ONGC News, 24.06.2021 Print

The Economic Times
Fear of Tax-Slapping Unfounded
Jun 24, 2021 | Delhi | Pg No.: 12 | | Sq Cm:242 | AVE: 2473985 | PR Value: 12369925

Fear of Tax-Slapping Unfounded

Arvind P Datar

A June 21 ET report (bit.ly/35LBwTv) claimed that compliance with the new information technology (IT) rules could lead to a 'huge tax liability' on the part of top digital companies. This apprehension is misplaced.

Rule 4 of the new Intermediary Guidelines and Digital Media Ethics Code Rules, 2021, mandates that a *significant* social media intermediary has to appoint a chief compliance officer, a nodal contact person for 24×7 coordination with law enforcement agencies, and a resident grievance officer. Social media intermediaries that have more than 5 million users are 'significant'. The question is whether the appointment of these three officers can be treated as a permanent establishment (PE) in India of these digital companies, and whether this will attract additional tax liability.

The two fundamental principles of international taxation are that every country gets the sovereign right to levy taxes on income whose source lies within its territory (source rule), or on persons resident in that territory (residence rule). Under Section 9 of the Income-Tax (I-T) Act, a foreign company is liable to pay tax on income earned in India, through a business connection, or from a property or any asset or source in India, or through the transfer of a capital asset in India. Most social media intermediary companies are foreign, and none of these conditions may apply.

However, a foreign company is liable to I-T if it has a PE in India. The tax is on the income attributable to this PE. In most tax treaties, the phrase signifies a fixed place of business through which the business of the enterprise is carried on wholly or in part, and will typically include a branch office, a factory or a place of management within India. However, almost all treaties provide that the maintenance of an office only to carry out preparatory or auxiliary activities will not make it a PE.

Undoubtedly, the new rules require that the three officers employed by the significant social media intermediary must be resident in

Not a permanent establishment

India. Now, the essential feature of a PE is that it is a fixed place through which the foreign company carries on its business. It will be impossible to argue that employing a few persons to ensure compliance with IT rules and to address grievances will lead to a PE.

These activities can certainly be classified as auxiliary in character. None of these officers carries on business in India, and no revenue is earned by their activities. On the other hand, their employment represents compliance costs for the foreign enterprise.

A July 2020 Supreme Court ruling settles all doubts on this issue. Samsung Heavy Industries Ltd of South Korea was part of a consortium that was awarded a turnkey contract by the Oil and Natural Gas Corporation (ONGC). Samsung set up a project office in Mumbai with two employees. Its application submitted to RBI stated that the project office was being established to coordinate and execute delivery of documents in connection with the construction of offshore platform modification of existing facilities for ONGC.

The Supreme Court held that such a project office was not a PE. It did not carry out any core activity related to the execution of the turnkey contract, and also did not incur any expenditure relating to this contract. This was an office that was merely involved in auxiliary activity and meant to act as a liaison office between Samsung and ONGC.

The same principle will apply to any office set up to comply with the Intermediary Rules and address grievances. The functions of such offices will be auxiliary in nature and not related to the core functions of the intermediaries. After the Samsung ruling, there is no basis to treat these offices as PEs and no additional tax burden can be fastened on the foreign intermediaries.

The writer is a senior advocate

Assam CM for transfer of ONGC assets to OIL

GUWAHATI

Assam Chief Minister Himanta Biswa Sarma has requested Prime Minister Narendra Modi to consider transferring all assets of the Oil and Natural Gas Corporation in the northeast to the Oil India Limited because of the latter's roots in the region. The Chief Minister wrote to the PM on June 5. A copy of the letter was made available on June 23. Assam and Assam-Arakan Basin in the northeast are the most prolific sedimentary basins in India. Both the public sector OIL and ONGC are the major operators in the region.

ओएनजीसी ONGC

The Indian Express
Hurdles in class action
Jun 24, 2021 | Delhi | Pg No.: 13 | | Sq Cm:1572 | AVE: 12257862 | PR Value: 61289309

EXPLAINED LAW & JUSTICE

Hurdles in class action

Incidents such as the recent ONGC barge disaster underline the absence of effective class action suits in India. Tougher action on negligence and liability is vital if India is to improve its ease-of-doing-business rankings.

EXPERTS EXPLAIN

MANJEET KRIPALANI
& KARTIK ASHTA

From The Indian Express panel
of specialists, exclusive insight

A group of survivors from theONGC barge disaster being rescued in May. File photo

THE FAMILIES of 71 people who were killed after Cyclone Tauktae battered ONGC's barge vessels off Bombay High last month have received compensation up to Rs 2 lakh from ONGC, and between Rs 35 lakh and Rs 75 lakh from Afcons, which was assigned the project contract. Three directors of ONGC have been suspended, and NHRC has issued notices to the Petroleum Ministry, ONGC, and the Coast Guard. A surviving engineer has filed a case of criminal negligence against the deceased captain of barge P-305, which sank. Neither ONGC nor Afcons have taken responsibility for the loss of lives.

For over 35 years, India's laws for negligence and liability have not been strengthened, in order to force safety and prevention measures, and to minimise such incidents.

In the ONGC matter, there is little the families can do in terms of personal injury suits, or class action suits. Both these legal options are weak in India, and not considered a worthwhile exercise.

However, they are necessary if India is to improve its ease of doing business rankings, especially in disaster prevention and risk of life.

How can such incidents be made preventable, and in the eventuality of damage and death, how can the parties be made responsible, with adequate damages paid?

How can India move in the direction of such accountability, which is taken seriously in developed economies, and which makes them better abodes for employment and business?

This explainer looks at class action suits, a tool extensively used in the US where individuals or small communities, aggrieved by the actions of a large entity, come together to exercise legal options collectively.

What are class action suits?

A class action suit is a legal action or claim that allows one or many plaintiffs to file and appear for a group of people with similar interests. Such a group forms a "class".

A class action suit derives from representative litigation, to ensure justice to the ordinary individual against a powerful adversary.

While class action suits have a history dating back to the 18th century, these were formally incorporated into law in the United States in 1938 under the Federal Rules of Civil Procedure. Over the years, class action has become so successful at curbing negligence, that it is now a part of US corporate and consumer laws, environmental litigation, etc.

The ubiquity of representative litigation in the US has given rise to a class of lawyers called "ambulance chasers" — those who solicit for clients at an accident or disaster site, largely for personal injury cases. They get financial compensation for their clients from the perpetrator, a percentage of which they keep. While such soliciting violates professional legal conduct in the US, it has helped hold people and corporations accountable.

The most successful class action suits in the US are the $206 billion settlement made by four American tobacco companies to cover medical costs for smoking-related illnesses; the $20 billion BP Gulf of Mexico oil spill in 2016, which caused environmental damage; and the $7.2 billion settlement made by Visa and MasterCard to retailers who claimed they had overpaid credit and debit card fees to the card companies.

In an incident made into a film, *Erin Brockovich*, Pacific Gas & Electric was ordered to pay $333 million for knowingly discharging harmful chemicals in surrounding water bodies in California that led to bodily harm.

THE EXPERTS

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Is there an Indian equivalent of US class action suits?

The most actionable suit was the Bhopal gas leak from the Union Carbide factory in 1984, where more than 3,700 people died. Three class action suits were filed in the US, which dismissed all claims for environmental clean-up, personal injuries, and medical compensation. In India, the central government filed a case on behalf of the persons who had been injured as a result of the gas leak.

Eventually, Union Carbide was asked to pay $470 million in compensation, one-seventh of the claim asked for. This also ended all civil and criminal complaints. The water is still contaminated, people still haven't recovered from their injuries, and multiple generations suffer the effects.

During the 2009 Satyam Computers scandal, there was fraud and misrepresentation to the stock exchanges, regulator, and investors. A class action suit was filed, but because India didn't have an appropriate law, 300,000 Indian investors were deprived of damages while Satyam's US investors were made whole. The amendment of Section 245 of the Companies Act, as mentioned below, was a consequence of this case.

In 2015, the Government of India filed a case on behalf of consumers in the National Consumer Disputes Redressal Commission against Nestle after the Food Safety and Standards Authority of India found higher than permissible levels of lead in instant noodles. The case is still pending.

India now has legal provisions for filing class action suits, but under four laws:

■ Order 1 Rule 8 of the Civil Procedure Code refers to representative suits, which is the closest to a classic class action suit in a civil context in India. It does not cover criminal proceedings.

■ Section 245 of the Companies Act allows members or depositors of a company to initiate proceedings against the directors of the company in specific instances. There are threshold limits, requiring a minimum number of people or holders of issued share capital before such a suit can proceed. This type of suit is filed in the National Company Law Tribunal. Currently, no class action matters have been filed under this provision.

■ The Competition Act under Section 53(N) allows a group of aggrieved persons to appear at the National Company Law Appellate Tribunal in issues of anti-competitive practices.

■ The Supreme Court has held that in certain complaints under the Consumer Protection Act, they can be considered as class action suits. (*Rameshwar Prasad Shrivastava and Ors v Dwarkadhis Project Pvt Ltd and Ors*)

Is a class action suit comparable with public interest litigation?

For filing a public interest litigation (Article 32 or Article 226 of the Constitution), the plaintiff need not have a personal interest or claim in the matter. The PIL must serve a matter of public interest. A crucial difference is that unlike a class action suit, a PIL cannot be filed against a private party.

What has deterred the development of a mature body of class action suits in India?

There are several hurdles, which are not necessarily regulatory in nature.

UNDERDEVELOPED SYSTEM OF TORTS: Tort law has not developed sufficiently in India for a number of reasons, primarily due to the high cost and time-consuming nature of litigation, especially in cases concerning the law of torts. As civil breaches, litigants find it too expensive and complicated, and therefore do not pursue such cases.

LACK OF CONTINGENCY FEES: The rules of the Bar Council of India do not allow lawyers to charge contingency fees, i.e., a percentage of the damages claimants receive if they win a case. This disincentivises lawyers from appearing in time-consuming cases that class action suits inevitably are. Revisiting this rule in specific cases may be a good first step in bringing class action suits into the mainstream.

THIRD-PARTY FINANCING MECHANISMS FOR LITIGANTS: Since litigation costs are high, class action suits can be made easier by allowing external parties to fund or sponsor the cost of litigation. Some states like Maharashtra, Gujarat, Madhya Pradesh, and Karnataka have made changes in the Civil Procedure Code to allow this.

Brent crude breaches $76, at two-year high

Oil prices rose on Wednesday, with Brent climbing above $76 a barrel to its highest since late 2018, after data showed US crude inventories declined and reinforced views of a tightening market as travel picks up in Europe and North America.

US crude inventories fell by 7.6 million barrels last week to June 18 to 459.1 million barrels, the US Energy Information Administration said, compared with analysts' expectations in a Reuters poll for a 3.9 million-barrel drop.

Brent crude rose $1.02, or 1.4 per cent, to $75.83 by 8:19 pm IST, having touched its highest since October 2018 at $76.02 after the EIA data. US West Texas Intermediate added $1, or 1.4 per cent, to $73.85 and hit $74.25, also the highest since October 2018.

REUTERS

Excise duty helps fill Centre's fiscal gap

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NEW DELHI

Excise duty, mostly from petrol and diesel, helped the government bridge a major gap in its revenue in FY21, even as receipts from goods and services tax (GST) revenue moderated from the year before, according to official data.

In spite of a dramatic recovery in GST collections since last October, overall collection from this tax on consumption contracted by 7.6% in FY21 to ₹4.56 trillion. On the other hand, revenue receipts from excise duty, collected mostly from petrol and diesel, jumped almost 63% to ₹3.89 trillion in FY21 from the year-ago period, as per data available with the Controller General of Accounts (CGA) for the full year.

The sharp rise in excise duty receipts also helped boost overall tax collections. Excise collections' share in the Centre's gross tax revenue (GTR) grew from 11.9% in FY20 to 19.2% in FY21, while that of Central GST (CGST) moderated from 24.6% to 22.5% in the same period.

On the direct tax side, the share of corporate tax collections in the Centre's gross tax receipts too declined in FY21 from a year ago, while that of personal income tax remained more or less the same.

Revenue receipts from excise duty on petrol and diesel rose 63% to ₹3.89 trillion in FY21 from the year-ago period

The sharp increase in the contribution of excise duty on the Centre's revenue recently became a matter of strain in Centre-state relations after Punjab finance minister Manpreet Singh Badal pointed out that a part of the excise duty is levied in the form of cess, which is not shared with states.

The additional excise duty on petrol and diesel is collected as road and infrastructure cess. According to Badal, the high fuel price has made India an "expensive economy".

Odisha chief minister Naveen Patnaik last month urged Union finance minister Nirmala Sitharaman to share the proceeds of all the cess it collects, with states. Although states are free to increase the value-added tax on petrol and diesel as these are outside the GST, in reality they are not in a position to do so because the price to the consumer inclusive of central and state taxes is already high. Neither the Centre, nor the states are taking the lead in cutting the tax on auto fuel as it might open up the room for the other to step up their taxes further.

While taxes on petrol and diesel remain high, the Centre had earlier given full tax rebate to those with taxable incomes of up to ₹5 lakh and revamped the tax slab system to offer a flexible alternative plan to those who do not avail of tax incentives.

In addition, businesses not availing incentives and new factories were offered a concessional tax rate regime. Unlike taxes on personal and corporate income, ease of collection of tax at the point of sale makes auto fuel the preferred revenue source for central and state governments, a government official said on condition of anonymity.

Oil rises above $75 as stockpile decline reflects a tight market

Oil in London advanced to a fresh two-year high above $75 a barrel, as industry data pointing to another drop in US crude stockpiles reinforced a bullish picture for global markets. The nation's inventories slid by a substantial 7.2 million barrels last week, the American Petroleum Institute reported, according to people familiar with the data. That would be a fifth straight week of declines if confirmed by government data later. This latest sign of tightening comes as fuel demand bounces back from the pandemic and stalled nuclear talks defer the prospect of renewed Iranian supplies. The heads of Royal Dutch Shell Plc. and TotalEnergies SE joined a chorus of industry figures warning that crude could return to $100 a barrel. Key consumers including the US and China have seen strong rebound, boosting consumption. **BLOOMBERG**

US accepted lifting oil and shipping sanctions, says Iran

REUTERS
Dubai, 23 June

Iran said on Wednesday that Washington had agreed to remove all sanctions on Iran's oil and shipping, and take some senior figures off a blacklist, at talks to revive Tehran's 2015 nuclear deal with global powers which are now on a pause.

The remarks, by outgoing president Hassan Rouhani's chief of staff, were consistent with previous assertions by officials in Rouhani's pragmatist camp that Washington is prepared to make major concessions at the talks, under way since April in Vienna.

The talks adjourned on Sunday for a break, two days after Iran held a presidential election won by hardliner Ebrahim Raisi, the head of Iran's judiciary who is on the US blacklist. Raisi is due to replace Rouhani in August.

"An agreement has been reached to remove all insurance, oil and shipping sanctions that were imposed by (former US President Donald) Trump," presidential chief of staff Mahmoud Vaezi was quoted as saying by Iran's state media. "About 1,040 Trump-era sanctions will be lifted under the agreement. It was also agreed to lift some sanctions on individuals and members of the supreme leader's inner circle."

US National Security Adviser Jake Sullivan said on Sunday there was still "a fair distance to travel", including on sanctions and on the nuclear commitments that Iran has to make. Other Western and Iranian officials have also said the talks are a long way from a conclusion.

Iran agreed in 2015 to curbs on its nuclear programme in return for the lifting of international sanctions. Trump abandoned the agreement three years later and reimposed sanctions, and Tehran responded by violating some nuclear limits.

The new U.S. administration of President Joe Biden aims to restore the deal, but the sides disagree on which steps need to be taken and when.

Iranian and Western officials alike say Raisi's rise is unlikely to alter Iran's negotiating position, as Supreme Leader Ayatollah Ali Khamenei already has final say on all major policy.

However, some Iranian officials have suggested Tehran may prefer an agreement before Raisi takes office to give the new president a clean slate.

The Pioneer
Fuel, healthcare, online businesses spur prices
Jun 24, 2021 | Delhi | Pg No.: 7 | | Sq Cm:771 | AVE: 7320098 | PR Value: 36600492

Fuel, healthcare, online businesses spur prices

SHIVAJI **SARKAR**

The recovery process, the SBI says, needs a cut in fuel prices by tax rationalisation as otherwise non-discretionary spends will continue to get distorted and cause inflation

The Indian economy may have started recovering with the pandemic unlock but galloping inflation, increasing healthcare expenses, and rising unemployment are major banes.

The global economy is to rise by four per cent and India would marginally benefit from it with some rise in exports. A World Bank report wants India to create 90 million jobs in non-agricultural organized sector - a Herculean task as most private sector offices are either closing down or slashing operations. Humanitarian crises, hunger deaths, and societal conflicts are growing.

Latest figures indicate 12.69 per cent inflation primarily on account of F2 - food and fuel. The fuel price rise is hitting every sector of the economy with nobody to correct it. The basic price of petrol remains still around ₹35.99 and over ₹65 are the central and state tax components. The edible oil prices have reached crisis points with a 62 per cent spike, Food Secretary Sudhansu Pande says. This follows withdrawal of edible oil from essential commodities list in September 2020

A State Bank of India report says that massive increase in healthcare, especially in the hinterland, steadily rising fuel prices, and online delivery of articles will increase inflationary pressure much higher on the one hand, while crowding out other consumer spending on the other, putting a big question mark on overall growth that is still being driven by consumption demand. Month-on-month increase in inflation on non-institutional medicines, x-ray, ECG, pathological and other clinical tests is taking a heavy toll not only in urban areas but even on the rural populace.

The SBI report has questioned the headline inflation figures announced by the ministry. It says that price movements convey important information about the scarcity of particular goods and services like health and medical care as of now. Health expenditure, which currently constitutes five per cent of overall inflation basket, may jump to at least 11 per cent. (It may be noted that health expenditure is around ₹6 lakh crore or five per cent of the private final consumption expenditure). This is likely to also result in a squeeze in expenditure on other items of discretionary consumption.

The daily increase of fuel prices is another bane. "And if we look at credit card spends since December, CPI computed inflation for the five-month ending April is higher than the CSO estimate on an average by 60 basis points and the higher oil prices had forced consumers to ration out discretionary spends in December," says SBI chief economist Soumya Kanti Ghosh. It means the actual inflation is 60 per cent more than the CSO figures.

The RBI has virtually given credence to the SBI finding as it estimates ₹2 lakh crore losses on economic output. It says that it may not reflect on GDP but there would be a considerable value loss across the economy. The SBI report clarifies it as the share of non-discretionary spend which has jumped to 59 per cent in April and 52 per cent and in March and "this does not augur well".

The inflation is to further rise as the US has matched its interest rate rise. It would impact India as well as there would be commodity price-rise globally. The RBI upon the government's suggestion has suppressed interest rates but it will not help keep prices low. It will make it difficult for the RBI to manage the conflicting targets of inflation, exchange rate, and adequate liquidity amidst weak growth.

> THE RBI HAS ALREADY LOWERED ITS GDP PROJECTION TO 9.5 PER CENT FROM 10.5 PER CENT. IT HAD HOPED 18.5 PER CENT RECOVERY IN THE FIRST QUARTER, CONSIDERED LOW BASE GIVEN THE CONTRACTION LAST YEAR. IT IS NOW SCEPTICAL DUE TO THE SECOND WAVE OF LOCKDOWN THAT SEES DECLINE IN DEPOSITS, INDICATING HIGHER HOUSEHOLD EXPENSES, AND LOWER SAVINGS

The RBI has already lowered its GDP projection to 9.5 per cent from 10.5 per cent. It had hoped 18.5 per cent recovery in the first quarter, considered low base given the contraction last year. It is now skeptical due to the second wave of lockdown that sees decline in deposits, indicating higher household expenses, and lower savings. Additionally, currency holding - cash - with the people decelerated to 1.7 per cent during April against a growth of 3.5 per cent last year.

It substantiates what the SBI says that extra expenses on households have increased manifold. Also, there has been an increase in use of online delivery platforms which is not considered by the NSO and if the NSO considers online prices, there will be 10-15 basic points (bps) impact on CPI inflation. The SBI says that the online delivery adds to inflation. The RBI says that the increased healthcare and other expenses have impacted domestic demand. That is the reason of delayed recovery of manufacturing, core sector and other activities.

The recovery process, the SBI says, needs a cut in fuel prices by tax rationalization as otherwise non-discretionary spends will continue to get distorted and cause inflation.

The RBI has given another formula. It has gone a bit beyond and wants to partner with the private sector - in short a prescription for further denuding the PSUs. The recommendation should make the authorities rethink on privatisiation.

Over the last few years, major PSUs have consistently increased payouts to the government despite a dip in their profitability. Since 2016, as per an official diktat they are paying a minimum 30 per cent of their profit after tax or five per cent of their net worth, whichever is higher, as dividend.

The 100 government companies declared a dividend of ₹71,857 crore during 2018-19, according to the CAG. In 2021, the PSUs paid a dividend of ₹39,022 crore (against an estimated ₹34,717 crore), the RBI paid ₹99,000 crore dividend, and other banks paid ₹1,619 crore in 2020-21. In short, a major part of the government expenses are being funded by the PSUs. The government's efforts to sell PSUs are being stonewalled by a poor economy. It should rather change its policies to strengthen the PSUs.

Despite this the India remains an investment destination. A healthy flow of FDI into the country corroborates India's strength and attracts attention of global investors, the Confederation of Indian Industry says. Total equity, re-invested earnings, and capital rose 10 per cent to the highest ever $81.72 billion during 2020-21.

The RBI expects recent government boost in capital expenditure to spur activity and investment. For all this, however, there has to be a major shift in policy thrust. While private investments must rise, the government must relook at strengthening PSUs to tide over the crisis that is beyond the capacity of the private sector. This would alone cut prices and boost demand.

(The writer is a senior journalist. The views expressed are personal.)

LPG can now be booked through CSC

PNS ■ NEW DELHI

To make it more accessible to every rural household, a new LPG connection can now be booked through the Common Service Centre (CSC). The CSC has taken the lead in helping Centre's Ujjwala beneficiaries in bookings for the refills.

Ujjwala scheme is one of the flagship programmes of the Modi Government to provide LPG gas connection to women of rural areas and especially to those from the weaker section of the society.

Linking the Ujjwala beneficiaries and also new connections through CSC digital kiosk can serve consumers close to their place of residence.CSC has so far done online booking for one crore Ujjwala beneficiaries.

"We have requested Oil companies to enable other support services through CSC as change in name, address, request for additional cylinder etc. Booking for new connection through CSC is still to be allowed by the oil companies through CSC and once these services are extended, CSC can provide all services to Ujjwala beneficiaries in villages," said CSC MD Dr Dinesh Kumar Tyagi.

Though the connection was provided by the government to women, however, refilling due to logistics still remained a concern. Many factors constrained the increase in delivery centers close to the place of residence.