



INSIDE THIS EDITION

FOREIGN EXCHANGE REGULATION ACT (AMENDMENT) 2015 – ADDITION TO FOREIGN INVESTMENT FRIENDLINESS... 1

CHANGES IN LAWS RELATING TO POWER OF ATTORNEY ACT. 2

RECENT CHANGES IN LABOUR LAWS OF BANGLADESH 2

TRANSFER PRICING BANGLADESH: A YEAR IN REVIEW 3

METRO RAIL ACT 2015 – OPENS NUMBERS OF DOORS FOR FDIS 4

THE AMENDMENTS OF FREIGHT FORWARDERS (LICENSING AND OPERATIONS) RULES 2008 4

ICT (AMENDMENT) ORDINANCE 2013..... 5

THE EXEMPTION TO FOREIGN COMPANIES AND JOINT VENTURE COMPANIES WITH FOREIGN INVESTMENT FROM OBLIGATORY CONVERSION FROM PRIVATE LIMITED COMPANY TO PUBLIC LIMITED COMPANY FOR EXCESSIVE PAID UP CAPITAL 6

TOBACCO CONTROL LAW & SMOKE-FREE ENVIRONMENT .. 7

FOREIGN EXCHANGE REGULATION ACT (AMENDMENT) 2015 – ADDITION TO FOREIGN INVESTMENT FRIENDLINESS

The increasing globalization has led to a massive growth in the number of foreign transactions in recent times. The foreign exchange market, globally, experiences transactions of trillions of dollars on a daily basis. Foreign exchange transactions encompass many things, starting from billion-dollar payments made by business conglomerates, corporate giants and governments for goods and services purchased from overseas to the conversion of currencies by a traveler at an airport. Bangladesh inherited its Foreign Exchange Regulation Act 1947 (hereinafter referred to as “Act”) from the British Government. The Act, prior to the most recent amendment, was modified couple of times; the changes made the law definite in respect of Bangladeshi citizens, but uncertainty continued when it came to foreigners living in the country.

On 9th September 2015 the Foreign Exchange Regulation Act, 1947 has again been amended. Through this recent amendment, certain unnecessary or burdensome requirements for investors and other stakeholders have been abolished.

Previously most of the business entities had to obtain permission under section 18A of the Act from the Bangladesh Bank for their expatriate employees for their employment in Bangladesh and remittance purposes; however, this provision has

been replaced by other provision. Now such onus to take permission is not on the entities; rather imposed directly on the subscribing bank.

Any foreign establishment, who is willing to introduce its branches or liaison offices in Bangladesh, does not have to give any prior information to the Bangladesh Bank, as it was regarded before. Such establishment will be able to start its work once the Board of Investment of Bangladesh gives its permission. But establishments will have to inform the Bangladesh Bank within a month eventually.

The current legislation also moves forward to treat both Bangladesh citizens and foreigners on same proportion in various aspects. For instance, the government may require both residents of Bangladesh and foreigners to provide details of their assets, immovable and other property, they have in abroad. The Bangladesh Bank now has the power to seek detailed information about foreign currency holdings and investments in foreign securities from both Bangladesh nationals and foreigners living in Bangladesh.

Such amendment would certainly encourage foreign investments in Bangladesh by easing and smoothen foreign investment procedure; consequently, expand the international trade.

-by Sadia Sarah Ruchi

CHANGES IN LAWS RELATING TO POWER OF ATTORNEY ACT

The Power of Attorney is a legal document that gives an individual the power to act on behalf of another person or another entity executing the power of attorney.

The new wave in laws relating to the power of attorney came in force when Power of Attorney Act, 2012 was enacted. Previously, the power of attorney could be executed in favour of an individual without being mandated by specific regulations or particular formats, but after the incorporation of the said Act, the scenario was quite heavily altered.

When an individual residing outside Bangladesh wishes to execute power of attorney and make someone a constituted attorney in Bangladesh, then the executor will have to comply with the Power of Attorney Act, 2012 read with Power of Attorney Rules, 2015. As per the law, it has to follow Schedule "Ka" of Form 3 for executing the power of attorney. Both the person who is executing the power of attorney and the constituted attorney would have to attach their recent passport size photographs with the power of attorney and will have to attest the same by putting signature and thumb impression on it. The same will then have to be executed in the presence of appropriate officer; which in the context of individuals residing outside of Bangladesh is the concerned officer of the Bangladesh Consulate. The executed power of attorney will thereafter be sent to Bangladesh. Within two months of reaching Bangladesh, it has to be submitted to the Ministry of Foreign Affairs for its attestation and then duly stamped within three months. In cases where the power of attorney is required to be registered, it shall be submitted to the concerned sub-registry office within four months from the date on which the power of attorney was received in Bangladesh.



Moreover, if an individual wishes to use a registered power of attorney in abroad, then there are specific rules and regulations that have to be complied; without which the power of attorney will not be of any use. As per the said Act, such registered power of attorneys will have to be notarised under the Notaries Ordinance 1961.

The laws relating to Power of Attorney have taken a structured outlook which addresses many issues of concern and effectively avoids complication to arise. For example, the newly promulgated Power of Attorney Rules, 2015 expressly lists out all the scenarios where the power of attorney cannot be provided to individuals. Such limitations include the execution of will, execution of power pertaining to adoption, execution of gifts and trust instruments.

A feature that is worth mentioning about the new law is how simply

a power of attorney can be terminated. It is quite obvious that if both the executor and the constituted attorney agree to terminate, then the document can be terminated. However, in case of general power of attorney, either of the parties can terminate the power of attorney in accordance with the termination provision contained in the power of attorney.

So, the new laws have been successful in catering to the purposes behind executing power of attorneys. The new addition of rules and regulations might have made the process slightly laborious but the broader perspective behind this, was to protect the intentions of the executor of power of attorney and make the documents independent of any complications or ambiguity.

– by Syeda Faiza Hossain

RECENT CHANGES IN LABOUR LAWS OF BANGLADESH

The Parliament of Bangladesh has passed the much awaited Labour Rules 2015. Now, as per the Chapter 10, Rule 111 of Bangladesh Labour Rules, 2015, workers employed in every factory or establishment who have completed one year of their employment continuously, shall be provided two festival bonuses in every year, subject to the fact that the festival bonus shall not be more than the monthly basic wages. It shall be considered as additional to wages.

Other provisions include amendments in relation to resolution of conflicts between workers and the employers. As per Rule 366 of Bangladesh Labour Rules, 2015, if a worker is treated unfairly by another worker or the employer of the establishment, an application has to be submitted to the Director of Labour or any officer empowered by him within a span of thirty days of receipt of such application. Resolution of conflicts over any legal issues including financial ones are to be resolved through arbitration. Both parties can file a case at the Labour court in case they are unable to reach mutual settlement.

The amended Labour Law introduces compulsory group insurance policies for workers in Rule 98 of Bangladesh Labour Rules, 2015. Group insurance of the workers has been made mandatory for companies with minimum 100 workers. In order to introduce

such insurance, the employer may enter into a contract with any existing established insurance company in the country approved by the Government. The Rules instruct all employers to pay the annual premiums of such insurance and make sure that no minute deductions can be made from the wages of the workers because of the mandatory group insurance policy.

This particular rule acts like a shield for all workers as it further

- by Sarjean Rahman Lian and Nadim Abdullah

entails that, in case of expiry of the worker for any reason during his employment, the money generated from such insurance shall be deposited directly to those nominated by the worker or his legal successor. The Rules have further stated that such annual premiums and the insurance money will not be subject to any income tax requirements.



Chittagong Office, Posterpar Jame Masjid Complex, 2nd Floor, Dewanhat, Chittagong, Bangladesh.

Phone: +880 2 9853440, +880 31-2517044

TRANSFER PRICING BANGLADESH: A YEAR IN REVIEW

Transfer pricing ("TP") is the determination of price for goods and services sold between entities within an enterprise/ group of companies. In order to avail tax advantages entities within a group may trade products to related entities/associated enterprises. This may result in tax avoidance by lowering profit in an entity subjected to high tax rate and raising profits to entities enjoying tax haven. Consequently, tax authorities may lose taxable revenues for transfer mispricing and due to which TP regulations came into force in Bangladesh from 1st July 2014. As per Washington-based Global Financial Integrity, Bangladesh is losing USD 1.8 billion every year through capital flight. Furtherance, it is to be noted that the TP regulations in Bangladesh are yet to be applicable for local entities doing business in local ambit, so it is safe to comment that the TP regulations has been implemented primarily for the prevention of such capital flight to foreign countries. Thereby, any entity situated in Bangladesh who is submitting corporate tax return in 2015 and onwards and has entered into international transactions over BDT 30,000,000 (approx. USD 380,000) needs to comply with the transfer pricing regulations as listed in Chapter XIA of Income Tax Ordinance 1984.

During the assessment procedure of an entity, generally the tax authority keeps an eagle eye for the following characteristics of the return which are:

- Price of products/services deviated from the market price.
- Gross profit rate is too low compared with industry average
- Ratio of shared expenses with associated enterprises is too high.

In determination of pricing for international transactions this is to be done at arm's length price, i.e. fair market value. In addition to OECD's five globally recognized methods of determination of arm's length price, the ITO 1984 also incorporates another method by virtue of which entities have been allotted the freedom to apply a method provided that such method yields a result parallel to the arm's length method.

The key requirements that an entity is required to follow are:

- Maintenance and keeping of information, documents and records pertaining to the international transactions and group profile (when international transactions exceed USD 380,000 in the income year) for a period of eight years from the end of the relevant assessment year.
- Furnishing of Statement of international transaction to the income tax authority at the time of submission of the corporate income tax return.
- Certificate from a certified accountant when the aggregate value of international transactions exceeds USD 380,000.

The amount of penalty for non-compliance ranges from 1-2% of the value of the international transactions.

Amongst some criticisms of the new TP regime, noteworthy are that the applicability of the TP has not been adequately advertised amongst the business



sector of the country as a result of which many entities are still in the dark. Furtherance, National Board of Revenue (NBR) has arranged very few training schemes to make the public, investors, taxpayers, professionals and particularly assesses of local enterprises to be acquainted with the system and its easy application. As a result the stakeholders are mostly relying on the OECD and UN transfer pricing model. Besides, the transfer pricing cell is still inadequate to provide the infrastructural support required to apply the TP requirements, as a result of which several misunderstandings have arisen between the stakeholders and the NBR.

The transfer pricing regulation in Bangladesh is still in its preliminary stage and not conclusive and is seeing

changes with the implementation of Finance Act every year. One penalty provision was inserted by the Finance Act 2015 and other provision of reporting requirement modified by the same Act. Currently the NBR is showing leniency and being flexible regarding the TP regulations to allow the entities to get acquainted. But there is still significant concern that the TP regulations will result in unnecessary bureaucracy because of the already existent procedure of s. 82 C (Final discharge of tax liability) and the minimum tax imposed on entities which is being imposed on the revenue regardless of the profit or expenses.

by Belal Chowdhury



METRO RAIL ACT 2015 – OPENS NUMBERS OF DOORS FOR FDIS

Dhaka, the capital of Bangladesh, is one of the most densely populated cities in the world. The huge population has meant a huge influx of vehicles. However, the number of roads has not increased at the same rate as the population. With a collaboration between Bangladeshi Government and Japan International Co-operation Agency (JICA) a 20.1 kilometer long metro rail is going to be built to cater the need of the commuters. This will be known as the Mass Rapid Transit (MRT) line 6 and it will be the first and the most advanced mass transport system in Bangladesh. In this regard, the Metro Rail Act, 2015 (hereinafter referred to as "Act") has been passed by the Parliament of Bangladesh with a view to ease the perplexity of traffic congestion and providing fast and reinforced public transport service in the capital, improving the city's exploding traffic gridlock.

The Metro Rail is a project of huge investment; it encompasses many opportunities for local and/or foreign companies. The Act also encourages the prospect for working in Public Private Partnership (PPP). Since there are several divisions of the project, opportunities emerge for local or foreign companies dealing with constructions, developments, administrations and managements, equipments or installations of instruments. But it needs to be noted that neither any company will be eligible to construct, develop, and provide service, nor install any machines or equipment, without obtaining the license from the Selection Committee set by the Government. Based on the procedure set out on the Legislation, the Selection Committee, who will



have the power to issue, renew, suspend or cancel license, will be responsible for making recommendations of the companies, who submit their documents in the pre-qualification tender phase for license.

Insurance would play an important role in terms of administrations and managements of the Metro Rail, once the project is implemented. The companies, who would obtain the license for administrations and managements they must insure the Metro Rail, passengers and any third party so that in case of any accident the companies can compensate accordingly. In case of failure to insure the Act has specified provisions for stringent penalties.

The whole project of Metro Rail shall be under constant supervision of an Inspector appointed by the Dhaka Transport Coordination Authority (DTCA), who will prepare reports based on his

findings. If the licensee is aggrieved by any orders given based on the report, he/she will be able to Appeal against the report of the Inspector within a specified period of time.

This project, besides easing transport facilities and reducing traffic congestion, is going to open up great deal of business opportunities both in pre and post-construction stages. However, the picture is not much clear to all sects of the society. It is high time that the Authorities come up with constant updates, letting both the local and expatriate investor or companies know about the spacious project along with all its small details, to increase and attract more scope of foreign investments in the country.

- by Mohammad Nafiu Alam

ICT (AMENDMENT) ORDINANCE 2013

The ICT (Information and Communication Technology) Act 2006, a law designed to combat cybercrimes, was passed by the Bangladesh National Parliament on 8th October 2006 and under this Act, the provisions were counted as non-cognizable and hence the police or the law enforcers could not arrest anyone without the prior approval from an authority or court and it further stipulated that the police cannot lodge any case for a non cognizable offence. Section 57, the most criticized provision of the 2006 Act stated that if any person deliberately publishes any material in electronic form that causes to deteriorate law and order, prejudice the image of the State or person or causes to hurt religious belief the offender shall be punishable with imprisonment for a term which may extend to 10 years and with fine which may extend to Taka 1 crore. Several human right activists considered this provision as an infringement of the right to freedom of expression.

Afterwards the ICT Act 2006 was made stricter by the Government when they approved the proposed draft ICT (Amendment) Ordinance 2013. Under the new Ordinance, the law enforcers have been empowered to arrest any

person without any warrant and has increased the maximum punishment for violation of section 57 of the 2006 Act to 14 years from 10 years. The offence has also been categorized as cognizable and non-bailable which means the police can make arrests without any judicial warrant and bail can only be granted at the discretion of the High Court Division of the Supreme Court.

Section 57, the most criticized provision of the 2006 Act stated that if any person deliberately publishes any material in electronic form that causes to deteriorate law and order, prejudice the image of the State or person or causes to hurt religious belief the offender shall be punishable with imprisonment for a term which may extend to 10 years and with fine which may extend to Taka 1 crore.

comprehend whether a comment posted on the internet is derogatory or not and it would give the police officers an unfettered power to interfere in citizens' personal lives. It also can be said with some conviction that it is a total question of our morale that by seeing something on the internet, some might react and some might discard it from their mind so by stating in the Section 57(1) of the 2006

The new draconian 2013 Ordinance would not have created such concern if our law enforcers were professional enough or could work out of political influence. There is no assurance that the law will not be abused. The police force may lack the educational and technical expertise to

Act, that anyone who can influence another person's perspective seems to have made the section completely ill founded. It will constrict freedom of thought and thereby democracy. The 2006 Act has already taken toll on journalists, bloggers, human rights defenders and even social media activists, specially Facebook users.

Article 57 of the 2006 Act was quite contentious as it will not be possible to decipher by the law enforcers that whether a writing published on internet can create the possibility of hurting someone's religious belief or deteriorate law and order because then anyone may be culpable without even knowing about it. Hence this conclusion can be drawn that citizens should also write or post comments on internet very responsibly and not abuse their right to freedom of expression and simultaneously, the government should also take sufficient care to ensure that innocent citizens are not made victims of this law. Since the Act has imposed extreme punishment provision for the suspects, hence a responsible behavior from both the citizens and the government will make the ICT more effective and the laws of the Act should be further well balanced so that no one can use it as a tool for oppression.

- by Anam Hossain

THE AMENDMENTS OF FREIGHT FORWARDERS (LICENSING AND OPERATIONS) RULES 2008

In the international arena, the Freight Forwarders are practicing the international rules and norms abiding by the legal provisions of the country of origin concerned. In Bangladesh a good number of Freight Forwarders are also operating and contributing to the country's export-import business, with their valuable services and the freight forwarding business is governed by the Freight Forwarders (Licensing and Operations) Rules 2008. According to this law the Freight Forwarders need to apply for the license and after fulfilling the necessary provisions they get license from the National Board of Revenue (NBR). Currently, there are a total of 878 freight forwarding companies in Bangladesh, out of which 30 companies either are fully foreign-owned or have foreign investment.

The NBR recently has imposed several restrictions through amending the existing Freight Forwarders (Licensing and Operations) Rules-2008 to promote domestic companies by issuing a statutory regulatory order, customs SRO No. 206-AIN/2015/43-Customs, on 1st July 12, 2015. According to the new rules, companies with full foreign ownership are barred

from obtaining license. Moreover, for joint venture companies the required portion of share for foreign companies have been reduced from 49% to 40% and that of local companies have been increased from 51% to 60%. However, the existing foreign owned companies will not come under these rules. The amended rules allow investment of security deposit amounting to BDT 3,00,000 (Taka Three Hundred Thousand) in saving certificates instead of bank guarantee while obtaining license and the term of the license has been increased from 2 years to 4 years. The Freight forwarding companies, under the new rules, needs to pay BDT 5,000 (Taka Five Thousand) plus VAT through treasury challan or bank draft or pay order to the concerned custom house or custom station's licensing authority along with the copy of original license and an application for renewal in order to renew the license.

The clearing and forwarding (C&F) and shipping business rules have also been amended. According to the new rules fully foreign owned companies cannot invest in C&F and shipping businesses. Under the amendments, a freight forwarding

licensee needs to pay BDT 10,000 (Taka Ten Thousand) if it wants to operate in other customs houses which are not mentioned in the license.

It is argued that these amendments will have adverse effect on the Foreign Direct Investment (FDI) as these restrictions on foreign companies will give wrong message to the foreign investors. However, according to the local companies, the freight forwarding business is a low-asset based service industry through which the country cannot fully get the benefit of FDI. This is because before the new amendments were made, fully foreign freight forwarders can get license by only bringing foreign currency equivalent to BDT 10000000 (Taka Ten Million) and providing bank guarantee of US\$ 500000 (Five Million US Dollar) in favour of customs authorities. The local entrepreneurs claim that they have adequate capacity to handle the freight forwarding business in Bangladesh.

- by Nadim Abdullah



TABIBUR RAHMAN FOUNDATION

Empowering Poverty

House No.50, Flat - A4, Road No.1, Block- 1, Banani, Dhaka.
Phone: +880181921200 2
Email: sabrina.zarin@gmail.com.

THE EXEMPTION TO FOREIGN COMPANIES AND JOINT VENTURE COMPANIES WITH FOREIGN INVESTMENT FROM OBLIGATORY CONVERSION FROM PRIVATE LIMITED COMPANY TO PUBLIC LIMITED COMPANY FOR EXCESSIVE PAID UP CAPITAL

Bangladesh, as a developing country, considers Foreign Direct Investment (FDI) as a crucial ingredient for economic development. Bangladesh aims to join middle income countries by 2021, in this regard, promotion of FDI is indispensable. However, this vision is not getting the full support from the laws governing FDI. Bangladesh Security Exchange Commission (BSEC), regulator of the country's capital market, imposed few regulations in May 2010 regarding paid up capital of the private limited companies which makes it obligatory for the private limited companies convert to public limited company if the paid up capital exceeds certain amount. These conditions discouraged foreign investors to invest and thus affecting economic development adversely.

On 5th May 2010, Bangladesh Security Exchange Commission, by a notification, No. SEC/CMRRCD/2006-159/36/Admin/03-44, imposed several conditions on the paid up capital of the private limited companies. According to the notification, a private limited company shall, complying due legal process, convert itself into a public limited company within 6 (six) months from the date the existing paid up capital it intends to raise above BDT 400,000,000.00/- (Taka Four Hundred Million) or within 12 (Twelve) months from the date of publication of the notification in the official gazette in case its existing paid up capital has already exceeded. Furthermore, the notification also states that once the

paid up share capital of a public limited company, including the said converted public limited company, exceeds BDT 500,000,000.00/- (Taka Five Hundred Million), then the public company is required to list their shares on the stock exchange of Bangladesh within one year, if it has already been in commercial operation for 3 (three) years, from the date of its paid up capital exceeds BDT 500,000,000.00/- (Taka Five Hundred Million), or from the date of publication of this notification in the official gazette, whichever comes later. But if it has not yet commenced its commercial operation, then the company will get 3 (three) years for enlisting their shares to the stock exchange.

These regulations have been criticized and considered as irrational by foreign investors as the regulations restrict their freedom to inject additional capitals while maintaining the status as private company. The regulations were having negative impact on the FDI and were not that much effective as a lot of companies

exceeding the above mention paid up capital were still running their business as private limited companies. The BSEC realized these drawbacks and published a new notification on 11th June 2015, No. SEC/CMRRCD/2009-193/170/Admin/60, which gives exemption to the foreign companies and joint venture companies with foreign investment from compliance with the above mention notification, No. SEC/CMRRCD/2006-159/36/Admin/03-44, which is published in the Bangladesh Gazette on 1st June 2010.

This acts as a relief to the existing foreign investors who could not raise their paid up capital, to enhance their business, above the capped amount (BDT 400 million) as they wanted to maintain their status as private limited company. It is desired that Bangladeshi government will continue to make efforts to develop investor friendly business environment.

- by Anam Hossain



M. L. H. Chowdhury & Co
Chartered Accountants

Affiliated with



87, Rashed Khan Menon Road (Level 17) Banglamotor, Dhaka-1000, Bangladesh
Phone No. +8802 9853 440, Email: dhaka@mlhcbd.com

TOBACCO CONTROL LAW & SMOKE-FREE ENVIRONMENT

Deaths attributable to smoking are projected to increase substantially throughout the 21st century and much of the increase will occur in low- and middle-income countries such as Bangladesh, whose population of 160 million makes it the seventh most populous country in the world. More than half of Bangladeshi men over the age of 25 years smoke cigarettes or bidis. Of the estimated 21.9 million smokers in Bangladesh, 21.2 million are males while 0.7 million are females. Hence, one can imagine the level of negative impact smokers have on the environment as a whole- especially when environment is the least of their concern!

While health warnings like 'Quit Smoking' or 'Smoking is injurious to health' on the cigarette packets are essential but when a smoker smokes, he smokes despite knowing most, if not all, the aftereffects. Smoking is highly addictive and it is not something one can quit in a hurry. An average person attempts to quit smoking six times before he actually succeeds. While smoking, a smoker does not only bring detrimental effects upon himself but also upon those surrounding him and obviously the environment at large. This is where the Smoking and Tobacco Products Usage (Control) Rule 2015 is expected to play a significant role.

The principal law passed by the Bangladesh government in relation to prevention of smoking was Smoking and Tobacco Products Usage (Control) Act 2005 which came into force in 2006. With the overflowing concern, criticism and awareness regarding the perilous effects of smoking, the government updated the law on the control of tobacco in 2013. Subsequently, the government passed the Smoking and Tobacco Products Usage (Control) Rule, 2015 to fill out the gaps in the principal law. The 2015 Rule elaborately talks about

many of the provisions of the Smoking and Tobacco Products Usage (Control) Act 2005 as amended by Act No.16 of 2013. Under the 2015 Rule, smoking area has specifically excluded public places and public areas like inside a library, educational institution, hospitals, inside a cinema hall, a one room public transport, etc.

The 2015 Rule has ensured that the health warning signs should be effectively advertised by making it prominent so as to catch everyone's eye as opposed to being obscured by anything which does not translate the actual purpose of such health warning sign. The rule specified unambiguously that if it is a public transport like train, launch, etc which has more than one room, then the designated place for smoking should be at the rear end and not in the main room for passengers. Further, it has extensively dealt with the control on displaying the usage of tobacco products in movies and it has specified the use of the health warning in the middle of the screen covering at least one fifth of the screen which should be in white letters against a black background in Bengali with the following words- 'Smoking/consuming tobacco causes death'. It further states that a smoke free area shall be segregated from a smoking area and it needs to be ensured that smoke from the smoking area does not enter

the smoke free area and so on.

Nevertheless, one of the most ironic part of the legal framework of Bangladesh is that one needs license to sell alcohol but not for cigarettes whereas the gravity of danger caused by cigarettes is a lot more than that of alcohol. The tobacco control legislation clearly prohibits sales of tobacco products to anyone below 18 years and employing anyone below 18 years in tobacco sales is also a punishable offence. However, to our utter dismay neither the customers are aware about it nor the vendors selling the tobacco products.

Though the government should be applauded for walking the extra mile and enforcing the 2015 Rule, it is unlikely to be of any use if the responsible governmental agencies do not act strictly and impose sanctions as and when required. Bangladesh does not lack laws, it has plenty and most have been drafted with precision but what is lacking is the implementation and effectiveness of the laws. As long as the law enforcement officers are smoking while sipping tea at a roadside tea-stall, changes shall only be seen on paper!

-by Anam Hossain



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FACTS:

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2. The Managing Partner of FM Associates Bangladesh, Mr. Al Amin Rahman, Barrister of the Honourable Society of Lincoln's Inn, UK & Advocate of Bangladesh Supreme Court, has won 'Most Outstanding Dual Qualified Lawyer – Bangladesh' in the Corporate Live Wire 2015 Innovation & Excellence Awards.
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Dhaka Office | Premier FM Heights | House 88 | Road 10/1 | Block D | Niketon | Gulshan 1 | Dhaka | Bangladesh

Chittagong Office | Posterpar Jame Masjid Complex | 2nd Floor | Dewanhat | Chittagong | Bangladesh

Phone | +880 2 9853440, +880 31-2517044 Email | dhaka@fmcibd.com, dhaka@fma.com.bd

Other Offices | Ahmedabad, Bangalore, Bhubaneswar, Chandigarh, Chennai, Hyderabad, Kochi, Kolkata, London, Mumbai, New Delhi, Noida, Pune.

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