

CONTRACTUAL AND TAX ISSUES ARISING DUE TO COVID-19 PANDEMIC

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Index

S.No.	Topic	Slide No.
1.	Objective	3
2.	Force Majeure & Doctrine of Frustration	4 – 15
3.	Sector specific (sample) contractual analysis	16 – 34
4.	COVID 19 missives & Change in Law	35 – 36
5.	GST Implications – COVID 19	37 – 46
6.	Fiscal Relaxations	47 – 53
7.	GST Implications – Foreign Trade Policy	54 – 57
8.	Judicial Respite	58 – 63
9.	The road ahead	64 – 65

Objective

- The COVID – 19 pandemic – has led to significant business disruption
- Force Majeure notices by several contracting parties - a direct consequence
- Several issues arise including:
 - Tenets of Force Majeure and its limits
 - Case to case variance – No one size that fits all
 - Varying sectoral impact
 - GST implications on peculiar scenarios arising during lockdown
- In addition, the presentation also highlights
 - Snippets of various statutory concessions introduced – GST and FTP
 - Judicial intervention easing law of limitation & continuation of interim orders



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Force Majeure & Doctrine of Frustration

Force Majeure & Doctrine of Frustration



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English Law

- **Force Majeure** was a judge made concession to meet **demands of Justice**
- **Absolute Contracts** constructed as **Conditional Contracts** to offer relief to deal with unexpected events (*Taylor v Caldwell, Robinson V Davison, Hirji Mulji*)
- In case of unexpected events (not in contemplation of parties), Courts would construe contracts not as per strict intent of the parties but in a manner **a reasonable man** would have presumably done (*Dhal V Nelson*)
- Evolved further:
 - If substantially the whole contract becomes **impossible to perform or impracticable** due to some reason for which neither is responsible – Dissolution of contract possible (*Tamplin Steam Ship Co*)
 - It is a **special case of discharge of contract** by an impossibility of performance arising after the contract is made (*Joseph Constantine Steam ship line ltd*)
 - Impossibility and Frustration used **interchangeably**



Force Majeure & Doctrine of Frustration



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Indian Law – The Indian Contract Act (“ICA”)

- **Section 9** Promises can be express or implied
- **Section 56** Agreement to do an act that is ab-initio or subsequently becomes impossible/unlawful, is void
- **Section 32** Enforcement of Contracts contingent on an event happening-Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.

Force Majeure & Doctrine of Frustration



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Indian Law – Judicial Evolution

- Unlike English courts, Indian Courts have a **limited role** in matters of dissolution of Contracts
- If Courts can gather the intent (express or implied) providing for discharge of contract in a given situation for dissolution of a contract, then
 - **contractual term to prevail** (i.e. Section 9 read with Section 32 of the ICA)
- If Parties have specifically contemplated a given event and waived dissolution despite contemplating it, then
 - **Courts cannot intervene** to grant extra contractual relief (*Mathey v Curling* – applied by Indian Judiciary as well)
- Therefore, in these cases, **Section 56** of the ICA (dealing with Frustration) **cannot apply**



Force Majeure & Doctrine of Frustration



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Indian Law – Coverage of Section 56

- When a given **event is not contemplated** at the time of execution of contract, which is so fundamental that it **strikes at the root** of the contract & performance is **impossible**
- A significantly high threshold and burden of proof
- Impossibility = **Impracticability**
- Impossibility need not be mere **physical impossibility** or **literal impossibility**
- In these cases, there is **no need to find out any implied term agreed** to by the parties qua discharge – as parties neither thought about the matter nor could have any intention regarding it

Force Majeure & Doctrine of Frustration



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Indian Law – Higher threshold applicable under Section 56

- Situation should lead to “**Radically different**” outcome in performance relative to intent of the parties
- Merely because performance is “**onerous**” not good enough
- If **alternate mode** available for performance – then performance cannot be said to be impossible
- Mere **rise in price/cost** cannot be said to be “hindrance in performance of Contract”
- Overall a significantly **higher threshold**

Force Majeure & Doctrine of Frustration



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Indian Law – When does Section 56 apply ?

- Section 56 would apply (including its higher threshold), when Contractual clause (related inter alia to Force Majeure clauses)
 - **Entirely Absent** (no express or implied provisions whatsoever, dealing with dissolution of a contract)
 - **Not applicable** (express or implied provisions dealing with dissolution of a contract does not contemplate a given event)
 - **Unworkable Contractual remedy** - (say termination of a contract not contemplated under the force majeure clause)

Force Majeure & Doctrine of Frustration



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Indian Law

- Typical Reliefs under Force Majeure
 - Termination / **Discharge** of a Contract
 - Temporary **suspension** of performance under the contract
 - **Part performance** of a contract
- Notwithstanding – parties can also agree to **remit performance** of a contract (in part/in whole) invoking Section 63 of the ICA
- Force Majeure event can be triggered by **either party** (i.e. Contractor as also Contractee)



Force Majeure & Doctrine of Frustration



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Indian Law- Other Relevant aspects of Force Majeure Clause

- Must be **narrowly construed**
- May be specific (containing a list of specific events) or, general (such as general referral to events outside control of parties) or a combination of both
- May also be inclusive in nature and/or include those:
 - that are expressly notified by the **contractee**
 - the making of any **Indian Legal Requirement** affecting the performance by parties
 - a subcontractor event of force majeure for the main contractor
- May in some cases include **acts and regulations of Government** of either party
- **'Act of God' often included** – *i.e. events due to natural causes without human intervention*
- **'Epidemic'** specifically included as Force Majeure event in some cases



Force Majeure & Doctrine of Frustration



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Indian Law- Other Relevant aspects of Force Majeure Clause

- **Some contracts provide for specific exclusions from qualifying as force majeure event:**
 - Unavailability or late delivery or change in cost of the plant, machinery, equipment, materials, spare parts, or consumables
 - Delay in performance by any contractor or subcontractor
- **Whether benefit of Force Majeure can be taken by a party who has failed to meet obligations anyway?**
 - Qualitative preconditions for invocation of force majeure needs to be tested:
 - ☐ Whether circumstances/event beyond reasonable control?
 - ☐ Whether situation unavoidable despite taking reasonable care or prudent utility practices?



Force Majeure & Doctrine of Frustration



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Scenario

Court intervention

FM clause does not contemplate epidemic

Dissolution of contract under Section 56 can be invoked provided foundation of the contract is affected

FM clause contemplates epidemic but expressly states that notwithstanding, parties should continue to work

Dissolution of contract under Section 56 **cannot** be invoked

FM clause contemplates epidemic and permits extension of time period

Dissolution of contract under Section 56 can still be invoked provided foundation of the contract is affected

FM clause specifically excludes an event as force majeure

Dissolution of contract under Section 56 can still be invoked provided foundation of the contract is affected



Force Majeure & Doctrine of Frustration



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Indian Law – points for consideration

- Can **Governmental directives**/orders/missives declare an event as Force Majeure **contrary to** the coverage of a **Contractual arrangement**:
 - Section 23 – Contracts which would defeat the provisions of law or are opposed to **public policy** are unlawful and void
 - Office memorandums issued by various ministries declaring COVID 19 as a force majeure likely to qualify as public policy
 - Can **compensation under Section 65 ICA** be claimed against the party who has derived advantage out of a contract that becomes void?
- Whether Force Majeure triggered on **supply side** can automatically trigger Force Majeure (Section 32 or Section 56 ICA) on the **procurement side**?
- Contractual **suspension Vs. non seizure** of work and vice versa





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Sector specific (sample)
contractual analysis

Solar power PPA

- **Coverage of Force Majeure clauses *vis a vis* COVID 19**
 - **Epidemic identified** as an FM event in many cases – **Pre-conditions to be met**
 - ☐ Mitigate FM eventuality
 - ☐ Demonstrate beyond reasonable control
 - ☐ 'Put to notice' requirements
 - **Epidemic not identified** as a Force Majeure - **Can 'Act of God' be invoked?**
 - ☐ MoF Office Memorandum - Disruption in supply chains due to COVID – 'Act of God'
 - ☐ US Jurisprudence – Human illnesses are a natural phenomena – Act of God
 - ☐ Applicability of Rule of *Contra Preferentum*
 - If Epidemic/ Act of God **not identified** as a Force Majeure
 - ☐ Section 63 of Indian Contract Act – Remission by mutual negotiations?
 - ☐ Section 56 – Doctrine of Frustration

Solar power PPA

- **Effects of FM clauses – across sample PPAs**
 - **Scenario 1** – Where FM provides for suspension of both parties' obligations – **No breach or default for failure to perform obligations during FM tenancy**
 - **Scenario 2** – Obligation to supply power not suspended but power purchaser can invoke FM for suspension of drawl of power
 - ❑ Lopsided FM clause
 - ❑ Power producer may or may not be entitled to compensation for losses suffered
 - ❑ Alternate supply arrangements may be envisaged in other contract terms
 - **Scenario 3** – Condonation of delay due to FM event to be made before State Commission - **Procedural issues including delay in settling petitions?**
 - **Scenario 4** - Extension allowed subject to requests being made within stipulated timelines
 - **Scenario 5** – FM not to cover payment obligation for work done / electricity supplied **prior to occurrence of FM**

Solar power PPA

- No compensation for losses under FM – **Neutral Risk**
- Consequently, adjustment of tariff due to FM ought not to be expected
- **Termination of contract**
 - Continuous operation of force majeure (usually 4-6 months) – Contract may be terminated at option of either party
 - Certain contracts - **silent on termination** –
 - ☐ Recourse to section 56 of the Contract Act?
 - ☐ Would specific omission for termination be considered as implied denial of termination?

Recent Guidelines issued – Construction phase



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- **MNRE Office Memo. dated 20.03.2020/MoF Memo. dated 19.02.2020**
 - Delay on account of disruption of supply chain due to COVID 19 in China or any other country – **FM event**
 - Case to case scrutiny along with evidence
- **MNRE Office Memo. dated 17.04.2020**
 - All RE implementing agencies of MNRE **will** treat lockdown due to COVID 19 as an FM event
 - They **may** grant extension of time equal to period of lockdown + 30 additional days
 - State Renewable Energy Departments **may** treat lockdown as an FM event and may allow for extension of time
 - **Blanket extension - No requirement for case to case analysis or evidence**
 - Disruption of Supply prior to lockdown to be dealt with on the basis of evidences, documents, etc. produced.



Recent Guidelines issued – Construction phase



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- Would MNRE directive have binding effect including on the State agencies?
- Is extension of time equal to lockdown + 30 days sufficient?
- Safeguard Duty on modules:
 - Expiring on 29.07.2020
 - For proceedings for extension of safeguard duty – time period for filing response to questionnaire extended from 10.04.2020 to 30.04.2020 vide missive dated 09.04.2020
 - No line of sight on the review proposed for extension

Recent Guidelines issued – Generating phase



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- **MHA Guidelines** dated 25.03.2020 and 15.04.2020 - **Exceptions to lockdown** –
 - Public Utilities (power generation, transmission and distribution) to remain functional;
 - Similar directive for Commercial and private establishments
- **CERC Order dated 03.04.2020**
 - Reduced late payment surcharge to 12% per annum for invoices issued between 24.03.2020 to 30.06.2020, in respect of which payment is delayed beyond 45 days
- **MNRE Office Memorandums dated 01.04.2020 & 04.04.2020** - 'Must Run' status for RE generating stations:
 - Payments to RE generators on a regular basis – since moratorium protection already afforded qua conventional supplies;
 - Any curtailment but for **grid safety reason** - Deemed Generation and therefore payment to be made



Can FM be invoked despite 'Must Run status'



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- Must run status Vs. impracticability of performance – **Can FM be invoked by SPD ?**
 - Breakdown of transformer or other vital component(s)
 - Any other difficulty in power transmission
 - Invocation of FM by SPD back end contractors/ O&M
- **Obligation of Discom to offtake power and obligation of Discom/ Intermediary to make payment**
 - Can Discoms invoke FM for **non-payment** due to **non availability of funds?**
 - Can Discoms invoke FM for not **off taking** power for reasons other than grid safety?
 - In case FM invoked by Discom, can Intermediary invoke FM (PPA – PSA being back to back)

Operation of MNRE Office Memo – **Binding on Discoms?**



Thermal Power Sector

- Typically Epidemic and/or Act of God covered as FM event
- **Varying effects of FM clauses – across sample PPAs**
 - Extension of SCOD on a **day to day basis** - **appropriate and regular documentation to be maintained**
 - If procurer invokes FM - **Compensatory measures viz deemed commissioning, capacity charges on normative basis amounts due under financial agreements** payable to the seller
- **Varying effects of FM clauses depending upon specifics of a given EPC contract**
- **Illustrative extreme situations include**
 - Absence of Act of God/Epidemic – Instead all events ‘**beyond reasonable control and unavoidable**’ included
 - Employer not discharged of payment obligation even under FM
 - No option of termination – **Resolution of FM through dispute resolution process**

Oil and Gas Sector

- Oil and gas sector – essential item under MHA Guidelines
 - Whether FM can be invoked by contractor due to FM invocation by sub-contractors/equipment suppliers?
- **Effects of FM clauses – across sample Sale Purchase Agreement**
 - Buyer **not relieved** from payment if the goods are delivered – during and before FM
 - No relief under FM for non fulfilment of ‘Conditions Precedent’
 - FM event operational from **commencement of the event and not on giving notice**
 - Option to terminate available

Oil and Gas Sector

- **Effects of FM clauses – as per standard PSC available on MoPNG website**
 - Coverage – Only '**natural phenomena**' identified as FM event
 - **Statutory payment obligations** to subsist during FM continuance
 - ❑ Royalty, surface rent and dead rent are statutory obligations
 - ❑ Therefore, obligation to pay these sums subsist
 - **Alternate to termination** - Parties to meet and discuss FM consequences and future course of action for mitigation

Real Estate Sector

- **Varying effects of FM clauses in lease arrangements (where FM clause present) -**
 - Lessee obligation to pay rent suspended if FM event continues beyond stipulated time period
 - Termination of lease if FM event continues beyond threshold time limit – **Refund of security deposit**

Real Estate Sector

- Lease arrangements (where FM clause absent)

- Inapplicability of **Section 56** of ICA

- Leases are to be governed by **Section 108 (e) of Transfer of Property Act**

108. Rights and liabilities of lessor and lessee.—In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased.....

*(e) if by fire, tempest or flood, or violence of an army or of a mob, or **other irresistible force**, any material part of the property be wholly destroyed or **rendered substantially and permanently unfit** for the purposes for which it was let, the lease shall, at the option of the lessee, be void:*

- **Lessees can seek to avoid leases** – provided high standard of Section 108 (e) of TOPA is met

Real Estate Sector

- **Sale of Land – English Law**

- Execution of a sale agreement creates equitable rights on the buyer subject to payment of consideration
- Consequently, Seller holds land in trust
- Therefore, Frustration as a concept cannot be invoked, as rights have accrued

- **Sale of Land – Indian Law**

- Contract for sale of land does not create any interest in Land
- Thus no rights accrue to the buyer
- Therefore, Frustration as a concept (under Section 56 of the ICA) can be invoked as performance is pending
- Section 56 would bear a very high threshold to be met – performance being onerous, or cost escalation would not be a ground
- Whether time is of essence would also be examined

Real Estate Sector

- **Flat Buyers Agreement**
 - Most agreements do not provide for FM recourse for purchaser of flats
 - However, Promoters retain such right
 - Lopsided FM clause

General Construction Sector – Roads/Ports/Highways et al

- General principles enumerated earlier to apply
- Special note must be taken to Sub-Contracting arrangements
- **Typical NHAI concession agreement** contains elaborate FM clause (article 29)
- Key Features of such an FM Clause
 - **Non Poltical event** such a Act of God or events beyond the control of the affected party covered
 - Can be triggered if
 - ☐ Prevents a party from performance under the Contract
 - ☐ Was beyond its reasonable control (and not its fault)
 - ☐ Unable to overcome such act despite due diligence, reasonable efforts skills and efforts including through expenditure of reasonable sum of money
 - ☐ Leads to **material adverse effect (??)** on projects

General Construction Sector – Roads/Ports/Highways et al

- Effect of FM clause
 - When triggered **before Financial Closure**
 - ❑ Termination possible - FM event continues for 180 days within 1 year continues period
 - ❑ Extension of Financial Closure for duration of FM event
 - ❑ Each party to bear respective costs
 - When triggered **after the Financial Closure**
 - ❑ Termination possible (same as above)
 - ❑ If triggered **before Commercial operation date** then
 - ❖ Project Completion Schedule and Concession period to be extended
 - ❑ If triggered **post Commercial Operation date** then
 - ❖ Concessionaire to make efforts to collect fees;
 - ❖ If however unable, then concession period to be extended
 - In all cases where Termination triggered – detailed payment terms usually provided for in the contract

Action points for Industries

- Careful review of FM clause – To examine if COVID - 19 covered
- Preconditions for invoking FM event namely prevention of performance under contracts, beyond reasonable control despite due diligence, etc. must be satisfied
- Procedural requirement to invoke Force Majeure *viz*
 - issue notice, collate evidence, identify impacts on account of sub-contractors, initiate mitigation measures
- Examination of payment terms to determine whether liability to pay/receive payment impacted by Force Majeure

Action points for Industries

- Whether subcontractor FM event tantamount to contractor FM event and vice versa
- Examine insurance terms to determine whether Insurance coverage applicable during continuance of Force Majeure
- Examination of alternate sources for procurement of critical raw materials (coal, solar modules, etc.)
- Approvals, licenses and compliances expiring during the period of FM to be examined - without extension – penal consequences to be examined
- Dispute resolution /arbitration cannot be ruled out



COVID 19 missives & Change in law

Change in Law – Applicable for COVID-19



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- **Whether lockdown notification by State and Central Government constitute ‘Change in law’**
 - *Enactment, coming into effect, adoption, promulgation, implementation, amendment, modification or repeal of any Law*
 - *Change in the interpretation or application of any law by any Governmental Instrumentality*
- **‘Change in law’ – Reimbursement of additional expenses, where ‘force majeure’ provisions do not contemplate compensation**
 - Possible non applicability – **Sectors exempted from the application of lockdowns including power, steel, mining, etc.**
 - Conflict with FM clause?
- **Whether lockdown has resulted in any incremental expenditure to the party –**
 - Appropriate documentation detailing additional expenses to be maintained ;
 - Some contracts may have materiality thresholds – Need to be reviewed
 - Notice to counterparties or petition to regulators to be sent invoking ‘change in law’ clause





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This part of the Webinar attempts to give a flavour of peculiar scenarios which may arise during lockdown and GST implications thereto

Please note that these are illustrative in nature.

There could be multiple other situations which need to be examined on a case-to-case basis

GST Implications – COVID 19

GST Implications due to COVID-19



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CASE 1 – Goods removed under cover of invoice, but truck never reached buyer due to lockdown

- Supplier continues to be liable to pay GST by virtue of Sec 2(96) read with 12(2) and 31(1)*
- As invoice to be raised before or at the time of removal of goods - which attracts GST
- Notwithstanding the fact that both parties may invoke the force majeure clause.
- However, obligation to deposit tax being tied up with GSTR 3B, date of deposit of tax would depend on the date when GSTR 3B was due.
- Vide amendment Notification No. 31/2020, for the month of February, March, & April 2020 –
 - Due date for filing GSTR 3B not extended
 - However, if turnover greater than 5 crores, a reduced interest cost of 9% to apply so long as GSTR 3B filed by 24.06.2020
 - In case where turnover is between 1.5 crores and 5 crores, then, no interest cost so long as GSTR 3B filed by 29.06.2020 (for February & March) & 30.06.2020 (for April)

* Time limits prescribed under these sections have not been extended by the Notification issued under Presidential Ordinance – Slide 52



GST Implications due to COVID-19



CHAMBERS OF SUJIT GHOSH

CASE 1 – Goods removed under cover of invoice, but truck never reached buyer due to lockdown (contd.)

- In case where turnover is less than 1.5 crores, then, no interest cost so long as GSTR 3B filed by 30.06.2020 (for February), 03.07.2020 (for March), & 06.07.2020 (for April)
- Vide amendment Notification No. 36/2020, for the month of May 2020 –
 - For turnover greater than 5 crore – due date for filing GSTR 3B has been extended from 20.06.2020 to 27.06.2020
 - For turnover less than 5 crore (specific states) – due date for filing GSTR 3B has been extended from 22.06.2020 to 12.07.2020, and from 24.06.2020 to 14.07.2020



GST Implications due to COVID-19



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CASE 2 – Services supplied but payment never released – when should the invoice be raised?

- Supplier continues to be liable to pay GST by virtue of Sec 13(2)(b) r/w Sec 31(2) and Rule 47 read with GSTR 3B alterations in time period
- Had invoice been raised within prescribed period of 30 days, then GST payable but no interest.
- If supplier – (a) could not issue invoice within 30 days due to lock down and/or (b) waits for payment by recipient beyond 30 days – then GST along with interest is payable from date of provision of service
- Notwithstanding that contractually FM may be triggered to temporarily suspend payment obligation
- **No such 30-day embargo on supply of goods**



GST Implications due to COVID-19



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CASE 3 – Continuous supply of goods

- Where statement of accounts (applies) not issued by supplier because of contractual understanding or lockdown
 - GST liability will be deferred till the date of raising of statement of accounts by virtue of Section 31(4)
 - Invoice is to be raised only before or at the time of issuance of statement of account - no GST liability accrues even though goods have been supplied.
- Where successive payments (applies) not made by recipient due to lockdown
 - GST liability will be deferred till the date of receipt of payment by virtue of Section 31(4)
 - Invoice is to be raised only before or at the time of payment - no GST liability accrues even though goods have been supplied.



GST Implications due to COVID-19



CHAMBERS OF SUJIT GHOSH

CASE 4 – Continuous supply of services despite lockdown but payment not received

- Where due date for payment is ascertainable from the contract –
 - Invoice to be raised on or before the due date of payment by virtue of Sec 31(5)(a) irrespective of whether payment received or not
 - GST liability accrues on raising of invoice
 - **What if Invoice could not be raised due to lock down** – time of supply to be date of provision of service/receipt of payment, whichever is earlier
 - Therefore, in these cases, tax along with interest cost likely to arise subject to GSTR 3B timeframe alterations
- Where due date for payment not ascertainable from contract –
 - Invoice to be raised on or before the receipt of payment by virtue of Sec 31(5)(b)
 - **GST liability can be deferred till such payment is made or invoice is raised, whichever is earlier**



GST Implications due to COVID-19



CHAMBERS OF SUJIT GHOSH

CASE 4 – Continuous supply of services despite lockdown but payment not received (contd.)

- Where payment is linked to completion of an event –
 - Invoice to be raised on or before date of completion of event by virtue of Sec 31(5)(c)
 - GST liability accrues on raising of invoice and discharge of tax as per GSTR 3B timeframe alterations
 - If event cannot be completed due to lock down – liability to pay does not arise
 - However, in case of essential services (say transportation of gas), milestone achieved, triggering tax liability – significant cash flow effect if counter party delays payment due to FM

GST Implications due to COVID-19



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CASE 5 (RCM) –Services not received, but invoice raised in advance by supplier routinely

- GST liability attracted on the recipient by virtue of Section 13(3)(b)
- GST liability accrues within 60 days of issuance of invoice – deposit as per GSTR 3B timeframe alterations

CASE 6 (RCM) – Payment made in advance by recipient, but no services received due to lockdown

- GST liability attracted on the recipient by virtue of Section 13(3)(a)
- GST liability accrues on the date of payment as entered in the recipient's books or when debited from bank account – deposit as per GSTR 3B timeframe alterations

CASE 7 (RCM) – Government Services in the case of mining against royalty payment

- Mining notified as 'essential service'
- Hence, application of Force Majeure contractual clause debatable
- Also, GST liability continues because royalty is based on actual quantity of minerals extracted – no closure of operation due to essential service status



GST Implications due to COVID-19



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CASE 8 – Contract terminated due to lockdown leading to cessation of supply of services

- Mandatory on supplier to raise invoice at time of cessation to the extent of services performed
- GST liability attracted on supplier by virtue of Section 31(6)
- Buyer's inability to pay for the supply has no bearing
- Tax to be deposited as per GSTR 3B timeframe alteration



GST Implications due to COVID-19



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CASE 9 – Payment received in advance – Refund available only if contract is terminated and not if temporarily suspended due to lockdown

- Advance received by supplier and invoice for advance raised, but no service rendered because contract terminated –
 - Circular No. 137/07/2020-GST provides that refund is available only if there is no output tax liability in general. Else, supplier is required to issue a credit note subject to Sec 34.
 - Does Sec 34 (couched in respect of tax invoice issued for supply of goods) contemplate issuance of credit note **if supply has not happened?**
 - If **not** –
 - Then supplier ought to be granted a refund under Sec 54 – as it covers tax plus any **other amount paid**
 - Can the Board introduce condition to go via credit note and not refund contrary to statutory provision?
 - Circular silent on contract suspension





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Fiscal Relaxations

Fiscal Relaxations – Hit or Miss?

CUMULATIVE ADJUSTMENT FOR RULE 36(4) COMPLIANCE

- As per Notification 30/2020-CT dt 03.04.2020-
 - Rule 36(4) condition applies “cumulatively” from Feb to Aug 2020 and adjustments will be carried out in Sept 2020’s return.
 - In other words, take full credit from Feb 2020 to Aug 2020 and reversals if any to be done in Sept 2020’s return.
- 10% ITC restriction rigour not dispensed with, but only delayed because significant ITC can be liable for reversal in Sept 2020.
- Was suspension of Rule 36(4) till Sept 2020, a better solution?
- Because, e-invoicing promised from Oct 2020 which would have nipped the problem of matching invoices in the bud.
- In any case, Rule 36(4) challenged before Del HC

Fiscal Relaxations – Hit or Miss?

RELAXATIONS IN GSTR-3B FILING FOR FEBRUARY, MARCH, APRIL 2020

- If GSTR-3B filed by last week of June or first week of July, depending on aggregate turnover, then
 - Reduced or nil rate of interest
 - Nil late fee

Turnover in preceding FY	Tax period	Provided GSTR-3B furnished by	Rate of interest, if any (Not 31/2020-CT)	Late fee (Not 32/2020-CT)
> 5 Crores	February 2020, March 2020, April, 2020	24.6.2020	Nil for first 15 days from the due date, and 9% thereafter	Nil
> 1.5 Crores and < 5 Crores	February, 2020, March, 2020	29.6.2020	Nil	Nil
	April, 2020	30.6.2020		
< 1.5 Crores	February, 2020	30.6.2020	Nil	Nil
	March, 2020	3.7.2020		
	April, 2020	6.7.2020		

Fiscal Relaxations – Hit or Miss?

RELAXATIONS IN GSTR-3B FILING FOR FEBRUARY, MARCH, APRIL 2020

- Concerns
 - Obvious discrimination between parties with turnover > 5 Cr and others
 - Is principle of reasonable classification under Art 14 satisfied?
 - Even more so in a case when late fee is waived for all?

Fiscal Relaxations – Hit or Miss?

EXTENDED DUE DATE FOR GSTR-3B FOR MAY 2020

Turnover in preceding FY	Original Due Date	Revised Due Date Notification 36/2020–CT
> 5 Crores	20.6.2020	27.6.2020
< 5 Crores, depending on principal place of business	22.6.2020 and 24.6.2020	12.7.2020 and 14.7.2020

- Concerns
 - 7 day extension of deadline because turnover > 5 Cr, while 20 day extension if turnover < 5 Cr
 - What is the basis?

Fiscal Relaxations – Hit or Miss?

TAXATION AND OTHER LAWS (RELAXATION OF CERTAIN PROVISIONS) ORDINANCE, 2020 DT 31.3.2020

- Due date for “**completion or compliance**” to be originally done between 20.3.2020 and 29.6.2020, or such other date **extended till 30.6.2020** or such other date for – (a) Central Excise Act (b) Customs Act (c) Customs Tariff Act and (d) Chap V of Finance Act.
- Section 168A in CGST Act inserted empowering the Govt to extend the time limit specified w.r.t actions which cannot be completed or complied with due to Force Majeure
- SVLDRS Scheme –

Issuance of SVLDRS Document	Extended due date
SVLDRS-3 when designated committee does not dispute amount declared	31.5.2020
SVLDRS-2 when designated committee disputes amount declared	1.5.2020
SVLDRS-3 after granting personal hearing to Declarant	31.5.2020
Payment of amount mentioned in SVLDRS-3 by Declarant	30.6.2020

Fiscal Relaxations – Hit or Miss?

BLANKET EXTENSION OF COMPLIANCES

- Not 35/2020 issued u/s 168A extending “any compliance” to be originally done between 20.3.2020 and 29.6.2020 – till 30.6.2020
- “Any compliance” includes:

Department/Authority Compliance	Assessee Compliance
Proceeding/order, notice, intimation, notification, sanction / approval or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called	Filing of appeal, reply, application, report, document, return, statement or such other record, by whatever name called

- Certain exclusions:-
 - Chapter IV on time and value of supply of goods and services
 - Section 31 relating to raising of tax invoices



GST Implications – Foreign Trade Policy

GST Implications - FTP

- FTP and HBP 2015-20 as a whole, extended till 31.03.2021.
- **Grim fate of SEIS**
 - SEIS scheme not discontinued
 - But eligibility and reward for services already rendered during 2019-20, to be notified later *de hors* the existence of the current eligibility and reward list
 - Hence, the amendment and the future notification (listing out the services) would have a retroactive effect

GST Implications - FTP

BENEFITS UNDER FTP 2015-2020

- **Concerns**

- FTP can only be amended from **‘time to time’**
 - ❑ **Phrase ‘time to time’ interpreted to mean only ‘prospectively’**
 - ❑ Hence, the retroactive amendment flies in the face of established precedent
- Moreover, Article 14 challenge between beneficiaries in the future vis-à-vis those who aren’t?

GST Implications - FTP

BENEFITS UNDER FTP 2015-2020 (contd.)

- Implementation of the SEIS scheme for 2020-21 itself unclear.
- Assuming it is temporarily suspended and then introduced from a particular date later, those excluded on account of the newly introduced eligibility criteria might be discriminated against

Phasing out of MEIS :-

- Entire FTP extended till 31.03.2021 through Govt Notification naturally including MEIS as well.
- But DGFT Trade Circular says MEIS will be continued till 31.12.2020 to make way for RoDTEP (Remission of Duties or Taxes on Export Products)
- Circular implies RoDTEP is likely to come into effect from 01.01.2021
- However, if RoDTEP introduced on any date prior to 31.12.2020, then MEIS coverage ceases for the notified product
- Settled law that DGFT cannot amend FTP in the garb of its interpretation
- Clear conflict between Govt Notification and Trade Circular on extension of MEIS whether till 31.03.2021 or 31.12.2020



CHAMBERS OF SUJIT GHOSH

Judicial Respite

Judicial Respite

SUPREME COURT EXTENDS THE TIME PERIOD FOR FILING PLEADINGS

- **In Re. Cognizance for Extension of Limitation** (Suo Moto W.P. 3/2020) :
 - If due date for filing appeals, petitions etc. was falling on a date after 15.03.2020, then period of limitation extended till further orders
 - Period of limitation extended irrespective of the Limitation Act or any other special law
 - Extension applies whether or not the period of limitation was condonable under the concerned statute
 - Order binding on Courts, Tribunals and **Authorities**
 - “Authorities” covers quasi-judicial authorities like Commissioner (Appeals) who are not courts and tribunals
 - However, Article 141 only says that law declared by SC would be binding on “Courts”
 - Article 142 is generally resorted to, to do complete justice between specific parties in specific disputes *in personam*
 - Thus, this is an extraordinary measure taken by SC, based on equity

Judicial Respite

HIGH COURTS U/A 226 AND 227 EXTEND THE VALIDITY OF INTERIM ORDERS

- High Courts have passed orders:-
 - Extending their own interim orders.
 - Extending the interim orders passed by District Courts, Family Courts, Civil Courts, Labour Courts, Industrial and other Tribunals in their jurisdiction
 - Some HCs, following the SC's orders dt 23.3.2020 have extended the time period for filing pleadings
- Summary of Interim Order Extensions :

High Court	If interim order expiring on	Granted extension till
Allahabad HC Order dated 26.03.2020	19.03.2020 - Or one month from 26.03.2020	26.04.2020
Andhra Pradesh HC order dated 26.03.2020	Two weeks prior to 26.03.2020 or One month prior to 26.03.2020	One month from 26.03.2020

Judicial Respite

HIGH COURTS U/A 226 AND 227 EXTEND THE VALIDITY OF INTERIM ORDERS

High Court	If interim order expiring on	Granted extension till
Chattisgarh HC order dated 26.03.2020	Interim Orders expiring on 16.03.2020	15.05.2020
Delhi HC order dated 25.03.2020	Interim orders expiring on or after 16.03.2020	15.05.2020
Karnataka HC order dated 24.03.2020	Interim orders expiring within one month from 24.03.2020	One month from 24.03.2020
Calcutta HC order dated 24.03.2020	Interim orders which were subsisting as on 16.03.2020 or expired on or before 09.03.2020	30.04.2020 or until further orders of Court, unless dealt with by any judicial order to the contrary
Kerala HC order dated 25.03.2020. Power also exercised under Section 482 of CrPC	Interim orders which are due to expire during the lockdown period	One month from the date of the order. Bail orders also extended from one month from the date of the order.

Judicial Respite

HIGH COURTS U/A 226 AND 227 EXTEND THE VALIDITY OF INTERIM ORDERS

High Court	If interim order expiring on	Granted extension till
Tripura HC order dated 27.03.2020 Power also exercised under Section 482 of CrPC	interim orders passed by the HC and Tribunals which were subsisting as on 16.03.2020	30.04.2020
Telangana HC order dated 27.03.2020	Interim orders passed by the HC and all subordinate Courts which were subsisting as on 16.03.2020 or have expired or will expire thereafter	07.06.2020
Madras HC order Dt 26.03.2020. Power also exercised under Section 482 and Section 483 of CrPC	Interim orders expiring on 20.03.2020, or later	Till 30.04.2020, unless interim relief granted until further orders Bail orders also extended till 30.04.2020

Judicial Respite

STATE AUTHORITIES TO KEEP RECOVERY PROCEEDINGS IN ABEYANCE

- Madras High Court: *State revenue recovery measures, proceedings relating to demolition and eviction* and other actions likely to give rise to an immediate litigation may be kept temporarily in abeyance
- Kerala High Court : Unique dynamics
 - Passed an ex-parte stay order dated 19.3.2020 staying all recovery proceedings by the GOI and PSUs
 - SC stayed the above order vide its own order dated 20.3.2020
 - As a result, Kerala HC passed a new order dated 25.3.2020 where –
 - ❑ In light of the SC stay, the High Court passed an obiter that ‘until such time, we hope that no action would be taken’ by GOI.
 - ❑ Recovery proceedings under State Laws not be initiated or if already initiated, not be proceeded further until 30.04.2020.

The road ahead

- Mapping of supply chain on a project by project basis
- Identifying critical fault lines in the chain leading to business disruption
- Isolating disrupted trade flows and examining contractual remedies for mitigation
- Evaluating cash flow challenges qua revenue and cost side of supply chain
- Detailed analysis of contractual force majeure reliefs and preconditions for their invocation (revenue and cost side)
- Inventorise contract by contract compliances and documentation necessary to establish force majeure claim
- Identify start and end date of force majeure event basis contractual arrangement and facts and circumstances on a project by project basis
- Identify projects where pre force majeure, the contracting party was already in default/delay
- Examine if there are conflicts between Government directives and contractual clauses on force majeure and consequent implication thereof

The road ahead

- Where force majeure remedy inapplicable/inadequate, explore if higher threshold of frustration can be invoked to exit project and seek compensation
- Identify the key foundational aspects of the contract, erosion of which would strike at the very root of the contract making it impracticable and impossible
- Identify whether time is of essence for a contract
- Test whether contract could be performed through alternate means
- Prepare road map and timeline for engaging with counter parties for availing contractual remedies, i.e. force majeure, or statutory remedy, i.e. frustration



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THANK YOU

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