# CS EXECUTIVE

NEW SYLLABUS

# ECONOMIC, COMMERCIAL
# INTELLECTUAL PROPERTY LAWS

Paper-6

Module-II

CS GD SALUJA

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# Chapter 1 : Foreign Exchange Management Act, 1999

## INTRODUCTION

An Act 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.

- It extends to the whole of India.
- It shall apply 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.

## SOME IMPORTANT DEFINITIONS

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| **"Authorised person"** | means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under Section 10(1) to deal in foreign exchange or foreign securities; |
| **"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 referred in section 6(3); |
| **"Currency"** | includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, traveler's cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank; |
| **"Currency notes"** | means and includes cash in the form of coins and bank notes; |
| **"Current account transaction"** | means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes —<br>i. payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business,<br>ii. payments due as interest on loans and as net income from investments,<br>iii. remittances for living expenses of parents, spouse and children residing abroad, and<br>iv. expenses in connection with foreign travel, education and medical care of parents, spouse and children; |

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| **"Export"** | means —<br>i. the taking out of India to a place outside India any goods,<br>ii. provision of services from India to any person outside India. |
| **"Foreign currency"** | means any currency other than Indian currency; |
| **"Foreign exchange"** | means foreign currency and includes —<br>i. deposits, credits and balances payable in any foreign currency,<br>ii. drafts, traveler's cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,<br>iii. drafts, traveler's cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency; |
| **"Foreign security"** | means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency<br>and<br>includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency; |
| **"Import"** | with its grammatical variations and cognate expressions, means bringing into India any goods or services; |
| **"Indian currency"** | means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one-rupee notes issued under section 28A of the RBI Act, 1934; |
| **"Person resident in India"** | means—<br>i. a person residing in India for more than 182 days during the course of the preceding financial year but does not include—<br>A. a person who has gone out of India or who stays outside India, in either case—<br>(a) for or on taking up employment outside India, or<br>(b) for carrying on outside India a business or vocation outside India, or<br>(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period; |

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| | B. a person who has come to or stays in India, in either case, otherwise than—<br>(a) for or on taking up employment in India, or<br>(b) for carrying on in India a business or vocation in India, or<br>(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;<br>ii. any person or body corporate registered or incorporated in India,<br>iii. an office, branch or agency in India owned or controlled by a person resident outside India,<br>iv. an office, branch or agency outside India owned or controlled by a person resident in India; |
| **"Person resident outside India"** | means a person who is not resident in India; |
| **"Repatriate to India"** | means bringing into India the realised foreign exchange and—<br>i. the selling of such foreign exchange to an authorised person in India in exchange for rupees, or<br>ii. the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank,<br>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. |

## SECTION 3: DEALING IN FOREIGN EXCHANGE, ETC.

Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall—

(a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;

(b) make any payment to or for the credit of any person resident outside India in any manner;

(c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

**Explanation** — For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

(d) 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.

## SECTION 4: HOLDING OF FOREIGN EXCHANGE, ETC.

Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

## SECTION 5: CURRENT ACCOUNT TRANSACTIONS

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction:

However, Central Government may, in public interest and in consultation with RBI, impose such reasonable restrictions for current account transactions as may be prescribed.

# FOREIGN EXCHANGE MANAGEMENT (CURRENT ACCOUNT TRANSACTIONS) RULES, 2000

**Definition:**

### Rule 3: Prohibition on drawal of foreign exchange

Drawal of foreign exchange by any person for the following purpose is prohibited, namely: -

(a) a transaction specified in the Schedule I; or -

**Transactions which are prohibited**

1. Remittance out of lottery winnings.
2. Remittance of income from racing/riding, etc. or any other hobby.
3. Remittance for purchase of lottery tickets, banned/ prescribed magazines, football pools, sweepstakes, etc.
4. Payments of commission on exports made towards equity investment in JVs/WOSs abroad of Indian companies.
5. Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
6. Payment of commission of exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
7. Payment related to "Call Back Services" of telephones.
8. Remittance of interest income on funds held in Non-Resident Special Rupee (Account) Scheme.

(b) a travel to Nepal and/ or Bhutan; or

(c) a transaction with a person resident in Nepal of Bhutan:

Provided that the prohibition in clause (c) may be exempted by RBI subject to such term and conditions as it may consider necessary to stipulate by special or general order.

## Rule 4: Prior approval of Government of India

No person shall draw foreign exchange for a transaction included in the Schedule II without prior approval of the Government of India.

However, this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

## Rule 5: Prior approval of Reserve Bank

Every drawal of foreign exchange for transactions included in Schedule III shall be governed as provided therein.

**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 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 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.

**Facilities for persons other than individual -**

The following remittances by persons other than individuals shall require prior approval of RBI:

i. Donations exceeding 1% of their foreign exchange earnings during the previous 3 financial years or US$ 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 US$ 25,000 or 5% of the inward remittance whichever is more.
iii. Remittances exceeding US$ 10,000,000 per project for any consultancy services in respect of infrastructure projects and US$ 1,000,000 per project, for other consultancy services procured from outside India.
iv. Remittances exceeding 5% of investment brought into India or US$ 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses."

However, this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

## Liberalised Remittance Scheme (LRS) of USD 2,50,000 for resident individuals

Under the LRS, 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 close 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**. Release of foreign exchange exceeding USD 2,50,000 requires prior permission from the RBI.

**(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 traveler.

**(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 close relatives abroad**

A resident individual can remit up-to USD 2,50,000 per FY towards maintenance of close 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 bonafide 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. purchase of immoveable property abroad;
iii. making investments abroad such as ODI & 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;
iv. extending loans including loans in Indian Rupees to NRIs who are relatives as defined in Companies Act, 2013.

## SECTION 6: CAPITAL ACCOUNT TRANSACTIONS

(1) Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.

(2) The Reserve Bank may, in consultation with the Central Government, specify:

(a) any class or classes of capital account transactions which are permissible;

(b) the limit up to which foreign exchange shall be admissible for such transactions:

(c) any conditions which may be placed on such transactions;

However, RBI shall not impose any restriction 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.

(2A) The Central Government may, in consultation with the RBI, prescribe:

(a) any class or classes of capital account transactions, not involving debt instruments, which are permissible;

(b) the limit up to which foreign exchange shall be admissible for such transactions; and

(c) any conditions which may be placed on such transactions.

~~(3) Without prejudice to the generality of the provisions of sub section (2), RBI may, by regulations prohibit, restrict or regulate the following: —~~

~~(a) transfer or issue of any foreign security by a person resident in India;~~

~~(b) transfer or issue of any security by a person resident outside India;~~

~~(c) transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;~~

~~(d) any borrowing or lending in foreign exchange in whatever form or by whatever name called;~~

~~(e) 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;~~

~~(f) deposits between persons resident in India and persons resident outside India;~~

~~(g) export, import or holding of currency or currency notes;~~

~~(h) transfer of immovable property outside India, other than a lease not exceeding 5 years, by a person resident in India;~~

~~(i) acquisition or transfer of immovable property in India, other than a lease not exceeding 5 years, by a person resident outside India;~~

~~(j) giving of a guarantee or surety in respect of any debt, obligation or other liability incurred—~~

~~i. by a person resident in India and owed to a person resident outside India; or~~

~~ii. by a person resident outside India.~~

(4) A person resident in India may 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.

(5) A person resident outside India may 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.

(6) RBI may, by regulation, prohibit, restrict, or regulate 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.

# FOREIGN EXCHANGE MANAGEMENT (PERMISSIBLE CAPITAL ACCOUNT TRANSACTIONS) REGULATIONS, 2000

**"Transferable Development Rights"** means certificates issued in respect of category of land acquired for public purpose either by Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole;

**'Derivative'** means a financial contract, to be settled at a future date, whose value is derived from one or more financial, or non-financial variables.

## Regulation 3: Permissible Capital Account Transactions

(1) Capital account transactions of a person may be classified under the following heads:

A. transactions, specified in Schedule I, of a person resident In India;

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

a) **Investment** by a person resident in India in foreign securities.
b) **Foreign currency loans** raised in India and abroad by a person resident in India.
c) **Transfer of immovable property** outside India by a person resident in India.
d) **Guarantees** issued by a person resident in India in favour of a person resident outside India.
e) Export, import and holding of **currency/currency notes.**
f) **Loans and overdrafts (borrowings)** by a person resident in India from a person resident outside India.
g) **Maintenance of foreign currency accounts in** India and outside India by a person resident in India.
h) Taking out of **insurance policy** by a person resident in India from an insurance company outside India.
i) **Loans and overdrafts** by a person resident in India to a person resident outside India.
j) **Remittance outside India of capital assets** of a person resident in India.
k) ~~Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India."~~
**Undertake derivative contracts. (Substituted in Feb. 2019)**

B. transactions, specified in Schedule II, of a person resident outside India.

## Classes of Capital Account Transactions of Persons Resident outside India

(a) **Investment in India** by a person resident outside India, i.e.,
   i. issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
   ii. investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.

(b) **Acquisition and transfer of immovable property** in India by a person resident outside India.

(c) **Guarantee** by a person resident outside India in favour of, or on behalf of, a person resident in India.

(d) **Import and export of currency**/currency notes into/from India by a person resident outside India.

(e) **Deposits** between a person resident in India and a person resident outside India.

(f) **Foreign currency accounts** in India of a person resident outside India.

(g) **Remittance outside India of capital assets** in India of a person resident outside India.

(h) **Undertake derivative contracts.**

(2) Subject to the provisions of the Act or the rules or regulations or direction or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction specified in the Schedules;

Provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction.

### Regulation 4: Prohibition

Save as otherwise provided in the Act, rules or regulations made thereunder,

(a) no person shall undertake or sell or draw foreign exchange to or from an authorised person for any capital account transaction,

Provided that-

   i. subject to the provisions of the Act or the rules or regulations or directions or orders made or issued thereunder, a resident individual may, draw from an authorized person foreign exchange not exceeding US$ 250,000 per financial year or such amount as decided by RBI from time to time for a capital account transaction specified in Schedule I.
   ii. Where the drawal of foreign exchange by a resident individual for any capital account transaction specified in Schedule I exceeds US$ 250,000 per financial year, or as decided by RBI from time to time as the case may be, the limit specified

in the regulations relevant to the transaction shall apply with respect to such drawal.

Provided further that no part of the foreign exchange of US$ 250,000, drawn under proviso (a) shall be used for remittance directly or indirectly to countries notified as non-cooperative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by RBI to all concerned.

(b) no person resident outside India shall 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 proposes to engage -

i. in the business of chit fund, or
ii. as Nidhi Company, or
iii. in agricultural or plantation activities or
iv. in real estate business, or construction of farm houses or
v. in trading in Transferable Development Rights (TDRs).

(c) No person resident in India shall undertake any capital account transaction which is not permissible by the Government of India, Ministry of External Affairs, with any person who is, a citizen of or a resident of Democratic People's Republic of Korea, or an entity incorporated or otherwise, in Democratic People's Republic of Korea unless there is specific approval from the Central Government to carry on any transaction after an order issued regarding this dated April 21, 2017.

(d) The existing investment transactions, with any person who is, a citizen of or resident of Democratic People's Republic of Korea, or an entity incorporated or otherwise in Democratic People's Republic of Korea, or any existing representative office or other assets possessed in Democratic People's Republic of Korea, by a person resident in India, which is not permissible in terms of Order April 21, 2017 shall be closed/liquidated/disposed/settled within a period of 180 days from the date of issue of this Notification, unless there is specific approval from the Central Government to continue beyond that period.

## Regulation 5: Method of payment for investment

The payment for investment shall 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 regulations made by RBI under the Act.

## Regulation 6: Declaration to be furnished

Every person selling or drawing foreign exchange to or from an authorised person for a capital account transaction shall furnish to RBI, a declaration in the form and within the time specified in the regulations relevant to the transaction.

# 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.

## 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 Rashtra 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.

## SECTION 8: REALISATION AND REPATRIATION OF FOREIGN EXCHANGE

Where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

# Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015

### Definitions:

**'Foreign exchange due'** means the amount which a person has a right to receive or claim in foreign exchange;

**'Surrender'** means the selling of foreign exchange to an authorised person in India in exchange of rupees;

### Regulation 3: 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 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 -

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

### Regulation 4: Manner of Repatriation

(1) 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 RBI; or
   (c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by RBI.

(2) 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.

### Regulation 5: 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 under Regulation 4(1)(a), within the period specified below: -

(1) 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 7 days from the date of its receipt;**

**(2) in all other cases within a period of 90 days from the date of its receipt.**

## Regulation 6: Period for surrender in certain cases

(1) 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 Section 10(5) of the Act 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 60 days from the date of its acquisition or purchase by him.**

(2) Notwithstanding anything contained in sub-regulation (1), 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 -

(a) within 90 days from the date of return of the traveler to India, when the unspent foreign exchange is in the form of currency notes and coins; and

(b) within 180 days from the date of return of the traveler to India, when the unspent foreign exchange is in the form of traveler's cheques.

## Regulation 7: 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.

## Regulation 8: Exemption

Nothing in these regulations shall apply to foreign exchange in the form of currency of Nepal or Bhutan.

## SECTION 9: EXEMPTION FROM REALISATION AND REPATRIATION IN CERTAIN CASES

The provisions of sections 4 and 8 shall not apply to the following: —

(a) possession of foreign currency or foreign coins by any person up to such limit as RBI may specify;

(b) foreign currency account held or operated by such person or class of persons and the limit up to which RBI may specify;

(c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of a general or special permission granted by RBI;

(d) foreign exchange held by a person resident in India up to such limit as RBI may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising therefrom;

(e) foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as RBI may specify; and

(f) such other receipts in foreign exchange as RBI may specify.

# Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015

## Definitions

'To possess' or 'to retain' means to possess or to retain in physical form and the words 'possession' or 'retention' shall be construed accordingly.

## Regulation 3: Limits for possession and retention of foreign currency or foreign coins

For the purpose of clause (a) and clause (e) of Section 9 of the Act, the Reserve Bank specifies the 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 traveler's cheques not exceeding US$ 2000 or its equivalent in aggregate,** provided that such foreign exchange in the form of currency notes, bank notes and traveler's cheques;

(a) was acquired by him while on 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

(b) was acquired by him, from any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation; or

(c) was acquired by him by way of honorarium or gift while on a visit to any place outside India; or

(d) represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

## Regulation 4: Possession of foreign exchange by a person resident In India but not permanently resident therein

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 traveler's 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 regulations made under the Act.

**Explanation:** For the purpose of this clause, 'not permanently resident' means 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 3 years.

## SECTION 10: AUTHORISED PERSON

(1) The RBI may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.

(2) An authorisation under this section shall be in writing and shall be subject to the conditions laid down therein.

(3) An authorisation granted above may be revoked by RBI at any time if RBI is satisfied that:

(a) it is in public interest so to do; or

(b) the authorised person has failed to comply with the condition subject to which the authorisation was granted or has contravened any of the provisions of the Act or any rule, regulation, notification, direction or order made thereunder:

However, no such authorisation shall be revoked on any ground referred to in clause (b) unless the authorised person has been given a reasonable opportunity of making a representation in the matter.

(4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as RBI may, from time to time, think fit to give, and, except with the previous permission of RBI, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.

(5) An authorised person shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorised person shall refuse in writing to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to RBI.

(6) 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 authorised person under sub-section (5):

- does not use it for such purpose or
- does not surrender it to authorised person within the specified period or
- uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder

shall be deemed to have committed contravention of the provisions of the Act for the purpose of this section.

## SECTION 11: RESERVE BANK'S POWERS TO ISSUE DIRECTIONS TO AUTHORISED PERSON

(1) RBI may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder:

- give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security.
- direct any authorised person to furnish such information, in such manner, as it deems fit.

(2) Where any authorised person contravenes any direction given by RBI under this Act or fails to file any return as directed by RBI, it may, after giving reasonable opportunity of being heard, impose on the authorised person a penalty which may extend to 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.

# FOREIGN EXCHANGE MANAGEMENT (REMITTANCE OF ASSETS) REGULATIONS, 2016

### Definitions:

**'Person of Indian Origin (PIO)'** means 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:

(a) who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955; or

(b) who belonged to a territory that became part of India after the 15th day of August, 1947; or

(c) 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

(d) 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)

For the purpose of this sub-regulation, the expression **'Person of Indian Origin'** includes an **'Overseas Citizen of India cardholder'** within the meaning of Section 7(A) of the Citizenship Act, 1955.

**'Remittance of asset'** means remittance outside India of funds representing a deposit with a bank or a firm or a 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 Act or rules or regulations made there under;

### Regulation 3: Prohibition on Remittance outside India of assets held in India

Save as otherwise provided in the Act or rules or regulations made or issued thereunder, no person, whether resident in India or not, shall make remittance of any asset held in India by him or by any other person:

However, RBI may for sufficient reasons, permit any person to make remittance of any asset held in India by him or by any other person.

## Regulation 4: Permission for remittance of assets in certain cases

(1) A citizen of foreign state, not being a Person of Indian origin (PIO) or a citizen of Nepal or Bhutan, who

i. has retired from an employment in India, or

ii. has inherited the assets from a person referred to in Section 6(5) of the Act; or

iii. is a widow/ widower resident outside India and has inherited assets of the deceased spouse who was an Indian citizen resident in India, may remit through an authorised dealer an amount, not exceeding US$ 1,000,000 per financial year on production of documentary evidence in support of acquisition, inheritance or legacy of assets by the remitter.

However, for the purpose of arriving at annual ceiling of remittance, the funds representing sale proceeds of shares and immovable property owned or held by the citizen of foreign state on repatriation basis in accordance with the Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2016 and Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 made under the Act, shall not be included.

Where the remittance is made in more than one instalment, the remittance of all instalments shall be made through the same authorised dealer.

iv. had come to India for studies/ training and has completed his studies/ training, may remit the balance available in his account, provided such balance represents funds derived out 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.

(2) A Non-Resident Indian (NRI) or a Person of Indian Origin (PIO) may remit through an authorised dealer an amount, not exceeding US$ 1,000,000 per financial year,

i. out of the balances held in the Non-Resident (Ordinary) Accounts (NRO accounts)/ sale proceeds of assets/ the assets acquired by him by way of inheritance/ legacy on production of documentary evidence in support of acquisition, inheritance or legacy of assets by the remitter;

ii. Under a deed of settlement made by either of his parents or a relative (relative as defined in Section 2(77) of the Companies Act, 2013) and the settlement taking effect on the death of the settler, on production of the original deed of settlement;

(3) An authorised dealer in India may, also allow remittance out of the assets of Indian companies under liquidation under the provisions of the Companies Act, 2013, subject to the following conditions:

i. Authorised Dealer shall ensure that the remittance is in compliance with the order issued by a court in India/ order issued by the official liquidator or the liquidator in the case of voluntary winding up; and

ii. no remittance shall be allowed unless the applicant submits: -

(a) Auditor's certificate confirming that all liabilities in India have been either fully paid or adequately provided for.

(b) Auditor's certificate to the effect that the winding up is in accordance with the provisions of the Companies Act, 2013.

(c) 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.

## Regulation 5: Permission to an Indian entity to remit funds in certain cases

An entity in India may remit the amount being its contribution towards the provident fund/ superannuation/ pension fund in respect of the expatriate staff in its employment who are resident in India but not permanently resident therein.

**Explanation:**

For the purpose of this Regulation, -

(a) **'expatriate staff'** means a person whose provident/ superannuation/ pension fund is maintained outside India by his principal employer outside India;

(b) **'not permanently resident'** means 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.

## Regulation 6: Permission for remittance of assets on closure or remittance of winding up proceeds of branch office/ liaison office (other than project office)

(1) A branch or office established in India by a person resident outside India may, for making remittance of assets on closure or remittance of its winding up proceeds, apply to the Authorised Dealer concerned supported by the following documents:

A. A copy of the Reserve Bank's permission for establishing the branch/ office in India, wherever applicable;

B. Auditor's certificate:

i. 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;

ii. 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;

iii. confirming that no income accruing from sources outside India (including proceeds of exports) has remained un-repatriated to India; and

iv. 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.

C. 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

D. A report from the ROC regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the office in India.

(2) On consideration of the application made under sub-regulation (1), the authorized dealer concerned may permit the remittance subject to the directions issued by RBI in this regard, from time to time.

### Regulation 7: Reserve Bank's prior permission in certain cases

(1) A person who desires to make a remittance of assets in the following cases, may apply to RBI, namely:

i. Remittance exceeding US$ 1,000,000 per financial year–
   (a) on account of legacy, bequest or inheritance to a citizen of foreign state, resident outside India; and
   (b) by a Non-Resident Indian (NRI) or Person of Indian Origin (PIO), out of the balances held in NRO accounts/ sale proceeds of assets/ the assets acquired by way of inheritance/ legacy.

ii. Remittance to a person resident outside India on the ground that hardship will be caused to such a person if remittance from India is not made;

(2) On consideration of the application made under sub-regulation (1), the Reserve Bank may permit the remittance, subject to such terms and conditions as it deem necessary.

## 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.**

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 45 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 45 days.

## Establishment of Appellate Tribunal

Section 18 of the Act provides that the Appellate Tribunal constituted under Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, shall 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:

However, 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:

However, 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 **45 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:

However, the Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 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:

**However, where any appeal could not be disposed of within the said period of 180 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.

## 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 60 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.

## SECTION 36: DIRECTORATE OF ENFORCEMENT

(1) The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act.

(2) Without prejudice to the provisions of sub-section (1), the Central Government may authorise

- Director of Enforcement or
- an Additional Director of Enforcement or
- a Special Director of Enforcement or
- a Deputy Director of Enforcement

to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement.

## SECTION 37: POWER OF SEARCH, SEIZURE, ETC.

(1) The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13.

(2) The Central Government may also, by notification, authorise any officer or class of officers in the CG, SG or RBI, not below the rank of an Under Secretary to the Government of India to investigate any contravention referred to in section 13.

(3) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 and shall exercise such powers, subject to such limitations 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.

- 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 subsection (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.

- 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.
- 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 subsection (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.
- 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.

## SECTION 42: CONTRAVENTION BY COMPANIES

(1) 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:

(2) 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.

Explanation —For the purposes of this section—

i. "company" means any body corporate and includes a firm or other association of individuals; and
ii. "director", in relation to a firm, means a partner in the firm.

# 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.**

**RBI 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. **Willful, malafide and fraudulent transactions are, however, viewed seriously, which will not be compounded by RBI.**

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

The Preamble to the Reserve Bank of India Act, 1934, under which it was constituted, specifies its objective as —to regulate the issue of Bank notes and the 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.

A core function of the Reserve Bank in the past years has been the formulation and implementation of monetary policy with the objective of maintaining price stability and ensuring adequate flow of credit to productive sectors of the economy. To these was added, in more recent times, the goal of maintaining financial stability. The objective of maintaining financial stability has spanned its role from external account management to oversight of banks and non-banking financial institutions as also of money, government securities and foreign exchange markets.

The Reserve Bank designs and implements the regulatory policy framework for banking and non-banking financial institutions with the aim of providing people access to the banking system, protecting depositors' interest, and maintaining overall health of the financial system.

## ESTABLISHMENT AND INCORPORATION OF RESERVE BANK

Section 3 of the RBI Act states that a bank to be called the Reserve Bank of India (RBI) shall be constituted for the purposes of taking over the management of the currency from the Central Government and of carrying on the business of banking in accordance with the provisions of the Act.

Sub-section (2) of this section further provides that the Bank shall be a body corporate by the name of RBI, having perpetual succession and a common seal, and shall by the said name sue and be sued.

## ORGANISATIONAL STRUCTURE & MANAGEMENT

The organizational structure of RBI can be classified under the following designations:

- **Central Board of Directors**

  The Central Board of Directors is at the top of the Reserve Bank's organisational structure. Appointed by the Government under the provisions of RBI Act, 1934, the Central Board has the primary authority and responsibility for the oversight of the function of Reserve Bank. It delegates specific functions to the Local Boards and various committees. **The Governor is the Reserve Bank's Chief Executive.**

  The Governor supervises and directs the affairs and business of RBI. The management team also includes Deputy Governors and Executive Directors.

  - The Central Government nominates 14 Directors on the Central Board, including 1 Director each from the 4 Local Boards.
  - The other 10 Directors represent different sectors of the economy, such as, agriculture, industry, trade, and professions.
  - All these appointments are made for a period of 4 years.
  - The Government also nominates one Government official as a Director representing the Government, who is usually the Finance Secretary to the Government of India and remains on the Board during the pleasure of the Central Government.

  The Governor and Deputy Governors devote their whole time to the affairs of the Bank, and receive such salaries and allowances as may be determined by the Central Board, with the approval of the Central Government [Section 8(2)]

  **The Deputy Governor and the Director nominated may attend any meeting of the Central Board and take part in its deliberations but shall not be entitled to vote.** However, when the Governor is, for any reason, unable to attend any such meeting, a Deputy Governor authorized by him in this behalf in writing may vote for him at that meeting. [Section 8(3)]

  The Governor and a Deputy Governor hold the office for such term not exceeding 5 years as the Central Government may fix when appointing them, and they are eligible for re-appointment. A Director nominated holds the office for a period of 4 years and thereafter until his successor is nominated. [Section 8(4)]

  No act or proceeding of the Board can be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution, of the board. [Section 8(5)]

- **Local Boards**

  The Reserve Bank Governor and a maximum of 4 Deputy Governors are also ex officio Directors on the Central Board. The Reserve Bank also has 4 Local Boards, constituted by the Central Government under the RBI Act, one each for the Western, Eastern,

Northern and Southern areas of the country, which are located in Mumbai, Kolkata, New Delhi and Chennai.

Each of these Boards has 5 members appointed by the Central Government for a term of 4 years and thereafter until his successor is appointed. They are eligible for re-appointment [Section 9(3)].

The members of the Local Board shall elect from amongst themselves one person to be the Chairman of the Board. [Section 9(2)].

These Boards represent territorial and economic interests of their respective areas, and advise the Central Board on matters, such as, issues relating to local cooperative and indigenous banks. They also perform other functions that the Central Board may delegate to them. [Section 9(1)]

- **Offices and Branches**

The Reserve Bank has a network of offices and branches through which it discharges its responsibilities. The units operating in the four metros — Mumbai, Kolkata, Delhi and Chennai — are known as offices, while the units located at other cities and towns are called branches. Currently, the Reserve Bank has its offices, including branches, at 27 locations in India. The offices and larger branches are headed by a senior officer of the rank of Chief General Manager, designated as Regional Director while smaller branches are headed by a senior officer of the rank of General Manager.

## 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.

# Chapter 2 : Overseas Direct Investment

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

## 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:

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.

Here,

- 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.
- 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 10% or more of voting rights or in any other manner in the entity.

**"Overseas Investment" means:**

- financial commitment and
- Overseas Portfolio Investment

by a PRI.

Here,

**Financial commitment by a PRI 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.

**"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

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.

**Indian Entity**

- 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

## 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.

## Procedure for Making Overseas Investment

1. The person intending to make any financial commitment shall fill up the Form FC duly supported by the requisite documents and approach the designated Authorised Dealer (AD) bank for making the investment/remittance.
2. 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, in addition to the online reporting.
3. 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.
4. The following documents shall be submitted along with the proposal:
   - Background and brief details of the transaction.
   - Reason(s) for seeking approval mentioning the extant FEMA provisions.
   - Observations of the designated AD bank with respect to the following:
     - Prima facie viability of the foreign entity;
     - Benefits which may accrue to India through such investment;
     - Financial position and business track record of the Indian entity and the foreign entity;
     - Any other material observation.
5. 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.
6. 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).
7. Valuation certificate for the foreign entity (if applicable).

8. Other relevant documents properly numbered, indexed and flagged.
9. 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 PRI:

- having an account appearing as a Non-Performing Asset (NPA) or
- is classified as willful 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 Depositary 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 2 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 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 2 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 6 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

1. 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 6 months, failing which the funds remitted overseas shall be repatriated within the said period of six months.
2. 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.
3. Form FC shall be submitted along with requisite documents to AD bank for obtaining UIN on or before making initial ODI.
4. The AD bank after due verification shall report the details in the OID application for allotment of UIN.
5. Any remittance towards a foreign entity shall be facilitated by the AD bank only after obtaining the necessary UIN for such entity.
6. The allotment of UIN does not constitute an approval from the Reserve Bank for the investment made/to be made in the foreign entity.
7. 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

1. 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.
2. 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

1. 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 3 FYs;
   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:
2. 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.
3. 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

1. 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.
2. 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 Depositary 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 3 FYs 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 45 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 these 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

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 30 days of receipt of disinvestment proceeds;

c) restructuring within 30 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 60 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.

## 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.

It may be noted that such restriction shall not apply to the following classes of companies: -

a) a banking company;

b) a non-banking financial company;

c) an insurance company; and

d) a Government company.

## Restriction on Acquisition or Transfer of Immovable Property Outside India

1. A PRI 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.
2. A PRI 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.
   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.
3. 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.
4. A PRI 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.
5. 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.

# Chapter 3 : External Commercial Borrowings (ECBs)

## 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 nonpermitted 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.

## EXTERNAL COMMERCIAL BORROWINGS FRAMEWORK

**Introduction:**

ECBs 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, etc. The parameters given below apply in totality and not on a standalone basis.

**ECB Framework:**

The framework for raising loans through ECB (hereinafter referred to as the ECB Framework) comprises the following two options:

| Sr. No. | Parameters | FCY denominated ECB | INR denominated ECB |
|---|---|---|---|
| 1. | Currency of borrowing | Any freely convertible Foreign Currency | Indian Rupee (INR) |
| 2. | Forms of ECB | - Loans including bank loans;<br>- Floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); | - Loans including bank loans;<br>- Floating/ fixed rate notes/ bonds/ debentures/ preference shares (other |

<table>
<tr><td></td><td></td><td>- Trade credits beyond 3 years;<br>- FCCBs;<br>- FCEBs and<br>- Financial Lease.</td><td>than fully and compulsorily convertible instruments);<br>- Trade credits beyond 3 years; and<br>- Financial Lease.<br>Also, plain vanilla Rupee denominated bonds issued overseas, which can be either placed privately or listed on exchanges as per host country regulations.</td></tr>
<tr><td>3.</td><td>Eligible borrowers</td><td>• All entities eligible to receive FDI.<br>• Following entities are also eligible to raise ECB:<br>- Port Trusts;<br>- Units in SEZ;<br>- SIDBI; and<br>- EXIM Bank of India.</td><td>• All entities eligible to raise FCY ECB; and<br>• Registered entities engaged in micro-finance activities, viz.,<br>- registered Not for Profit companies,<br>- registered societies/ trusts/ cooperatives and<br>- Non- Government Organisations.</td></tr>
<tr><td>4.</td><td>Recognised Lenders</td><td colspan="2">The lender should be resident of FATF or IOSCO (International Organization of Securities Commissions) compliant country, including on transfer of ECB. However,<br>a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders;<br>b) Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad; and<br>c) Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY 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.<br>However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.</td></tr>
<tr><td>5.</td><td>Minimum Average Maturity Period (MAMP)</td><td colspan="2">MAMP for ECB will be 3 years. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:
<table>
<tr><th>S. No.</th><th>Category</th><th>MAMP</th></tr>
<tr><td>(a)</td><td>ECB raised by manufacturing companies up to US$ 50 million or its equivalent per financial year.</td><td>1 year</td></tr>
</table>
</td></tr>
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<table>
<tr><td></td><td></td><td>
<table>
<tr><td>(b)</td><td>ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans.</td><td>5 years</td></tr>
<tr><td>(c)</td><td>ECB raised for:<br>i. working capital purposes or general corporate purposes<br>ii. on-lending by NBFCs for working capital purposes or general corporate purposes</td><td>10 years</td></tr>
<tr><td>(d)</td><td>ECB raised for:<br>i. repayment of Rupee loans availed domestically for capital expenditure<br>ii. on-lending by NBFCs for the same purpose</td><td>7 years</td></tr>
<tr><td>(e)</td><td>ECB raised for:<br>i. repayment of Rupee loans availed domestically for purposes other than capital expenditure<br>ii. on-lending by NBFCs for the same purpose</td><td>10 years</td></tr>
</table>
For the categories mentioned at (b) to (e) –<br>i. ECB cannot be raised from foreign branches / subsidiaries of Indian banks<br>ii. the prescribed MAMP will have to be strictly complied with under all circumstances.
</td></tr>
<tr><td>6.</td><td>End-uses (Negative list)</td><td>The negative list, for which the ECB proceeds cannot be utilised, would include the following:<br>a) Real estate activities.<br>b) Investment in capital market.<br>c) Equity investment.<br>d) Working capital purposes, except in case of ECB mentioned at 5(b) and 5(c) above.<br>e) General corporate purposes, except in case of ECB mentioned at 5(b) and 5(c) above.<br>f) Repayment of Rupee loans, except in case of ECB mentioned at 5(d) and 5(e) above.<br>g) On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at 5(c), 5(d) and 5(e) above.</td></tr>
</table>

## 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

- Under the aforesaid framework, all eligible borrowers can raise ECB up to US$ 750 million or equivalent per financial year under the automatic route.
- Further, in case of FCY 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 NBFCs) shall not invest in FCCBs/ FCEBs 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

- All ECB can be raised under the automatic route if they conform to the parameters prescribed under this framework.
- 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.

- 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.
- 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.
- 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 Reserve Bank of India. 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 DSIM *(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 DSIM within 7 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 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 FDI or Government approval is received, wherever applicable, for foreign equity participation as per extant FDI 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 FDI 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 at least 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.

# Chapter 4 : Special Economic Zone Act, 2005

An Act to provide for the establishment, development and management of the SEZs for the promotion of exports and for matters connected therewith or incidental thereto.

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.

## Definitions

(1) **"Authority"** means a SEZ Authority;

(2) **"Board"** means the Board of Approval;

(3) **"Developer"** means a person who, or a State Government which, has been granted by the Central Government a letter of approval under section 3(10) and includes an Authority and a Co-Developer;

(4) **"Domestic Tariff Area"** means the whole of India (including the territorial waters and continental shelf) but does not include the areas of the SEZ;

(5) **"Entrepreneur"** means a person who has been granted a letter of approval by the Development Commissioner under section 15(9);

(6) **"Export"** means –

i. taking goods, or providing services, out of India, from a SEZ, by land, sea or air or by any other mode, whether physical or otherwise; or

ii. supplying goods, or providing services, from the DTA 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 SEZ;

(7) **"Free Trade and Warehousing Zone"** means a SEZ wherein mainly trading and warehousing and other activities related thereto are carried on;

(8) **"Import"** means-

i. bringing goods or receiving services, in a SEZ, 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, Unit or Developer from another Unit or Developer of the same SEZ or a different SEZ;

(9) **"Infrastructure facilities"** means industrial, commercial or social infrastructure or other facilities necessary for the development of a SEZ or such other facilities which may be prescribed;

**(10) "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;

(11) **"Offshore Banking Unit"** means a branch of a bank located in a SEZ and which has obtained the permission under section 23(1)(a) of the Banking Regulation Act, 1949;

(12) **"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 or 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;

(13)**"Services"** means such tradable services which -

i. are covered under the General Agreement on Trade in Services;
ii. may be prescribed by the Central Government for the purposes of this Act; and
iii. earn foreign exchange;

(14)**"Unit"** means a Unit set up by an entrepreneur in a SEZ and includes:

- an existing Unit,
- an Offshore Banking Unit and
- a Unit in an International Financial Services Centre,

whether established before or established after commencement of this Act;

# ESTABLISHMENT OF SEZ

## Section 3: Procedure for making proposal to establish SEZ

(1) A SEZ may be established under this Act,

- either jointly or severally by the Central Government, State Government, or
- any person for manufacture of goods or rendering services or for both or
- as a Free Trade and Warehousing Zone.

**(2) SEZ by person other than Government, through SG:**

Any person, who intends to set up a SEZ, may, after identifying the area, make a proposal to the State Government concerned for the purpose of setting up the SEZ.

(3) **SEZ by person other than Government directly:**

Any person, who intends to set up a SEZ, may, after identifying the area, at his option, make a proposal directly to the Board for the purpose of setting up the SEZ:

However, where such a proposal has been received directly from a person under this sub-section, the Board may grant approval and after receipt of such approval, the person concerned shall obtain the concurrence of the State Government within the period, as may be prescribed.

(4) **SEZ by State Government:**

In case a State Government intends to set up a SEZ, it may after identifying the area, forward the proposal directly to the Board for the purpose of setting up the SEZ:

However, the Central Government may: -

(a) after consulting the State Government concerned;
(b) without referring the proposal for setting up the SEZ to the Board; and
(c) after identifying the area;

suo moto set up and notify the SEZ.

(5) Every proposal under sub-sections (2) to (4) shall be made in such form, and, manner, containing such particulars as may be prescribed.

(6) The State Government may, on receipt of the proposal forward the same together with its recommendations to the Board within such period as may be prescribed.

(7) The Board may approve the proposal subject to such terms and conditions as it may deem fit to impose, or modify or reject the proposal.

(8) The Central Government may prescribe the following requirement for establishment of a SEZ, namely: -

(a) the minimum area of land and other terms and conditions subject to which the Board shall approve, modify or reject any proposal received by it; and

(b) the terms and conditions, subject to which the Developer shall undertake the authorised operations and his obligations and entitlements.

However, different minimum area of land and other terms and conditions referred to in clause (a) above may be prescribed by the Central Government for a class or classes of SEZs.

(9) If the Board -

(a) approves without any modification, the proposal received, it shall communicate the same to the Central Government;

(b) approves with modifications the proposal received, it shall, communicate such modifications to the person or the State Government concerned and if such modifications have been accepted by such person or the State Government, the Board shall communicate the approval to the Central Government;

(c) rejects the proposal, it shall record the reasons therefor and communicate the rejection to the Central Government which shall intimate to the State Government or the person concerned.

(10) The Central Government shall, on receipt of communication from the Board regarding approval of the proposal, grant, a letter of approval on such terms and conditions and obligations and entitlements as may be approved by the Board, to the Developer, being the person or the State Government concerned:

(11) Any person who, or a State Government which, intends to provide any infrastructure facilities in the identified area for which proposal was made above to Board, or undertake any authorised operation may, after entering into an agreement with the Developer, make a proposal for the same to the Board for its approval.

(12) Every person or a State Government referred in above point, 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 as a Co-Developer of the SEZ.

(13) Subject to the provisions of this section and the letter of approval granted to a Developer, the Developer may allocate space or built up area or provide infrastructure services to the approved units in accordance with the agreement entered into by him with the entrepreneurs of such Units.

## Section 4: Establishment of SEZ and approval and authorisation to operate to Developer

1. The Developer shall, after the grant of letter of approval from Central Government, submit the exact particulars of the identified area, to the Central Government and thereupon that Government may, **after satisfying that the requirements regarding minimum area of land and other terms and conditions are fulfilled, notify the specifically identified area in the State as a SEZ:**

   Further, the Central Government may, after notifying the SEZ, if it considers appropriate, notify subsequently any additional area to be included as a part of that SEZ.

2. After the appointed day, the Board may, authorise the Developer to undertake in a SEZ, such operations which the Central Government may authorise.

## Section 5: Procedure for making proposal to establish SEZ

The Central Government, while notifying any area as a SEZ or an additional area to be included in the SEZ and discharging its functions under this Act, shall be guided by the following: -

Guidelines for notifying SEZ:

(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.

## Section 6: Processing and non-processing areas

The areas falling within the SEZs may be demarcated by the Central Government or any authority specified by it as-

(a) the processing area for setting up Units for activities, being the manufacture of goods, or rendering services; or
(b) the area exclusively for trading or warehousing purposes; or
(c) the non-processing areas for activities other than those specified under clause (a) or clause (b).

## Section 7: Exemption from taxes, duties or cess

Any goods or services exported out of, or imported into, or procured from the Domestic Tariff Area by, -

(i) a Unit in a SEZ; or

(ii) a Developer;

shall, subject to such terms, conditions and limitations, as may be prescribed, be exempt from the payment of taxes, duties or cess under all enactments specified in the First Schedule.

## Section 8: Constitution of Board of Approval

The Central Government shall, within 15 days of the commencement of this Act, by notification, constitute, for the purposes of this Act, a Board to be called the Board of Approval.

## Section 9: Duties, powers and functions of Board

1. The Board shall have the duty to promote and ensure orderly development of the SEZs.
2. The powers and functions of the Board shall include –
   (a) granting of approval or rejecting proposal or modifying such proposals for establishment of the SEZs;
   (b) granting approval of authorised operations to be carried out in the SEZs by the Developer;
   (c) granting of approval to the Developers or Units for foreign collaborations and foreign direct investments in the SEZ for its development, operation and maintenance;
   (d) granting of approval or rejecting of proposal for providing infrastructure facilities in a SEZ or modifying such proposals;
   (e) granting a licence to an industrial undertaking referred to in Industries (Development and Regulation) Act, 1951 if such undertaking is established, as a whole or part thereof, or proposed to be established, in a SEZ;
   (f) suspension of the letter of approval granted to a Developer and appointment of an Administrator;
   (g) disposing of appeals preferred under section 15(4);
   (h) disposing of appeals preferred under section 16(4);
   (i) performing such other functions as may be assigned to it by the Central Government.
3. The Board may if so, required for purposes of this Act or any other law for the time being in force relating to SEZs, by notification, decide as to **whether a particular activity constitutes manufacture** and such decision of the Board shall be binding on all Ministries and Departments of the Central Government.
4. The Board may 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 10: Suspension of letter of approval and transfer of SEZ in certain cases

(1) If at any time the Board is of the opinion that a Developer -
   (a) is unable to discharge the functions or perform the duties imposed on him by or under the provisions of this Act or rules made thereunder; or
   (b) has persistently defaulted in complying with any direction given by the Board under this Act; or
   (c) has violated the terms and conditions of the letter of approval; or
   (d) whose financial position is such that he is unable to fully and efficiently discharge the duties and obligations imposed on him by the letter of approval, and the circumstances exist which render it necessary for it in public interest so to do, the

Board may, on application, or with the consent of the Developer, or otherwise, for reasons to be recorded in writing, suspend the letter of approval, granted to the Developer for a whole or part of his area established as SEZ, **for a period not exceeding 1 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 SEZ accordingly.

(2) Consequent upon appointment of an Administrator, the management of the SEZ of the Developer shall vest in the Administrator.

(3) No letter of approval shall be suspended unless the Board has given to the Developer not less than 3 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.

(4) 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, and any further terms or conditions so imposed shall be binding upon and be complied with by the Developer and shall be of like force and effect as if they were contained in the letter of approval.

(5) In case the Board suspends a letter of approval under this section, it shall serve a notice of suspension upon the Developer and fix a date on which the suspension shall take effect.

(6) Where the Board has given notice for suspension of letter of approval above the Developer may, after prior approval of the Board, transfer his letter of approval to any person who is found eligible by the Board for grant of such approval.

(7) If at any time, it appears to the Board that the purpose of the order appointing the Administrator has been fulfilled or that for any reason it is undesirable that the order of appointment should remain in force, the Board may cancel the order and thereupon the Administrator shall be divested of the management of the SEZ which shall, unless otherwise directed by the Board, again vest in the person, being the Developer, in whom it was vested immediately prior to the date of appointment of the Administrator.

(8) Where the Board suspends the letter of approval, under this section, in respect of any Developer, the following provisions shall apply: -

(a) the Board shall invite applications for transferring the letter of approval of the Developer, whose approval has been suspended and select the person or persons, in accordance with the procedure as may be prescribed, to whom the letter of approval of the Developer in the SEZ may be transferred;

(b) upon selection of person or persons under subsection (a), the Board may, by notice in writing, require the Developer to transfer his letter of approval in a SEZ to the person or the persons so selected and thereupon the Developer shall transfer his interests, rights and liabilities in the SEZ who has been selected by the Board on such terms and conditions and consideration as may be agreed upon between the Developer and the transferee;

(c) all the rights, duties, obligations and liabilities of the Developer, on and from the date of suspension of letter of approval or on and from the date, if earlier, on which his letter of approval in the SEZ of the Developer has been transferred to

the transferee, shall cease absolutely except for any liabilities which have accrued prior to that date;

(d) the Board may make such interim arrangements in regard to the operation of the SEZ as may be considered appropriate;

(e) the Administrator shall exercise such powers and discharge such functions as the Board may direct.

## Section 11: Development Commissioner

(1) The Central Government may appoint **any of its officers not below the rank of Deputy Secretary to the Government of India as the Development Commissioner of one or more SEZs.**

(2) The Central Government may appoint such officers and other employees as it considers necessary to assist the Development Commissioner in the performance of his functions in the SEZs established by a Developer (other than Central Government) under this Act on such terms and conditions as it deems fit.

## Section 12: Functions of Development Commissioner

(1) Every Development Commissioner shall take all steps in order to discharge his functions under this Act to ensure speedy development of the SEZ and promotion of exports therefrom.

(2) Without prejudice to the generality of the foregoing provisions, the Development Commissioner shall-

(a) guide the entrepreneurs for setting up of Units in the SEZ;

(b) ensure and take suitable steps for effective promotion of exports from the SEZ;

(c) ensure proper co-ordination with the Central Government or State Government Departments concerned or agencies with respect to above mentioned purposes;

(d) monitor the performance of the Developer and the Units in a 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) discharge such other functions as may be delegated to him by the Board.

(3) Every Development Commissioner shall be overall in charge of the SEZ and shall exercise administrative control and supervision over the officers and employees appointed under section 11(2) to discharge any of the functions under this Act.

(4) Every Development Commissioner shall 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.

(5) Every Development Commissioner may call for such information from a Developer or Unit from time to time as may be necessary to monitor the performance of the Developer or the Unit, as the case may be.

(6) The Development Commissioner, may, delegate any or all of his powers or functions to any of the officers employed under him.

## Section 13: Constitution of Approval Committee

The Central Government shall -

(a) in the case of existing SEZs, within 6 months from the date of commencement of this Act;

(b) in case of other SEZs established after the commencement of this Act, within 6 months from the date of establishment of such SEZ, by notification, constitute a Committee for every SEZ, to be called the Approval Committee to exercise the powers and perform the functions specified in section 14.

## Section 14: Powers and functions of Approval Committee

Every Approval Committee may discharge the functions and exercise the powers in respect of the following matters: -

(a) approve the import or procurement of goods from DTA, in the SEZ for carrying on the authorised operations by a Developer;

(b) approve the providing of services by a service provider, from outside India, or from the DTA, for carrying on the authorised operations by the Developer, in the SEZ;

(c) monitor the utilisation of goods or services or warehousing or trading in the SEZ;

(d) approve, modify or reject proposals for setting up Units for manufacturing or rendering services or warehousing or trading in the SEZ [other than the grant of licence under section 9(2)(e)];

However, where the Approval Committee is unable to decide whether a particular process constitutes manufacture or not, it shall refer the same to the Board of Approval for a decision.

(e) allow, on receipt of approval under clause (c) of subsection (2) of section 9, 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, has been granted to the Developer or entrepreneur; and

(g) perform such other functions as may be entrusted to it by the Central Government or the State Government concerned, as the case may be.

## Section 15: Setting up of Unit

(1) Any person, who intends to set up a Unit for carrying on the authorised operations in a SEZ, may submit a proposal to the Development Commissioner concerned in such form and manner containing such particulars as may be prescribed:

(2) On receipt of the proposal under sub-section (1), the Development Commissioner shall submit the same to the Approval Committee for its approval.

(3) The Approval Committee may, either approve the proposal without modification, or approve the proposal with modifications subject to such terms and conditions as it may deem fit to impose, or reject the proposal:

However, in case of modification or rejection of a proposal, the Approval Committee shall afford a reasonable opportunity of being heard to the person concerned and after recording the reasons, either modify or reject the proposal.

(4) Any person aggrieved, by an order of the Approval Committee, made under sub-section (3) may prefer an appeal to the Board within such time as may be prescribed.

(5) No appeal shall be admitted if it is preferred after the expiry of the time prescribed therefor:

Provided that an appeal may be admitted after the expiry of the period prescribed therefor if the appellant satisfies the Board that he had sufficient cause for not preferring the appeal within the prescribed time.

(6) Every appeal made under sub-section (4) shall be in such form and shall be accompanied by a copy of the order appealed against and by such fees as may be prescribed.

(7) The procedure for disposing of an appeal shall be such as may be prescribed:

(8) The Central Government may prescribe -

(a) the requirements (including the period for which a Unit may be set up) subject to which the Approval Committee shall approve, modify or reject any proposal referred to in subsection (3);

(b) the terms and conditions, subject to which the Unit shall undertake the authorised operations and its obligations and entitlements.

(9) The Development Commissioner may, after approval of the proposal referred to in sub-section (3), grant a letter of approval to the person concerned to set up a Unit and undertake such operations which the Development Commissioner may authorise and every such operation so authorised shall be mentioned in the letter of approval.

## Section 16: Cancellation of letter of approval to entrepreneur

(1) The Approval Committee may, at any time, if it has any reason or cause to believe that the entrepreneur has persistently contravened any of the terms and conditions or its obligations subject to which the letter of approval was granted to the entrepreneur, cancel the letter of approval:

(2) Where the letter of approval has been cancelled under subsection (1), the Unit shall not from the date of such cancellation, be entitled to any exemption, concession, benefit or deduction available to it, being a Unit, under this Act.

(3) The entrepreneur whose letter of approval has been cancelled under sub-section (1), shall remit, the exemption, concession, drawback and any other benefit availed by him in respect of the capital goods, finished goods lying in stock and unutilised raw materials relatable to his Unit, in such manner as may be prescribed.

(4) Any person aggrieved by an order of the Approval Committee made under sub-section (1), may prefer an appeal to the Board within such time as may be prescribed.

(5) No appeal shall be admitted if it is preferred after the expiry of the time prescribed therefor:

Provided that an appeal may be admitted after the expiry of the period prescribed therefor if the appellant satisfies the Board that he had sufficient cause for not preferring the appeal within the prescribed time.

(6) Every appeal made under sub-section (4) shall be in such form and shall be accompanied by a copy of the order appealed against and by such fees as may be prescribed.

(7) The procedure for disposing of an appeal shall be such as may be prescribed:

## Section 17: Setting up and operation of Offshore Banking Unit

(1) An application for setting up and operation of an Offshore Banking Unit in a SEZ may be made to RBI in such form and manner as may be prescribed.

(2) On receipt of an application under sub-section (1), RBI shall, if it is satisfied that the applicant fulfills all the conditions specified under sub-section (3), grant permission to such applicant for setting up and operation of an Off-shore Banking Unit.

(3) RBI may, by notification, specify the terms and conditions subject to which an Offshore Banking Unit may be set up and operated in the SEZ

## Section 18: International Financial Services Centre (IFSC)

(1) The Central Government may approve the setting up of an IFSC in a SEZ and may prescribe the requirements for setting up and operation of such Center:

However, the Central Government shall approve only one IFSC in a SEZ.

(2) The Central Government may, subject to such guidelines as may be framed by RBI, SEBI, IRDA and such other concerned authorities, as it deems fit, prescribe the requirements for setting up and the terms and conditions of the operation of Units in an IFSC.

## Section 19: Single application form, return, etc.

Notwithstanding anything contained in any other law for the time being in force, the Central Government may, if required, -

(a) prescribe a single application form for obtaining any licence, permission or registration or approval by a Developer, or an entrepreneur under one or more Central Acts;

(b) authorise the Board, the Development Commissioner or Approval Committee, to exercise the powers of the Central Government on matters relating to the development of a SEZ; or setting up and operation of units;

(c) prescribe a single form for furnishing returns or information by a Developer or an entrepreneur under one or more Central Acts.

## Section 20: Agency to inspect

Notwithstanding anything contained in any other law for the time being in force, the Central Government may, by notification, specify any officer or agency to carry out surveys or inspections for securing of compliance with the provisions of any Central Act by a Developer or an entrepreneur, as the case may be, and such officer or agency shall submit verification and compliance reports, in such manner and within such time as may be specified in the said notification.

## Section 21: 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.

## Section 22: 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.

## Section 23: 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:

a) to try all suits of a civil nature arising out of offences committed in the Special Economic Zone; and
b) to try notified 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.

## Section 24: 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.

## Section 25: 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.

# SPECIAL FISCAL PROVISIONS FOR SEZS

## Section 26: Exemptions, drawbacks and concessions to every Developer and entrepreneur

- Every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions: -
  - (a) exemption from any duty of **CUSTOMS** on goods imported into, or service provided in, a SEZ or a Unit, to carry on the authorised operations by the Developer or entrepreneur;
  - (b) exemption from any duty of **CUSTOMS** on goods exported from, or services provided, from a SEZ or from a Unit, to any place outside India:
  - (c) exemption from any duty of **EXCISE** on goods brought from Domestic Tariff Area to a SEZ or Unit, to carry on the authorised operations by the Developer or entrepreneur;
  - (d) drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the DTA into a SEZ or Unit or services provided in a SEZ or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur;
  - (e) exemption from **SERVICE TAX** on taxable services provided to a Developer or Unit to carry on the authorised operations in a SEZ;
  - (f) exemption from **SECURITIES TRANSACTION TAX** in case the taxable securities transactions are entered into by a non-resident through the IFSC;
  - (g) exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 if such goods are meant to carry on the authorised operations by the Developer or entrepreneur.

## Section 27: 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.

## Section 28: 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.

## Section 29: 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.

## Section 30: Domestic clearance by Units

Subject to the conditions specified in the rules made by the Central Government in this behalf: -

(a) any goods removed from a SEZ to the DTA shall 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; and

(b) the rate of duty and tariff valuation, if any, applicable to goods removed from a SEZ 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.

## Section 31: Constitution of Authority

(1) The Central Government shall, by notification in the Official Gazette, constitute, for every SEZ established by it before the commencement of this Act or which may be established by it after such commencement by the Central Government, an Authority to be called the …… (name of the SEZ) Authority to exercise the powers conferred on, and discharge the functions assigned to, it under this Act:

However, in respect of existing SEZ established by the Central Government, such Authority shall be constituted by the Central Government within 6 months from the date of commencement of this Act:

Further, until such Authority is constituted, the person or the authority including the Development Commissioner exercising control over such existing SEZs shall continue to exercise such control over the SEZs till the Authority is constituted.

(2) Every Authority shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with a power to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue and be sued.

## Section 34: Functions of Authority

(1) It shall be the duty of each Authority to undertake such measures as it thinks fit for the development, operation and management of the SEZ for which it is constituted.

(2) The measures may provide for -

(a) the development of infrastructure in the SEZ;

(b) promoting exports from the SEZ;

(c) reviewing the functioning and performance of the SEZ;

(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.

## Section 38: 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.

## Section 39: Returns and reports

(1) Every Authority shall furnish to the CG at such time and in such form and manner as may be prescribed or as the CG may direct, such returns and statements and such particulars in regard to the promotion and development of exports and the operation and maintenance of the SEZ and Units as the CG may, from time to time, require.

(2) Every Authority shall, as soon as possible, after the end of each financial year, submit to the Central Government a report in such form and before such date, as may be prescribed, giving a true and full account of its activities, policy and programmes during the previous financial year.

(3) A copy of every report received under sub-section (2) shall be laid, as soon as may be, after it is received, before each House of Parliament.

## Section 40: Power to supersede Authority

(1) If at any time the CG 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 by or under this Act or
- has exceeded or abused its powers, or
- has wilfully or without sufficient cause, failed to comply with any direction issued by the Central Government,

the Central Government may, by notification, supersede that Authority for such period not exceeding 6 months, as may be specified in the notification:

(2) Upon the publication of a notification above regarding superseding of the Authority -

(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 this 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 CG may direct;

(c) all property vested in the Authority shall, during the period of supersession, vest in the Central Government.

(3) On the expiration of the period of supersession specified in the notification issued under sub-section (1), the Central Government may -

(a) extend the period of supersession for such further period not exceeding 6 months; or

(b) reconstitute the Authority in the manner provided in section 31.

## Section 42: Reference of dispute

(1) If-

(a) any dispute of civil nature arises among two or more entrepreneurs or two or more Developers or between an entrepreneur and a Developer in the SEZ; and

(b) the court or the courts to try suits in respect of such dispute had not been designated, such dispute shall be referred to arbitration:

However, no dispute shall be referred to the arbitration on or after the date of the designation of court or courts here.

(2) Where a dispute has been referred to arbitration above, the same shall be settled or decided by the arbitrator to be appointed by CG.

(3) The provisions of the Arbitration and Conciliation Act, 1996 shall apply to all arbitration under this Act as if the proceedings for arbitration were referred in settlement or decision under provisions of the Arbitration and Conciliation Act, 1996.

## Section 45: Person to whom a communication may be sent under this Act

A communication by any competent authority or person under this Act may be sent to the person who has the ultimate control over the affairs of the SEZ 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.

## Section 46: Identity Card

Every person, whether employed or residing or required to be present in a SEZ, shall be provided an identity card by every Development Commissioner of such SEZ, in such form and containing such particulars as may be prescribed.

## Section 49: 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.

## Section 50: Power of State Government to grant exemption

The State Government may, for the purposes of giving effect to the provisions of this Act, notify policies for Developers and Units and take suitable steps for enactment of any law: -

(a) granting exemption from the State taxes, levies and duties to the Developer or the entrepreneur;
(b) 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.

### Section 51: Act to have overriding effect

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.

### Section 53: SEZs to be ports, airports, inland container depots, land stations, etc., in certain cases

(1) A SEZ shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations.
(2) A SEZ shall, with effect from such date as Central Government may notify, be deemed to be a port, inland container depot, land station and land customs stations, as the case may be, under section 7 of the Customs Act, 1962:

Provided that for the purposes of this section, the Central Government may notify different dates for different SEZs.

## 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 Section 2(1)(c) of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under section 6(1) of that Act.

## Salient features of the Act

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.

# Chapter 5 : Foreign Contribution (Regulation) Act, 2010

The object of the Foreign Contribution (Regulation) Act, 2010 is:

- 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.

## Definitions:

- **"association"** means an association of individuals, whether incorporated or not, having an office in India and includes a society, whether registered under the Societies Registration Act, 1860, or not, and any other organisation, by whatever name called;
- **"candidate for election"** means a person who has been duly nominated as a candidate for election to any Legislature;
- **"foreign company"** means any company or association or body of individuals incorporated outside India and includes—
  - i. a foreign company as explained under Companies Act;
  - 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.

  **Explanation** — For the purposes of this sub-clause, a corporation incorporated in a foreign country or territory shall be deemed to be a multi-national corporation if such corporation, —
  - (a) has a subsidiary or a branch or a place of business in two or more countries or territories; or
  - (b) carries on business, or otherwise operates, in two or more countries or territories;
- **"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 Securities Contracts (Regulation) Act, 1956 and includes any foreign security as defined in 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 section 17(1) 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;

- **"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 free boarding, lodging, transport or medical treatment;
- **"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;
  vi. a company within the meaning of the Companies Act, 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: —
    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;
    E. foreign company;
  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;

- **"person"** includes—
  i. an individual;
  ii. Hindu undivided family;
  iii. an association;
  iv. a company registered under section 8 of the Companies Act, 2013;

- **"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 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 as notified by the Election Commission of India;
- **"relative"** has the meaning assigned to it in Companies Act;

## Section 3: Prohibition to accept foreign contribution

**Ques.** Which are the organisations/individuals specifically debarred from receiving foreign contribution?

(1) No foreign contribution shall be accepted by any—

(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;

Here, the expression "corporation" means a corporation owned or controlled by the Government and includes a Government company as defined in the Companies Act.

(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 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).

(2)

(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.

(3) 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.

## Section 4: Persons to whom section 3 shall not apply

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:

However, 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.

## Section 5: Procedure to notify an organization of a political nature

(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 Section 3(1)(f):

(2) 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:

(3) The organisation to whom a notice has been served under sub-section (2), may, with in a period of 30 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):

(4) 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.

(5) 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.

(6) Every order under sub-section (1) shall be made within a period of 120 days from the date of issue of notice under sub-section (2):

However, in case no order is made within the said period of 120 days, the Central Government shall, after recording the reasons therefor, make an order under sub-section (1) within a period of 60 days from the expiry of the said period of 120 days.

## Section 6: Restriction on acceptance of foreign hospitality

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:

However, 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 1 month from the date of receipt of such hospitality an intimation to the CG as to the receipt of such hospitality, and the source from which, and the manner in which, such hospitality was received by him.

## Section 7: Prohibition to transfer foreign contribution to other persons

No person who—

(a) is registered and granted a certificate or has obtained prior permission under this Act; and

(b) receives any foreign contribution,

shall transfer such foreign contribution to any other person.

## Section 8: Restriction to utilize foreign contribution for administrative purpose

(1) Every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution —

(a) shall utilise such contribution for the purposes for which the contribution has been received:

However, any foreign contribution or any income arising out of it shall not be used for speculative business:

Further the CG 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 20% of such contribution, received in a financial year, to meet administrative expenses:

However, administrative expenses exceeding 20% of such contribution may be defrayed with prior approval of the Central Government.

(2) The Central Government may prescribe the elements which shall be included in the administrative expenses and the manner in which the administrative expenses referred above shall be calculated.

## Section 9: Power of Central Government to prohibit receipt of foreign contribution, etc., in certain cases

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 with in 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) require any person or class of persons, not specified in section 6, to furnish intimation, with in 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:

However, 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.

## Section 10: Power to prohibit payment of currency received in contravention of the Act

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 there upon the provisions of Unlawful Activities (Prevention) Act, 1967 shall, so far as may be, apply to, or in relation 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.

## Section 11: Registration of certain persons with Central Government

(1) Save as otherwise provided in this Act, no person having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution unless such person obtains a certificate of registration from the Central Government:

**Who can receive foreign contribution?**

An association having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution unless such person obtains a certificate of registration / prior permission from the Central Government.

Provided that any association registered with the Central Government under section 6 or granted prior permission under that section of the Foreign Contribution (Regulation) Act, 1976, as it stood immediately before the commencement of this Act, shall be deemed to have been registered or granted prior permission, as the case may be, under this Act and such registration shall be valid for a period of 5 years from the date on which this section comes into force.

(2) Every person referred to in sub-section (1) may, if it is not registered with the Central Government under that sub section, accept any foreign contribution only after obtaining the prior permission of the Central Government and such prior permission shall be valid for the specific purpose for which it is obtained and from the specific source:

"Provided that the Central Government, on the basis of any information or report, and after holding a summary inquiry, has reason to believe that a person who has been granted prior permission has contravened any of the provisions of this Act, it may, pending any further inquiry, direct that such person shall not utilise the unutilised foreign contribution or receive the remaining portion of foreign contribution which has not been received or, as the case may be, any additional foreign contribution, without prior approval of the Central Government:

Provided further that if the person referred to in sub-section (1) or in this sub-section has been found guilty".

(3) Notwithstanding anything contained in this Act, the Central Government may, by notification in the Official Gazette, specify —

i. the person or class of persons who shall obtain its prior permission before accepting the foreign contribution; or

ii. the area or areas in which the foreign contribution shall be accepted and utilised with the prior permission of the Central Government; or

iii. the purpose or purposes for which the foreign contribution shall be utilised with the prior permission of the Central Government; or

iv. the source or sources from which the foreign contribution shall be accepted with the prior permission of the Central Government.

## Section 12: Grant of certificate of registration

(1) An application by a person, referred to in section 11 for grant of certificate or giving prior permission, shall be made to the Central Government in such form and manner and along with such fee, as may be prescribed.

'(1A) Every person who makes an application under sub-section (1) shall be required to open "FCRA Account" in the manner specified in section 17 and mention details of such account in his application.'.

(2) On receipt of an application under sub-section (1), the Central Government shall, by an order, if the application is not in the prescribed form or does not contain any of the particulars specified in that form, reject the application.

(3) If on receipt of an application for grant of certificate or giving prior permission and after making such inquiry as the Central Government deems fit, it is of the opinion that the conditions specified in sub-section (4) are satisfied, it may, ordinarily within 90 days from the date of receipt of application, register such person and grant him a certificate or give him prior permission, as the case may be, subject to such terms and conditions as may be prescribed:

However, in case the Central Government does not grant, with in the said period of 90 days, a certificate or give prior permission, it shall communicate the reasons therefor to the applicant:

Further a person shall not be eligible for grant of certificate or giving prior permission, if his certificate has been suspended and such suspension of certificate continues on the date of making application.

(4) The following shall be the conditions for the purposes of sub-section (3): —

(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 or 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 it sends;

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;

(b) the person making an application for registration under sub-section (1) has under taken reasonable activity in its chosen filed for the benefit of the society for which the foreign contribution is proposed to be utilised;

(c) the person making an application for giving prior permission under sub-section (1) has prepared a reasonable project for the benefit of the society for which the foreign contribution is proposed to be utilised;

(d) in case 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 pending against him;

(e) in case 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;

(f) the acceptance of foreign contribution by the person referred to in sub- section (1) is not likely to affect prejudicially—

i. the sovereignty and integrity of India; or
ii. the security, strategic, scientific or economic interest of the State; or
iii. the public interest; or
iv. freedom or fairness of election to any Legislature; or
v. friendly relation with any foreign State; or
vi. harmony between religious, racial, social, linguistic, regional groups, castes or communities;

(g) the acceptance of foreign contribution referred to in sub-section (1) —

i. shall not lead to incitement of an offence;
ii. shall not endanger the life or physical safety of any person.

(5) Where the Central Government refuses the grant of certificate or does not give prior permission, it shall record in its order the reasons therefore and furnish a copy thereof to the applicant:

However, CG may not communicate the reasons for refusal for grant of certificate or for not giving prior permission to the applicant under this section in cases where is no obligation to give any information nor documents or records or papers under the Right to Information Act, 2005.

(6) The certificate granted under sub-section (3) shall be valid for a period of 5 years and the prior permission shall be valid for the specific purpose or specific amount of foreign contribution proposed to be received, as the case may be.

## Section 12A: Power of Central Government to require Aadhaar number, etc., as identification document

Notwithstanding anything contained in this 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

## Section 13: Suspension of certificate

(1) Where the Central Government, for reasons to be recorded in writing, is satisfied that pending consideration of the question of canceling 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.

(2) Every person whose certificate has been suspended shall—

(a) not receive any foreign contribution during the period of suspension of certificate:

However, CG, 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;

(b) utilise, in the prescribed manner, the foreign contribution in his custody with the prior approval of the Central Government.

Section 15Surrender of certificate.

## Section 14: Cancellation of certificate

(1) The Central Government may, if it is satisfied after making such inquiry as it may deem fit, by an order, cancel the certificate if —

(a) 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

(b) the holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof; or

(c) in the opinion of the Central Government, it is necessary in the public interest to cancel the certificate; or

(d) the holder of certificate has violated any of the provisions of this Act or rules or order made there under; or

(e) 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 are as on able 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 3 years from the date of cancellation of such certificate.

## Section 14A: 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).

### Section 15: Management of foreign contribution of person whose certificate has been cancelled or surrendered

(1) 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.

(2) The authority 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.

(3) The authority 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.

### Section 16: Renewal of certificate

(1) Every person who has been granted a certificate under section 12 shall have such certificate renewed within 6 months before the expiry of the period of the certificate.

Provided 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).

(2) 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.

(3) The Central Government shall renew the certificate, ordinarily within 90 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 5 years:

However, in case the Central Government does not renew the certificate within the said period of 90 days, it shall communicate the reasons there for to the applicant:

## ACCOUNTS, INTIMATION, AUDIT AND DISPOSAL OF ASSETS, ETC.

### Section 17: Foreign contribution through scheduled bank

(1) 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.

(2) 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,

in such form and manner as may be prescribed.

# OFFENCES AND PENALTIES

## Section 33: Making of False Statement, Declaration or Delivering False Accounts

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.

## Section 34: Penalty for article or currency or security obtained in contravention of section 10

If 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 3 years, or with fine, or with both; and 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 there of as the court may deem fit.

## Section 35: Punishment for contravention of any provision of the Act

Whoever accepts, or assists any person, political party or organization 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 5 years, or with fine, or with both.

## Section 36: 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.

## Section 37: 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.

## Section 38: 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.

## Section 39: Offences by companies

(1) Where an offence under this Act or any rule or order made there under 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, nothing contained in this sub-section shall render such person liable to any punishment if he proves that the offence was committed without this knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) 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 attribute able 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 —

(a) "company" means anybody corporate and includes a firm, society, trade union or other association of individuals; and

(b) "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.

## Section 40: Bar on Prosecution of Offences under the Act

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.

## Section 41: Compounding of certain offences

(1) 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.

(2) 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 3 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 3 years from the date on which the offence was previously compounded, shall be deemed to be a first offence.

(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.

(4) 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.

## Salient features of the Foreign Contribution (Regulation) Amendment Act, 2020

- 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;
- Amended Section 7 of the Act to prohibit any transfer of foreign contribution to any association/person;
- Amended section 8(1) of the Act to reduce the limit for defraying administrative expenses from existing "fifty per cent." to "twenty per cent.";
- Inserted of a new Section 12A empowering the Central Government to require Aadhaar number, etc., as identification document;
- Inserted of a new Section 14A enabling the Central Government to permit any person to surrender the certificate granted under the Act;
- 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.

# Chapter 6 : Prevention of Money Laundering Act, 2002

## INTRODUCTION

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.

It is the processing of criminal proceeds to hide its illegal origin like terrorism, illegal arms sales, financial crimes, smuggling, and the activities of organised crime, including drug trafficking and prostitution rings. 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. 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 are entered 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.

## Impact of Money Laundering on Development

- 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.
- the funds owned by criminals escape the government's ability to control and regulate the economy.
- 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.
- the economic and political influence of criminal organisations can weaken the social fabric, ethical standards and ultimately the democratic institutions of society.

i. Increased crime
ii. Increased corruption
iii. Inability of the govt. to control & regulate the economy
iv. Bribe in the public offices
v. Weak social & ethical standards
vi. Economic & political influence of criminal organizations
vii. Infiltration of banks & financial institutions through organized crimes
viii. Control over vast sector of economy by small chunk of population
ix. Money laundering weakens 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, 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 antimony 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 ACT, 2002

## IMPORTANT DEFINITIONS

| | | |
|---|---|---|
| **Attachment** | **Section 2 (1)(d)** | Attachment means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III. |
| **Proceeds of crime** | **Section 2 (1)(u)** | '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. |
| **Property** | **Section 2 (1)(v)** | Property 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. |
| **Intermediary** | **Section 2 (1)(n)** | Intermediary means 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. |
| **Investigation** | **Section 2(1)(na)** | Investigation includes 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. |

## 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.

### Analysis:

- Acquires, owns, possesses, or transfers any **proceeds of crime**
- 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**.

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 3 years but which may extend to 7 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 10 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.

## ATTACHMENT OF PROPERTY INVOLVED IN MONEY LAUNDERING

Where the Director or any officer not below the rank of Deputy Director authorised by him, 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, such officer may by order in writing, provisionally attach such property for a period not exceeding 180 days from the date of the order, in the manner provided in the Second Schedule of the Income-tax Act, 1961.

- Every order of attachment shall cease to have effect after the expiry of 90 days from the date of the order or on the date of the order made by the Administrating Officer finding the person interested is not prevented from the enjoyment of property attached.
- 'Person interested in relation to any immovable property includes all persons claiming or entitled to claim any interest in the property.
- The Director or any other officer who provisionally attaches any property shall, within a period of 30 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 rank of Joint Secretary to the Government of India as Adjudicating Authority** to exercise the jurisdiction, powers and authority conferred on or under the Act.

## 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 2 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 subsection (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 an order of confiscation made, in respect of any property of a person, vests in the Central Government all the rights and title in such property free from all encumbrances.

The Adjudicating Authority after giving an opportunity of being heard to any other person interested in the property attached or seized is of the opinion that any encumbrances on the property or lease hold interest has been created with a view to defeat the provisions of the Act, it may, by order declare such encumbrances or lease hold interest to be void and thereupon the property shall vest in the Central Government free from such encumbrances or lease hold. However, this provision shall not 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 gives wide powers of search and seizure to the investigating agency. If the investigating agency has reason to believe (and such belief should be recorded in writing) the commission of offence under the PMLA and possession of proceeds of crime, it can enter and seize property/records etc. make an inventory of the same. The seizure memo is required to be signed by two independent witnesses.

Whereas this section provides for search of premises, Section 18 provides for search of an individual and it 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 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) Sub-section (1) provides that 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 180 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 section 8, the Court or the Adjudicating Authority, as the case may be, 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 Court under sub-section (6) of section 8 or by the Adjudicating Authority, the Director or any officer authorised by him in this behalf may withhold the release of any such property for a period of 90 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 under sub-section (5) or sub-section (7) of section 8, 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 under sub-section (6) of section 8 or by the Adjudicating Authority, 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, a person accused of an offence punishable for a term of imprisonment of more than 3 years under Part A of the Schedule shall not 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 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.

## 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
- 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 of 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 where Adjudicating Authority has made an order confirming such attachment or confiscation of any property under 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 when a letter of request is received by the Central Government from a court or an authority in a contracting state requesting attachment or confiscation of the property in India derived or obtained directly or indirectly, by any person from the commission of an offence under Section 3 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 the 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

### 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:

- Customer Acceptance Policy
- Customer Identification Procedures
- Monitoring of transaction
- Risk Management

## 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. 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

## 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.

# Chapter 7 : Benami Transactions (Prohibition) Act, 1988

## INTRODUCTION

Benami Transactions (Prohibition) Act, 1988 **(name changed to Prohibition of Benami Property Transactions Act, 1988 by section 3 of the 2016 amendment)** is an Act of the Parliament of India that prohibits certain types of financial transactions. The act defines a 'benami' transaction as any transaction in which property is transferred to one person for consideration paid by another person. Such transactions were a feature of the Indian economy, usually relating to the purchase of property (real estate), and were thought to contribute to the Indian black money problem. The act bans all benami transactions and gives the government the right to recover property held benami without paying any compensation.

The said Act provides that—

(a) all the properties held benami shall be subject to acquisition by such authority in such manner and after following such procedure as may be prescribed;

(b) no amount shall be payable for the acquisition of any property held benami;

(c) the purchase of property by any person in the name of his wife or unmarried daughter for their benefit would not be benami transaction;

(d) the securities held by a depository as registered owner under the provisions of the Depositories Act, 1996 or participant as an agent of a depository would not be benami transactions.

During the administration of the Benami Transactions (Prohibition) Act, 1988, it was found that the provisions of the aforesaid Act are inadequate to deal with benami transactions as the Act does not—

i. contain any specific provision for vesting of confiscated property with Central Government;

ii. have any provision for an appellate mechanism against an action taken by the authorities under the Act, while barring the jurisdiction of a civil court;

iii. confer the powers of the civil court upon the authorities for its implementation; and

iv. provide for adequate enabling rule making powers.

In view of the circumstances stated above, comprehensive amendments to the Benami Transactions (Prohibition) Act, 1988 has become necessary in order to prohibit holding property in benami and restrict right to recover or transfer property held benami and also to provide a mechanism and procedure for confiscation of property held benami. Consequently, Benami Transactions (Prohibition) Amended Act, 2016 was passed.

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 legislation is also intended to effectively prohibit benami transactions and consequently prevent circumvention of law through unfair practices. However, those who declare their benami properties under income declaration scheme will get immunity under the Benami Act.

In the case of Union of India & Anr. vs. Ganpati Dealcom Pvt. Ltd., 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.

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.

## IMPORTANT DEFINITIONS

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| **Adjudicating Authority** | **Section 2(1)** | Adjudicating Authority" means the Adjudicating Authority appointed under section 7. |
| **Administrator** | **Section 2(2)** | "Administrator" means an Income-tax Officer as defined in the Income-tax Act, 1961. |
| **Approving Authority** | **Section 2(4)** | "Approving Authority" means an Additional Commissioner or a Joint Commissioner as defined in Income-tax Act, 1961. |
| **Attachment** | **Section 2(5)** | Attachment means the prohibition of<br>— **transfer,**<br>— **conversion,**<br>— **disposition or**<br>— **movement**<br>**of property**, by an order issued under the Act. |
| **Benami Property** | **Section 2(8)** | Benami Property means any property which is the subject matter of a benami transaction and also includes the proceeds from such property. |
| **Benami Transaction** | **Section 2(9)** | Benami Transaction means: -<br>A. a transaction or an arrangement—<br>(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 |

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| | | (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—<br>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;<br>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;<br>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;<br>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<br>B. a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or<br>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;<br>D. a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;<br>***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 |

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| | | contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force —<br>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;<br>ii. stamp duty on such transaction or arrangement has been paid; and<br>iii. the contract has been registered. |
| **Benamidar** | **Section 2(10)** | 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. |
| **Beneficial Owner** | **Section 2(12)** | "Beneficial Owner" means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar. |
| **Fair Market value** | **Section 2(16)** | Fair market value in relation to a property, means—<br>i. the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and<br>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. |
| **Initiating Officer** | **Section 2(19)** | "Initiating Officer" means an Assistant Commissioner or a Deputy Commissioner as defined in Income-tax Act, 1961 |
| **Person** | **Section 2(24)** | "person" shall include—<br>i. an individual;<br>ii. a Hindu undivided family;<br>iii. a company;<br>iv. a firm;<br>v. an association of persons or a body of individuals, whether incorporated or not;<br>vi. every artificial juridical person, not falling under sub-clauses (i) to (v). |
| **Property** | **Section 2(26)** | Property means assets of any kind, whether<br>— movable or immovable,<br>— tangible or intangible,<br>— 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<br>— also includes the proceeds from the property. |
| **Transfer** | Section 2(29) | Transfer includes sale, purchase or any other form of transfer of right, title, possession or lien. |

# CHAPTER-II
# PROHIBITION OF BENAMI TRANSACTIONS

## Prohibition of Benami Transactions

As per Section 3 of the Act, no person shall enter into any benami transaction.

**Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to 3 years or with fine or with both.**

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.

## Section 4: 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.

## Section 5: 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.

## Section 6: 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 provision, the transaction of such property shall be deemed to be null and void.

Above provisions shall not apply to a transfer made in accordance with the provisions of section 190* of the Finance Act, 2016.

*Undisclosed Income declared not to be treated as benami transaction in certain cases.*

# CHAPTER-IV
# ATTACHMENT, ADJUDICATION AND CONFISCATION

## Section 24: Notice and Attachment of property involved in Benami Transaction

(1) 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 why the property should not be treated as benami property.

(2) Where a notice under sub-section (1) specifies any property as being held by a benamidar referred to in that sub-section, a copy of the notice shall also be issued to the beneficial owner if his identity is known.

**(3)** 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 the property in the manner as may be prescribed, **for a period not exceeding 90 days from the date of issue of notice under sub-section (1).**

(4) 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 90 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 section 26(3); 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 section 26(3); or

ii. decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

**(5)** where the Initiating Officer passes an order continuing the provisional attachment of the property under sub-section (4) (a) (i) or passes an order provisionally attaching the property under sub-section (4) (b) (i), **he shall, within 15 days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.**

## Section 25: Manner of Service of Notice

(1) A notice under section 24(1) may be served on the person named therein either by post or as if it were a summons issued by a Court under the CPC, 1908.

(2) any notice referred 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.

## Section 26: Adjudication of Benami Property

(1) On receipt of a reference under Section 24(5), 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: -

- **the person specified as a benamidar therein;**
- **any person referred to as the beneficial owner therein or identified as such;**
- **any interested party, including a banking company;**
- **any person who has made a claim in respect of the property.**

However, the Adjudicating Authority shall issue notice within a period of 30 days from the date on which a reference has been received.

Further, the notice shall provide a period of time of not less than 30 days to the person to whom such notice is issued to furnish the information sought.

(2) Where such property is held jointly by more than one person, the Adjudicating Authority shall try 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.

(3) The Adjudicating Authority shall, after

(a) considering the reply, if any, to the notice issued under sub-section s(1);

(b) **making or causing to be made such inquiries and calling for such reports or evidence as it deems fit; and**

(c) **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** and thereafter 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.

(4) 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.

(5) 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 section 24(5).

(6) 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 him to adjudicate upon and settle all the questions involved in the reference.

(7) No order under sub-section (3) shall be passed after the expiry of 1 year from the end of the month in which the reference under section 24(5) was received.

(8) The benamidar or any other person who claims to be the owner of the property may either appear in person or take the assistance of an authorised representative of his choice to present his case.

## Section 27: Confiscation and Vesting of Benami Property

(1) Where an order is passed in respect of any property under Section 26(3) 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.

(2) The provision given in sub-section (1) 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 Section 24(1) without his having knowledge of the benami transaction.

(3) Where an order of confiscation has been made under sub-section (1), 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.

(4) 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.

(5) Where no order of confiscation is made upon the proceedings under this Act attaining finality, no claim shall lie against the Government.

## Section 28: Management of Properties Confiscated

(1) The Administrator shall have the power to receive and manage the property, in relation to which an order of confiscation under Section 27(1) has been made, in such manner and subject to such conditions, as may be prescribed.

(2) 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.

(3) 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 Section 27(3) in such manner and subject to such conditions as may be prescribed.

### Section 29: Possession of the Property

(1) where an order of confiscation in respect of a property under Section 27(1), has been made, **the Administrator shall proceed to take the possession of such property.**

(2) The Administrator shall -

(a) by notice in writing, order within 7 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.

## CHAPTER-V
## APPELLATE TRIBUNAL

### Section 30: Appellate Tribunal

Section 30 seeks to provide that the Central Government shall, by notification, establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authority under this Act.

### Section 40: Procedure of Appellate Tribunal

Section 40 (1) 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.

### Section 49: Appeal to High Court

(1) Any party aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 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.

(2) The High Court may entertain any appeal after the said period of 60 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).

**(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.**

(4) 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.

(5) 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.

(6) 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.

(7) 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).

(8) 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.

# CHAPTER-VI
# SPECIAL COURTSS

## Section 50: Special Courts

(1) 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.

(2) While trying an offence under this Act, a Special Court shall also try an offence other than an offence mentioned above, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

(3) 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.

(4) 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 6 months from the date of filing of the complaint.

# CHAPTER-VII
# OFFENCES AND PROSECUTION

## Section 53: Penalty for Benami Transaction

- 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 the benami transaction, shall be guilty of the offence of benami transaction.
- Whoever is found guilty of the offence of benami transaction shall be punishable with rigorous imprisonment for a term which shall not be less than 1 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.

## Section 54: Penalty for False Information

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 6 months but which may extend to 5 years and shall also be liable to fine which may extend to 10% of the fair market value of the property.

# CHAPTER-VIII
# MISCELLANEOUS

## Section 62: Offences by Companies

(1) 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.

(2) No person mentioned above shall be held liable to punishment, if he proves that the contravention took place without his knowledge.

(3) 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.

## SALIENT FEATURES OF THE ACT

- 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 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 Bill.
- It provides penalty for entering into benami transactions and for furnishing any false documents in any proceeding under the Bill.
- 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.

# Chapter 8 : Consumer Protection Act, 2019

An Act to provide 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.

**"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;

**"complaint"** means any allegation in writing, made by a complainant for obtaining any relief provided by or under this Act, that—

i. any trader or service provider has adopted:
   - an unfair contract or
   - unfair trade practice or
   - a restrictive trade practice;

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 has charged for the goods or for the services 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;
   (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;

**"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.

Here,

- "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;
- "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;

**"consumer rights"** includes —

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** 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 forum;

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"** 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 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.

**"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 or
- has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and
- includes—
  - any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and
  - deliberate withholding of relevant information by such person to the consumer;

**"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—

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;

**"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;

**"goods"**

- means every kind of movable property and
- includes "food" as defined in Section 3(1)(j) of the Food Safety and Standards Act, 2006;

**"food"**

- means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and
- includes primary food, to the extent defined in clause (ZK) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment
- but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:

**"primary food"** means an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman;

**"harm",** in relation to a product liability, includes—

- damage to any property, other than the product itself;
- personal injury, illness or death;
- mental agony or emotional distress attendant to personal injury or illness or damage to property; or
- any loss of consortium or services or other loss resulting from a harm referred to above 3 points;

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;

**"manufacturer"** means a person who—

i. makes any goods or parts thereof; or
ii. assembles any goods or parts thereof made by others; or
iii. puts or causes to be put his own mark on any goods made by any other person;

**"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 would constitute an unfair trade practice if made by the manufacturer or seller or service provider thereof; or
iv. deliberately conceals important information;

**"person"** includes—

i. an individual;
ii. a firm whether registered or not;
iii. a HUF;
iv. a co-operative society;
v. an AOP 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;

**"product"**

- means any article or goods or substance or raw material or any extended cycle of such product,
- which may be in gaseous, liquid, or solid state
- possessing intrinsic value which is capable of delivery either as wholly assembled or as a component part and is produced for introduction to trade or commerce,
- but does not include human tissues, blood, blood products and organs;

**"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;

**"product liability action"** means a complaint filed by a person before a

- District Commission or

- State Commission or
- National Commission

for claiming compensation for the harm caused to him;

**"product manufacturer"** means a person who—

i. makes any product or parts thereof; or

ii. assembles parts thereof made by others; or

iii. puts or causes to be put his own mark on any products made by any other person; or

iv. makes a product and sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains such product or is otherwise involved in placing such product for commercial purpose; or

v. designs, produces, fabricates, constructs or re-manufactures any product before its sale; or

vi. being a product seller of a product, is also a manufacturer of such product;

**"product seller",** in relation to a product,

- means a person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purpose and
- includes—
  - a manufacturer who is also a product seller; or
  - a service provider,
- but does not include—
  - a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats;
  - a provider of professional services in any transaction in which, the sale or use of a product is only incidental thereto, but furnishing of opinion, skill or services being the essence of such transaction;
  - a person who—
    - acts only in a financial capacity with respect to the sale of the product;
    - is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider;
    - leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;

**"product service provider",** in relation to a product, means a person who provides any service in respect of such product;

**"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—
  - 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;
  - 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;

**"service"**

- means service of any description which is made available to potential users and
- includes 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;

**"spurious goods"** means such goods which are falsely claimed to be genuine;

**"trader"**, in relation to any goods,

- means a person who sells or distributes any goods for sale and
- includes the manufacturer thereof, and
- where such goods are sold or distributed in package form, includes the packer thereof;

**"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;

**"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: —

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:
   (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.

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;
   (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.

# CHAPTER-II
# CONSUMER PROTECTION COUNCILS

## Central Consumer Protection Council or named as Central 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 following members: —
  (a) **Chairperson:** The Minister-in-charge of the Department of Consumer Affairs in the Central Government; and
  (b) such number of other official or non-official members representing such interests as may be prescribed.
- At least 1 meeting of the Council shall be held every year.
- 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 or State Council

- The State Council shall be an advisory council and consist of the following members: —
  (a) **Chairperson:** The Minister-in-charge of Consumer Affairs in the State Government;
  (b) such number of other official or non-official members representing such interests as may be prescribed;
  (c) such number of other official or non-official members, not exceeding 10, as may be nominated by the Central Government.
- At least 2 meetings of the council shall be held every year.
- Every State Government is empowered to establish a State Consumer Protection Council for such State to be known as the State Council.
- 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 or District Council

- The State Government is empowered to establish for every District a District Consumer Protection Council to be known as the District Council.
- The District Council shall be an advisory council and consist of the following members: -
  (a) **Chairperson:** The Collector of the district; and
  (b) such number of other official and non-official members representing such interests as may be prescribed.
- At least 2 meetings of the council shall be held every year.
- The objects of every District Council shall be to render advice on promotion and protection of consumer rights under the Act within the district.

# CHAPTER-III
# CENTRAL CONSUMER PROTECTION AUTHORITY
## (SECTION 10 TO SECTION 27)

### Establishment of Central Consumer Protection Authority or Central Authority

- The Central Government shall establish a Central Consumer Protection 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 this Act.

### 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

- 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.
- The Central Authority may engage 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.

### Section 15: Investigation Wing

- 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.

## Power of District Collector

The District Collector 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.

## 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

- the District Collector or
- the Commissioner of regional office or
- the Central Authority.

## Section 18: Powers and functions of Central Authority

(1) The Central Authority shall—

(a) protect, promote and enforce the rights of consumers as a class and prevent violation of consumers rights;

(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 any of its rule and regulations;

(d) ensure that no person takes part in the publication of any advertisement which is false or misleading.

(2) 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 moto 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 under this Act;

(c) intervene in any proceedings before the District Commission or the State Commission or the National Commission in respect of any allegation of violation of consumer rights or unfair trade practices;

(d) recommend adoption of international covenants and best international practices on consumer rights to ensure effective enforcement of consumer rights;

(e) undertake and promote research in the field of consumer rights;

(f) spread and promote awareness on consumer rights;

(g) encourage non-Governmental organisations and other institutions working in the field of consumer rights to co-operate and work with consumer protection agencies;

(h) issue safety notices to alert consumers against dangerous or hazardous or unsafe goods or services;

(i) advise the Ministries and Departments of the Central and State Governments on consumer welfare measures;

(j) 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

(1) 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.

(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 20: Power of Central Authority to recall goods, etc.

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:

## Section 21: Power of Central Authority to issue directions and penalties against false or misleading advertisements

- 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 ***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 Rs. 10,00,000:

  However, the Central Authority may, for every subsequent contravention by a manufacturer or endorser, impose a penalty, which may extend to Rs. 50,00,000.
- 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 1 year:

  However, the 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 3 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 Rs. 10 lakhs.

  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.
- While determining the penalty under this section, 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.

## Section 22: Search and seizure

- For the purpose of conducting an investigation after preliminary inquiry the Director-General or any other officer authorised by him in this behalf, or the District Collector 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.

- Every document, record or article seized shall be returned to the person, from whom they were seized or who produced the same, within a period of 20 days of the date of such seizure or production after copies thereof or extracts therefrom certified by that person 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.

## Appeal

A person aggrieved by any order passed by the Central Authority may file an appeal to the National Commission within a period of 30 days from the date of receipt of such order.

# CHAPTER IV

# CONSUMER DISPUTES REDRESSAL COMMISSION

## District Commission (Section 28 to 41)

### Section 28: Establishment of District Consumer Disputes Redressal Commission or District Commission

- The State Government shall establish a District Commission, in each district of the State:

  However, the State Government may, if it deems fit, establish more than one District Commission in a district.

- Each District Commission shall consist of—
  - a President; and
  - not less than 2 members in consultation with the Central Government.

### Transitional Provision

Any person appointed as President or a member of the District Commission immediately before the commencement of this Act shall hold office as such as President or as member till the completion of his term for which he has been appointed.

### Vacancy in office of member of District Commission

If, at any time, there is a vacancy in the office of the President or member of a District Commission, the State Government may, by notification, direct—

- any other District Commission specified in that notification to exercise the jurisdiction in respect of that district also; or
- the President or a member of any other District Commission specified in that notification to exercise the powers and discharge the functions of the President or member of that District Commission also.

### Section 34: Jurisdiction of District Commission

- The District Commission shall have **jurisdiction to entertain complaints where the value of the goods or services paid as consideration does not exceed Rs. 1 Crore:**
- A complaint shall be instituted in a District Commission within the local limits of whose jurisdiction —
  - 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 or actually resides or carries on business or has a branch office or personally works for gain; or
  - the cause of action, wholly or in part, arises; or
  - the complainant resides or personally works for gain.

### Section 35: Manner in which complaint shall be made

- 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 —

- 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;
- any recognised consumer association;
- 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
- the Central Government, the Central Authority or the State Government, as the case may be:

## Section 36: Proceedings before District Commission

- Every proceeding before the District Commission shall be conducted by the President of that Commission and at least one member thereof, sitting together:
- 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:

  However, complaint shall not be rejected unless an opportunity of being heard has been given to the complainant and the admissibility of the complaint shall ordinarily be decided within 21 days from the date on which the complaint was filed and if not decided the issue of admissibility of the complaint within this 21 days period it shall deemed to have been admitted.

## Section 37: Reference to mediation

- 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 it may direct the parties to give in writing, within 5 days, consent to have their dispute settled by mediation.
- Where the parties agree for settlement by mediation and give their consent in writing, the District Commission shall, within 5 days of receipt of such consent, refer the matter for mediation, and in such case the provisions relating to mediation, shall apply.

## Section 38: Procedure on admission of complaint

(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 21 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 30 days or such extended period not exceeding 15 days as may be granted by it;

(b) if the opposite party on receipt of a complaint referred to him 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;

(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 and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory to make an analysis or test 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 45 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 require the complainant to deposit to the credit of the Commission, fees 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 to the appropriate laboratory to enable it to carry out the analysis or test 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 and issue an appropriate order.

(3) If the complaint relates to any services, the District Commission shall: —

(a) refer a copy of such complaint to the opposite party directing him to give his version of the case within a period of 30 days or such extended period not exceeding 15 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 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) Every complaint shall be heard by the District Commission on the basis of affidavit and documentary evidence placed on record:

(5) Every complaint shall be disposed of as expeditiously as possible and endeavour shall be made to decide the complaint within a period of 3 months from the date of receipt of

notice by opposite party where the complaint does not require analysis or testing of commodities and within 5 months if it requires analysis or testing of commodities:

However, 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.

(6) 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.

(7) Here, the District Commission shall have the same powers as are vested in a civil court under the CPC, 1908 while trying a suit in respect of the following matters: —

(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.

## Section 39: Findings of District Commission

(1) Where the District Commission is satisfied that:

- the goods complained against suffer from any of the defects specified in the complaint or
- 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 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:

(e) to pay such amount as may be awarded by it as compensation in a product liability action;

(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:

However, the minimum amount of sum so payable shall not be less than 25% of the value of such defective goods sold or service provided 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.

(2) 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 1 month from the date of such reference.

(3) Every order made by the District Commission here shall be signed by the President and the member who conducted the proceeding and where the order is made as per majority opinion above, such order shall also be signed by the other member.

## Review by District Commission in certain cases

The District Commission shall have the power 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 30 days of such order.

## Section 41: Appeal against order of District Commission

- 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 45 days from the date of the order.
- State Commission may entertain an appeal after the expiry of the said period of 45 days, if it is satisfied that there was sufficient cause for not filing it within that period:
- 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 50% of that amount in the manner as may be prescribed:

# STATE COMMISSION (SECTION 42 TO 52)

## Section 42: Establishment of State Consumer Disputes Redressal Commission or State Commission

- The State Commission shall ordinarily function at the capital of the State and perform its functions at such other places as the State Government may in consultation with the State Commission notify in the Official Gazette:
- Each State Commission shall consist of—
  - a President; and
  - not less than 4 members in consultation with the Central Government.

## Section 47: Jurisdiction of State Commission

- The State Commission shall have jurisdiction—
  (a) to entertain —
    i. complaints where the value of the goods or services paid as consideration, exceeds Rs. 1 crore, but does not exceed Rs. 10 crores:
    ii. complaints against unfair contracts, where the value of goods or services paid as consideration does not exceed Rs. 10 Crores;
    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.
- 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:
- 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 or actually resides or carries on business or has a branch office or personally works for gain; or
  (b) the cause of action, wholly or in part, arises; or
  (c) the complainant resides or personally works for gain.

## Transfer of cases

On the application of the complainant or of its own motion, the State Commission may, at any stage of the proceeding, transfer any complaint pending before a District Commission to another District Commission within the State if the interest of justice so requires.

## Review by State Commission in certain cases

The State Commission shall have the power 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.

## Section 51: Appeal to National Commission

- Any person aggrieved by an order made by the State Commission may prefer an appeal against such order to the National Commission within a period of 30 days from the date of the order in such form and manner as may be prescribed:

  Provided that the National Commission shall not entertain the appeal after the expiry of the said period of 30 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 50% of that amount.
- 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.
- An appeal may lie to the National Commission under this section from an order passed ex parte by the State Commission.

## Section 52: Hearing of appeal

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 90 days from the date of its admission:

# NATIONAL COMMISSION (SECTION 53 TO 73)

## Section 53: Establishment of National Consumer Disputes Redressal Commission

The Central Government shall establish a National Consumer Disputes Redressal Commission, to be known as the National Commission.

The National Commission shall consist of—

- President; and
- not less than four and not more than such number of members as may be prescribed.

## Section 55: Qualifications, etc., of President and members of National Commission

The President and members of the National Commission shall hold office for such term as specified in the rules made by the Central Government but not exceeding 5 years from the date on which he enters upon his office and shall be eligible for re-appointment:

Provided further that no President or members shall hold office as such after he has attained such age as specified in the rules made by the Central Government which shall not exceed —

- in the case of the President, the age of 70 years;
- in the case of any other member, the age of 67 years.

## Section 58: Jurisdiction of National Commission

- The National Commission shall have jurisdiction—

(a) to entertain—

i. complaints where the value of the goods or services paid as consideration exceeds Rs. 10 crores:

ii. complaints against unfair contracts, where the value of goods or services paid as consideration exceeds Rs. 10 crores;

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.

## Section 60: Section Review by National Commission in certain cases

The National Commission shall have the power 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 30 days of such order.

## Section 61: 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.

## Transfer of cases

On the application of the complainant or of its own motion, the National Commission may, at any stage of the proceeding, in the interest of justice, transfer any complaint pending before the District Commission of one State to a District Commission of another State or before one State Commission to another State Commission.

## Section 65: Service of notice, etc.

- 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.
- 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.
- 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.

## Section 66: Experts to assist National Commission or State Commission

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.

## Section 67: Appeal against order of National Commission

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 30 days from the date of the order:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of 30 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 50% of that amount in the manner as may be prescribed.

## Section 69: Limitation period

- The District Commission, the State Commission or the National Commission shall not admit a complaint unless it is filed within 2 years from the date on which the cause of action has arisen.
- A complaint may be entertained after the above period 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:

## Section 70: Administrative control

(1) The National Commission shall have the authority to lay down such adequate standards in consultation with the Central Government from time to time, for better protection of the interests of consumers and for that purpose, shall have administrative control over all the State Commissions in the following matters, namely: —

(a) monitoring performance of the State Commissions in terms of their disposal by calling for **periodical returns regarding the institution, disposal and pendency of cases;**

(b) **investigating into any allegations against the President and members of a State Commission** and submitting **inquiry report** to the State Government concerned along with copy endorsed to the Central Government for necessary action;

(c) issuance of instructions regarding:

- adoption of uniform procedure in the hearing of matters,
- prior service of copies of documents produced by one party to the opposite parties,
- furnishing of English translation of judgments written in any language,
- speedy grant of copies of documents;

(d) overseeing the functioning of the State Commission or the District Commission either by way of inspection to ensure that the objects and purposes of the Act are best served and the standards set by the National Commission are implemented without interfering with their quasi-judicial freedom.

(2) There shall be a monitoring cell to be constituted by the President of the National Commission to oversee the functioning of the State Commissions from the administrative point of view.

(3) The State Commission shall have administrative control over all the District Commissions within its jurisdiction in all matters referred above.

## Section 71: 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.

## Section 72: Penalty for noncompliance of order

- Whoever fails to comply with any order made by the District Commission or the State Commission or the National Commission shall be punishable with imprisonment for a term which shall not be less than 1 month, but which may extend to 3 years, or with fine, which shall not be less than Rs. 25,000, but which may extend to Rs. 1,00,000 or with both.
- The District Commission, the State Commission or the National Commission shall have the power of a Judicial Magistrate of first class for the trial of offences referred above.

## Section 73: Appeal against order issued under Section 72

Where an order is passed under section 72, 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 under this section shall be preferred within a period of 30 days from the date of order of a District Commission or a State Commission or the National Commission.

# CHAPTER-V
# MEDIATION (Section 74-81)

## Section 74: Establishment of consumer mediation cell

- The State Government shall establish a consumer mediation cell to be attached to each of the District Commissions and the State Commissions of that State.
- The Central Government shall establish a consumer mediation cell to be attached to the National Commission and each of the regional Benches.
- Every consumer mediation cell shall maintain—
  i. a list of empanelled mediators;
  ii. a list of cases handled by the cell;
  iii. record of proceeding; and
  iv. 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.

## Empanelment of mediators

- For the purpose of mediation, the National Commission or the State Commission or the District Commission shall prepare a panel of the mediators to be maintained by the consumer mediation cell attached to it, on the recommendation of a selection committee consisting of the President and a member of that Commission.
- The panel of mediators shall be valid for a period of **5 years**, and the empanelled mediators shall be eligible to be considered for re-empanelment for another term, subject to certain conditions.

## Duty of mediator to disclose certain facts

It shall be the duty of the mediator to disclose—

- any personal, professional or financial interest in the outcome of the consumer dispute; and
- the circumstances which may give rise to a justifiable doubt as to his independence or impartiality.

## Replacement of mediator in certain cases

Where the District Commission or the State Commission or the National Commission 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

- 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.

## Settlement through mediation

- 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.
- 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

- The District Commission or the State Commission or the National Commission, as the case may be, shall, within 7 days of the receipt of the settlement report, pass suitable order recording such settlement of consumer dispute and dispose of the matter accordingly.
- Where the consumer dispute is settled only in part, the District Commission or the State Commission or the National Commission 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.

# CHAPTER-VI
# PRODUCT LIABILITY

## Section 83: Product liability action

A product liability action may be brought by a complainant against

- a product manufacturer or
- a product service provider or
- a product seller

for any harm caused to him on account of a defective product.

## Section 84: Liability of product manufacturer

A product manufacturer shall be liable in a product liability action, if—

- the product contains a manufacturing defect; or
- the product is defective in design; or
- there is a deviation from manufacturing specifications; or
- the product does not conform to the express warranty; or
- the product fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage.

## Section 85: Liability of product service provider

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 of 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.

## Section 86: Liability of product sellers

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 cannot be effected on 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.

## Section 87: Exceptions to product liability action

(1) A product liability action cannot be brought against the product seller if, at the time of harm, the product was misused, altered, or modified.

(2) 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.

(3) 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.

# CHAPTER VII
# OFFENCES AND PENALTIES

## Penalty for noncompliance 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 6 months or with fine which may extend to Rs. 20,00,000, or with both.

## Punishment for false or misleading advertisement

**Section 89** provides 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 2 years and
- with fine which may extend to Rs. 10,00,000; and

for every subsequent offence, be punished

- with imprisonment for a term which may extend to 5 years and
- with fine which may extend to Rs. 50,00,000.

## Punishment for manufacturing for sale or storing, selling or distributing or importing products containing adulterant

**Section 90** 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 6 months and
   - with fine which may extend to Rs. 1,00,000;

(b) causing injury not amounting to grievous hurt to the consumer:
   - with imprisonment for a term which may extend to 1 year and
   - with fine which may extend to Rs. 3,00,000;

(c) causing injury resulting in grievous hurt to the consumer:
   - with imprisonment for a term which may extend to 7 years and
   - with fine which may extend to Rs. 5,00,000; and

(d) results in the death of a consumer:
   - with imprisonment for a term which shall not be less than 7 years, but which may extend to imprisonment for life and
   - with fine which shall not be less than Rs. 10,00,000.

The offences under clauses (c) and (d) mentioned above shall be cognizable and non-bailable.

Apart from above provision the court may, in case of first conviction, suspend any licence issued to the person referred above, under any law for the time being in force, for a period up to 2 years, and in case of second or subsequent conviction, cancel the licence.

***"adulterant" means any material including extraneous matter which is employed or used for making a product unsafe;***

## Punishment for manufacturing for sale or for storing or selling or distributing or importing spurious goods

Section 91 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 1 year and
   - with fine which may extend to Rs. 3,00,000;

(b) causing injury resulting in grievous hurt to the consumer:
   - with imprisonment for a term which may extend to 7 years and
   - with fine which may extend to Rs. 5,00,000;

(c) results in the death of a consumer:
   - with imprisonment for a term which shall not be less than 7 years, but may extend to imprisonment for life and
   - with fine which shall not be less than Rs. 10,00,000.

The offences under clauses (b) and (c) above shall be cognizable and non-bailable.

Apart from above provision 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 2 years, and in case of second or subsequent conviction, cancel the licence.

## Vexatious search

The Director General or any other officer who knowingly and without any reasonable grounds does —

(a) search, or causes to be searched any premises; or

(b) seize any record, register or other document or article,

shall, for every such offence, be punished with imprisonment for a term which may extend to 1 year, or with fine which may extend to Rs. 10,000 or with both.

# CHAPTER VIII
# MISCELLANEOUS

## Presidents, members, Chief Commissioner, Commissioner and certain officers to be public servants

- The Presidents and members of the District Commission, the State Commission and the National Commission, and officers and other employees thereof,
- The Chief Commissioner and the Commissioner of the Central Authority, the Director General, the Additional Director General, the Director, the Joint Director, the Deputy Director and the Assistant Director and all other officers and employees of the Central Authority and
- Other persons performing any duty under this Act, while acting or purporting to act in pursuance of any of the provisions of this Act,

shall be deemed to be public servants.

## Compounding of offences

- Section 96 provides that any offence punishable under sections 88 and 89, may, either before or after the institution of the prosecution, be compounded.

  However, no compounding of such offences shall be made without the leave of the court before which a complaint has been filed under section 92:
- The Central Authority or any officer as may be specially authorised by him in this behalf, may compound above offences.
- Above provisions will not apply to person who commits the same or similar offence, within a period of 3 years from the date on which the first offence, committed by him, was compounded.

  ***For the purposes of this sub-section, any second or subsequent offence committed after the expiry of a period of 3 years from the date on which the offence was previously compounded, shall be deemed to be a first offence.***
- Where an offence has been compounded above no proceeding or further proceeding shall be taken against the offender in respect of the offence so compounded.

## Protection of action taken in good faith

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.

## Power of Central Government to make rules

The Central Government may make rules for carrying out any of the provisions contained in this Act and such rules may provide for —

- the manner of issuing bill or cash memo or receipt for goods sold or services rendered;
- the number of Commissioners in the Central Authority;

- the qualifications for appointment, method of recruitment, procedure of appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the Chief Commissioner and other Commissioners of the Central Authority;
- the salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the Central Authority;
- the qualifications for appointment of Director General, Additional Director General, Director, Joint Director, Deputy Director and Assistant Director and the manner of appointment;
- the form and manner for preparing annual statement of accounts by the Central Authority in consultation with the CAG of India;
- the qualifications for appointment, method of recruitment, procedure for appointment, term of office, resignation and removal of President and members of the District Commission and State Commission;
- the manner of electronically filing complaint;
- the fee, electronic form and the manner of payment of fee for filing complaint;
- the cases which may not be referred for settlement by mediation;
- the form and the manner in which appeal may be preferred to the State Commission;
- the form and manner of filing appeal to the National Commission, and the manner of depositing 50% of the amount before filing appeal;
- the number of members of the National Commission;
- the qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the President and members of the National Commission;
- the salaries and allowances payable to, and other terms and conditions of service of, the officers and other employees of the National Commission;
- the persons in the consumer mediation cell;
- the measures to be taken by the Central Government to prevent unfair trade practices in e-commerce and direct selling;
- any other matter which is to be, or may be, prescribed, or in respect of which provisions are to be, or may be, made by rules.

# E-COMMERCE

E-Commerce means buying or selling of goods or services including digital products over digital or electronic network.

## 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 or under the Companies Act, 2013 or a foreign company covered under section 2(42) 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 48 hours and redresses the complaint within 1 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. 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.
2. 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) 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.

3. 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.
4. 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 multichannel 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.

### 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 for the purposes of manufacture or sale of food items;
j) License and Registration Certificate issued under the Drugs and Cosmetics Act, 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, 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.

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 48 working hours of receipt of such complaint and redresses the complaint normally within a period of 1 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 additional 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.

# CASE STUDIES RELATING TO CONSUMER PROTECTION ACT

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| **Laxmi Engineering Works v. P.S.G. Industrial Institute** | Supreme Court held 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. |
| **Bhupendra Jang Bahadur Guna v. Regional Manager and Others**, | 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. |
| **A Narasamma v. LIC of India** | It was held that the widow being the beneficiary of services is a 'consumer' under the Act and is entitled to be compensated for the loss suffered by her due to negligence of the LIC. |
| **Spring Meadows Hospital v. Harjot Ahluwalia** | The Supreme Court held that parents who bring the child to hospital and the child, both are consumers. |
| **Morgan Stanley Mutual Fund v. Kartik Das** | The Supreme Court held that **shares before allotment cannot** constitute **goods** because at the stage of application there is no purchase of goods for consideration. |
| **(General Manager v. Anand Prasad Sinha)** | Passengers travelling by trains on payment of the stipulated fare charged for the ticket are 'consumers' and the facility of transportation by rail provided by the railway administration is a 'service' rendered for consideration as defined in the Act. |
| **(Dist. Manager, Telephones Patna v. Lalit Kumar Bajla)** | Subscribers of telephones would also be 'consumer' under the Act |
| **Consumer Unity and Trust Society v. State of Rajasthan)** | It was held that complaints against government hospitals cannot be entertained under the Act on the ground that a person receiving treatment in such hospital is not a 'consumer as the patient does not 'hire the services of the hospital'. Moreover, the treatment provided is free of charge, and therefore, it does **not** amount to service. |
| **(Centre for Research & Industrial Development v. Madan Lal Sahni)** | It was held that Professors of Universities or Civil Servants are not covered under Act as they are appointed under Contract of Personal Service. |
| **(J. Rebello v. Vice Chancellor, Bangalore University)** | It was held that the University in conducting examination, evaluating answer sheets and publishing the result was not performing any service for consideration and a candidate who appeared for the examination cannot be regarded as a consumer. |

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| **(Consumer Unity and Trust Society)** | It was held that in order to be 'deficiency in service' loss or injury must be coupled with **negligence**. |
| **(Punjab National Bank v. K.B. Shetty)** | In ornaments kept in the banks locker were found lost though the certificate recorded by the custodian of the bank on the day the customer operated the locker stated that all lockers operated during the day have been checked and found properly locked. Bank was held guilty of negligence. |
| **(Lucknow Development Authority v. Roop Kishore Tandon)** | Failure of a Housing Board to give possession of the flat after receiving the price and after registering it in favour of the allottee was held to be 'deficiency in service |
| **(Skypack Couriers Pvt. Ltd. & Another v. Ms. Anupama Bagla)** | Non-delivery of a video cassette by a courier service company resulting in the complainant losing admission to the desired college was held to be 'deficiency in service' |
| **(Special Machines v. Punjab National Bank,)** | Failure to provide nursing and financing facilities to a small scale industry which consequently became sick cannot be said to constitute 'deficiency in service'. |
| **(Pradeep Kumar Jain v. Citi Bank)** | If the appellant purchased a car by taking a loan from the respondent bank, and gave post-dated cheques to the bank not only in respect of repayment of loan instalments but also of premium of insurance policy for succeeding years. On the expiry of the policy the bank failed to get the policy renewed. In the meantime the car met with an accident. The Supreme Court held that there is no deficiency in service because the obligation to renew the policy was on the appellant alone. |

## SOME IMPORTANT CASES

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| **J.K. Puri Engineers v. Mohan Breweries & Distilleries Ltd** | In this case, the company maintained a guest house for use of its managing director, and other executives. It entered into a contract with the appellants for the installation of central air-conditioning system. The allegation was that the system installed did not function, developed snags, and that there was leakage of water from dusting system.<br><br>Supreme Court held that guest house was intended only for the residence of the directors, including the Managing Director and other executives of the company during their visits to the city. The system was installed only to provide comfort of these persons and therefore it was not used for a commercial purpose as it had no close or direct nexus with the commercial activity carried on by the company.<br>*Even where the goods are purchased for **commercial purpose**, if there is a **warranty**, for its maintenance, the purchaser becomes a **consumer** in respect of the services rendered or to be rendered by the manufacturer or supplier during the warranty period.* |

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| **Kerela State Electricity Board v. Raveendran** | It was held that fall in electricity voltage damaging the machine in a plastic factory and affecting production would amount to deficiency in service. |
| **Poonam Verma v. Ashwin Patel** | In this case the respondent was a qualified medical practitioner in homoeopathic system of medicine. The appellant, was the widow of a person who, it was alleged, had died because of the negligence of the respondent in administering allopathic medicines in which he was not qualified to practise. It was alleged that the deceased was treated to begin with, for viral fever on allopathic medicines and since his condition had not improved antibiotics were used without conducting proper tests.<br>When his condition further deteriorated he was removed to a nursing home and after four days he was removed to a hospital in an unconscious state. Within a few hours thereafter he died.<br>Her complaint to the National Consumer Disputes Redressal Commission for damages for the negligence and carelessness of respondent in treating her husband was dismissed. Allowing the appeal the Supreme Court held that the respondent who had practised in allopathy without being qualified in that system was guilty of negligence per se. A person is liable at law for the consequences of his negligence.<br>Jurisdiction of the Commission: The Supreme Court observed that it is beyond doubt now that disputes regarding applicability of the Act to persons engaged in medical profession either as private practitioners or as Government doctors working in hospitals or Government dispensaries come within the purview of the Consumer Protection Act, 1986. It is also settled that a patient who is a consumer has to be awarded compensation for loss or injury suffered by him due to negligence of the doctor by applying the same tests as are applied in an action for damages for negligence. |
| **Gopi Ram Goyal and others v. National Heart Institute and others** | In this case the National Commission held that where the record and evidence shows that the conduct of the opposite parties i.e. doctors was more than reasonable and the level of care was as could be expected from professional in exercising reasonable degree of skill and knowledge. The complainant however failed to prove any case of negligence on the part of doctors, therefore the doctor cannot be held liable for death of patient. |

## INSURANCE CASES

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| **L.I.C. v. Mumta ji Begam** | In this case, it was held that where the date of birth of the insured was in dispute and not accepted by the insurance company, the forums under the Act had no jurisdiction to entertain any complaint against the insurance company. |
| **Jyoti Kumar Jain and another v. United India Insurance Co. Ltd** | In this case, it was held that repudiation of claim on the ground that complainant was suffering from chronic disease even before the issuance of policy, amounts to suppression of material facts, cannot be sustained unless Insurance Company proves suppression of facts amounted to fraud. |

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| **Jitendra Kumar v. Oriental Insurance Company Ltd** | In this case, the Supreme Court has held that where the fire has occurred due to mechanical failure and not due to any act or omission of the driver, the insurance company cannot repudiate the claim because of lack of valid driving license. |
| **Harshad J. Shah v. Life Insurance Corporation of India** | In this case, it was held that if Premium is paid to the agent of the LIC, but the agent did not deposit the premium and during that period if the death of the insured takes place, the complainant cannot claim compensation as there is no deficiency of service on the part of the LIC.<br>Supreme Court held that the agent had no express authority to receive the premium on behalf of the Corporation. |
| **National Insurance Co. Ltd. v. Seema Malhotra** | A cheque was issued under a contract of insurance of motor car by the insured for payment of premium to the policy. However, cheque was dishonoured for want of funds in the account. Meanwhile, the car met an accident and badly damaged, killing the insured owner. The claim for insured amount was repudiated by the company.<br>The Supreme Court held insurer need not to perform his part of promise when the other party fails to perform his part and thus not liable to pay the insured amount. |
| **Delhi Electric Supply Undertaking v. Basanti Devi** | Premium due on each policy was collected by the employer from the salary of the employee and sent to LIC under a salary saving scheme. Employees were kept ignorant of what happens between the employer and LIC. After a few month employer started not depositing the money to LIC but continued the salary deduction. In the meantime, an employee died and payment from LIC was sought. LIC repudiated the claim on the ground of non-remittance of the premium.<br>The Supreme Court held that since the burden of collecting the premium and remitting it to the corporation was on the employer it was not for the employee to intimate the corporation about non-remittance of the premium, the LIC is liable to pay the claim. |

## TRANSPORTATION CASES

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| **Indian Airlines v. Dr. Jiteswar Ahir,** | When the complainant-passenger occupied his seat in the aircraft, an announcement was made that his luggage was lying on the ground unidentified and that he should disembark to identify his luggage. Accordingly, the complainant moved towards the rear door, and finding that the step ladder was attached to the aircraft door, he stepped out on to the staircase but before he could actually put his entire body weight on the staircase the ladder was suddenly removed as a result of which he fell down on the ground and sustained bodily injuries.<br>It was held that there was dangerous deficiency in service. |
| **Ravneet Singh Bagga v. KLM Royal Dutch Fintimes** | In this case, the complainant booked a ticked from Delhi to New York by a KLM plane. The airport authorities in New Delhi did not find any fault in his visa and other documents. However at Amsterdam, the airport authorities instituted proceedings of verification because of which the appellant missed his flight to New York. After reaching New York, the airlines tendered apology to the appellant for the inconvenience and paid as a goodwill gesture a sum of Rs. 2,500. The appellant made a complaint to the National Commission under the Consumer Protection Act which was rejected. |

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| | The Supreme Court held that the respondent could not be held to be guilty of deficiency in service as staff of the airline acted fairly and in a bona fide manner, keeping in mind security and safety of passengers and the Aircraft. |
| **Union of India v. Nathmal Hansaria** | In this case, the daughter of the complainant, travelling by a train, fell down from the running train while she was passing through the inter-connecting passage between two compartments and died as a result of crush injuries on her head. The Railways contended that the Consumer Redressal agencies had no jurisdiction to consider a complaint of this nature in view of Railway Claims Tribunal Act.<br>The State Commission held that a railway passenger travelling in a train on payment of consideration was a consumer and as the death didn't occur because of railway accident, but due to absence of safety device in the vestibule passage way, there was deficiency in service. |
| **General Manager, Southern Railway v. Mrs. A Shamin** | In this case, Railway was held liable for deficiency in service when some unauthorized passengers who boarded reserved compartments was not removed by T.T.E despite several complaint of passengers and later passengers were robbed during the night. |

## POST OFFICE CASES

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| **Devi Engineering Co. v. Union of India** | In this case, the complainant had alleged that demand drafts sent by him by registered post to an addressee were mis - delivered to someone else. The State Commission, invoking the provisions of Section 6 of the Post Office Act held that the post office could not be made liable to pay compensation ordered by the District forum. |
| **Presidency Post Master v. Dr. U. Shankar Rao** | Absolute immunity to Post Offices under **Section 6 of Post Office Act**.<br>It was settled by the National Commission in **Presidency Post Master v. Dr. U. Shankar Rao** that in view of the clear mandate of Section 6 of the Indian Post Office Act, the Government shall not incur any liability by reason of the loss, mis - delivery or delay or damage to any postal article in course of transmission by post. |
| **Airpack Couriers (India) Pvt. Ltd. v. S. Suresh** | where a package of important documents entrusted to the courier had not been delivered causing loss to the complainant, the National Commission, on appeal against the State Commissions order awarding compensation of Rs. 1 lakh, reduced it to Rs. 100 holding that the terms incorporated in the consignment note specifically limited the couriers liability to a maximum of Rs. 100 per consignment for loss in transit.<br>Moreover, as per (International Air Transport Association) IATA regulations, no important documents may be sent through courier service and the consignee is bound to declare the nature of contents before sending the consignment. Further, if the documents to be consigned were of great value, the consignee ought to have insured them or declared their value in the consignment note. |

## EDUCATION CASES

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| **Sashikant Krishnaji Dole v. Shitshan Prasarak Mandali** | **The** school owned a swimming pool and offered swimming facilities to the public on payment of a fee. The complainants had enrolled their son for learning swimming under the guidance of the coach. It was alleged that due to the negligence of the coach the boy was drowned and met with his death. The school denied that it had engaged the services of a coach and also denied any responsibility on its part. The State Commission held the school and the coach deficient in rendering service to the deceased, that the coach was not fully trained, did not exercise even the basic common sense needed to counter an accident in swimming and as far as the school was concerned it did not even provide basic facilities nor did it provide any safeguards to prevent accidents. Accordingly, it was considered as deficiency in service. |
| **Isabella Thoburn College v. Ms. Fatima Effendi** | In this case the State Commission held that non-refund of admission fee is not a deficiency of service on the part of the university because admission fee is consideration for admission and respondent herself voluntarily withdrawing admission from one university to join another institute cannot claim refund of admission fee. |
| **Sreedharan Nair N. v. Registrar, University of Kerala** | In this case the University refused to provide LL.B. degree certificate on completion of course on the ground that the qualifying examination on the basis of which student was admitted in LL.B. course in Kerala law college has not been recognised by it. The National Commission held that this is a clear case of deficiency on part of University. A compensation of Rs. 50,000 was awarded to complainant. |

# Chapter 9 : Legal Metrology Act, 2009

## INTRODUCTION

Legal Metrology is the name by which the law relating to weights and measures is known in international parlance. 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.

**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 ORGANISATION 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 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.

## Objectives of OIML Certificate System:

- To promote the global harmonization, uniform interpretation and implementation of legal metrological requirements for measuring instruments and/or modules;
- 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
- 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

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| **Dealer** | **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; |

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| **Label** | **Section 2 (f)** | "label" means any written, marked, stamped, printed or graphic matter affixed to, or appearing upon any pre-packaged commodity; |
| **Legal Metrology** | **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; |
| **Manufacturer** | **Section 2 (i)** | "manufacturer" in relation to any weight or measure, means a person who -<br>i. manufactures weight or measure,<br>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,<br>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,<br>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)** | "protection" means 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-packaged Commodity** | **Section 2 (l)** | "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; |
| **Person** | **Section 2 (m)** | "person" includes: -<br>i. a Hindu undivided family, |

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| | | ii. every department or office,<br>iii. every organisation established or constituted by Government,<br>iv. every local authority within the territory of India,<br>v. a company, firm and association of individuals,<br>vi. trust constituted under an Act,<br>vii. every co-operative society, constituted under an Act,<br>viii. every other society registered under the Societies Registration Act, 1860; |
| **Premises** | **Section 2 (n)** | "premises" includes—<br>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,<br>ii. a warehouse, godown or other place where any weight or measure or other goods are stored or exhibited,<br>iii. a place where any books of account or other documents pertaining to any trade or transaction are kept,<br>iv. a dwelling house, if any part thereof is used for the purpose of carrying on any business, industry, production or trade,<br>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)** | "repairer" means 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** | **Section 2 (r)** | "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; |

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| **Seal** | **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)** | "stamp" means 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-<br>i. certifying that such weight or measure conforms to the standard specified by or under this Act, or<br>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** | **Section 2 (u)** | "transaction" means-<br>i. any contract, whether for sale, purchase, exchange or any other purpose, or<br>ii. any assessment of royalty, toll, duty or other dues, or<br>iii. the assessment of any work done, wages due or services rendered; |
| **Verification** | **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 or Measure** | **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

☞ 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

**i.** length shall be the metre;

**ii.** mass shall be the kilogram;

**iii.** time shall be the second;

**iv.** electric current shall be the ampere;

v. thermodynamic temperature shall be the kelvin;

vi. luminous intensity shall be the candela; and

vii. amount of substance shall be the mole.

☞ Section 6 states that:

i. the base unit of numeration shall be the unit of the international form of Indian numeral.

ii. Every numeration shall be made in accordance with the decimal system.

iii. The decimal multiples and submultiples 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

i. the base units of weights and measures specified in section 5 shall be the standard units of weights and measures.

ii. The base unit of numeration specified in section 6 shall be the standard unit of numeration.

iii. 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.

iv. 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

i. 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.

ii. Any numeral which conforms to the provisions of section 6 shall be the standard numeral.

iii. No weight, measure or numeral, other than the standard weight, measure or numeral, shall be used as a standard weight, measure or numeral.

iv. No weight or measure, shall be manufactured or imported unless it conforms to the standards of weight or measure specified under section 8.

**Provided that 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, -

i. quote, or make announcement of, whether by word of mouth or otherwise, any price or charge, or

ii. issue or exhibit any price list, invoice, cash memo or other document, or

iii. prepare or publish any advertisement, poster or other document, or

iv. indicate the net quantity of a pre-packaged commodity, or

v. 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.

☞ 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- SECTION 13 TO 23)

### Appointment of Director, legal metrology officer and other employees

Section 13 of the Ac:

- 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 thereunder.
- 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.
- Where any delegation of powers is made above, the powers so delegated shall be exercised under the general superintendence, direction and guidance of the Director.

## Appointment of Controller, legal metrology officer and other employees

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, -
  - 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.
  - seize 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

Section 16 of the Act provides that:

- 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.

Provided that 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.

## Declarations on pre-packaged commodities

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.

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.

### Manner in which Declaration Shall be Made

Rule 9 of the Legal Metrology (Packaged Commodities) Rules, 2011 deals with manner in which declaration shall be made. It provides that:

1) Every declaration which is required to be made on a package under these rules shall be:
   a) legible and prominent;
   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.

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.

2) No declaration shall be made so as to require it to be read through any liquid commodity contained in the package.

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.

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.

## Non-standard weights and measures not to be imported

Section 20 provides that 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.

## Approval of model

Section 22 of the Act states that:

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 20 litres in capacity, which are ordinarily used in retail trade for measuring kerosene, milk or potable liquors.

Further 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.

## VERIFICATION AND STAMPING OF WEIGHT OR MEASURE (CHAPTER IV)

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)

## Section 25 of the Act provides penalty for use of non-standard weight or measure

This 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 Rs. 25,000/- and for the second or subsequent offence, with imprisonment for a term which may extend to 6 months and also with fine.

## Section 26 of the Act provides penalty for alteration of weight and measure

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 Rs. 50,000/- and for the second and subsequent offence with imprisonment for a term which shall not be less than 6 months but which may extend to 1 year or with fine or with both.

## Section 27 of the Act provides penalty for manufacture or sale of non-standard weight or measure

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 Rs. 20,000/- and for the second or subsequent offence with imprisonment for a term which may extend to 3 years or with fine or with both.

## Section 30 of the Act provides penalty for transactions in contravention of standard weight or measure

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 Rs. 10,000/- and; for the second or subsequent offence, with imprisonment for a term which may extend to 1 year, or with fine, or with both

## Section 31 of the Act provides penalty for non-production of documents, etc.

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 Rs. 5,000/- and for the second or subsequent offence, with imprisonment for a term which may extend to 1 year and also with fine.

## Section 35 of the Act provides penalty for rendering services by non-standard weight or measure

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 Rs. 2,000/- but which may extend to Rs. 5,000/- and for the second or subsequent offence, with imprisonment for a term which shall not be less than 3 months but which may extend to 1 year, or with fine, or with both.

## Section 36 of the Act provides penalty for selling, etc. of non-standard packages

- 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 Rs. 25,000/-, for the second offence, with fine which may extend to Rs. 50,000/- and for the subsequent offence, with fine which shall not be less than Rs. 50,000/- but which may extend to Rs. 1 lakh or with imprisonment for a term which may extend to 1 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 Rs. 10,000/- but which may extend to Rs. 50,000/- and for the second and subsequent offence, with fine which may extend to Rs. 1 lakh or with imprisonment for a term which may extend to 1 year or with both.

## Section 42 of the Act provides for Vexatious search

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 1 year, or with fine which may extend to Rs. 10,000/- or with both.

## Section 44 of the act provides penalty for counterfeiting or seals

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 6 months but which may extend to 1 year and for the second or subsequent offence, with imprisonment for a term which shall not be less than 6 months but which may extend to 5 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 6 months hut which may extend to 5 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 6 months but which may extend to 1 year and for the second or subsequent offence, with imprisonment for a term which shall not be less than 6 months but which may extend to 5 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 6 months but which may extend to 1 year and for the second or subsequent offence, with imprisonment for a term which shall not be less than 6 months but which may extend to 5 years.

## Section 49 provides for offences by companies and power of court to publish name, place of business, etc., for companies convicted

- 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.

  **However, 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: -For the purposes of this section: -**

a) **"company" means anybody 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.**

## SALIENT FEATURES OF THE LEGAL METEOROLOGY ACT, 2009

Legal Metrology Act, 2009 has following main features:

- It establishes and enforce standards of weight and measures, regulate trade and commerce in weight and measure and other goods which are sold or distributed by weight, measure or number.
- It suggests that every unit of measure should be as per metric system based on international system of unit.
- It authorise Central Government to appoint Director, Controller and other Legal Metrology Officers.
- It provides for declarations on pre-packed commodities.
- It deals with offences for use of non-standard weight and measures and compounding of offences.
- It empowers Central Government and State Government to make rules to apply provisions of Act.

# 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:

"Drugs" means drugs as defined under 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 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.

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 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.

# Chapter 10 : Real Estate (Regulation & Development) Act, 2016

## INTRODUCTION

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.

- An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to 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 and the adjudicating officer and for matters connected therewith or incidental thereto.

## IMPORTANT DEFINITIONS

| |
|---|
| **"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;** |
| **"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; |
| **"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. |
| **"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; |

**"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 and lobbies 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, system for water conservation and renewable energy;

vi. the water tanks, motors, fans, compressors, ducts and all apparatus connected with installations for common use;

vii. all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;

***"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;

***"Development"*** means carrying out the development of immovable property, engineering or other operations in, on, over or under the land or the making of any material change in any immovable property or land and includes re-development;

***"Estimated cost of real estate project"*** means the total cost involved in developing the real estate project and includes the land cost, taxes, cess, development and other charges;

***"External development works"*** includes roads, water supply, sewage and drainage systems, electricity supply transformer, solid waste management and disposal or any other work which may have to be executed in the periphery of, or outside, a project for its benefit, as may be provided under the local laws;

***"Garage"*** means a place within a project having a roof and walls on three sides for parking any vehicle, but does not include an unenclosed or uncovered parking space such as open parking areas;

***"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;

***"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;

***"Occupancy certificate"*** means the occupancy certificate 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;

***"Planning area"*** means a planning area or a development area or a local planning area or a regional development plan area 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;

***"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, 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.

***"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;

***"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;

***"Sanctioned plan"*** means the site plan, building plan, service plan, parking and circulation 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;

## REGISTRATION OF REAL ESTATE PROJECT AND REGISTRATION OF REAL ESTATE AGENTS

**Registration of every project with the regulatory authority has been mandatory before it is launched for sale and for registration the basic pre-requisite is that the developer must have all the requisite approvals.** The gist of relevant provisions for registration are stated below:

### Section 3: Prior Registration of Real Estate project with Real Estate Regulatory Authority

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.

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 **3 months** from the date of commencement of this Act.

### Projects exempt from the ambit of the Act

The following projects do not require to be registered under the Act:

1. where the area of land proposed to be developed does not exceed 500 square meters or the number of apartments proposed to be developed does not exceed 8, inclusive of all phases;
2. where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

3. for the purpose of renovation/ repair/ 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.

## Section 4: Application for Registration of real estate projects

The promoter shall enclose the following documents along with the application, namely: —

(a) a brief detail of his enterprise including its name, registered address, type of enterprise 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;

(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;

(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**;

B. **that the land is free from all encumbrances**;

C. the **time period within which he undertakes to complete the project or phase** thereof, as the case may be;

D. that **70% 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 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 6 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.**

## Section 5: Grant of Registration by the Authority

On receipt of the application, the Authority shall within a period of 30 days-

(a) grant registration and provide 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 the Authority fails to grant the registration or reject the application, as the case may be, the project shall be deemed to have been registered, and the Authority shall within a period of **7 days of the expiry of the said period of 30 days specified** 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.

## Section 6: Extension of registration

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 important 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.

## Section 7: Revocation of registration

The Authority may, on receipt of a complaint or suo motu 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.

(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 30 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, 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;
- To protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.

## Section 8: Obligation of Authority consequent upon lapse of or on revocation of registration

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:

## Section 9: Registration of real estate agents

- 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—
  - grant a single registration to the real estate agent for the entire State of Union territory, as the case may be;
  - 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:
- 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.
- 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.

## Section 10: Functions of real estate agents

Every real estate agent registered under section 9 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.
- maintain and preserve such books of account, records and documents as may prescribed.
- not to involve himself in any unfair trade practices.
- 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 (CHAPTER III)

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.

## Section 11: Functions and Duties of promoter

- 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 till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees:

(b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force;

(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;

(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:

(f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee;

(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:

- 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.

## Section 12: Obligations of promoter regarding veracity of the advertisement or prospectus

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.

## Section 13: No deposit or advance to be taken by promoter without first entering into agreement for sale

A promoter shall not accept a sum more than 10% 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.

## Section 14: Adherence to sanctioned plans and project specifications by the promoter

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.

The promoter shall not make—

(i) 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:

(ii) 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.

**Structural Defect**

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 5 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 30 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.

## Section 15: Obligations of promoter in case of transfer of a real estate project to a third party

- 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:
- 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:

## Section 16: Obligations of promoter regarding insurance of real estate project

The promoter shall 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.

## Section 17: Transfer of title

- 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 of 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.
- 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.

## Section 18: Return of amount and compensation

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.

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.

# RIGHTS AND DUTIES OF ALLOTTEES (CHAPTER IV)

## RIGHTS OF ALLOTTEES (SECTION 19)

(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 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.

(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 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

## DUTIES OF ALLOTTEES

(1) 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.

(2) 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.

(3) 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.

(4) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of 2 months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

(5) Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be.

# THE REAL ESTATE REGULATORY AUTHORITY (CHAPTER V)

## Section 20: Establishment and incorporation of Real Estate Regulatory Authority

- 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.

- 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.

## Section 21: Composition of Authority

The Authority shall consist of a Chairperson and not less than 2 whole time Members to be appointed by the appropriate Government.

## Section 22: Qualifications of Chairperson and Members of Authority

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 20 years in case of the Chairperson and 15 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.

## Section 23: Term of office of Chairperson and Members

The Chairperson and Members shall hold office for

- a term not exceeding 5 years from the date on which they enter upon their office, or
- until they attain the age of 65 years,

whichever is earlier and shall not be eligible for re-appointment.

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.

## Section 31: Filing of complaints with the Authority or the adjudicating officer

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.

## Section 32: Functions of Authority for promotion of real estate sector

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 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 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;

## Section 33: Advocacy and Awareness Measures

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.

## Section 34: Functions of Authority

The functions of the Authority shall include—

- to register and regulate real estate projects and 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;
- 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 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;

## Section 35: Powers of Authority to Call for Information, Conduct Investigation

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;

## Section 36: Power to issue interim orders

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 of until further orders, without giving notice to such party, where the Authority deems it necessary.

## Section 37: Powers of Authority to Issue Directions

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.

## Section 38: Powers of Authority

(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 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.

## Section 39: Rectification of Orders

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:

## Section 40: Recovery of interest or penalty or compensation

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.**

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.

# CENTRAL ADVISORY COUNCIL (CHAPTER VI)

## Section 41: Establishment of Central Advisory Council

(1) The Central Government may establish 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:

- 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.

## Section 42: Functions of Central Advisory Council

The Central Advisory Council is required to advise and recommend the Central Government:

- on matters relating to implementation of the Act,
- on major questions of policy,
- towards protection of consumer interest,
- to foster growth and development of the real estate sector, and
- on any other matters as may be assigned to it by the Central Government.

# THE REAL ESTATE APPELLATE TRIBUNAL (CHAPTER VII)

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.

## Section 43: Establishment of Real Estate Appellate Tribunal

(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.

## Section 44: Application for settlement of disputes and appeals to Appellate Tribunal

- 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 60 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:

## Section 50: Restrictions on Chairperson or Judicial Member or Technical or Administrative Member on Employment after Cessation of Office

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 of 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.

## Section 53: Powers of Tribunal

**(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.

## Section 56: Right to legal representation

This section 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.

## Section 57: Orders passed by Appellate Tribunal to be executable as a decree

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.

## Section 58: Appeal to High Court

Any person aggrieved by any decision or order of the Appellate Tribunal may, file an appeal to the High Court, within a period of 60 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.

No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

# ROLE OF COMPANY SECRETARIES

**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

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 AND PENALTIES

## 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 10% 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 10% 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 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 Rs. 10,000 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 5%, 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 3 years or with fine for every day during which such default continues, which may cumulatively extend up to 10% 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 10% 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.

## Section 69: Offences by Companies

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 -

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.

## Section 70: Compounding of Offences

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.

## Section 71: Power to adjudicate

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.

## Section 72: Factors to be taken into account by the adjudicating officer

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.

## Section 79: Bar of Jurisdiction

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.

## 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.

## Objects and Reasons for which the Act has been framed are:

- Ensure accountability towards allottees and protect their interest.
- Infuse transparency, ensure fair-play and reduce frauds and delay.
- Introduce professionalism and PAN India standardization.
- Establish symmetry of information between the promoter and allottees.
- Imposing certain responsibilities on both promoter and allottees.
- Establish regulatory oversight mechanism to enforce contracts.
- Establish fast-track dispute resolution mechanism.

- Promote good governance in the sector which in turn would create investor confidence.

## SALIENT FEATURES OF THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

- Establishment of the Real Estate Regulatory Authority for regulation and promotion of the real estate sector.
- Ensuring sale of plot, apartment of building, as the case may be, or sale of real estate project, in an efficient and transparent manner.
- Ensuring the protection of the interest of consumers in the real estate sector.
- Establishment of an adjudicating mechanism for speedy dispute redressal and also the establishment of 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.
- Establishment of 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.
- On registration, 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. The state government can alter this amount.
- 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 DEVELOPMENT AND REGULATION ACT)

- Increased FDI
- Reduction in litigation
- Customer management
- Timely completion of the project
- Transparency
- Project planning

# Chapter 11 : Law relating to Fugitive Economic Offenders

## 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 Rs. 100 crore 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

1) 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.

2) On a declaration, the Special Court may order that any of the following properties stand confiscated to the Central Government—

(a) the proceeds of crime in India or abroad, whether or not such property is owned by the fugitive economic offender; and

(b) any other property or benami property in India or abroad, owned by the fugitive economic offender.

3) 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.

4) 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.

5) 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.

6) 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.

7) 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.

8) 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 24 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.

## 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 30 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.

# Chapter 12 : Foreign Trade Policy & Procedure

## INTRODUCTION

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.

- New Policy introduces a one-time Amnesty* Scheme for exporters to close the old pending authorizations and start afresh.

  **Amnesty means a general pardon for offenses*

- New Policy encourages recognition of new towns through "Towns of Export Excellence Scheme" and exporters through "Status Holder Scheme".
- New Policy facilitates 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

### 1. 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.

### 2. 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 Market Access Initiative (MAI) scheme. This addition is expected to boost the exports of handlooms, handicrafts, and carpets.

### 3. Recognition of Exporters

Exporter firms recognized with 'status' based on export performance will now be partners in capacity building initiatives on a best-endeavour 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.

### 4. 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.

### 5. Streamlining SCOMET Policy

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.

### 6. Facilitating E-Commerce Exports

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.

### 7. 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.

**8. 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 on self-declaration basis to facilitate prompt execution of export orders.
- 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.

**9. Merchanting trade**

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.

**10. 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 [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 1st 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.

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.

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.

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).

## 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 (complicated part) 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.

## Issue of e-IEC (Electronic-Importer Exporter Code)

Importer Exporter Code (IEC) is mandatory for export/ import from/to India. 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).

**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.

**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).

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 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.

**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.

**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,

ii. DGCI&S portal (Directorate General of Commercial Intelligence & Statistics) and

iii. NIRYAT Portal (National Import-Export Record for Yearly Analysis of Trade).

## 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 (Inland Container Depot) 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.
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.
xiii. For detailed guidelines/procedures visit https://www.cbic. gov.in/ and https://icegate.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.

   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.

## 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 flavouring 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.

## 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.

a. 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 3 financial years.

   However, for Gems & Jewellery Sector above export performance threshold during the current and preceding 2 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.

b. For deemed export, FOR 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.

c. 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 & Jewellery 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**

a. 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.

b. A merchandise shipment/ service rendered can get double weightage only once in any one of above categories.

| **Other Conditions for Grant of Status** | | |
|---|---|---|
| Export of items under Authorisation, including SCOMET items, would be included for calculation of export performance. | Export performance of one IEC holder shall not be permitted to be transferred to another IEC holder. Hence, calculation of exports performance based on disclaimer shall not be allowed. | Exports made on re-export basis shall not be counted for recognition. |

**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;

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 originating from India with a view to qualify for preferential treatment under different preferential trading agreements.

h. Status holders shall be entitled to export freely exportable items (excluding Gems and Jewellery, Articles of Gold and precious metals) on free of cost basis for export promotion subject to an annual limit of Rs. 1 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 endeavour 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'.

## GENERAL PROVISIONS REGARDING IMPORTS AND EXPORTS

### 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.

### 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.

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.

### 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) 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.

(c) 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.

(d) 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.

(e) 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:

1. any commercial establishment, carrying on any business, trade or profession, which has a definitive postal address; or
2. any laboratory, Scientific or Research and Development(R&D) institution, university or other educational institution or hospital which has a definitive postal address; or
3. 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 include either all or some of the following terms and conditions, in addition to such other conditions as may be specified:

- → Description, quantity and value of goods;
- → Actual User condition;
- → Export Obligation;
- → Minimum Value addition to be achieved;
- → Minimum export/import price;
- → Bank guarantee/ Legal undertaking / Bond with Customs Authority/RA.
- → Validity period of import/export as specified in Handbook of Procedures.

**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. 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, 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.

**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 United Nations Security Council Resolution 2231 (2015):
    i. Items listed in IAEA Documents as updated by the UNSC and IAEA from time to time.
    ii. Items listed in 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.

**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. 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).

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 for export and /or import.

## 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 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).

### 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) | a. Desktop Computers;<br>b. Refurbished/re-conditioned spares of re-furbished parts of Personal Computers/ Laptops;<br>c. Air Conditioners;<br>d. Diesel generating sets | 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 | a. 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.<br>b. Import of unregistered/noncompliant notified products as in CRO, 2012 as amended from time to time is "Prohibited" |
| 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

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.

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 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 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, 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 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 31st 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.

(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.

(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 will not be subject to minimum value addition requirement for export to Iran.

(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 re-export. 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.

# 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, 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) DGFT or any other officer authorized by him to suspend or cancel the Importer Exporter Code Number for the reasons as given therein;
(b) DGFT 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) DGFT 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) 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.

**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 3 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 4 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.

**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**

DGFT 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.

# 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 shall apply to exports, transfers, re-transfers, brought in transit, trans-shipment of, and brokering in specified goods, technology or services.

## 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.

## 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:

**CIN:** Commodity Identification Note of SCOMET List

## Different types of export authorizations for SCOMET items

1. **Direct export to ultimate end user:** Export to the ultimate end users abroad after due verification process;
2. **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;
3. **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;
4. **Export of spare parts under SCOMET under Stock and Sale:** Export of spare parts along with main item/ equipment under stock and sale;
5. **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;
6. **Temporary export of SCOMET items:** Export authorization for demo/ display/ exhibition/ tenders abroad or for return abroad after demo/ display/ exhibition/ tenders etc. in India;
7. **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.;
8. **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, 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.

## 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.

## SCHEMES FOR EXPORTERS OF GEMS AND JEWELLERY

### Import of Input

Exporters of Gems and Jewellery can import / procure duty free 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.

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**
- **Replenishment Authorisation for Gems from Regional Authority**
- **Replenishment Authorisation for Consumables**

  "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 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 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 Handbook of Procedures. It would be calculated as under:

VA = A – B ÷ B x 100, 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.

**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.

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.

v. A bank authorised by RBI is allowed export of gold scrap for refining and import standard gold bars as per RBI 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 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 Hand Book of Procedures may export cut & polished diamonds (each of 0.25 carat or above) to any of the agencies/laboratories mentioned under Handbook of Procedures with re-import facility at zero duty within 3 months from the date of export.

**Export against Supply by Foreign Buyer**

(i) Where export orders are placed on nominated agencies / status holder / exporters of 3 years standing having an annual average turnover of Rs. 5 crores during preceding 3 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 Handbook of Procedures.

(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.

**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.

**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 3 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.
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.

**Re-import of rejected Jewellery**

Gems & Jewellery exporters shall be allowed to re-import rejected precious metal jewellery.

## 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.

**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 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.

"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

(iv) 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:

| S. 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) |

"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. If an importer/exporter is aggrieved by any decision taken by Policy Relaxation Committee (PRC), or a decision/order by any authority in the DGFT, a specific request for Personal Hearing (PH) 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.

## 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 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.

**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-convener of the committee.

**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, 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.

# DUTY EXEMPTION / REMISSION SCHEMES

## Objective

Schemes under this Chapter 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.

## 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;

OR

(ii) On the basis of self-declaration.

OR

(iii) Applicant-specific prior fixation of norm by the Norms Committee.

OR

(iv) On the basis of Self Ratification Scheme.

### 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, 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. In such cases, adhoc-norms shall be fixed within stipulated time period of 90 days.

c. Authorisation, and the fabric imported, shall be subject to actual user condition. The same shall be non-transferable even after completion of export obligation.

d. 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.

**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 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 '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**

→ 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.

→ 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.

→ An exporter (manufacturer or merchant), who holds AEO Certificate under Common Accreditation Programme of CBEC is eligible to opt for this scheme.

→ A status holder who is a manufacturer cum actual user and holds valid 2-star or above status 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 –

2. Their application for grant of AEO certification has not yet been rejected;
3. There is no case of infringement of Customs and allied laws against the status holder in the current year and last three FYs.
4. Status holder has not been issued show cause notice by Customs or GST authorities in the current year and last three FYs.
5. Status holder has positive net current assets.
6. There are no insolvency, bankruptcy or liquidation proceedings taken against the status holder in the current year and last three FYs.

c) The DGFT may deny authorisation under this scheme to two star and above status holder based on its risk management principles.

d) Status holder shall be audited by the DGFT.

→ The scheme shall not be available for the following inputs:

A. All vegetable / edible oils and all types of oilseeds;
B. All types of cereals;
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;
H. Vitamins;
I. Biotechnology items and related products;
J. Waste/Scrap of all types; and
K. Second hand goods.

→ Inputs imported shall be subject to pre import condition and they shall be physically incorporated in the export product (making normal allowance for wastage).

→ 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.

→ 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.

→ 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.

→ 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

→ 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.

b. Exporters having past export performance (in at least preceding two financial years) shall be entitled for Advance Authorisation for Annual requirement.

c. 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 shall be: -

VA = A-B÷ B x 100, where

A = FOB value of export realized/FOR value of supply received.

B = CIF value of inputs covered by Authorisation.

**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 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%.

**Ineligible categories of import on Self Declaration basis:**

a. Import of following products shall not be permissible on self-declaration basis:

→ All vegetable / edible oils and all types of oilseeds;

→ All types of cereals;

→ All Spices other than light black pepper (light berries) having a basic customs duty of more than 30%;

→ All types of fruits/ vegetables having a basic customs duty of more than 30%;

→ Horn, Hoof and any other organ of animal;

→ Honey;

→ Rough Marble Blocks/Slabs;

→ Rough Granite;

→ Vitamins except for use in pharmaceutical industry; and

→ 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.

c. Where export and/or import of biotechnology items and related products are involved, Authorisation shall be issued by Regional Authority only on submission of a "No Objection Certificate" from Department of Biotechnology.

**Currency for Realisation of Export Proceeds**

a. Export proceeds shall be realized in freely convertible currency or in Indian Rupees.

b. 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.

c. 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.

d. 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.

## DUTY FREE IMPORT AUTHORISATION SCHEME (DFIA)

**DFIA Scheme**

2. DFIA 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.
3. Import of Tyre under DFIA scheme is not allowed.

**Duties Exempted**

i. DFIA 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.

**Eligibility**

i. DFIA shall be issued on post export basis for products for which SION 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.

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.

**Minimum Value Addition**

Minimum value addition of 20% shall be required to be achieved.

**Validity &Transferability of DFIA**

b. Applicant shall file online application to Regional Authority concerned before starting export under DFIA.

c. Export shall be completed within 12 months from the date of online filing of application and generation of file number.

d. 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.

e. Separate DFIA shall be issued for each SION.

f. Exports under DFIA shall be made from any port.

g. 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, Perfumes / Essential Oil/ Aromatic Chemicals, Relevant Fabrics, Marble, Articles made of Paper and Paper Board, Insecticides, Citric Acid, 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.

## SCHEME FOR REMISSION OF DUTIES AND TAXES ON EXPORTED PRODUCTS

**Scheme Objective and Operating Principles**

- 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.
- The rebate under the Scheme shall not be available in respect of duties and taxes already exempted or remitted or credited.
- 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.
- 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.

- 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.
- 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.
- 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.
- 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.
- The Scheme will take effect for exports from 1st January 2021.

**Ineligible Supplies/ Items/Categories under the Scheme**

The following categories of exports/ exporters shall not be eligible for rebate under RoDTEP Scheme:

1. Exports through trans-shipment, meaning thereby exports that are originating in third country but trans-shipped through India.
2. Export products which are subject to Minimum export price or export duty.
3. Products which are restricted for export under Export Policy.
4. Products which are prohibited for export under Export Policy.
5. Deemed Exports.
6. Supplies of products manufactured by DTA units to SEZ/FTWZ units.
7. Products manufactured in EHTP and BTP.
8. 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.
9. Products manufactured or exported by a unit licensed as 100% EOU in terms of the provisions of the FTP.

10. Products manufactured or exported by any of the units situated in Free Trade Zones or Export Processing Zones or Special Economic Zones.

### 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.

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, whose decisions would be binding.

## 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 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 Customs Tariff Act, 1975. Capital goods for the purpose of the EPCG scheme shall include:
    a. Capital Goods 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. Authorisation shall be valid for import for 24 months from the date of issue of Authorisation. Revalidation of EPCG Authorisation shall not be permitted.
4. 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.

5. 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 fulfilment of EO of the CSP;

   iii. Such export will not count towards fulfilment 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, 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 fulfilment 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;

(d) Exports under Advance Authorisation, DFIA, Duty Drawback, RoSCTL and RoDTEP Schemes would also be eligible for fulfilment of EO under EPCG Scheme.

(e) Export obligation may be fulfilled both by physical exports as well as deemed exports.

(f) Exports made from DTA units shall only be counted for calculation and/or fulfilment of EO.

(g) Export proceeds realized in Indian Rupees are also counted towards fulfillment of export obligation.

(h) Extension of EO period shall be permitted as prescribed in Handbook of Procedures.

**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.

**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 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.

**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 5 years from date of imports even in cases where export obligation has been fulfilled.

## 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 some specified goods 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 CGST/SGST Act, on the recommendations of the GST Council.

### 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):**

d)

i. Supply of goods to projects financed by multilateral or bilateral Agencies / Funds as notified by Department of Economic Affairs (DEA), MoF.

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.

iii. Supplies covered in this paragraph shall be under International Competitive Bidding (ICB) in accordance with procedures of those Agencies / Funds.

e)

i. Supply of goods to any project or for any purpose in respect of which the Ministry of Finance 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 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.

f) 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 under United Nations (Privileges and Immunities Act), 1947.

g) Supply of goods to nuclear power projects.

**Common conditions for deemed export benefits**

(i) Supplies shall be made directly to entities. 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.

(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 in the main contract.

**Benefits on specified supplies**

(i) Deemed export benefits shall be available for supplies of "Cement"

(ii) Deemed export benefit shall be available on supply of "Steel":

(iii) Deemed export benefit shall be available on supply of "Fuel" 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.

## 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, reengineering, rendering of services, development of software, agriculture including agro-processing, aquaculture, animal husbandry, bio-technology, 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.

(b) Export of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) shall be subject to fulfillment of conditions contained in FTP.

(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.

iii. The procurement of goods covered under GST from DTA would be on payment of applicable GST and compensation cess.

(e) 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.

(f) 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.

(g) Procurement and export of spares / components, upto 5% of FOB value of exports, may be allowed to same consignee / buyer of the export article.

**Second hand Capital Goods**

Second hand capital goods, without any age limit, may also be imported with or without payment of duty/taxes.

**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, 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;

**Net Foreign Exchange Earnings**

EOU/EHTP/STP/BTP unit shall be a positive net foreign exchange earner.

NFE Earnings shall be calculated cumulatively in blocks of 5 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 5 years 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 5 years block period for calculation of NFE earnings may be extended by BoA for a period of upto 1 year, on a case to case basis.

**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.

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.

b. LoP / LoI issued to EOU/EHTP/STP/BTP units by concerned authority would be construed as an Authorisation for all purposes.

c. Unit shall execute an LUT with DC concerned.

**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.

**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 9 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.

**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.

(f) 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.

**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.

**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.

# Chapter 13 : Competition Act, 2002

## What is competition in the market?

Competition can be defined as a situation in the market in which manufacturers or sellers independently fight for selling their goods or services to the buyers, 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 order to gain lead ahead of rival enterprises, market players either –

a) adopt fair means (producing quality goods, being cost efficient, adopting appropriate technologies, etc.), or

b) indulge in unfair measures (carrying out restrictive business practices- such as predatory pricing exclusive dealing, collusion, cartelization, 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 facilities fair competitive outcomes in the market, curb anti-competitive behavior and discourage market players from adopting unfair measures.

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.

## Competition Law & Policy

The objective of competition policy is to preserve and promote competition as a means of ensuring efficient allocation of resources.

Competition policy has two components. The first component is a set of policies that enhance competition in local and national markets. The second component is a set of legislations designed to prevent anti-competitive business practices with minimal government intervention.

A 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 would also be incomplete without a law to enforce such policies and prevent competition malpractices.

Competition policy is about ensuring that markets are, and remain, competitive. This brings benefits to consumers eventually in all ways. However, eliminating anti-competitive practices and dismantling monopoly positions that lead to abuses also benefits those firms whose business suffers from these practices and abuses.

Competition polices cover a much broader set of instruments than competition law, and typically include all polices aimed at increasing the intensity of competition or rivalry in local and national markets by lowering entry barriers to ensure that markets work effectively and serve interests of all citizens. Competition law is only a sub-set of a nation's competition policies.

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.
- 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.

The principal objectives of the Act, as spelt out in the preamble were:

i prevention of concentration of economic power to the common detriment;

ii control of monopolies;

iii prohibition of monopolistic trade practice;

iv prohibition of restrictive trade practices.

## 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.

Salient Features of the Act

With the enforcement of the Competition Act, 2002 the MRTP Act, 1969 shall stand repealed and the MRTP Commission shall be dissolved.

1. The Competition Act, 2002 has been enacted to:
   - Prevent practices having an appreciable adverse effect on competition,
   - To promote and sustain competition in the market and
   - To protect the interests of consumers and to ensure freedom of trade.
2. The competition Act, 2002 seeks to achieve its objectives by:
   - Prohibiting anti-competitive policy on competition,
   - Creating awareness by imparting training on competition issues.
3. The Competition Act, 2002 provides for the establishment of Competition Commission of India.

## 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:

**"Main Objectives and Benefits of Competition Policy"**

- **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.
- **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.
- **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:**

1. 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. 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 favoring jobs creation by new efficient competitors.

3. 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 existing 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.

## COMPETITION REGIME IN INDIA

### 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 halftruths, 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.

## 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.

"**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

"**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 relatable 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.

**"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)]

**"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)]

**"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)]

**"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)]

**"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)]

## 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.

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.

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. Anticompetitive 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
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 26% or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
ii. appoint more than 50% 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.

## 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 Rs. 2,500 crores or turnover more than Rs. 7,500 crores; or
      B. in India or outside India, in aggregate, the assets of the value of more than 1.25 billion US dollars, including at least Rs. 1,250 crores in India, or turnover more than 3.75 billion US dollars, including at least Rs. 3,750 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 Rs. 10,000 crores or turnover more than Rs. 30,000 crores; or
      B. in India or outside India, in aggregate, the assets of the value of more than 5 Billion US dollars, including at least Rs. 1,250 crores in India, or turnover more than 15 Billion US dollars, including at least Rs. 3,750 crores in India; 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 Rs. 2,500 crores or turnover more than Rs. 7,500 crores; or
      B. India or outside India, in aggregate, the assets of the value of more than 1.25 billion US dollars, including at least Rs. 1,250 crores in India, or turnover more than 3.75 billion US dollars, including at least Rs. 3,750 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 Rs. 10,000 crores or turnover more than Rs. 30,000 crores; or
      B. in India or outside India, in aggregate, the assets of the value of more than 5 Billion US dollars, including at least Rs. 1,250 crores in India, or turnover more than 15 Billion US dollars, including at least Rs. 3,750 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 Rs. 2,500 crores or turnover more than Rs. 7,500 crores; or
      B. India or outside India, in aggregate, the assets of the value of more than 1.25 billion US dollars, including at least Rs. 1,250 crores in India, or turnover more than 3.75 billion US dollars, including at least Rs. 3,750 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 Rs. 10,000 crores or turnover more than Rs. 30,000 crores; or

B. in India or outside India, in aggregate, the assets of the value of more than 5 Billion US dollars, including at least Rs. 1,250 crores in India, or turnover more than 15 Billion US dollars, including at least Rs. 3,750 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 Rs. 2,000 crores:

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 26% or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or

ii. appoint more than 50% of the members of the board of directors in the other enterprise; or

iii. control the management or affairs of the other enterprise;

**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.

## 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.

According to Section 6(2A), no combination shall come into effect until 150 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 subsection 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.

### 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.

## 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 2 and not more than 6 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 15 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:

i. the Chief Justice of India or his nominee – Chairperson
ii. the Secretary in MCA – Member
iii. the Secretary in Ministry of Law & Justice – Member
iv. 2 experts of repute who have special knowledge of, and such professional experience 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 – Members.

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 5 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 65 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.

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 391) 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 3 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) dependence of consumers on the enterprise;
e) 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;

**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 1[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.

## 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, 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) extent of barriers to entry into the market;
b) level of concentration in the market;
c) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
d) extent of effective competition likely to sustain in a market;
e) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
f) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
g) possibility of a failing business;
h) nature and extent of innovation.

## 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 60 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 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 60 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.

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 sub-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.

## 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 10% of the average of the turnover or income, as the case may be, for the last 3 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 3 times of its profit for each year of the continuance of such agreement or 10% of its turnover or income, as the case may be, for each year of the continuance of such agreement, whichever is higher.

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.

## 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 15 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 30 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 7 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 7 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 10 days from the date on which the details of the combination were published under sub-section (2).

4. The Commission may, within 7 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 10 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 25 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 7 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 12 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 12 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 section 6(2).

It may be noted that if the Commission does not form a prima facie opinion as provided under section 29(1B), 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 section 29(7) or section 29A(2)(3), 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 subsection (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 section 6(2), 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, —

- 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 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.

## 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.

## 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 Chartered Accountants Act, 1949 and who has obtained a certificate of practice;
b) "Company Secretary" means a company secretary as defined in Company Secretaries Act, 1980 and who has obtained a certificate of practice;
c) "Cost Accountant" means a cost accountant as defined in section 2 of the Cost and Works Accountants Act, 1959 and who has obtained a certificate of practice;
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: —

i. summoning and enforcing the attendance of any person and examining him on oath;
ii. requiring the discovery and production of documents;
iii. receiving evidence on affidavits;
iv. issuing commissions for the examination of witnesses or documents;
v. requestioning 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 DG 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 DG or the Secretary or an 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;

## 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 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 subsection (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 180 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 180 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.

# 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 clause, 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. 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 commission, 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.

## 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.

## 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.

# Chapter 14 : Intellectual Property Rights

## 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 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 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. Intellectual property rights (IPR) are ideas, inventions, and creative expressions on which the public is ready to bestow the status of property.

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).

## 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.

- **Right to sue:**

  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. 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.

- **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.

- **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. Bio patents, Software Copyrights, and Plant Diversity Protection are just a few examples of terms that highlight recent advancements in the IPR area.

## 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, 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.

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.

## 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 was the foundation 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 liberalization.

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.

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 liberalization 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.

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 liberalization 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 liberalization, Article XIX stipulates that liberalization must take place with due consideration for national policy objectives and members' levels of development, both generally and in specific sectors.

## WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

The United Nations organization 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, WIPO was founded 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 organizations. 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 specialized 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.

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 globalization 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 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 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 Registrationof 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. computerprogrammes, regardless of how they are expressed; and
  ii. collections of data or other materials ("databases").
- **WIPO Performances and Phonograms Treaty (WPPT):** 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).

- **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)

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

## 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.

# Chapter 15 : Law relating to Trade Marks

## REGULATORY FRAMEWORK

- Trade Marks Act, 1999
- Trade Marks Rules, 2017

**What are the Sources of Trademark Laws?**

- The national statues 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.

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

### Trade Mark

The term trade mark has been defined under Section 2(1)(zb) of the Act

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.

### Certification Trade Mark

Section 2(1)(e) defines the term certification trade mark

It means 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 covered 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

## 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 Section 2(1)(q) 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 as to mean the use of trademark-

(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 theregistration of the trade mark is subject.

## Service

The term service under Section (2)(1)(z) 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 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.

### What are different types of Trademarks that may be Registered in India?

- Any name 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.
- 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 for the registration of his trademark.

Section 18(2) 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.

## 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.

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. 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 1 month time and if he fails to do so, the application is abandoned for want of reply.

a. 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.

b. 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 4 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.

**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.

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 1 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 1 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.

### 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 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.

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;
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.

## 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.

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.

**Earlier Trade Mark means–**

a. a registered trade mark or an application bearing an earlier date of filing or an international registration 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 –

a. the knowledge or recognition of that trade mark in the relevant section of the public including knowledge in India;
b. the duration, extent and geographical area of any use of that trade mark;
c. 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;
d. 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;
e. 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.

## 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 in respect of a chemical substance or preparation, or
b. which is declared by the World Health Organisation and notified 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.

## 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 20 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 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

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 18 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 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 12 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, 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(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 Act, 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 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 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.

## 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.

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.

## 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 resembleness 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.

# Chapter 16 : Law relating to Designs

## 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.

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.

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.

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, Supreme Court of India observed that:**

The sole purpose of this Act is protection of the intellectual property right of the original design for a period of 10 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 section 2(d). 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.

**In the case of Escorts construction Equipment Ltd. vs. Action construction Equipment Pvt. Ltd.,1999 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 defined in 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;
- Any 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)]**

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.

## Proprietor of a New or Original Design

- 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;
- 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
- 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.

**In the matter of M/s Brighto Auto Industries vs. Shri Raj Chawla (1978 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 pre-existing 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 (Form 1) 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.

## 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 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.

### 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.
- 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 applications 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;

## 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 10 years from the date of registration. However, before the expiration of the said 10 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 2nd period of 5 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.
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.
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. If the design is registered under the Designs Act, the design would lose its copyright protection under the Copyright Act.

### 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.

### 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.

## 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:

- 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;
- to import such article for the purposes of sale;

### 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.

## 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.

# Chapter 17 : Law relating to Geographical Indications of Goods

- **Geographical Indications of Goods (Registration and Protection) Act, 1999**
- **The Geographical Indications of Goods (Registration and Protection) Rules, 2002**

## INTRODUCTION

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.

The object of the Geographical Indications of Goods (Registration and Protection) Act, 1999 is threefold:

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, Nagpur Orange, Kolhapuri Chappal, Bikaneri Bhujia, Agra Petha etc.

### 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

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 sentiments 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

shall not be registered as a geographical indication.

## 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.

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 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;

Application maybe 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.

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 12 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 scope of the definition of a Geographical Indication.

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.
- Give details of all the applicant together with address.

**Step 2 & 3: Preliminary Scrutiny and Examination**

- The Examiner will scrutinize the application for any deficiencies.
- Content of statement of case is assessed by a consultative group of experts.
- 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 2 months or apply for a hearing.
- The decision will be duly communicated. If the applicant wishes to appeal, he may within 1 month make a request.
- The Registrar is also empowered to withdraw an application, if it is accepted in error, after giving on opportunity of being heard.

**Step 5: Publication in the Geographical Indications Journal**

- Every application, within 3 months of acceptance shall be published in the Geographical Indications Journal.

**Step 6: Opposition to Registration**

- Any person can file a notice of opposition within 3 months opposing the GI application published in the Journal.
- The registrar shall serve a copy of the notice on the applicant.
- Within 2 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.

### 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 **10 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 10 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, by the registered proprietor or by the authorised user renew the registration of the geographical indication or authorised user for a period of **10 years from the date of expiration of the original registration or of the last renewal of registration**.

## 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.

"Act of unfair competition" means any act of competition contrary to honest practices in industrial or commercial matters. Following acts shall be deemed to be acts of unfair competition:

- 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.

### 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** 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 its business or services so as to discredit the fame of Darjeeling tea as a geographical indication and/ or to mislead persons.

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
c) places, encloses or annexes any goods which are sold, 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, 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, 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; 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 6 months but which may extend to 3 years and with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 2,00,000.

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 6 months or a fine of less than Rs. 50,000.

# Chapter 18 : Law relating to Copyright

## 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.

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:

**a) Copyright in the case of a Literary, Dramatic or Musical Work, not being a Computer Programme**

i. to reproduce the work in any material form including the storing of it in any medium by electronic means;
ii. to issue copies of the work to the public not being copies already in circulation;
iii. to perform the work in public, or communicate it to the public;
iv. to make any cinematograph film or sound recording in respect of the work;
v. to make any translation of the work;
vi. to make any adaptation of the work;
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).

**b) Copyright in the case of a Computer Programme**

i. to do any of the acts specified in specified in respect of a literary, dramatic or musical work;
ii. to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programmer:

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.

**c) Copyright in the case of an Artistic Work**

To reproduce the work in any material form including—

i. the storing of it in any medium by electronic or other means; or
ii. depiction in three-dimensions of a two-dimensional work; or
iii. depiction in two-dimensions of a three-dimensional work.

**d) Copyright in the case of a Cinematograph Film**

i. to make a copy of the film, including—
   a) a photograph of any image forming part thereof; or
   b) storing of it in any medium by electronic or other means.

ii. to sell or give on commercial rental or offer for sale or for such rental, any copy of the film.
iii. to communicate the film to the public.

**e) Copyright in the case of a Sound Recording**

i. to make any other sound recording embodying it including storing of it in any medium by electronic or other means;
ii. to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;
iii. to communicate the sound recording to the public.

It may be noted that a copy which has been sold once shall be deemed to be a copy already in circulation.

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. 2010 (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.

| **Term of Copyright** | **Number of Years** |
|---|---|
| Term of Copyright in Published Literary, Dramatic, Musical and Artistic Works | 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.<br>In the case of a work of joint authorship, be construed as a reference to the author who dies last. |
| Term of Copyright in Anonymous and Pseudonymous Works | 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.<br>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. |
| Term of Copyright in Posthumous Work | 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.<br>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. |
| Term of Copyright in Cinematograph Films | In the case of a cinematograph film, copyright shall subsists until sixty years from the beginning of the calendar year next following the year in which the film is published. |
| Term of Copyright in Sound Recording | 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. |
| Term of Copyright Government Works | 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. |
| Term of Copyright in Works Of Public Undertakings | 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. |
| Term of Copyright in Works of International Organizations | 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—

- issue licences under section 30 in respect of any rights under this Act;
- collect fees in pursuance of such licences;
- distribute such fees among author and other owners of right after making deductions for its own expenses;
- perform any other functions consistent which 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 includes 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 copyrights 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.

A per Section 37(3) during the continuance of a broadcast reproduction right in relation to the broadcast or any substantial part thereof -

- re-broadcasts the broadcast; or
- causes the broadcast to be heard or seen by the public on payment of any charges; or
- makes any sound recording or visual recording of the broadcast; or
- 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
- 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.

## 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.

## 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.

## 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:

- does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or
- 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 -

- in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;
- in relation to a cinematographic film, a copy of the film made on any medium by any means;
- in relation to a sound recording, any other recording embodying the same sound recording, made by any means;
- 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 Honble 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 literacy 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 non-commercial 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 —

- the title or other information identifying the work or performance;
- the name of the author or performer;
- the name and address of the owner of rights;
- terms and conditions regarding the use of the rights; and
- 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 penalities. 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, with in 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.

# Chapter 19 : Law relating to Patents

## 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.

## 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.

### 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.

## 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 January1, 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 obligations 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 in 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 his not 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 licencee 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 licencee 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 licencee 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 licencee 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.

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 prescribe.