ACAE

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ASSOCIATION OF CORPORATE ADVISERS & EXECUTIVES

Transcending Limits, Expanding Knowledge

Work is Worship
ESTD. 1960

Contents

September Quarter 2024

Disclaimer

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From the Desk of

President

Dear Esteemed Members of ACAE,

Prologue

Penning this communication is very special and touching for me this time as thousands of thoughts are flashing in my mind today when I write this farewell message as the President of ACAE. I reminisce my journey and recollect memories as the Captain of ACAE Ship for the term 2023-24. I feel content as the evanescent milestones we were able to set during this clinch for sailing ACAE towards its continuous journey gives a satisfaction that I was able to pour some drops in the ocean of glory and illustriousness named ACAE. This journey has made zillion memoirs in my memory bank and I am indebted and gratified for the affable, ebullient and unstinted support of each and every soul in this honoured journey. I am also grateful to the Almighty who gave me this distinction to lead this revered association. I am grateful that I was fortunate to represent ACAE as "Igniting Utkarsh" throughout my tenure to the outside world. Yes, it was a 24/7 assignment throughout the year, but then, I was privileged to fetch generous support of you all. All of you inspired me and held this message firmly for me "You don't have to move fast, you even don't have to run, the only thing you have to do...is to... keep moving and just keep on moving and while doing so, not to focus on the finish line but just to enjoy the journey." I did the same, I enjoyed my journey each day, each moment, and when I see myself on the finish line today, a feeling of serenity grapples me.

ACAE@2023-24

During this term, the ACAE leadership actively engaged with members to enhance the visibility and branding of the Association, with a focus on togetherness and interdependence.

Reviving a cherished tradition, ACAE reintroduced drama, debate and enjoyable activities into its events, reminiscent of the vibrant era until 1988. The joy of hosting plays and educational dramas was rekindled. A highlight was the staging of seven short plays titled **"Seven Sisters,"** inaugurated by motivational and spiritual icon **Jaya Kishori** to celebrate International Women's Day in March 2024. Another standout production, **"Life After Death,"** explored the importance of wills and succession planning during the Annual Conference in July 2024. Both plays, performed by ACAE members, received widespread acclaim and added a cultural richness to the events. The addition of a **cultural night** titled "Bolly Sufi" after the annual conference was a huge success, attracting active participation from the youth, revitalizing their engagement. A **new Theme Song** based on ACAE's motto, "Work is Worship," was also unveiled at the annual conference.

Throughout 2023-24, ACAE organized a plethora of academic and business events. **9 different theme conclaves** were held, each attracting full houses and receiving high praise. The 14th Professor Sukumar Bhattacharya Memorial Lecture featured **Mr. Ramesh Agarwal, Chairman of Agarwal Packers & Movers Limited,** discussing "Entrepreneurial Leadership - Building a Business Beyond Legacy." A **record 715 delegates** registered for the historic Annual Conference, which included a riveting **Debate** among top entrepreneurs and professionals. Other notable events during the term included a two-day residential picnic in January 2024 at **Shantiniketan**, West Bengal, an enriching eight-day international tour to **Russia** in June 2024 and a super exciting **Graveyard Walk** that thrilled the participants.

The vibrancy and quality of ACAE's events during the "Igniting Utkarsh"

From the Desk of President

year created a significant **pull factor for membership**, attracting more than 100 new life members and 2 patron members to the association. ACAE's high-calibre events, also drew record sponsorships with sponsors eager to be part of its success. Effective communication of ACAE's activities was maintained through a **quarterly physical newsletter** besides social media, keeping members well-informed and engaged.

ACAE's unique events also received **extensive media coverage**, with over 100 mentions in electronic, print, and TV media, marking a remarkable achievement. The blend of knowledge sessions and fellowship events cultivated a culture of continuous learning, collaboration, and community. Members found immense value not only in the insightful discussions but also in the relationships and experiences forged during these gatherings.

The leadership's initiatives during the **"Igniting Utkarsh" year**, 2023-24 stand as a testament to ACAE's unwavering commitment to fostering knowledge exchange, professional camaraderie, and a vibrant sense of community among its members. This theme guided every event and initiative, underscoring ACAE's dedication to progress, excellence, and continuous development.

Epilogue

As I move on to bid adieu as the President to all of you precious stakeholders, I wish to express again that it was absolutely wonderful to team-up with you all, and I wish to thank all of you from the core of my heart for being there in my journey through all visible as well as invisible support and good wishes as in underlying poem the poet is thanking God for being there in his most testing times even.

Footprints on the Sand

One night I dreamed a dream.

As I was walking along the beach with my Lord.

Across the dark sky flashed scenes from my life.

For each scene, I noticed two sets of footprints in the sand,

One belonging to me and one to my Lord.

After the last scene of my life flashed before me,

I looked back at the footprints in the sand.

I noticed that at many times along the path of my life,

especially at the very lowest and saddest times,

there was only one set of footprints.

This really troubled me, so I asked the Lord about it.

"Lord, you said once I decided to follow you,

You'd walk with me all the way.

But I noticed that during the saddest and most troublesome times of my life,

there was only one set of footprints.

I don't understand why, when I needed You the most, You would leave me."

He whispered, "My precious child, I love you and will never leave you

Never, ever, during your trials and testings.

When you saw only one set of footprints, It was then that I carried you."

It was all the same for me too.....while putting all my efforts to propagate the brand ACAE in the term gone by, whenever, I faced repressive challenges in my course, there were another set of zillion invisible footprints along me...... and those were all of the Members of ACAE. In the last, I can't stop myself from humming my favorite lines from Robert Frost's poem, The woods are lovely, dark and deep, But I have promises to keep, And miles to go before I sleep, And miles to go before I sleep...!!!.

Enjoy being a proud member of ACAE.

Sumit Binani
+9198308 10003
president@acaekolkata.org
sumit.binani@gmail.com

14th September, 2024

Dear Esteemed Members of ACAE,

As I pen this message, I feel an immense sense of pride and gratitude in addressing all of you as the Chairman of the Journal Committee. Our Association, a beacon of professional excellence, continues to flourish through the dedication and passion of its members. It is truly a privilege to witness the vibrant spirit and commitment that each of you brings to our community.

This year, we have embraced new opportunities, setting the stage for growth, learning, and camaraderie. We have seen an inspiring confluence of knowledge and fellowship through a series of impactful events and initiatives that have further strengthened our bond as a community. Our commitment to fostering a culture of continuous learning has been reflected in the diverse array of programs, workshops, and seminars that were held, each contributing significantly to our shared mission of excellence.

The Journal Committee, under the guidance of president and the relentless efforts of our contributors, has worked diligently to provide insightful and thought-provoking content. Our journal stands as a testament to our collective intellectual pursuits and our desire to remain at the forefront of knowledge and innovation in our field. I am proud of the creativity and dedication of our authors, reviewers, and editorial team who have ensured that every issue is a valuable resource for our members.

As we move forward, let us continue to build on our strengths, nurture our shared values, and uphold the highest standards of professionalism and integrity. Our journey is a shared one, filled with opportunities to learn, grow, and make a difference. I invite all members to actively participate, contribute, and be part of the exciting future that awaits us.

In closing, I would like to extend my heartfelt thanks to each of you for your unwavering support, enthusiasm, and commitment to the ACAE. Together, we are not just a professional association; we are a family dedicated to achieving excellence.

With warm regards and best wishes,

CA Gopal Kr. Khetan
Chairperson - ACAE Journal Sub-Committee
+9199035 64214
journal.acae@gmail.com
gopal@khetangk.com

14th September, 2024

ACAE Journal Sub-Committee Members

CA Anup Kr. Luharuka

CA Devarshi Bhuwalka

CA Siddhant Jajodia

CA Renu Modi

Mentored by

CA H K Agrawal
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ACAE

Office Bearers

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About ACAE

ACAE was established on 26th August, 1960 when 30 illustrious academicians, some of whom were in service while others who were engaged in profession as Chartered Accountants and Advocates came together with a common goal of diffusion of knowledge

THE FUTURE OF THE AUDIT PROFESSION: EMBRACING BUSINESS ANALYTICS AND DATA ANALYTICS

Vivek Agarwal, FCA, FCS, Dip in IFRS (ACCA UK)

The audit profession is undergoing a transformative shift driven by advancements in technology, particularly in business analytics and data analytics. These tools are revolutionizing how auditors approach their work, enhancing efficiency, accuracy, and the ability to derive deeper insights. In India, the integration of analytics into the audit process is not just a trend but a necessity as businesses become more complex and data-driven.

As rightly said by **N. R. Narayana Murthy**, Co-founder of Infosys: "The real power of a technology lies in how it is used to solve the problems of society."

The Role of Business Analytics in Auditing

Business analytics refers to the process of using statistical methods and technologies to analyze business data. In the context of auditing, business analytics enables auditors to go beyond traditional sampling methods and perform a comprehensive analysis of the entire dataset. This shift from sample-based audits to data-driven audits allows for more thorough and accurate audits.

For example, in a traditional audit, an auditor might review a random sample of transactions to assess the accuracy of financial statements. However, this approach has limitations, as it may not capture anomalies or patterns present in unselected transactions. With business analytics, auditors can analyze the entire population of transactions, identifying trends, outliers, and inconsistencies that might indicate potential issues such as fraud, misstatement, or inefficiencies.

Data Analytics in Audit: A Game Changer

Data analytics is the process of examining large datasets to uncover hidden patterns, correlations, and other insights. In auditing, data analytics can significantly enhance the audit process by automating routine tasks, enabling continuous monitoring, and improving risk assessment.

One of the most compelling use cases of data analytics in auditing is the analysis of journal entries. Traditionally, auditors would manually inspect a selection of journal entries to ensure they comply with relevant standards. This method is time-consuming and prone to human error. However, with data analytics, auditors can quickly analyze all journal entries to identify unusual transactions, such as those that are manually posted, made outside regular working hours, or involve large amounts. Such transactions may warrant further investigation, allowing auditors to focus their efforts on high-risk areas.

Practical Examples in the Indian Ecosystem

Dr. A. P. J. Abdul Kalam, Former President of India once said "You have to dream before your dreams can come true." This emphasizes the visionary approach required to transform the audit profession through the adoption of new technologies like analytics. In the Indian context, the adoption of business analytics and data analytics in auditing is gaining momentum, particularly in sectors such as banking, manufacturing, and e-commerce.

About ACAE

ACAE was initially registered, under the name and style of "Association of Company Secretaries & Executives", under the Societies Registration Act, 1860.

1. Banking Sector: Indian banks deal with enormous volumes of transactions daily. By employing data analytics, auditors can efficiently analyze these transactions to identify patterns that may indicate money laundering, fraud, or other financial crimes. For instance, a sudden spike in transactions just below the reporting threshold can be flagged for further review.

2. Manufacturing Sector: In manufacturing, auditors can use business analytics to evaluate inventory management practices. For example, by analyzing historical data, auditors can identify discrepancies between inventory records and actual stock levels. This can help in detecting issues such as theft, waste, or inefficiencies in the supply chain.

3. E-commerce Sector: With the rise of e-commerce in India, companies generate vast amounts of customer and transaction data. Auditors can use data analytics to assess the accuracy of revenue recognition and the integrity of customer data. For instance, analytics can help in identifying fraudulent orders or returns, ensuring that the financial statements accurately reflect the company's financial position.

The Road Ahead

The future of the audit profession in India is closely tied to the continued advancement and adoption of business and data analytics. As these technologies evolve, auditors will need to develop new skills, including proficiency in analytics tools and techniques. Additionally, firms will need to invest in the necessary infrastructure and training to fully leverage the benefits of these technologies.

Ms Arundhati Bhattacharya, Former Chairperson of State Bank of India said, "The future belongs to those who prepare for it today", which can reinforce the idea that auditors must embrace analytics today to stay relevant in the future.

In conclusion, the integration of business and data analytics into the audit process is not just an enhancement—it's a transformation. By embracing these tools, auditors in India can provide more accurate, efficient, and insightful audits, thereby enhancing the overall integrity and trustworthiness of financial reporting. The future of auditing is data-driven, and those who adapt will be at the forefront of this evolving profession.

Glimpses of 65th Foundation Day Celebration

About ACAE

The name of ACAE was changed to "Association of Company Secretaries, Executives and Advisers" with effect from 31st January, 1968.

"AI ADOPTION: NAVIGATING THE NEW NORMAL"

Sumit Bihani, FCA
sumit.bihani@mbrm.in

"AI Adoption: Navigating the New Normal"

As the world continues to become more digital with the invent of AI tools like ChatGPT and by OpenAI in November 2022, business across the world continue to face pressure to embrace and adopt AI technology in their line of duties. Earlier this year, an International Monetary Fund (IMF) study found that almost 40 percent of global employment is exposed to Artificial Intelligence (AI).

This figure may grow in the coming years as technology continues to advance. The biggest concern amongst the world's workforce is AI's threat and ability to impact white-collar jobs – a category our profession finds itself in. While it is still early to determine the extensive impact of AI in the accounting profession, some studies indicate that an accountant's role is likely to evolve as AI becomes more integrated into our workday. Common repetitive tasks such as making Posting Entries, opening and closing accounts, balancing accounts, and reconciling errors, are likely to fall into the hands of AI.

Despite the pace at which AI is getting embedded in our work, we should remember the jobs which requires human judgement and to provide oversight would become more relevant.

To mitigate its impact and track its contribution, it will be important that we are mindful of the AI environment and adopt to changes.

Few of the Tools we can adopt in our profession to save time & Resources are:

GPT Models like of Chat GPT, Gemini & Claude which can analyse data at a higher speed and can help you summarise & compare documents, extract data and prepare insights. The paid version has added capabilities of making infographic, charts from the data long with several other capabilities at the same time can deal with higher volume of data.

ICAI GPT: ICAI on 1st of July has launched Beta Version of ICAI GPT which has 15 module and are trained on all the resources of published by ICAI. ICAI GPT provides you output from a limited information and as a result the quality of output is comparatively better. ICAI GPT is free for its members and can be logged on with Membership Number & an OPT @ https://ai.icai.org/cagpt/

My GPT: Paid version of Chat GPT enables you to train the GPT model with your own knowledge library and at the same time you can restrict it from giving output from the internet as a result the quality of output provided is comparatively accurate and training GPT model with your data improves performance over an period of time.

Copilot by Microsoft: Microsoft Copilot can be a boon to Senior Professional as well as they can use their experience & understanding of audit without knowing or learning the formula. Copilot can perform formulas on Prompt/Instructions given in normal language and as a result learning of the formula is not important.

Text to Video: There has been a change in the manner we learn & consume information. Learning from Video

About ACAE

The name of ACAE was subsequently changed to Association of Corporate Advisers & Executives, with effect from 2nd July, 1998.

and visuals have taken the front seat so with use of AI tools like Invideo.io and Veed.io we can create videos from our Knowledge Library, Audit programs and our learning resources which in will be much more engaging and effective at the same time we can create our learning management systems which can help us to navigate the challenge of employees turnover and learning. The AI feature embed in it uses visuals which related to the text increasing its impact.

PPTs with AI: With AI Tools like Gamma.ai you can transform your report in word file to a executive summary in PPT within few minutes which will saves time and create impact.

Flow Charts, Image: With AI tools one can transform the Text into flow charts or can even prepare images in few click which would resonate the subject or emphasise on the context.

Lets make most out of AI with a word of Caution "Make AI your slave to increase productivity not your Master"

About ACAE

The First President of ACAE was Sri S B Dandekar, Partner S B Dandekar & Co.


EXTERNAL COMMERCIAL BORROWING

"From Niche Financial Tool to Global Staple"

Niraj Kumar Harodia, Founder/Director, JPNR Corporate Consultants Pvt. Ltd.

Priti Kanodia, Senior Manager, JPNR Corporate Consultants Pvt. Ltd.

Evolution of ECB:

With the process of globalization, the facets of improvement in quality of life, such as "trade with other countries of the world" and "availing the technologies" which are abundant in a particular country got accelerated. With a zeal to excel, the quest for dominance on the world stage intensified, sparking and igniting within countries a drive to become a superpower. But the survival is possible only for those who prove that they are the fittest to survive. The key to survival is in the continuous growth and development of the economies.

In this high-stakes race for global dominance, third-world countries were not left behind. They swiftly entered the fray, striving to become competitive players on the world stage. By engaging in international trade and pursuing economic reforms, these nations sought to enhance their development and position themselves as key contenders in the quest for supremacy.

A country's economic development can be financed through domestic savings or by attracting foreign investment. When there is a shortfall between domestic savings and required investments, and foreign direct investment inflows are insufficient, a country may turn to borrowing from internal or external sources. In the wake of the Balance of Payments (BoP) crisis in the early 1990s, India embarked on a path of globalization and liberalization. This transition marked a significant shift in the composition of capital flows—from official transfers to private capital inflows. During this period, External Commercial Borrowings (ECBs) emerged as a central element of debt-creating capital flows, playing a crucial role in supporting India's economic growth.

Meaning & Relevance of ECB:

External Commercial Borrowings (herein referred as ECB), are commercial loans raised by eligible resident entities from recognized non-resident entities and should conform to parameters such as minimum maturity , permitted and non-permitted end uses, maximum all-in-cost ceiling , etc. The parameters apply in totality and not on a standalone basis.

Benefits of ECB:

(i) Introduction of Foreign Funds: ECBs by nature debt flows provide an additional source of funds for public sector undertakings and private corporates to finance new investments as well as expansion of the existing capacity when domestic sources fail to meet some of the requirements of funds for such purposes.

(ii) Advantage of Interest Rate Differentials: Domestic corporates take into account the advantages of interest rate differentials between domestic and international markets and opt for foreign borrowings accordingly.

About ACAE

ACAE's initial registered office was situated at 134/1 Mahatma Gandhi Road, Calcutta-700 007. It initially got changed to 4, Synagogue Street, Calcutta-700 001 and subsequently to 23A, Netaji Subhash Road, Calcutta-700 001 & then to 9 Dacres Lane, Calcutta-700 069 before relocating to its current address at 6, Lyons Range , Kolkata-700 001.

(iii) Portfolio Diversification: On the part of the lenders, interest rate differentials as well as the associated market risks and the need for diversification of portfolios play important roles in extending such debt funds to other countries.

(iv) **Does not dilute equity shareholding in a company:** External Commercial Borrowing (ECB) does not dilute equity shareholding because it involves raising capital through debt rather than issuing new shares. As a result, the ownership structure of the company remains intact.

Routes prescribed for ECB:

Under the ECB framework, ECB can be raised either under the automatic route or under the approval route.

(i) Approval Route: The prospective borrowers are required to submit an application to the Reserve Bank through their AD Banks for examination.

(ii) Automatic Route: For the automatic route, the cases are examined by the Authorized Dealer Category-I (AD Category-I) Banks.

Eligible Borrowers as per the ECB Framework:

FCY (Foreign Currency) denominated ECB	INR denominated ECB
All entities eligible to receive FDI. Further, the following entities to raise ECB: (i) Port Trusts (ii) Units in SEZ (iii) SIDBI (iv) EXIM Bank of India	(a) All entities are eligible to raise to raise FCY ECB. (b) Registered entities engaged in micro-finance activities, viz., registered Not for Profits companies, registered societies/trusts/cooperatives and Non-Government Organisations.
Foreign Direct Investment (FDI) means investment through equity instruments by a person resident outside India in an unlisted Indian Company; or in ten per cent or more of the post issue paid-up capital on a fully diluted basis of a listed Indian Company.	

Recognized Lenders as per the ECB Framework:

The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECB. However,

a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lender.

b) Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/ debentures listed abroad; and

c) Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for 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. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed

Notes:

(i) FATF Compliant Country: A country that is a member of the Financial Action Task Force (FATF) or a member of a FATF-Style Regional Body; and should not be a country identified in the public statement of the FATF as (i) A jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or (ii) A jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

(ii) IOSCO Compliant Country: A country whose securities market regulator is a signatory to the International Organisation of Securities Commission's (IOSCO's) Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with the SEBI for information sharing arrangements.

Minimum Average Maturity Period as per the ECB Framework:

MAMP for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:

Sr. No.	Category	MAMP
(a)	ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.	1 year
(b)	ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans	5 years
(c)	ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes	10 years
(d)	ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose	7 years
(e)	ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose	10 years

for the categories mentioned at (b) to (e) –

(i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks

(ii) the prescribed MAMP will have to be strictly complied with under all circumstances.

End Uses (Negative List):

The negative list, for which the ECB proceeds cannot be utilised, would include the following:

a) Real estate activities.

b) Investment in capital market.

c) Equity investment.

d) Working capital purposes, with certain exceptions.

e) General corporate purposes, with certain exceptions.

f) Repayment of Rupee loans, with certain exceptions.

g) On-lending to entities for the above activities, with certain exceptions.

About ACAE

In 1963, the ACAE leadership initiated a series of memorial lectures in honour of Shri J. P. Gupta, the Second President of ACAE (1963-64), who tragically passed away during his term.

Limit and Leverage: Under the aforesaid framework, all eligible borrowers can raise ECB up to USD 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.

Borrowings under ECB framework is broadly subject to following compliances under FEMA:

(i) Loan Registration Number (LRN): Any draw-down in respect of an ECB should happen only after obtaining the LRN from the RBI. To obtain the LRN, borrowers are required to submit duly certified Form ECB, which also contains terms and conditions of the ECB (Loan Agreement), in duplicate to the designated AD Category I bank.

(ii) 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 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.

(iii) 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 seven working days from the close of month to which it relates. Changes, if any, in ECB parameters should also be incorporated in Form ECB 2 Return.

Some Important Pointers:

a) Trade Credits beyond three years also take form of ECB.

b) ECB Proceeds are permitted to be parked abroad as well as domestically in the manner prescribed by RBI in the ECB Framework.

Conclusion:

External Commercial Borrowings (ECB) are set to play a pivotal role in the future of corporate finance by providing companies with access to international capital while preserving equity ownership. With the ability to tap into diverse global capital sources, companies can benefit from potentially lower borrowing costs and more flexible terms. As global markets continue to evolve, ECB is likely to remain a crucial tool for driving growth and enhancing competitive positioning, provided that companies effectively manage associated risks and regulatory requirements. While applying for ECB the companies need to be cautious about the exchange rate risk and impact on balance sheet debt to use ECBs effectively, the government too should not be unmindful of the dangers of increasing reliance on such borrowings with external risks.

Niraj Kumar Harodia
Founder/Director
JPNR Corporate Consultants Private Limited

Priti Kanodia
Senior Manager
JPNR Corporate Consultants Private Limited

About ACAE

Since 2005, following the demise of Sri Sukumar Bhattacharya, Association's founder Vice President and Former President (1964-65), in his honour, ACAE organises an annual memorial lecture on a topic of general public interest, known as the "Prof Sukumar Bhattacharya Memorial Lecture.

CONUNDRUM AROUND ADMISSION AND PAYMENT OF PROVIDENT FUND DUES AS PER IBC

Rohit Sharma, Partner, Consultepreneurs LLP, Advocates and Solicitors, Mumbai

Introduction

By way of a judgement dated 10.07.2024, in the matter of **Mr. Anuj Bajpai, Liquidator of Shirt Company (India) Limited vs. Employee Provident Fund Organisation & Ors.,** the Hon'ble National Company Law Appellate Tribunal, New Delhi Bench, has inter alia held that the claim amount of the provident fund department ("PF Department") will have to admitted in full by the liquidator, that is, the admitted claim of the PF Department shall include principal, interest, damages and penalties levied by the PF Department and the said admitted claim of the PF Department, should be kept out of the liquidation estate and be paid in priority over other creditors.

The author argues that the said proposition of law, in a way, will render a dominating position to the PF Department, for its claim pertaining to even penalties and damages, over other statutory creditor whose rank is much below the secured creditor as per Section 53 of the Insolvency and Bankruptcy Code, 2016 ("Code"). It is a settled position of law that the PF Department dues pertaining to workmen and employees is to be kept outside the liquidation estate and is to be paid in priority over other creditors. Pertinently, the restriction in law is limited to the dues pertaining to workmen and employees and not the dues which benefits the PF Department, as such.

However, the aforesaid judgement has held that the entire claim of the PF Department, including penalties and damages (which benefits the PF Department only), be excluded from the liquidation estate and be paid in priority, which seriously jeopardises the chances of recovery of claims of other creditors. The context of such jeopardy can be understood from an example being: suppose, a company, namely ABC Private Limited is under liquidation, having total admitted claims of 50 crores and PF Department dues stands at Rs. 10 crores. Now, if there are no available funds in a corporate debtor and the liquidator has been able to recover about 15 crores by liquidating the entire assets of the Corporate Debtor, then out of the recovered 15 crores, 10 crores will be paid to the PF department to satisfy its due and out of the remaining 5 crores, fees of the Liquidator will be paid and finally the remaining amount will be paid equally to workmen's dues and secured creditors, as per Section 53 of the Code. But if the total recovery is only 5 crores, the entire amount will be paid to the PF Department, leaving behind nothing to be paid towards CIRP and liquidation cost or towards secured creditors of a corporate debtor.

Law governing dues of PF Department

Section 36(4)(a)(iii) of the Code, states as follows:

XXX

Liquidation estate.-

XXX

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:-

(a) assets owned by a third party which are in possession of the corporate debtor, including –

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;

XXX

Section 36(4)(a)(iii) of the Code, states that the PF Department dues payable to employees or workmen is to be kept out of the liquidation estate and is to be paid in priority over other creditors and there is no specific provisioning in law for penalties and damages. While that being the case, claims lodged by the Provident Fund Department (PF department) does not only include principal and interest (as is the case in almost all claims lodged by creditors) but also includes damages and penalty for belated or non-depositing of the provident fund amount by the employer (corporate debtor). Further, in most of the cases, damages/ penalty is determined by the competent authority of PF Department after CIRP is initiated against a corporate debtor and just before filing of the claim. Section 7Q of The Employees' Provident Fund and Miscellaneous Provisions Act, 1952 ("EPF Act"), which states inter alia that the employer becomes liable to pay interest for belated submission of provident fund amount at the rate of 12% till the date of actual payment. While, Section 14B of the EPF Act grants power to the PF department to claim damages from the employer for default committed by the employer in depositing the provident fund amount.

Judicial precedence

The Hon'ble National Company Law Appellate Tribunal, New Delhi Bench, vide its judgement dated 19.08.2019, in the matter of **State Bank of India vs. Moser Baer Karamchari Union & Anr.,** had held inter alia that the amounts due to provident fund, gratuity fund and pension fund shall be kept out of the liquidation estate. While the said judgement dealt with the factual position of law regarding exclusion of provident fund, gratuity fund and pension fund out of the liquidation estate but the quantum of the amount to be admitted or rejected by an insolvency professional was not dealt with in the said judgement. Hence, the manner of admission of quantum of provident fund departments varied amongst insolvency professionals.

Further, in the matter of **Jet Aircraft Maintenance Engineers Welfare Association vs. Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd. & Ors.,** the Hon'ble NCLAT, vide its judgement dated 21.10.2022, held inter alia that the resolution applicant will have to pay entire admitted dues of the provident fund department including damages and penalty, in addition to the resolution amount which has been approved by the committee of creditors of the corporate debtor.

The said judgement gave food for thought to interested resolution applicants of a corporate debtor to have a prior understanding of any pending provident fund dues in a corporate debtor during corporate insolvency resolution process ("CIRP"), as the dues of the provident fund, as admitted by the resolution professional will have to be paid in full to the provident fund department in addition to the resolution amount for acquisition of the corporate debtor.

The judgement of **Jet Aircraft (Supra)** was further relied on by the Hon'ble NCLAT, Chennai Bench, while passing the judgement in the matter of **Mrs. C.G Vijaylakshmi vs. Shri Kumar Rajan, Resolution Professional of Hindustan Newsprint Limited & Ors.,** dated 08.02.2023, wherein the issue of maintenance of provident fund account by the erstwhile promoter/director for treating the dues of PF Department out of Section 53 of the Code, was held irrelevant.

In the meantime, a contradictory judgement came to be passed by the Hon'ble NCLT, Hyderabad Bench, in the matter of **Employees' Provident Fund Organisation vs. Kanakadhara Ventures Private Limited,** vide its judgement dated 26.02.2024, held inter alia that the

About ACAE

ACAE has a history of organizing debates, recognizing their vital role in professional and intellectual growth. The first **debate** organised by ACAE was held on February 15, 1967, discussing the intriguing topic "In the opinion of the House, Tax incentives and Concessions are Illusory.

preferential payments to PF department for its dues cannot be granted after the commencement of the liquidation proceedings against a corporate debtor. The Hon'ble NCLT, Hyderabad Bench placed reliance on the judgement of **Moser Baer** (Supra) and held that the Hon'ble Apex Court has categorically held in the said judgement regarding non-applicability of Section 326 of the Companies Act, 2013 (which offers preferential payments to workmen dues) during the liquidation of a corporate debtor. It was held that as there cannot be any preference granted to the dues of the PF department, its dues are to be considered in terms of Section 53 of the Code.

Conclusion

Section 36(4)(a)(iii) of the Code stipulates regarding exclusion of dues towards provident fund to be paid to employees or workmen, while the damages and penalty is purely for the benefit of the PF department, however, the Hon'ble NCLAT in **Anuj Bajpai (Supra)** has directed to admit the entire claim of the PF department, which puts the chances of recovery of dues by the secured creditors also in jeopardy, let alone chances of recovery to operational creditors. Further, the major repercussion due to the judgement in **Anuj Bajpai (Supra)** is to be faced not only by the creditors of the corporate debtor, but also by the liquidator of a corporate debtor.

In the humblest opinion of the author, since the inception there has been numerous amendments/ notifications which has been bought out by the Insolvency and Bankruptcy Board of India, while none of which aided the cause of the operational creditors. Now with the judgement of **Anuj Bajpai (Supra)** in place, not only is the cause of operational creditors in jeopardy but also hampers the chances of recovery for secured creditors of a corporate debtor.

Further, it cannot be gainsaid that while the entire CIRP proceeding/ liquidation proceeding is conducted by the members of the committee of creditors/ stakeholders' consultation committee and resolution professional/ liquidator of a corporate debtor, but in case of lesser recovery than the admitted dues of the PF department, these creditors or insolvency professionals will not receive a single penny for all the efforts. This proposition of law sets the entire liquidation process of a corporate debtor in dilemma, for on one hand insolvency professionals would not be willing to take up any litigation matter as no fees maybe paid to the insolvency professional for the liquidation period and on other hand, the secured creditors may choose to realise its security interest on their own. The position of PF department dues during CIRP and liquidation, has to be settled at the earliest in order to strengthen the confidence of the stakeholders.

Glimpses of 64th Annual General Meeting

About ACAE

At ACAE we believe that both knowledge and fellowship events are pivotal in cultivating a culture of continual learning, collaboration, and community within diverse professional and academic settings. Participants not only derive value from the content presented but also from the relationships and experiences forged during these occasions.

Intellectual Exchange : Capturing the Energy of our Annual Conference

6th July, 2024, Dhano Dhanyo Auditorium

ACAE Annual Conference - Glimpse of the Play - "Life after Death"

Annual Conference - Cultural Evening with Bollysufi and DJ Noni !

GST CONCLAVE

27th July, 2024,
THE PARK, Kolkata

Lighting of lamp by Chief Guest Shri. D.P.Karanam, IAS, Commission, WBGST

Second Technical Session by CA. (Advocate) Jatin Harjai

Third Technical Session by CA. Ashok Batra

Panel Discussion in progress (L-R) CA. Rohit Prasad, Organiser, CA. Rajarshi Dasgupta, Head-Taxation, Aquilaw, Panelist, CA. Pramod Gupta, CFO, Haldia Petrochemicals, Panelist, Shri. Manoj Kedia, Principal Commissioner, Kolkata North Commissionerate, CGST, Panelist, CA. Shagun Tulsyan, Head-Taxation, Emami Ltd., Panelist, CA. Arun Kr. Agarwal, Practicing Chartered Accountant, Moderator and CA. Priyanshi Agarwal, Organiser

Group Photo

Launch of Souvenir by Chief Guest and other dignitaries

The Team Behind

Fourth Technical Session by Mr. Atul Tripathi

Felicitation of CA. (Advocate) Bimal Jain, Speaker

About ACAE

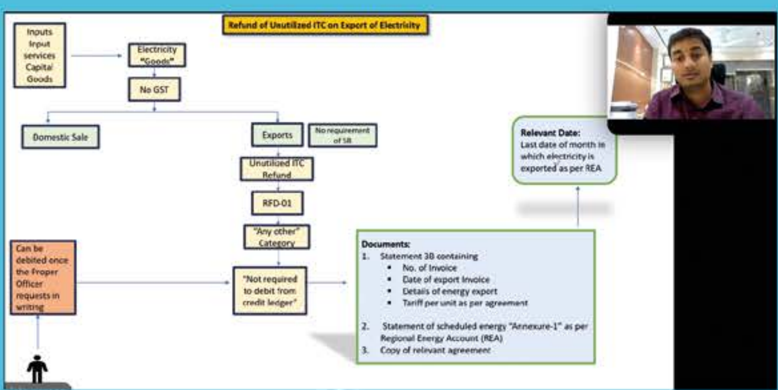
ACAE's inaugural academic cum fellowship residential event was held from 9th to 16th January 1984, drawing around 40 members, along with their families. This immersive event spanned three foreign locations—Kuala Lumpur, Singapore, and Bangkok.

Certificate Course on GST, 2024 (Litigation Series)

In Association with Indirect Tax Professionals Forum, Kolkata and Society for Tax Analysis and Researches

10 Days
Speakers
Advance Litigation Topics

More than 150 Participants



We are delighted to announce the launch of ACAE Debate, an initiative designed to encourage all our members to embrace the art of debating, aimed at enhancing public speaking & interpersonal skills. Language is no barrier—this initiative is open to all our members.

Debate

ACAE GALLERY

Lecture Meeting on recent changes related to Income Tax in Trusts held on 4th September, 2024
(L-R) CA. Nilima Joshi, Member, CA. Ayush Jain, Deputy Convenor, CA. Tarun Kr. Gupta, Convenor and CA. Suresh Kejriwal, Speaker

Lecture Meeting on recent changes related to Income Tax in Trusts held on 4th September, 2024
(L-R) CA. K.M.Tibrewal, Member, CA. P.R.Kothari, Speaker and CA. Suresh Kejriwal, Speaker

Meeting on Union Budget Organised by EIRC Of Icai With All Study Circles Held on 1st August, 2024 At Mahajati Sadan

Meeting on Union Budget Organised by EIRC Of Icai With All Study Circles Held on 1st August, 2024 At Mahajati Sadan
Members participating in the Budget Meeting

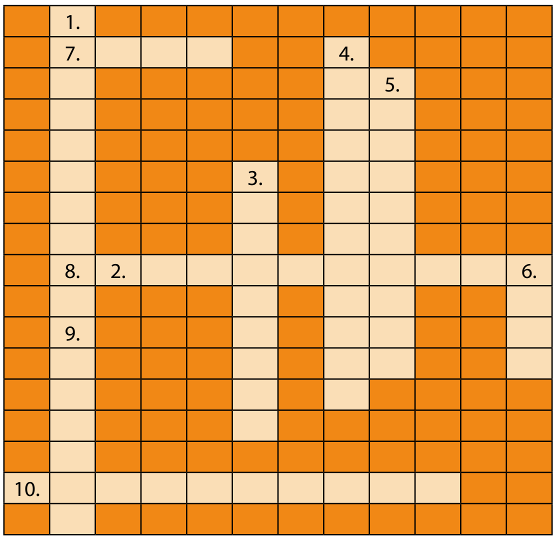
Lecture Meeting on Peer Review and Code of Ethics held on 30th August, 2024
(L-R) CA. Ayush Jain, Deputy Convenor, CA. Ravi Patwa, Past Chairman, EIRC of ICAI, Speaker and CA. Tarun Kr. Gupta, Convenor

Lecture Meeting on Peer Review and Code of Ethics held on 30th August, 2024
(L-R) CA. Ayush Jain, Deputy Convenor, CA. Sandip Dey, Speaker and CA. Ravi Patwa, Past Chairman, EIRC of ICAI, Speaker

ACAE GALLERY

Lecture Meeting Held on 12th July, 2024 on Income Tax
(L-R) CA. Tarun Kr. Gupta, Convenor, CA. Sanjay Bhattacharya, Speaker, CA. Ayush Goel, Speaker and CA. Ayush Jain, Deputy Convenor

EIRC Regional Conference Held at Milan Mela Ground on 23rd to 24th August, 2024
ACAE Chartered Accountants CPE Study Circle being felicitated by Chairman, EIRC of ICAI, CA. Sanjib Sanghi for the support in organizing the Regional Conference



Down

1) A person to whom a financial debt is owed.
2) An insolvency professional appointed by the Adjudicating Authority to manage the affairs of the corporate debtor during the period between admission of insolvency application and appointment of a resolution professional.
3) Transactions that can be set aside by the Adjudicating Authority if they were made with the intent to defraud creditors or prefer certain creditors over others, during a specified period before the insolvency commencement date.
4) The authority responsible for deciding whether a corporate debtor should be admitted into the corporate insolvency resolution process.
5) The process of finding a solution to the insolvency of a company, either through insolvency resolution or liquidation.
6) The forum where insolvency resolution and bankruptcy proceedings for corporate persons are adjudicated and managed as per the IBC.

Across

7) The regulatory body responsible for implementing and regulating the insolvency resolution and bankruptcy process in India under IBC.
8) A process where the assets of a company are realized and distributed among its creditors after the company is declared insolvent.
9) An independent professional appointed to manage the affairs of the company during the corporate insolvency resolution process.
10) A period during which no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the corporate debtor.

Contributed by
Rashmi Chhawchharia

Crack the Crossword Puzzle and forward your solutions via email to journal.acae@gmail.com within 31st Oct, 2024. The first three correct responses to each puzzle will earn the privilege of having their names along with correct answers featured in our next issue.

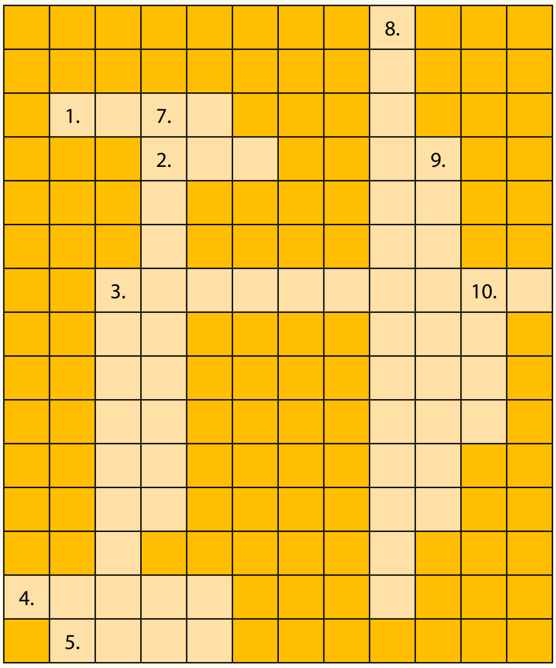
Across

1) The type of tax treaty provision that seeks to prevent double taxation by allowing a deduction or tax credit for taxes paid in a foreign country.
2) A method under transfer pricing that compares the gross profit margin of a controlled transaction to similar uncontrolled transactions.
3) The rules for division of income and expenses among different jurisdictions based on the functions performed, risks assumed, and assets used.
4) A tax regime applied to profits shifted to low or no-tax jurisdictions to ensure a minimum level of tax.
5) An approach to determine transfer pricing that uses financial data from comparable companies to set arm's length pricing.

Down

3) The process of dividing a multinational company's global profit among the jurisdictions where it operates based on some objective criteria.
7) The principle that suggests related parties should price their transactions as if they were independent entities.
8) This occurs when two or more tax jurisdictions claim tax on the same income, resulting in a higher tax burden.
9) The country where a multinational enterprise is subject to tax on its worldwide income.
10) The organization that provides the Model Tax Convention on Income and Capital to avoid double taxation.

Contributed by
Sandeep Khemka



The Genius minds who could decode our mind bending clues are:

GST Crossword :

Preeti Modi, Iti Agarwal and Manav Chhawchharia

Company Law Crossword :

Nikhil Jajoo, Shweta Dalan and Vinay Kr Agarwal

Below are the answers to the previous crosswords are:

GST Crossword: (1)Zerorated (2)Concessional (3)Hotel (4)LGW (5)Jobworker (6)13 (7)GSTINS1 (8)Ewaybill (9)BhartiAirtel (10)Normal

Company Law Crossword: (1)Adjourned (2)Minutes (3)Resolution (4)Secretary (5)Arbitration (6)Private (7)Director (8)Proxy (9)Agenda (10)Quorum

ASSOCIATION OF CORPORATE ADVISERS & EXECUTIVES

(Registered under the Societies Registration Act, 1860)

An ISO 9001 : 2015 Certified Organisation

6, Lyons Range 3rd Floor, Unit - 2, Kolkata - 700 001

Phone : +91-33-2210-7724, +91-33-4060-8353, 93305 71824

E-mail : info@acaekolkata.org • Website : www.acaekolkata.org

GSTIN : 19AAATA7029F1ZV

ACAE — Work is Worship — ESTD. 1960

2 pcs Passport Colour Photograph

APPLICATION FORM FOR MEMBERSHIP

To
The General Secretary,
Association of Corporate Advisers & Executives
6, Lyons Range, 3rd Floor, Unit - 2
Kolkata – 700 001

FOR OFFICE USE ONLY

Date of Receipt ______________________

Membership Approved on ______________________

Membership No. Allotted ______________________

Chairperson
Membership Development Sub-Committee

General Secretary

Dear Sir,

Please **ENROL** me / us as a **LIFE / GENERAL MEMBER** of the Association. **I** / We agree to abide by the Memorandum and Rules & Regulations of the Association.

1. Name in Full (IN BLOCK LETTERS) : ______________________
2. Father's Name : ______________________
3. Date of Birth : ______________________
4. Academic and / or Professional Qualifications : ______________________
5. Occupation : ______________________
6. Name of the Concern with which associated : ______________________
7, GSTIN : ______________________
8. Designation : ______________________
9. CA / CS / ICWAI Membership No. : ______________________
10. Blood Group : ____________ (Self) ____________ (Spouse)
11. Date of Marriage : ____________ Name of Spouse ____________
12. Office Address : ______________________
____
13. Resident Address : ______________________
____
14. Telephone (Nos.) : (Off.) : ____________ (Resi.) : ____________ Fax : ____________
Mobile : ____________ E-mail : ____________
15. Address where Circular etc. should be sent : ☐ Office ☐ Residence

I am / We are sending herewith Rs. ____________ (Rupees ______________________)

by Cash / Cheque No. ____________ Dated ____________ Drawn on ____________

towards ☐ Life Membership ☐ General Membership.

Place : ____________

Date : ____________

____
Signature of the Applicant

Proposed By : Name : ______________________

ACAE Membership No. : ____________ Signature : ____________

Seconded By : Name : ______________________

ACAE Membership No. : ____________ Signature : ____________

NOTES : *1. Fee for Life Membership Rs. 11,800/- (for individuals only) (inclusive of GST)*

2. Fee for General Membership :

a) Annual Subscription Rs. 8850/- and Admission fees Rs. 8850/- (For Firm and Body Corporate) (inclusive of GST)

b) Annual Subscription Rs. 1770/- and Admission fees Rs. 1770/- (for individual) (inclusive of GST)

c) Annual Subscription will be half, if Membership Commences after 30th September of the year in which the membership is approved.

*3. Cheques should be drawn in favour of **Association of Corporate Advisers & Executives.***

You can also fill the form online at :
https://acaekolkata.org/acaemembership

New Theme Song (Hindi)

निष्काम तू जो कर्म कर
विश्वास हो जो धर्म पर
हर नियति में हो गति
जग जीत ले तू

हो हौसला चट्टान सा
हो श्वास में तूफान सा
मझधार को अब पार कर
जग जीत ले तू

तू विश्व में उदघोष कर
अब हर हृदय में जोश भर
पहचान तू जो लक्ष्य है
जीवन तेरा उत्कर्ष है
जग जीत ले तू!

हो सत्य निष्ठ तेरी डगर
हो रौशनी हर राह पर
अब बस यही पैगाम दे
सृष्टि नए आयाम ले
जग जीत ले तू... जग जीत ले तू.....

New Theme Song (dialect in English)

Nishkaam tu jo karm kar
Vishwas ho jo dharm par
Har neeyati mein ho gati
jag jeet le tu

Ho haunsla chattaan sa
Ho shwaas mein toofaan sa
Majhdhaar ko ab paar kar
jag jeet le tu

Tu vishwa mein udghosh kar
Ab har hriday mein josh bhar
Pehchaan tu jo lakshya hai
Jeevan tera utkarsh hai
Jag jeet le tu!

Ho satya nishth teri Dagar
Ho raushni har raah par
Ab bas yahi paighaam de
Srishtii naye aayaam le
Jag jeet le tu... Jag jeet le tu....

English Translation

“Perform actions with integrity,
Have faith in righteousness.
Let there be momentum in
every intention,
Achieve greatness, O you!

Let your courage be like a
mountain,
Let every breath be courageous.
Cross the tides with honesty,
Achieve greatness, O you!

Declare in the world,
Fill every heart with
enthusiasm.
identify the goal to be achieved,
Your life is excellence.
Achieve greatness, O you!

Let truth be your path,
Let there be light on every road.
Now, give this message:
Embrace a new dimension,
Achieve greatness... Achieve
greatness, O you!"

Singer:	Sukrit Sen
Composer:	Palaash Chaturvedi
Chorus (Female):	Ms. Neetu Gupta Ms. Sonia Khator Ms. Chandana Dixit
Chorus (Male):	Mr. Sumit Binani
Recorded at:	Studio Royz, Kolkata