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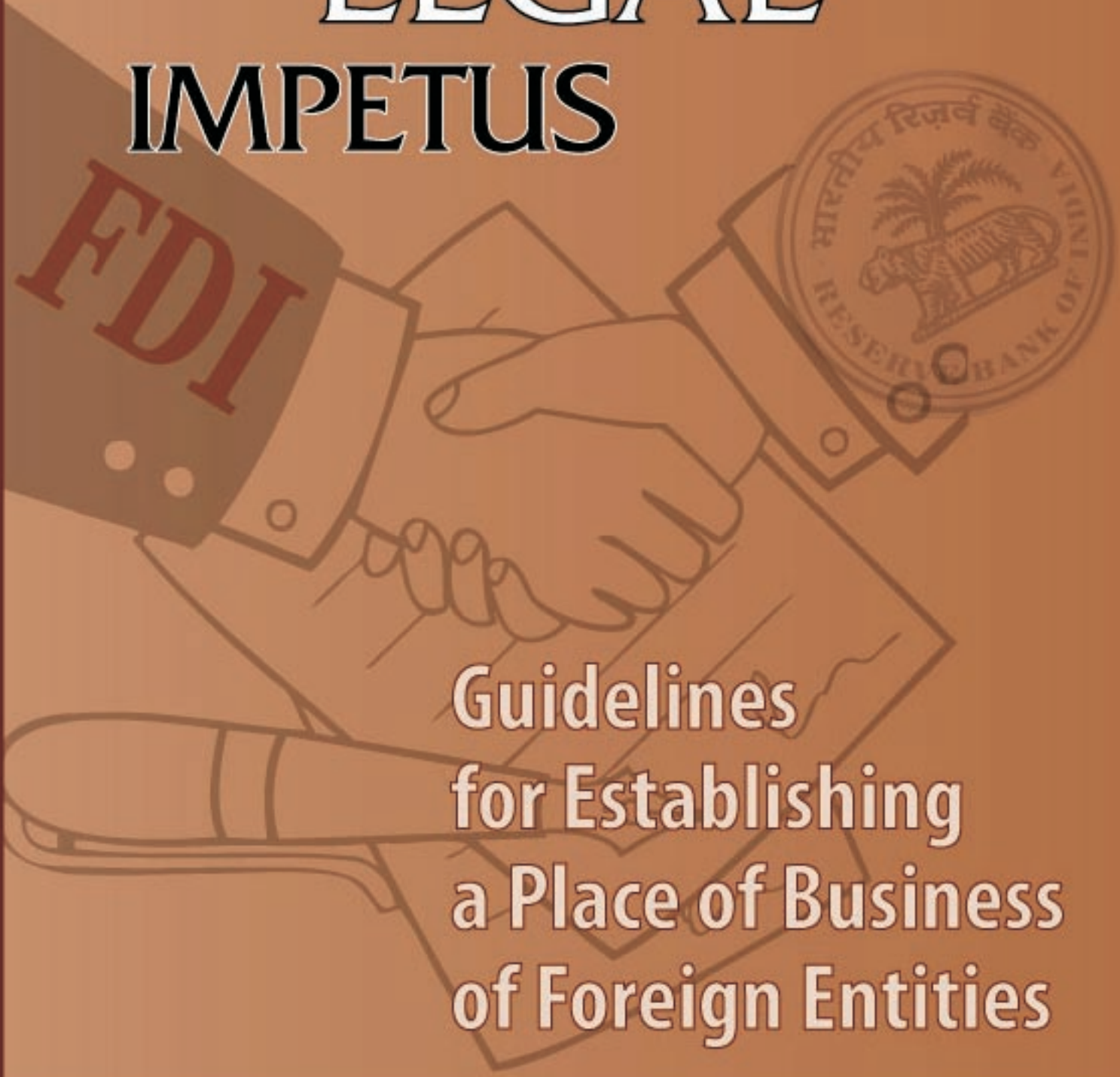

Guidelines for Establishing a Place of Business of Foreign Entities

Foreword

At the outset, I, on behalf of my entire Team, would like to wish all our esteemed readers a Happy and Prosperous 2010. This is a great pleasure for me and my entire Team to present to you the January 2010 issue of our monthly Newsletter "Indian Legal Inputs". In this New Year, we hope that our "Indian Legal Imputes" will be more helpful to all of you. We also hope that our work shall receive more of your responses and support as your warm responses, generous suggestions and appreciations are our strength to our endeavor of providing legal updates in the Indian legal scenario.

In the present issue, we have included variety of topics including latest developments in the legal arena and also discussions on general topics.

To start with, this issue includes an article that shall help the foreign entities to establish a place of business in India as we have discussed in detail about the recent Circular of the Reserve Bank of India which amends the Foreign Exchange Management (Establishment in India of Branch or Office or Other Place of Business) Regulations, 2000.

We have also discussed about the lacunas in the existing Corporate Governance in India. This issue also touches upon the First Draft of the FDI Regulatory Framework which shall fulfill the desire of the Government to make India even more attractive destination for Foreign Direct Investment.

In General Section we have included a write up on the move of the present Government to give voting rights to the Non-Resident Indians and its pros and cons.

This issue also contains two Judgment updates on Arbitration. In one of the recent matter the Hon'ble Supreme Court of India held that the right to make an appointment of an Arbitrator is not forfeited but continues till the other party files application before the Court seeking appointment of an Arbitrator. In another matter the Hon'ble Delhi High Court held that Arbitration Agreement can stand alone and there is requirement of registration of the Arbitration Agreement.

The present issue also envisages a write up discussing the need to outline and list the requirements for proper submission of Form 27 at the Patent Office as per the recent Public Notice issued by the Controller of Patents, Trade Marks & Designs.

Apart from all this, our present issue also covers the two recent Notifications of the Reserve Bank of India, execution of revised Agreement and Protocol between India and Finland for Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and a recent study carried out by CRISIL.

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 and comments for our newsletter and hope that the valuable insights provided by our readers would make "Indian Legal Inputs" a valuable reference point and possession for all. You may send your suggestions, opinions, queries or comments to newsletter@singhassociates.in

Manoj K Singh
Managing Partner

"Indian Legal Impetus"

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Guidelines for Establishing a Place of Business of Foreign Entities

Mr. Manoj K. Singh & Ms. Daizy Chawla

Reserve Bank of India (RBI), vide A.P.(DIR Series) Circular No. 23 dated 30th December 2009, issued circular making an amendment to the Notification No. FEMA 22/2000-RB dated May 3, 2000 viz. Foreign Exchange Management (Establishment in India of Branch or Office or Other Place of Business) Regulations, 2000, as amended from time to time, in terms of which a person resident outside India requires the prior approval of the RBI for establishing Branch Office (BO)/ Liaison Office (LO) in India. As per current regulations, the applications from foreign companies (a body corporate incorporated outside India, and includes a firm or other association of individuals) (foreign entities) for establishing BOs/Los in India are considered by the RBI under two routes:

a) Reserve Bank Route- Principal business of the foreign entity falls under sectors where 100 per cent Foreign Direct Investment (FDI) is permissible under the automatic route.

b) Government Route- Principal business of the foreign entity falls under the sectors where 100 per cent FDI is not permissible under the automatic route. Applications from entities falling under this category and Non-Government Organizations/Non-Profit Organizations/Government Bodies/ Departments are considered by the RBI in consultation with the Ministry of Finance, Government of India.

In order to provide more transparency, the RBI decided to place the eligibility criteria and the procedural guidelines for establishment of BO and LO in India, in the public domain.

Eligibility Criteria for Establishment of Branch/ Liaison Office in India

(i) Eligibility Criteria

An application from a foreign entity to establish Branch/Liaison Office in India is considered on the basis of two criteria viz. basic and additional:

Basic Criteria

- Reserve Bank Route- Principal business of the foreign entity falls under sectors where 100 per cent foreign direct investment (FDI) is permissible under the automatic route.
- Government Route- Principal business of the foreign entity falls under the sectors where 100 per cent FDI is not permissible under the automatic route. Applications from entities falling under this category are considered by the Reserve Bank, in consultation with the Government of India, Ministry of Finance.

Additional Criteria

- Track Record
- For Branch Office- a profit making track record during the immediately preceding five financial years in the home country.
- For Liaison Office- a profit making track record during the immediately preceding three financial years in the home country.
- Net Worth [total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance Sheet or Account Statement certified by a Certified Public Accountant or any Registered Accounts Practitioner by whatever name].

For Branch Office- not less than USD 1,00,000 or its equivalent

For Liaison Office-not less than USD 50,000 or its equivalent.

Applicants that do not satisfy the eligibility criteria and are subsidiaries of other companies may submit a Letter of Comfort from their parent company, subject to the condition that the parent company satisfies the eligibility criteria as prescribed. The contents of the letter of comfort shall be:-

"The parent company undertakes to provide the necessary financial support for our subsidiary/group company's operations as a Branch/Liaison Office in India. Any liability that may arise due to the functioning of the Branch/Liaison Office in India will be met by us (the parent company), in case of inability on part of the Branch/Liaison Office to do so."

The application for establishing BO/LO in India be made by foreign entity in Form FNC through a designated AD Category I bank [refer to A.D. (DIR Series] Circular No. 24 dated 30th December 2009) along with the prescribed documents. However, the applications from foreign banks and insurance companies shall continue to be received and examined by the Department of Banking Operations and Development (DBOD), *RBI, Central Office and the Insurance Regulatory and Development Authority (IRDA), respectively, as hitherto.

Further, in order to provide a Uniform Framework, a Unique Identification Number (UIN) would be allotted to both, the existing as well as the new BOs/LOs. The UIN will have to be quoted in all references to the RBI by the BO/LO and the designated AD Category-I Bank.

The RBI or the Government of India, as the case may be, reserves the right to reject an application for non-fulfillment of any other condition(s) not specifically referred, fulfillment of which, in the opinion of the RBI/the Government of India, is necessary for grant of such permission or in the public interest. The RBI or the Government of India, as the case may be, also reserves the right to verify/examine the activities of the BO/LO of the foreign entities established in India and to withdraw the permission already granted, after due notice, if the circumstances so warrant or due to changes in the policy.

The BO/LOs shall obtain Permanent Account Number (PAN) from the Income Tax Authorities on setting up of their office in India and report the same in the Annual Activity Certificate.

Applications for additional offices or undertaking additional activities

- Requests for establishing additional BO/LOs may be submitted to the RBI in the same manner, as the new BO/LO i.e. by filing Form FNC and enclosing with it the documents required.
- Fresh FNC Form, duly signed by the authoriesd signatory of the foreign entity in the home country should be submitted. However, the documents mentioned in Form FNC need not be resubmitted, if there are no changes to the documents already submitted earlier.
- If the number of Offices exceeds 4 (i.e. one BO/LO in each zone viz; East, West, North and South), the applicant has to justify the need for additional office(s).
- The applicant may identify one of its Offices in India as the Nodal Office, which will coordinate the activities of all of its Offices in India.
- Requests for undertaking activities in addition to what has been permitted initially by the RBI may be submitted through the designated AD Category-I bank to the Chief General Manager-in-Charge, RBI, Foreign Exchange Department, Foreign Investment Division, Central Office, Mumbai, justifying the need with comments of the designated AD Category-I bank.

In addition to the Circular no. 23 dated 30th December 2009, the Reserve Bank of India, vide A.P. (DIR Series) Circular No. 24 dated 30th December 2009, issued further guidelines with respect to delegations of powers to Authorised Dealers (AD) Banks.

In furtherance to the circular No. 23 and 24, the Application in Form FNC by the foreign entity (other than those engaged in insurance and banking) for opening of Branch Office/Liaison Office should be routed through a designated AD Category-I Bank. The designated AD Category-I bank is required to forward the application(s), along with the relevant documents and their comments/recommendations, to the Chief General Manager-in-Charge, RBI, Foreign Exchange Department, Foreign Investment Division, Central Office, Mumbai- 400 001. The designated AD Category-I bank should exercise due diligence in respect of the applicant's background, antecedents of the promoter, nature and location of activity, sources of funds, etc. and also ensure compliance with the KYC norms before forwarding the application together with their comments/recommendations to the RBI.

As far as applications from banks and insurance companies are concerned for opening of Branch Office/Liaison Office will continue to be received and examined directly by the Department of Banking Operations and Development of RBI and the Insurance Regulatory and Development Authority (IDRA) respectively, as hitherto. Approval of RBI is not required to establish a branch/unit in Special Economic Zones for undertaking manufacturing and service activities, subject to compliance with the conditions prescribed from time to time.

Further, with a view to liberalizing the existing procedure in respect of BO/LOs, it has been decided to delegate the powers to the designated Authorised Dealers Category-I banks, as under:

i) Submission of Annual Activity Certificate

With effect from 1st February, 2010, the Annual Activity Certificate certifying that the BO/LO has carried out only those activities which are approved by the RBI, to be submitted by the Auditors at the end of March 31, shall be submitted, on or before April 30, to the designated AD Category- I Bank and a copy to the Directorate General of Income Tax (International Taxation), Drum Shape Building, I.P. Estate, New Delhi-110002, by the following:

a) In case of a sole BO/LO, by the BO/LO concerned;

b) In case of multiple BO/LOs, a combined Annual Activity Certificate in respect of all the Offices in India by the Nodal Office of the BOs/ LOs.

The AD Category-I bank shall scrutinize the Annual Activity Certificate and ensure that the activities undertaken by the BO/LO are being carried out in accordance with the terms and conditions of the approval given by the RBI. In the event of any adverse findings being reported by the Auditor or noticed by the AD Bank, the same shall be reported immediately by the AD Bank to the respective Regional Office of the RBI in respect of LOs and to the Central Office of the RBI in the case of BOs, along with the copy of the Annual Activity Certificate and their comments thereon.

ii) Extension of validity period of Liaison Offices

The designated AD Category –I bank may, with effect from February 01, 2010, extend the validity period of LO/s for a period of 3 years from the date of expiry of the original approval/extension granted by the RBI, if the applicant has complied with the following and the application is otherwise in order.

- The LO has submitted the Annual Activity Certificates for the previous years (initially, for existing LO, the designated AD Category-I

banks may obtain confirmation from the Regional Office concerned about timely submission of the Certificate for previous years); and

- The account of the LO maintained with the designated AD Category-I bank is being operated in accordance with the terms and conditions stipulated in the approval.

As per the circular the, RBI has directed the AD Category-I banks to grant the extension as expeditiously as possible, say within a period of one month from the receipt of the request under intimation to the Regional Office concerned and to the Chief General Manager In-charge, as the case may be, quoting the reference number of the original approval letter and the UIN.

However, in the case of LOs of banks and entities engaged in insurance business, the application has to be directly submitted to the Department of Banking Operations and Development, RBI and IRDA, respectively as stipulated by them, as hitherto.

No extension would be considered for LOs of entities which are NBFCs and those engaged in Construction and Development Sectors (excluding infrastructure development). Upon expiry of the validity period, these entities have to either close down or be converted into a Joint Venture (JV)/Wholly Owned Subsidiary (WOS), in conformity with the extant Foreign Direct Investment Policy.

iii) Closure of Branch/Liaison Office(s)

With effect from 1st February 2010, the work related to closure of Branch/Liaison Offices, shall be handled by the designated AD Category-I Bank. The closure formalities shall be dealt with in accordance with Foreign Exchange Management (Remittance of Assets) Regulations 2000, as amended from time to time. The AD Category- I Bank is required to obtain following documents while considering the closure of the Branch Office/Liaison Office and permitting the remittance of winding up proceeds:

A) Copy of the RBI's permission/approval from the sectoral regulator(s) for establishing the Branch Office/Liaison Office.

B) Auditors Certificate-

i) Indicating the manner in which the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets;

ii) Confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc., of the Office have been either fully met or adequately provided for; and

iii) Confirming that no income accruing from sources outside India (including proceeds of exports) has remained unrepatriated to India.

C) No-objection/Tax Clearance Certificate from Income Tax authority for the remittance(s).

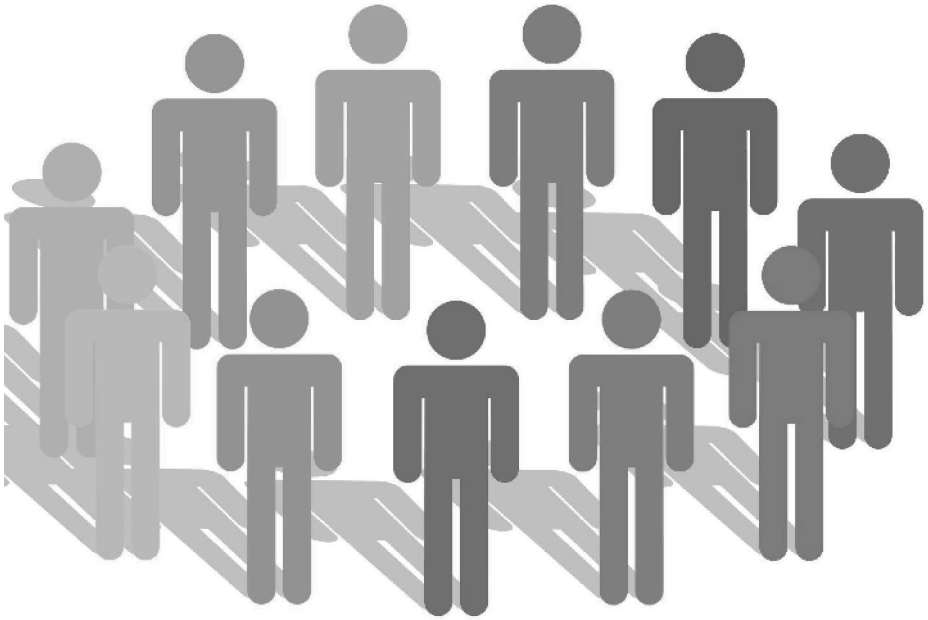
D) Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending and there is no legal impediment to the remittance.

E) A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 1956, in case of winding up of the Office in India.

In addition to the above, any other document(s), specified by the RBI while granting approval may be obtained and verified. The designated AD Category-I banks may also ensure that the BO/LOs had filed their respective Annual Activity Certificates with the RBI for the previous years, in respect of the existing Branch/ Liaison Offices. Confirmation about the same may be obtained from the Central Office of the RBI in the case of BOs and from the Regional Office concerned in the case of LOs.

On receipt of the documents as mentioned above, the AD Category-I bank may, after satisfying themselves about the bonafides, allow closure of the Office by closing the account maintained with them and remit the proceeds to the overseas entity.

Closure of such BO/LO should be reported by the designated AD Category-I bank to the RBI (the Regional Office concerned for LOs and Central Office for BOs), along with a declaration stating that all the necessary documents submitted by the BO/LO have been scrutinized and found to be in order. If the documents are not found in order, the AD Category-I bank may forward the application to the RBI, with their observations, for necessary action.



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CORPORATE GOVERNANCE – MOVING BEYOND A "COMPLIANCE CALENDAR" THE LACUNA

Ms. Sunaina Jhingan

In the wake of the wide-spread corporate catastrophes in recent years, Corporate Governance (CG) has caught fancy of most corporates. The reputational harm and financial damage that is done in the likely event of lack of effective Corporate Governance can tarnish the corporate image quite irreparably. But what exactly does effective Corporate Governance mean? Is it only a calendar-based event that the corporates have to comply with? What more do today's corporates needed to do to achieve it?

There has been a lack of commentary, regulatory activity and action(s) both among the corporates and the lawmakers of the land, aimed towards improving governance in corporate functioning. The focus to date has been more on cosmetic, structural and process issues rather than the real issues of governance, which are required to be addressed and viewed by companies as a strategic challenge and internalized in the management practices. Rather than responding passively to recurring imposition of regulatory rigours, responsible corporates should seize this opportunity, define what good governance means and put in place a cohesive governance framework.

Defining Corporate Governance In recent past, Governance guidelines, through legislative reforms, have tried to address issues such as proper Board structure (quality and mix), independent Directors' issues, role and constitution of the Audit Committee, disclosure practices and the like. However, they have failed to address the core issues of Corporate Governance. **To my mind, effective Corporate Governance is achieved when the Board (the share-owners' agent) truly represents the interests of the company's owners and when in exercising that responsibility, it thoroughly evaluates, faces up to and watches over companies' business tactics and effectiveness of the implementation, including compliance with some business practices and all legal structures.** It is more about the intent, independence and transparency in practice of the Directors and the management, rather than the rigour of complying with a set of rulebooks, which needs to be addressed. To achieve this, there is a need to make substantive changes in governance structure than those that have been suggested so far.

Clearly, this issue gives rise to a tantalizing topic of a delicate balance between management's responsibility of running a business and the Board's mandate to supervise management performance. Efforts aimed at achieving this fine balance and defining the contours of each team's responsibilities is likely to challenge the Board and the management in the days to come.

Why take all this trouble? Why companies should strive, if at all, to achieve the aforesaid mission? Beyond the enlightened ethical reasons and the discussion fora, are there other compelling causes for which the corporates should spend their precious resources to improve Corporate Governance? To answer these questions, companies should realise some of the following "more-than-obvious", persuasive reasons that should drive them to embrace effective Corporate Governance practices : Instil trust among the stakeholders; Minimising reputational risks; Assure effectiveness and integrity of company's business processes; Enhance capital market efficiency – portray a better image in the capital market **How far have we reached and what more remains to be done?** Perhaps the requirements of ensuring a good and effective Corporate Governance to be in place may be summarised as follows : Full representation of share-owners' interests; An informed, engaged, challenging

Board of Directors, focussed on effectiveness of key business processes and business performance; Directors with business knowledge, sense of ownership; Elimination of conflicts of interest; and Embedding governance in day-to-day management affairs. It should also be realised that in order to dig deeper into the Company's affairs, directors will have to dedicate more time to the assignment at hand, than what they had committed in the past and they will need to be better compensated as well. More time and more compensation will be necessary for the Directors to achieve the uphill task assigned to them. In conclusion, as we attempt to assess the progress made towards achieving the desired goals till date, it is more than clear that we still have some distance to travel.

The biggest example of corporate fraud in the recent past is the Satyam case which makes us to think about the need of Corporate Governance and its need.

But in order to study the reasons behind such Corporate Frauds and why still after such a big scam of Satyam Corporates are still facing such kinds of frauds.

A recent study is being highlighted below

More Satyam-like cases simmering

Corporate frauds rarely get noticed by the public, except when it takes on alarming proportions as seen in the recent Satyam fiasco. There are several such cases of fraud simmering in the sidelights.

As India becomes more globalised, Indian corporates are adopting newer models to commit frauds. That over 60% of the respondents in a recent survey said they faced frauds in their organisations. Many estimate their financial loss to be Rs 10-100 million per organisation.

Has there been any kind of shift in the way frauds are committed?

We are seeing more frauds now compared to 3-4 years ago and the nature of frauds is no more limited to scrap sales or cash being stolen. We are seeing a dynamic shift with respect to intellectual property, e-commerce and other IT-related frauds. It is not just the junior employees who are involved. The senior management seems to be encouraging it and there is more focus on bribery and corruption.

What are some of the new models of frauds in the Indian corporate world?

In the IT industry, most frauds are being detected in the human resources division because hiring volumes have increased. Some HR people have floated their own recruitment consultancy firms and they root in CVs through their own consultancy firms. This results in a conflict of interest issue. The second most prevalent cases of fraud are being noticed in the procurement division. A single company may bid for the same tender under different names. We have observed that after a vendor bags a contract, the bills keep coming in and payments get processed, without the goods physically coming in. Another prominent sector is among PEs. Although they invest in many entrepreneurial ventures, it is hard to track where the money is going.

What is the main reason for this increase?

The risk of fraud at corporate levels is becoming higher. There is more pressure on Indian corporates. This forces some of them to resort to fraudulent practices as they don't want their stocks to be slammed at the exchanges.

How can the red flags be identified?

A majority of organisations are aware of these unethical practices. It can be identified through more stringent laws and awareness. Companies need to show zero tolerance on these matters and be proactive

in analyzing frauds. Experts say that there are more Satyam-like scandals in the country. Financial services sector is relatively more susceptible to fraud followed by real estate, infrastructure and IT and ITES. Considering that the procurement values are very high in sectors such as telecom, power, the utility industry, the amount of fraud can also be very high.

What impact will it have on the outsourcing industry?

We have to ensure that we don't make the same mistakes developed economies have made. Otherwise, this will impact the reputation we have created outside the country especially in the area of outsourcing.

A DESIRE TO MAKE INDIA EVEN MORE ATTRACTIVE FOR FOREIGN DIRECT INVESTMENT

Ms. Shipra Makkar

An Introduction

Shri Anand Sharma, the Union Minister of Commerce and Industry released the First Draft of the FDI Regulatory Framework through a Draft Press note 2010 dated 24th December, 2009.

This new policy regime is in the form of a single consolidated press note, which not only specifies the sectoral caps, but also the way foreign investments will be treated. The draft is a Consolidation or a compilation and a comprehensive listing of most matters on FDI and is not intended to make changes in the extant regulations.

Further, this policy regime not only includes the 177 Press notes released all over the past two decades in to a single platform, but also guarantees a review in every six month. This comprehensive press note will have a sunset clause of six months and will automatically lapse on 30th September, 2010, and a new press note would be issued every six months, incorporating and reflecting all the changes in the regulations during the intervening period of six months.

That is to say that, The Government would continue to make changes to the policy through press notes whenever required. However, at the time of the six-monthly revision such changes would be incorporated in the compendium. This has been done to avoid multiple policy documents on overseas investment norms.

The Department of Industrial Policy and Promotion has invited comments from the public, investors and stake holders, opened to their suggestions till 31st, January 2010.

After which the final policy will be formed over a period of next two months and is expected to be operational from 31st, March 2010.

The Rationale behind:

The current foreign investment policy is spread all over, in Foreign Exchange Management Act, RBI Guidelines and Press notes. Also, The FDI rules have been notorious for their inconsistency and vagueness which have led to many corporate wrangles and disputes. All theses press notes which have been issued have created new areas of ambiguity while trying to resolve the existing ones.

The Department of Industrial Policy and Promotion has itself issued about 177 Press Notes since 1991, covering various aspects of FDI Policy, including cross border investments, policy liberalization, policy rationalization and Foreign technology collaborations, Industrial policy etc.

Therefore, there was always a need for further simplification and consolidation of the FDI policy framework, so as to make it more comprehensible to all the investors and stakeholders and hence, the present exercise has been undertaken.

The Objective:

According to the preface of the 66 page document, its intention is to "lay down a regulatory framework which is transparent, predictable, understandable, simple and clear to reduce the regulatory burden and promote Foreign Direct Investment."

This Consolidation would ensure the availability of all information on FDI policy at one place and is expected to lead to simplification of the policy, greater clarity of understanding of Foreign Investment rules among foreign investors and sectoral regulators, as also predictability of policy and having a single policy platform which would ease the regulatory burden for the government.

NON – RESIDENT INDIANS TO GET VOTING RIGHTS

Mr. Harsimran Singh

India's Prime Minister, Manmohan Singh, in his inauguration speech at the Pravasi Bhartiya Divas, told the annual gathering of the Indian Diaspora that Non-Resident Indians (NRIs) may be able to vote by the next general elections. He added that he recognized the legitimate desire of Indians living abroad to exercise their franchise and to have a say in deciding as to who governs India. The aim of this move seems to be seeking the active involvement of NRIs with their home country.

NRIs are Indian citizens who live abroad but are Indian passport holders. As of now, there is no provision to facilitate their voting from abroad. Voting rights could be extended to Indian passport holders while holders of Persons of Indian Origin (PIO) cards would not be eligible.

Bill To This Effect Was Introduced Earlier Too

The United Progressive Alliance government had earlier cleared amendments to Section 20 of the Representation of the People Act under which NRIs could get voting rights; this would have enabled them to get their names registered in the electoral roll of the constituency of their place of residence in India, the first step ahead of casting their vote.

Subsequently, a Bill was introduced in the Rajya Sabha in February 2006 and was referred to the parliamentary standing committee on law and justice, which presented its report in August that year.

According to an official in the Election Commission of India (ECI), the autonomous body that conducts polls in the country, no concrete decision on the proposal has been taken yet.

Change In Definition Of 'Citizen'

There are indications that the long-held promise of Non - Resident Indians getting the voting rights may come to fruition with government planning to change the definition of who is a "citizen".

The Law Ministry is currently working on amending the definition of the Indian citizen in the Representation of Peoples Act from the current "ordinary resident" to a term that includes those living overseas.

Revival Of Debate On Voting Rights For Nris

Prime Minister Manmohan Singh has revived the debate on voting rights for NRIs by signalling that they would get a chance to cast their votes in the next general election.

Arguments in favour of the move

Those favouring the idea of giving voting rights to NRIs suggest that voting rights would bring them closer to their motherland and help them get directly involved in its decision-making process, further giving them a chance to influence political and economic reforms in India. More political participation from NRIs will facilitate better exchange of ideas which will bind them closer to their motherland. Inclusion of NRIs' views and choices in the political process will benefit India.

Arguments against the move

While seeking the active involvement of NRIs with their home country is the aim of this move, yet for many, the very fact that they left the country to seek life elsewhere doesn't seem to shore up their right to vote. It is argued that it is not fair to the people living in the country itself as people who are residents have the maximum stake in who should rule the country. Moreover, it is not clear whether giving voting rights

to NRIs will make them more involved with politics and other issues at home, as the Prime Minister intends.

Complexities involved

While constitutional experts and analysts say the move of giving voting rights to NRIs was inevitable, they point out that the process involves a lot of complexities – both in enrolment and in balloting.

Complexities in Enrolment

The present rules suggest that one has to be a resident of India for enrolling his/her name in the voters' list. NRIs, by the very definition of their name, are not eligible for this. The residential qualification (clause) needs to be amended for providing them the rights. But it can't be done away with only a blind amendment. Such a move could lead to a situation in which people get their names registered in multiple places. There has to be exception in the case of NRIs and it has to be specified where they are going to register their names for voting rights. The ECI official said the poll panel had taken an "informal decision" that NRIs could be allowed to enroll their names in the address shown in their passports.

Complexities in Casting Votes

Though the move is considered as inevitable but there are many confusions and doubts regarding its implementation. It is not clear whether the government will allow their participation in elections though proxy voting or postal ballot.

For giving voting rights to NRIs, government will have to prepare the technology roadmap. Since NRIs cannot come be expected to come to India to cast their vote, they can either do postal balloting, proxy voting or can cast their votes in embassies.

As of now, postal balloting is permitted for personnel of the armed/paramilitary forces and state armed police forces who are on outstation posting, people employed in embassies and those who are put on election duty in places other than their territories.

If it is postal balloting, it would have to include those inside the country too who are working at some other place in India. One cannot be denied voting rights if he is working somewhere else in India, not in the US or other outstations. Moreover, there has to be a clear roadmap and technology to carry out this plan.

Conclusion

If Non – Resident Indians are given the right to vote, it would definitely be in tandem with globalisation and the blurry notions of belonging and origin many have developed.

WHETHER THE RIGHT TO APPOINT AN ARBITRATOR UNDER SECTION 11(5) IS FORFEITED IF A PARTY FAILS TO MAKE THE APPOINTMENT WITHIN THIRTY DAYS OF THE DEMAND

Mr. Nilava Badhyopadyay

In a recent decision, the Hon'ble Supreme Court has held that the right of a party to appoint an Arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996 is not forfeited if it fails to make the appointment within thirty days of the demand. The Hon'ble Supreme Court further held that the provisions of Section 11(8), which provide that qualifications required of the Arbitrator and other considerations in order to secure the appointment of an independent and impartial Arbitrator, have to be considered by a Court while deciding a Petition for appointment.

Facts

A Contractor and BSNL entered into a contract pursuant to the tender notices issued by BSNL for the work of construction of certain staff quarters and vertical extensions to building. The said contract contained an Arbitration Clause under which, the Chief Engineer, Telecommunication/Postal Department or the Administrative Head of the said Department was to be appointed as a sole Arbitrator. Certain disputes arose between the parties and the Contractor requested the Chief Engineer (Civil) for the appointment of an Arbitrator to adjudicate the disputes. BSNL failed to respond to the letters of the Contractor and to appoint an Arbitrator within the stipulated period.

Reference before the Hon'ble Court

The Contractor was constrained to file a petition under Section 11(6) of the Act for the appointment of an Arbitrator. However, BSNL contended that the Chief Engineer (Civil) had already appointed an Arbitrator. The Hon'ble High Court allowed the application under Section 11(6) of the Act, filed by the Contractor and appointed another Arbitrator in place of the departmental nominee.

Dispute before the Hon'ble Court

Feeling aggrieved by the order of the High Court, BSNL filed a Special Leave Petition before the Hon'ble Supreme Court of India, impugning the aforesaid order of the Hon'ble High Court.

Court's Reasoning

On the question of whether the right to appoint an Arbitrator under Section 11(5) is forfeited if a party fails to make the appointment within thirty days of the demand, the Hon'ble Court held as under:

"A plain reading of Section 11(5) of the Act would show that if one party demands appointment of an arbitrator and the other party does not appoint any Arbitrator within thirty days of such demand, the right to appointment at the instance of one of the parties does not get automatically forfeited. If the appellant makes an appointment even after thirty days of demand but the first party has not moved the Court under Section 11, that action on the part of the appellant would be sufficient. In other words, in cases arising under Section 11(6), if the Respondent has not made an appointment within thirty days of demand, right to make an appointment of an arbitrator is not forfeited but continues, but such appointment shall be made before the other party files the application under Section 11 seeking appointment of an arbitrator before the High Court. It is only then the right of the respondent ceases."

In support of this reasoning, the Hon'ble Court referred to the decisions of the Hon'ble Supreme Court in Punj Lloyd Ltd. v. Petronet MHB Ltd[1]., wherein, the applicability of Section 11(6) of the Act was considered and it was held that once notice period of thirty days has expired and the party has moved the Hon'ble Chief Justice of the High Court under Section 11(6) of the Act, the other party loses his right to appoint an arbitrator on the basis of arbitral agreement.

The Hon'ble Supreme Court dealt with the aspect that a different view had been expressed in a latter decision of the Hon'ble Supreme Court in the case of Union of India v. Bharat Battery Manufacturing Co. Pvt. Ltd[2]. Thereafter, in view of the difference of opinion of the two coordinate benches, the matter was referred to a three-Judge Bench in the case of Northern Railway Administration, Ministry of Railway v. Patel Engineering Company Ltd[3]. , wherein, it was concluded that the Court must first ensure that the remedies provided for are exhausted and that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator(s). The Hon'ble Court, in the said decision, had further held that:

"It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of Sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable."

Taking into consideration the fact that the Hon'ble High Court, in the impugned order did not seem to have taken the requirement of Sub-section (8) of Section 11 into account, the Hon'ble Court observed:

"In the aforesaid decision in the case of Northern Railway Administration, Arijit Pasayat, J. (as His Lordship then was), found that the High Court in the said case did not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other conditions necessary to secure the appointment of an independent and impartial arbitrator. In the aforesaid decision, this Court also concluded that since the requirement of Sub-section (8) of Section 11 was not at all dealt with by the High Court in its order, the appointment of an arbitrator without dealing with Sub-section 8 of Section 11 of the Act became vulnerable and accordingly, such appointment was set aside. Similar is the position in this case. In this case also, before appointing an arbitrator under Section 11(6) of the Act, the High Court had failed to take into consideration the effect of Section 11(8) of the Act as was done in Northern Railway Administration."

In view of the above, the Hon'ble Supreme Court allowed the Appeal, and set aside the impugned order of the Hon'ble High Court and remanded the case to the High Court for deciding the application under Section 11(6) afresh.

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1. *2006 (2) SCC 638*
2. *2007 (7) SCC 684*
3. *2008 (10) SCC 240*

WHETHER AN ARBITRATION AGREEMENT CONTAINED IN A PARENT CONTRACT, WHICH IS BOTH UNREGISTERED AND UNSTAMPED, IS VALID AND BINDING UPON THE PARTIES

Mr. Ankit Parhar

The Hon'ble Delhi High Court, in a recent decision, held that in a situation where the parent contract requires registration, and it is not registered, it would be covered by the proviso to Section 49 of the Registration Act, 1908. The said Section relates to the effect of the non-registration of documents which are required to be registered under Section 17 of the Registration Act. The Hon'ble Court further held that an Arbitration Agreement contained in a parent contract would still be valid and binding upon the parties to the contract, irrespective of the fact that the parent contract requires Registration under Section 17 of the Registration Act, 1908.

Facts

(NEXGEN) preferred an Application before the Hon'ble Delhi High Court under Section 8 of the Arbitration & Conciliation Act, 1996 seeking a reference to Arbitration. Nexgen's claim was based on an Arbitration Agreement contained in an unregistered lease deed for a period exceeding one year. The parties did not dispute the existence of the lease deed. (ASPIRE) opposed the application on the contention that since the lease deed required registration under Section 17 of the Registration Act, it could not be valid and binding upon the parties. Section 17 of the Registration Act provides for the mandatory registration of a lease deed for a period of one year or more.

Reference before the Hon'ble Court

It was contended by Aspire that Section 17(1)(d) of the Registration Act would be applicable as the period of the lease was over one year. The said Section mandates that any lease for a period exceeding one year would require to be registered. Whereas Nexgen contended that the proviso to Section 49 of the Registration Act, which provides that any document which requires registration under Section 17 cannot be received as evidence of any transaction affecting a property concerned if it is not registered. The Section provides the exception to the admissibility of such an unregistered document, where it is placed as evidence of any collateral transaction which is not required to be effected by a registered instrument.

Dispute before the Hon'ble Court

The question before the Hon'ble Court was limited to the issue whether an Arbitration Agreement contained in a lease deed, which requires registration under Section 17 of the Registration Act, 1908 would be valid and binding upon the parties, in case the lease deed/ principal contract is not registered.

Court's Reasoning

The Hon'ble Court considered the Application of Section 49 of the Registration Act which provides that a lease agreement can neither affect immovable property nor can be received as evidence of any transaction affecting such property unless it is registered. The Hon'ble Court also noticed the exception to this bar i.e. where an unregistered lease agreement is sought to be relied upon as evidence of any collateral transaction.

On the issue whether a stand alone Arbitration Agreement would require registration under the

provisions of the Arbitration Act, 1996 the Hon'ble Court held that:

"Thus, a bare reading of Section 7 of the Arbitration Act would show that a valid Arbitration agreement is one whereby parties agree to submit their disputes to Arbitration whether arising out of a contract or otherwise, and this agreement is reflected in a 'writing'. Instances of 'writing' which the Arbitration Act recognizes as valid are given in Sub-section 4(a) to (b) and Sub-section (5) of Section 7. There is no requirement of registration or stamping. Therefore, the position vis-à-vis a stand alone Arbitration agreement is clear that it does not require registration."

The Hon'ble Court relied upon the decision of the Hon'ble Supreme Court in the case of Damodar Valley v. K.K. Kar[1] , and the decision in the case of Union of India v. Kishorilal Gupta and Bros[2]. , wherein the Hon'ble Supreme Court has observed that an Arbitration Clause is a collateral term of a contract as distinguished from its substantive terms and that an Arbitration Clause would perish only if the parent contract is void ab initio. Therefore, the Court held as under:

"There is no requirement either under Section 17 of the Registration Act or under the provisions of Section 7 of the Arbitration Act that an Arbitration Agreement should be effected by a registered instrument. Therefore, just because it forms part of a parent contract it does not stand to reason that it cannot be relied upon because the parent contract is not registered. It is no one's case; as it cannot be, that the parent contract is void or non est in law for want of registration or stamping. Therefore, assuming that such a submission were to be accepted, it would still not help the cause of the plaintiff as such an Arbitration Agreement would fall within the ambit of the proviso to Section 49 of the Registration Act."

The Hon'ble Court held that the stamping of a document like the registration would only have an effect on the admissibility of the document and the absence of the same would not bar the reliance on the parent contract for the purposes of the Arbitration Agreement. Therefore, the Hon'ble Court held that even though the parent contract was neither registered nor stamped, the Arbitration Clause contained in the same would survive. The Hon'ble Court held that an Arbitration Agreement is a collateral transaction which would fall within the proviso to Section 49 of the Registration Act, 1908.

Thus, in view of the legal position and the relevant provisions of the Registration Act and the Arbitration Act, the Hon'ble Court allowed the Application preferred by Nexgen under Section 8 of the Arbitration & Conciliation Act, 1996 for the reference of the dispute to Arbitration.

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1. *AIR 1974 SC 158*
2. *AIR 1959 SC 1362*

PATENT UPDATE : PATENTEE RIGHT HOLDER MUST SHOW THE WORKING OF PATENTS

Mr. Shrimant Singh & Mr. Kailash Chaudhary

The Controller General of Patents, Trade Marks & Designs (CGPDTM) issued a Public Notice (dated 24/12/2009) to draw attention of all Patentees and Licensees to the provision of mandatory filing of Working Statement on Form 27 as prescribed under section 146(1) of Patents Act, 1970. The said Working Statement shall provide the details of commercial use of the Patent in India starting from the third year of the grant. By this article our endeavor is to outline and list the requirements for proper submission of Form 27 at the Patent Office.

What information is desired in a Working Statement, and when to submit the same?

Section 146 places the mandatory requirement to submit the Working Statements by the Patent holders, the section states as below:

"146. Power of Controller to call for information from patentees.

(1) The Controller may, at any time during the continuance of the patent, by notice in writing, require a patentee or a licensee, exclusive or otherwise, to furnish to him within two months from the date of such notice or within such further time as the Controller may allow, such information or such periodical statements as to the extent to which the patented invention has been commercially worked in India as may be specified in the notice.

(2) Without prejudice to the provisions of sub-section (1), every patentee and every licensee (whether exclusive or otherwise) shall furnish in such manner and form and at such intervals (not being less than six months) as may be prescribed statements as to the extent to which the patented invention has been worked on a commercial scale in India.

(3) The Controller may publish the information received by him under sub-section (1) or sub-section (2) in such manner as may be prescribed."

Emphasis is made on the sub-section (2) above whereby the Working Statement must be furnished at such intervals as prescribed. The prescribed interval is stated under Rule 131 of the Patent Rules, which also provides the manner and form for submission of the Working Statements:

"Rule131. Form and manner in which statements required under section 146(2) to be furnished.

(1) The statements which shall be furnished by every patentee and every licensee under sub-section (2) of section 146 in From 27 which shall be duly verified by the patentee or the licensee or his authorized agent.

(2) The statements referred to in sub-rule (1) shall be furnished in respect of every calendar year within three months of the end of each year.

(3) The Controller may publish the information received by him under sub-section (2) of section 146.

Thus the Working Statements shall be submitted within 2 months of the notice from the Controller, and further every Patentee or Licensee shall submit the Working Statement every year starting from third year of the Grant. The due date prescribed to submit the Working Statement for a year is before 31st March of the next year. The Rule 131 also prescribes the format as Form 27 under Schedule II of the Act for submitting the Working Statement.

What to mention on Form 27?

From 27 (Working Statement) may contain the following information:

a. Whether the patented invention is worked or not;

b. If not worked, reasons for not working;

c. Quantum and value of the worked invention;

d. Whether that patented invention is worked in India;

e. Any licenses or assignments granted in that particular year;

f. Statement declaring public requirements has been met.

What will happen if the Patentee/Licensee fails to submit the Working Statement?

What will happen if a false Working Statement is submitted?

The Act fixes a penalty in case of non-compliance to section 146; the penal provisions under section 122 are reproduced as below:

"122. Refusal or failure to supply information.

(1) If any person refuses or fails to furnish-

(a) ……..,

(b) to the Controller any information or statement which he is required to furnish by or under section 146,

he shall be punishable with fine which may extend to Ten Lacs rupees.

(2) If any person, being required to furnish any such information as is referred to in sub-section (1), furnishes information or statement which is false, and which he either knows or has reason to believe to be false or does not believe to be true, he shall be punishable with imprisonment which may extend to six months, or with fine, or with both".

The Act provides that failure to submit the said Working Statement within prescribed time may attract penalty which may extend to INR 10 Lacs (USD 22000 approx.). Further, knowingly submitting a false/ misleading/ wrong data as Working Statement may lead to imprisonment upto six months or fine, or both.

Non working of a patented invention on commercial scale in India makes the patent vulnerable to compulsory licensing provisions of the Act, which can be duly prevented by prompt filing of Form 27 within prescribed time. Clause (1) of section 84 of Patents Act states conditions for the grant of compulsory license as reproduced below

'Section 84. Compulsory Licenses"

(1) At any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for the grant of compulsory license on patent on any of the following grounds, namely:-

(a) That the reasonable requirements of the public with respect to the patented invention have not been satisfied, or

(b) That the patented invention is not available to the public at a reasonable affordable prices, or

(c) That the patented invention is not worked in the territory of India.

Another drawback of non furnishing information regarding working statement is in the suits for infringement or revocation. The contesting party can take the benefit of this issue as it is mandatory and will go against the patentee in any case.

Conclusion:

After the said Public Notice by the CGPDTM it can be safely said that there shall be no confusion regarding submission of Working Statements as this compliance is expressly prescribed under law and duly reminded by the Notice. In addition to above the said compliance would certainly act as valuable additional evidence in establishing the Patent Holder's claims under an infringement matter in the Court of Law.

INTEACTUAL PROPERTY RIGHT

NEWS BYTE

By Singh & Associates

Currency Future Contracts

Reserve Bank of India vide A.P (DIR Series) Circular No. 27 dated January 19, 2010 has permitted recognized stock exchanges to offer currency futures contracts in the currency pairs of EURO-INR, Japanese Yen (JPY)-INR and Pound Sterling (GBP)-INR, in addition to the existing pair of USD-INR Contracts. Earlier persons resident outside India were only permitted to trade in US Dollar (USD)- Indian Rupees (INR) currency futures contracts in recognized stock exchanges. The present permission to trade in other pair currencies was made in order to facilitate direct hedging of currency risk in other currency pairs as well.

The settlement price for USD-INR and Euro-INR contracts shall be the Reserve Bank's Reference Rates and for GBP-INR and JPY-INR contracts shall be the exchange rates published by the Reserve Bank in its press release on the last trading day.

Amendment in Foreign Exchange Management {Acquisition and Transfer of Immoveable Property in India}, Regulations, 2000

Reserve Bank of India vide A.P. (DIR Series) Circular no. 25 dated January 13, 2010, has notified an amendment in Foreign Exchange Management (Acquisition and Transfer of Immoveable Property in India), Regulations, 2000.

An amendment has been made in the definition of "a person of Indian Origin". Prior to the amendment the definition reads out as "an individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan) who (i) at any time, held an Indian Passport or (ii) who or either of whose father or whose grandfather was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955)

However, after the amendment 'a Person of Indian Origin' means

"an individual (not being a citizen of Pakistan or Bangladesh or Sir Lanka or Afghanistan or China or Iran or Nepal or Bhutan) who (i) at any time, held an Indian Passport or (ii) who or either of whose father or mother or whose grandfather or grandmother was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955)."

Government of India signs revised DTAA with Finland

A revised Agreement and Protocol between India and Finland for Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (DTAA) was signed by Sh. S.S.N.Moorthy, Chairman, CBDT on behalf of Government of India and Ms Terhi Hakala, the Ambassador of Finland to India, on behalf of Government of Finland.

As per the revised Agreement, withholding tax rates have been reduced on dividends from 15 percent to 10 percent, and on royalties and fees for technical services from 15 or 10 percent to a uniform rate of 10 percent. Lowering of withholding tax will promote greater investments, flow of technology and technical services between the two countries.

The revised Agreement also expands the ambit of Article concerning Exchange of Information to provide effective exchange of information in line with current international standards. The Article inter-alia provides that a Contracting State shall not deny furnishing of the requested information solely on the ground that it does not have any domestic interest in that information or such information is held by a bank etc.

An Article for Limitation of Benefits to the residents of the contracting countries has also been included to prevent misuse of the DTAA.

Other features of the revised Agreement are as under:-

a) Provisions regarding Service PE have been included in the Article concerning PE.

b) Paragraph 2 has been included to Article 9 so as to increase the scope for relieving double taxation through recourse to Mutual Agreement Procedure (MAP).

c) A new Article on assistance in collection of taxes has been added to ensure assistance in collection of taxes when such taxes are due under the domestic laws and regulation.

d) The time test for Independent Personal Service has been extended from 90 days or more in the relevant fiscal year to 183 days or more in any period of 12 months commencing or ending in the fiscal year concerned.

The revised DTAA will enter into force after completion of internal processes in both the countries.

CRISIL: Companies with higher IPO grading enjoy higher PE multiples

According to a study carried out by CRISIL, equity companies with higher IPO grading enjoy higher price to earnings (PE) multiples.

An analysis of 56 graded listed initial public offerings (IPOs) by all the rating agencies found that companies which enjoyed a 4/5 rating (indicating above average fundamentals) have enjoyed average PE multiples of 25.8x, compared to companies with a lower IPO grade of 1/5 (indicating poor fundamentals) at 14.8 times.

Companies with IPO grades of 2/5 and 3/5 were trading at PE multiples of 17.6 times and 20.9 times, respectively.

There are no IPOs graded 5/5 (indicating strong fundamentals) listed on the exchanges. Since the time IPO grading was made mandatory in May 2007, more than 100 companies have been graded by various rating agencies, out of which 75 companies have been listed. However, CRISIL equities had restricted its analysis to the companies which have been listed for more than 6 months, as on December 31, 2009.

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