COVID 19: Legal Pandemonium for Individuals, Families and Family Offices

With the outbreak of the novel coronavirus (COVID-19), the world is facing unprecedented challenges. The World Health Organisation (WHO) has already declared the spread of COVID-19 a pandemic and called it a 'global health and societal emergency' requiring coordinated, swift and untrammelled efforts of States and their people to contain it.

India has seen an alarming rise of COVID-19 cases with the numbers escalating with every passing day (as on the date of publishing this communiqué, the number stands at 519). In order to combat this outbreak, the Indian Government is moving fast on preparing itself to tackle cases, equipping hospitals, authorising private labs to test for COVID-19 cases and importantly, undertaking preventive measures - banning inbound and outbound travel from India, lockdowns of major cities, among others.

The travel restrictions, lockdowns and mandatory quarantine has far-reaching social and economic consequences. The ensuing paragraphs discuss the significant impact of these from a tax and regulatory perspective for families, individuals and businesses alike.

Families

There is a silver lining to every cloud, no matter how grey it may be. The outbreak, lockdowns and social distancing measures result in us spending more time than usual at home with families. This might be a good time to pay attention to familial affairs. Be it assets, estate or succession planning, matters like these generally should not be done in haste. It requires undivided attention, deliberations, concentration, focus and directed thought process from the head of the family, family members and lawyers collectively.

Those who have family holdings in assets spread across several complex structures or various branches of a family holding diverse assets may consider streamlining their holdings through family arrangements / settlements or undertaking various other restructuring exercises.

One may ponder over and implement plans for managing and bequeathing assets. Consider drawing up Wills, creating private trusts, gifts and/or combination thereof. A private trust is a sound structure, which allows for distributions to the next generation of family members in accordance with the settlor's wishes. Further, every individual above the age of majority should prepare a Will, if he/she does have assets or may be inheriting assets. This allows for an interim estate plan and is a smooth approach for distributing assets. *To read more about making a trust click here and for a Will click here.*

Individuals

Due to travel restrictions, an individual will have no control on his physical stay in a particular country. A person who generally resides outside India, but has returned to India due to the pandemic, has now been forced to continue residing in India. This may result in such individual becoming a tax resident in India on an annual cumulative basis for the financial year in question.

If lockdowns stretch beyond the current financial year, individuals must be mindful of their stay in India in the next financial year for determining the tax residential status. This is pertinent considering the latest amendment introduced by the Indian Government for determining tax residential status, which has reduced the day-count threshold for residency for non-resident Indians (NRIs) visiting India and deemed residency of Indian citizens under certain circumstances.

If one is full tax resident of India (and not a 'resident but not ordinarily resident of India'), he/she will expose their global income and foreign assets to disclosure requirements in their India tax returns.

Conversely, individuals who are currently out of India may run the risk of becoming a tax resident in a country outside India and be subject to tax implications in that country. Dealing in foreign exchange, remittances and repatriation of funds from in or outside India is governed by the Indian exchange control law - Foreign Exchange Management Act 1999 (FEMA). Individuals are subject to FEMA and determination of residential status forms the thrust of its applicability to them. Residency under FEMA does not depend solely on day count of individual in the previous financial year but is also governed by the intention to stay in India / outside India. Now, in this peculiar and unusual situation that the world is faced with – the intention test for residency under FEMA, hopefully, may be fulfilled without many challenges.

One can only hope that government authorities around the world will be sympathetic and provide relief or clarifications on determination of tax residential status (due to mandatory stays in respective countries) on account of this pandemic.

Business

COVID-19 is a disruption on an unprecedented scale for businesses across the world. Entities incorporated outside India (offshore entities) should be mindful of their place of effective management (POEM) in India. Due to travel restrictions, key managerial personnel of offshore entities on a visit to India may have to remain in India for a considerable time. If they manage its operations from India, the offshore entity may be exposed to the risk of its POEM being situated in India thereby attracting Indian tax implications.

From an operational viewpoint, supply chains may be disrupted due to the COVID-19 outbreak. Several corporates face the likelihood of not meeting supply targets. Such entities may be looking to invoke *force majeure* clauses (FMCs) in their contracts.

FMCs were traditionally meant to be invoked only for occurrences which could be termed 'acts of God' but have evolved over the years to account for events which are outside of an individual's control, like rebellions, strikes, curfews etc. If both parties consent, then contracts may be renegotiated to extend timelines for delivery or performance. *To read more about invoking FMCs during the outbreak here.*

Business continuity insurance protects against situations where business is disrupted due to several reasons. Those who have such insurance must check with their insurance broker or agent if a pandemic qualifies as a disruption. If a contract is still being drafted, parties should certainly consider including an 'outbreak' or a 'pandemic' as a cause to trigger the FMC.

In these unusual and seemingly uncertain times, it is of paramount importance to support and follow the guidelines of the government to stop the spread of infection. However, it is equally important to chalk out or revisit individual and business plans and determine the collateral legal ramifications of the fight against the pandemic.

Stay Safe! Stay Healthy!