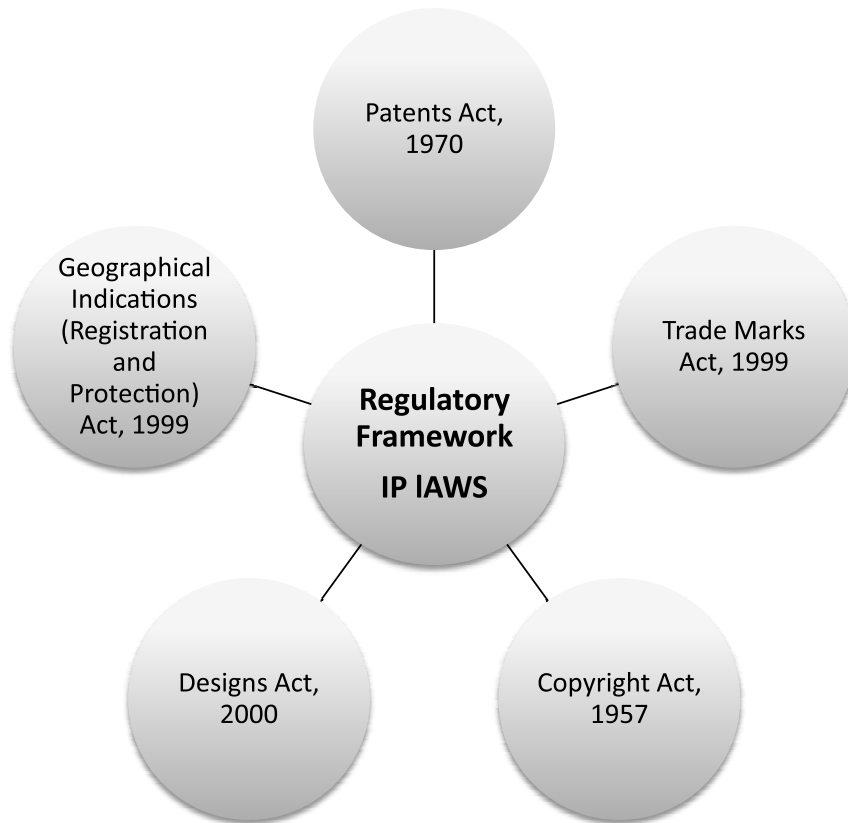
Any original work of the human intellect, including works of art, literature, technology, and science, is considered to be a work of intellectual property (IP). The legal privileges granted to the inventor or creator to safeguard his invention or creativity for a predetermined amount of time are known as intellectual property rights (IPR). For a specific amount of time, these legal rights grant the inventor or creator's assignee the sole right to fully exploit their idea or production. The importance of IP in the contemporary economy has long been established. Furthermore, it has been unequivocally proven that the intellectual work involved in the innovation must be given the attention it deserves if the innovation is to serve the greater good.

Since it gives the inventor or creator of an IP an exclusive right to exploit his invention or product for a specific length of time, IPR is a powerful weapon for protecting investments in time, money, and effort. By enabling healthy competition, industrial progress, and economic expansion, IPR thereby contributes to the economic development of a nation.

Any society's progress is directly influenced by IPR and the framework of its policy. Lack of understanding of IPR led to the demise of inventions, a high danger of infringement, financial loss, and the end of a nation's

intellectual era. Therefore, there is a critical necessity for the transmission of IPR knowledge in order to support home-grown discoveries and technological advancements. Only by teaching the many stakeholders, including policymakers, farmers, academia, industry, researchers, and consumers about the significance of IPR and technology management can the process of IP awareness be accelerated in an agrarian nation like India.

## REGULATORY FRAMEWORK



## NATURE OF INTELLECTUAL PROPERTY

- **Intangible Rights over Tangible Property:** IP's intangibility is the primary characteristic that sets it apart from other types of property. Although there are many significant differences between the various types of IP, one characteristic they all share is the establishment of property protection over intangible objects like ideas, inventions, signs, and information as opposed to close relationships and other intangible assets, which are tangible objects. When works are exploited for commercial purposes, it enables the creators or owners to profit from their creations.
- **Right to sue:** IP is a resource that can be owned and managed, to use the language of the law. The majority of intellectual property is challenged through legal rights of action that can only be carried out by people who have legal standing. Since intellectual property (IP) is a property right, it can be inherited, purchased, gifted, sold, licenced, entrusted, or pledged. Subject to certain restrictions, the owner of an IPR owns a sort of property that can be used however they like. They also have the legal right to sue anyone who uses their innovation without their permission and to be compensated with actual property.
- **Rights and Duties:** IP results in both obligations and property rights. The owner of the IP is entitled to carry out specific tasks in connection with his creations. He has the sole authority to create, copy, sell,

and otherwise exploit the work. Additionally, there is a negative right that bars others from using their statutory rights.

- **Coexistence of different rights:** In relation to a specific function, various IPR kinds may coexist. For instance, an image of an innovation might be copyrighted and the invention itself might be patented. A design may be included in a trademark and may also be protected under the Design Act. The numerous rights that can coexist in IP share many similarities and distinctions. For instance, there are similarities between a patent and an industrial design, a trademark and a geographical indicator, and so forth. Some of the rights related to intellectual property are positive rights, while the others are negative rights.
- **Exhaustion of rights:** The doctrine of exhaustion generally applies to intellectual property rights. Exhaustion fundamentally means that after the first sale made by the right holder or by the authority designated for its exhaustion, that person's right expires and he is no longer permitted to halt the movement of the goods moving forward. As a result, once an IP rights holder has sold a physical good that bears IPRs, it cannot stop subsequent sales of the good. The first consent marks the end of the right. This theory is founded on the idea of free movement of products, which is legitimate by the owner's permission or right. It is prohibited to use the exclusive selling privilege in connection to the same items twice.
- **Dynamism:** IPR is undergoing continual improvement. The realm of IP is expanding as quickly as technology in all spheres of human activity. New things are being added to the IPR scope and the scope of its protection is being enlarged in accordance with the demands of scientific and technical advancement. Biopatents, Software Copyrights, and Plant Diversity Protection are just a few examples of terms that highlight recent advancements in the IPR area. The value of intellectual property and its portability has long been recognised, and it is represented in all spheres of government, including legislative, administrative, and judicial levels.

## NEED OF INTELLECTUAL PROPERTY

Every invention involves labour, time, and resources. The length of each project varies substantially. It could be anything from a few seconds to a few years. A certain amount of actual money is also necessary for any creative endeavour, along with education or knowledge of course. Any creative professional making all of these investments is making a significant one. Therefore, it is important to acknowledge and honour a creator's intellectual works. The word "intellectual property" did not become common usage until the 19th century, despite the fact that many of the legal rules governing intellectual property rights have developed over centuries. It wasn't until the latter half of the 20th century that it spread throughout much of the world.

In 1967, the World Intellectual Property Organization (WIPO) was founded as a UN body. Since then, the phrase has gained significant traction in the US. A comprehensive international system for defining, safeguarding, and upholding intellectual property rights exists. It consists of multilateral treaty systems as well as international organisations like the European Union, World Trade Organization, World Intellectual Property Organization, World Customs Organization, and United Nations Commission on International Trade Law (UNCITRAL).

## SCOPE OF INTELLECTUAL PROPERTY

The range of IP rights is wide, and there are two methods for classifying IP as either copyright or industrial property. Patents or inventions, trademarks, trade names, biodiversity, plant breeding rights, and other commercial interests are all examples of industrial properties. In order to profit from the invention, a patent gives its holder the sole right to exploit the Intellectual Property.

A novel creation, procedure, tool, or product is considered to be an invention. Copyright protects the expression

of ideas that are distinct from patents but does not grant you the sole right to an idea. In addition to technological and scientific works, copyright also applies to the arts and literature. Copyright rules apply to everything, including music and audiovisual works. 60 years after the creator's passing, copyright protection continues to be in effect. In other words, a writer's book has copyright protection both during his lifetime and for 60 years following his passing. In contrast to patent laws, copyright laws do not mandate an administrative procedure.

### **The General Agreement on Trade in Services (GATS)**

The General Agreement on Trade in Services (GATS) is the first ever collection of legally binding, multinational regulations governing global trade in services. One of the most important outcomes of the Uruguay Round, whose conclusions came into effect in January 1995, was the founding of the GATS. The General Agreement on Tariffs and Trade (GATT), the GATS's counterpart in merchandise trade, served as a model for it, sharing many of the same goals: establishing a trustworthy and reliable system of international trade regulations; guaranteeing the non-discrimination of all participants; boosting economic activity through guaranteed policy bindings; and advancing trade and development through progressive liberalisation. The GATS functions on three levels, similar to the accords on goods: the primary text, which contains basic principles and obligations; annexes, which deal with rules for particular sectors; and individual nations' explicit commitments to allow access to their markets. In contrast to goods, the GATS provides a fourth special element list that identifies the instances where the most-favored-nation principle of non-discrimination is not currently being followed by a country.

Although services today make up more than two thirds of global production and employment, when measured on a basis of balance of payments, they only account for no more than 25% of total commerce. However, this share—while appearing modest—should not be undervalued. Indeed, one of the GATS-defined modes of service supply—the supply through commercial presence in another country—is not included in balance-of-payments figures (mode 3). Additionally, even while trade in services is growing, they are also essential components in the manufacturing of products. As a result, when measured in terms of value added, services make up around 50% of global commerce.

The two key pillars that support the GATS' contribution to global services trade are (a) increasing the openness and predictability of pertinent rules and regulations and (b) fostering progressive liberalisation through subsequent rounds of talks. The latter idea is equivalent, within the meaning of the Agreement, to enhancing market access and extending national treatment to foreign services and service providers across a broader variety of sectors. But it doesn't involve deregulation. Instead, the Agreement emphasises clearly both the need for developing nations in particular to exercise this right, as well as governments' right to regulate and enact new regulations to fulfil national policy objectives.

The Agreement's overall framework and specific sections were influenced by the concerns of developing countries. In particular, the Preamble to the Agreement and the provisions of Article IV are motivated by the goal of supporting the growing participation of developing nations in services trade. This Article requires members to negotiate specific commitments regarding the improvement of developing countries' access to distribution channels and information networks, the strengthening of developing countries' domestic service capacity, and the liberalisation of market access in sectors of export interest to these countries, among other things.

Although one of the fundamental principles of the GATS is the idea of progressive liberalisation, Article XIX stipulates that liberalisation must take place with due consideration for national policy objectives and members' levels of development, both generally and in specific sectors. Thus, developing nations are given the option to gradually expand market access while opening fewer sectors and fewer types of transactions in accordance with their stage of development. Other sections make sure that developing nations have more freedom to pursue economic integration policies, uphold balance of payments limits, and control who can access and utilise their telecommunications transport networks and services. Additionally, the WTO Secretariat is permitted to provide technical assistance to developing nations.

## World Intellectual Property Organization (WIPO)

The United Nations organisation devoted to using intellectual property as a tool to foster innovation and creativity is known as the World Intellectual Property Organization (WIPO). Following the WIPO Convention's entrance into effect in 1967, WIPO was founded in 1970 with a mission from its Member States to advance the protection of intellectual property all over the globe through intergovernmental cooperation and cooperation with other international organisations. Its goal is to foster innovation and creativity through the creation of a fair and efficient international intellectual property system for the benefit of all nations' economic, social, and cultural development.

In 1974, the Organization was designated as a specialised agency of the UN. The WIPO's main office is in Geneva. It is committed to creating a fair and open worldwide intellectual property (IP) system that encourages innovation, rewards creativity, and advances economic growth while protecting the general welfare. By signing a cooperative agreement with the World Trade Organization in 1996, WIPO enlarged its mandate and further illustrated the significance of intellectual property rights in the administration of globalised trade.

In order to establish and unify laws and procedures for the protection of intellectual property rights, WIPO serves as a platform for its Member States. Additionally, WIPO provides global patent filing services as well as global registration services for trademarks, industrial designs, and appellations of origin. Systems for protecting intellectual property have existed in the majority of developed countries for decades. However, many emerging and developing nations are still constructing their legal frameworks and systems for copyright, patents, and trademarks. Through treaty negotiation, registration, enforcement, legal and technical assistance, and training in various forms, WIPO plays a critical role in assisting these new systems in evolving in light of the increasing globalisation of trade and the rapid changes in technological innovation.

The World Intellectual Property Organization works to advance the growth and application of the global intellectual property system by:

- Services - run systems which make it easier to obtain protection internationally for patents, trademarks, designs and appellations of origin; and to resolve IP disputes.
- Law - develop the international legal IP framework in line with society's evolving needs.
- Infrastructure - build collaborative networks and technical platforms to share knowledge and simplify IP transactions, including free databases and tools for exchanging information.
- Development - build capacity in the use of IP to support economic development.

### **Legal Frameworks under WIPO**

- *Patent Cooperation Treaty (PCT)*: The Paris Convention's Patent Cooperation Treaty (PCT) enables public access to a plethora of technical data pertaining to such inventions while also assisting applicants in securing patent protection for their ideas on a global scale. Applicants are able to concurrently apply for protection of an innovation in a large number of nations by submitting a single worldwide patent application under the PCT.
- *Madrid Agreement*: The Madrid Agreement, signed in 1891, and the Protocol pertaining to that Agreement, signed in 1989, set forth the rules for the Madrid System for the International Registration of Marks. By acquiring an international registration that is valid in each of the specified Contracting Parties, the method enables the protection of a mark across a wide range of nations.
- *Vienna Agreement*: For marks that are composed of or incorporate figurative features, the Vienna Agreement creates an International Classification of the Figurative Elements of Marks known as the Vienna Classification.

- *Nice Agreement*: Regarding the International Classification of Goods and Services for the Registration of Marks, the Nice Agreement came into force.
- *Locarno Agreement*: The Locarno Agreement creates the Locarno Classification, an international classification system for industrial designs.
- *WIPO Copyright Treaty (WCT)*: A particular agreement under the Berne Convention known as the WIPO Copyright Treaty (WCT) deals with the protection of works and the rights of their authors in the digital sphere. The Treaty also addresses two items that must be covered by copyright protection: (i) computer programmes, regardless of how they are expressed; and (ii) collections of data or other materials (“databases”).
- *WIPO Performances and Phonograms Treaty (WPPT)*: In especially in the digital context, the WIPO Performances and Phonograms Treaty (WPPT) deals with the rights of two categories of beneficiaries: (i) performers (actors, singers, musicians, etc.); and (ii) manufacturers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds).
- *WIPO Intergovernmental Committee* : According to its mandate, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore is engaging in text-based negotiations to find a text or texts for an international legal instrument that will effectively protect traditional knowledge (TK), traditional cultural expressions (TCEs), and genetic resources (GRs).
- *Standing Committee on Copyright and Related Rights (SCCR)*: During the biennium of 1998–1999, the Standing Committee on Copyright and Related Rights (SCCR) was established to look into issues of substantive law or harmonisation in the area of copyright and related rights.
- *Hague System/Agreement*: Through the submission of a single international application, the Hague System for the International Registration of Industrial Designs offers a useful commercial option for registering up to 100 designs in 74 contracting parties spanning 91 countries.
- *Lisbon System/Agreement*: By using a single registration process and a single set of costs, the Lisbon System for the International Registration of Appellations of Origin and Geographical Indications provides a way to secure protection for an appellation of origin or a geographical indication in the contracting parties.

### Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Beyond simply transporting items across borders, trade has developed to include the value it brings to societies. Today’s international trade involves a significant amount of value exchanged through innovation, creativity, and branding. Development and trade policy increasingly heavily weighs how to increase this value and make it easier for knowledge-rich commodities and services to move across borders.

The TRIPS Agreement is essential for facilitating intellectual property trade, settling intellectual property trade disputes, and giving WTO members the freedom to pursue their own national goals. The Agreement formally acknowledges the importance of the connections between intellectual property and trade. That was accomplished by the Uruguay Round. The TRIPS Agreement is an attempt to put these rights under common international law and to close the gaps in how they are safeguarded and upheld globally. It provides minimal requirements for enforcement and protection of intellectual property owned by citizens of other WTO members by each government.

WTO countries have a great deal of flexibility under the TRIPS Agreement to customise their methods to IP protection and enforcement to meet their needs and realise public policy objectives. The Agreement gives members plenty of leeway to strike a balance between the long-term advantages of encouraging innovation and the potential short-term costs of restricting access to works of creative genius. Through a variety of procedures



permitted by TRIPS provisions, such as exclusions or exceptions to intellectual property rights, Members can lower short-term costs. Additionally, the WTO's dispute resolution mechanism is accessible in cases of trade disputes involving the application of the TRIPS Agreement.

The TRIPS Agreement addresses five main topics:

- How general rules and fundamental ideas of the global trading system apply to international intellectual property?
- What are the minimum protection criteria for intellectual property rights that members should offer?
- What mechanisms should members offer to defend those rights in their home countries?
- Specific interim framework for resolving intellectual property disputes between WTO members in order to implement TRIPS requirements.
- Special transitional arrangements for the implementation of TRIPS provisions.

## THE CONCEPT OF INTELLECTUAL PROPERTY

The term "intellectual property" refers to works produced by the human mind and intellect. In other words, intellectual property refers to information that may be used to create tangible goods simultaneously in an infinite number of copies at various locations throughout the globe. The information reflected in those copies, not the copies themselves, is what grants the property right. Similar to property rights in movable and immovable property, intellectual property is also characterised by certain rights as well as limitations such as right to use and licence and also limited duration in the case of copy right and patents.

### Industrial Property

The expression 'Industrial Property' is sometimes misunderstood as relating to movable or immovable property used for industrial production. However, industrial property is a kind of intellectual property and relates to creation of human mind, e.g., inventions and industrial designs. Simply stated, inventions are new solutions to technological problems, and industrial designs are aesthetic creations determining the appearance of industrial products. In addition, industrial property includes trademarks, service marks, commercial names and designations, including indications of source and appellations of origin, and the protection against unfair competition.

The term 'Industrial Property' may not appear entirely logical in the sense that the inventions are only concerned with the industry. In other words, the inventions are exploited in industrial plants while the trademarks, service marks, trade names and service names are concerned with both the commerce as well as industry. Notwithstanding the lack of logic, this term has acquired a meaning which clearly covers inventions as well as other marks. The Paris Convention also recognised industrial property to cover patent, trademark, service mark, trade names, utility models, industrial designs, indication of source and appellations of origin and the repression of unfair competition.

Hence, industrial property right is a collective name for rights referring to the commercial or industrial activities of a person. These activities may include the activities of industrial or commercial interests. They may be called inventions, creations, new products, processes of manufacture, new designs or model and a distinctive mark for goods etc.

A person's commercial or industrial activities are covered by a group of rights known as industrial property rights. The actions of commercial or industrial interests may be among these activities. They can be referred to as inventions, creations, new products, manufacturing methods, new designs or models, and distinguishing marks for commodities, among other terms.



## Patent

A patent is a monopoly award that gives the inventor control over the output and, up to a certain point in the demand curve, the price of the patented goods. The patent system's primary economic and commercial justification is that it encourages investment in industrial innovation. The upkeep and expansion of a country's stock of valuable, transferable, and industrial assets are both facilitated by innovative technologies.

An innovation, such as a product or a technique that gives a novel approach to a problem or a new technical solution, is given an exclusive right known as a patent. An invention is the concept for creating a novel and practical product, process, or substance. Without the permission of the patent holder, the innovation cannot be made, utilised, disseminated, or sold for a profit. For the duration that the invention is shielded by a patent, the patent holder has the authority to decide who may or may not use the invention. The owner of the patent may provide another party a licence to exploit the innovation under mutually agreeable terms. Additionally, he has the option to transfer ownership of the patent to the buyer of the right to use the innovation. From the day the patent application was submitted, the patent is valid for 20 years. After a patent expires, the invention is no longer protected and becomes part of the public domain, meaning that the owner no longer has the sole right to use the invention.

## Trade Mark

A trade mark tries to safeguard both the interests of the trader and the customer by differentiating the items of one manufacturer or trader from comparable goods of others. A trademark can be any combination of words, characters, numbers, symbols, or devices showing images of people, animals, or both. A trademark acts as an effective form of advertising for the goods and their quality since it denotes the relationship between the merchant and the items during the course of commerce. The goal of trademark law is to give businesses the ability to acquire an exclusive right to use, share, or assign a mark by registering their mark. Similar to this, service marks set one company's services apart from those of other companies.

Like inventions and industrial designs, it is patentable. Various combinations of words, letters, numbers, symbols, drawings, images, and even sounds can be used as a trademark. These are typically registered for seven years, but by reapplying, they can be renewed indefinitely. It guarantees the owner of the mark the sole right to use it to distinguish products or services, or to grant another person permission to use it in exchange for payment. Because of the nature and quality of the goods or service, which are denoted by its distinctive trademark, it aids consumers in recognising and purchasing it.

## Copyright

The idea of Copyright protection only began to emerge with the invention of printing, which made it for literary works to be duplicated by mechanical processes instead of being copied by hand. This led to the grant of privileges, by authorities and kings, entitling beneficiaries exclusive rights of reproduction and distribution, for limited period, with remedies in the form of fines, seizure, confiscation of infringing copies and possibly damages.

However, the criticism of the system of privileges led to the adoption of the Statute of Anne in 1709, the first copyright Statute. In the 18th century there was dispute over the relationship between copyright subsisting in common law and copyright under the Statute of Anne. This was finally settled by House of Lords in 1774 which ruled that at common law the author had the sole right of printing and publishing his book, but that once a book was published the rights in it were exclusively regulated by the Statute. This common law right in unpublished works lasted until the Copyright Act, 1911, which abolished the Statute of Anne.

Copyright is a well recognised form of property right which had its roots in the common law system and subsequently came to be governed by the national laws in each country. Copyright as the name suggests arose as an exclusive right of the author to copy the literature produced by him and stop others from doing so.

There are well-known instances of legal intervention to punish a person for copying literary or aesthetic output of another even before the concept of copyright took shape. The concept of idea was originally concerned with the field of literature and arts. In view of technological advancements in recent times, copyright protection has been expanded considerably. Today, copyright law has extended protection not only to literary, dramatic, musical and artistic works but also sound recordings, films, broadcasts, cable programmes and typographical arrangements of publications. Computer programs have also been brought within the purview of copyright law.

Thus, the copyright deals with the rights of intellectual creators in their creation. The copyright law deals with the particular forms of creativity, concerned primarily with mass communication. It is also concerned with virtually all forms and methods of public communication, not only printed publications but also with such matters as sound, and television broadcasting, films for public exhibition etc. and even computerised systems for the storage and retrieval of information. The copyright law, however, protects only the form of expression of ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colours, shapes and so on. In India, the law relating to copyright is governed by the Copyright Act, 1957 which has been amended in 1983, 1984, 1985, 1991, 1992, 1994, 1999 and 2012. The amendment introduced in 1984 included computer program within the definition of literary work and a new definition of computer program was inserted by the 1994 amendment. The philosophical justification for including computer programs under literary work has been that computer programs are also products of intellectual skill like any other literary work.

In 1999, the Copyright Act, 1957 has been amended to give effect to the provisions of Article 14 of the TRIPs agreement providing term of protection to performers rights at least until the end of a period of fifty years computed from the end of the calendar year in which the performance took place. The Amendment Act also inserted new Section 40A empowering the Central Government to extend the provisions of the Copyright Act to broadcasts and performances made in other countries subject to the condition however that such countries extend similar protection to broadcasts and performances made in India. Another new Section 42A empowers the Central Government to restrict rights of foreign broadcasting organisations and performers.

## Industrial Designs

Industrial designs belong to the aesthetic field, but are at the same time intended to serve as pattern for the manufacture of products of industry or handicraft. An industrial design is the ornamental or aesthetic aspect of a useful article, which must appeal to the sense of sight and may consist of the shape and/or pattern and/or colour of article. An industrial design to be protectable, must be new and origin. Industrial designs are protected against unauthorised copying or limitation, for a period which usually lasts for five, ten or fifteen years.

Textile designs were the first to receive legal protection. As early as 1787 the first Act for design protection was enacted in Great Britain for the Encouragement of the Arts of design and printing Linens, cotton, calicoes and Muslins, by vesting properties thereof in the Designers, Printers and Proprietors for a limited time. This was an experimental measure extending protection for a limited duration. Shortly thereafter its life was extended and soon afterwards it was made perpetual. In 1839 the protection under the Act was enlarged to cover "Designs for Printing other woven Fabrics".

In the same year another Act was passed for design protection for articles of manufacture generally. An Act to secure to Proprietors of Designs for Articles of Manufacture the Copyright of such Designs for a limited time. The legislative process for design protection took rapid strides thereafter. A consolidating and updating measure enacted in 1842. An Act to consolidate and amend the laws relating to the Copyright of Designs for ornamenting Articles of manufacture-repealed all the earlier statutes referred to above.

It is significant to observe that when the designs law was codified in 1842 and took its modern day shape, copyright protection had not yet been extended to drawings, paintings and photographs. This came only twenty years later with the enactment of the Fine Arts Copyright Act, 1862. Codification of copyright law was nowhere in sight and came only seventy years later with the enactment of the Imperial Copyright Act, 1911. Until 1883

the statutes relating to patents, designs and trademarks remained separate. They were combined in a single enactment by the Patents, Designs, and Trade Marks Act, 1883, which repealed all the then existing statutes in the three areas. Soon trademarks law parted company and was separately enacted as the Trade Marks Act, 1905, leaving patents and designs to remain together. The Patents and Designs Act, 1907, consolidated the enactments relating to patents and designs.

The first designs legislation enacted in India was the Patterns and Designs Protection Act, 1872. It was enacted as a supplement to the Statute-Act 15 of 1859-passed by the Governor-General of India in Council which for the first time made provision for granting to inventors of “new manufacture the exclusive privilege of making, selling and using the invention in India or authorising others to do so for a specified term. The Act of 1872 was passed to extend similar privileges to the inventors of new patterns and designs in British India, though for a very shorter duration of years. It included in the term new manufacture any new and original pattern or design, or the application of such pattern or design to any substance or article of manufacture”. The Act, however, left undefined the expression new pattern or design.

The Inventions and Designs Act, 1898, which consolidated and amended the law relating to the protection of inventions and designs contained provisions relating to designs in a separate part. The (British) Patents and Designs Act, 1907, became the basis of the Indian Patents and Designs Act, 1911. The patents provisions of the Indian Patents and Designs Act, 1911, were repealed by the Patents Act, 1970, a post-Independence updating and consolidation of the patents law. The design provisions of the Indian Patents and Designs Act, 1911, continue, with some consequential amendments, with the title as the Designs Act, 1911. The new Designs Act, 2000 has been passed by the Parliament.

### **Geographical Indication (GI)**

Geographical Indicator is that part of industrial property that designates a nation or a location within it as the nation or place of origin of that product. Such a name typically carries a guarantee of quality and individuality, which is mostly due to the fact that it originated in the specified geographical place, region, or nation. Signs that identify a product's exact geographic origin are known as geographic indicators. A GI identifies a product's origin, which could be a village or town, a region, or a nation, and identifies the product's unique traits. Since it is an exclusive privilege granted to a certain community, all of the community's members profit from its registration. All producers or traders whose goods originate from that location and have defining traits may use it.

Geographical Indications are covered by Articles 22 to 24 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which was a component of the Agreements that concluded the Uruguay Round of GATT negotiations. The Geographical Indications of Goods (Registration and Protection) Act, 1999 was passed by India as a WTO member. It was enacted in December 1999, and it became effective on September 15, 2003. With this Act, geographical indicators for commodities in India are to be registered and given additional protection.

Bordeaux wine, Darjeeling tea, Chanderi sarees, Kullu shawls, Tuscany olive oil, Kanchipuram silk sarees, Alphonso Mango, Nagpur orange, and Kolhapuri (Chappal) are well-known examples of GIs.

### **Trade Secret**

A trade secret is a method, practise, procedure, design, instrument, pattern, or collection of information that is not widely known or easily discoverable and through which a company might gain a competitive edge over rivals or clients. An enterprise may gain a competitive edge from secret business information. Sales techniques, distribution strategies, consumer profiles, marketing plans, client and supplier lists, production procedures, and advertising strategies are all examples of trade secrets. A trade secret can be preserved indefinitely, but there must be a significant amount of secrecy, making it difficult to obtain the information unless inappropriate means are used.

## NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY

The Indian government has provided the exclusive right of intellectual property to safeguard the originality of inventors' works. The simplest form of intellectual property is an intangible work of human imagination. This intellectual property contains rights centred on copyright, patents, trademarks, trade names, industrial designs, and merchandise. Maintaining intellectual property rights is crucial for the quality, safety, and effectiveness of all pharmaceutical products and services. For the certification and identification of products in a large market, it serves as a standard authority and certification body. The privileges granted to individuals over the works of their imaginations are known as intellectual property rights.

Typically, they grant the creator a limited time, exclusive permission to utilise his or her works. The term "intellectual property" refers to human inventions in the fields of art, literature, science, and industry. This application is crucial for protecting the inventor's invention and upholding the inventor's work's high standards of quality.

As a result of these changes, the government decided to create a roadmap for IPRs in the nation. The National Intellectual Property Rights Policy was put into place to encourage innovation, enhance the business climate, and make it easier to commercially utilise intellectual property. The Policy is in accordance with India's proclamation that this decade is the "Decade of Innovation".

On May 12th, 2016, the Union Cabinet approved the IPR Policy. It acknowledges India's well-established, TRIPS-compliant legal structure to protect IPRs and strives to balance her development objectives by making use of the flexibilities offered by the global regime. The Policy places a special emphasis on spreading knowledge about IPRs and emphasising their value as a marketable financial asset and a tool for the economy.

IPR Policy focus on:

- Improving access to healthcare, food security, and environmental protection, among other areas of critical social, economic, and technological importance.
- fostering creativity and innovation and thereby promote entrepreneurship and enhance socio-economic and cultural development.

The Policy outlines seven goals that are further defined with actions that must be taken by the designated nodal Ministry or Department. The goals are briefly discussed below:-

- **IPR Awareness: Outreach and Promotion** – To create public awareness about the economic, social and cultural benefits of IPRs among all sections of society.
- **Generation of IPRs** - To stimulate the generation of IPR.
- **Legal and Legislative Framework** - To have strong and effective IPR laws, which balance the interests of rights owners with larger public interest.
- **Administration and Management** - To modernize and strengthen service oriented IPR administration.
- **Commercialization of IPR** - Get value for IPRs through commercialization.
- **Enforcement and Adjudication** - To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements.
- **Human Capital Development** - To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPRs.

**LESSON ROUND-UP**

- A patent is a monopoly award that gives the inventor control over the output and, up to a certain point in the demand curve, the price of the patented goods. The patent system's primary economic and commercial justification is that it encourages investment in industrial innovation.
- A trade mark tries to safeguard both the interests of the trader and the customer by differentiating the items of one manufacturer or trader from comparable goods of others. A trademark can be any combination of words, characters, numbers, symbols, or devices showing images of people, animals, or both.
- A trade secret is a method, practise, procedure, design, instrument, pattern, or collection of information that is not widely known or easily discoverable and through which a company might gain a competitive edge over rivals or clients. An enterprise may gain a competitive edge from secret business information.
- Geographical Indicator is that part of industrial property that designates a nation or a location within it as the nation or place of origin of that product. Such a name typically carries a guarantee of quality and individuality, which is mostly due to the fact that it originated in the specified geographical place, region, or nation.
- The National Intellectual Property Rights Policy encourage innovation, enhance the business climate, and make it easier to commercially utilise intellectual property. The Policy is in accordance with India's proclamation that this decade is the "Decade of Innovation".

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Discuss the need of Intellectual Property Protection Laws in India.
2. What is Industrial Property?
3. A patent is a monopoly award that gives the inventor control over the output. Critically Examine.
4. What is Trade Secret?
5. Discuss briefly National Intellectual Property Rights Policy.

**LIST OF FURTHER READINGS**

- Intellectual Property Laws and Practice – Elizabeth Verkey
- Law Relating to Intellectual Property - Dr. BL Wadhwa

**OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)**

- <https://ipindia.gov.in/>
- <https://www.wipo.int/portal/en/index.html>



### KEY CONCEPTS

■ Patent ■ Invention ■ Inventive Step ■ New Invention ■ Patent Office

### Learning Objectives

#### To understand:

- What are not Inventions
- Persons Entitled to apply for Patents
- Contents of Specifications
- Examination of Application
- Opposition to Patent
- Grant of Patents
- Term of Patent
- Surrender of Patent

### Lesson Outline

- Form of Application
- Provisional and Complete Specifications
- Examination of Application
- Rights of Patentees
- Patents of Addition
- Revocation of Patent in Public Interest
- Registration of Assignments, Transmissions
- Power of Controller
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- Patents Act 1970
- Patents Rules 2003

The term 'Patent' acquired a statutory meaning in India under the Patents Act, 1970. The Act and the Rules framed under it, i.e. the Patent Rules, 2003 regulate the subjects like the grant, the operative period, the revocation, and infringement etc. of the Patents.

## INTRODUCTION

A Patent is a statutory right for an invention granted for a limited period of time to the patentee by the Government, in exchange of full disclosure of his invention for excluding others, from making, using, selling, importing the patented product or process for producing that product for those purposes without his consent. Patent is a monopoly grant and it enables the inventor to control the output and within the limits set by demand, the price of the patented products. Underlying economic and commercial justification for the patent system is that it acts as a stimulus to investment in the Industrial innovation. Innovative technology leads to the maintenance of and increase in nations stock of valuable, tradable and industrial assets.

The law relating to patents contained in the Patents Act, 1970 .The Patents Act was enacted by the Government of India in the year 1970 in pursuance of its powers under Entry 49 of the List I of Schedule VII of the Constitution of India. List I contains the list of the items in the Union List and Entry 49 reads, "Patents, inventions and designs; copyright; trade-marks and merchandise marks." The Act was notified on 19th September 1970. It has been amended in the year 1995, 1999, 2002 and 2005. With increase in the technological progress of India, the fundamental reasoning of the Act is that patents are given to promote innovations & developments and to ensure that these creations got recognition commercially without delay; and patents are conceded to empower patentee to commercially utilize the monopoly for the importation of the patented product into the nation. The similar rationality is applicable in compulsory licensing, certification cum registration of process patents for sustenance, or medication, other products like pesticides came through synthetic procedures which, aside from compound substances ordinarily incorporate things, for example, combinations, optical glass, semi-transmitters, alloys, etc. It might, nonetheless, be noticed that items fundamental for our economy, for example, agribusiness and cultivation items, nuclear vitality creations and all organic products are not patentable. So, the Patents legislation was relied upon to provide a sensible adjust amongst satisfactory & efficient security of patents from one perspective and the innovation improvement, open intrigue and particular needs of the nation on another.

## PATENTS

Section 2(1) (m) of the Patents Act, 1970, defines the term patent as to mean a patent for any invention granted under Patents Act.

An invention is considered as new (novel), if it is not anticipated by prior publication in patent and non-patent literature, i.e., an invention is novel if it has not been disclosed in the prior art, where the prior art means everything that has been published, presented or otherwise disclosed to the public before the date of filing/priority date of complete specification. An invention is considered as novel, if it has not been anticipated by prior use or prior public knowledge in India.

***In the case of Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries, (1979) 2 SCC 511, it was held by the Hon'ble Supreme Court of India that the object of Patent law is to encourage scientific research, new technology and industrial progress. A limited-time grant of the only right to own, use, or sell a patented method or product encourages the development of new commercially useful inventions. The disclosure of the invention to the Patent Office, which becomes public domain after a predetermined duration of the monopoly, is the cost of the monopoly grant.***



### Advantages of Patents

- Patentee have the complete rights to restrict outsider from making, operating, providing accessibility to be bought, providing or putting in the product generated by him, without his consent. He has absolute prerogative to utilize his invention and his rights that are very much ensured under the Act.
- The patentee has a privilege to file the suit for encroachment of his patent and can ask for remedies like, Injunction, compensation and a settlement of profit against the individual who encroached his patent.
- Patentee can commercially exploit or pitch his creation to any skilled individual and concede permit to him to abuse his item and in this way the patentee can likewise wins benefit along these lines.
- The holder of the exclusive permit can also avail the rights given to the patentee and can bring a suit if there should arise an occurrence of any encroachment of Patent.
- A patentee gets the privilege to make changes in or alterations of an invention depicted or uncovered in the total determination of the primary innovation and get the particular right of a patent by the substantial change or patent as a matter of addition/certain adjustment.

It may be noted that according to Section 2(1) (p) of the Patents Act, 1970, the term patentee as to mean the person for the time being entered on the register as the grantee or proprietor of the patent.

#### ***What can be Patented?***

***An invention relating either to a product or process that is new, involving inventive step and capable of industrial application can be patented. However, it must not fall into the categories of inventions that are non-patentable under sections 3 and 4 of the Act.***

It may be noted that Section 2(1) (j) of the Act, defines invention as to mean a new product or process involving an inventive step and capable of Industrial application.

Capable of industrial application, in relation to an invention, means that the invention is capable of being made or used in an industry as defined under Section 2(1) (ac) of the Act.

Also, Section 2(1) (l) defines the term new invention as to mean any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e. the subject matter has not fallen into public domain or that it does not form part of the state of the art.

As per legal regime of Intellectual Property Right, invention is something construed as new substance or altogether new process having inventive stage/action and potential of industrial usage & relevance. Inventive stage/step include certain aspects of action which are not palpable & evident to the person experienced in the art. The real purpose of patent system is stimulating new innovative practices & technological development to market for public interest.

***In Raj Prakash v. Mangat Ram Choudhary AIR 1978 Delhi 1, it was held that inventive creation, as is notable, is to discover something or find something not found or found by anybody previously. It isn't essential that the invention ought to be anything confounded. The fundamental thing is that the creator was first to embrace it. The main issue in this manner, is that each basic creation is asserted, as in the form of novelty or new character, it will be considered as an invention and the cases & specifications must be perused in that light.***

### What are not inventions

The following are not inventions within the meaning of Section 3 of the Act:

- a) an invention which is frivolous or which claims anything obviously contrary to well established natural laws;
- b) an invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment;
- c) the mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substances occurring in nature;
- d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any property or mere new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant;

Explanation to clause (d) clarifies that salts, esters, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.

- e) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;
- f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way;
- g) a method of agriculture or horticulture;
- h) any process for the medicinal, surgical, curative, prophylactic diagnostic, therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products;
- i) plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals;
- j) a mathematical or business method or a computer programme per se or algorithms;
- k) a literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever including cinematographic works and television productions;
- l) a mere scheme or rule or method of performing mental act or method of playing game;
- m) a presentation of information;
- n) topography of integrated circuits;
- o) an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components;

Section 4 prohibits the grant of patent in respect of an invention relating to atomic energy falling within Sub-section (1) of Section 20 of the Atomic Energy Act, 1962.

***After analysing the legislative history of Section 3(d), the Hon'ble Supreme Court in the matter of Novartis AG Vs. Union of India, W.P.No. 24760/06, commented, "We have, therefore, no doubt that the amendment/addition made in section 3(d) is meant especially to deal with chemical substances, and more particularly pharmaceutical products. The amended portion of section 3(d) clearly sets up a second tier of qualifying standards for chemical substances/ pharmaceutical products in order to leave the door open for true and genuine inventions but, at the same time, to check any attempt at repetitive patenting or extension of the patent term on spurious grounds.***

***It was further held by the Apex Court :***

***In the case of medicines, efficacy means therapeutic efficacy and physico-chemical properties of substances do not meet the requirement of therapeutic efficacy .***

***It was also held that patent applicants must prove the increase in therapeutic efficacy and just increased bioavailability alone may not necessarily lead to an enhancement of therapeutic efficacy, and in any given case, enhanced efficacy must be specifically claimed and established by research data.***

***In this regard, in Para 187 of the Apex Court judgment, it is held that, ".....the physico-chemical properties of beta crystalline form of Imatinib Mesylate, namely (i) more beneficial flow properties, (ii) better thermodynamic stability, and (iii) lower hygroscopicity, may be otherwise beneficial but these properties cannot even be taken into account for the purpose of the test of section 3(d) of the Act, since these properties have nothing to do with therapeutic efficacy."***

#### ***What are the Criteria of Patentability?***

***An invention is patentable subject matter if it meets the following criteria –***

- ***It should be novel.***
- ***It should have inventive step or it must be non-obvious.***
- ***It should be capable of Industrial application.***
- ***It should not attract the provisions of section 3 and 4 of the Patents Act, 1970.***

It may be noted that Section 2(1) (ja) of the Act defines the term inventive step as to mean a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both that makes the invention not obvious to a person skilled in the art.

#### **Persons Entitled to make Application for Patent**

Section 6 of the Act provides that an application for a patent for an invention may be made by any of the following persons, that is to say:

- a) by any person claiming to be the true and first inventor of the invention;
- b) by any person being the assignee of the person claiming to be the true and first inventor in respect of the right to make such an application;
- c) by the legal representative of any deceased person who immediately before his death was entitled to make such an application.

The application may be made by one of the persons either alone or jointly with any other person.

It may be noted that Section 2(1) (a) of the Act defines the term assignee as to include the legal representative

of a deceased assignee, and references to the assignee of any person include references to the assignee of the legal representative or assignee of that person.

### Form of Application and Provisional & Complete Specification

***The Specification is a techno-legal document containing scientific and technical disclosure and claims for the invention which is the basis of rights of a patent. The Specification, thus, forms a crucial part of the patent application.***

Section 7 dealing with form of application requires every application for a patent to be made for one invention only. Where the application is made by virtue of an assignment of the right to apply for a patent for the invention, there shall be furnished with the application proof of the right to make the application.

Every international application under the **Patent Cooperation Treaty (PCT)** for a patent, as may be filed designating India shall be deemed to be an application under the Act, if a corresponding application has also been filed before Controller in India. The filing date of such application and its complete specification processed by patent office as designated office or elected office shall be the international filing date accorded under the PCT.

#### ***What is the Patent Cooperation Treaty (PCT)?***

***The PCT is an international treaty with more than 150 Contracting States which are bound with certain formal requirements set out in the Treaty and Regulations. The PCT makes it possible to seek patent protection for an invention simultaneously in a large number of countries by filing a single international patent application instead of filing several separate national or regional patent applications however, granting of patents remains under the control of the national or regional patent offices after the corresponding national phase application has been filed and the national phase application is assessed as per patent law of that jurisdiction.***

Section 7(4) provides that every such application, not being a convention application or an application filed under PCT designating India, shall be accompanied by a provisional or a complete specification.

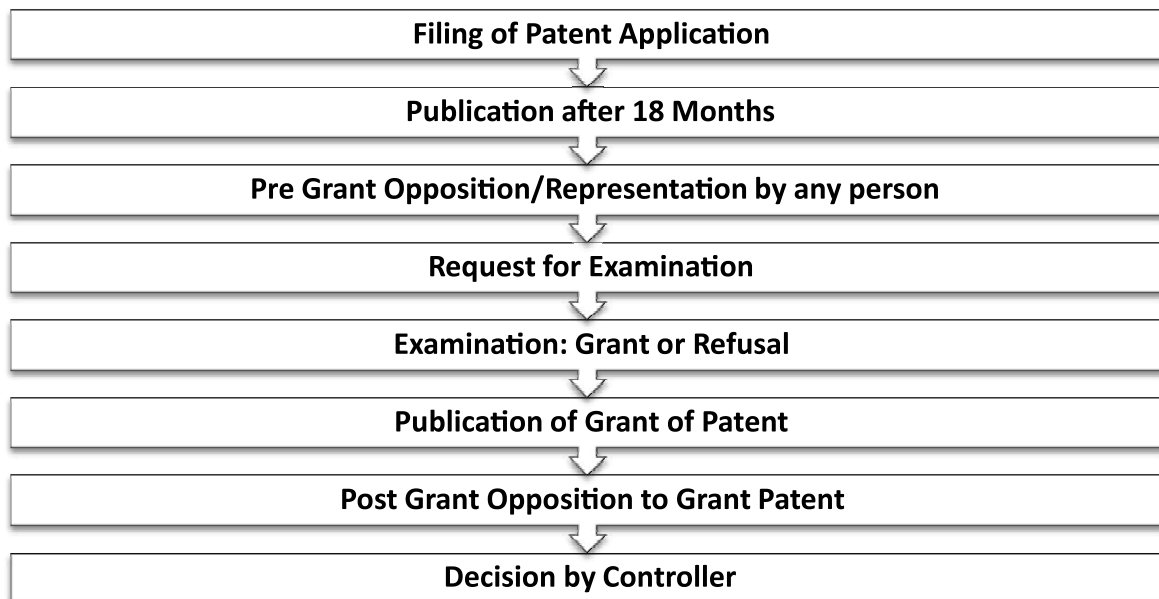
Section 9 stipulates that where an application for a patent (not being a convention application or an application filed under PCT designating India) is accompanied by a provisional specification, a complete specification shall be filed within twelve months from the date of filing of the application, and if the complete specification is not so filed, the application shall be deemed to be abandoned. Where two or more applications in the name of the same applicant are accompanied by provisional specifications in respect of inventions which are cognate or of which one is a modification of another and the Controller is of opinion that the whole of such inventions are such as to constitute a single invention and may properly be included in one patent, he may allow one complete specification to be filed in respect of all such provisional specifications. However, the period of twelve months shall be reckoned from the date of filing of the earliest provisional specification.

Where an application for a patent (not being a convention application or an application filed under PCT designating India) is accompanied by a specification purporting to be a complete specification, the Controller may, if the applicant so requests at any time within twelve months from the date of filing of the application, direct that such specification shall be treated as a provisional specification and proceed with the application accordingly. Where a complete specification has been filed in pursuance of an application for a patent accompanied by a provisional specification or by a specification treated by virtue of a direction under sub-section (3) as a provisional specification, the Controller may, if the applicant so requests at any time before the grant of patent, cancel the provisional specification and post-date the application to the date of filing of the complete specification.

**When should an Application for a Patent be Filed?**

**An application for a patent can be filed at the earliest possible date and should not be delayed. An application filed with provisional specification, disclosing the essence of the nature of the invention helps to register the priority of the invention. Delay in filing an application may entail some risks such as:**

- (i) some other inventor might file a patent application on the said invention and**
- (ii) there may be either an inadvertent publication of the invention by the inventor himself/herself or by others independently of him/her.**

**General Procedure for Obligation a Patent****Contents of Specifications**

Section 10 dealing with contents of Specifications provides that every specification, whether provisional or complete, shall describe the invention and begin with a title sufficiently indicating the subject matter to which the invention relates.

Every complete specification is required to -

- a) fully and particularly describe the invention and its operation or use and the method by which it is to be performed;
- b) disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection;
- c) end with a claim or claims defining the scope of the invention for which protection is claimed; and
- d) be accompanied by an abstract to provide technical information on the invention.

However, the Controller may amend the abstract for providing better information to third parties and if the applicant mentions a biological material in the specification which may not be described in such a way as to

satisfy clauses (a) and (b) above and if such material is not available to the public, the application shall be completed by depositing the material to an International Depository Authority under the Budapest Treaty and by fulfilling the following conditions, namely:

- (i) the deposit of the material shall be made not later than the date of filing the patent application in India and a reference thereof shall be made in the specification within the prescribed period;
- (ii) all the available characteristics of the material required for it to be correctly identified or indicated are included in the specification including the name, address of the depository institution and the date and number of the deposit of the material at the institution;
- (iii) access to the material is available in the depository institution only after the date of the application for patent in India or if a priority is claimed after the date of the priority;
- (iv) disclose the source and geographical origin of the biological material in the specification, when used in an invention.

In case of an international application designating India the title, description, drawings, abstracts and claims filed with the application shall be taken as the complete specification for the purposes of the Act.

The claim or claims of a complete specification shall relate to a single invention, or to a group of inventions linked so as to form a single inventive concept, shall be clear and succinct and shall be fairly based on the matter disclosed in the specification.

Any kind of innovation/invention is patented for making monetary profit and that it can be identified further when it got the status of exclusivity in a commercial market. A feature of exclusivity or monopoly is attained when description in patent specification is clear on the part of being novel. Patentee can rightfully exploit his monopoly either by utilizing marketable strategies over patented product or by licensing the same to a different person. A patentee also has privilege to assign the invention to third person by way of deed. Special thing about patented invention is that its monetary value can increase with passage of time. Right of licensing is also one of the acceptable way to commercially exploit patented invention and prevent it from any possible kind of unauthorized usage and patent holder can retain exclusive commercial right.

#### ***How a Patent Specification is prepared?***

***A patent specification can be prepared by the applicant himself or his registered and authorized agent. The patent specification generally comprises of the title of the invention indicating its technical field, prior art, draw backs in the prior art, the solution provided by the inventor to obviate the drawbacks of the prior art, a concise but sufficient description of the invention and its usefulness, drawings (if any) and details of best method of its working. The complete specification must contain atleast one claim or statement of claims defining the scope of the invention for which protection is sought for.***

#### **Publication of Applications**

Section 11A(1) provides that save as provided otherwise, no application for patents shall ordinarily be open to public for such period as may be prescribed. Sub-section (2) entitles an applicant to request the Controller, in the prescribed manner, to publish his application at any time before the expiry of the period prescribed under sub-section (1) and subject to the provisions of sub-section (3). The Controller on receipt of such request shall publish such application as soon as possible. Every application for patent shall be published on expiry of the period specified in sub-section (1) except those applications in which secrecy direction is imposed under section 35; or application has been abandoned under section 9(1); or application has been withdrawn three months prior to the period specified under sub-section (1).

The publication of every application shall include the particulars of the date of application, number of application, name and address of the applicant identifying the application and an abstract. Upon publication of an application for a patent, the depository institution shall make the biological material mentioned in the specification available to the public. The patent office may, on payment of prescribed fee make the specification and drawings, if any, of such application available to the public.

Section 11A(7) provides that on or from the date of publication of the application for patent and until the date of grant of a patent in respect of such application, the applicant shall have the like privileges and rights as if a patent for invention had been granted on the date of publication of application. However, the applicant shall have no right to institute any proceedings for infringement until the patent has been granted. Additionally, the rights of a patentee in respect of applications made under Section 5(2) before January 1, 2005 shall accrue from the date of grant of patent. Moreover, after the patent is granted in respect of applications made under Section 5(2), the patent holder shall only be entitled to receive reasonable royalty from such enterprises which have made significant investment and were producing and marketing concerned product prior to January 1, 2005 and which continue to manufacture the product covered by the patent on the date of grant of the patent and no infringement proceedings shall be instituted against such enterprises.

#### ***When is an Application for Patent Published?***

***Every application for patent is published after expiry of 18 months from the date of its filing or priority date whichever is earlier. However, following applications are not published.***

- (A) Application in which secrecy direction is imposed.***
- (B) Application which has been abandoned u/s 9(1) and i.e. when a provisional application has been filed and the complete application has not been filed with 12 months from the filing of the provisional application.***
- (C) Application which has been withdrawn 3 months prior to 18 months.***

#### **Request for Examination**

Section 11B provides that no application for a patent shall be examined unless the applicant or any other interested person makes a request in the prescribed manner for such examination within the prescribed period. In case of an application in respect of a claim for a patent filed under Section 5(2) before January 1, 2005, a request for examination shall be made in the prescribed manner for such examination within the prescribed period, by the applicant or any other interested person.

In case the applicant or any other interested person does not make a request for examination of the application for a patent within the specified period, the application shall be treated as withdrawn by the applicant. However the applicant may, at any time after filing the application but before the grant of the patent, withdraw the application by making a request in the prescribed manner; and in a case secrecy direction has been issued under Section 35, the request for examination may be made within the prescribed period from the date of revocation of the secrecy direction.

#### **Examination of Application**

Section 12 dealing with examination of application provides that when the request for examination has been filed in respect of an application for a patent in the prescribed manner under Section 11B (1) or (3), the application



and specification and other documents related thereto shall be referred at the earliest by the Controller to an examiner for making a report to him in respect of the following matters, namely:

- a) whether the application and the specification and other documents relating thereto are in accordance with the requirements of the Act and of any rules made thereunder;
- b) whether there is any lawful ground of objection to the grant of the patent in pursuance of the application;
- c) the result of investigations made under Section 13; and
- d) any other matter which may be prescribed.

The examiner to whom the application and the specification and other documents relating thereto are referred shall ordinarily make the report to the Controller within the prescribed period.

### **Search for Anticipation by Previous Publication and by Prior Claim**

Section 13 dealing with search for anticipation by previous publication and by prior claim provides that the examiner to whom the application for a patent is referred shall make investigation for the purpose of ascertaining whether the invention so far as claimed in any claim of the complete specification:

- (a) has been anticipated by publication before the date of filing of the applicant's complete specification in any specification filed in pursuance of an application for a patent made in India and dated on or after the 1st day of January, 1912;
- (b) is claimed in any claim of any other complete specification published on or after the date of filing of the applicant's complete specification, being a specification filed in pursuance of an application for a patent made in India and dated before or claiming the priority date earlier than that date.

The examiner shall, in addition, make such investigation for the purpose of ascertaining whether the invention so far as claimed in any claim of the complete specification has been anticipated by publication in India or elsewhere in any document other than those mentioned in Section 13(1) before the date of filing of the applicant's complete specification. In case a complete specification has been amended before the grant of a patent, the amended specification shall be examined and investigated in the like manner as the original specification.

### **Consideration of the Report of Examiner by Controller**

Section 14 provides that in case the report of the examiner is adverse to the applicant and requires any amendment of the application, specification or other documents, the Controller shall, before proceeding to dispose of the application, communicate the gist of objections to the applicant as expeditiously as possible and afford him an opportunity of hearing.

### **Power of Controller to Refuse or Require Amended Application in Certain matters**

Section 15 empowers the Controller to refuse the application or to require the application, specification or other documents to be amended, if he is satisfied that the application or any specification or any other document filed in pursuance thereof does not comply with the provisions of the Act and the rules made thereunder.

### **Power of Controller to make Orders Respecting Dating of Application and Cases of Anticipation**

Section 17 provides that at any time after the filing of an application and before the grant of the patent, the Controller may at the request of the applicant direct that the application shall be post-dated to such date as may be specified in the request and proceed with the application accordingly. However, no application shall be post-dated to a date later than six months from the date on which it was actually made or would be deemed to have been made.



Where an application or specification (including drawings) or any other document is required to be amended under Section 15, the application or specification or other document shall, if the Controller so directs, be deemed to have been made on the date on which the requirement is complied with or where the application or specification or other document is returned to the applicant, the date on which it is refiled after complying with the requirement.

Section 18 says that where it appears to the Controller that the invention so far as claimed in any claim of the complete specification has been anticipated, he may refuse the application unless the applicant:

- a) shows to the satisfaction of the Controller that the priority date of the claim of his complete specification is not later than the date on which the relevant document was published; or
- b) amends his complete specification to the satisfaction of the Controller.

If it appears to the Controller that the invention is claimed in a claim of any other complete specification, he may, direct that a reference to that other specification be inserted in the applicant's complete specification unless the applicant shows to the satisfaction of the Controller that the priority date of his claim is not later than the priority date of the claim of the said other specification; or the complete specification has been amended to his satisfaction.

Similar provision also applies in the case where it appears to the Controller that the invention so far claimed in any claim of the applicant's complete specification has been claimed in other complete specification referred to in section 13(1)(a) and that such other complete specification was published on or before the priority date of the applicant's claim.

### Potential Infringement

***Patent infringement is the violation of the exclusive rights of the patent holder. The Patents Act 1970, does not specifically define activities or situations that constitute patent infringement. Section 48 of the Patents Act gives the patent holder/ patentee an 'exclusive right' to exclude any third- party from making, using, offering, selling, manufacturing etc. the patented invention/ product/ process, during the valid term of the patent. This essentially creates monopolistic rights over the patented invention/ product/ process. Thus, any activity which violates such a monopoly can be considered a patent infringement. In cases of patent infringement, the patent holder has the right to sue the infringing party to get relief and compensation for the damage caused. Sections 104-114 of the Act provide certain guidelines relating to patent infringement.***

Section 19 provides that if in consequence of the investigations it appears to the Controller that an invention in respect of which an application for a patent has been made cannot be performed without substantial risk of infringement of a claim of any other patent, he may direct that a reference to that other patent, be inserted in the applicant's complete specification by way of notice to the public within such time as may be prescribed, unless

- a) the applicant shows to the satisfaction of the Controller that there are reasonable grounds for contesting the validity of the said claim of the other patent; or
- b) the complete specification is amended to the satisfaction of the Controller.

The reference shall be inserted in the following form, namely:

“Reference has been directed, in pursuance of Section 19(2) of the Patents Act, 1970 to Patent No.....”.

Where after a reference to another patent has been inserted in a complete specification in pursuance of a direction under Section 19(1):

- a) that other patent is revoked or otherwise ceases to be in force; or

- b) the specification of that other patent is amended by the deletion of the relevant claim; or
- c) it is found, in proceedings before the court or the Controller, that the relevant claim of that other patent is invalid or is not infringed by any working of the applicant's invention, the Controller may, on the application of the applicant delete the reference to that other patent.

### Substitution of Applicants

Section 20 says that if the Controller is satisfied, on a claim made in prescribed manner at any time before a patent has been granted that by virtue of any assignment or agreement in writing made by the applicant or one of the applicants for the patent or by operation of law, the claimant would, if the patent were then granted, be entitled thereto or to the interest of the applicant therein, or to an undivided share of the patent or of that interest, the Controller may direct that the application shall proceed in the name of the claimant or in the names of the claimants and the applicant or the other joint applicant or applicants, accordingly as the case may be. No such direction shall however, be given by virtue of any assignment or agreement made by one of the two or more joint applicants for a patent except with the consent of the other joint applicant or applicants. Further, no such direction shall be given by virtue of any assignment or agreement for the assignment of the benefit of an invention unless:

- a) the invention is identified therein by reference to the number of the applications for the patent; or
- b) there is produced to the Controller an acknowledgement by the person by whom the assignment or agreement was made that the assignment or agreement relates to the invention in respect of which that application is made; or
- c) the rights of the claimant in respect of the invention have been finally established by the decision of court; or
- d) the Controller gives directions for enabling the application to proceed or for regulating the manner in which it should be proceeded with under sub-section (5).

Where one of the two or more joint applicants for a patent dies at any time before the patent has been granted, the Controller may upon a request made by the survivor or survivors and with the consent of the legal representative of the deceased direct that the application shall proceed in the name of the survivor or survivors alone.

If any dispute arises between joint applicants for a patent whether or in what manner the application should be proceeded with, the Controller may upon an application made by any of the parties, and after giving to all parties concerned an opportunity of being heard, give such directions as he thinks fit for enabling the application to proceed in the name of one or more of the parties alone or for regulating the manner in which it should be proceeded with.

### Time for Putting Application in Order for Grant

Section 21 of the Act provides that an application for a patent shall be deemed to have been abandoned unless, the applicant has complied within the prescribed period with all the requirements imposed on him by or under the Act, whether in connection with the complete specification or otherwise in relation to the application from the date on which the first statement of objections to the application or complete specification or other documents related thereto is forwarded to the applicant by the Controller.

Explanation to section 21(1) clarifies that where the application for a patent or any specification or, in the case of a convention application or an application filed under the PCT designating India any document filed as part

of the application has been returned to the applicant by the Controller in the course of the proceedings, the applicant shall not be deemed to have complied with such requirements unless and until he has re-filed it or the applicant proves to the satisfaction of the Controller that for the reasons beyond his control such document could not be re-filed.

Sub-section (2) of Section 21 provides that if at the expiration of the period as prescribed under sub-section (1) an appeal to the High Court is pending in respect of the application for the patent for the main invention; or in the case of an application for a patent of addition, an appeal to the High Court is pending in respect of either that application or the application for the main invention, the time within which the requirements of the Controller shall be complied with shall, on an application made by the applicant before the expiration of the period as prescribed under sub-section (1), be extended until such date as the High Court may determine. In case, the time within which the appeal mentioned in sub-section (2) may be instituted has not expired, the Controller may extend the period as prescribed under sub-section (1), to such further period as he may determine. However, in case of an appeal filed during the said further period, and the High Court has granted any extension of time for complying with the requirements of the Controller, then the requirements may be complied with within the time granted by the Court.

## OPPOSITION TO THE PATENT

Section 25 of the Act deals with opposition to grant of patent and provides that where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the following grounds and the Controller on request of such person shall hear him and dispose of the representation in the prescribed manner and specified time:

- (a) that the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;
- (b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim —
  - (i) in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or
  - (ii) in India or elsewhere, in any other document.

Provided that the ground specified in sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of sub-section (2) or sub-section (3) of section 29;

- (c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the applicant's claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim;
- (d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.

*Explanation* — For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

- (e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim;

- (f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;
- (g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;
- (h) that the applicant has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge;
- (i) that in the case of convention application, the application was not made within twelve months from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title;
- (j) that the complete specification does not disclose or wrongly mention the source of geographical origin of biological material used for the invention;
- (k) that the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

Section 25(2) entitles any interested person to give notice of opposition, to the Controller in the prescribed manner at any time after the grant of patent but before the expiry of a period of one year from the date of publication of grant of a patent, on any of the following grounds only :-

- (a) that the patentee or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;
- (b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or in India or elsewhere, in any other document. However, the ground that the invention so far claimed in any claim of complete specification has been published before the priority date of the claim in India or elsewhere in any other document shall not be available where such publication does not constitute an anticipation of the invention by virtue of section 29(2) or (3);
- (c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the claim of the patentee and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the claim of the patentee;
- (d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim;

It may be noted that an invention relating to a process for which a patent is granted shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

- (e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the claim;
- (f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;
- (g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

- (h) that the patentee has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge;
- (i) that in the case of a patent granted on convention application, the application for patent was not made within twelve months from the date of the first application for protection for the invention made in a convention country or in India by the patentee or a person from whom he derives title;
- (j) that the complete specification does not disclose or wrongly mentions the source and geographical origin of biological material used for the invention;
- (k) that the invention so far as claimed in any claim of the complete specification was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

### **Constitution of Opposition Board and its proceeding**

Section 25(3) provides that where any such notice of opposition is duly given under sub-section (2), the Controller shall notify the patentee and constitute a Board by order in writing to be known as the Opposition Board consisting of such officers as he may determine and refer such notice of opposition alongwith the documents to that Board for examination and submission of its recommendation. Every Opposition Board is required to conduct the examination in accordance with the prescribed procedure. Sub-section (4) provides that the Controller shall on receipt of the recommendation of the Opposition Board and after giving the patentee and the opponent an opportunity of being heard, order either to maintain or amend or revoke the patent. However, the Controller while passing the order shall not take into account any personal document or secret trial or secret use in case the opposition is based on the grounds mentioned under sub-section (2)(d) & (e). In case the Controller issues an order under sub-section (4) that the patent shall be maintained subject to amendment of the specification or any other document, the patent shall stand amended accordingly.

### **Controller to Treat Application as Application of Opponent**

Section 26 of the Act provides that where in any opposition proceeding the Controller finds that the invention, so far as claimed in any claim of the complete specification, was obtained from the opponent in the manner set out in section 25(2)(a) and revokes the patent on that ground, he may, on request by such opponent made in the prescribed manner, direct that the patent shall stand amended in the name of the opponent; or a part of an invention described in the complete specification was so obtained from the opponent, he may pass an order requiring that the specification be amended by the exclusion of that part of the invention.

Where an opponent has, before the date of the order of the Controller requiring the amendment of a complete specification referred to in section 26(1)(b), filed an application for a patent for an invention which included the whole or a part of the invention held to have been obtained from him and such application is pending, the Controller may treat such application and specification in so far as they relate to the invention held to have been obtained from him, as having been filed, for the purposes of the priority dates of claims of the complete specification, on the date on which the corresponding document was or deemed to have been filed by the patentee in the earlier application but for all other purposes the application of the opponent shall be proceeded with as an application for a patent.

### **RESIDENTS NOT TO APPLY FOR PATENTS OUTSIDE INDIA WITHOUT PRIOR PERMISSION**

Section 39 of the Act provides that no person resident in India shall, except under the authority of a written permit sought in the prescribed manner and granted by or on behalf of the Controller, make or cause to be made any application outside India for the grant of a patent for an invention unless an application for a patent

for the same invention has been made in India, not less than six weeks before the application outside India and either no direction has been given under of section 35(1) in relation to the application in India, or all such directions have been revoked.

Sub-section (2) obliges the Controller to dispose of every such application within the prescribed period. However, if the invention is relevant for defence purpose or atomic energy, the Controller shall not grant permit without the prior consent of the Central Government. Sub-section (3) clarifies that the provisions of section 39 shall not apply in relation to an invention for which an application for protection has first been filed in a country outside India by a person resident outside India.

## GRANT OF PATENTS

Section 43 dealing with grant of patents provides that where an application for a patent has been found to be in order for grant of the patent and either the application has not been refused by the Controller by virtue of any power vested in him by the Act; or the application has not been found to be in contravention of any of the provisions of the Act, the patent shall be granted as expeditiously as possible to the applicant or, in the case of a joint application, to the applicants jointly, with the seal of the patent office and the date on which the patent is granted shall be entered in the register. The Controller has been put under obligation to publish the fact that the patent has been granted and thereupon the application, specification and other documents related thereto shall be open for public inspection.

### Grant of Patents Subject to Conditions

Section 47 dealing with grant of patents subject to conditions provides that the grant of a patent shall be subject to the conditions that:

- (1) any machine, apparatus or other article in respect of which the patent is granted or any article made by using a process in respect of which the patent is granted, may be imported or made by or on behalf of the Government for the purpose merely of its own use;
- (2) any process in respect of which the patent is granted may be used by or on behalf of the Government for the purpose merely of its own use;
- (3) any machine, apparatus or other article in respect of which the patent is granted or any article made by the use of the process in respect of which the patent is granted, may be made or used, and any process in respect of which the patent is granted may be used by any person, for the purpose merely of experiment or research including the imparting of instructions to pupils; and
- (4) in the case of a patent in respect of any medicine or drug, the medicine or drug may be imported by the Government for the purpose merely of its own use or for distribution in any dispensary, hospital or other medical institution maintained by or on behalf of the Government or any other dispensary, hospital or other medical institution which the Central Government may, having regard to the public service that such dispensary, hospital or medical institution renders, specify in this behalf by notification in the Official Gazette.

### Rights of Patentees

Section 48 provides that subject to the other provisions contained in the Patents Act and the conditions specified in section 47, a patent granted under the Act shall confer upon the patentee:

- (a) where the subject matter of the patent is a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;
- (b) where the subject matter of the patent is a process, the exclusive right to prevent third parties, who do

not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India.

***What are the Rights of a Patentee once the Patent is Granted?***

***A patentee enjoys the exclusive right to make and use the patented invention. The patentee also has the right to assign the patent, grant licences, or otherwise deal with the patent, for any consideration. These rights, created by statute, are circumscribed by various conditions and limitations as prescribed under the Patents Act, 1970.***

**Term of Patent**

According to Section 53 of the Act, the term of every patent which has not expired and has not ceased to have effect, on the date of such commencement shall be twenty years from the date of filing of the application for the patent.

The term of patent in case of International applications filed under the Patent Cooperation Treaty designating India, shall be twenty years from the international filing date accorded under the Patent Cooperation Treaty.

A patent shall cease to have effect notwithstanding anything therein or in the Act on the expiration of the period prescribed for the payment of any renewal fee, if that fee is not paid within the prescribed period or within such extended period as may be prescribed.

Notwithstanding anything contained in any other law for the time being in force, on cessation of the patent right due to non-payment of renewal fee or on the expiry of the term of patent, the subject matter covered by the said patent shall not be entitled to any protection.

***What is the Term of a Patent in the Indian System?***

***The term of every patent granted is 20 years from the date of filing of application. However, for application filed under national phase under Patent Cooperation Treaty (PCT), the term of patent will be 20 years from the international filing date accorded under PCT.***

**PATENTS OF ADDITION**

Section 54, 55 and 56 deals with patents of addition. Section 54 provides that where an application is made for a patent in respect of any improvement in or modification of an invention described or disclosed in the complete specification, namely the main invention and the applicant also applies or has applied for a patent for that invention or is the patentee in respect thereof, the Controller may, if the applicant so requests, grant the patent for the improvement or modification as a patent of addition. Where an invention being an improvement in or modification of another invention, is the subject of an independent patent and the patentee in respect of that patent is also the patentee in respect of the patent for the main invention, the Controller may, if the patentee so requests, revoke the patent for the improvement or modification and grant to the patentee a patent of addition in respect thereof, bearing the same date of the patent so revoked. However a patent shall not be granted as a patent of addition unless the date of filing of the application is the same as or later than the date of filing of the application in respect of the main invention. A patent of addition shall not be granted before the grant of the patent for the main invention.

Section 55 deals with term of patents of addition and provides that a patent of addition is granted for a term equal to that of the patent for the main invention or so much thereof as has not expired and remains in force during that term or until the previous cessor of the patent for the main invention and no longer. No renewal fees is payable in respect of a patent of addition, but if any such patent becomes an independent patent the same fees shall thereafter be payable upon the same dates, as if the patent had been originally granted as an independent patent.

Section 56 which deals with validity of patents of addition provides that the grant of a patent of addition shall



not be refused and a patent granted as a patent of addition shall not be revoked or invalidated, on the ground only that the invention claimed in the complete specification does not involve any inventive step having regard to any publication or use of the main invention described in the complete specification relating thereto; or any improvement in or modification of the main invention described in the complete specification of a patent of addition to the patent for the main invention or of an application for such a patent of addition, and the validity of a patent of addition shall not be questioned on the ground that the invention ought to have been the subject of an independent patent. In this context, it is clarified that in determining the novelty of the invention claimed in the complete specification filed in pursuance of an application for a patent of addition regard shall be had also to the complete specification in which the main invention is described.

***A patent of addition application cannot be rejected on the grounds that the disclosure in the primary application or patent lacked innovative step. However, the disclosure in the main application or patent may be used as evidence of innovation against the patent addition application.***

***In the matter of Ravi Kamal Bali v/s Kala Tech and others the Bombay High Court on 12th February, 2008 dismissed the defendant's arguments that Patent of addition can only be granted if it has an inventive step over the main application.***

## RESTORATION OF LAPSED PATENTS

Section 60 provides that where a patent has ceased to have effect by reason of failure to pay any renewal fee within the period prescribed under section 53 or within period as may be allowed under section 142(4), the patentee or his legal representative and where the patent was held by two or more persons jointly, then with the leave of the Controller one or more of them without joining the others, may within eighteen months from the date on which the patent ceased to have effect, make an application for the restoration of the patent.

### Procedure for disposal of applications for restoration of lapsed patents

Section 61 provides that if, after hearing the applicant in cases where the applicant so desires or the Controller thinks fit, the Controller is prima facie satisfied that the failure to pay the renewal fee was unintentional and that there has been no undue delay in the making of the application, he shall publish the application in the prescribed manner; and within the prescribed period, any person interested may give notice to the Controller of opposition thereto on either or both of the following grounds that –

- (a) the failure to pay the renewal fee was not unintentional; or
- (b) there has been undue delay in the making of the application.

If notice of opposition is given within the prescribed period aforesaid, the Controller shall notify the applicant, and shall give to him and to the opponent an opportunity to be heard before deciding the case. If no notice of opposition is given within the prescribed period aforesaid or if in the case of opposition, the decision of the Controller is in favour of the applicant, the Controller shall, upon payment of any unpaid renewal fee and such additional fee as may be prescribed, restore the patent and any patent of addition specified in the application which has ceased to have effect on the cesser of that patent. The Controller may, if he thinks fit as a condition of restoring the patent, require that an entry shall be made in the register of any document or matter which has to be entered in the register but which has not been so entered.

### Rights of patentees of lapsed patents which have been restored

Section 62 provides that where a patent is restored, the rights of the patentee shall be subject to such conditions as may be prescribed and to such other conditions as the Controller thinks fit to impose for the protection or compensation of persons who may have begun to avail themselves of, or have taken definite steps by contract



or otherwise to avail themselves of, the patented invention between the date when the patent ceased to have effect and the date of the publication of the application for restoration of the patent. No suit or other proceeding shall be commenced or prosecuted in respect of an infringement of a patent committed between the date on which the patent ceased to have effect and the date of the publication of the application for restoration of the patent.

## SURRENDER AND REVOCATION OF PATENTS

Section 63 entitles the patentee to offer to surrender his patent, at any time by giving notice to the Controller. Where such an offer is made, the Controller shall publish the offer in the prescribed manner and also notify every person other than the patentee whose name appears in the register as having an interest in the patent. Any person interested may, within the prescribed period after such publication, give notice of opposition to the Controller and where such notice is given the Controller shall notify the patentee. If the Controller is satisfied after hearing the patentee and any opponent, if desirous of being heard, that the patent may properly be surrendered, he may accept the offer and by order revoke the patent.

### Grounds for Revocation of Patents

Section 64 deals with revocation of patents. A patent may be revoked on any of the following grounds:

- where an invention as claimed in a valid claim of earlier priority date which is included in the complete specification of another patent granted in India;
- where the patent application was filed by a person who is not entitled under the provisions of the Act and was granted a patent on such application;
- where the patent was wrongfully obtained and the rights of the petitioner or any person under/through whom he claims, were contravened;
- when the subject of a claim of the complete specification is not an invention within the meaning of the Act;
- where the invention that is being claimed is not new having regard to what was publicly known or used in India before the priority date of the claim and also having regard to what was published in any of the documents, whether in India or elsewhere;
- where the invention that is claimed is obvious and lacks any inventive step, having regard to what was publicly known, used or published in India, before the priority date of the claim;
- where the invention is not useful;
- where the invention and the method by which it is to be performed is not sufficiently and fairly described by the complete specification. In other words, the description of the method or the instructions for the working of the invention as specified in the complete specification are insufficient to enable a person of average skill and knowledge of the art to which the invention relates, to operate or work the invention or where the best method of performing the invention which is known to the applicant is not disclosed;
- where the scope of any claim is not defined properly or based on the matter which has not been disclosed in the specification;
- where a false suggestion or representation was made to obtain the patent;
- where the subject of any claim of the complete specification is not patentable under the Act;
- the invention that is being claimed was secretly used in India before the priority date of the claim;

- where the information required under Section 8 has not been disclosed by the applicant of the patent to the Controller or the information that has been furnished is false to his knowledge;
- where any direction of secrecy passed under Section 35 has been contravened by the applicant or made an application in contravention of Section 39 for the grant of a patent outside India;
- where the permission to amend the complete specification under Section 57 or 58 was obtained by fraud;
- the complete specification does not disclose or mentions the wrong source or geographical origin of biological material used for the invention;
- the invention was anticipated having regard to the knowledge which was available within any local or indigenous community within India or elsewhere.

However, where the invention claimed is not new, obvious or lacks any inventive step, having regard to what was publicly known or used in India or published in India or elsewhere, before the priority date of the claim:

- a personal document, secret trial or secret use shall not be taken into account;
- where the patent is for a process or for a product that is made by a process which is claimed, the importation of the product which is made abroad by that process into India will constitute knowledge or use in India of the invention, on the date of importation. Except where the product has been imported for the purpose of reasonable trial or experiment only.

Furthermore, on a petition of the Central Government, the High Court may revoke a patent if it is satisfied that the patentee has failed to comply with the request of the Central Government, without any reasonable cause to make, use or exercise the invention which has been granted a patent for the Government's purpose, within the meaning of Section 99 of the Act. The petition for revocation of a patent should be notified to all persons mentioned in the register who are proprietors of that patent or have a share or interest in the patent.

Section 65 deals with revocation of patent and amendment of complete specification on directions of the Government in cases relating to atomic energy and section 66 deals with revocation of patents in public interest. Section 65 provides that where at any time after grant of a patent, the Central Government is satisfied that a patent is for an invention relating to atomic energy for which no patent can be granted under sub-section (1) of section 20 of the Atomic Energy Act, 1962, it may direct the Controller to revoke the patent, and thereupon the Controller, after giving notice, to the patentee and every other person whose name has been entered in the register as having an interest in the patent, and after giving them an opportunity of being heard, may revoke the patent. Sub-section 2 empowers the Controller allow the patentee to amend the complete specification in such manner as he considers necessary instead of revoking the patent.

## WORKING OF PATENTED INVENTIONS – GENERAL PRINCIPLES

Section 83 dealing with general principles applicable to working of patented invention provides that in exercising the powers conferred for working of patents and compulsory licences, regard shall be had to the following general considerations, namely:

- a) that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay;
- b) that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article;

It may be noted that Section 2(1) (o) of the Act defines the term patented article and patented process as to mean respectively an article or process in respect of which a patent is in force;

- c) that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations;
- d) that patents granted do not impede protection of public health and nutrition and should act as instrument to promote public interest specially in sectors of vital importance for socio-economic and technological development of India;
- e) that patents granted do not in any way prohibit Central Government in taking measures to protect public health;
- f) that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and the patentee or a person deriving title or interest on patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and
- g) that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.

### COMPULSORY LICENCES

***Compulsory licenses are authorizations given to a third-party by the Controller General to make, use or sell a particular product or use a particular process which has been patented, without the need of the permission of the patent owner. This concept is recognised at both national as well as international levels, with express mention in both (Indian) Patent Act, 1970 and TRIPS Agreement. There are certain pre-requisite conditions, given under sections 84-92, which need to be fulfilled if a compulsory license is to be granted in favour of someone.***

Section 84 provides that at any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent on any of the following grounds, namely:

- a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or
- b) that the patented invention is not available to the public at a reasonably affordable price, or
- c) that the patented invention is not worked in the territory of India.

An application for compulsory licence may be made by any person notwithstanding that he is already the holder of a licence under the patent and no person shall be estopped from alleging that the reasonable requirements of the public with respect to the patented invention are not satisfied or that the patented invention is not worked in the territory of India or that the patented invention is not available to the public at a reasonably affordable price by reason of any admission made by him, whether in such a licence or otherwise or by reason of his having accepted such a licence.

Sub-section (3) requires every application for compulsory licence to contain a statement setting out the nature of the applicant's interest together with such particulars as may be prescribed and the facts upon which the application is based. The Controller on being satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or the patented invention is not worked in the territory of India or the patented invention is not available to the public at a reasonably affordable price, may grant a licence upon such terms as he may deem fit.

In considering the application of compulsory licence, the Controller is required to take into account —

- (i) the nature of the invention, the time which has elapsed since the sealing of the patent and the measures already taken by the patentee or any licensee to make full use of the invention;
- (ii) the ability of the applicant to work the invention to the public advantage;
- (iii) the capacity of the applicant to undertake the risk in providing capital and working the invention, if the application were granted;
- (iv) as to whether the applicant has made efforts to obtain a licence from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period as the Controller may deem fit.

It may be noted that above stated point (i) to (iv) shall not be applicable in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use or on establishment of a ground of anti-competitive practices adopted by the patentee.

However, the Controller is under no obligation to take into account matters subsequent to the making of the application. It has been clarified that the reasonable period shall be construed as a period not ordinarily exceeding a period of six months. In this context, it has been clarified that, the reasonable requirements of the public shall be deemed not to have been satisfied if —

- (a) by reason of the refusal of the patentee to grant a licence or licences on reasonable terms,-
  - (i) an existing trade or industry or the development thereof or the establishment of any new trade or industry in India or the trade or industry in India or the trade or industry of any person or class of persons trading or manufacturing in India is prejudiced; or
  - (ii) the demand for the patented article has not been met to an adequate extent or on reasonable terms; or
  - (iii) a market for export of the patented article manufactured in India is not being supplied or developed; or
  - (iv) the establishment or development of commercial activities in India is prejudiced; or
- (b) by reason of conditions imposed by the patentee upon the grant of licences under the patent or upon the purchase, hire or use of the patented article or process, the manufacture, use or sale of materials not protected by the patent, or the establishment or development of any trade or industry in India, is prejudiced; or
- (c) the patentee imposes a condition upon the grant of licences under the patent to provide exclusive grant back, prevention to challenges to the validity of patent or coercive package licensing; or
- (d) the patented invention is not being worked in the territory of India on a commercial scale to an adequate extent or is not being so worked to the fullest extent that is reasonably practicable; or
- (e) the working of the patented invention in the territory of India on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by —
  - (i) the patentee or persons claiming under him; or
  - (ii) persons directly or indirectly purchasing from him; or
  - (iii) other persons against whom the patentee is not taking or has not taken proceedings for infringement.

### **Revocation of Patents by the Controller for Non-Working**

Section 85 deals with revocation of patents by Controller for non-working and provides that where, in respect of a patent, a compulsory licence has been granted, the Central Government or any person interested may, after the expiration of two years from the date of the order granting the first compulsory licence, apply to the Controller for an order revoking the patent on the ground that the patented invention has not been worked in the territory of India or reasonable requirements of the public with respect to the patented invention has not been satisfied or the patented invention is not available to the public at a reasonably affordable price.

Every application for revocation should contain prescribed particulars, the facts upon which the application is based, and, in the case of an application other than by the Central Government, should also set out the nature of the applicant's interest. The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention has not been satisfied or patented invention has not been worked in the territory of India or is not available to the public at a reasonably affordable price, may make an order revoking the patent. The controller has however been put under obligation to ordinarily decide such application within one year of its presentation.

### **Procedure for Dealing with Applications**

Section 87 provides that where the Controller is satisfied, upon consideration of an application for compulsory licence or revocation of patent, that a prima facie case has been made out for the making of an order, he shall direct the applicant to serve copies of the application upon the patentee and any other person appearing from the register to be interested in the patent in respect of which the application is made, and shall publish the application in the Official Journal.

The patentee or any other person desiring to oppose the application may, within prescribed time or within such further time as the Controller may on application allow, give to the Controller notice of opposition. Any such notice of opposition should contain a statement setting out the grounds on which the application is opposed. Where any such notice of opposition is duly given, the Controller shall notify the applicant, and shall give to the applicant and the opponent an opportunity to be heard before deciding the case.

### **Powers of Controller in granting compulsory licences**

Section 88 provides that where the Controller is satisfied that the manufacture, use or sale of materials not protected by the patent is prejudiced by reason of conditions imposed by the patentee upon the grant of licences under the patent, or upon the purchase, hire or use of the patented article or process, he may order the grant of licences under the patent to such customers of the applicant as he thinks fit as well as to the applicant. Where an application for compulsory licence is made under Section 84 by a person being the holder of a licence under the patent, the Controller may, if he makes an order for the grant of a licence to the applicant, order the existing licence to be cancelled, or may, if he thinks fit, instead of making an order for the grant of a licence to the applicant, order the existing licence to be amended.

Where two or more patents are held by the same patentee and an applicant for a compulsory licence establishes that the reasonable requirements of the public have not been satisfied with respect to only some of the said patents, then, if the Controller is satisfied that the applicant cannot efficiently or satisfactorily work the licence granted to him under those patents without infringing the other patents held by the patentee and if those patents involve important technical advancement or considerable economic significance in relation to the other patents, he may, by order, direct the grant of a licence in respect of the other patents also to enable the licensee to work the patent or patents in regard to which a licence is granted under Section 84.

Where the terms and conditions of a licence have been settled by the Controller, the licensee may, at any time

after he has worked the invention on a commercial scale for a period of not less than twelve months, make an application to the Controller for the revision of the terms and conditions on the ground that the terms and conditions settled have proved to be more onerous than originally expected and that in consequence thereof the licensee is unable to work the invention except at a loss. However no such application shall be entertained a second time by the Controller.

### Termination of compulsory licence

Section 94 provides that on an application made by the patentee or any other person deriving title or interest in the patent, a compulsory licence may be terminated by the Controller, provided the circumstances that give rise to the grant thereof no longer exist and such circumstances are unlikely to recur. In this regard the holder of the compulsory licence has been entitled to object to such termination.

### International Arrangements

Section 133 to 139 deal with international arrangements. Section 133 deals with convention countries; section 134 deals with notification as to countries not providing for reciprocity; section 135 provides for convention applications; section 136 contains special provisions relating to convention applications; section 137 provides for multiple priorities; section 138 deals with supplementary provisions as to convention applications; and section 139 provides for application of other provisions of the Act to convention applications.

In terms of Section 133 a convention country is that country, which is a signatory or party or a group of countries, union of countries or intergovernmental organizations which are signatories or parties to an international, regional or bi-lateral treaty, convention or arrangement to which India is also a signatory or party and which affords to the applicants for patents in India or to citizens of India similar privileges as are granted to their own citizens or citizens to their member countries in respect of the grant of patents and protection of patent rights. Section 134 provides that where any country notified by the Central Government as Convention Country does not accord to citizens of India the same rights in respect of the grant of patents and the protection of patent rights as it accords to its own nationals, no national of such country shall be entitled either solely or jointly with any other person:

- a) to apply for the grant of a patent or be registered as the proprietor of a patent;
- b) to be registered as the assignee of the proprietor of a patent; or
- c) to apply for a licence or hold any licence under a patent granted under the Act.

Section 135(1) provides that where a person has made an application for a patent in respect of an invention in a convention country (basic application) and that person or legal representative or assignee of that person makes an application under the Act for a patent within twelve months after the date on which the basic application was made, the priority date of a claim of the complete specification being a claim based on matter disclosed in the basic application, is the date of making of the basic application.

The explanation to Section 135(1) clarifies that where applications have been made for similar protection in respect of an invention in two or more convention countries, the period of twelve months shall be reckoned from the date on which the earlier or earliest of the said applications was made.

In case of an application filed under the Patent Cooperation Treaty designating India and claiming priority from a previously filed application in India, the provisions of sub-sections (1) and (2) shall apply as if the previously filed application were the basic application. However, a request for examination under section 11B shall be made only for one of the applications filed in India.

Section 136 containing special provisions relating to convention applications requires every convention application to be accompanied by a complete specification; and specify the date on which and the convention country in which the application for protection, or as the case may be, the first of such application was made; and to state that no application for protection in respect of the invention had been made in a convention country before that date by the applicant or by any person from whom he derives title.

A complete specification filed with a convention application may include claims in respect of developments of, or additions to, the invention in respect of which the application for protection was made in a convention country, being developments or additions in respect of which the applicant would be entitled under the provisions of Section 6 to make a separate application for a patent. Sub-section (3) prohibits a convention application to be post-dated to a date later than the date on which the application could have been made under the Act.

Section 138 requires the applicant of a convention application to furnish, in addition to the complete specification, copies of the specifications or corresponding documents filed or deposited by the applicant in the patent office of the convention country and verified to the satisfaction of the Controller within the prescribed period from the date of communication by the Controller. If any such specification or other document is in a foreign language, a translation into English of the specification or document verified by affidavit or otherwise to the satisfaction of the Controller are required to be furnished.

### **Patent Agent**

The work relating to drafting of specifications, making of application for a patent, subsequent correspondence with the Patent office on the objections raised, representing the applicant's case at the hearings, filing opposition and defending application against opposition is entrusted to a qualified Patent Agent. Sections 125-132 of the Patents Act, 1970 read with the Patents Rules deal with the Patent Agents.

### **Patent Office and Its Establishment**

The Controller General of Patents, Designs and Trade Marks appointed under Section 3(1) of the Trade Marks Act, 1999 shall be the Controller of Patents for the purposes of this Act.

For the purposes of Patents Act, there shall be an office which shall be known as the patent office. The Central Government may, by notification in the Official Gazette, specify the name of the Patent Office.

### **Appeals to High Court**

Section 117A(1) states that save as otherwise expressly provided in sub-section (2), no appeal shall lie from any decision, order or direction made or issued under this Act by the Central Government, or from any act or order of the Controller for the purpose of giving effect to any such decision, order or direction.

According to Section 117A (2) an appeal shall lie to the High Court from any decision, order or direction of the Controller of Central Government under section 15, section 16, section 17, section 18, section 19, section 20, sub-section (4) of section 25, section 28, section 51, section 54, section 57, section 60, section 61, section 63, section 66, sub-section (3) of section 69, section 78, sub-sections (1) to (5) of section 84, section 85, section 88, section 91, section 92 and section 94.

Every appeal under this section shall be in the prescribed form and shall be verified in such manner as may be prescribed and shall be accompanied by a copy of the decision, order or direction appealed against and by such fees as may be prescribed.

**LESSON ROUND-UP**

- A Patent is a statutory right for an invention granted for a limited period of time to the patentee by the Government, in exchange of full disclosure of his invention for excluding others, from making, using, selling, importing the patented product or process for producing that product for those purposes without his consent.
- The law relating to patents contained in the Patents Act, 1970 has been amended in the year 1995, 1999, 2002 and 2005 to meet India's obligations under the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) forming part of the Agreement establishing the World Trade Organisation (WTO).
- Invention as to mean a new product or process involving an inventive step and capable of Industrial application.
- Inventive step as to mean a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both that makes the invention not obvious to a person skilled in the art.
- Provisional specification describes the nature of the invention to have the priority date of filing of the application in which the inventive idea has been disclosed. It must be followed by a complete specification describing the details of the invention along with a statement of claims within 12 months after filing of the provisional application. If the complete specification is not filed within the prescribed period, the application is treated as deemed to have been abandoned.
- Generally, an application filed with provisional specification is known as provisional application which is useful in establishing a priority date for your invention. Moreover, filing of a provisional application is useful as it gives sufficient time to the applicant to assess and evaluate the market potential of his invention before filing complete specification. However, it is not necessary to file an application with provisional specification and one can file application directly with complete specification.
- Application for a patent for an invention may be made (a) by any person claiming to be the true and first inventor of the invention;(b) by any person being the assignee of the person claiming to be the true and first inventor in respect of the right to make such an application;(c)by the legal representative of any deceased person who immediately before his death was entitled to make such an application.
- Patents Act deals with opposition to grant of patent and provides that where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the certain grounds.
- The work relating to drafting of specifications, making of application for a patent, subsequent correspondence with the Patent office on the objections raised, representing the applicant's case at the hearings, filing opposition and defending application against opposition is entrusted to a qualified Patent Agent.

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. What is the term of a patent in the Indian system?
2. What are the criteria of patentability?
3. What types of inventions are not patentable in India?
4. Who can apply for a patent?
5. What are the rights of a patentee once the patent is granted?







### KEY CONCEPTS

- Trade Marks ■ Well Known Trade Mark ■ Certification Trade Mark ■ Registered Trade Mark ■ Registered Users
- Assignment ■ Trademark Agent

### Learning Objectives

#### To understand:

- Registrar and Trade Mark Registry
- Application for registration
- Withdrawal of acceptance
- Advertisement of application
- Procedure for and duration of registration of Trade Mark
- Assignment and Transmission of Trade Mark
- Rectification and Correction of the register Collective mark

### Lesson Outline

- Effect of Registration
- Infringement of Trademark
- Passing Off of Trade Mark
- Registered Users
- Registration as Registered User
- Special provisions for Collective Marks
- Infringement of Certification Trade Marks
- Lesson Round-up
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- List of Further Readings
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## REGULATORY FRAMEWORK

- Trade Marks Act, 1999
- Trade Marks Rules, 2017

***Trade Marks Act, 1999 is an Act to amend and consolidate the law relating to trade marks, to provide for registration and better protection of trade marks for goods and services and for the prevention of the use of fraudulent marks. It extends to the whole of India.***

### ***What are the Sources of Trademark Laws?***

- ***The national statutes i.e., the Trade Marks Act, 1999 and rules made thereunder.***
- ***International Multilateral Convention.***
- ***National Bilateral Treaty.***
- ***Regional Treaty.***
- ***Decision/Rulings of the Courts.***
- ***Office Practice reduced in Manuals and Guidelines.***
- ***Text Books written by Academician and Professional Experts.***

## INTRODUCTION

A trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises. Trademarks are protected by intellectual property rights. A trade mark is a visual symbol which may be a word signature, name, device, label, numerals or combination of colours used by one undertaking on goods or services or other articles of commerce to distinguish it from other similar goods or services originating from a different undertaking. Trademark is a symbol that allows a purchaser to identify goods or services that have been proved satisfactory and not to buy goods or services that have not been satisfactory.

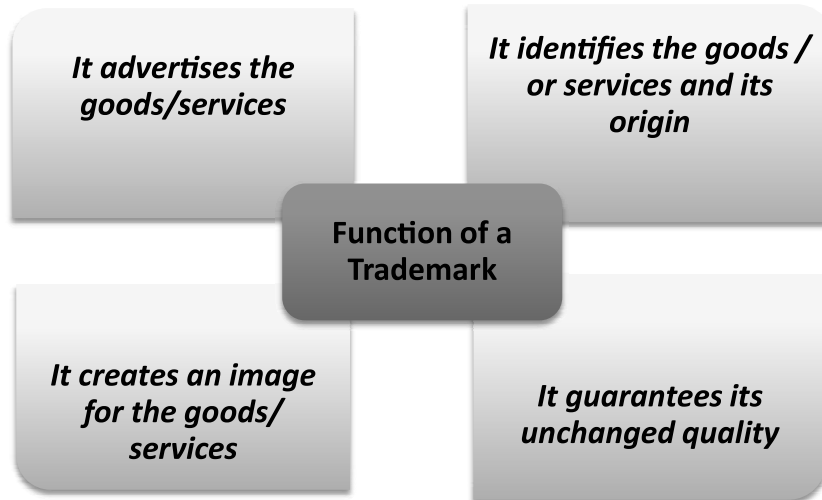
Trademarks help promote economic efficiency. If trademarks are not allowed to be registered with the manufacturers it may eventually take away the incentive of trademark owning manufacturers to make investments in quality control. There would thus be no healthy competition among the manufacturers leading to the loss of vitality of the economy. If we do not have a system of having trademark a manufacturer would get nothing by improving his product's quality. And consumers would not be in a position to identify high or low-quality products. In such a situation a manufacturer who reduce the price by reducing quality may pocket the benefit of the market. The consequence would be attempts to produce inferior quality products rather than competition to produce better-quality products.

In view of developments in trading and commercial practices, increasing globalisation of trade and industry, the need to encourage investment flows and transfer of technology, need for simplification and harmonization of trade mark management systems and to give effect to important judicial decisions, a new Trade Marks Act, 1999 have been enacted to provide for registration of trade mark for goods as well as services including prohibition to the registration of imitation of well-known trademarks, and expansion of grounds for refusal of registration.

A Trade Mark distinguishes the goods of one manufacturer or trader from similar goods of others and therefore, it seeks to protect the interest of the consumer as well as the trader. A trade mark may consist of a device depicting the picture of animals, human beings etc., words, letters, numerals, signatures or any combination

thereof. Since a trade mark indicates relationship in the course of trade, between trader and goods, it serves as a useful medium of advertisement for the goods and their quality.

The current law of Trade Marks contained in the Trade Marks Act, 1999 is in harmony with two major international treaties on the subject, namely The Paris Convention for Protection of Industrial Property and TRIPS Agreement to both of which India is a signatory.



## DEFINITIONS AND INTERPRETATIONS

Following are some of the important terms defined in the Trade Marks Act

### Trade Mark

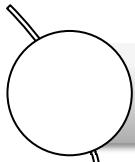
The term trade mark has been defined under Section 2(1)(zb) of the Act as to mean a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and

- (i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and
- (ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark.

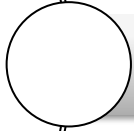
#### ***What is a Trademark?***

***A trademark (popularly known as brand name) in layman's language is a visual symbol which may be a word signature, name, device, label, numerals or combination of colours used by one undertaking on goods or services or other articles of commerce to distinguish it from other similar goods or services originating from a different undertaking.***

The essential requirements to register a trademark under the Act are:



*The selected mark should be capable of being represented graphically (that is in the paper form).*



*It should be capable of distinguishing the goods or services of one undertaking from those of others.*



*It should be used or proposed to be used mark in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services and some person have the right to use the mark with or without identity of that person*

### Certification Trade Mark

Section 2(1)(e) defines the term certification trade mark as to mean a mark capable of distinguishing the goods or services in connection with which it is used in the course of trade which are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics from goods or services not so certified and registerable as such in respect of those goods or services in the name, as proprietor of the certification trade mark, of that person.

### Collective Mark

As per Section 2(1)(g) of the Act, Collective mark means a trade mark distinguishing the goods or services of members of an association of persons (not being a partnership within the meaning of the Indian Partnership Act, 1932) which is the proprietor of the mark from those of others.

### Well Known Trade Mark

In terms of Section 2(1)(zg), a well-known trade mark in relation to any goods or services means a mark which has become so to the substantial segment of the public which uses such goods or services such that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

With coming up of the Trade Mark Rules 2017, a new procedure has been created that allows the Registrar to proclaim a particular trademark as “well known”. According to the new rule, a trademark owner can file an application in form TM-M with a request made to the Registrar for declaring the mark to be “well-known”. A well-known trade mark has been vouchsafed with extraordinary protection and safeguards against passing off and infringement of such trademarks. Well-known trademarks are recognised in India on the basis of their reputation, nationally, internationally and the cross-borders. Unlike other trademarks whose goodwill and reputation is limited to a certain specified geographical area and to a certain range of products, well-known trademarks have its goodwill and reputation protected across the nation and across categories of goods and services. It is law that restricts the Trade Mark Registry to allow and register any mark as a trademark which is deceptively similar to any of the well-known trademark.

For Example: Google has been registered as a well-known trademark of Alphabet Inc., which thereby means only Alphabet Inc. can register the term 'Google' for any category of goods and services. Even if the service is not related to the Internet industry, no other company but Alphabet Inc. can register 'Google' as its trademark.

### Mark

The term mark under Section 2(1)(m) has been defined to include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.

### Assignment

According to Section 2(1)(b) of the Act, assignment means an assignment in writing by act of the parties concerned.

### Deceptively Similar

According to Section 2(1) (h) of the Act a mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion.

### Package

In terms of clause (q) of Section 2(1) the term package include any case, box, container, covering, folder, receptacle, vessel, casket, bottle, wrapper, label, band, ticket, reel, frame, capsule, cap, lid, stopper and cork.

### Permitted Use

Section 2(1)(r) defines the term permitted use, in relation to a registered trade mark, as to mean the use of trade mark-

- (i) by a registered user of the trade mark in relation to goods or services -
  - a) with which he is connected in the course of trade; and
  - b) in respect of which the trade mark remains registered for the time being; and
  - c) for which he is registered as registered user; and
  - d) which complies with any conditions or limitations to which the registration of registered user is subject; or
- (ii) by a person other than the registered proprietor and registered user in relation to goods or services
  - a) with which he is connected in the course of trade; and
  - b) in respect of which the trade mark remains registered for the time being; and
  - c) by consent of such registered proprietor in a written agreement; and
  - d) which complies with any conditions or limitations to which such user is subject and to which the registration of the trade mark is subject.

### Service

The term service under clause (z) of sub-section (1) of Section (2) has been defined as to mean service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising.

### **Who can Apply for a Trademark and How?**

**Any person, claiming to be the proprietor of a trademark used or proposed to be used by him, may apply in writing in prescribed manner for registration. The application should contain the trademark, the goods/services, name and address of applicant and agent (if any) with power of attorney, the period of use of the mark.**

**The applications can be submitted personally at the Front Office Counter of the respective office or can be sent by post. These can also be filed on line through the e-filing gateway available at the official website.**

### **What are different types of Trademarks that may be Registered in India?**

- **Any name (including personal or surname of the applicant or predecessor in business or the signature of the person), which is not unusual for trade to adopt as a mark.**
- **An invented word or any arbitrary dictionary word or words, not being directly descriptive of the character or quality of the goods/service.**
- **Letters or numerals or any combination thereof.**
- **The right to proprietorship of a trademark may be acquired by either registration under the Act or by use in relation to particular goods or service.**
- **Devices, including fancy devices or symbols.**
- **Monograms.**
- **Combination of colors or even a single color in combination with a word or device.**
- **Shape of goods or their packaging.**
- **Marks constituting a three dimensional sign.**
- **Sound marks when represented in conventional notation or described in words by being graphically represented.**

### **Procedure for Registration**

Section 18 deals with the procedure for making an application for registration. Any person claiming to be the Proprietor of a trademark used or proposed to be used by him, who is desirous of registering it, shall apply in writing to the Registrar in the prescribed manner for the registration of his trademark. Sub-section (2) of Section 18 allows registration in several classes of goods or services by means of a single application. However, the fee payable is to be calculated on the basis of the number of classes in which registration is sought.

Section 23 places obligation on the Registrar to register the trade mark where the procedure for registration of a trade mark has been completed viz., the application has been accepted and either the application has not been opposed or the opposition has been dismissed.

### **Processing of TM Application in Trade Mark Registry**

At present processing of Trade Mark application is done completely through TM electronic processing System and filing of application is allowed in hybrid mode, i.e. online as well as offline. Currently online filing has



reached around 98%. Moreover, all applications received offline get digitized at its initial stage and movement of the file is done through complete electronic mode thereafter.

A brief description of stage wise processing in Trade Mark Registration is as follows -

#### **A. Pre-Examination Processing:**

- i. *Filing of application:* A Trade Mark Application may be filed online or offline. After digitization of offline applications, both online and offline applications are merged and proceed further for processing through the Trade Mark system.
- ii. *VIENNA Codification:* If applied mark consists of figurative elements, codification of the figurative elements is done as per VIENNA Agreement and then application moves for examination. Trade Marks applied as word per se directly proceed for examination. It is expected that all applications which may require VIENNA Codification or otherwise should be processed expeditiously and serially as per priority based on the date of filing of application.

#### **B. Examination of Applications:**

It may be noted that allotment of applications for the examination is done by the automated system serially on the basis of the date of filing. Examination in Trade Mark Registration is done in two stages, first examination report is prepared by an Examiner and then the application and examination report is forwarded to Examination Controller for approval. Examination Controller evaluates the examination report, and if found proper, approves it and thereafter the examination report is issued to applicant. However, if some deficiency is noted by the Controller, the examination report is reverted/referred back to the concerned Examiner with suggestions for resubmission/re-examination.

At this stage, application may be accepted or an objection may be raised as per provisions of the Trade Mark Act. In case it is accepted, it will be published in Trade Mark Journal, else examination report will be issued to the applicant containing office objections which needs to be replied by the applicant within 30 days from the date of receipt of examination report.

It is expected that examination should be done expeditiously and serially as per priority based on the date of filing of application or if any compliances are required, expeditiously and serially as per priority based the date of last compliance, if any.

#### **C. Post Examination Processing:**

- i. *Consideration of Reply:* After receipt of examination report, applicant needs to submit his reply to the office objections within one month time and if he fails to do so, the application is abandoned for want of reply.

If reply is submitted within the prescribed period, the same is considered by the authorized officers for the purpose. Here also, the application is allotted to the authorized officers through the Trade Mark system serially on the basis of the date of filing of the response to the examination report. At this stage, the authorized officer may accept application and the same is to be published in the Trade Mark Journal. In other cases, where the office objections cannot be waived or found not met, a hearing opportunity is offered to the applicants in all those cases where a decision can adversely affect the interest of the applicant, a hearing opportunity is given as per law.

It is expected that if reply is submitted against the office objections, the same should be considered by the authorized officers expeditiously and serially as per priority based the date of filing of response to the examination report.

- ii. *Show-cause hearing*: In case the objection/s raised by the office are not met after consideration of reply to the examination report, the application moves for show cause hearing. In show cause hearing, the hearing notices are issued serially to the applicant/ agent through the system and allotment of the cases to the Hearing officers is also done by the TM system automatically.

The scheduling of applications for hearing should also be done serially based on the date of consideration of reply by the authorized officer.

#### **D. Post Advertisement Processing:**

After the acceptance of the mark, trademark is published in Trade Mark Journal. If no opposition is filed within four months from the date of publication of the trademark, the published trademark becomes eligible for registration.

The issuance of registration certificate is done through automated Trade Mark system. The certificate gets automatically issued if no opposition is filed within the prescribed period or where the application has not already been withdrawn by the Registrar of Trade Marks at the request of the applicant.

The Trade Mark once registered is valid for 10 years. The same can be renewed after every 10 years for an indefinite period by paying the prescribed fee on the prescribed form.

#### **E. Opposition:**

If the trademark is opposed by any third party after the publication, the same needs to be disposed of as per rules after giving proper hearing opportunity to both the parties. If the opposition is dismissed, the trade mark proceeds for registration and registration certificate is issued to the applicant. In case opposition is allowed, the application gets refused as per law.

It is expected that if any application is opposed, the same should be disposed serially based on the compliance or non-compliance by the party (i.e. Applicant or Opponent) as per provisions of the Trade Marks Act and Rules.

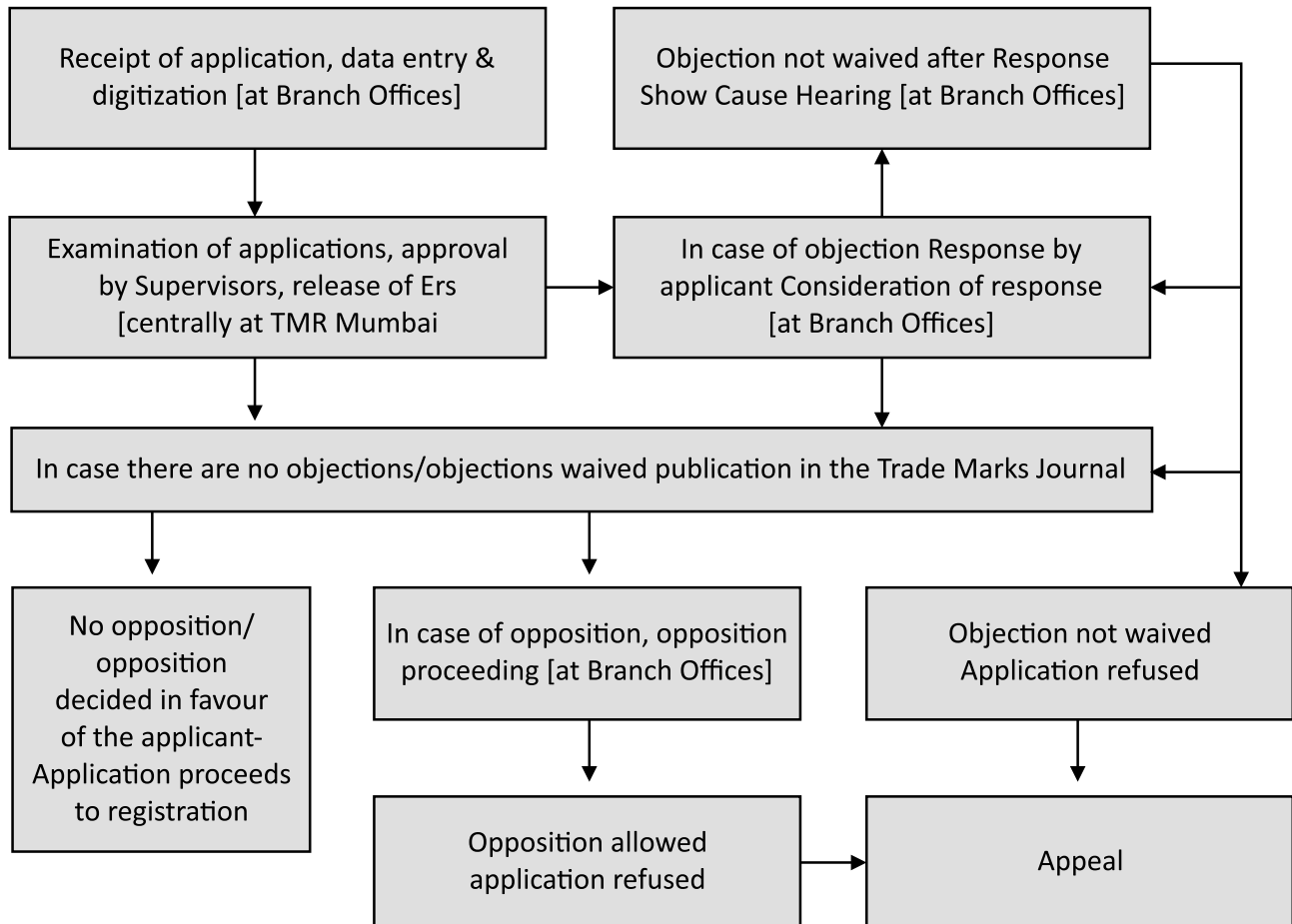
Procedure for disposal of the Rectification proceedings shall be similar to the opposition procedure subject to the provisions of the Trade Marks Act and Rules.

#### **F. Post Registration Trade Mark Management**

It is possible for the registered proprietor to record the post registration changes pertaining to proprietor name, address, address for service, assignment or registered user, etc. in the Register of Trade Marks by filing a request on the prescribed form, with the prescribed fee. In case the concerned officer examining the request raises some objections and requires some compliance on part of the applicant, the same should be processed ordinarily within 30 days from the date of compliance by the applicant. It is also a practice of Registry to send one month notice to previous registered proprietor in case any change in proprietorship by way of assignment or transmission is filed by the applicant. In this case, the request can be processed only after expiry of one month notice period as mentioned above.

It is expected that the post registration request shall be examined and processed serially based on the date of filing of the request and date of compliance of the requirements, if any.

The renewal requests received by the Registry are processed through an automated TM system serially based on the date of filing of the request.

**Trade Mark Registration Workflow Chart**

Source: <https://ipindia.gov.in/workflow-chart.htm>

**What are the Benefits of Registering a Trademark?**

*The registration of a trademark confers upon the owner the exclusive right to the use the trademark in relation to the goods or services in respect of which the mark is registered and to indicate so by using the symbol (R), and seek the relief of infringement in appropriate courts in the country. The exclusive right is however subject to any conditions entered on the register such as limitation of area of use etc. Also, where two or more persons have registered identical or nearly similar marks due to special circumstances, such exclusive right does not operate against each other.*

**Absolute Grounds for Refusal of Registration**

Section 9(1) of the Act containing provisions relating to absolute grounds for refusal for registration prohibit the registration of those trademarks

- (a) which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another person;
- (b) which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service;

- (c) which consist exclusively of marks or indications which have become customary in the current language or in the bona fide and established practices of the trade, shall not be registered: Provided that a trade mark shall not be refused registration if before the date of application for registration it has acquired a distinctive character as a result of the use made of it or is a well-known trade mark.

*In the case of Himalaya Drug Company vs. S.B.L. Ltd. 2013 (53) PTC 1 (Del.) (DB): the Appellant had filed a suit against the Respondent for infringement of trade mark "Liv.52" by use of the trade mark "Liv-T". The lower court dismissed the suit of the Appellants holding that the mark 'LIV' is publici juris and there is no similarity between the two trademarks. 'Liv' will be considered as the generic on account of the fact that it is used in respect of medicine used for treatment of ailment of 'Liver' and non-distinctive part of the mark and it is to be ignored even if the two rival marks are to be taken as a whole.*

*The Plaintiffs filed an appeal before the High Court of Delhi, whereby the High Court reversed the finding of the lower court and upheld the principles of Trade Mark law of comparison and infringement. The court held that the onus of proving that the term 'LIV' has become generic lied heavily on the Defendant, more so in the light of the fact that the Trade Mark of the Plaintiff had voluminous sales, was being used since the year 1955 and was registered since the year 1957 and as seven years had expired from the date of the registration, the Registration of the trade mark the trade mark was taken to be valid as per Section 32 of the erstwhile Trade Marks Act, 1958.*

*The Defendant could not prove by way of its evidence that the word 'LIV' is generic. The Plaintiff on the other hand proved the distinctiveness of its mark by way of its evidence by providing the orders where the mark 'LIV.52' has been granted protection. The court also noted that consumer asked for Plaintiff's product as Liv.52 thus 'LIV' was the essential and prominent feature of the mark 'LIV.52' and restrained the Defendant from using the mark 'LIV-T' and the Court allowed the Defendant to amend its mark accordingly to a mark which will not be similar to the mark of the Plaintiff.*

However, a trademark shall not be refused registration, if the mark has in fact acquired a distinctive character as a result of use or is a well-known trade mark before the date of application. In short, a trade mark which has been demonstrated to be distinctive in the market place shall be regarded as distinctive in law as well and be registerable.

According to Section 9(2) the following trademark shall not be registered:

1. If the trademark tends to deceive the public or cause any confusion;
2. In any instance if the trademark hurts any religious sentiment of any demographic section of Indian citizens;

*In the case of Amritpal Singh vs. Lal Babu Priyadarshi , 2005 (30) PTC 94, Intellectual Property Appellate Board (IPAB) the word RAMAYAN was refused registration on the grounds that: Firstly, it was not capable of distinguishing the goods of the applicant and Secondly, that it was likely to hurt religious sentiments of a class of society.*

*Further, Intellectual Property Appellate Board referred the case Registrar of Trade Marks v. Ashok Chandra Rakhit Ltd., AIR 1955 SC 555 where in the Hon'ble Supreme Court in his order inter alia observed:*

*"(4) It appears that subsequently the Registrar found that the word "Shree" was used by Hindus as an auspicious symbol and placed even on letter heads and that consequently it was not adapted to distinguish within the meaning of the Act. In course of time, therefore, a practice became established in the Registry whereby the word "Shree" was either refused registration as a trade mark or a disclaimer*

*was enforced if it were made a part of a trade mark. So inflexible had been this practice that barring this particular trade mark No. 3815 there was no other trade mark containing the word "Shree" which had been registered without a disclaimer of the word "Shree". Naturally this circumstance was bound to be regarded as an invidious discrimination and, indeed, pointed reference is said to have been made to it and it was suggested that the Registry should deal impartially and uniformly with all applications in matters relating to practice."*

3. It comprises or contains scandalous or obscene matter;
4. Its use is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950.

Section 9(3) prohibits registration of a mark, if it consists exclusively of shape of goods which result from the nature of the goods themselves or which is necessary to obtain a technical result or which gives substantial value to the goods. It is, however, explained that the nature of goods or services in relation to which the Trade Mark is used or proposed to be used shall not be a ground for refusal of registration.

### Limitation as to Colour

Section 10 provides that a trade mark may be limited wholly or in part to any combination of colours and any such limitation shall be taken into consideration by the Registrar or the High Court, as the case may be having to decide on the distinctive character of the trade mark.

So far as a trade mark is registered without limitation of colour, it shall be deemed to be registered for all colours.

### Relative Grounds for Refusal of Registration

Section 11(1) stipulates that a trade mark shall not be registered if, because of—

- (a) its identity with an earlier trade mark and similarity of goods or services covered by the trade mark; or
- (b) its similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the trade mark, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.

Section 11 (2) states that a trade mark which (a) is identical with or similar to an earlier trade mark; and (b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered in the name of a different proprietor, shall not be registered if or to the extent the earlier trade mark is a well-known trade mark in India and the use of the later mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark.

Section 11 (3) provides that a trade mark shall not be registered if, or to the extent that, its use in India is liable to be prevented—

- (a) by virtue of any law in particular the law of passing off protecting an unregistered trade mark used in the course of trade; or
- (b) by virtue of law of copyright.

Section 11(4) states that nothing in this section shall prevent the registration of a trade mark where the proprietor of the earlier trade mark or other earlier right consents to the registration, and in such case the Registrar may register the mark under special circumstances under section 12.

**Earlier Trade Mark means–**

- (a) a registered trade mark or an application under section 18 bearing an earlier date of filing or an international registration referred to in section 36E or convention application referred to in section 154 which has a date of application earlier than that of the trade mark in question, taking account, where appropriate, of the priorities claimed in respect of the trade marks.
- (b) a trade mark which, on the date of the application for registration of the trade mark in question, or where appropriate, of the priority claimed in respect of the application, was entitled to protection as a well-known trade mark.

As per Section 11 (6) of the Act, the Registrar shall, while determining whether a trade mark is a well-known trade mark, take into account any fact which he considers relevant for determining a trade mark as a well-known trade mark including–

- (i) the knowledge or recognition of that trade mark in the relevant section of the public including knowledge in India obtained as a result of promotion of the trade mark;
- (ii) the duration, extent and geographical area of any use of that trade mark;
- (iii) the duration, extent and geographical area of any promotion of the trade mark, including advertising or publicity and presentation, at fairs or exhibition of the goods or services to which the trade mark applies;
- (iv) the duration and geographical area of any registration of or any application for registration of that trade mark under this Act to the extent that they reflect the use or recognition of the trade mark;
- (v) the record of successful enforcement of the rights in that trade mark, in particular the extent to which the trade mark has been recognised as a well-known trade mark by any court or Registrar under that record.

Section 11(7) provides that the Registrar shall, while determining as to whether a trade mark is known or recognised in a relevant section of the public for the purposes of sub-section (6), take into account–

- (i) the number of actual or potential consumers of the goods or services;
- (ii) the number of persons involved in the channels of distribution of the goods or services;
- (iii) the business circles dealing with the goods or services;

to which that trade mark applies.

Where a trade mark has been determined to be well known in at least one relevant section of the public in India by any court or Registrar, the Registrar shall consider that trade mark as a well-known trade mark for registration under this Act.

***The Registrar shall not require as a condition, for determining whether a trade mark is a well-known trade mark, any of the following, namely:–***

- (i) that the trade mark has been used in India;
- (ii) that the trade mark has been registered;
- (iii) that the application for registration of the trade mark has been filed in India;
- (iv) that the trade mark–
  - (a) is well-known in; or

- (b) has been registered in; or
- (c) in respect of which an application for registration has been filed in, any jurisdiction other than India, or
- (v) that the trade mark is well-known to the public at large in India.

**While considering an application for registration of a trade mark and opposition filed in respect thereof, the Registrar shall—**

- (i) protect a well-known trade mark against the identical or similar trademarks;
- (ii) take into consideration the bad faith involved either of the applicant or the opponent affecting the right relating to the trade mark.

Where a trade mark has been registered in good faith disclosing the material information to the Registrar or where right to a trade mark has been acquired through use in good faith before the commencement of this Act, then, nothing in this Act shall prejudice the validity of the registration of that trade mark or right to use that trade mark on the ground that such trade mark is identical with or similar to a well-known trade mark.

*In the case of Imperial Tobacco Co. of India Ltd. vs. The Registrar of Trade Marks Calcutta High Court judgement dated 28 May, 1968, the Imperial Tobacco Company manufactured and distributed cigarettes with a label "simla" all over the country. ITC Ltd. made an application to the Registrar for the registration in the year 1960 and 1966. But both the times the registration application was refused by the registrar. The Calcutta High Court rejected the appeal on the ground that the term "simla" is a famous geographical place. This term cannot be registered as a trademark. The trade mark "Simla" with the label is composite in character. Its essential feature is the word Simla. "Simla" is neither an invented word nor is it a word having a dictionary meaning. It is a well-known hill-station of India. Its geographical signification is, therefore, plain and unequivocal. The snow-clad hills in outline on the label makes the geographical significance inescapable.*

### **Prohibition of Registration of Names of Chemical Elements or International Non-Proprietary Names**

Section 13 states that no word (a) which is the commonly used and accepted name of any single chemical element or any single chemical compound (as distinguished from a mixture) in respect of a chemical substance or preparation, or (b) which is declared by the World Health Organisation and notified in the prescribed manner by the Registrar from time to time, as an international non-proprietary name or which is deceptively similar to such name, shall be registered as a trade mark and any such registration shall be deemed for the purpose of section 57 to be an entry made in the register without sufficient cause or an entry wrongly remaining on the register, as the circumstances may require.

### **Use of Names and Representations of Living Persons or Persons Recently Dead**

Where an application is made for the registration of a trade mark which falsely suggests a connection with any living person, or a person whose death took place within twenty years prior to the date of application for registration of the trade mark, the Registrar may, before he proceeds with the application, require the applicant to furnish him with the consent in writing of such living person or, as the case may be, of the legal representative of the deceased person to the connection appearing on the trade mark, and may refuse to proceed with the application unless the applicant furnishes the Registrar with such consent.

### Withdrawal of Acceptance

Section 19 provides that where, after the acceptance of an application for registration of a trade mark but before its registration, the Registrar is satisfied—

- (a) that the application has been accepted in error; or
- (b) that in the circumstances of the case the trade mark should not be registered or should be registered subject to conditions or limitations or to conditions additional to or different from the conditions or limitations subject to which the application has been accepted, the Registrar may, after hearing the applicant if he so desires, withdraw the acceptance and proceed as if the application had not been accepted.

### Advertisement of Application

According to Section 20, once the Registrar for registration has accepted the application, he shall get the application advertised in the prescribed manner after acceptance. However, the application shall be advertised before acceptance if the application is related to a trademark to which Section 9(1) and Section 11(1) & (2) apply or in any other case as it seems expedient to the Registrar. The purpose of advertisement is to give information to the public at large in respect of the trademark advertised and afford an opportunity to oppose the registration of the mark on given grounds. So the advertisement must be complete in all respects and otherwise the very purpose of advertisement will be frustrated. If there is incomplete or incorrect information in the advertisement, it would amount to misrepresentation, which deprives a prospective opponent of the opportunity to get full information and of filing an effective opposition.

### Registration

Section 23 states that subject to the provisions of section 19, when an application for registration of a trade mark has been accepted and either:-

- (a) the application has not been opposed and the time for notice of opposition has expired; or
- (b) the application has been opposed and the opposition has been decided in favour of the applicant, the Registrar shall, unless the Central Government otherwise directs, register the said trade mark within eighteen months of the filing of the application and the trade mark when registered shall be registered as of the date of the making of the said application and that date shall, subject to the provisions of section 154, be deemed to be the date of registration.

On the registration of a trade mark, the Registrar shall issue to the applicant a certificate in the prescribed form of the registration thereof, sealed with the seal of the Trade Marks Registry.

Where registration of a trade mark is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the Registrar may, after giving notice to the applicant in the prescribed manner, treat the application as abandoned unless it is completed within the time specified in that behalf in the notice.

The Registrar may amend the register or a certificate of registration for the purpose of correcting a clerical error or an obvious mistake.

### Duration, Renewal, Removal and Restoration of Registration

Section 25 of the Act deals with duration, renewal of registration, for removal and restoration of registration. ***It allows registration of a trademark for a period of 10 years.*** In keeping with the generally accepted international practice and to reduce the work-load of the Trade Marks Office, Section 25 allows renewal of



registration for successive periods of 10 years, from the date of the original registration or the last renewal. With a view to facilitate renewal of registration, Section 25(4) provides for restoration of removed trade marks on payment of renewal fee.

***Can a Registered Trademark be Removed from the Register?***

***It can be removed on application to the Registrar on prescribed form on the ground that the mark is wrongly remaining on the register. The Registrar also can suo moto issue Notice for removal of a registered trademark.***

**Infringement of Registered Trade Marks**

***A person shall be deemed to have infringed a registered trade mark, if he uses a mark which is identical with or similar to the registered trade mark, and is used in relation to goods or services which are not similar to those for which trademark is registered; and the registered trade mark has a reputation in India and the use of the mark without due cause would take unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark.***

Section 29 dealing with infringement of trademarks, explicitly enumerates the grounds which constitute infringement of a trademark. Section 29(1) provides that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

As per section 29(2) of the Act, a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of—

- (a) its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark; or
- (b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or
- (c) its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark, is likely to cause confusion on the part of the public, or is likely to have an association with the registered trade mark.

Section 29(3) states that in any case falling under section 29(2)(c), the court shall presume that it is likely to cause confusion on the part of the public.

Section 29(4) provides that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which—

- (a) is identical with or similar to the registered trade mark; and
- (b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and
- (c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

According to Section 29(5) of the Ac, a registered trade mark is infringed by a person if he uses such registered

trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered.

Section 29(6) provides that a person uses a registered mark, if, in particular, he:-

- (a) affixes it to goods or the packaging thereof;
- (b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark;
- (c) imports or exports goods under the mark; or
- (d) uses the registered trade mark on business papers or in advertising.

Section 29(7) states that a registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labeling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.

As per Section 29(8) a registered trade mark is infringed by any advertising of that trade mark if such advertising:-

- (a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or
- (b) is detrimental to its distinctive character; or
- (c) is against the reputation of the trade mark.

Section 29(9) provides that where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly.

In the case of *Renaissance Hotel Holdings Inc. vs. B. Vijaya Sai and Ors. (Civil Appeal No. 404 OF 2022) (Arising out of SLP(C) No. 21428 of 2019) judgement dated 19.01.2022* appeal was filed against the observation of High Court that they did not see any infringement of the Appellant's trade mark "RENAISSANCE" with that of "SAI RENAISSANCE" of Respondents-Defendants. Also, that no evidence of a trans-border reputation for its mark or of any damage to reputation was presented. Therefore, this appeal was presented. Supreme Court held that that High Court has erred in their opinion and that respondents/defendants had infringed on the appellant/trademark plaintiff's "RENAISSANCE".

Hon'ble Supreme Court of India *inter alia* observed that:

*"A perusal of subsection (2) of Section 29 of the said Act would reveal that a registered trade mark would be infringed by a person, who not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of the three eventualities mentioned in clauses (a), (b) and (c), is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark. The first eventuality covered by clause (a) being its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark. The second one covered by clause (b) being its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark. The third eventuality stipulated in clause (c) would be its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark.*

*It is, however, pertinent to note that by virtue of subsection (3) of Section 29 of the said Act, the legislative intent insofar as the eventuality contained in clause (c) is concerned, is clear. Subsection (3) of Section 29 of the said Act provides that in any case falling under clause (c) of subsection (2) of Section 29 of the said Act, the Court shall presume that it is likely to cause confusion on the part of the public. Subsection (4) of Section 29 of the*

*said Act provides that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with or similar to the registered trade mark; and is used in relation to goods or services which are not similar to those for which the trade mark is registered; and the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.*

*Subsection (5) of Section 29 of the said Act provides that a registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered.*

*Subsection (6) of Section 29 of the said Act provides that for the purposes of this section, a person uses a registered mark, if, in particular, he affixes it to goods or the packaging thereof; offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark; imports or exports goods under the mark; or uses the registered trade mark on business papers or in advertising.*

*Subsection (7) of Section 29 of the said Act provides that a registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorized by the proprietor or a licensee.*

*Subsection (8) of Section 29 of the said Act provides that a registered trade mark is infringed by any advertising of that trade mark if such advertising takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or is detrimental to its distinctive character; or is against the reputation of the trade mark.*

*Subsection (9) of Section 29 of the said Act provides that where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly.”*

The legislative scheme is clear that when the mark of the defendant is identical with the registered trade mark of the plaintiff and the goods or services covered are similar to the ones covered by such registered trade mark, it may be necessary to prove that it is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark. Similarly, when the trade mark of the plaintiff is similar to the registered trade mark of the defendant and the goods or services covered by such registered trade mark are identical or similar to the goods or services covered by such registered trade mark, it may again be necessary to establish that it is likely to cause confusion on the part of the public. However, when the trade mark of the defendant is identical with the registered trade mark of the plaintiff and that the goods or services of the defendant are identical with the goods or services covered by registered trade mark, the Court shall presume that it is likely to cause confusion on the part of the public.

It is thus trite law that while interpreting the provisions of a statute, it is necessary that the textual interpretation should be matched with the contextual one. The Act must be looked at as a whole and it must be discovered what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. As already discussed hereinabove, the said Act has been enacted by the legislature taking into consideration the increased

globalization of trade and industry, the need to encourage investment flows and transfer of technology, and the need for simplification and harmonization of trade mark management systems. One of the purposes for which the said Act has been enacted is prohibiting the use of someone else's trade mark as a part of the corporate name or the name of business concern. If the entire scheme of the Act is construed as a whole, it provides for the rights conferred by registration and the right to sue for infringement of the registered trade mark by its proprietor. The legislative scheme as enacted under the said statute elaborately provides for the eventualities in which a proprietor of the registered trade mark can bring an action for infringement of the trade mark and the limits on effect of the registered trade mark. By picking up a part of the provisions in subsection (4) of Section 29 of the said Act and a part of the provision in subsection (1) of Section 30 of the said Act and giving it a textual meaning without considering the context in which the said provisions have to be construed, in our view, would not be permissible. We are at pains to say that the High Court fell in error in doing so.

We are, therefore, of the considered view that the High Court fell in error on various counts. The present case stood squarely covered by the provisions of Section 29(2)(c) read with subsection (3) of Section 29 of the said Act. The present case also stood covered under subsections (5) and (9) of Section 29 of the said Act. The High Court has erred in taking into consideration clause (c) of subsection (4) of Section 29 of the said Act in isolation without noticing other parts of the said subsection (4) of Section 29 of the said Act and the import thereof. The High Court has failed to take into consideration that in order to avail the benefit of Section 30 of the said Act, apart from establishing that the use of the impugned trade mark was not such as to take unfair advantage of or is detrimental to the distinctive character or repute of the trade mark, it is also necessary to establish that such a use is in accordance with the honest practices in industrial or commercial matters. As such, we have no hesitation to hold that the High Court was not justified in interfering with the well-reasoned order of the trial court.

*In the case of Imperial Tobacco Co. of India Ltd. vs. The Registrar of Trade Marks Calcutta High Court judgement dated 28 May, 1968, the Imperial Tobacco Company manufactured and distributed cigarettes with a label "simla" all over the country. ITC Ltd. made an application to the Registrar for the registration in the year 1960 and 1966. But both the times the registration application was refused by the registrar. The Calcutta High Court rejected the appeal on the ground that the term "simla" is a famous geographical place. This term cannot be registered as a trademark. The trade mark "Simla" with the label is composite in character. Its essential feature is the word Simla. "Simla" is neither an invented word nor is it a word having a dictionary meaning. It is a well-known hill-station of India. Its geographical signification is, therefore, plain and unequivocal. The snow-clad hills in outline on the label makes the geographical significance inescapable.*

*A suit was brought against Amul Canada by the Kaira District Cooperative Milk Producers Union Limited (Amul Dairy) and the Gujarat Cooperative Milk Marketing Federation (GCMMF), AMUL's official brand's distributors. The dairy behemoth discovered that the organisation had imitated the trademark "Amul" and the slogan "Amul - The Taste of India" in January 2020. The four people were listed as Amul Canada workers. Amul testified before the court that he never granted Amul Canada or any of the four people permission to utilise their trademarks and copyrights.*

*Canadian Court opined that the defendants had violated and infringed the copyright and trademark. The court awarded CAD 32,733 (around Rs 19.5 lakh) in damages and issued an order prohibiting the defendants from using "Amul" and "Amul-The Taste of India" copyright and trademark.*

The Hon'ble High Court in the above case *Mankind Pharma Limited (Plaintiff) vs. Novakind Bio Sciences Private Limited (Defendant) CS(COMM) 188/2021, I.A. 5700/2021 & I.A. 3248/2023 Judgement dated August 07, 2023*, High Court of Delhi inter alia observed that the little apothecary, oftentimes not even able to flaunt a medical degree, occupying the little cubbyhole at the street corner, dispensing medicines, is an unfortunate reality in this country. The poor, and those who are unable to afford the services of the more upmarket physician, often people these “clinics”. Many of these “doctors” prescribe medicines based on their manufacturer. Again, it is a well known fact that the same drug, when manufactured by different companies, may work differently, and that, at the very least, with different degrees of efficacy. Thus, without meaning either to extol the plaintiff or denigrate the defendant, a physician, or dispensing chemist, who finds drugs manufactured by the plaintiff especially effective, may prefer them, but may get confused into believing the drugs manufactured by the defendant to be those of the plaintiff, owing to the common “KIND” suffix. At the end of the day, the guiding principle is that, where medicines are concerned, even the slightest possibility of confusion cannot be permitted, and that, therefore, drugs – especially prescription drugs – have to be clearly distinguishable from one another.

### Limits on Effect of Registered Trade Mark

Section 30 enumerates certain acts which do not constitute infringement. This section explicitly states that nothing in section 29 shall be construed as preventing the use of a registered trade mark by any person for the purposes of identifying goods or services as those of the proprietor provided the use—

- (a) is in accordance with honest practices in industrial or commercial matters, and
- (b) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trade mark.

Section 30(2) states that a registered trade mark is not infringed where—

- (a) the use in relation to goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services;
- (b) a trade mark is registered subject to any conditions or limitations, the use of the trade mark in any manner in relation to goods to be sold or otherwise traded in, in any place, or in relation to goods to be exported to any market or in relation to services for use or available for acceptance in any place or country outside India or in any other circumstances, to which, having regard to those conditions or limitations, the registration does not extend;
- (c) the use by a person of a trade mark—
  - (i) in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark if, as to those goods or a bulk of which they form part, the registered proprietor or the registered user conforming to the permitted use has applied the trade mark and has not subsequently removed or obliterated it, or has at any time expressly or impliedly consented to the use of the trade mark; or
  - (ii) in relation to services to which the proprietor of such mark or of a registered user conforming to the permitted use has applied the mark, where the purpose and effect of the use of the mark is to indicate, in accordance with the fact, that those services have been performed by the proprietor or a registered user of the mark;
- (d) the use of a trade mark by a person in relation to goods adapted to form part of, or to be accessory to, other goods or services in relation to which the trade mark has been used without infringement of

the right given by registration under this Act or might for the time being be so used, if the use of the trade mark is reasonably necessary in order to indicate that the goods or services are so adapted, and neither the purpose nor the effect of the use of the trade mark is to indicate, otherwise than in accordance with the fact, a connection in the course of trade between any person and the goods or services, as the case may be;

- (e) the use of a registered trade mark, being one of two or more trademarks registered under this Act which are identical or nearly resemble each other, in exercise of the right to the use of that trade mark given by registration under this Act.

*The Madras High Court in Consim Info Pvt. Ltd vs. Google India Pvt. Ltd. 2013 (54) PTC 578 (Mad), relied upon two U.S. Ninth Circuit judgments, to interpret the meaning of the words ‘reasonably necessary’ used in section 30(2)(d) and held that for any unauthorized use of the trademark to be considered a ‘nominative fair use’, it must meet three tests viz., (i) the product or service in question must be one not readily identifiable without use of the trademark; (ii) only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and (iii) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the proprietor of the trademark.*

As per Section 30(3) of the Act, where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringement of a trade mark by reason only of—

- (a) the registered trade mark having been assigned by the registered proprietor to some other person, after the acquisition of those goods; or
- (b) the goods having been put on the market under the registered trade mark by the proprietor or with his consent.

Section 30 (3) shall not apply where there exists legitimate reasons for the proprietor to oppose further dealings in the goods in particular, where the condition of the goods, has been changed or impaired after they have been put on the market.

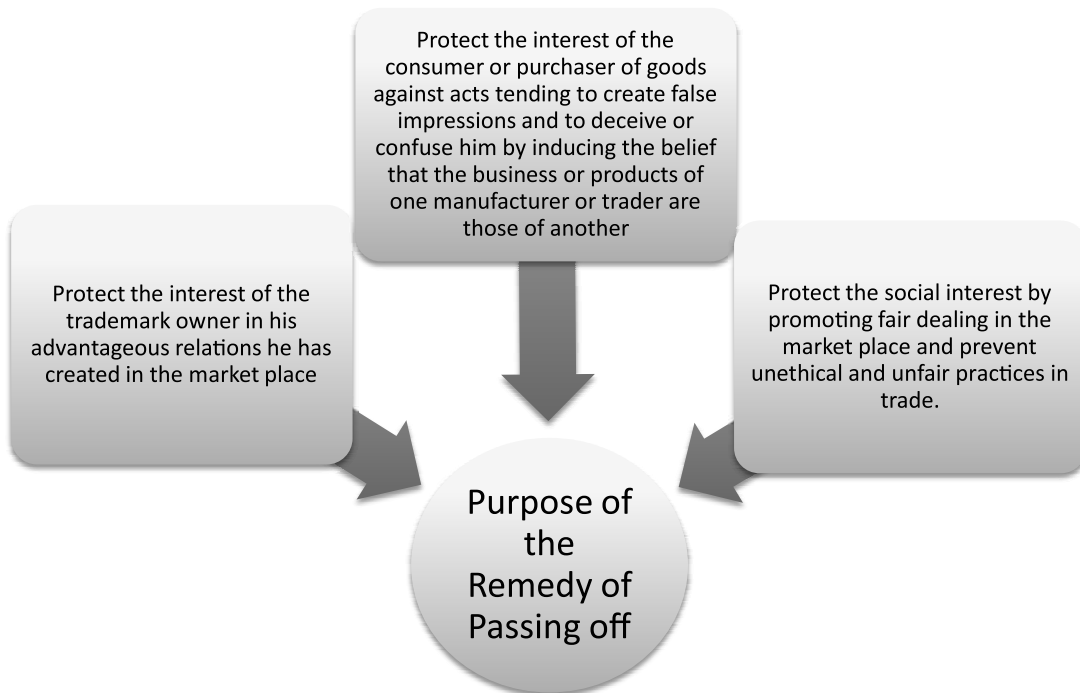
*In the case, Samsung Electronics Company Limited and Ors. vs. Kapil Wadhwa and Ors. (17.02.2012 – Delhi High Court): MIPR 2012 (2) 1: 2012 (49) PTC 571 (Del): 2012(4) R.A.J. 13, the plaintiffs have raised the complaint before this court by preferring a suit for infringement of the trade mark and passing off the mark SAMSUNG. Court held that “Section 30(3) of the Trade Marks Act, 1999 acts as an exception to the infringement of registered trade marks as the head note of Section 30 itself speaks for itself which says limits on the effects of registered trademark and the wordings of Section 30(3) in particular also states that the selling of goods in the market or otherwise dealing in those goods is not an infringement of trademark. The said exception operates in the nature of defence to an infringement wherein the person using the mark in a particular form or dealing otherwise in the goods under the mark can plead that the said goods are lawfully acquired from the market wherein the proprietor has also put the goods in the market or the proprietor has given consent to the effect of such dealings or usage. The provision relating to exhaustion or proprietor’s consent is a complete defence to an infringement act. Therefore, the nature and the scope of Section 30(3) is that it operates as a defence to the infringing act and cannot be said to giving any additional right beyond the same.”*



**PASSING OFF**

*Black's Law Dictionary defines passing off as "the act or an instance falsely representing one's own product as that of another in an attempt to deceive potential buyers. Passing off is actionable in tort under the law of unfair competition. It may be actionable as trademark infringement".*

With the tremendous growth in trade and commerce, the competitors or other traders tend to imitate the well-known or reputed trademarks by imitating colour scheme or get up or packaging with a view to pass off such goods as goods of the genuine owner. In cases of registered trademarks, the owner can move the court under this Act for the infringement whereas in cases of the unregistered trademarks, the Act recognizes the Common Law remedy of passing off. The tort of passing off is based upon the principle that "no man is entitled to represent his goods as being the goods of another man; and no man is required to use any mark, sign or symbol, device or means, whereby without making a direct representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate purchaser."



The plaintiff, in an action of passing off, has to establish that his business or goods has acquired the reputation and that his mark has become distinctive of his goods among the public at large. He has to establish that there is likely hood of deception or confusion in the minds of the public. He, however, does not have to establish the fraudulent intention on the part of the defendant. Thirdly, he has to establish that confusion is likely to cause damage or injury to the reputation, goodwill and fair name of the plaintiff. He need not prove the actual loss or damage in an action of passing off.

*In the case of Mahendra and Mahendra Paper Mills Ltd. vs. Mahindra and Mahindra Ltd. [AIR 2002 SC 117] Supreme Court broadly stated, in an action for passing off on the basis of unregistered trade mark generally for deciding the question of deceptive similarity the following factors are to be considered—*

- *The nature of the marks i.e. whether the marks are word marks or labels marks or composite marks i.e. both words and label works.*

- *The degree of resemblance between the marks, phonetically similar and hence similar in idea.*
- *The nature of the goods in respect of which they are used as trademarks.*
- *The similarity in nature, character and performance of the goods of the rival traders.*
- *Class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and /or using the goods.*
- *The mode of purchasing the goods or placing orders for the goods.*
- *Any other surrounding circumstances which may be relevant in the extant of dissimilarity between the competing marks.*

*Weightage to be given to each of the aforesaid factors depending upon facts of each case and the same weightage cannot be given to each factor in every case.*

### **Registration to be Prima Facie Evidence of Validity**

Section 31 of the Act stipulates that in all legal proceedings relating to trade mark registered under the Act, the original registration and all subsequent assignments and transmission thereof shall be prima facie evidence of its validity. However, as per Section 34 the proprietor or a registered user of a registered trademark is not entitled to interfere with or restrain the use by any person of a trademark identical with or nearly resembling it in relation to goods or services in relation to which that person or a predecessor in title of his has continuously used that trade mark from a prior date.

Therefore, in case of unregistered marks, the owner of the trade mark may lodge a case against passing off action in case his trademark is used by some other person. It has been held by the courts in various cases and the ownership of a trademark is decided by its usage in commercial transactions.

*The Supreme Court in Uniply Industries Ltd. vs. Unicorn Plywood Pvt. Ltd. and Others observed that:*

- (i) for inherently distinctive marks ownership is governed by priority of use for such marks. The first user of sale of goods/services is the owner who is senior to others.*
- (ii) These marks are given legal protection against infringement immediately upon adoption and use in trade.*
- (iii) Some courts indicate that even prior sales of goods – though small in size with the mark – are sufficient to establish priority, the test being to determine continuous prior user and the volume of sale or the degree of familiarity of the public with the mark.*

*Therefore, the proprietorship of the trademark is decided by the date of usage of the mark by a person in business transactions.*

### **Assignment and Transmission**

Section 37 entitles the registered proprietor of a trademark to assign the trade mark and to give effectual receipts for any consideration for such assignment. Section 38 deals with the assignability and transmissibility of a registered trade mark with or without goodwill of the business either in respect of all goods or services or part thereof. Section 39 provides that unregistered trade mark may be assigned or transmitted with or without the goodwill of the business concerned.



Section 40 contains restriction on assignments or transmissions of trade mark where multiple exclusive rights would be created in more than one person in relation to same goods or services; same description of goods or services; goods or services or description of goods or services which are associated with each other, which would be likely to deceive or cause confusion. Nevertheless, such assignment is not deemed to be invalid, if having regard to the limitations imposed, the goods are to be sold in different markets - either within India or through exports.

Section 42 stipulates conditions for assignment of a trade mark without goodwill of business. Such an assignment shall not take effect unless the assignor obtains directions of the Registrar and advertises the assignment in accordance with the directions of the Registrar and as per the prescribed manner.

Section 43 deals with the assignability and transmissibility of certification trade marks and provides that the assignment of certification trade mark can only be done only with the consent of the Registrar. Section 44 states that associated trademarks shall be assignable and transmissible only as a whole but they will be treated as separate trade marks for all other purposes. Section 45 deals with the procedure for registration of assignment and transmission and provides that where the validity of an assignment is in dispute between the parties, the Registrar may refuse to register the assignment or transmission unless the rights of parties are determined by the competent court.

### **Proposed Use of Trade Mark by Company to be Formed**

Section 46 empowers the Registrar to allow registration of a trademark, if he is satisfied that—

- (i) a company is about to be formed and registered under the Companies Act and that the applicant intends to assign the trademark to that company with a view to use thereof in relation to those goods and services by the company; or
- (ii) the proprietor intends it to be used by a person, as a registered user after the registration of trademark.

### **Removal of Trade Mark for Non-use**

Section 47 deals with removal of a trade mark from the register on the ground of non-use and provides that a trade mark which is not used within five years of its registration, becomes liable for removal either completely or in respect of those goods or services for which the mark has not been used. The five years period starts from the date on which the trade mark is actually entered on the register. However, Section 47(3) protects a mark from being removed from the register on ground of non-use if such non-use is shown to have been due to special circumstances in the trade which may include restriction imposed by any law or regulation on the use of trade mark in India.

### **Registered User**

Section 48 deals with registered users. Section 49 provides for registration as registered user. Section 50 deals with the power of the Registrar to vary or cancel registration as registered user on the ground that the registered user has used the trade mark otherwise than in accordance with the agreement or in such a way as to cause or likely to cause confusion, or deception or the proprietor/registered user misrepresented or has failed to disclose any material facts for such registration or the stipulation in the agreement regarding the quality of goods is not enforced or the circumstances have changed since the date of registration, etc. However, Registrar has been put under obligation to give reasonable opportunity of hearing before cancellation of registration.

In view of the simplification of the procedure for registration of registered user and to ascertain whether the registered user agreement is in force, Section 51 empowers the Registrar to require the proprietor to confirm at any time during the continuation of registration as registered user, whether the agreement, on the basis of

which registered user was registered is still in force, and if such confirmation is not received within a period of one month, the Registrar shall remove the entry thereof from the Register in the prescribed manner. Section 52 recognises the right of registered user to take proceedings against infringement. Section 54 provides that the registered user will not have a right of assignment or transmission. However, it is clarified that where an individual registered user enters into partnership or remains in a reconstituted firm, the use of the mark by the firm would not amount to assignment or transmission.

#### **Collective Marks**

***Collective Marks means a trades mark distinguish the goods or services of members of an association of person not being a partnership within the meaning of the Indian Partnership Act, 1932 which is the proprietor of the mark from those of others.***

Sections 61 to 68 contain provisions relating to the registration of Collective trade marks. These sections provide for registration of a collective mark which belongs to a group or association of persons and the use thereof is reserved for members of the group or association of persons. Collective marks serve to distinguish characteristic features of the products or services offered by those enterprises. It may be owned by an association which may not use the collective mark but whose members may use the same. The association ensures compliance of certain quality standards by its members, who may use the collective mark if they comply with the prescribed requirements concerning its use. The primary function of a collective mark is to indicate a trade connection with the Association or Organisation.

#### **Certification Trade Marks**

***Certification trade mark as to mean a mark capable of distinguishing the goods or services in connection with which it is used in the course of trade which are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics from goods or services not so certified and registerable as such in respect of those goods or services in the name, as proprietor of the certification trade mark, of that person.***

Sections 69 to 78 deal with registration of certification trade mark. The purpose of certification trade mark is to show that the goods on which the mark is used have been certified by some competent person in respect of certain characteristics of the goods such as origin, mode of manufacture, quality, etc. The proprietor of a certification trade mark does not himself deal in the goods. A certification trade mark may be used in addition to the users own trade mark on his goods. Central Government empower the final authority for registration of certification trade mark to the Registrar.

### **Appointment of Registrar and Trade Mark Registry**

Section 3 provides for appointment of the Registrar and other officers and Section 4 empowers the Registrar to withdraw any matter pending before an officer and deal with such matter himself or transfer it to another officer with reasons for such transfer to be recorded therein. Section 5 deals with the establishment of the Trade Marks Registry and branch offices and provides that the Trade Marks Registry established under the Trade and Merchandise Marks Act, 1958 shall continue to be the Trade Marks Registry for the purposes of this Act.

### **Register of Trade Marks**

Section 6 contains provisions relating to maintenance of a single Register of Trade Marks at Head Office including therein particulars of registered trademarks and other prescribed particulars, except notice of trust. A copy of the Register is to be kept at each branch office. Sub-section (2) allows the maintenance of records in computer floppies or diskettes or in any other electronic form subject to the prescribed safeguards.

**What does the Register of Trademark Contain?**

*The register of trademark currently maintained in electronic form contains inter alia the trademark the class and goods/ services in respect of which it is registered including particulars affecting the scope of registration of rights conferred; the address of the proprietors; particulars of trade or other description of the proprietor; the convention application date (if applicable); where a trademark has been registered with the consent of proprietor of an earlier mark or earlier rights, that fact.*

**Classification of Goods and Services and Publication of Index**

Section 7 empowers the Registrar to classify goods and services according to international classification of goods and services and to determine any question related thereto. Section 8 requires the Registrar to publish an alphabetical index of classification of goods and services.

According to Rule 20 of the Trade Marks Rules, 2017, classification of goods and service for the purpose of registration of trademark, the goods and services shall be classified as per current edition of “the International Classification of goods and services (NICE classification)” published by the World Intellectual Property Organization (WIPO). The Registrar shall publish a class wise and an alphabetical index of such goods and services, including goods and services of Indian origin.

**Trade Mark Agent**

Section 145 deals with agents and provide that Where, by or under the Trade Marks Act, any act, other than the making of an affidavit, is required to be done before the Registrar by any person, the act may, subject to the rules made in this behalf, be done instead of by that person himself, by a person duly authorised in the prescribed manner, who is—

- (a) a legal practitioner, or
- (b) a person registered in the prescribed manner as a trade marks agent, or
- (c) a person in the sole and regular employment of the principal.

**Qualifications for Registration**

Rule 144 of the Trade Marks Rule states that subject to the provisions of Rule 145, a person shall be qualified to be registered as a trademarks agent if he—

- (i) is a citizen of India,
- (ii) is not less than 21 years of age;
- (iii) is a graduate of any university in India or possesses an equivalent qualification and has passed the examination prescribed in rule 148 or is an Advocate within the meaning of the Advocates Act, 1961 or is a member of the Institute of Company Secretaries of India;
- (iv) is considered by the Registrar as a fit and proper person to be registered as a trademark agent.

**Manner of Making Application for Trademarks Agent**

All applications under the provisions of Part IV of the Trade Marks Rules, 2017 shall be made in duplicate and shall be sent to or submitted at that office of the Trade Marks Registry within whose territorial limits the principal place of business of the applicant is situate.

### Application for Registration as a Trademarks Agent

Every person desiring to be registered as a trademarks agent shall make an application in Form TM-G. The applicant shall furnish such further information bearing on his application as may be required of him at any time by the Registrar.

#### LESSON ROUND-UP

- Trade Mark distinguishes the goods of one manufacturer or trader from similar goods of others and therefore, it seeks to protect the interest of the consumer as well as the trader. A trade mark may consist of a device depicting the picture of animals, human beings etc., words, letters, numerals, signatures or any combination thereof.
- The Trade Marks Act, 1999 and the Trade Marks Rules, 2017 govern the law relating to Trade Marks in India.
- Object of trademark law is to permit an enterprise by registering its trademark to obtain an exclusive right to use, share, or assign a mark. Closely related to trademarks are service marks which distinguish the services of an enterprise from the services of other enterprise.
- Mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.
- A trade mark performs four functions: It identifies the goods/or services and its origin; It guarantees its unchanged quality; It advertises the goods/services; It creates an image for the goods/ services.
- A well-known trade mark in relation to any goods or services means a mark which has become so to the substantial segment of the public which uses such goods or services such that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services. When a registered trade mark is used by a person who is not entitled to use such a trade mark under the law, it constitutes infringement.
- A person shall be deemed to have infringed a registered trade mark, if he uses a mark which is identical with or similar to the registered trade mark, and is used in relation to goods or services which are not similar to those for which trademark is registered; and the registered trade mark has a reputation in India and the use of the mark without due cause would take unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark.
- There will be no infringement of trade mark, if the use of a mark is in accordance with honest practices in industrial or commercial matters and is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of a trade mark.
- The registered proprietor of a trademark to assign the trade mark and to give effectual receipts for any consideration for such assignment.
- A trade mark which is not used within five years of its registration becomes liable for removal either completely or in respect of those goods or services for which the mark has not been used.





### KEY CONCEPTS

■ Copyright ■ Artistic Work ■ Author ■ Licence ■ Broadcast ■ Performance ■ Copyright Society

### Learning Objectives

#### To understand:

- Meaning of Copyright
- Commercial Rental
- Term of Copyright
- Assignment of Copyright
- Mode of Assignment
- International Copyright
- Registration of Copyright
- Infringement of Copyright
- Statutory Exception
- Remedies against Infringement
- Offences and Penalty

### Lesson Outline

- Meaning of Copyright
- Works in which Copyright Subsists
- Registration of Copyright
- Ownership of Copyright
- Assignment of Copyright
- Term of Copyright
- Licenses by owners of Copyright
- Copyright Society
- Infringement of Copyrights
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- The Copyright Act, 1957
- The Copyright Rules, 2013

The Copyright Act, 1957 protects original literary, dramatic, musical and artistic works and cinematograph films and sound recordings from unauthorized uses. Under Article 9.2 of the TRIPS Agreements, copyright protects the expressions and not the ideas. There is no copyright protection for ideas, procedures, and methods of operation or mathematical concepts as such.

## INTRODUCTION

Copyright is a well recognised form of property right which had its roots in the common law system and subsequently came to be governed by the national laws in each country. Copyright as the name suggests arose as an exclusive right of the author to copy the literature produced by him and stop others from doing so. There are well-known instances of legal intervention to punish a person for copying literary or aesthetic output of another even before the concept of copyright took shape. The concept of idea was originally concerned with the field of literature and arts. In view of technological advancements in recent times, copyright protection has been expanded considerably. Today, copyright law has extended protection not only to literary, dramatic, musical and artistic works but also sound recordings, films, broadcasts, cable programmes and typographical arrangements of publications. Computer programs have also been brought within the purview of copyright law.

Copyright deals with the rights of intellectual creators in their creation. The copyright law deals with the particular forms of creativity, concerned primarily with mass communication. It is also concerned with virtually all forms and methods of public communication, not only printed publications but also with such matters as sound, and television broadcasting, films for public exhibition etc. and even computerised systems for the storage and retrieval of information.

In India, the law relating to copyright is governed by the Copyright Act, 1957 which has been amended in 1983, 1984, 1985, 1991, 1992, 1994, 1999 and 2012 and 2021. The copyright law aims to endorse exclusive forms of artistic works at the same time safeguarding the rights of its inventor. The scope of the law extends as far as literary, music, software, graphics, choreography, movies and likewise is concerned. These categories are further sub-categorised into books, documentaries, painting, articles and likewise, which aim in promoting work and not ideas. It is to be noted that the work of the creator is protected by the copyright law irrespective of its content or quality. Although the registration of the work is not a mandate, nevertheless it is always advisable to register the work the moment it is put to force.

### ***What is Copyright?***

***Copyright (or author's right) is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.***

The object of copyright is to protect and reward the general advantages i.e. the authors' labour on the created work. This helps the writers to constantly produce and carry out more plays. It is important to note that in a given work, copyright law protects the "type of material communication," not the individual concepts, ideas, techniques or details. That is the reason why work has to be set in a physical form to be covered by copyright. A few examples of works being tangibly set to include stories written on paper and initial canvas paintings. The forms of work protected by copyright laws include, among other items, song lyrics, books, playbacks, images, computer programs, and emails. Though, you can't copyright stuff like ideas, titles, names, details etc. Publishing is important for businesses because it only gives the author of the work exclusive rights to replicate



their works, create derivative works, distribute and sell any copies of the work, show and publicly perform copyrighted works. You may grant certain rights as a package or separately. This also helps owners to produce income if any other individual opts for reproducing the job.

**Why should Copyright be Protected?**

**Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity. Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same. Economic and social development of a society is dependent on creativity. The protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to create more and motivates others to create.**

**The Copyright Act provides an economic right to the author to reproduce the work, to issue copies, to perform or communicate it to the public, to make any cinematograph film or sound recording or to make any adaptation or translation of the work. The Act also provides a right to claim authorship of the work; an integrity right- right to protect one's honor and reputation and a general right- right to not have a work falsely attributed to oneself. These moral rights remain with the author even after assignment of the copyright.**

It may be noted that:

“Adaptation” means,-

- (i) in relation to a dramatic work, the conversion of the work into a non-dramatic work;
- (ii) in relation to a literary work or an artistic work, the conversion of the work into a dramatic work by way of performance in public or otherwise;
- (iii) in relation to a literary or dramatic work, any abridgement of the work or any version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical;
- (iv) in relation to a musical work, any arrangement or transcription of the work; and
- (v) in relation to any work, any use of such work involving its re-arrangement or alteration.

“Communication to the public” means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available. However, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.

“Sound recording” means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced.

“Author” means,-

- (i) in relation to a literary or dramatic work, the author of the work;
- (ii) in relation to a musical work, the composer;

- (iii) in relation to an artistic work other than a photograph, the artist;
- (iv) in relation to a photograph, the person taking the photograph;
- (v) in relation to a cinematograph or sound recording the producer; and
- (vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;

### Works in which Copyright Subsists

Section 13(1) of the Act provides that copyright shall subsist throughout India in the following classes of works, that is to say,—

- (a) original literary, dramatic, musical and artistic works;
- (b) cinematograph films; and
- (c) sound recording.

Section 13 (2) states that copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of Section 40 (*deals with power to extend copyright to foreign works*) or section 41 (*deals with provisions as to works of certain international organisations*) apply, unless—

- (i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;
- (ii) in the case of an unpublished work other than a work of architecture, the author is at the date of making of the work a citizen of India or domiciled in India; and
- (iii) in the case of a work of architecture the work is located in India.

It may be noted that in the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

According to Section 13 (3) Copyright shall not subsist—

- (a) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;
- (b) in any sound recording made in respect of a literary, dramatic or musical work, if in making the sound recording, copyright in such work has been infringed.

The copyright in a cinematograph film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or, as the case may be, the sound recording is made.

In the case of a work of architecture, copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction.

It may be noted that 'work' means any of the following works, namely:-

- a literary, dramatic, musical or artistic work;
- a cinematograph film;
- a sound recording.

**MEANING OF COPYRIGHT**

Copyright is an intellectual property right that law gives to a creator of literary, dramatic, musical, and artistic work and a producer of cinematograph films and sound recordings. It also applies to architectural works and computer program/software. It can be understood as a bundle of rights that include the right of reproduction, communication, adaptation, and translation of the work. Copyright ensures protection to the rights of authors over their creations and in turn aims at rewarding creativity.

<b>Section 14 of the Act defines the term Copyright as to mean the exclusive right to do or authorise the doing of the following acts in respect of a work or any substantial part thereof, namely:</b>		
(a) Copyright in the case of a Literary, Dramatic or Musical Work, not being a Computer Programme	→	<ul style="list-style-type: none"> <li>(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;</li> <li>(ii) to issue copies of the work to the public not being copies already in circulation;</li> <li>(iii) to perform the work in public, or communicate it to the public;</li> <li>(iv) to make any cinematograph film or sound recording in respect of the work;</li> <li>(v) to make any translation of the work;</li> <li>(vi) to make any adaptation of the work;</li> <li>(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi).</li> </ul>
(b) Copyright in the case of a Computer Programme	→	<ul style="list-style-type: none"> <li>(i) to do any of the acts specified in specified in respect of a literary, dramatic or musical work;</li> <li>(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programmer:</li> </ul> <p>Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.</p>
(c) Copyright in the case of an Artistic Work	→	<p>To reproduce the work in any material form including—</p> <ul style="list-style-type: none"> <li>(A) the storing of it in any medium by electronic or other means; or</li> <li>(B) depiction in three-dimensions of a two-dimensional work; or</li> <li>(C) depiction in two-dimensions of a three-dimensional work.</li> </ul>

(d) Copyright in the case of a Cinematograph Film	→	<p>(i) to make a copy of the film, including—</p> <p style="padding-left: 20px;">(A) a photograph of any image forming part thereof; or</p> <p style="padding-left: 20px;">(B) storing of it in any medium by electronic or other means.</p> <p>(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the film.</p> <p>(iii) to communicate the film to the public.</p>
(e) Copyright in the case of a Sound Recording	→	<p>(i) to make any other sound recording embodying it including storing of it in any medium by electronic or other means;</p> <p>(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;</p> <p>(iii) to communicate the sound recording to the public.</p> <p>It may be noted that a copy which has been sold once shall be deemed to be a copy already in circulation.</p>

It may be noted that “commercial rental” does not include the rental, lease or lending of a lawfully acquired copy of a computer programme, sound recording, visual recording or cinematograph film for non-profit purposes by a non-profit library or non-profit educational institution.

However, a “non-profit library or nonprofit educational institution” means a library or educational institution which receives grants from the Government or exempted from payment of tax under the Income-Tax Act, 1961.

***In the case of Gramophone Company of India Ltd. vs. Super Cassette Industries Ltd. R.A.J. 433: 2010 (44) PTC 541 (Del) - Infringement of original literary, dramatic and musical works. Whether action of the Defendant in using its sound recording to produce a cinematograph film constitutes infringement of the Plaintiffs copyright in the original literary, dramatic and musical works. Copyright conferred on the owner of a copyright in a sound recording by virtue of Section 14(e) does not specifically include the right to make a cinematograph film embodying the sound recording. It gives the owner exclusive right to make any other sound recording embodying it. Right to utilise the literary, dramatic or musical work to make a cinematograph film is specifically conferred on the owner of the copyright in the literary, dramatic or musical work by virtue of Section 14(a)(iv) of the Act. Without the specific permission of the owners of the copyright in the musical, dramatic, or literary works from which the sound recording was made, the owner of the copyright in a sound recording cannot proceed with incorporating the sound recording or version recording in a cinematograph film.***

## TERM OF COPYRIGHT

Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity. Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same. Economic and social development of a society is dependent on creativity. The protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to create more and motivates others to create.

**Sections 22-29 deal with Term of Copyright in respect of Published Literary, Dramatic, Musical and Artistic Works; Anonymous and Pseudonymous; Posthumous, Photographs, Cinematograph Films, Sound Recording, Government Works, Works of PSUs and Works of International Organisations.**

<b>Term of Copyright</b>		<b>Number of Years</b>
<b>Term of Copyright in Published Literary, Dramatic, Musical and Artistic Works</b>	→	<p>Copyright shall subsist in any literary, dramatic, musical or artistic work published within the lifetime of the author until sixty years from the beginning of the calendar year next following the year in which the author dies.</p> <p>In the case of a work of joint authorship, be construed as a reference to the author who dies last.</p>
<b>Term of Copyright in Anonymous and Pseudonymous Works</b>	→	<p>In the case of literary, dramatic, musical or artistic work (other than a photograph), which is published anonymously or pseudonymously, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the work is first published.</p> <p>Provided that where the identity of the author is disclosed before the expiry of the said period, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the author dies.</p>
<b>Term of Copyright in Posthumous Work</b>		<p>In the case of a literary, dramatic or musical work or an engraving, in which copyright subsists at the date of the death of the author or, in the case of any such work of joint authorship, at or immediately before the date of the death of the author who dies last, but which, or any adaptation of which, has not been published before that date, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the work is first published or, where an adaptation of the work is published in any earlier year, from the beginning of the calendar year next following that year.</p> <p>A literary, dramatic or musical work or an adaptation of any such work shall be deemed to have been published, if it has been performed in public or if any sound recordings made in respect of the work have been sold to the public or have been offered for sale to the public.</p>
<b>Term of Copyright in Cinematograph Films</b>	→	<p>In the case of a cinematograph film, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the film is published.</p>
<b>Term of Copyright in Sound Recording</b>	→	<p>In the case a sound recording copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the sound recording is published.</p>

<b>Term of Copyright Government Works</b>	→	In the case of Government work, where Government is the first owner of the copyright therein, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the work is first published.
<b>Term of Copyright in Works Of Public Undertakings</b>	→	In the case of a work, where a public undertaking is the first owner of the copyright therein, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the work is first published.
<b>Term of Copyright in Works of International Organizations</b>	→	In the case of a work of an international organisation to which the provisions of section 41 apply, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the work is first published.

It may be noted that:

The © symbol stands for copyright.

### ASSIGNMENT OF COPYRIGHT

Section 18 of the Copyright Act provides that the owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof.

However, in case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence. No such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work.

However, the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copy right society for collection and distribution and any agreement to contrary shall be void.

The author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void. It may be noted that assignee in respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.

***In Video Master vs. Nishi Production 1998(3) Bom. CR 782, judgement dated 21 October, 1997, Hon'ble Bombay High Court considered the issue whether assignment of video rights would include the right of satellite broadcast as well. The Court agreed with the defendant's arguments that there were several public communication channels, including video TV, satellite broadcasting, and terrestrial television broadcasting. The film's owner owned independent copyright in each of those formats, and he could assign it to various people. As a result, the video copyright granted to the plaintiff would exclude the satellite broadcast copyright of the film, which was a separate entitlement of the owner of the film.***

### Mode of Assignment

Section 19 of the Act provides that an assignment of the copyright in any work should be in writing signed by the assignor or by his duly authorised agent. The assignment of copyright in any work required to identify such work, and also specify the rights assigned; the duration; territorial extent of such assignment; the amount of royalty and any other consideration payable to the author or his legal heirs during the currency of the assignment and the assignment subject to revision, extension or termination on terms mutually agreed upon by the parties.

Where the assignee does not exercise the rights assigned to him under any of the other sub-sections of this section within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment.

The assignment of copyright in any work contrary to the terms and conditions of the rights already assigned to a copyright society in which the author of the work is a member is void. The Assignment of copyright in any work to make a cinematograph film does not affect the right of the author of the work to claim an equal share of royalties and consideration payable in case of utilization of the work in any form other than for the communication to the public of the work, along with the cinematograph film in a cinema hall.

*In the case of K.A. Venugopala Setty vs. Dr. Suryakanta V. Kamath 1992 (12) PTC 55 (DB) (Kar) Assignment setup by the defendant is an oral assignment. Under the provisions contained in section 19 of the Act, assignment of copyright must be in writing and signed by the author or his duly authorized agent stating in clear terms about the right proposed to be assigned as well as the size of the work. Hence, an oral assignment is invalid and it is impermissible in law.*

*The Hon'ble Court ruled that Section 19A of the Act, which deals with copyright disputes, will only be applicable when a copyright assignment is made in compliance with Section 19 of the Act, which means it is in written and signed by the assignor or his properly authorised agent. Therefore, provision 19A cannot be considered to apply in the current instance and preclude the lawsuit because there isn't an assignment in writing as required by section 19 of the Act.*

### Disputes with respect to Assignment of Copyright

Section 19A(1) provides that if an assignee fails to make sufficient exercise of the rights assigned to him, and such failure is not attributable to any act or omission of the assignor, then, the Commercial Court may, on receipt of a complaint from the assignor and after holding such inquiry as it may deem necessary, revoke such assignment.

According to Section 19A(2) If any dispute arises with respect to the assignment of any copyright, the **Commercial Court** may, on receipt of a complaint from the aggrieved party and after holding such inquiry as it considers necessary, pass such order as it may deem fit including an order for the recovery of any royalty payable:

*It may be noted that Commercial Court for the purposes of any State, means a Commercial Court constituted under section 3, or the Commercial Division of a High Court constituted section 4, of the Commercial Courts Act, 2015.*

Provided that the Commercial Court shall not pass any order under this sub-section to revoke the assignment unless it is satisfied that the terms of assignment are harsh to the assignor in case the assignor is also the author:

Provided further that, pending the disposal of an application for revocation of assignment under this sub-section, the Commercial Court may pass such order, as it deems fit regarding implementation of the terms and conditions of assignment including any consideration to be paid for the enjoyment of the rights assigned:—

Provided also that, no order of revocation of assignment under this sub-section, shall be made within a period of five years from the date of such assignment.



Every complaint received under Section 19A(2) shall be dealt with by the Commercial Court as far as possible and efforts shall be made to pass the final order in the matter within a period of six months from the date of receipt of the complaint and any delay in compliance of the same, the Commercial Court shall record the reasons thereof.

## LICENCES

Chapter VI containing Sections 30-32B deal with licences. Section 30 deals with licences by owners of copyright; Section 30A contains provisions regarding application of Sections 19 and 19A; section 31 provides for compulsory licence in works withheld from public; Section 31A deals with compulsory licences in unpublished Indian works; Section 31B deals with Compulsory Licence for the benefit of disabled; Section 31C deals with statutory licence for cover versions; Section 31D deals with statutory licence for broadcasting of literary and musical works and sound recording; Section 32 deals with licences to produce and publish translations; Section 32A provides for licence to reproduce and publish works for certain purposes; and Section 32B deals with termination of licences.

### Licences by Owners of Copyright

The author or the copyright owner has exclusive rights in his creative work and he alone has right to grant license with respect to such work. Section 30 of the Act empowers the owner of the copyright in any existing work or the prospective owner of the copyright in any future work to grant any interest in the right by licence in writing by him or by his duly authorised agent. However, in the case of a licence relating to copyright in any future work, the licence shall take effect only when the work comes into existence.

Explanation to this section clarifies that where a person to whom a licence relating to copyright in any future work is granted, dies before the work comes into existence, his legal representatives shall, in the absence of any provision to the contrary in the licence, be entitled to the benefit of the licence.

### Compulsory Licence in Works withheld From Public

According to Section 31 of the Act, if at any time during the term of copyright in any work] which has been published or performed in public, a complaint is made to the Commercial Court that the owner of copyright in the work—

- (a) has refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or
- (b) has refused to allow communication to the public by broadcast of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable;

the Commercial Court, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a licence to republish the work, perform the work in public or communicate the work to the public by broadcast, as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Commercial Court may determine; and thereupon the Registrar of Copyrights shall grant the licence to such person or persons who, in the opinion of the Commercial Court, is or are qualified to do so in accordance with the directions of the Commercial Court, on payment of such fee as may be prescribed.



### **Compulsory Licence in Unpublished or Published Works**

Section 31A provides that where, in the case of any unpublished work or any work published or communicated to the public and the work is withheld from the public in India, the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found, any person may apply to the Commercial Court for a licence to publish or communicate to the public such work or a translation thereof in any language.

Before making an application, the applicant shall publish his proposal in one issue of a daily newspaper in the English language having circulation in the major part of the country and where the application is for the publication of a translation in any language, also in one issue of any daily newspaper in that language.

Every such application shall be made in such form as may be prescribed and shall be accompanied with a copy of the advertisement issued above and such fee as may be prescribed.

Where an application is made to the Commercial Court under this section, it may after holding such inquiry as may be prescribed, direct the Registrar of Copyrights to grant to the applicant a licence to publish the work or a translation thereof in the language mentioned in the application subject to the payment of such royalty and subject to such other terms and conditions as the Commercial Court may determine, and thereupon the Registrar of Copyrights shall grant the licence to the applicant in accordance with the direction of the Commercial Court.

Where a licence is granted under this section, the Registrar of Copyrights may, by order, direct the applicant to deposit the amount of the royalty determined by the Commercial Court in the public account of India or in any other account specified by the Commercial Court so as to enable the owner of the copyright or, as the case may be, his heirs, executors or the legal representatives to claim such royalty at any time.

If the original author is dead, the Central Government may, if it considers that the publication of the work is desirable in the national interest, require the heirs, executors or legal representatives of the author to publish such work within such period as may be specified by it.

Where any work is not published within the period specified by the Central Government Commercial Court may, on an application made by any person for permission to publish the work and after hearing the parties concerned, permit such publication on payment of such royalty as the Commercial Court may, in the circumstances of such case, determine in the prescribed manner.

### **Statutory Licence for Broadcasting of Literary and Musical Works and Sound Recording**

According to Section 31D of the Act, any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so, subject to the provisions of this section.

The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Commercial Court.

The rates of royalties for radio broadcasting shall be different from television broadcasting and the Commercial Court shall fix separate rates for radio broadcasting and television broadcasting.

In fixing the manner and the rate of royalty the Commercial Court may require the broadcasting organisation to pay an advance to the owners of rights.

The names of the authors of the principal performers of the work shall, except in case of the broadcasting organisation communicating such work by way of performance, be announced with the broadcast.

No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights.

The broadcasting organisation shall—

- (a) maintain such records and books of account, and render to the owners of rights such reports and accounts; and
- (b) allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such broadcast, in such manner as may be prescribed.

### Termination of Licence

Section 32B of the Act deals with termination of licences and provides that if at any time after the granting of a licence, the owner of the copyright in the work or any person authorised by him publishes a translation of such work in the same language and which is substantially the same in content at a price reasonably related to the price normally charged in India for the translation of works of the same standard on the same or similar subject, the licence so granted shall be terminated. However, such termination shall take effect only after the expiry of a period of three months from the date of service of a notice in the prescribed manner on the person holding such licence by the owner of the right of translation intimating the publication of the translation.

### COPYRIGHT SOCIETY

***A copyright society is a registered collective administration society under Section 33 of the Copyright Act, 1957. Such a society is formed by authors and other owners. A copyright society can issue or grant licences in respect of any work for which it is authorised to by the authors or owners of the work.***

***The Copyright Society is a legal body that protects or safeguards the interest of the owner in the product in which copyright subsists. Copyright societies give assurance to the creative author of the commercial management of their works. It can also be described as a registered collective administration society for the management and protection of copyright.***

### Registration of Copyright Society

Section 33(1) prohibits any person or association of persons to commence or, carry on the business of issuing or granting licences in respect of any work in which copyright subsists on respect or in respect of any other rights conferred by the Act. However, owner of copyright in his individual capacity, continue to have the right to grant licences in respect of his own works consistent with his obligations as a member of the registered copyright society. The business of issuing or granting license in respect of literary, dramatic, musical and artistic works incorporated in a cinematograph films or sound recordings shall be carried out only through a copyright society duly registered under the Act.

Sub section (3) of Section 33 provides that Central Government registers association of persons as a copyright society after taking into account the following factors:

- in the interests of the authors and other owners of rights;
- the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licences in respect of the relevant rights; and
- the ability and professional competence of the applicants.

As per Section 33(3A) registration granted to a copyright society under sub-section (3) mentioned above shall be for a period of five years and may be renewed from time to time before the end of every five years on a request in the prescribed form and the Central Government may renew the registration after considering the report of Registrar of Copyrights on the working of the copyright society. However, the renewal of the registration of a

copyright society shall be subject to the continued collective control of the copyright society being shared with the authors of works in their capacity as owners of copyright or of the right to receive royalty.

Central Government if satisfied that a copyright society is being managed in a manner detrimental to the interests of “authors and other owners of right” concerned, cancel the registration of such society after such inquiry as may be prescribed. It also states that the copyright society duly registered under the act can only conduct the business of issuing/granting licenses to the copyrighted work i.e. literary, dramatic, musical, or artistic works incorporated in cinematograph films or sound recordings.

### Administration of Rights of Owner by Copyright Society

Section 34 of the Act empowers a copyright society to accept exclusive authorisation from an author and other owners of right to administer any right in any work by issue of licences or collection of licence fees or both. Such authorization can be withdrawn by an author and other owners of right.

Copyright society is competent to enter into agreement with any foreign society or organisation administering rights corresponding to rights under the Indian Copyright Act to entrust to such foreign society or organisation the administration in any foreign country of rights administered by the said copyright society in India, or for administering in India the rights administered in a foreign country by such foreign society or organisation.

Copyright Society empower to—

- (i) issue licences under section 30 in respect of any rights under this Act;
- (ii) collect fees in pursuance of such licences;
- (iii) distribute such fees among author and other owners of right after making deductions for its own expenses;
- (iv) perform any other functions consistent with the provisions of section 35.

### Control Over the Copyright Society by the Author and Other Owners of Right

As per Section 35 every copyright society is subject to the collective control of the owners of rights it administers. It does not include those administered by a foreign society or organisation.

Every copyright society shall have a governing body with such number of persons elected from among the members of the society consisting of equal number of authors and owners of work for the purpose of the administration of the society. All members of copyright society shall enjoy equal membership rights and there shall be no discrimination between authors and owners of rights in the distribution of royalties.

## RIGHTS OF BROADCASTING ORGANISATION AND OF PERFORMERS RIGHTS OF BROADCASTING ORGANISATION AND PERFORMERS

*Chapter VIII of the Act containing Section 37-39A deals with rights of Broadcasting Organisations and of Performers.*

### Broadcast Reproduction Right

Section 37 entitles every broadcasting organisation to have a special right to be known as “broadcast reproduction right” in respect of its broadcasts.

The Broadcast reproduction right shall subsist until **twenty-five years** from the beginning of the calendar year next following the year in which the broadcast is made.

As per Section 37(3) during the continuance of a broadcast reproduction right in relation to the broadcast or any substantial part thereof,-

- (a) re-broadcasts the broadcast; or
- (b) causes the broadcast to be heard or seen by the public on payment of any charges; or
- (c) makes any sound recording or visual recording of the broadcast; or
- (d) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; or
- (e) sells or gives on commercial rental or offer for sale or for such rental, any such sound recording or visual recording referred to in clause (c) or clause (d).

### Performer's Right

Section 38 provides that where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance. The performer's right subsist until **fifty years** from the beginning of the calendar year next following the year in which the performance is made.

### Exclusive Right of Performer

As per section 38A without prejudice to the rights conferred on authors, the performer's right which is an exclusive right subject to the provisions of the Act to do or authorise for doing any of the following acts in respect of the performance or any substantial part thereof, namely:—

- (a) to make a sound recording or a visual recording of the performance, including—
  - (i) reproduction of it in any material form including the storing of it in any medium by electronic or any other means;
  - (ii) issuance of copies of it to the public not being copies already in circulation;
  - (iii) communication of it to the public;
  - (iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording;
- (b) to broadcast or communicate the performance to the public except where the performance is already broadcast.

It may be noted that once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film. However, the performer shall be entitled for royalties in case of making of the performances for commercial use.

### Moral Right of Performer

Section 38B of Act provides that the performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have the right to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance; and to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

### **What are the Moral Rights of an Author?**

***The author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other acts in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation. Moral rights are available to the authors even after the economic rights are assigned.***

### **Copyright Protection to Foreign Works**

The Copyright Act applies only to works first published in India, irrespective of the nationality of the author. However Section 40 of the Act empowers the Government of India to extend the benefits of all or any of the provisions of the Act to works first published in any foreign country. The benefits granted to foreign works will not extend beyond what is available to the works in the home country and that too on a reciprocal basis i.e. the foreign country must grant similar protection to works entitled to copyright under the Act.

**The International Copyright Order, 1999 [S.O. 228(E), dated 24<sup>th</sup> March 1999, published in the Gazette of India, Extra Pt II, Sec. 3 (i), dated 6<sup>th</sup> April 1999]**

*In exercise of the powers conferred by section 40 of the Copyright Act, 1957 and in supersession of the International Copyright Order, 1991, the Central Government hereby makes the following Order, namely the International Copyright Order, 1999.*

**2. In International Copyright Order, 1999, unless the context otherwise requires:-**

- (a) *“Berne Convention Country” means a country which is a member of the Berne Copyright Union, and includes a country mentioned either in Part I or in Part II of the Schedule;*
- (b) *“Phonogram” means an exclusively aural fixation of a performance or other sounds;*
- (c) *“Phonograms Convention Country” means a country which has either ratified, or accepted, or acceded to the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms, done at Geneva on the Twenty ninth day of October, one; thousand nine hundred and seventy-one, and includes a country mentioned in Part V of the Schedule;*
- (d) *“Schedule” means the Schedule appended to this Order;*
- (e) *“Universal Copyright Convention Country” means a country which has either ratified, or accepted, or acceded to the Universal Copyright Convention, and includes a country mentioned either in Part III or in Part IV of the Schedule;*
- (f) *“World Trade Organisation Country” means a country which is a member of the World Trade Organisation and which has either ratified, or accepted, or acceded to the Agreement on Trade Related Aspects of Intellectual Property Right, 1994 and includes a country mentioned in Part VI of the Schedule.*

**3. Subject to the provisions of paragraphs 4, 5 and 6, all the provisions of the Copyright Act, 1957 except those in Chapter VIII, and those other provisions which apply exclusively to Indian works, shall apply :-**

- (a) *to any work first made or published in a country mentioned in Part I, II, III, IV or VI of the Schedule, in like manner as if it was first published in India;*
- (b) *to any work first made or published in a country other than a country mentioned in Part I, II, III, IV or VI of the Schedule, the author of which was, at the date of such publication, or, where the author was dead*

*on that date, he was at the time of his death, a national of a country mentioned in Part I, II, III, IV and VI of the Schedule, in like manner, as if the author was a citizen of India at that point of time;*

- (c) *to an unpublished work, the author whereof was, at the time of the making or publication of the work, a national or domiciled in any country mentioned in Part I, II, III, IV and VI of the Schedule, in like manner, as if the author was a citizen of, domiciled in, India;*
- (d) *to any work first made or published by a body corporate incorporated under any law of a country mentioned in Part I, II, III, IV or Part VI of the Schedule, in like manner, as if it was incorporated under a law in force in India; and*
- (e) *to a sound recording first made, the producer of which was, at the date of such production, a national of a country mentioned in Part V or Part VI of the Schedule or a body corporate incorporated under a law in force in such a country, in like manner as if the producer was the citizen of India or a body corporate incorporated under a law in force in India, as the case may be, at that point of time.*

**4.** *Notwithstanding anything contained in paragraph 3, the provisions of Chapter VIII of the Act shall apply to a Broadcasting Organisation and a Performer in a World Trade Organisation Country mentioned in Part VI of the Schedule.*

**5.** *Notwithstanding anything contained in clause (a) of paragraph 3 and paragraph 4 of the provisions of sub-section (1) of section 32 of the Act-*

- (i) *shall not apply to a work first made or published in any Berne Convention Country mentioned in Part I and Part II of the Schedule.*
- (ii) *shall not apply to a work first made or published in any World Trade Organisation Country mentioned in Part VI of the Schedule.*
- (iii) *shall apply to a work first made or published in any Universal Copyright Convention Country mentioned in Part III or Part IV of the Schedule. Only in respect of the translation of such work into any language specified in the Eighth Schedule to the Constitution of India.*

**6.** *The provisions of section 32 (excluding its sub section (1) 32A and 32B shall apply to a work first made or published in a Berne Convention Country mentioned in Part I of the Schedule or in a Universal Copyright Convention Country mentioned in Part III of the Schedule or in a World Trade Organisation Country mentioned in Part VI of the Schedule.*

**7.** *The term of copyright in a work shall not exceed that which is enjoyed by it in its country of origin.*

*Explanation- In this paragraph, "the country of origin" shall mean-*

- (a) *in the case of a work first made or published in a Berne Convention Country or in a Universal Copyright Convention Country or a World Trade Organisation Country, that country;*
- (b) *in the case of a work made or published simultaneously either in a Berne Convention Country or a Universal Copyright Convention Country or in a World Trade Organisation Country and in a country which is neither a Berne Convention Country nor a World Trade Organisation Country, the former country;*
- (c) *in the case of a work which is made or published simultaneously in several Berne Convention Countries, the country whose laws grant the shortest term of copyright to such a work';*
- (d) *in the case of a work which is made or published simultaneously in several Universal Copyright*

*Convention Countries, the country whose laws grant the shortest term of copyright to such a work;*

- (e) *in the case of a work which is made or published simultaneously in several World Trade Organisation Countries, the country whose laws grant the shortest term of copyright to such a work;*
- (f) *in the case of an unpublished work or a work first made or published in a country other than a Berne Convention Country or a Universal Copyright Convention Country or a World Trade Organisation Country, the country of which the author was a citizen, or the country in which he was domiciled at the time of its first publication, whichever grants the longer term of copyright.*

## REGISTRATION OF COPYRIGHT

***Chapter X of the Copyright Act containing Sections 44- 50A deals with various aspects of registration of copyright.***

The mechanism of registration of copyright has been contemplated under Section 44 of the Act. It is evident from the provisions of the aforesaid section that registration of the work under the Copyright Act is not compulsory and is not a condition precedent for maintaining a suit for damages, if somebody infringes the copyright. Sections 44 and 45 of the Copyright Act are only enabling provisions and do not affect the common law right to sue for infringement of copyright. An action for infringement can be brought even if the registration has not been done. The only effect of registration is that it is the prima facie evidence of the particulars entered in the register.

Section 45 of the Act clearly mentions that the author or publisher of, or the owner of or other person interested in the Copyright in, any Work *may* make an application in the prescribed form accompanied by the prescribed fee to the registrar of Copyrights. The use of word “may” clearly indicate that the author is at the discretionary liberty to apply for registration of Copyrights.

An artistic work which is used or is capable of being used in relation to any goods or services, the application shall include a statement to that effect and shall be accompanied by a certificate from the Registrar of Trade Marks referred to in section 3 of the Trade Marks Act, 1999 to the effect that no trade mark identical with or deceptively similar to such artistic work has been registered under that Act in the name of, or that no application has been made under that Act for such registration by, any person other than the applicant.

On receipt of an application in respect of any work, the Registrar of Copyrights may, after holding such inquiry as he may deem fit, enter the particulars of the work in the Register of Copyrights.

### Registrar of Copyrights Possess Certain Powers of Civil Courts

The Register of Copyrights is to be maintained by the Copyright Office to enter the names or titles of works and the names and addresses of authors, publishers and owners of copyright.

The Registrar of Copyrights shall have the powers of a civil court when trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely, —

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of any document;
- (c) receiving evidence on affidavits;



- (d) issuing commissions for the examination of witnesses or documents;
- (e) requisitioning any public record or copy thereof from any court or office;
- (f) any other matter which may be prescribed.

***In Sanjay Soya Private Ltd. vs. Narayani Trading Company IA (L) 5011/2020 in COMP (L) 2/2020 the Bombay High Court ruled that no section of the Act requires registration of copyright before requesting relief under the Act. Instead, it is up to the owner's choice whether to register copyright under the Act. The Convention and the TRIPS Agreement were also cited by the court to buttress its ruling. Registration just establishes a presumption of validity for information placed in the Copyright register. The word "may" is used in Section 45(1) of the Act, which deals with entries in the register of copyrights, and Section 51 states that infringement is not limited to the registered Work. Protection should be "automatic" as soon as the Work is created.***

### The Procedure for Registration

The Copyright Office has been set up to provide registration facilities to all types of works and is headed by a Registrar of Copyrights. The applications are also accepted by post. On-line registration through "E-filing facility" has also been provided which facilitates the applicants to file applications at the time and place chosen by them.

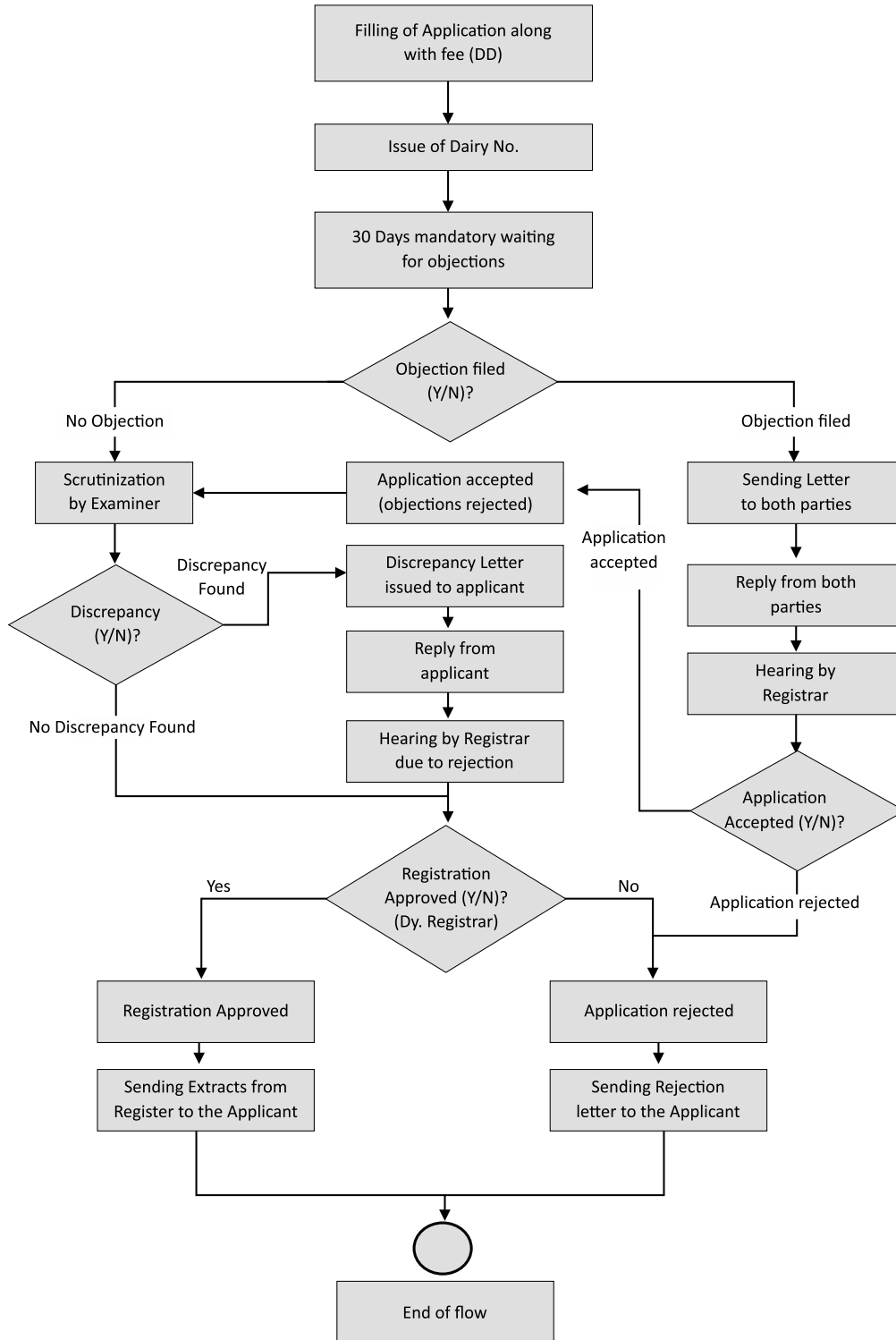
Chapter XIII of the Copyright Rules, 2013, as amended, sets out the procedure for the registration of a work.

The procedure for registration is as follows:

- Application for registration is to be made on specified Form (Including Statement of Particulars and Statement of Further Particulars);
- Separate applications should be made for registration of each work;
- Each application should be accompanied by the requisite fee prescribed in the second schedule to the Rules;
- The applications should be signed by the applicant. The Power of Attorney signed by the party and accepted by the advocate should also be enclosed, if applicable;
- The fee is to be paid either in the form of Demand Draft or Indian Postal Order or through E payment. Each and every column of the Statement of Particulars and Statement of Further Particulars should be replied specifically.



**Copyright Registration Workflow**



Source: <https://copyright.gov.in/frmWorkFlow.aspx>

## INFRINGEMENT OF COPYRIGHT

**Copyright infringement refers to the unauthorized use of someone's copyrighted work. Thus, it is the use of someone's copyrighted work without permission thereby infringing certain rights of the copyright holder, such as the right to reproduce, distribute, display or perform the protected work. Copyright protection gives exclusive rights to the owners of the work to reproduce the work enabling them to derive financial benefits by exercising such rights. If any person without authorisation from the owner exercises these rights in respect of the work which has copyright protection it constitutes an infringement of the copyright. If the reproduction of the work is carried out after the expiry of the copyright term it will not amount to an infringement.**

Section 51(a) of the Act contemplates situation in which a copyright shall be deemed to be infringed. This Section says that a copyright is infringed when any person without a licence granted by the owner of the copyright or the Registrar of Copyright or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority:

- (i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or
- (ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

Section 51(b) when any person (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or (iii) by way of trade exhibits in public, or (iv) imports into India, any infringing copies of the work.

It may be noted that Section 51(b) (iv) i.e., imports into India shall apply to the import of one copy of any work for the private and domestic use of the importer.

Explanation: For the purposes of section 51, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy".

It may be noted that "Infringing copy" means,-

- (i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;
- (ii) in relation to a cinematographic film, a copy of the film made on any medium by any means;
- (iii) in relation to a sound recording, any other recording embodying the same sound recording, made by any means;
- (iv) in relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance, if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act.

### **Which are the Common Copyright Infringements?**

**The following are some of the commonly known acts involving infringement of copyright:**

- **Making infringing copies for sale or hire or selling or letting them for hire;**
- **Permitting any place for the performance of works in public where such performance constitutes infringement of copyright;**
- **Distributing infringing copies for the purpose of trade or to such an extent so as to affect prejudicially the interest of the owner of copyright;**
- **Public exhibition of infringing copies by way of trade; and**
- **Importation of infringing copies into India.**

*In the case of S.K. Dutt vs. Law Book Co. AIR 1954 All 570, the Hon'ble Court held that in infringement of copyright the onus of proof is on plaintiff to satisfy the court that the defendant had infringed his copyright. The plaintiff having failed to establish any infringement of his copyright, no question of granting any relief to the plaintiff could arise. It may here be noted, however, that there was on behalf of the plaintiff, no evidence to indicate what damage, if any, accrued to him, assuming that there was an infringement of his copyright by the defendants.*

### Statutory Exceptions-Certain acts not to be Infringement of Copyright

Certain exceptions to infringement have been stipulated by the Copyright Act. The object of these exceptions is to enable the reproduction of the work for certain public purposes, and for encouragement of private study, research and promotion of education. The list of acts which do not constitute infringement of copyright has been provided under Section 52 of the Act. These includes:

- (i) A fair dealing with any work, not being a computer programme, for the purposes of—
- private or personal use, including research;
  - criticism or review, whether of that work or of any other work;
  - reporting of current events and current affairs, including the reporting of a lecture delivered in public.

It may be noted that storing of any work in any electronic medium including the incidental storage of any computer programme which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright.

- (ii) The making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy in order to utilise the computer programme for the purposes for which it was supplied; or to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied.
- (iii) the doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available.
- (iv) the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied.
- (v) the making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use.
- (vi) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public.
- (vii) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy.

It may be noted that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access

for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.

- (viii) the reproduction of any work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding.
- (ix) the reproduction or publication of any work prepared by the Secretariat of a Legislature or, where the Legislature consists of two Houses, by the Secretariat of either House of the Legislature, exclusively for the use of the members of that Legislature.
- (x) the reproduction of any work in a certified copy made or supplied in accordance with any law for the time being in force.
- (xi) the reading or recitation in public of reasonable extracts from a published literary or dramatic work.
- (xii) the publication in a collection, mainly composed of non-copyright matter, bona fide intended for instructional use, and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for such use in which copyright subsists. However, not more than two such passages from works by the same author are published by the same publisher during any period of five years.

In the case of a work of joint authorship, references in this clause to passages from works shall include references to passages from works by any one or more of the authors of those passages or by any one or more of those authors in collaboration with any other person.

- (xiii) the reproduction of any work—
  - by a teacher or a pupil in the course of instruction; or
  - as part of the questions to be answered in an examination; or
  - in answers to such questions.
- (xiv) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a sound recording if the audience is limited to such staff and students, the parents and guardians of the students and persons connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording.
- (xv) the causing of a recording to be heard in public by utilising it,-
  - in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or
  - as part of the activities of a club or similar organisation which is not established or conducted for profit;
  - as part of the activities of a club, society or other organisation which is not established or conducted for profit.
- (xvi) the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution.
- (xvii) the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction.

- (xviii) the storing of a work in any medium by electronic means by a noncommercial public library, for preservation if the library already possesses a non-digital copy of the work.
- (xix) the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a non-commercial public library for the use of the library if such book is not available for sale in India.
- (xx) the reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access.

However, where the identity of the author of any such work or, in the case of a work of joint authorship, of any of the authors is known to the library, museum or other institution, as the case may be, the provisions of this clause shall apply only if such reproduction is made at a time more than sixty years from the date of the death of the author or, in the case of a work of joint authorship, from the death of the author whose identity is known or, if the identity of more authors than one is known from the death of such of those authors who dies last.

- (xxi) the reproduction or publication of-
  - any matter which has been published in any Official Gazette except an Act of a Legislature;
  - any Act of a Legislature subject to the condition that such Act is reproduced or published together with any commentary thereon or any other original matter;
  - the report of any committee, commission, council, board or other like body appointed by the Government if such report has been laid on the Table of the Legislature, unless the reproduction or publication of such report is prohibited by the Government;
  - any judgement or order of a court, tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the court, the tribunal or other judicial authority, as the case may be.
- (xxii) the production or publication of a translation in any Indian language of an Act of a Legislature and of any rules or orders made thereunder-
  - if no translation of such Act or rules or orders in that language has previously been produced or published by the Government; or
  - where a translation of such Act or rules or orders in that language has been produced or published by the Government, if the translation is not available for sale to the public;
  - however, such translation contains a statement at a prominent place to the effect that the translation has not been authorised or accepted as authentic by the Government.
- (xxiii) the making or publishing of a painting, drawing, engraving or photograph of a work of architecture or the display of a work of architecture.
- (xxiv) the making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work failing under sub-clause (iii) of clause (c) of section 2, if such work is permanently situate in a public place or any premises to which the public has access.
- (xxv) the inclusion in a cinematograph film of-
  - any artistic work permanently situate in a public place or any premises to which the public has access; or

- any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film.
- (xxvi) the use by the author of an artistic work, where the author of such work is not the owner of the copyright therein, of any mould, cast, sketch, plan, model or study made by him for the purpose of the work. However, he does not thereby repeat or imitate the main design of the work.
- (xxvii) the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device.
- (xxviii) the reconstruction of a building or structure in accordance with the architectural drawings or plans by reference to which the building or structure was originally constructed . However, the original construction was made with the consent or licence of the owner of the copyright in such drawings and plans.
- (xxix) in relation to a literary, “dramatic, artistic or” musical work recorded or reproduced in any cinematograph film the exhibition of such film after the expiration of the term of copyright therein .However, the provisions of sub-clause (ii) of clause (a), sub-clause (a) of clause (b) and clauses (d), (f), (g), (m) and (p) shall not apply as respects any act unless that act is accompanied by an acknowledgment-
- identifying the work by its title or other description; and
  - unless the work is anonymous or the author of the work has previously agreed or required that no acknowledgement of his name should be made, also identifying the author.
- (xxx) the making of an ephemeral recording, by a broadcasting organisation using its own facilities for its own broadcast by a broadcasting organisation of a work which it has the right to broadcast; and the retention of such recording for archival purposes on the ground of its exceptional documentary character.
- (xxxi) the performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any *bona fide* religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority. However, religious ceremony including a marriage procession and other social festivities associated with a marriage.
- (xxxii) the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format by any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research; or any organisation working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons. However, the copies of the works in such accessible format are made available to the persons with disabilities on a non-profit basis but to recover only the cost of production and the organization shall ensure that the copies of works in such accessible format are used only by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.
- It may be noted that “any organization” includes and organization registered under section 12A of the Income-tax Act, 1961 and working for the benefit of persons with disability or recognized under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection or Rights and full Participation) Act, 1995 or receiving grants from the government for facilitating access to persons with disabilities or an educational institution or library or archives recognized by the Government.
- (xxxiii) the importation of copies of any literary or artistic work, such as labels, company logos or promotional or explanatory material, that is purely incidental to other goods or products being imported lawfully.

In the *Chancellor, Masters and Scholars of the University of Oxford and Ors. vs. Rameshwari Photocopy Services and Ors.* (16.09.2016 - DELHC) : CS(OS) 2439/2012, I.A. Nos. 14632/2012, 430 and 3455/2013, in this case, the

plaintiffs instituted this suit for the relief of permanent injunction restraining the two defendants from infringing the copyright of the plaintiffs in their publications by photocopying, reproduction and distribution of copies of plaintiffs' publications on a large scale and circulating the same and by sale of unauthorised compilations of substantial extracts from the plaintiffs' publications by compiling them into course packs/anthologies for sale. Court inter alia held that -

*“Copyright, specially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public....”*

*Applying the tests as aforesaid laid down by the Courts of (i) integral part of continuous flow; (ii) connected relation; (iii) incidental; (iv) causal relationship; (v) during (in the course of time, as time goes by); (vi) while doing; (vii) continuous progress from one point to the next in time and space; and, (viii) in the path in which anything moves, it has to be held that the words “in the course of instruction” within the meaning of Section 52(1)(i) supra would include reproduction of any work while the process of imparting instruction by the teacher and receiving instruction by the pupil continues i.e. during the entire academic session for which the pupil is under the tutelage of the teacher and that imparting and receiving of instruction is not limited to personal interface between teacher and pupil but is a process commencing from the teacher readying herself/himself for imparting instruction, setting syllabus, prescribing text books, readings and ensuring, whether by interface in classroom/tutorials or otherwise by holding tests from time to time or clarifying doubts of students, that the pupil stands instructed in what he/she has approached the teacher to learn. Similarly the words “in the course of instruction”, even if the word “instruction” have to be given the same meaning as ‘lecture’, have to include within their ambit the prescription of syllabus the preparation of which both the teacher and the pupil are required to do before the lecture and the studies which the pupils are to do post lecture and so that the teachers can reproduce the work as part of the question and the pupils can answer the questions by reproducing the work, in an examination. Resultantly, reproduction of any copyrighted work by the teacher for the purpose of imparting instruction to the pupil as prescribed in the syllabus during the academic year would be within the meaning of Section 52(1)(i) of the Act.*

*I thus conclude that the action of the defendant No. 2 University of making a master photocopy of the relevant portions (prescribed in syllabus) of the books of the plaintiffs purchased by the defendant No. 2 University and kept in its library and making further photocopies out of the said master copy and distributing the same to the students does not constitute infringement of copyright in the said books under the Copyright Act.”*

### Remedies against Infringement of Copyright

Section 54 defines the term “owner of copyright” shall include:

- (a) an exclusive licensee;
- (b) in the case of an anonymous or pseudonymous literary, dramatic, musical or artistic work, the publisher of the work, until the identity of the author or, in the case of an anonymous work of joint authorship, or a work of joint authorship published under names all of which are pseudonyms, the identity of any of the authors, is disclosed publicly by the author and the publisher or is otherwise establishment to the satisfaction of the Commercial Court by that author or his legal representatives.

Section 55 provides for the civil remedies for infringement of copyright and entitles the owner of the copyright to all such remedies by way of injunction, damages, accounts and otherwise as may be conferred by law for the infringement of copyright. Section 58 entitles the owner of the copyright to initiate proceedings for the possession of infringing copies and other materials related thereto. In this context, the section clarifies that



all infringing copies of any work in which copyright subsists and all plates used or intended to be used for the production of such infringing copies shall be deemed to be the property of the owner of the copyright.

***The Copyright law in India provided for remedies to be made available to the author against a copyright infringer. The Copyright Act, 1957 provides to an author both Civil, Criminal and border enforcement remedies. They are:***

- ***Civil Remedies: provide for injunctions, damages, interpretation of accounts, delivery and destruction of infringing copies and damages for conversion.***
- ***Criminal Remedies: provide for imprisonment, fines, seizures of infringing copies and delivery of infringing copies to the owner.***
- ***Border Enforcement: also provides for prohibition of import and destruction of any imported goods that infringe the copyright of a person with the assistance of the customs authorities of India.***

### Protection of Right of Management Information

As per section 65B any person, who knowingly removes or alters any rights management information without authority, or distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.

It may be noted that “Rights Management Information” means,—

- (a) the title or other information identifying the work or performance;
- (b) the name of the author or performer;
- (c) the name and address of the owner of rights;
- (d) terms and conditions regarding the use of the rights; and
- (e) any number or code that represents the information referred to in sub-clauses (a) to (d), but does not include any device or procedure intended to identify the user.

### OFFENCES & PENALTIES

Chapter XIII of the Act containing Sections 63-70 deal with offences and penalties. Section 63 deals with offences of infringement of copyright or other rights conferred by the Copyright Act, 1957. This section makes, any person who knowingly infringes or abates the infringement of the copyright in a work or any other right conferred under the Act (except for resale share right in original copies), liable to imprisonment for a minimum period of six months which may extend to three years and with minimum fine of fifty thousand rupees which may extend upto rupees two lakhs. However, the court has been empowered to impose a sentence less than six months or a fine less than fifty thousand, if the infringement had not been made for gain in the course of trade or business. In such situations, the section requires the courts to mention adequate and special reasons in the judgement. Section 63 criminalises the infringement of copyright and other associated rights conferred by the Copyright Act except for the right to resale share in original copies under section 53 A. It prescribes imprisonment for a term not less than 6 months which may extend up to 3 years and with a fine, not less than fifty thousand rupees which may extend to two lakh rupees.

According to section 63, any person who knowingly infringes or even abets the infringement of the copyright in a work or any other rights conferred by the Copyright Act except the **right to resale share in original copies** commits the offence of copyright.



*In the case of Jitendra Prasad Singh vs. State of Assam (2003) 26 PTC 486 GAU, the Hon'ble Gauhati High Court held that the phrase "punishable with imprisonment for a term, which may extend to three years" will mean that the imprisonment can be for a term as long as three years, but the expression, "punishable with imprisonment for less than three years" will mean that the imprisonment can be for a term less than three years. Therefore, offences under Section 63 of the Act are non-bailable in nature, and as such an application for anticipatory bail will be maintainable.*

*M/s Knit Pro International vs. the State of NCT of Delhi & Anr. (Criminal Appeal No. 807 of 2022) the Hon'ble Supreme Court of India Judgement dated May 20, 2022 inter alia observed that thus, for the offence under Section 63 of the Copyright Act, the punishment provided is imprisonment for a term which shall not be less than six months but which may extend to three years and with fine. Therefore, the maximum punishment which can be imposed would be three years. Therefore, the learned Magistrate may sentence the accused for a period of three years also. In that view of the matter considering Part II of the First Schedule of the Cr.P.C., if the offence is punishable with imprisonment for three years and onwards but not more than seven years the offence is a cognizable offence. Only in a case where the offence is punishable for imprisonment for less than three years or with fine only the offence can be said to be non-cognizable. In view of the above clear position of law, the decision in the case of Rakesh Kumar Paul (supra) relied upon by learned counsel appearing on behalf of respondent no.2 shall not be applicable to the facts of the case on hand. The language of the provision in Part II of First Schedule is very clear and there is no ambiguity whatsoever.*

*Under the circumstances the High Court has committed a grave error in holding that the offence under Section 63 of the Copyright Act is a non-cognizable offence. Thereby the High Court has committed a grave error in quashing and setting aside the criminal proceedings and the FIR. Therefore, the impugned judgment and order passed by the High Court quashing and setting aside the criminal proceedings/FIR under Section 63 of the Copyright Act deserves to be quashed and set aside.*

*In view of the above discussion and for the reason stated above, it is observed and held that offence under Section 63 of the Copyright Act is a cognizable and non-bailable offence. Consequently, the impugned judgment and order passed by the High Court taking a contrary view is hereby quashed and set aside and the criminal proceedings against respondent No.2 for the offence under Sections 63 & 64 of the Copyright Act now shall be proceeded further in accordance with law and on its own merits treating the same as a cognizable and non-bailable offence.*

### **Power of Police to Seize Infringing Copies**

Section 64 of the Act empowers any Police Officer, not below the rank of a sub-inspector, to seize without warrant, all copies of the work and all plates used for the purpose of making infringing copies of the work, wherever they are found. However such Police Officer has to satisfy himself before such seizure, that an offence under Section 63 in respect of the infringement of copyright in any work has been, is being or is likely to be committed. Further, such Police Officer has been put under obligation to produce before the Magistrate, as soon as practicable, all copies and plates so seized. Any interested person may make an application to Magistrate, within fifteen days of such seizure, for restoring to him such copies and plates. Section 65 makes liable, any person, who knowingly makes or has in his possession, any plate for the purpose of making infringing copies of any work in which copyright subsists, to imprisonment which may extend to two years and also fine.

**LESSON ROUND-UP**

- Copyright is a well-recognized form of property right which had its roots in the common law system and subsequently came to be governed by the national laws in each country. In India, the law relating to copyright is governed by the Copyright Act, 1957.
- Copyright ensures certain minimum safeguards of the rights of authors over their creations.
- Literary, dramatic, musical or artistic works enjoy copyright protection for the life time of the author plus 60 years beyond i.e. 60 years after his death. In the case of joint authorship which implies collaboration of two or more authors in the production of the work, the term of copyright is to be construed as a reference to the author who dies last.
- The Act is amended in 2012 with the object of making certain changes for clarity, to remove operational difficulties and also to address certain newer issues that have emerged in the context of digital technologies and the Internet.
- Section 18 of the Copyright Act provides for the assignment of copyright in an existing work as well as future work. In both the cases an assignment may be made of the copyright either wholly or partially and generally or subject to limitations and that too for the whole period of copyright or part thereof.
- Copyright protection gives exclusive rights to the owners of the work to reproduce the work enabling them to derive financial benefits by exercising such rights. If any person without authorisation from the owner exercises these rights in respect of the work which has copyright protection it constitutes an infringement of the copyright.
- Certain exceptions to infringement have been stipulated by the Copyright Act. The object of these exceptions is to enable the reproduction of the work for certain public purposes, and for encouragement of private study, research and promotion of education.
- The Copyright Act provides for the civil remedies for infringement of copyright and entitles the owner of the copyright to all such remedies by way of injunction, damages, and accounts.

**TEST YOURSELF**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation.)*

1. Briefly explain the concept of copyright.
2. Discuss in detail the Copyright Society.
3. Discuss in detail the provisions relating to infringement of copyright.
4. Write short note on the following:
  - (i) Government work.
  - (ii) Term of Copyright.
5. Elaborate the provisions relating to certain exception to infringement have been stipulated by the Copyright Act.





### KEY CONCEPTS

■ Geographical Indication ■ Goods ■ Indication ■ Infringement

### Learning Objectives

#### To understand:

- Registration of Geographical Indication
- Prohibits Registration of certain Geographical Indications
- Prohibition of Registration of Geographical Indication as Trade Marks
- Duration of Registration

### Lesson Outline

- Application for Registration
- Effect of Registration of Design
- Copyright on Registration
- Infringement of Geographical Indication
- Offence & Penalty
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- Geographical Indications of Goods (Registration and Protection) Act, 1999
- The Geographical Indications of Goods (Registration and Protection) Rules, 2002

## INTRODUCTION

The desire of mankind for quality and genuine premium products such as silk, cotton and spices, having distinct characteristics originating from a particular region, have over centuries created an impact on human civilization which has resulted in discovery of new sea routes and new continents. These identifications became so important that these regions started specializing in producing these unique products, which led to identifying such goods as originating from a particular region, which over a period of time has become renowned globally. Rising demand for such products among the consumers, gave rise for counterfeit products, which began to tarnish the image of genuine products. A effort to safeguard the interest of the producers and consumers led to evolution and conceptualization of “Geographical Indications”.

Every region has its claim to fame. Each fame and reputation was carefully built up and painstakingly maintained by the masters of that region, combining the best of nature, man and traditionally handed over from one generation to the next for centuries. Gradually, a specific link between the goods and place of production evolved resulting in growth of geographical indications.

Geographical Indications of Goods are that aspect of industrial property which refers to a country or to a place situated therein as being the country or place of origin of that product. Typically, such a name conveys an assurance of quality and distinctiveness which is essentially attributable to the fact of its origin in that defined geographical locality, region or country.

Geographical Indications covered under Articles 22 to 24 of the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which was part of the Agreements concluding the Uruguay Round of GATT negotiations.

“Geographical Indications” as being used currently includes both the above concepts and it refers to “... indications which identify a good as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.” (Article 22.1 of the TRIPS Agreement). Consequent upon India joining as a member state of the TRIPS Agreement a sui-generis legislation for the protection of Geographical Indications was enacted in 1999.

***The object of the Geographical Indications of Goods (Registration and Protection) Act, 1999 is three fold, firstly by specific law governing the geographical indications of goods in the country which could adequately protect the interest of producers of such goods, secondly, to exclude unauthorized persons from misusing geographical indications and to protect consumers from deception and thirdly, to promote goods bearing Indian geographical indications in the export market.***

*Examples of Indian Geographical Indications are: Darjeeling Tea, Kanchipuram Silk Saree, Alphonso Mango, Nagpur Orange, Kolhapuri Chappal, Bikaneri Bhujia, Agra Petha etc.*

## Geographical Indication

Geographical indication in relation to goods means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one

of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.

It may be noted that any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that country, region or locality, as the case may be. [Section 2(e)]

### **Geographical Indication**

- *It is an indication.*
- *It originates from a definite geographical territory.*
- *It is used to identify agricultural, natural or manufactured goods.*
- *The manufactured goods should be produced or processed or prepared in that territory.*
- *It should have a special quality or reputation or other characteristics.*

*It may be noted that:*

*Goods means any agricultural, natural or manufactured goods or any goods of handicraft or of industry and includes food stuff.*

*Indication includes any name, geographical or figurative representation or any combination of them conveying or suggesting the geographical origin of goods to which it applies.*

### **Example of Registered Geographical Indications**

Darjeeling Tea (word & logo); Pochampalli Ikat ; Salem Fabric; Chanderi Sarees; Solapur Chaddar; Solapur Terry Towel; ; Kotpad Handloom fabric ; Mysore Silk ; Kota Doria; Mysore Agarbathi; Kancheepuram Silk ;Bhavani Jamakkalam ; Kullu Shawl ; Madurai Sungudi ; Madur kathi; Banaras Zardozi; Gorgonzola (Food Stuff, Italy); Wooden Mask of Kushmand; Gobindobhog Rice; Kashmiri Hand Knotted Carpet, Orissa Pattachitra; Berhampur Patta (Phoda Kumbha) Saree & Joda; Madhubani Paintings; Raktsey Karpo Apricot of Ladakh etc.

### **Indication**

Indication includes any name, geographical or figurative representation or any combination of them conveying or suggesting the geographical origin of goods to which it applies. [Section 2(g)]

### **Prohibition of Registration of Certain Geographical Indications**

Section 9 of the Act prohibits registration of certain geographical indications. They are as follows:-

- (a) the use of which would be likely to deceive or cause confusion; or
- (b) the use of which would be contrary to any law for the time being in force; or
- (c) which comprises or contains scandalous or obscene matter; or
- (d) which comprises or contains any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India; or
- (e) which would otherwise be disentitled to protection in a court; or
- (f) which are determined to be generic names or indications of goods and are, therefore, not or ceased to be protected in their country of origin, or which have fallen into disuse in that country; or

- (g) which, although literally true as to the territory, region or locality in which the goods originate, but falsely represent to the persons that the goods originate in another territory, region or locality, as the case may be;

shall not be registered as a geographical indication.

It may be noted that “generic names or indications”, in relation to goods, means the name of a goods which, although relates to the place or the region where the goods was originally produced or manufactured has lost its original meaning and has become the common name of such goods and serves as a designation for or indication of the kind, nature, type or other property or characteristic of the goods.

However, in determining whether the name has become generic, account shall be taken of all factors including the existing situation in the region or place in which the name originates and the area of consumption of the goods.

### Registration of Geographical Indication

Section 8 of the Act provides that a geographical indication may be registered in respect of any or all of the goods, comprised in such class of goods as may be classified by a region or locality in that territory, as the case may be the Registrar and in respect of a definite territory of a country.

The Registrar may also classify the goods under in accordance with the International classification of goods for the purposes of registration of geographical indications and publish in the prescribed manner in an alphabetical index of classification of goods.

Any question arising as to the class within which any goods fall or the definite area in respect of which the geographical indication is to be registered or where any goods are not specified in the alphabetical index of goods published shall be determined by the Registrar whose decision in the matter shall be final.

### Application for Registration

Under section 11 any association of persons or producers or any organisation or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods, who are desirous of registering a geographical indication in relation to such goods shall apply in writing to the Registrar in such form and in such manner and accompanied by such fees as may be prescribed for the registration of the geographical indication.

The application shall contain –

- A single application may be a statement as to how the geographical indication serves to designate the goods as originating from the concerned territory of the country or region or locality in the country, as the case may be, in respect of specific quality, reputation or other characteristics of which are due exclusively or essentially to the geographical environment, with its inherent natural and human factors, and the production, processing or preparation of which takes place in such territory, region or locality, as the case may be;
- the class of goods to which the geographical indication shall apply;
- the geographical map of the territory of the country or region or locality in the country in which the goods originate or are being manufactured;
- the particulars regarding the appearance of the geographical indication as to whether it is comprised of the words or figurative elements or both;
- a statement containing such particulars of the producers of the concerned goods, if any, proposed



to be initially registered with the registration of the geographical indication as may be prescribed; and

- such other prescribed particulars.

Application may be made for registration of a geographical indication for different classes of goods and fee payable therefore shall be in respect of each such class of goods.

Every application shall be filed in the office of the Geographical Indications Registry within whose territorial limits, the territory of the country or the region or locality in the country to which the geographical indication relates is situated.

Every application shall be examined by the Registrar in such manner as may be prescribed.

The Registrar may refuse the application or may accept it absolutely or subject to such amendments, modification, conditions or limitations, if any, as he thinks fit. In the case of refusal or conditional acceptance of application, the Registrar shall record in writing the grounds for such refusal or conditional acceptance and the materials used by him in arriving at his decision.

### Registration

Section 16 provides that on the registration of a geographical indication, the Registrar shall issue each to the applicant and the authorised users, if registered with the geographical indication, a certificate sealed with the seal of the Geographical Indications Registry.

It may be noted that where registration of a geographical indication is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the Registrar may, after giving notice to the applicant in the prescribed manner treat the application as abandoned unless it is completed within the time specified in that behalf in the notice.

### Step by Step Guide on Geographical Indication of Goods Registration Process

#### **Step 1 : Filing of application**

Please check whether the indication comes within the ambit of the definition of a Geographical Indication under section 2(1)(e) of the Act.

The association of persons or producers or any organization or authority should represent the interest of producers of the concerned goods and should file an affidavit how the applicant claims to represent their interest.

- Application must be made in triplicate.
- The application shall be signed by the applicant or his agent and must be accompanied by a statement of case.
- Details of the special characteristics and how those standards are maintained.
- Three certified copies of the map of the region to which the GI relates.
- Details of the inspection structure if any to regulate the use of the GI in the territory to which it relates.
- Give details of all the applicant together with address. If there is a large number of producers a collective reference to all the producers of the goods may be made in the application and the GI. If registered will be indicated accordingly in the register.

#### **Step 2 & 3: Preliminary Scrutiny and Examination**

- The Examiner will scrutinize the application for any deficiencies.

- The applicant should within one month of the communication in this regard, remedy the same.
- The content of statement of case is assessed by a consultative group of experts will versed on the subject.
- The will ascertain the correctness of particulars furnished.
- Thereafter an Examination Report would be issued.

#### **Step 4: Show Cause Notice**

- If the Registrar has any objection to the application, he will communicate such objection.
- The applicant must respond within two months or apply for a hearing.
- The decision will be duly communicated. If the applicant wishes to appeal, he may within one month make a request.
- The Registrar is also empowered to withdraw an application, if it is accepted in error, after giving an opportunity of being heard.

#### **Step 5: Publication in the Geographical Indications Journal**

Every application, within three month of acceptance shall be published in the Geographical Indications Journal.

#### **Step 6: Opposition to Registration**

- Any person can file a notice of opposition within three months (extendable by another month on request which has to be filed before three months) opposing the GI application published in the Journal.
- The registrar shall serve a copy of the notice on the applicant.
- Within two months the applicant shall sent a copy of the counter statement.
- If he does not do this he shall be deemed to have abandoned his application. Where the counter-statement has been filed, the registrar shall serve a copy on the person giving the notice of opposition.
- Thereafter, both sides will lead their respective evidences by way of affidavit and supporting documents.
- A date for hearing of the case will be fixed thereafter.

#### **Step 7: Registration**

- Where an application for a GI has been accepted, the registrar shall register the geographical indication. If registered the date of filing of the application shall be deemed to be the date of registration.
- The registrar shall issue to the applicant a certificate with the seal of the Geographical indications registry.

#### **Step 8: Renewal**

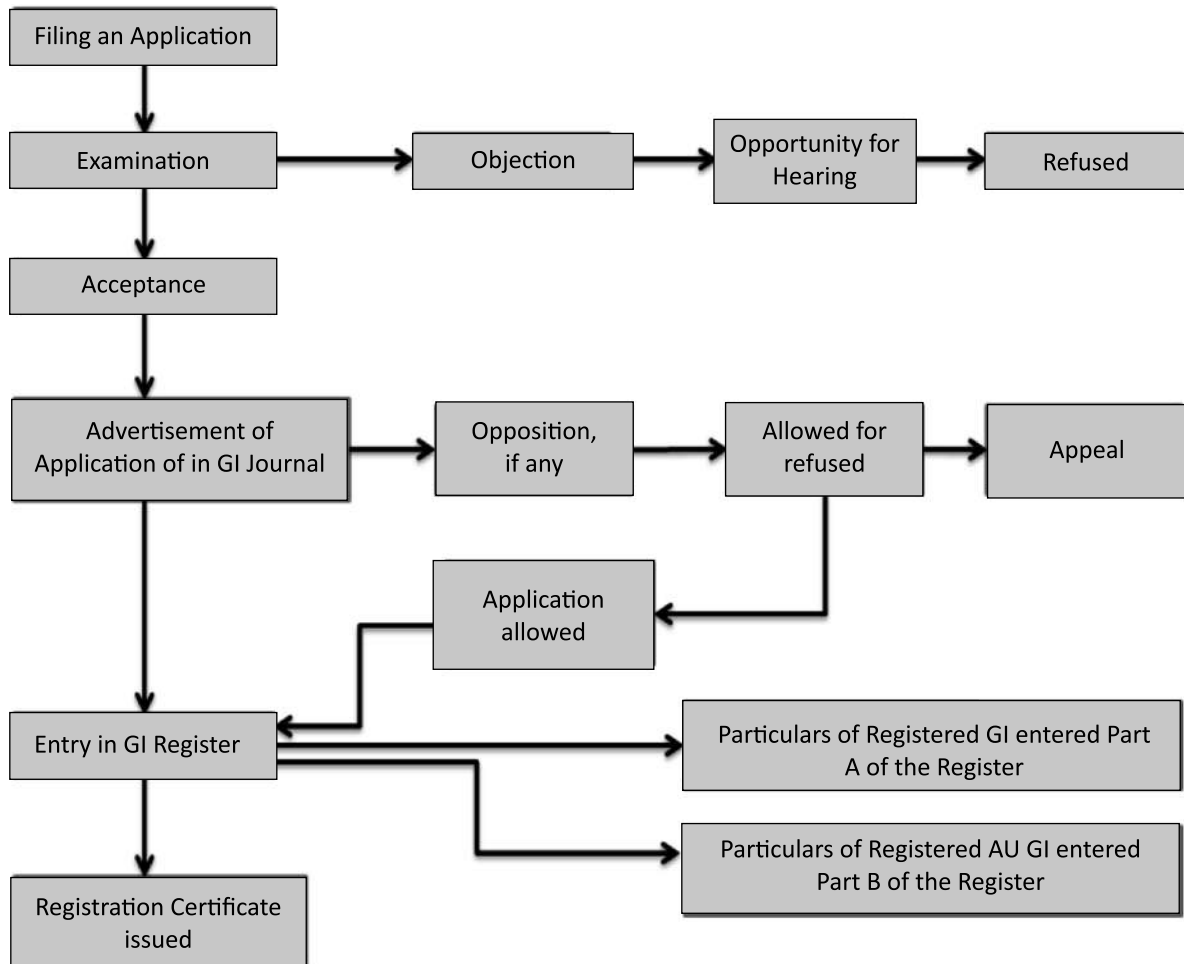
A registered GI shall be valid for 10 years and can be renewed on payment of renewal fee.

#### **Step 9: Additional Protection to Notified Goods**

Additional protection for notified goods is provided in the Act.

#### **Step 10: Appeal**

Any person aggrieved by an order or decision may prefer an appeal .

**Geographical Indications Registration Workflow**

Source: <https://ipindia.gov.in/the-registration-process-gi.htm>

**What is the benefit of registration of Geographical Indications?**

- ***It confers legal protection to Geographical Indications in India.***
- ***Prevents unauthorised use of a Registered Geographical Indication by others.***
- ***It provides legal protection to Indian Geographical Indications which in turn boost exports.***
- ***It promotes economic prosperity of producers of goods produced in a geographical territory.***

**Duration of registration**

Section 18 of the Act deals with duration, renewal, removal and restoration of registration of Geographical Indication. The registration of a geographical indication shall be for a period of ten years, but may be renewed from time to time in accordance with the provisions of this section.

The registration of an authorised user shall be for a period of ten years or for the period till the date on which the registration of the geographical indication in respect of which the authorised user is registered expires, whichever is earlier.

The Registrar shall, on application made in the prescribed manner, by the registered proprietor or by the

authorised user and within the prescribed period and subject to the payment of the prescribed fee, renew the registration of the geographical indication or authorised user, as the case may be, for a period of ten years from the date of expiration of the original registration or of the last renewal of registration, as the case may be.

### **Infringement of Unregistered Geographical Indication**

As per section 20 of the Act a person shall not be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered geographical indication.

### **Infringement of Registered Geographical Indications**

As per section 22 a registered geographical indication is infringed by a person who, not being an authorized user thereof uses such geographical indication by any means in the designations or presentation of goods that indicates or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner goods; or which misleads the persons as to the geographical origin of such goods; or uses any geographical indication in such manner which constitutes an act of unfair competition including passing off in respect of registered geographical indication.

It may be noted that “act of unfair competition” means any act of competition contrary to honest practices in industrial or commercial matters. The following acts shall be deemed to be acts of unfair competition, namely:

- all acts of such a nature as to create confusion by any means whatsoever with the establishment, the goods or the industrial or commercial activities, of a competitor;
- false allegations in the course of trade of such a nature as to discredit the establishment, the goods or the industrial or commercial activities, of a competitor;
- geographical indications, the use of which in the course of trade is liable to mislead the persons as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

A registered geographical indication is infringed by a person who, not being an authorised user thereof uses another geographical indication to the goods which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the persons that the goods originate in the territory, region or locality in respect of which such registered geographical indication relates.

#### ***When is a registered Geographical Indication said to be infringed?***

- ***When an unauthorised user uses a geographical indication that indicates or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner which mislead the public as to the geographical origin of such goods.***
- ***When the use of geographical indication result in an unfair competition including passing off in respect of registered geographical indication.***
- ***When the use of another geographical indication results in false representation to the public that goods originate in a territory in respect of which a registered geographical indication relates.***

### **Assignment or Transmission**

Section 24 of the Act prohibits assignment or transmission of geographical indication. It states that any right to a registered geographical indication shall not be the subject matter of assignment, transmission, licensing, pledge, mortgage or any such other agreement. However, on the death of an authorised user his right in a registered geographical indication shall devolve on his successor in title under the law for the time being in force.

### Prohibition of Registration of Geographical Indication as Trade mark

Section 25 of the Act provides that the Registrar of Trade Marks shall, suo-motu or at the request of an interested party, refuse or invalidate the registration of a trade mark which contains or consists of a geographical indication with respect to the goods or class or classes of goods not originating in the territory of a country, or a region or locality in that territory which such geographical indication indicates, if use of such geographical indications in the trade mark for such goods, is of such a nature as to confuse or mislead the persons as to the true place of origin of such goods or class or classes of goods.

#### *How a Geographical Indication is different from a Trade Mark?*

- **A trade mark is a sign which is used in the course of trade and it distinguishes goods or services of one enterprise from those of other enterprises.**
- **Whereas a geographical indication is an indication used to identify goods having special characteristics originating from a definite geographical territory.**

In the case of *Tea Board, India vs. ITC Limited (GA No. 3137 of 2010 CS No. 250 of 2010)*, Judgement dated 20 April, 2011 plaintiff moved an interlocutory application for temporary injunction for restraining the defendant from using or conducting or making its business at the hotel by the name “DARJEELING LOUNGE”. Application stated that usage of the word “DARJEELING” in the name and logo by defendants is passing off or attempting to pass off its business or services so as to discredit the fame of Darjeeling tea as a geographical indication and/or to mislead persons.

Hon’ble Calcutta High Court *inter alia* observed that passing-off as in Section 20(2) of the GI Act has to be seen in the light of what it implies in trade mark law. As to whether any goods or services are passed off as some other goods or services would depend on a variety of factors ranging from the nature of the marks, their resemblance, the nature of the goods and services, the similarity of the character of the goods and services, the mode of accessing the goods or services and other surrounding circumstances.

The word “Darjeeling” - as precious to tea as it may be as champagne to sparkling wines of that province in France - cannot be exclusively claimed by the plaintiff by virtue of its registration as a geographical indication or as a certification trade mark. Even for a case of passing-off, the use of “Darjeeling” by a person other than the plaintiff can be complained of if the word or the geographical indication has any nexus with the product with which it is exclusively associated upon the registration. It is not necessary to consider whether a “Darjeeling Tea Stall” selling only hot cups of tea can entitle the plaintiff to carry a complaint in respect thereof or a “Darjeeling Tea House” selling all varieties of packaged tea can be said to be in derogation of the plaintiff’s rights. The defendant’s “Darjeeling Lounge” is an exclusive area within the confines of its hotel which is accessible only to its high-end customers. The lounge is a place where such customers and accompanying visitors may frequent, and even sip Darjeeling tea or any other beverage or drink, but there is scarcely any likelihood of deception or confusion in the lounge being named “Darjeeling” for the plaintiff to be granted to any order that it seeks.

As to the case of dilution, the name “Darjeeling” has been extensively used in trading and commercial circles for decades before the GI Act was enacted. In a case of dilution by blurring, it is the uniqueness of a mark which is protected even in a case where there is no likelihood of confusion. But the word “Darjeeling” has been and continues to be so widely used as a business name or for like purpose for so long that the plaintiff’s recent registration would, prima facie, not entitle it to enjoy the kind of exclusivity that it asserts.

## OFFENCES, PENALTIES AND PROCEDURE

### Meaning of Applying Geographical Indications

Section 37 of the Act provides that a person shall be deemed to apply a geographical indication to goods who:

- (a) applies it to the goods themselves; or
- (b) applies it to any package in or with which the goods are sold, or exposed for sale, or had in possession for sale or for any purpose of trade or manufacture; or
- (c) places, encloses or annexes any goods which are sold, or exposed for sale, or had in possession for sale or for any purpose of trade or manufacture, in or with any package or other thing to which a geographical indication has been applied; or
- (d) uses a geographical indication in any manner reasonably likely to lead to the belief that the goods in connection with which it is used are designated or described by that geographical indication; or
- (e) in relation to the goods uses a geographical indication in any sign, advertisement, invoice, catalogue, business letter, business paper, price list or other commercial documents and goods are delivered to a person in pursuance of a request or order made by reference to the geographical indication as so used.

A geographical indication shall be deemed to be applied to goods whether it is woven in, impressed on, or otherwise worked into, or annexed or affixed to, the goods or to any package or other thing.

### Falsifying and Falsely Applying Geographical Indications

Section 38 states that a person shall be deemed to falsify a geographical indication who, either:

- (a) without the assent of the authorised user of the geographical indication makes that geographical indication or deceptively similar geographical indication; or
- (b) falsifies any genuine geographical indication, whether by alteration, addition, effacement or otherwise.

A person shall be deemed to falsely apply to goods a geographical indication who, without the assent of the authorised user of the geographical indication:

- (a) applies such geographical indication or a deceptively similar geographical indication to goods or any package containing goods;
- (b) uses any package bearing a geographical indication which is identical with or deceptively similar to the geographical indication of such authorised user, for the purpose of packing, filling or wrapping therein any goods other than the genuine goods of the authorised user of the geographical indication.

Any geographical indication falsified or falsely applied referred to as a false geographical indication.

In any prosecution for falsifying a geographical indication or falsely applying a geographical indication to goods, the burden of proving the assent of proprietor shall lie on the accused.

### Penalty for Applying False Geographical Indications

According to Section 39 of the Act, any person who:

- (a) falsifies any geographical indication; or
- (b) falsely applies to goods any geographical indication; or
- (c) makes, disposes of, or has in his possession, any die, block, machine, plate or other instrument for the purpose of falsifying or of being used for falsifying, a geographical indication; or

- (d) applies to any goods to which an indication of the country or place in which they were made or produced or the name and the address of the manufacturer or person for whom the goods are manufactured is required to be applied under section 71, a false indication of such country, place, name or address; or
- (e) tampers with, alters or effaces an indication of origin which has been applied to any goods to which it is required to be applied under section 71; or
- (f) causes any of the things above-mentioned in this section to be done, shall, unless he proves that he acted, without intent to defraud,

be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees.

It may be noted that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.

### Special Provisions Relating to Applications for Registration from Citizens of Convention Countries

Section 84 empowers Central Government may by notification in the Official Gazette, declare such country or group of countries or union of countries or Inter-Governmental Organisations to be a convention country or convention countries for the purposes of the Act for the fulfillment of a treaty, convention or arrangement with any country or a country which is a member of a group of countries or union of countries or Inter- Governmental Organisations outside India which affords to citizens of India similar privileges as granted to its own citizens.

#### LESSON ROUND-UP

- Geographical indication in relation to goods means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.
- Goods mean any agricultural, natural or manufactured goods or any goods of handicraft or of industry and includes food stuff.
- Indication includes any name, geographical or figurative representation or any combination of them conveying or suggesting the geographical origin of goods to which it applies.
- The object of the Geographical Indications of Goods (Registration and Protection) Act, 1999 is three fold, firstly by specific law governing the geographical indications of goods in the country which could adequately protect the interest of producers of such goods, secondly, to exclude unauthorized persons from misusing geographical indications and to protect consumers from deception and thirdly, to promote goods bearing Indian geographical indications in the export market.
- Any association of persons or producers or any organisation or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods, who are desirous of registering a geographical indication in relation to such goods shall apply in writing to the Registrar in such form and in such manner and accompanied by such fees as may be prescribed for the registration of the geographical indication.





### KEY CONCEPTS

■ Design ■ Article ■ Artistic Work

### Learning Objectives

#### To understand:

- Procedure for Registration of Designs
- Certificate of Registration
- Copyright on Registration
- Cancellation of Registration
- Piracy of Registered Design

### Lesson Outline

- Design which are Prohibited of Registration
- Application for Registration
- Effect of Registration of Design
- Copyright on Registration
- Piracy of Registered Design
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- Designs Act, 2000
- Designs Rules, 2001

## INTRODUCTION

Industrial designs refer to creative activity which result in the ornamental or formal appearance of a product and design right refers to a novel or original design that is accorded to the proprietor of a validly registered design. Industrial designs are an element of intellectual property.

The first legislation in India for protection of Industrial Designs was The Patents & Designs Protection Act, 1872. It supplemented the 1859 Act passed by Governor General of India for granting exclusive privileges to inventors and added protection for Industrial Design. The 1872 Act included the term – any new and original pattern or design, or the application of such pattern or design to any substance or article of manufacture’.

The Inventions & Designs Act of 1888 re-enacted the law relating to protection of inventions and designs and contained provision relating to Designs in a separate part 3. The Patents & Designs Act enacted in 1911 also provided for protection of Industrial Designs. The Patents Act, 1970 repealed the provisions of the Patents and Designs Act, 1911, so far as they related to Patents. However, the provisions relating to Designs were not repealed and continued to govern the Designs Law.

India joined the WTO as a – member State in 1995. Consequently, the Patents & Designs Act, 1911 was repealed and the Designs Act, 2000 was enacted, to make the Designs Law in India TRIPS compliant. Article 25 of the World Trade Organization TRIPS Agreement, obliges Members to provide for the protection of independently created industrial designs that are new or original. A design which is not new or original; or which has been disclosed to the public anywhere; or which is not significantly distinguishable from known design or combination of known design; or which comprises or contains scandalous or obscene matter are prohibited for registration under the Design Act, 2000.

The objective of the Designs Act, 2000 is to protect new or original designs so created to be applied or applicable to particular article to be manufactured by Industrial Process or means. Sometimes purchase of articles for use is influenced not only by their practical efficiency but also by their appearance. The important purpose of design registration is to see that the artisan, creator, originator of a design having aesthetic look is not deprived of his bonafide reward by others applying it to their goods.

In the case of *Bharat Glass Tube Limited vs. Gopal Glass Works Limited, Appeal (Civil) 3185 of 2008 Judgement dated 1 May, 2008*, Supreme Court of India observed that:

*“It may be mentioned here that in 1911 the Designs Act was passed by the then British Government in India. But with the advancement of science and technology and the number of registration of the design having increased in India, the Act of 1911 was amended wholesale by the Parliament and this new Act known as Designs Act, 2000 came to be introduced in the Parliament and the same was passed as such. The statement of objects and reasons read as under:*

*Since the enactment of the Designs Act, 1911 considerable progress has been made in the field of science and technology. The legal system of the protection of industrial designs requires to be made more efficient in order to ensure effective protection to registered designs. It is also required to promote design activity in order to promote the design element in an article of production. The proposed Design Bill is essentially aimed to balance these interests. It is also intended to ensure that the law does not unnecessarily extent protection beyond what is necessary to create the required incentive for design activity while removing impediments to the free use of available designs.*

*In fact, the sole purpose of this Act is protection of the intellectual property right of the original design for a period of ten years or whatever further period extendable. The object behind this enactment is to benefit the person for his research and labour put in by him to evolve the new and original design. This is the sole aim of enacting this Act. It has also laid down that if design is not new or original or published previously then such design should not be registered. It further lays down that if it has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of the application for registration then such design will not be registered or if it is found that it is not significantly distinguishable from known designs or combination of known designs, then such designs shall not be registered. It also provides that registration can be cancelled under section 19 of the Act if proper application is filed before the competent authority i.e. the Controller that the design has been previously registered in India or published in India or in any other country prior to the date of registration, or that the design is not a new or original design or that the design is not registerable under this Act or that it is not a design as defined in clause (d) of section 2. The Controller after hearing both the parties if satisfied that the design is not new or original or that it has already been registered or if it is not registerable, cancel such registration and aggrieved against that order, appeal shall lie to the High Court. These prohibitions have been engrafted so as to protect the original person who has designed a new one by virtue of his own efforts by researching for a long time. The new and original design when registered is for a period of ten years. Such original design which is new and which has not been available in the country or has not been previously registered or has not been published in India or in any other country prior to the date of registration shall be protected for a period of ten years. Therefore, it is in the nature of protection of the intellectual property right. This was the purpose as is evident from the statement of objects and reasons and from various provisions of the Act.....”*

***In the case of Escorts construction Equipment Ltd. vs. Action construction Equipment Pvt. Ltd 1999 PTC 36(Del) at pp 39, 40, 48], Delhi High Court observed that the primary object the Act is to protect shape and not the function or functional shape. The expression design doesn't include a method or principle of construction or features of shape or configuration which is dictated solely by the function which the article to be made in that shape or configuration has to perform.***

## DESIGN

As per section 2(d) Design means only the features of shape, configuration, pattern or ornament or composition of lines or colour or combination thereof applied to any article whether two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye, but does not include any mode or principle or construction or anything which is in substance a mere mechanical device, and does not include any trade mark, as define in clause (v) of sub-section of Section 2 of the Trade and Merchandise Marks Act, 1958, property mark or artistic works as defined under Section 2(c) of the Copyright Act, 1957.

***An artistic work as defined under Section 2(c) of the Copyright Act, 1957 is not a subject matter for registration which reads as follows:***

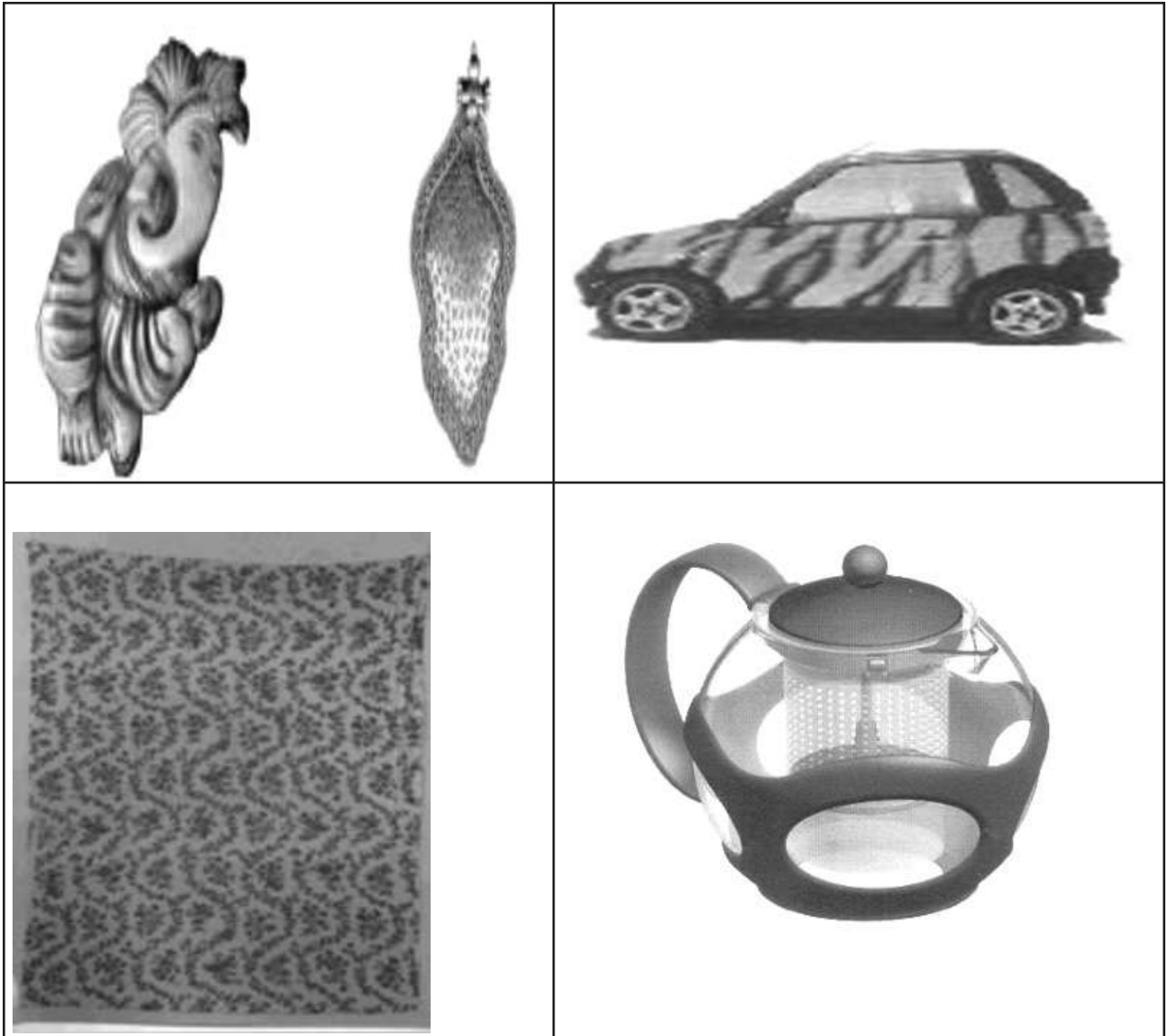
***“Artistic works” means: -***

- ***A painting, a sculpture, a drawing (including a diagram, map, chart or plan) on engraving or a photograph, whether or not such work possesses artistic quality;***
- ***An work of architecture; and***
- ***Any other work of artistic craftsmanship.***

*A design or pattern covers the whole body or the goods and forms part and parcel or the goods but a trade mark is apart from and different from the goods for denoting the goods to be the manufacture or merchandise of a particular person. The copying of a design cannot, therefore, be treated as counterfeiting a trade mark. [Narumal Khemchand vs. The Bombay Co., Ltd., (1914), 25 Ind. Cas. 998]*

*Article means any article of manufacture and any substance, artificial, or partly artificial and partly natural; and includes any part of an article capable of being made and sold separately.*

Design is one of the categories of IPR where the design system focuses on the aesthetic feature of an article derived from its visual appearance. Relevant aspects are the shape, configuration, surface pattern, the colour or line or a combination thereof as applied to an article which produces an aesthetic impression on the sense of sight. Following are the pictorial examples of design:



Source: 1. <https://ipindia.gov.in/writereaddata/images/pdf/design-registration.pdf>

2. *Design Registration in India* (Office of the Controller General of Patent, Designs and Trademark).

In the case of *Jayson Industries and Anr vs. Crown Craft (India) Pvt Ltd, CS(COMM) 580/2022, I.A. 13422/2022, I.A. 13425/2022, judgement dated 03.07.2023*, Delhi High Court inter alia observed that in order to understand the scope of the concept of a “design” under the Designs Act and the extent to which it is entitled to protection, one has to refer to the relevant provisions of the Designs Act in conjunction with the judgment of the Supreme Court in *Bharat Glass Tubes 2008 (10) SCC 657*, which is the only authoritative pronouncement from the Supreme Court on the point. The expression “design” is defined, essentially, in clause (d) of Section 2 of the Designs Act, as the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article, whether in two dimensional or three dimensional or in both forms, by any industrial process or means which, in the finished. The following features of the definition of “design”, as contained in the Designs Act, are of significance:

- i. The application of the features of shape, configuration, pattern, etc. to an article, in order for it to constitute a “design” may be two dimensional, three dimensional or both. No article, in its physical form, is two dimensional. Howsoever slim an article may be, it is, per definition, three dimensional. By extending the definition of “design”, to the application of shapes, configuration, patterns, etc. to articles even in two dimensional forms, the statute makes it clear that even a two dimensional representation of the application of features or shape, configuration, pattern etc. to an article would constitute a “design”.
- ii. The design is to be judged “solely by the eye”. The test to decide whether a particular application of shape, configuration, pattern, etc. to an article constitutes a design is, therefore, essentially ocular/visual.
- iii. Judged thus in an ocular/visual manner, the application of the shape, configuration, pattern, etc., to the article must appeal to the eye. Thus, it is not mere ocular assessment, but ocular appeal, which is necessary for a particular application of shape, configuration, etc. to an article, to constitute a “design”. Sans ocular appeal, there can be no design. Thus, unlike the Patents Act, which deals with inventions and judges their patentability on the basis of whether they involve inventive steps, the application of shape, configuration, etc., to an article, in order to constitute a “design”, must have ocular appeal, irrespective of whether it is inventive, or is or is not functionally superior to prior art.
- iv. The definition, as already noted, excludes any mode or principle of construction or anything which is in substance a mere mechanical advice. This expression, quite frankly, is not easy to comprehend. However, a Full Bench of this Court has, in *Mohan Lal v. Sona Paint & Hardwares (2013) 200 DLT 322 (FB)*, held thus:

“15. Before one proceeds further, it may be relevant to indicate here some well accepted principles which operate in the field of designs law. Design as is generally understood refers to the features of shape, configuration, pattern or ornament when applied to an article. It is for this reason that designs such as these are described as Industrial Designs. It is these designs which are covered under the Designs Act. Designs can be two dimensional or three dimensional. While pattern or an ornament would ordinarily be applied to an article; shape and configuration, become the article itself. Designs in that sense relate to the non-functional features of the article. Therefore, by necessary corollary, a design which has functional attributes cannot be registered under the Designs Act. This is the essence of Section 2(d) of the Designs Act. The protection under the Designs Act is granted only to those designs which have an aesthetic value or otherwise appeal to the eye. There may be, however, cases where the design while fulfilling the test of being appealing to the eye, is also, functional. [See judgment in the case of *Cow (P.B.) & Coy Ld. v. Cannon Rubber Manufacturers Ld.*30]. In this case the diagonal ribs on a hot water bottle were both appealing to the eye as well as functional. They were functional in as much as they permitted the heat to be radiated without singeing the user. The conundrum of functionality was resolved by taking note of the fact that it would make no impact on the articles functionality if, the ribs on the hot water bottle were either horizontal or vertical or even diagonal formations.”

In other words, if the feature, which distinguishes the finished article from prior art is merely functional, with no ocular appeal, it cannot constitute a “design”. At the same time, if the article, compared vis-à-vis prior art, has both ocular and functional appeal, then it would qualify as a “design”.

- v. “Article” is defined, in Clause (a) of Section 2, as “any article of manufacture...”. Thus, an “article” has to be a tangible entity. A design which merely exists in the mind of its creator, and is not to be applied to any article of manufacture is, therefore, no “design” within the meaning of the Designs Act. Abstract concepts are not registerable as designs.

### Proprietor of a New or Original Design

- (i) Where the author of the design, for good consideration, executes the work for some other person, means the person for whom the design is so executed;
- (ii) Where any person acquires the design or the right to apply the design to any article, either exclusively of any other person or otherwise, means, in the respect and to the extent in and to which the design or right has been so acquired, the person by whom the design or right is so acquired; and
- (iii) In any other case, means the author of the design; and where the property in or the right to apply, the design has devolved from the original proprietor upon any other person, includes that other person. [Section 2(j)]

### Prohibition of Registration of Certain Designs

A design which prohibited of registration under Section 4 of the Design Act, 2000 are as follows:

- is not new or original; or
- has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of the application for registration; or
- is not significantly distinguishable from known designs or combination of known designs; or
- comprises or contains scandalous or obscene matter, shall not be registered.

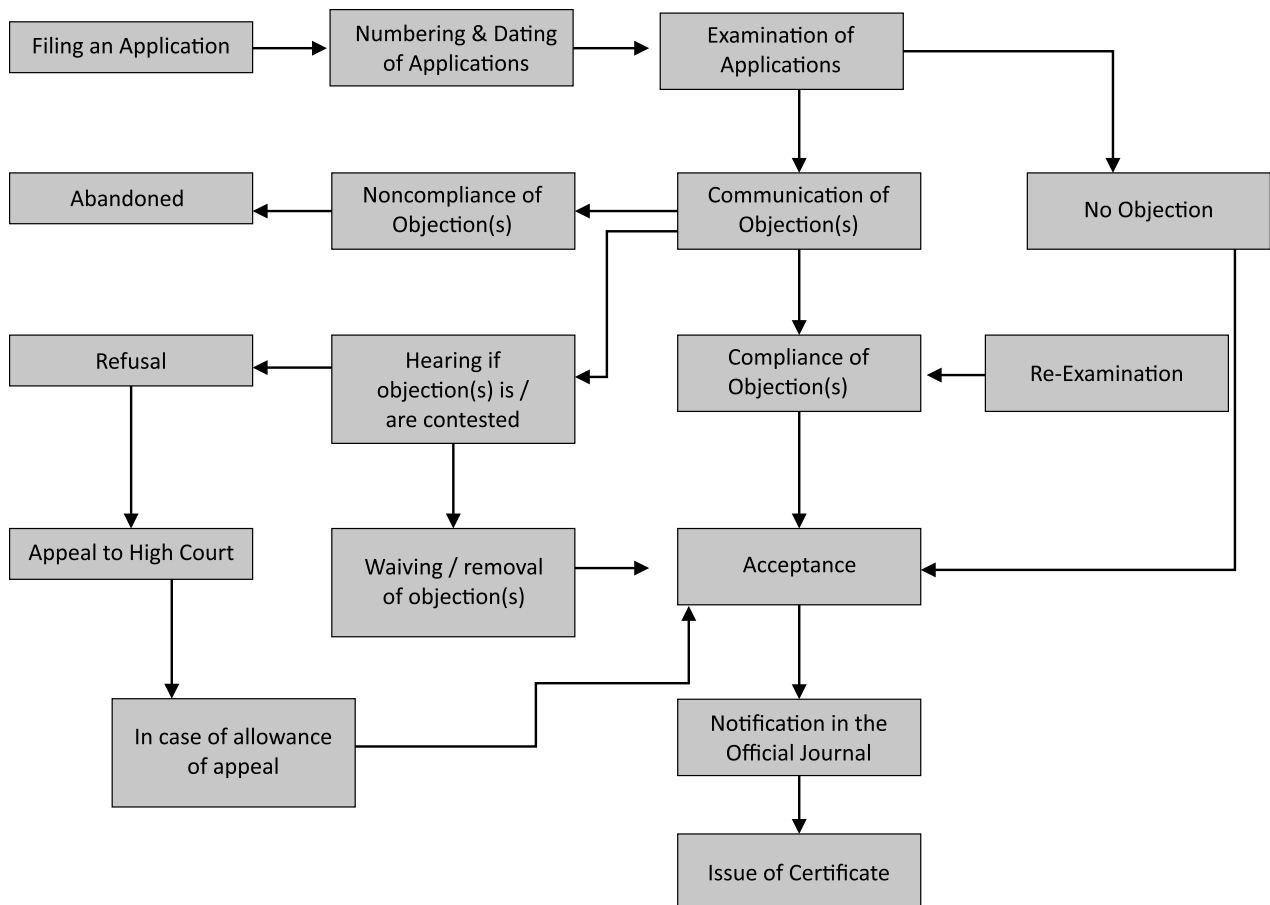
***Hon'ble Supreme Court of India held that expression new or original appearing in Section 4 means that the design which has been registered has not been published anywhere or it has been made known to the public and that it had been invented for the first time or it has not been reproduced by anyone.***

***In the matter of M/s Brighto Auto Industries vs. Shri Raj Chawla (ILR 1978 (I) Delhi) it was held by the Honorable Court that new is taken generally to mean as different to what has gone before and original as something originating from the author. In the matter of novelty the eye has to be the ultimate arbiter and the determination has to rest on the general ocular impression. To secure recognition for its newness or originality it is imperative that a design identical with or even materially similar to the relevant design should not have been published or registered previously. A slight trivial or infinitesimal variation from a preexisting design will not qualify it for registration taking into account the nature involved the change introduced should be substantial. It is not necessary to justify registration that the whole of the design should be new, the newness may be confined to only a part of it but that part must be a significant one and it should be potent enough to impart to the whole design a distinct identity, unless the registration sought for the said part alone. Further it was held that it is the duty of the court to take special care that no design shall be counted new or original, unless it is distinct from what previously existed by something essentially new or original which is different from ordinary trade variants, which may have lost, been common matters of test or choice in that trade.***

### Application for Registration of Designs (Section 5)

- (1) The Controller may, on the application of any person claiming to be the proprietor of any new or original design not previously published in any country and which is not contrary to public order or morality, register the design under this Act.
- (2) Every application shall be in the prescribed form and shall be filed in the patent office in the prescribed manner and shall be accompanied by the prescribed fee.
- (3) A design may be registered in not more than one class, and, in case of doubt as to the class in which a design ought to be registered, the Controller may decide the question.
- (4) The Controller may, if he thinks fit, refuse to register any design presented to him for registration; but any person aggrieved by any such refusal may appeal to the High Court.
- (5) An application which, owing to any default or neglect on the part of the applicant, has not been completed so as to enable registration to be effected within the prescribed time shall be deemed to be abandoned.
- (6) A design when registered shall be registered as of the date of the application for registration.

#### Design Registration Process Workflow



Source: <https://ipindia.gov.in/writereaddata/images/pdf/design-registration.pdf>



**Registration to be in respect of Particular Article (Section 6)**

- (1) A design may be registered in respect of any or all of the articles comprised in a prescribed class of articles.
- (2) Any question arising as to the class within which any article falls shall be determined by the Controller whose decision in the matter shall be final.
- (3) Where a design has been registered in respect of any article comprised in a class of article, the application of the proprietor of the design to register it in respect of some one or more other articles comprised in that class of articles shall not be refused, nor shall the registration thereof be invalidated —
  - (a) on the ground of the design not being a new or original design, by reason only that it was so previously registered; or
  - (b) on the ground of the design having been previously published in India or in any other country, by reason only that it has been applied to article in respect of which it was previously registered.

It may be noted that such subsequent registration shall not extend the period of copyright in the design beyond that arising from previous registration.

- (4) Where any person makes an application for the registration of a design in respect of any article and either—
  - (a) that design has been previously registered by another person in respect of some other article; or
  - (b) the design to which the application relates consists of a design previously registered by another person in respect of the same or some other article with modifications or variations not sufficient to alter the character or substantially to affect the identity thereof, then, if at any time while the application is pending the applicant becomes the registered proprietor of the design previously registered, the foregoing provisions of this section shall apply as if at the time of making the application, the applicant, had been the registered proprietor of that design.

**Essential requirements for the registration of 'Design' under the Act**

- ***The design should be new or original, not previously published or used in any country before the date of application for registration. The novelty may reside in the application of a known shape or pattern to new subject matter.***
- ***The design should relate to features of shape, configuration, pattern or ornamentation applied or applicable to an article.***
- ***The design should be applied or applicable to any article by any industrial process.***
- ***The features of the design in the finished article should appeal to and are judged solely by the eye. This implies that the design must appear and should be visible on the finished article, for which it is meant.***
- ***Any mode or principle of construction or operation or anything which is in substance a mere mechanical device, would not be a registrable design. For instance a key having its novelty only in the shape of its corrugation or bent at the portion intended to engage with levers inside the lock associated with, cannot be registered as a design under the Act.***
- ***The design should not include any Trade Mark or property mark or artistic works as defined under the Copyright Act, 1957.***



### Publication of Particulars of Registered Designs

Section 7 of the Act provides that the Controller shall, as soon as may be after the registration of a design, cause publication of the prescribed particulars of the design to be published in such manner as may be prescribed and thereafter the design shall be open to public inspection.

### Substitution of Applicant or Joint Claiming (Section 8)

- (a) Name of an applicant can be substituted or a joint claim can be made for an applied design, if the following requirements are met:
  - i. The claim for substitution is made before the design has been registered; and
  - ii. Right of claimant shall be created only by:
    - An assignment;
    - Agreement in writing made by the applicant or one of the applicants; or
    - Operation of law;
  - iii. The design under consideration shall be identified in the assignment or agreement specifically by reference to the number of application for registration; or
  - iv. The rights of the claimant in respect of the design have been finally established by a Court.
- (b) A request for substitution of applicant shall be filed in Form-2 along with the required fee. If the above said requirements are fulfilled and the Controller is satisfied that, upon registration of design, the claimant would be entitled to any interest in the design the Controller may direct that the application shall proceed:
  - i. in the names of the claimant(s); or
  - ii. in the names of the claimant(s) and the applicant or the other joint applicant(s), as the case may be.
- (c) However, in case of joint applicants, the Controller shall not pass such direction without with the consent of the other joint applicant(s);
- (d) In case, joint applicant(s) die(s) at any time before the design has been registered, a request may be made for substitution by the survivor(s) and the Controller may direct that the application shall proceed in the name of the survivors alone. However, no such direction shall be issued without the consent of legal representative of the deceased;
- (e) If case, there is any dispute between joint applicants as to whether or in what manner the application should be proceeded with an application may be made by any of the parties. The Controller may give such directions as he thinks fit for enabling the application to proceed in the name of one or more of the parties alone or for regulating the manner in which it should be proceeded with, or for both those purposes, as the case may be. However, the Controller shall not pass any such direction without giving an opportunity to be heard to all the concerned parties.

### Certificate of Registration.

Under section 9 of the Design Act, the Controller grant a certificate of registration to the proprietor of the design when it registered.

The Controller may, in case of loss of the original certificate, or in any other case in which he deems it expedient, furnish one or more copies of the certificate.

### **Effect of Registration of Design**

***The registration of a design confers upon the registered proprietor 'Copyright' in the design for the period of registration. 'Copyright' means the exclusive right to apply a design to the article belonging to the class in which it is registered.***

### **Register of Designs**

Section 10 of the Act provides that there shall be kept at the patent office a book called the register of designs, wherein shall be entered the names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs, and such other matter as may be prescribed and such register may be maintained wholly or partly on computer, floppies or diskettes, subject to such safeguards as may be prescribed.

The register of designs shall be prima facie evidence of any matter by this Act directed or authorized to be entered therein.

### **Copyright on Registration**

Section 11 provides that when a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during ten years from the date of registration. However, before the expiration of the said ten years, application for the extension of the period of copyright is made to the Controller in the prescribed manner, the Controller shall, on payment of the prescribed fee, extend the period of copyright for a second period of five years from the expiration of the original period of ten years.

High Court of Delhi in the case of *Microfibers Inc. vs. Girdhar and Co. and Anr.* had *inter alia* criteria observed the following guidelines:

- a. The definition of artistic work has a very wide connotation as it is not circumscribed by any limitation of the work possessing any artistic quality. Even an abstract work, such as a few lines or curves arbitrarily drawn would qualify as an artistic work. It may be two dimensional or three dimensional. The artistic work may or may not have visual appeal.
- b. The rights to which a holder of an original artistic work is entitled are enumerated in Section 14(c) of the Copyright Act.
- c. It is the exclusive right of the holder of a Copyright in an original artistic work to reproduce the work in any material form. For example, a drawing of an imaginary futuristic automobile, which is an original artistic work, may be reproduced in the three-dimensional material from using an element, such as a metal sheet.
- d. The design protection in case of registered works under the Designs Act cannot be extended to include the copyright protection to the works which were industrially produced.
- e. A perusal of the Copyright Act and the Designs Act and indeed the Preamble and the Statement of Objects and Reasons of the Designs Act makes it clear that the legislative intent was to grant a higher protection to pure original artistic works such as paintings, sculptures etc and lesser protection to design activity which is commercial in nature. The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure Artistic.
- f. The original paintings/artistic works which may be used to industrially produce the designed article would continue to fall within the meaning of the artistic work defined under Section 2(c) of the Copyright Act, 1957 and would be entitled to the full period of copyright protection as evident from the definition

of the design under Section 2(d) of the Designs Act. However, the intention of producing the artistic work is not relevant.

- g. This is precisely why the legislature not only limited the protection by mandating that the copyright shall cease under the Copyright Act in a registered design but in addition, also deprived copyright protection to designs capable of being registered under the Designs Act, but not so registered, as soon as the concerned design had been applied more than 50 times by industrial process by the owner of the copyright or his licensee.
- h. In the original work of art, copyright would exist and the author/holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work *per se*.
- i. If the design is registered under the Designs Act, the design would lose its copyright protection under the Copyright Act. If it is a design registrable under the Designs Act but has not so been registered, the design would continue to enjoy copyright protection under the Act so long as the threshold limit of its application on an article by an industrial process for more than 50 times is reached. But once that limit is crossed, it would lose its copyright protection under the Copyright Act. This interpretation would harmonize the Copyright and the Designs Act in accordance with the legislative intent.

***What is the duration of the registration of a design? Can it be extended?***

***The duration of the registration of a design is initially ten years from the date of registration, but in cases where claim to priority has been allowed the duration is ten years from the priority date. This initial period of registration may be extended by further period of 5 years on an application made to the Controller before the expiry of the said initial period of ten years.***

### **Restoration of Lapsed Designs**

Section 12 of the Act provides that where a design has ceased to have effect by reason of failure to pay the fee for the extension of copyright, the proprietor of such design or his legal representative and where the design was held by two or more persons jointly, then, with the leave of the Controller one or more of them without joining the others, may, within one year from the date on which the design ceased to have effect, make an application for the restoration of the design in the prescribed manner on payment of such fee as may be prescribed.

An application under this section shall contain a statement, verified in the prescribed manner, fully setting out the circumstances which led to the failure to pay the prescribed fee, and the Controller may require from the applicant such further evidence as he may think necessary.

***Can the Registration of a Design be cancelled?***

***According to Section 19 of the Act, the registration of a design may be cancelled at any time after the registration of design on a petition for cancellation in prescribed form with fee to the Controller of Designs on the following grounds:***

- ***That the design has been previously registered in India; or***
- ***That it has been published in India or elsewhere prior to date of registration; or***
- ***The design is not new or original; or***
- ***Design is not registrable; or***
- ***It is not a design under Clause (d) of Section 2.***

### Designs to bind Government

As per Section 20 a registered design shall have to all intents the like effect as against the Government as it has against any person and the provisions of Chapter XVII of the Patents Act, 1970 shall apply to registered designs as they apply to patents.

### Piracy of Registered Design

During the existence of copyright in any design it shall not be lawful for any person, without the license or written consent of the registered proprietor:

- i. for the purpose of sale to apply or cause to be applied, to any article in any class of articles in which the design is registered, the design or any fraudulent or obvious imitation thereof, or to do anything with a view to enable the design to be so applied;
- ii. to import such article for the purposes of sale;
- iii. to publish or expose or cause to be published or exposed for sale, that article.

#### ***What is Piracy of a Design?***

***Piracy of a design means the application of a design or its imitation to any article belonging to class of articles in which the design has been registered for the purpose of sale or importation of such articles without the written consent of the registered proprietor. Publishing such articles or exposing terms for sale with knowledge of the unauthorized application of the design to them also involves piracy of the design.***

### Industrial and International Exhibitions

The exhibition of a design, or of any article to which a design is applied, at an industrial or other exhibition to which the provisions of this section have been extended by the Central Government by notification in the Official Gazette, or the publication of a description of the design, during or after the period of the holding of the exhibition, or the exhibition of the design or the article or the publication of a description of the design by any person else-where during or after the period of the holding of the exhibition, without the privity or consent of the proprietor, shall not prevent the design from being registered or invalidate the registration thereof.

It may be noted that-

- (a) the exhibitor exhibiting the design or article, or publishing a description of the design, gives to the Controller previous notice in the prescribed form; and
- (b) the application for registration is made within six months from the date of first exhibiting the design or article or publishing a description of the design.

### Appeal

An appeal lies to the High Court against an order passed by the Controller under the following provisions:

- i. an order under Section 5, refusing registration of a design;
- ii. an order under Section 19, passed in a cancellation petition;
- iii. an order under Section 31, passed in a rectification petition;
- iv. an order under Section 35, refusing registration on the ground of public order or morality.

Every appeal shall be made within three months of the date of the order of the Controller. The date of such order is the date on which the order is dispatched.

In calculating the said period of three months, the time taken in granting a copy of the order appealed against shall be excluded.

The High Court may, if it thinks fit, obtain the assistance of an expert in deciding such appeals, and the decision of the High Court shall be final.

### LESSON ROUND-UP

- Industrial designs refer to creative activity which result in the ornamental or formal appearance of a product and design right refers to a novel or original design that is accorded to the proprietor of a validly registered design. Industrial designs are an element of intellectual property.
- The objective of the Designs Act, 2000 is to protect new or original designs so created to be applied or applicable to particular article to be manufactured by Industrial Process or means.
- Design means only the features of shape, configuration, pattern or ornament or composition of lines or colour or combination thereof applied to any article whether two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye, but does not include any mode or principle or construction or anything which is in substance a mere mechanical device, and does not include any trade mark, as define in clause (v) of sub-section of Section 2 of the Trade and Merchandise Marks Act, 1958, property mark or artistic works as defined under Section 2(c) of the Copyright Act, 1957.
- The registration of a design confers upon the registered proprietor 'Copyright' in the design for the period of registration. 'Copyright' means the exclusive right to apply a design to the article belonging to the class in which it is registered.
- Piracy of a design means the application of a design or its imitation to any article belonging to class of articles in which the design has been registered for the purpose of sale or importation of such articles without the written consent of the registered proprietor.

### TEST YOURSELF

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation.)*

1. What is meant by 'Design' under the Designs Act, 2000?
2. What is the object of registration of Designs?
3. What is the effect of registration of design?
4. What is piracy of a Design?
5. What is the penalty for the piracy of a registered Design?

### LIST OF FURTHER READINGS

- Bare Act - The Designs Act, 2009 and rules made thereunder.
- Intellectual Property Laws and Practice – Elizabeth Verkey



## WARNING

### **Regulation 27 of the Company Secretaries Regulations, 1982**

*In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or any Committee formed by the Council in this regard, may suo-moto or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity of being heard, suspend or debar him from appearing in any one or more examinations, cancel his examination result, or registration as a student, or debar him from re-registration as a student, or take such action as may be deemed fit.*

*It may be noted that according to regulation 2(ia) of the Company Secretaries Regulations, 1982, 'misconduct' in relation to a registered student or a candidate enrolled for any examination conducted by the Institute means behaviour in disorderly manner in relation to the Institute or in or around an examination centre or premises, or breach of any provision of the Act, rule, regulation, notification, condition, guideline, direction, advisory, circular of the Institute, or adoption of malpractices with regard to postal or oral tuition or resorting to or attempting to resort to unfair means in connection with writing of any examination conducted by the Institute, or tampering with the Institute's record or database, writing or sharing information about the Institute on public forums, social networking or any print or electronic media which is defamatory or any other act which may harm, damage, hamper or challenge the secrecy, decorum or sanctity of examination or training or any policy of the Institute.*

# EXECUTIVE PROGRAMME

## ECONOMIC, COMMERCIAL & INTELLECTUAL PROPERTY LAWS

### GROUP 2 • PAPER 6

*(This test paper is for practice and self-study only and not to be sent to the Institute)*

#### TEST PAPER

**Time Allowed: 3 Hours**

**Maximum Marks: 100**

*All questions are compulsory.*

*Marks for each question is indicated alongside of the question.*

#### PART-I: ECONOMIC AND COMMERCIAL LAWS

##### Question 1

- (a) Mr. 'X' an Indian resident had remitted an amount of USD 2,80,000 under Liberalised Remittance Scheme (LRS) for family maintenance in USA during the F.Y. 2022-23 which exceeded the prescribed limit of USD 2,50,000. The Bank had reportedly sought clarification from the Mr. 'X'. Mr. 'X' claimed ignorance stating that he assumed that the LRS limit was unlimited and hence did not declare the transactions done. Mr. 'X' was issued a Memorandum of Contravention advising him to remit back the excess amount.

*In view of the above facts, answer the following:*

- (i) Can remittances be made only in US Dollars? Is Mr. 'X' eligible for compounding of the contravention of Liberalised Remittance Scheme?
- (ii) Mr. 'X' had remitted an amount of USD 2,80,000 under Liberalised Remittance Scheme (LRS) for expenses in connection with medical treatment abroad? Will your answer be different in this situation?

**(3 Marks Each)**

- (b) Competition Commission of India (CCI) primary function is to promote competition and curb anti-competitive practices in the market. "Market" could be anything i.e., from food to infrastructure and it may be incorrect to state that the Competition Act in India is complementary to the enactments such as Telecom Regulatory Authority of India Act, 1997, Insurance Regulatory and Development Authority of India Act, 1999 governing sectors such as Telecom Sector and Insurance Sector respectively.

Insurance Regulatory and Development Authority of India (IRDAI) is a statutory body created under the IRDAI Act, 1999. The IRDAI is vested with the regulatory powers to regulate to the insurance sector. The Competition Act does not contemplate the CCI to act as an appellate court or a grievance redressal forum against any decisions, which are taken by other regulators, in exercise of their statutory powers and are not interfaced with trade or commerce.



In view of the above, whether the following statements are valid. Answer with reasons:

- (i) The basic objectives of the Competition Act are to promote and sustain an enabling competition culture and support economic growth in India.
- (ii) Whether the Statutory Functions of IRDAI are within the jurisdiction of the Competition Commission of India (CCI)?

**(3 Marks Each)**

- (c) Mr. 'M' received foreign remittances of Rs. 5, 00, 000/- from a relative who is a Non-Resident India and presently residing in United States of America, then whether foreign remittance received by Mr. 'M' is to be treated as foreign contribution as per Foreign Contribution (Regulation) Act, 2010? Whether Mr. 'M' required to be complied with the relevant provisions of the Foreign Contribution (Regulation) Act, 2010?

**(3 Marks)**

### Question No. 2

- (a) ABC Ltd. maintained a rest house for the use of its Employees, Managing director and other executives. It entered into an agreement with XYZ Ltd. for the installation of central air-conditioning system. The system installed did not function well, and there was leakage of water from the AC ducts. ABC Ltd. filed a complaint claiming compensation for deficiency in service under the Consumer Protection Act, 2019. Will ABC Ltd. succeed?
- (b) India's Foreign Trade Policy (FTP) has, conventionally, been formulated for five years at a time and reviewed annually. The focus of the FTP has been to provide a framework of rules and procedures for exports and imports and a set of incentives for promoting exports. In view of this enumerate the key highlights of Foreign Trade Policy 2023.
- (c) What are Anti-Competitive Practices under Competition Act, 2002? State the factors, which are taken into account by the Competition Commission of India to determine whether Anti-Competitive Practices of an enterprise would have the effect of or is likely to have an appreciable adverse effect on competition in relevant market.

**(5 Marks Each)**

### Question No. 3

- (a) M/S Lal Limited Liability Partnership incorporated under the LLP Act, 2008, invested five Billion US \$ in Australia. What are the obligations of the M/S Lal Limited Liability Partnership under Foreign Exchange Management (Overseas Investment) Rules & Regulation made thereunder, which has made direct investment outside India?
- (b) What are the permitted activities if SAS Inc. a company incorporated in USA want to set up a Branch office in India?
- (c) Discuss the application procedure for setting up of a Special Economic Zone (SEZ) under SEZ Act, 2005.
- (d) Discuss proceeds of crime under Prevention of Money Laundering Act, 2002 (PMLA). What are the actions that may be taken for not complying with the obligations under PMLA?

**(4 Marks)**

**(4 Marks)**

**(4 Marks)**

**(3 Marks)**

**Attempt all parts of either Q.No.4 or Q.No.4A****Question No. 4**

- (a) Pre-packaged commodity means a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity. Discuss about pre-packaged declaration under Legal Metrology Act, 2009.
- (4 Marks)**
- (b) Who is a Fugitive Economic Offender? How is an individual can be declared a Fugitive Economic Offender under Fugitive Economic Offender Act?
- (4 Marks)**
- (c) Mr. 'A' purchases a house in the name of his daughter-in-law Ms. 'L'. Further, the property is sold to a lady name Ms. 'V', however, the consideration for the same is provided by her father-in-law. Discuss whether the house is the subject matter of the *benami transaction* under Benami Property Transactions Act, 1988.
- (4 Marks)**
- (d) Who is the 'Appropriate Government' as per the Real Estate (Regulation and Development) Act, 2016? What are the important responsibilities of the Appropriate Government under the Real Estate (Regulation and Development) Act, 2016?

**(3 Marks)****OR (Alternate question to Q.No.4)****Question No. 4A**

- (a) Foreign Trade Policy envisages, "Export should not merely be a function of marketable surplus but should also reflect an enhancement of economic capacity and development". Comment
- (b) Describe the conditions which do not require fresh approval of the Government for bringing in further foreign investment in a business entity under Foreign Direct Investment (FDI) in India.
- (c) While trying the suit under the provisions of the Competition Act, 2002, explain the procedure which is being regulated by the Competition Commission of India under Section 36 of the mentioned statute.

**(5 Marks Each)****PART II: INTELLECTUAL PROPERTY LAWS****Question No. 5(a)**

ABC Inc. one of the world's largest and leading chain of hotels, is a company incorporated under the laws of the State of Delaware, United States of America. It is the holder and proprietor of the trade mark and service mark "ABC" in relation to hotel, restaurant, catering, bar, cocktail lounge, fitness club, spa services, etc. The trade mark "ABC" has been used by it for its hospitality business throughout the world since 1981. That it is one of the world's largest and leading chains of hotels. That it is using the trade mark "ABC" in India since 1981.

The ABC Inc. filed a suit before the trial court in India claiming a decree of permanent injunction to restrain the ACB Limited Incorporated in India engaged in the business of hotels and restaurants since 1992, from using the trade mark "ACB" or any other trade mark identical with the ABC Inc. franchising, licensing, dealing directly or indirectly in hotels, restaurant or hospitality services of any manner under the trade mark "ABC". Further, ABC Inc. pray before court to give direction to ACB Limited to deliver all the goods, label or any other printed

material bearing the impugned mark “ACB” or “ABC” and claim for damages amounting to Rs.5,000,000/- for having used its trade mark.

In this backdrop answer the following issues with reasons:

- (i) Whether the ABC Inc. is the registered proprietor of the trade mark/service mark “ABC” under the Trade Marks Act 1999?
- (ii) Whether the ABC Inc. is the proprietor of trade mark/service mark “ABC” on account of prior adoption and use in relation to hotels and hospitality business?
- (iii) Whether the ABC Inc. proves that the defendant is infringing the trade mark of the plaintiff?
- (iv) Whether the ABC Inc. proves that the action of defendant is one of passing off?

**(2 Marks Each)**

**Question No. 5(b)**

- (i) Intellectual Property is the Property, which has been created by exercise of Intellectual Faculty. Comment.
- (ii) Briefly explain ‘Geographical Indication’ under Geographical Indications of Goods (Registration and Protection) Act, 1999? Give examples of Geographical Indication.
- (iii) “Over the past fifteen years, intellectual property rights have grown to a stature from where it plays a major role in the development of global economy.” In the light of this statement, prepare a brief note on recent developments that have taken place in the regulatory regime of intellectual property in India.
- (iv) An invention may satisfy the condition of novelty, inventiveness and usefulness but it may not qualify for a patent under the certain situations. What types of inventions under Patents Act are not patentable in India?

**(3 Marks Each)**

***Attempt all parts of either Q.No.6 or Q.No.6A***

**Question No. 6**

- (a) “Patent information is more than just technological or legal information.” In the light of this statement, enumerate the practical applications of patent information.
- (b) In 2023, XYZ Pvt. Ltd. started manufacturing of Cetadine Microbicidal solution consisting of a Providone Iodine combination which is being marketed in pack sizes of 100 ml and 500 ml bottles under the trademark CETADINE. It has been extensively advertised by the company. The bottles bear distinctive labels having distinct colour combination, layout and get up which qualify as original artistic work within Section 2(c) of Copyright Act, 1957 and is registered with the Registrar. “R. Pharma Works” manufactures microbicidal solutions in bottles with a label having an identical and/or substantially similar get up, layout and colour scheme as that of XYZ Pvt. Ltd. Its bottles contain the name Povidone Iodine Solution. XYZ Pvt. Ltd. instituted a suit against “R. Pharma Works” for infringement and consequent damages. What are the defences that “R. Pharma Works” can plead in its favour? Will XYZ Pvt. Ltd. succeed in the suit?
- (c) What are the grounds and procedure to register a patent under the law relating to patents in India? Once a patent is granted can it be challenged further? State your answer with reasons and relevant provisions.

- (d) Section 3(k) of the Indian Patents Act, 1970 states that “a mathematical or business method, a computer program per se or algorithms” are not considered to be inventions. However, it does not impose a blanket ban on patenting computer-related inventions in India. A software can be granted patent if it is attached with novel hardware, an invention which is unique and capable of industrial use. Why is software not directly patented in India? Does this help the Indian software business to grow? Examine critically.

**(5 Marks Each)**

**OR (Alternate question to Q.No.6A)**

**Question No. 6A**

- (a) Parliament had passed the Geographical Indications of Goods (Registration and Protection) Act, 1999. This Act seeks to provide for the registration and better protection of geographical indications relating to goods in India. Discuss the benefit of registration of geographical indications
- (b) Discuss the provisions regarding provisional application under Patents Act, 1970.
- (c) What is the difference between an industrial design right and a patent? What are the advantages to any business of protecting its industrial designs?
- (d) Mr. 'A' is a famous actor and musician. He has his own entertainment company managed by his manager Mr. 'B'. SRT Private Limited is manufacturer of toys and has designed a toy which looks similar to Mr. 'A' and sings his movie song. Mr. 'B' filed a case against SRT Private Limited for infringement of artistic rights to publicity. Is Mr. 'B' 's contention is correct? Give your answer with Justification.

**(5 Marks Each)**

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