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# INDIAN LEGAL IMPETUS

-  **The Balancing Act of Patents Law and Public Interest**
-  **Amendments in Service Tax Laws**
-  **India Signed Free Trade Agreement with ASEAN**

## Foreword

I, on behalf of my entire team proudly present to you this September, 2009 issue of our monthly Newsletter "Indian Legal Impetus". I, on behalf of my team thank our readers for their warm support and generous suggestions & appreciation.

The present issue includes variety of topics including latest developments in the legal sector and also discussions on general topics.

The issue envisages write up the latest development with respect to the patent regime in India, especially in pharma sector vis-à-vis patent monopoly, protection and commercialization. Recent developments and amendments in Service-Tax laws has also been included in this issue.

A write up on a judgment passed by the Hon'ble Supreme Court of India observing the sorry state of adjudicating authorities in 'intellectual property' matters pending over several years, has been included in this issue. A recent development in the Indian domestic and regional markets, i.e. signing of a Free Trade Agreement (FTA) with the Association of Southeast Asian Nations (ASEAN) by India has been envisaged a write up under this issue.

The current issue also touches upon the latest development in the Indian Service Tax Laws whereby the Legal Consultancy Services have been brought under the ambits of service tax.

We hope this issue also helps us in further achieving our objective of making you understand the laws and recent legal developments in India. We welcome all suggestions or comments for our newsletter and hope that the valuable insights provided by our readers would make 'Indian Legal Impetus' a valuable reference point and possession for all. You may send your suggestions, opinions, queries or comments to [newsletter@singhassociates.in](mailto:newsletter@singhassociates.in)

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## The Balancing Act of Patents Law and Public Interest

“No public interest is anything other or nobler than a massed accumulation of private interest.”

– Mark Twain



The patent regime in India, especially in pharma sector, has time and again emphasized the importance of public health and nutrition *vis-à-vis* patent monopoly, protection and commercialization. The Indian Patents Act ('the Act') has the basic structure to promote the technological development while balancing it with reasonable availability/access of said invention to a common man. The Patent law strengthens the public interests by incorporating provisions under compulsory licensing, easy availability of patented invention for public benefit at reasonable prices. The Indian Courts have time and again observed that the Patent law envisages promoting public interest especially in sectors of health and nutrition managing the socio-economic factors against the protection & promotion of technological development in India.

### Public Interest Safeguards in Patent Law

#### – An Overview

The Patent Act seeks to effectively calibrate the extent of 'Patent protection' in areas of

- Public Health;
- National Security; and
- Public Interest Concerns.

### Exemptions from Patentability<sup>1</sup>

The exemptions preventing ever-greening of patents and restricting the grant of patent rights in special cases, medical products, etc., inter alia, are:

- Mere discovery of a new form, use, property, process, etc. of a known substance which does not result in enhanced efficacy is not invention. Illustrating by example of salts, esters, ethers, polymorphs, etc. of known substance are to be considered to be the same substance until these differ significantly in properties with regard to efficacy;
- Any process for medicinal, surgical, curative, prophylactic, diagnostic, therapeutic, or other treatment of human beings are not considered as inventions;
- Plants and animals in whole or any part thereof other than micro-organism are not inventions.

### In the interest of public welfare: Compulsory Licenses<sup>2</sup>

Compulsory license at any time after the expiry of three years from the date of grant of patent, on the

1. Section 3 of The Patents Act, 1970

2. Section 84 of The Patents Act, 1970

grounds are –

- That reasonable requirement of public with respect to the patented invention have not been satisfied;
- That the patent invention is not available to the public at a reasonably affordable price; or
- That the patented invention is not worked in the territory of India.

Compulsory licensing provisions also cover the events of national emergency, public need of non-commercial use under special circumstances.

### Revocations and Acquisition of Patents

- Revocation on the ground of non – working or the patented invention not being available to the public at reasonably affordable price or in the interest or security of the country<sup>3</sup>
- Acquisition of patent by government for public purpose against payment of compensation<sup>4</sup>

Recently in **M.C. Jayasingh vs. Mishra Dhatu Nigam Ltd. & Ors.**<sup>5</sup>, the Division Bench of the Madras High Court dismissed an appeal filed by the Appellant / Plaintiff against the decision of a Single Judge disallowing the interlocutory application of the Plaintiff. The division bench applied the three parameters of (i) *Prima Facie* case; (ii) Irreparable Injury; and, (iii) Balance of Convenience, to the facts at hand and concluded that the Appellant failed to satisfy any of the criteria.

3. Section 85 of The Patents Act, 1970

4. Section 102 of The Patents Act, 1970

5. MANU/TN/1045/2009, decided on 29th April, 2009 by Madras High Court

As regards *prima facie* case the court held that each Custom Mega Prosthesis – Knee Joint Prosthesis (CMP-KJP) was made as per the specifications and requirements of the patient. Hence, the fact that the appellant has patent over one model of CMP-KJP cannot entitle him to claim protection over variations of such model. Moreover, on examining the two models, the judges stated that the two models were visually dissimilar and functional similarity alone does not establish a *prima facie* case. It was stated that, “...since the products of the appellant and the respondent were not appearing similar or identical at the initial stage of the proceedings ..... given the fact that the products of the appellant and also the respondent have their own uniqueness vis-à-vis the requirement of the particular patients, a mere functional similarity does not lay a strong ground for granting interim injunction.”

The fact that the bench decided the issue of *prima facie* case on visual similarity is rather unusual, given the fact that functional elements normally are predominant factors in deciding patent infringement suits. On the other hand, visual comparisons are more of a copyright and design parameter to determine





infringement. However, court's reasoning was probably directed by the public interest involved and the fact that a determination on the basis of functional similarity would grant the appellant a very wide patent.

Next, as regards balance of convenience the court opined that, "*considering the relevance of prosthesis to those who are in need of the same as a life saving equipment, its cost effectiveness and the functional advantage of a customized titanium made prosthesis, ... the balance of convenience is not in favour of the appellant to grant the interim injunction.*"

Lastly, the court also held that the appellant did not satisfy the criteria of irreparable injury. They stated that, "*the affidavit of the Appellant was bereft of any details with regard to the loss suffered and likely to be suffered by the Appellant on account of the supplies by the Respondent.*" On these grounds the court dismissed the above Appeal for an interim injunction.

The case is interesting given the emphasis laid on the public interest involved in access to prosthesis and the same being used as a ground to conclude that 'balance of convenience' tilted in favour of the respondents, because of their ability to provide access to medicine to the public at large at an affordable price.

Furthermore, the question is, whether there is a trend catching up in the judiciary wherein the 'public interest' factor is used to decide an injunction application. The same approach was also seen in the 'Tarceva patent case'<sup>6</sup>.

Finally, a rather disturbing trend is that the Judges tend to mix the different

intellectual properties involved in the matter, as in the above mentioned M.C. Jayasingh case, w h e r e i n the patent was deemed not to be infringed as the

design/looks of the infringing article was distinct, although the Court observed that the functionality is somewhat same. Given the fact that they possibly confused parameters applicable in deciding the existence of a *prima facie* case, the confusion in terms of the intellectual property itself being dealt with is rather undesirable.

**Further in F. Hoffman – LA Roche Ltd.**<sup>7</sup> and Anr. Vs. Cipla Ltd., the Delhi High Court opined Public Interest in Patent Law, as intended by the legislature with regard to life saving drugs, in the following words: -

***"That there are various aspects which has to be looked into, while considering public interest with regard to patent regime. The case of life saving drugs holds an exceptional position. The question of general public***



6. *F. Hoffman – LA Roche Ltd. and Anr. Vs. Cipla Ltd.*  
[MIPR (2009) (2) (1)]

7. *MIPR (2009) (2) (1),*

*access in our country to life saving drugs assumes great significance and the adverse impact on such access which the grant of injunction in such case likely to have, would have to be accounted for. The Appellants/Plaintiffs do not hold a patent yet for the drug, the public interest to greater public access to a life saving drug will have to outweigh the public interest in granting an injunction to the Appellants/Plaintiffs."*

Further, the question of availability of drug at affordable price was provided for in the Patents Act, 1970 by way of provisions of compulsory licensing. The legislative intent was to grant a monopoly to the patent holder for at least the first three years after the grant of patent to enable it to recover the enormous costs incurred in research and development of the product, the court should not override such legislature intent on the basis of untested principles. The legislature has for good reasons granted a statutory monopoly to a patent, although for a limited period. The grant of such a limited monopoly must therefore also be taken to be in the public interest, which itself a *part and parcel* is of patent law regime.

The Patent Act, 1970 in 2005 introduced **section 83 (e)**, which states that among the general principles applicable to the working of patented inventions regard shall be had:

"that patents granted do not in any way prohibit the Central Government in taking measures to promote public health"

and under **section 83 (g)**:

"that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public."

Under **section 84** among the grounds on which a person can seek a compulsory license on a patent is that "the patented invention is not available to the public at reasonable affordable price." The element of public interest therefore is not alien to the scheme of

Patent Act, 1970.

The aspect of *balance of convenience* has also to be looked into in case of life saving drugs (anti cancer drug) and the Appellants/Plaintiffs do not manufacture it the drug in India but import it from a foreign country. The demand for this drug is very large in India. The Defendant manufactures the drug in India. The public interest in the availability of the drug to the public at large is outweighed by the need to encourage research in the invention, would obviously differ from case to case and depend on a host of factors.

Even while considering this aspect, the Court was much conscious, that the Defendant was able to demonstrate that the Appellants/Plaintiffs do not hold a patent for the drug Tarceva (which is the *Polymorph B* form of the substance for which they hold a patent.) Further, the Defendant raised a credible challenge to the validity of the patent held by the Plaintiffs. In such circumstances, the public interest in greater public access to a life saving drug will have to outweigh the public interest in granting an injunction to the patent holder.

Further, in ***Franz Xaver Huemer Vs. New Yash Engineers<sup>8</sup>***, the Delhi High Court refused to grant injunction for alleged infringement of patent on the ground that, the patentee's contention (of prerogative of use), if sustained, would enable a device to be registered in India and kept unused, thereby not only denying to the public its benefit, but also precluding similar devices from being manufactured and sold by third parties in India. This would work against the very reasons that compel the grant of a patent. The Court further held that an injunction being an equitable remedy must be refused in cases of 'non use' of a patent.

8. *AIR(1997)Delhi(79)*

9. *To develop scientific temper, humanism and the spirit of inquiry and reform*



Thus, the Patent Law effectively balances and calibrates Intellectual Property protection with public health, national security and public interest concerns. It promotes the idea as enshrined in **Article 51 A (h)**<sup>9</sup> of the Constitution of India with a view as to patents are granted to encourage inventions, simultaneously balancing patent regime with regard to public interest by providing number of safeguards to protect both.

Further, Article 7 & 8 of the Trade Related Aspects of Intellectual Property Rights Agreement objects on the balanced regime of IP. It states that-

***“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.***

***Members may, in formulating or amending their laws and regulations, adopt measures necessary to***

***protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.***

***Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.”***

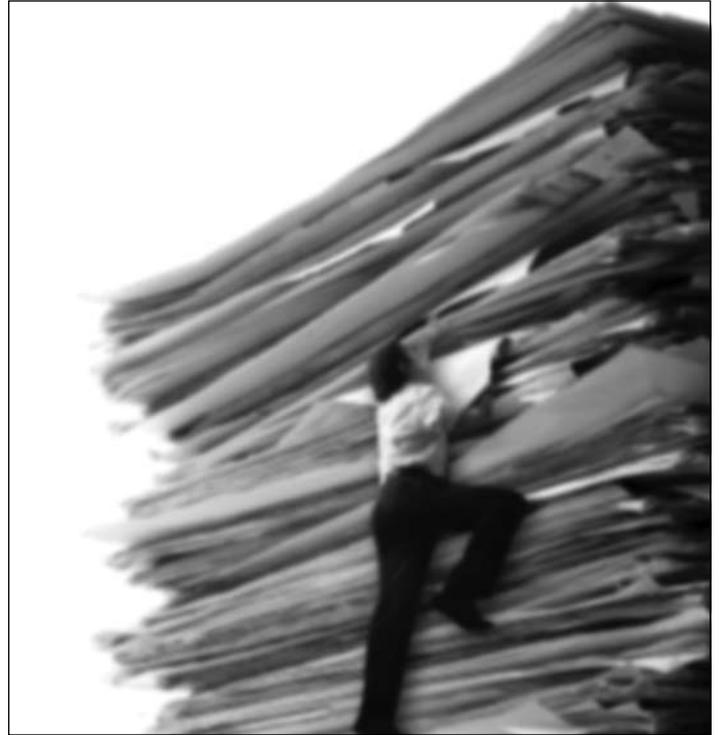
Hence, the international IP regime also lays down the concept of public interest as basic to protection of intellectual property rights. The challenge to the policy maker is to balance the two so as to ensure that the rights stimulate innovation while access to inventions for the betterment of society and further development is not unduly blocked. They have to find a *via media* between the IP maximalists and the IP minimalists.



## Amendments in Service Tax Laws

In the Union Budget 2009, many amendments / additions were issued in the arena of Service Tax. Service Tax is a Value Added Tax (VAT) which in turn is destination based consumption tax in a sense that it is on commercial activities and is not a charge on the business but on the consumer. Just as excise duty is a tax on value addition on goods. Service Tax is on the value addition by rendition of service. In this article, the changes/amendments/additions introduced vide Union Budget 2009 has been highlighted in brief:-

1. It is an international practice to zero-rate exports. To achieve this objective, a scheme was announced in 2007, granting refund of service tax paid on certain taxable services used after the clearance of export goods from the factory. However the exporters were facing difficulties in claiming refunds, in order to overcome it, the following changes in the scheme were proposed:-
  - a) Services rendered by exporters from Goods Transport Agents and Commission Agents, where the liability to pay service tax is ab initio on the exporter, would be exempted from service tax. Thus, there would be no need for the exporter to first pay the tax and later claim refund.
  - b) For other services received by exporters, the exemption would be operated through the existing refund mechanism based on self-certification of the documents where such refund is below 0.25 per cent of FOB value, and certification of documents by a chartered accountant for value of refund exceeding the above limit.
2. The Export Promotion Councils and Federation of Indian Export Organizations (FIEO) provide a



valuable service in augmenting India's export effort. The services rendered by FIEO will be exempt from the levy of service tax on the membership and other fees collected by them till 31st March 2010.

3. In the goods transport sector, service tax is currently levied on transport of goods by road, by air, through pipelines and in containers. However, goods carried by Indian railway or those carried as coastal cargo or through inland waterways are not charged to service tax. In order to provide a level playing field in the goods transport sector, it has been proposed to extend the levy of service tax to these modes of goods transport. The new levy is not likely to impact the prices of essential commodities or goods for mass consumption, as suitable exemption would be provided wherever necessary.
4. Legal Consultancy Service: As in the case of management consultancy or engineering consultancy service, any consultancy, advice or technical assistance provided in any discipline of



law is proposed to be subjected to service tax. However, the tax would be limited to services provided by a business entity to another business entity. It has been defined that a business entity includes firms, associates, enterprises, companies etc. but does not include any individual or even to a business entity would be outside the scope of the taxable service. Similarly, the service provided by a corporate legal firm to an individual would also be outside the purview to taxable service. Any service of appearance before any court of law or any statutory authority would also be kept outside this levy.

5. Alteration in the scope of existing taxable services:

The following alteration / modifications have been done in the existing taxable services.

- a) Modification in Business Auxiliary Service (BAS) (Section 65 (19): It may be recalled that

production or processing of goods for or on behalf of a client falls within the purview of this service. However, if any such activity amounts to manufacture within the meaning of Section 2(f) of the Central Excise Act, the same is excluded from its purview. This exclusion has been modified to state that it would apply only if the activity results in manufacture of 'excisable goods'. Both the words / phrases i.e. 'manufacture' and 'excisable goods' would have the same meaning as defined under the Central Excise Act. The impact of this change would be that even if a process of manufacture is undertaken for the client, but the resultant product does not fall under the category of excisable goods, such as alcoholic beverages, the service tax would be attracted. Certain other goods which would also fall under BAS on account of the proposed change would be kept



## Alteration in the scope of existing taxable services



outside the tax net by way of exemption meaning as defined under the Central Excise Act. The impact of this change would be that even if a process of manufacture is undertaken for the client, but the resultant product does not fall under the category of excisable goods, such as alcoholic beverages, the service tax would be attracted. Certain other goods which would also fall under BAS on account of the proposed change would be kept outside the tax net by way of exemption notification, to be issued at the appropriate time.

- b) Stock Broker Service {Section 65(105) (a)}: The present definition of a stock broker {Section 65(101)} includes Sub-Broker as well. A number of cases have been booked in the recent past where the Sub-Brokers have been asked to pay tax on the remuneration they receive from the stock broker. Previously, the sub-brokers could issue contract note and receive amounts from the investors. With effect from 01.06.2005, SEBI regulations have prohibited sub-brokers from these activities. The role of sub-brokers has thus reduced substantially. Considering that the entire broking charges are anyway taxable at the hands of stock-broker and a large number of small sub-brokers have to comply with the service tax laws, the sub-brokers have been excluded from the purview of service tax by making suitable amendment in the definition of stock-broker. It is also clarified that such sub-business Auxiliary Service. For this purposes, specific exemption notification would be issued at the appropriate time.
- c) Information Technology Software Service {Section 65(105)(zzzzz)}: A correction has been carried out in the definition of the taxable service by replacing the word acquiring by the word 'providing' in v) and (vi) of Section 65(105)(zzzzz) considering the fact that it is the providing of 'right to use' and not the acquiring of 'right to use' is a taxable service. This amendment would have retrospective effect from 16.05.2008, when the service came into effect.



The definition of Information Technology Software Service {Section 65(105) (zzzze)} after the above changes will be as follows:-

Section 65(105)(zzzze): Information Technology Software Service means a service to any person, by any person in relation to information technology software for use in the course, or furtherance, of business or commerce, including,-

- (i) Development of information technology software,
- (ii) Study, analysis, design and programming of information technology software,
- (iii) Adaptation, up gradation, enhancement, implementation and other similar services related to information technology software,
- (iv) Providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specifications for a database design, guidance and assistance during the start-up phase of a new system, specifications to secure a database, advice on proprietary information technology software.
- (v) Providing the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products,
- (vi) Providing the right to use information technology software supplied electronically.



## SC: Timely Adjudication Is Of Essence In 'IP'

### – A Welcome Notion Evoked

The Supreme Court of India's verdict (in *Bajaj Auto Limited Vs TVS Motor Company Limited* decided on 16 Sep. 2009) stating the sorry state of adjudicating authorities in 'intellectual property', matters pending over several years, has definitely come as a new ray of hope for the IP right holders considering civil litigation as remedy.

#### A brief history on the Case:

Bajaj Auto Limited ("Bajaj") filed a suit in Dec 2007, for injunction against infringement of its Patent No. 195904 by TVS Motor Company Limited ("TVS") at High Court of Madras ("Court"). The said Patent titled "An improved internal combustion engine working on four stroke principle". According to Patent Publication said invention particularly relates to the *use of twin spark plugs for efficient combustion of lean*

*air fuel mixture in small bore ranging from 45 mm to 70 mm internal combustion engine working on 4 stroke principle.* TVS in Dec. 2007, launched its motorcycle of 125-CC 'FLAME' powered with a lean burn internal combustion engine of bore size 54.5 mm with a twin spark plug configuration, which according to Bajaj, infringes its patent No. 195904.

The Court granted an interim injunction on February 16, 2009, as prayed by the Bajaj restraining TVS from selling its two/three wheelers using the said patented technology.

TVS preferred an appeal against the said injunction in front of Division Bench of the Court. The Court on May 18, 2009, upon the contentions and evidence put forwarded by the TVS stated that there is a distinctive feature of a different operation in the TVS technology with three valve provision with twin plugs operation and the said three valves operation of the engine produce distinctively different result in its operation.

Further, the twin plug operation in the Bajaj's internal combustion engine may have resulted in improved internal combustion, the three valve technology of the TVS also with twin plug provision produce a





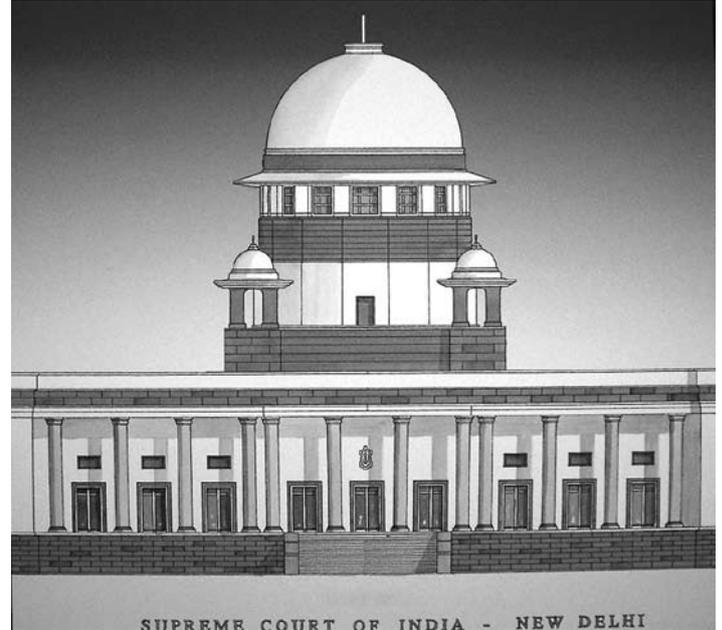
distinctive product of its own, different from the claimed invention of the Bajaj. Hence the Appeal was allowed and the interim injunction by Single Judge was vacated by the Division Bench of the Court.

Now to the above revocation of interim injunction, Bajaj moved an appeal in Supreme Court of India ("Supreme Court") challenging the impugned revocation of interim injunction by the Division Bench of the Madras High Court.

The Supreme Court, after perusal and hearing the parties at length, stated its shock and displeasure over the pendency suits relating of intellectual property. The Apex Court displayed its dissatisfaction at the fact that the matter is pending in High Court from such a long time since December 2007 at the interlocutory stage and yet even written Statement is not filed. The Apex Court further states that without going into the merits of the case we direct the respondent-defendant to file Written Statement and requested the Ld. Single Judge to commence the hearing of the suit on a day to day basis and the suit shall be finally disposed of on or before 30th November, 2009.

The Apex Court gave a strong observation against the long pending matter of intellectual property quoting lines from its earlier decision in ***Shree Vardhman Rice & Gen Mills v. Amar Singh Chawalwala*** wherein it was stated that: ***"in our opinion, in matters relating to trademarks, copyright and patents the proviso to Order XVII Rule 1(2) C.P.C. should be strictly complied with by all the Courts, and the hearing of the suit in such matters should proceed on day to day basis and the final judgment should be given normally within four months from the date of the filing of the suit."***

The Supreme Court relying on the recently decided Special Leave Petition as above mentioned held that: experience has shown that, in India, suits relating to the matters relating to intellectual property are mainly



fought about injunction. The Court went on to say that: ***This is a very unsatisfactory state of affairs, and hence we had passed the above quoted order in the above-mentioned case to serve the ends of justice. We direct that the directions in the aforesaid order be carried out by all courts and tribunals in this country punctually and faithfully.***

The above observation and strict comments by the Apex Court is a welcome move for the IP litigators. More than often it is seen that suits relating to intellectual property remains at pending adjudication, and the interim injunction stays for longer than expected timeline, hence in effect interim injunction almost forms for the final word in India. The Apex Court further suggested that in the present case arguments were advanced at length the Ld. Single Judge instead of deciding the case at interlocutory stage should have been disposed the Suit at an early date.

It is evident that the value and benefits out of most of the intellectual properties lies in the initial phase of its creation. For instance a Patent when brought to the market has the 'milking period' during initial couple of years or even months only. In such a situation a pending litigation against the infringement of same

would in effect take away that initial gain period or would hamper the prospects as a minimum. After the said initial phase the value of IP is diminished as that is overshadowed by the new improved one. So when the matter remains in the Court for the long time it is obviously shortening the life as well as the return on the intellectual creation.

Above all when the matter remains in the Courts, the parties or the right holders may not effectively bar and restrain others from infringement(s). The longer the suit lasts the more the inventor/patentee/right holder has to wait to reap benefits out of its intellectual creation. Moving to the other side, many entities might just use this 'delay' defect in our adjudication system as a shield to restrict others to enter into competition. For example if a temporary injunction is granted in favour of the Plaintiff and after couple of

years the Plaintiff's claim over the said intellectual property is not substantiated to that effect and the final order is against the Plaintiff, in this state the other party was restrained from using the said intellectual property for the peak period of demand, which actually would have been used by it in all legal sense.

It can be safely said in case of Intellectual Property the timeline decides the value of intellectual property. Taking cue from the said observation by Supreme Court the Tribunals and Courts adjudicating the IP matters shall endeavor to decide the case in shorter possible time, and shall pass the final order if possible under the given facts and submissions, instead of giving an interlocutory order. The decision of the Supreme Court, that intellectual property cases shall be disposed of in much quicker fashion, is definitely a welcome move.





## India Signed Free Trade Agreement With ASEAN

In order to widen the Indian domestic and regional markets, India had signed a Free Trade Agreement (FTA) with the Association of Southeast Asian Nations (ASEAN) on 13th August 2009. FTA can be defined as a trade agreement (treaty) between two or more countries which comes into existence to reduce or remove tariffs on trading goods and services between the countries. The benefits of signing FTA are reciprocal in nature. The FTA signed by India with ASEAN would ultimately eliminate duty on about 80% of the goods traded at present between the countries associated with ASEAN such as readymade garments, pharmaceuticals, consumer electronics etc. ASEAN comprises Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

Acceleration of economic growth, social progress and cultural development and promotion of regional peace and stability are certain objectives of ASEAN. ASEAN is forth largest trading partner of India after the EU, US and China. India's trade with ASEAN is largely concentrated in Singapore, Malaysia and Thailand. Singapore is still a largest market in ASEAN for India's merchandise exports. The FTA is noteworthy since it is the first multilateral trade agreement entered into by India. North-eastern states of India are expected to benefit the most from the FTA since of their proximity to ASEAN nations. The FTA will enhance the size of the regional economy and will create better conditions for competitive market structure.

According to ASEAN statistics trade between India and ASEAN was \$ 40 billion in 2008 and now it is expected to rise to \$ 50 billion with the signing of the FTA. China signed its FTA agreement with ASEAN in 2004 and has since emerged as the Southeast Asian community's largest trading partner. Japan has also



signed FTA agreement in goods and services with the ASEAN nations. India has taken a major step into the world of multilateral trade agreements by signing of the FTA. According to ASEAN-India joint statement, the agreement will take effect on January 2010 and tariffs will be eliminated on products including chemicals, electronics, textiles and machineries between 2013 and 2016. Just a few days before signing of the FTA, India signed a Comprehensive Economic Partnership Agreement (CEPA) with South Korea.

According to Ministry of Commerce and Industry, Government of India, this is a historical development, given rising engagement between India and ASEAN and the enhanced economic cooperation. This agreement will open new opportunities for multi-sectoral engagement. By signing the FTA, India has entered into an important regional trade bloc. ASEAN

economies import \$ 936 billion worth of goods and services annually and therefore it will provide India a significant market access opportunity.

Under the FTA, India has included 489 items from agriculture, textiles and chemicals in the negative list which are termed as sensitive, meaning thereby these products will be remained out of the duty reduction. The Agreement is only for trade in goods and does not include software and technology. However, negotiations have already been started on services and investment sectors and are expected to be completed by December 2009. The FTA also provides for bilateral safeguard mechanisms to address sudden surge in imports after the Agreement comes into force. Safeguard duties may be imposed in case any provisions of the Agreement come into conflict with the interest of the domestic industry.





## LEGAL CONSULTANCY SERVICE - now within the ambit of service tax

*“As the Hon’ble Members are aware, services provided by chartered accountants, cost accountants, and company secretaries as well as by engineering and management consultants are presently charged to service tax. Although there is a school of thought that legal consultants do not provide any service to their client, I hold my distinguished predecessor in high esteem and disagree! As such, I propose to extend service tax on advice, consultancy or technical assistance provided in the field of law. This tax would not be applicable in case the service provider or the service receiver is an individual.”*

**- By The Hon’ble Finance Minister of India,  
Mr. Pranab Mukherjee in his budget speech**



### A Background

Service Tax is a form of indirect tax imposed on specified services called “taxable services”. Service tax cannot be levied on any service which is not included in the list of taxable services. Over the past few years, service tax has been expanded to cover new services. The objective behind levying service tax is to reduce the degree of intensity of taxation on manufacturing and trade without forcing the government to compromise on the revenue needs. The intention of the government is to gradually increase the list of taxable services until most services fall within the scope of service tax. For the purpose of levying service tax, the value of any taxable service should be the gross amount charged by the service provider for the service rendered by him.

Service Tax was first brought into force with effect from 1 July 1994. All service providers in India, except those in the state of Jammu and Kashmir, are required to pay a Service Tax in India. Initially only three services were brought under the net of service tax and the tax rate was 5%. Gradually more services came under the ambit of Service Tax. The rate of tax was increased from 5% to 8% w.e.f 14 May 2003. From 10 September 2004 the rate of Service Tax was enhanced to 10% from 8%. Besides this 2% education cess on the amount of Service Tax was also introduced. In the Union Budget of India for the year 2006-2007, service tax was increased from 10% to 12%. On February 24, 2009 in order to give relief to the industry reeling under the impact of economic recession, the rate of Service Tax was reduced from 12 per cent to 10 per cent.

### The present scenario

For the first time in last fifteen years, since the introduction of service tax in India in 1994, such a move has been taken by any Finance Minister. 'Legal Consultancy services' is one of the new services brought into the service tax net in The Union Budget 2009. This levy is introduced by way of insertion of Clause (zzzzm) in sub-section 105 of Section 65 of the Finance Act, 1994. Service tax has been imposed on legal consultancy services by the Finance Act, 2009 with effect from 1st September, 2009.

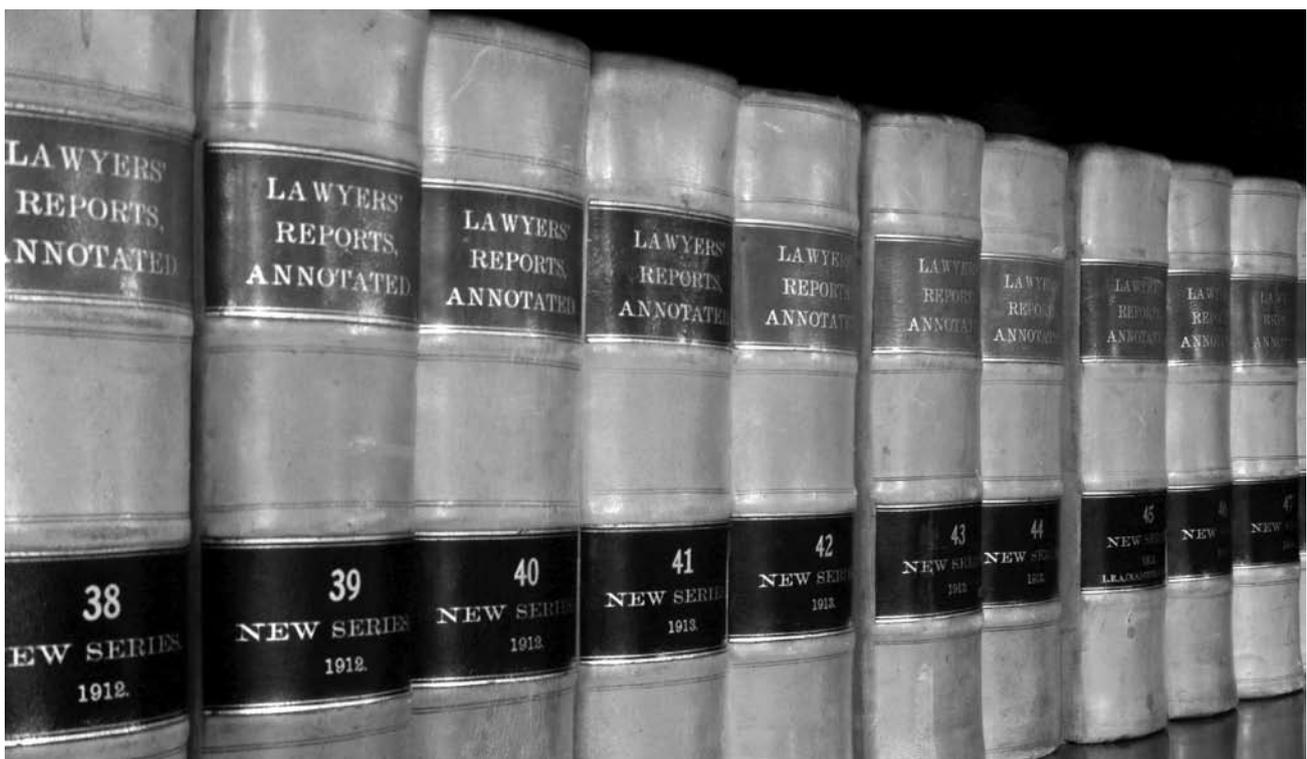
As per the definition in clause (zzzzm) of section 65(105) of the Finance Act, 1994, legal consultancy services shall cover the following services in its scope,

- (a) any advice,
  - (b) any consultancy, or
  - (c) any assistance
- in any branch of law

Legal consultancy services have not been defined by Finance Act, 1994 but as the nomenclature suggest, it would cover consultancy services in any branch of law (legal services). The words and expression 'any branch of law' and 'in any manner' make the scope of legal services very wide. All type of laws - civil, criminal, political, economic, taxation, IPR related, international laws, WTO / anti dumping related laws, arbitration and reconciliation laws etc. Not only this, such services could be provided in any manner, directly or indirectly, by electronic or any other mode and form.

The levy is applicable for any taxable services provided to a business entity in relation to advice, consultancy or assistance in any branch of law, in any manner by any other business entity. That is to say, the tax would be limited to services provided by a business entity to another business entity.

Business entity has been defined to include firms, associates, enterprises, companies etc. but does not include a individual. Thus, services provided by n





individual advocate either to an individual or even to a business entity would be outside the scope of the taxable service. Similarly, the services provided by a corporate legal firm to an individual would also be outside the purview of taxable service.

Further, any service of appearance before any court of law or any statutory authority would also be kept outside the levy.

### Objective behind the Change

Presently, legal advisory services, especially in relation to tax and corporate laws, provided by chartered accountants and other professionals are subject to

service tax. With an intent to eliminate the current disparity in tax treatment between different service providers for similar services, this amendment has been introduced.

Pursuant to this, in addition to taxable services provided by domestic law firms, taxable services provided by foreign law firms to Indian recipients will be chargeable to tax in the hands of Indian recipients through the reverse charge route.

However, the proposed levy would not result in significant tax implications either on the service provider or on the service recipient as there will be an opportunity for both the service provider and the recipient to offset their input service taxes with their respective output service tax / excise liability. ●●●

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