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INDIAN LEGAL IMPETUS

INDIA OPENING DOORS FOR FOREIGN INVESTMENT IN RETAIL SECTOR

Foreword

Manoj K Singh
Founding Partner

It gives me immense pleasure to bring to you the November 2011 edition of our Newsletter 'Indian Legal Impetus.' It has been our consistent endeavor that through this publication we inform our readers of the latest happenings and changes taking place in the dynamic and ever changing Indian Legal System.

Through this edition, we have tried to bring to the fore the diverse and expansive developments in various fields of law, to provide the readers a decisive advantage to effectively assess and comprehend their dealings in law.

The lead story of the month covers a major development in the prospect of Foreign Direct Investment in India with the Union Cabinet giving an affirmative nod on the 24th November 2011 to Foreign Direct Investment (FDI) in Multi Brand Retail Trading [MBRT] up to a level of 51% and liberalizing the limit of FDI in the Single Brand Retail Trade [SBRT] to 100%, both under the Approval Route subject to adequate safeguards for domestic stakeholders. Experience in mature retailing markets show that the granting of FDI in retail results in more varied choices at competitive prices for consumers, better employment opportunities, increased revenue generation, more competition from foreign players, inflow of capital with technical know-how resulting in greater efficiency.

The Foreign Investment section further delves into the other avenues of Foreign Investments in India with a discussion on FDI in Limited Liability which has now become an integral component of all FDI Policies of India vide Press Note No.1 (2011 Series) along with a feature that highlights the concept of Foreign Investments in Infrastructure Bonds as recently allowed by the Reserve Bank of India.

Taking note of the importance that the notion of Credit Default Swaps have assumed of late, there is an article that discusses how plain vanilla Over-The-Counter (OTC) single-name Credit Default Swap Derivatives in India is definitely a step towards novelty and progressiveness despite the fact that number of litigation/disputes related to other OTC derivatives products adding to the woes of our judiciary. Further, there is also an article on a recent judgement of Bombay High Court wherein it was held that brokers will now have to deduct 10% TDS while crediting the transaction charges to the account of Stock Exchange.

The IPR Section incorporates a wide range of issues discussing novel concepts such as Reverse Passing off which is a rapid growing menace in India and the notion of copyright in Advertising slogans. There is also a feature on the recent Bombay High Court wherein it was held that once a sound recording is made, it is only the producer, as the owner thereof, who can exploit it exclusively and the owners of the underlying musical and literary work (such as lyricists, music composers) embodied in such sound recording cannot interfere with these rights of the owner.

The Litigation Section of this edition begins with an overview of the Concept of Plea Bargain and the change in the hostile stance of the Indian Judiciary to the accommodative position post amendments in the Code of Criminal Procedure post 2005. There is also an analysis of the SEBI v Sahara case discussing the course of events uptill the granting of the stay by Supreme Court dated 28th November, 2011 on the SAT Order and delves into the proposed outcome of the case.

Concluding the section, we have a feature that talks about the concept of surrogate advertising and its inter-relationship with the doctrine of Colorable Legislation embodied in the Constitution discussing whether permitting the surrogate advertising would amount to circumvention of the Constitution.

Lastly, this issue in brief mentions of all the recent happenings in the various other legal fields in India for the past month in the form of newsbytes. These newsbytes have been mentioned in the last pages of this issue. A perusal of the same will easily abreast the reader with the latest events in the Indian legal scenario giving them the necessary tools to encounter the legal tussles faced by them both personally and professionally.

I hope that our esteemed readers find this issue succinct and useful. We welcome all suggestions, opinions, queries or comments from our esteemed readers. You can send us your valuable insights and thoughts at newsletter@singhassociates.in

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INDIA OPENING DOORS FOR FOREIGN INVESTMENT IN RETAIL SECTOR

– Manoj K Singh & Karan Gandhi

An affirmative nod to the much awaited proposal for allowing the Foreign Direct Investment [FDI] in the Retail Sector was given on 24th November 2011 by the Union Cabinet of India. The Cabinet had approved the FDI in the Multi Brand Retail Trading [MBRT] up to a level of 51% and liberalized the limit of FDI in the Single Brand Retail Trade [SBRT] to 100%, both under Approval Route subject to adequate safeguards for domestic stakeholders. However, the final guideline on the issue are still awaited.

In January 2006, the Indian Government, in the urge of globalization, relaxed the FDI norms by allowing up to 51% FDI in SBRT and also relaxed the norms and rules for the cash & carry whole sale trade. The move was followed by major business developments, tie ups, joint ventures between the Indian players and the International brands.

The press release issued by the Ministry of Commerce & Industry, Government of India, announcing this policy change has provided following major rationale:

a) Leveraging Foreign Investment in supply chain infrastructure: at present there is very limited integrated cold-chain infrastructure having a total capacity of 23.6 million MT for the total availability of about 200 million MT. Similarly there is lack of adequate storage facilities;

b) Lack of investment in the logistics of retail chain creating inefficiencies in the food supply chain, the present move shall increase in supply chain for farmers;

c) Securing remunerative prices for farmers: At present there is a complex chain of procurement involving several middlemen. FDI in retail will create the enabling environment and is expected that progressive states will undertake gradual reform and will ensure the direct procurement of horticultural produce & others; from farmers to enable the farmer secure a remunerative price;

d) Reduction in impact on food inflation: The opening of Multi Brand Retail will also have a salutary impact on food inflation as it would contribute to savings to the food which perishes on account of inadequate infrastructure. Further, consumers will get products at cheaper prices, as competition will bring down prices.

e) Creation of employment opportunities

SALIENT FEATURES OF THE RELAXATIONS

I. The 51% Foreign Direct Investment in Multi Brand Retail Trading to be allowed by Government of India subject to the following conditions:-

a) The minimum investment shall be US $ 100 million out of which the 50% shall be in the back end infrastructure.

b) Back End Infrastructure can be defined as infrastructure which will include capital expenditure on all activities, excluding that on front-end units; for instance, back end infrastructure will include investment made towards cold chains, refrigeration, transportation, processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, ware-house, agriculture market produce infrastructure etc.

c) The back end infrastructure cannot include investment in land & rentals and front end stores.

d) At least 30% of the procurement of manufactured/processed products shall be sourced from 'Small Industries" which have a total investment in plant and machinery not exceeding US $ 1.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. Further, if at any point in time, this valuation is exceeded, the industry shall not qualify as 'small industry' for this purpose.

e) Self Certification by the company, to ensure compliance of the condition as above, which could be cross-checked as and when required. Accordingly, the investors to maintain

accounts, duly certified by the Statutory Auditors.

f) The Retail sales location shall only set up in cities with a population of more than 1 million. As per 2011 Census only 53 Cities qualify for FDI in multi-bran retail out of nearly 8000 towns and cities and may also cover an area of 10 Kms around the municipal/urban agglomeration limits of cities; retail locations will be restricted to conforming areas as per the Master/Zonal Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking.

g) Where the population is less than 1 million, the current policy regime shall apply. In the current regime, 100% FDI is allowed upto wholesale cash and carry point from which franchise/small retailers are able to source quality products for sale to the public at large.

h) The Government shall have the first right to procurement of agricultural products.

II. 100% Foreign Direct Investment to be permitted in Single Brand Retail Trade subject to following conditions:-

a) The FDI shall be permitted upto 100% with Government Approval i.e. approval from Foreign Investment Promotion Board [FIPB];

b) The products which shall sold in Retail outlets shall be of 'Single Brand' only and have been sold under the same brand internationally;

c) Further, these products have been branded during manufacturing only;

d) The Foreign Investor should himself be the owner of the brand;

e) In proposals where Foreign Direct Investment is beyond 51%. 30% sourcing would mandatorily have to be done from SMEs/ Village and cottage industries artisans and Craftsmen.

f) It has been stipulated that 30% sourcing will be done from micro and small enterprises having plant and machinery worth US 1 million. This condition has been included to ensure that SME sector, including artisans, craftsman, handicraft and cottage industry benefits, especially in sectors like textiles, gems and jewellery, leather and jute.

In a subsequent press release dated 28th November 2011, the Government of India cleared that the condition that 30% sourcing in both MBRT and SBRT is from micro and small enterprises means the Indian Industries and not any small and medium industry from any country of the world. The earlier press release dated 25th November 2011 was silent on this issue.

It is important to mention that the subject [FDI] is under concurrent list i.e. both States as well as Union can make decision on it, therefore the State Governments which don't want to allow the foreign investors who otherwise qualify the conditions mentioned above can stop retailers under their local laws. It's the prerogative of State Government to adopt the FDI policy or not.

All eyes are now on DIPP to issue the relevant circular providing the provisions relating to FDI in retail sector and to clear the picture so as to provide way to aspirants on how to proceed further. ◆◆◆

FOREIGN DIRECT INVESTMENT IN LIMITED LIABILITY PARTNERSHIP: A GREAT OPPORTUNITY OR DISGUISED LIABILITY

– Karan Kumar Kamra

BACKGROUND

As the Indian economy burgeons with continued globalization, the Indian Government is making every effort to make the Indian market more hospitable to foreign capital and is undertaking all the measures to attract Foreign Direct Investment (hereinafter referred to as FDI) into India. FDI plays a crucial role in growth since it facilitates the inflow of foreign capital and funds in addition to transfer of skills and technology. While primarily FDI policies should be oriented towards creating a stable and predictable environment wherein the foreign investor finds himself at ease with the legal and financial framework of the host country, the same being rational and non onerous, at the same time they should also encourage capital inflows across a wide array of industries. Thus, the need for effective policies which help inject significant FDI into a growing economy can never be over emphasized.

With the notification of the Limited Liability Partnership Act 2008 on 2nd April 2009, India witnessed the birth of a new hybrid entity by the name of Limited Liability Partnership.(hereinafter referred to as LLP) which combines the traditional partnership model, with unlimited personal liability on one hand and a limited liability company with detailed compliance requirements and restrictions on the other. The various attributes of the LLP structure such as lower compliance costs, flexibility in operations, better control over management, perpetual succession, limited liability and tax benefits have made it an attractive alternative, ensuring businesses are organized and operated in an efficient manner.

India Companies certainly seems to relish the idea of this new corporate form of organization, since the registration of the first LLP on 2nd April 2009, the count of LLPs has significantly risen and as on 2nd May 2011 stands at an impressive 4,679.[1] Around 4,800 holding firms of Indian corporates across industries have been converted into LLPs with the Promoters of more than three dozen listed companies, including firms like **Reliance Industries Reliance Communication, Zee Entertainment, Gems, Hexware Technologies, Siyaram Silk and Edelweiss Capital** converting their ownership into LLPs to save tax and smoothen succession planning. Despite the fact that since the allowing of the LLP, the government and regulators, possibly sensing the tax loss that the said entity could cause, have brought in changes to make LLPs comparatively less attractive to business houses by imposing conditions of obtaining a No-Objection Certificate (NoC) from RBI, levelling of an Minimum Alternate Tax (MAT) nonetheless undeterred by the above, business houses continue to transform their investment firms, which hold shares in key group companies, into LLPs.[2]

In a move to facilitate FDI further into the country's growing economy, the Ministry of Commerce approved in May 2011, FDI into LLPs, that has on one hand sparked a wave of excitement in the country with many welcoming it as the heralding in of a new era in Corporate India while others view the said approval accompanied with restrictions as dampening the spirits of the Industry and the stakeholders therein involved.

HISTORY OF INDUCTION OF FDI IN LLP

The Department of Industrial Policy & Promotion (hereinafter referred to as DIPP) of the Government of India addressing the said issue released a discussion paper on the subject and other allied and inter-related aspects in September 2010. The said development was the outcome the of the UPA government's decision to have a simpler regulatory framework to attract FDI inflows, which had declined by 25% in the first 10 months of the financial year 2010-2011 to $17 billion. Subsequently, the proposal of foreign investment in LLPs was fast tracked and on 11th May 2011, the Cabinet Committee on Economic Affairs reviewed the extant policy on FDI and decided to permit the same in LLP firms.[3]

Amendments were made in the existing Foreign Direct Investment Policy (effective from 1'st April 2011)[4] vide

1 *Economic Times Report dated 11th May 2011*

2 *Economic Times Report dated 24th May 2011*

3 *Press release dated 11th May 2011 issued by the Cabinet Commitee on Economic Affairs*

4 *DIPP Circular 1 of 2011- FDI Policy as effective from April 1,2011*

Press Note No.1 (2011 Series) in terms of the aforementioned approval and FDI in LLP came to be incorporated retrospectively in the said policy. The above mentioned changes, as made therein, have been reiterated in Consolidated FDI Policy as effective from October 2011).[5]

Prior to the aforementioned approval for amendment, there was no separate treatment for FDI in LLPs under the relevant policies and foreign investors apart from non-resident Indians persons of Indian origin were required to obtain prior approval of the Reserve Bank of India (hereinafter referred to as 'RBI') to invest in partnership firms as per the terms of the relevant RBI Guidelines.

THE REGULATORY FRAMEWORK FOR FDI IN LLPS

FDI in LLPs is sought to be implemented in India, in a calibrated manner, beginning with the 'open' sectors where monitoring is not required, subject to the following conditions as are effectively summarized in **Para 3.2.5** of the current FDI Policy as effective from October 1, 2011:-

- FDI will be allowed, through the Government approval route, only in LLPs operating in sectors/ activities where 100% FDI is allowed through the automatic route. Thus, LLPs in Sectors such as single brand retail, telecom etc where 100% FDI through automatic route is not permitted will not be allowed to have FDI. Moreover, FDI will further not be allowed where one encounters FDI-linked performance related conditions (such as Non Banking Finance Companies' or 'Development of Townships, Housing, Built-up infrastructure and Construction-development projects). Separately, one has to consider whether the guidelines governing the particular business per se permit the usage of the LLP or not as for instance LLP cannot be used as a vehicle for banking or road sectors.
- LLPs with FDI will not be allowed to operate in agricultural/plantation activity, print media or real estate business.
- LLPs with FDI will not be eligible to make any downstream investments. An Indian company, having FDI, will be permitted to make downstream investment in an LLP only if both-the company, as well as the LLP- are operating in sectors where 100% FDI is allowed, through the automatic route and there are no FDI-linked performance conditions.
- Foreign Capital participation in LLPs will be allowed only by way of cash consideration, received by inward remittance, through normal banking channels or by debit to NRE/FCNR account of the person concerned, maintained with an authorized dealer/authorized bank.
- Investment in LLPs by Foreign Institutional Investors (FIIs) and Foreign Venture Capital Investors (FVCIs) will not be permitted. LLPs will also not be permitted to avail External Commercial Borrowings (ECB)
- Under the LLP Act, one of the designated partners needs to be a resident of India. For the purpose of determination of the designated partners in respect of LLPs with FDI, the term "resident in India" would have the meaning, as defined for "person resident in India", under Section 2(v)(i)(A) & (B) of the Foreign Exchange Management Act, 1999.
- The designated partners will be responsible for compliance with all the above conditions and also liable for all penalties imposed on the LLP for their contravention, if any.
- Conversion of a company with FDI, into an LLP, will be allowed only if the above stipulations are met and with the prior approval of FIPB/Government.

CRITICAL ANALYSIS

The new rules on FDI in LLP seem to have excited many a people. The move is touted to benefit small partnership firms having operations in financial services, legal advisory and civil engineering consultants and to bring professionalism in operations and giving the said businesses much desired teeth. Experts see FDI opening up newer avenues for Indian entities in the form of expanded geographies for operations and competitive advantage in the international market.

Ruia-led conglomerate Essar Group is in favour of allowing FDI in LLP as it will help attract overseas funds in capital intensive sectors and in no way find it restricted in its suitability to small businesses.

The cautious approach taken by the Government that is approving FDI with restrictions finds approval with many industrialists and businessmen.

5 *DIPP Circular 2 of 2011- FDI Policy as effective from October 1,2011*

While celebrating the positives of the new development one cannot negate the pitfalls of this latest phenomenon as well which are documented as hereunder:-

- **Time taken/ number of steps required to start business :** Foreign investment in LLPs has recently been permitted, but it is only under the approval route (even in sectors where investment into a company is possible under the automatic route), and the approval from Foreign Investment Promotion Board (FIPB) is therefore an extra step a foreigner will have to take while setting up his business. If the sector is a regulated sector where foreign investment is not up to 100% and under the automatic route, then the foreigner has no option at all, as FDI in LLPs operating in such sectors is not permitted.
- **Structuring Shareholding within group / affiliate / subsidiary companies :** Second, a business which is in the industrial or manufacturing sector is likely to have investments in other related or group companies. Unfortunately, LLPs with FDI are not permitted to have downstream investments at all.
- **Ability to control management :** Thirdly, a foreign company which has incorporated a Limited Liability Partnership venture in India would like to be involved in the active governance. Ordinarily, a company can be nominated as a Designated Partner. However, if a foreign company intends to nominate a body corporate as a designated partner, the body corporate must be a company registered under the Companies Act, 1956. It cannot nominate other Indian entities or a foreign body corporate as a Designated Partner.
- **Ability to look for Indian partners :** A foreign entity is likely to look for Indian business partners. While an LLP can enter into joint venture and agency agreements, some partners are likely to demand equity in the venture. The ability of an LLP to look for business partners who hold equity stake in it is severely limited. Any company which has FDI can only invest into an LLP if both are in the 100% automatic route sector. Further, the LLP has an increased burden of doing significant legal due diligence to find out the detailed shareholding pattern and ownership structure of the company that is investing into it, before it can involve the company as an equity holder in its business.
- **Ability to borrow: Cost of capital and access to capital:-** The freedom to borrow money is restricted in case of an LLP. A foreigner is typically not used to the high interest rates charged in India (access to foreign capital is much cheaper than capital from India, as interest rates abroad are much lower), and he may have the added advantage of having dealt with and convinced foreign financial institutions to lend money to his venture. Indian businesses also prefer taking loans and debt from abroad, which is done through the External Commercial Borrowings (ECB) route under Exchange Control Regulations. However, LLPs are placed at a great disadvantage with respect as they cannot avail ECBs
- There are concerns that the said approval coupled with the onerous restrictions may result in the LLPs losing their competitive edge against the corporate entities for the time being. Further, restricting FDI in LLPs only to approved sectors and prohibition of downstream investments may hinder the use of these organizational forms for structuring businesses in India as the biggest advantage of these entities i.e. tax benefit (absence of distribution dividend) may not be available in the absence of use of LLP for multi tier holding structures. Additionally, the RBI may be required to issue separate notification for setting out disclosure and filing requirements, including the revision of the current forms to provide for situation of FDI in LLP. The Approval is silent on the point of entry/exit, pricing and valuation which is expected to be verified by the RBI shortly.

CONCLUSION

Today India stands poised as a land of opportunity and looks at the future with innate confidence ready to combat the domestic and international challenges that try and impediment fast and inclusive growth. India has come out of the recessionary crisis stronger than most nations holding the spot as one of the top three investment destinations even in the trying conditions. India definitely is more securely placed to push the reform process forward than ever before. It definitely has a bright future ahead if it avails of the opportunities strewn in his way.

FDI in LLP is another channel of giving effect to the determined policy of the Government on Liberalization and attracting foreign investments. Given that the LLP Act specifically provides for foreign participation in LLPs in India, FDI being an enabling policy by the same Government should permit the same to ensure that the LLP legislation can be executed and not constrained. From the above, it can be observed that the LLP model

of business is in no way restricted in its suitability to small businesses. It has also proved to be advantageous for various large capital intensive sectors as well.

Further, it may be observed that even in countries such as UK and Singapore, foreign participation in LLP was permitted from the time the LLP Act was introduced. In fact in case of Singapore, one among the many other objectives for introducing LLP as an entity was to attract more foreign investment. Indian LLP Act is based on UK and Singapore laws where FDI has been permitted. Thus, we have precedence which maybe followed for India as well.

Even if the wide array of restrictions, prevent immediate flow of FDI but if the initial experience is smooth, it may pave the way for gradual withdrawal of some of the restrictions ensuring meaningful impact on the growth of LLP's in India. ◆◆◆

FOREIGN INVESTMENTS IN INFRASTRUCTURE DEBT FUNDS

– Shipra Makkar

The Reserve Bank of India [RBI] vide A.P. [DIR Series] Circular No. 49 dated November 22, 2011 has allowed nonresident investors to invest on repatriation basis in units issued by Infrastructure Debt Funds [IDFs].

THE EXISTING SCENARIO

As per Schedule 5 to the Foreign Exchange Management [Transfer or Issue of Security by a Person Resident outside India] Regulations, 2000, as amended from time to time, a SEBI registered Foreign Institutional Investor [FII] and a Non-Resident Indian [NRI] may invest in securities other than shares or convertible debentures, subject to such terms and conditions mentioned therein and limits as prescribed for the same by the RBI and the Securities and Exchange Board of India [SEBI] from time to time.

As per the AP (DIR Series) Circular No.8 dated August 9, 2011 and AP (DIR Series) Circular No.42 dated November 3, 2011, in terms of which Qualified Foreign Investors (QFIs as defined therein to mean non-resident investors, other than SEBI registered FIIs and SEBI registered FVCIs, who meet the KYC requirements of SEBI) were allowed to invest in units of domestic Mutual Funds.

THE AMENDMENTS

In furtherance to the above and with regards to easing out rules, the RBI has now allowed investment on repatriation basis by eligible non-resident investors in rupee and foreign currency denominated bonds issued by Infrastructure Debt Funds (IDFs) set up as an Indian company and registered as Non-Banking Financial Companies (NBFCs) and also in rupee denominated units issued by IDFs set up as SEBI registered domestic Mutual Funds (MFs).

It has now been decided to allow investment on repatriation basis in the following order:

	Eligible Non Resident Investor	Eligible Instruments
[1]	Sovereign Wealth Funds, Multilateral Agencies, pension Funds, Insurance Funds and Endowments Funds w hich are registered with SEBI as eligible nonresident investors in IDFs (hereinafter referred to as 'SEBI registered eligible non-resident investors in IDFs']	Foreign currency and Rupee denominated bonds and rupee denominated units issued by IDFs
[2]	SEBI registered Foreign institutional Investors [FIIs] who qualify as [1] above.	Foreign Currency and Rupee denominated bonds and rupee denominated units issued by IDFs
[3]	SEBI registered FIIs who do not qualify as [1] above.	Rupee denominated bonds and units issued by IDFs
[4]	Non Resident Indians [NRIs] as defined in the Foreign Exchange Management [Transfer or Issue of Security by a person resident outside India] Regulations, 2000	Rupee denominated bonds and units issued by IDFs
[5]	High Net worth individuals [HNIs] registered with SEBI as sub accounts of SEBI registered FIIs or HNIs which are separately registered with SEBI as eligible non-resident investors in IDFs in India.	Foreign currency and Rupee denominated bonds and Rupee denominated units issued by IDFs

GENERAL TERMS AND CONDITIONS

1. The original/initial maturity of all the above mentioned securities at the time of first investment by a non resident investor shall be five years.

2. All non-resident investment in the aforementioned securities would be subject to a lock in period of three years. However, all non-resident investors can trade amongst themselves within this lock in period of three years.

3. Foreign currency denominated bonds issued by IDFs would have to comply with all the terms and conditions (including all in cost) under the extant FEMA guidelines / regulations for External Commercial Borrowing (ECB), other than reporting requirements.

4. Quantitative limits for non- resident investment in IDFs:

    4.1 All non-resident investment in IDFs (other than NRIs) (in both Rupee and Foreign Currency denominated securities) would be within an overall cap / limit of USD 10 billion only. This cap / limit of USD 10 billion would be within the overall cap of USD 25 billion for FII investment in bonds / non convertible debentures issued by Indian companies in the infrastructure sector (where infrastructure is as defined under the extant ECB guidelines) or

by Infrastructure Finance Companies (IFCs registered as NBFCs with the Reserve Bank).

4.2 There would be no cap / limit for NRI investment in IDFs by way of Rupee denominated bonds / units.

5. End use

5.1 IDFs set up as NBFCs may invest in debt securities of only Public Private Partnership (PPP) infrastructure projects which have a buyout guarantee and have completed at least one year of commercial operations. Refinance by IDF would be up to 85% of the total debt covered by the concession agreement.

5.2 IDFs set up as MFs would invest minimum of 90% of its funds in debt securities of infrastructure companies or SPVs across all infrastructure sectors, project stages and project types.

(where 'infrastructure' is defined in terms of the extant ECB guidelines)

6. The facility of foreign exchange hedging would be available to the eligible non-resident IDF investors, IDFs as well as the infrastructure project companies exposed to the foreign exchange/ currency risk as per the extant provisions under Notification No. FEMA.25/2000-RB dated May 3, 2000, as amended from time to time. ◆◆◆

CREDIT DEFAULT SWAP DERIVATIVES: "DON'T STIR THE POT IF YOU DON'T UNDERSTAND THE INGREDIENTS"

– Kumar Satyakam

BACKGROUND

Reserve Bank of India having considered it necessary in public interest and to regulate the financial system of the country to its advantage, has issued notification specifying Credit Default Swap as a derivative for the purposes of Chapter IIID of the RBI Act, 1934.

Moreover, at the time when we have already entered into the untraded world of litigation/disputes due to the nuances involved in the Derivative transactions, it would be interesting to see what will be the consequences in the wake of introduction of plain vanilla Over-The-Counter (OTC) single-name Credit Default Swap (CDS) in India[1] .

CDS CONCEPT REVISITED

The concept of Derivatives always find flavor when the issue of risk management or risk transfer comes into play. Thus, a credit derivative can be defined as an OTC derivative designed to transfer credit risk from one party to another. By synthetically creating or eliminating credit exposures, they allow institutions to more effectively manage credit risks. Credit derivatives take many forms and one of the variants is Credit Default Swap (CDS).

CDS is a risk management product which helps entities guard against possibility of defaults in repayment of corporate bonds. In other words, CDS is a swap designed to transfer the credit exposure of fixed income products between parties. There are two parties – one is the buyer of CDS which gets itself insured against the possibility of credit default on corporate bonds by the Reference Entity on the occurrence of credit event. The other is the seller of CDS which intends to benefit from the regular premium paid for assuming the risk in the event of a default i.e. the buyer makes regular premium payments to the seller, the premium amounts constituting the "spread" charged by the seller to insure against a credit event.

A single-name CDS is a derivative in which the underlying instrument is a reference obligation, or a bond of a particular issuer or reference entity. In the CDS world, a credit event is a trigger that causes the buyer of protection to terminate and settle the contract. Credit events are agreed upon at the time the trade is entered into and are part of the contract. The majority of single-name CDSs are traded with the following credit events as triggers: reference entity bankruptcy, failure to pay, obligation acceleration, repudiation and moratorium.

Underlying essence behind introduction of CDS in India can be enumerated as below:

- to provide an additional instrument for hedging risks in the event of a default in corporate bonds by reference entity,
- to increase investors' interest in corporate bonds,
- to enhance borrowing opportunities for the corporate,
- to increase the required market liquidity,
- it would be beneficial to the development of the corporate bond market in India,
- to decrease quantum of bad loans in the banking system which appears to be gradually building up,
- an opportunity to the buyers of CDS to diversify their loan portfolio,
- to retain client and their faith unlike in the case of other credit risk transfer techniques such as selling of loans or securitization (which is much in vogue in India),
- Premium paid by the buyer of CDS is a good source of income for the Banks especially when there is no default in the wake of an economy flourishing

AN INSIGHT INTO THE GUIDELINES ISSUED BY RBI

Guidelines issued by RBI relate to introduction of plain vanilla OTC single-name CDS for corporate bonds. The guidelines further say that entities will only be allowed to buy CDS contracts to hedge credit risk and not for speculation. This means that RBI has implicitly barred any speculation i.e. Naked Credit Default Swaps to take place in Indian corporate bonds market. The reference entity in a CDS contract, against whose default the protection is bought and sold, shall be a single legal

1 *As announced by RBI circular dated May 23, 2011 – which is expected to be operationalised by November end 2011*

resident entity[2] and the CDS contract shall be denominated in Indian Rupess. Further, all CDS trades have an RBI regulated entity, at least on one side of the transaction.[3]

As per guidelines, Commercial Banks, Primary Dealers (PDs), Non-Banking Financial Companies (NBFCs), Mutual Funds, Insurance Companies, Housing Finance Companies, Provident Funds, Listed Corporates, FIIs and other institution specifically permitted by the RBI can buy credit protection under the scheme. The eligible Market-makers may be any of the Commercial banks, stand alone PDs, NBFCs having sound financials and good track record in providing credit facilities and any other institution permitted by the Reserve Bank. This way the guidelines differ from the Draft Guidelines of RBI on Credit Default Swap dated May 2007, which did not take into consideration NBFCs with sound financial and good track record to act as market makers or facilitators (for buying and selling of such swaps). The recent guidelines stands to plug in this loophole by allowing NBFCs and this will go a long way in assisting NBFCs to manage their asset-liability mismatch due to absence of alternative source of funding other than credit lines from Banks.

Besides the listed corporate bonds, the bonds for the purpose of CDS would also include unlisted and unrated debt instruments, including those issued by the infrastructure companies engaged in sector like road, port and telecommunication, power among others.

The users cannot buy CDS for amounts higher than the face value of corporate bonds held by them and for periods longer than the tenor of corporate bonds held by them. In addition to this maintaining naked CDS protection i.e. CDS purchase position without having an eligible underlying is specifically barred. In other words, speculation has been discouraged vide the circular. In addition to this, CDS transactions between related parties[4] as counterparty or as the reference party, are not permitted

One of the most remarkable guideline is in the context of devising of Mater Document. Till now, the derivatives transaction has been following Master Agreement devised by International Swaps and Derivatives Association. But, through this circular; special responsibilities has been devolved over Fixed Income Money Market and Derivatives Association of India (FIMMDA), which has been given the task for devising Master Agreement for Indian CDS. Further, responsibility for standardization of the CDS Contract has been assigned to FIMMDA in consultation with the market participants. In addition to all this, a Determination Committee shall be formed by the market participants and FIMMDA, which shall deliberate and resolve CDS related issues such as Credit Events, CDS Auctions, Succession Events, Substitute Reference Obligations etc.

These guidelines has laid down a better Risk Management system emphasizing on prudential norms related to Counterparty Credit Exposures by tools such as internal limits on gross amount of protection sold by the market-makers on a single entity, periodical assessment of stress test related to liquidity position and ability to raise funds, on a short notice. Special attention has been paid to the need of collateralization and margining, so as to minimize liquidity risk.

Role of Board and Senior Management in risk management has been appreciated and the need of ability to understand the various risks involved and ability to manage them properly has been emphasized. The guideline further stress on the need of a robust Risk Management Architecture established and assured by the senior management. To prevent mis-selling and market abuse, the guidelines lays down that market-makers may ensure adherence to suitability and appropriateness criteria[5].

RBI guidelines related to CDS Contract Reporting Requirements is evident of the intent of our regulatory bodies to match the endeavors of global authorities. For the first time, concepts like Trade Reporting and Supervisory Reporting has been introduced. The latter of the two emphasizes on fortnightly regulatory reporting. Such initiatives prove that the uncertainties that hovers around OTC derivatives transactions (even though right now it is restricted to CDS transactions) have finally compelled our regulatory authority to foray into new reporting regime.

2 the term entity will be as defined in Section 2(v) of Foreign Exchange Management Act,1999

3 Due to the provisions of Section 45V of Reserve Bank of India Act

4 Related Parties for the purpose of these guidelines will be as defined in "Accounting Standard 18 – Related Party Disclosures"

5 RBI / 2006 – 2007 / 333 DBOD.No.BP.BC.86/21.04.157/2006-07 dated April 20, 2007

WAY FORWARD

In light of the complex character of the derivative transaction, the RBI has deferred operationalisation of its credit default swap (CDS) guidelines to give market participants like banks and other financial institutions more time to clarify details on documentation, operational aspects and the arrangement for the necessary institutional framework.

Inspite of the financial turmoil, if our regulatory authority is taking such initiatives, it really deserves loads of praises. It shows that we are moving towards a real globalization era. Inspite of International Swap and Derivatives Association (ISDA) advocacy for introduction of Naked Credit Default Swaps, our regulatory authority has not conceded to such demand for the time being. It may be a step in the right direction as a lot needs to be observed and analyzed before foraying into such area.

Increase in number of disputes needs a well defined set of guidelines, proper debates and discussions, more research and development, proper financial trainings imparted, parties need to be vigilant etc.; rather than a blanket ban on such derivative transactions as there is no alternative to progressiveness.

Now it needs to be seen, how our market react to such novelty. ◆◆◆

TRADING CHARGES - A FEE PAID FOR TECHNICAL SERVICES, HENCE TAXABLE -RULES BOMBAY HIGH COURT

– Megha Kapoor

The Bombay High Court, in The Commissioner of Income Tax vs. M/s. Kotak Securities Limited has ruled that the transaction charges paid by the assessee to the stock exchange constitute 'fees for technical services' covered under Section 194J of the Income Tax Act, 1961 [*hereinafter referred to as* "Act"] and, therefore, the assessee shall be liable to deduct tax at source while crediting the transaction charges to the account of the stock exchange.

The trading and settlement of transactions in securities are done as per the procedure adopted by the stock exchange. To regulate and control the contracts for sale and purchase of securities, the recognized stock exchanges have framed Bye-laws which are duly approved by the Securities & Exchange Board of India (SEBI). Under the framed bye-laws, the stock exchanges are entitled to charge various fees to its members, one of such fee includes transaction charges. Thus, transaction charge is basically a fee charged by the stock exchange while dealing in securities. The Bombay High Court is of the view that the stock exchange not only provides physical infrastructure, but also renders managerial services to its members and that transaction charges are the fee for "technical services" and therefore liable to be taxed.

BRIEF FACTS OF THE CASE

M/s Kotak Securities Limited [Respondent] is a company engaged in the business of share broking, depositories, mobilization of deposits etc. The respondent, in the assessment year 2005-06 had paid to the Bombay Stock Exchange Rs.5,17,65,182/- towards transaction charges. Thereon, the assessing officer raised question that the said payment of transaction charges constituted payment of 'fees for technical services' covered under Section 194J of the Income Tax Act, 1961 and the respondent was liable to deduct tax at source [TDS] at the time of crediting the transaction charges to the account of the stock exchange. Also, as the assessee had not deducted tax at source, the assessing officer held that in view of Section 40(a)(ia) of the Act, the entire expenditure of Rs.51765182/- incurred by the assessee by way of transaction charges was liable to be disallowed.

LEGAL PROVISIONS

It shall be important to discuss the relevant provisions of the Income Tax Act, 1961 before proceeding further.

Section 194J of the Act states that any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of….

(a) Fees for professional services, or
(b) Fees for technical services,

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income-tax on income compromised therein.

Further, "fees for According technical services" has been defined under explanation to Section 9(1)(vii) of the Act. to the said explanation, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services for technical or other personnes) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

Section 40(a)(ia) of the Act, provides that while computing the income chargeable under the head "Profits and gains of business or profession", any interest, commission or brokerage, [rent, royalty,] fees for professional services or fees for technical services payable to a resident shall not be deducted on which tax is deductible at source under Chapter XVII-B of the Act and such tax has not been deducted or, after deduction, has not been paid on or before the due date

ISSUES IN DISPUTE

During the assessment proceeding before the Assessing Officer [AO], the AO has held that transaction charges were in the nature of 'fees for technical services' and hence taxable. Further, since the assessee had not deducted tax at source, the assessing officer held that

in view of Section 40(a)(ia) of the Act, the entire expenditure of Rs.5,17,65,182/- incurred by the assessee by way of transaction charges was liable to be disallowed.

However, an appeal was filed by the respondent before the Commissioner of Income Tax (Appeals) [CIT(A)], CIT(A) upheld the order of the AO and also stated that the stock exchange is not merely a mute spectator providing only physical infrastructure to the members but the stock exchange was a supervisor, overseer, manager controller, settlor and arbitrator over the security trading done through the stock exchange which necessarily had vital inputs and ingredients of rendering managerial services and, therefore, the provisions of Section 194J was applicable to the facts of the present case.

The respondent aggrieved by the order of the CIT(A) filed an appeal before Income Tax Appellate Tribunal [ITAT] and the tribunal reversed the findings of CIT(A) and held that the stock exchange does not render any managerial service or render any technical consultancy service and, therefore, transaction charges were not covered under Section 194J of the Act and consequently Section 40(a)(ia) of the Act was also not attracted. Accordingly, the Tribunal deleted the disallowance made by the assessing officer.

On the difference of opinion of CIT(A) and ITAT, the question aroused as how to treat the consideration paid by the respondent to the stock exchange. Challenging the aforesaid order of the ITAT, the revenue has filed the present appeal before the Bombay High Court.

POSITION BEFORE THE HIGH COURT

The revenue (department) while making an appeal before the HC contended that the stock exchange provides a trading platform which is highly sophisticated and constantly monitored and managed by the managerial staff of the SE and the services rendered are in the nature of technical services under 194J of the Act and Tax has to be deducted on the amount. Since the assessee failed to deduct tax at source, the assessing officer was justified in invoking Section 40(a)(ia) of the Act.

On the other hand, respondent contended that the BOLT system (system by which Stock exchange works) is similar to the ATM system provided by the banks which neither envisage a contract for rendering technical services nor a contract for rendering managerial services, but merely a contract for user of the BOLT system. The respondent also stated that in the absence of a contract for rendering the technical services, the BOLT system is a device set up by using high technology and hence cannot be held as a ground to hold the transaction charges are fees for technical services under Section 194J of the Act and hence Section 194J is not applicable and consequently, the provisions of Section 40(a)(ia) are also not applicable to the facts of the present case.

On the said argument, hon'ble High Court of Bombay observed that the argument that the BOLT system is like a ATM system provided by the banks is without any merit, because through the ATM system, no trading activity is carried on, whereas, through the BOLT system trading activity is carried on which is monitored / regulated / managed by the stock exchange.

The Bombay High Court further stated that the stock exchanges were established with a view to prevent undesirable transactions in securities by regulating the business of dealing in shares and that the stock exchanges manages the entire trading activity carried on by its members and accordingly managerial services are rendered by the stock exchanges. Therefore, in the facts of the present case, the transaction charges were paid by the assessee to the stock exchange for rendering the managerial services constitutes fees for technical services under Section 194J read with Explanation 2 to Section 9(1)(vii) of the Act and hence the assessee was liable to deduct tax at source before crediting the transaction charges to the account of the stock exchange. However, since both the revenue and the assessee were under the bonafide belief for nearly a decade that tax was not deductible at source on payment of transaction charges, no fault can be found with the assessee in not deducting the tax at source in the assessment year in question and consequently disallowance made by the assessing officer under Section 40(a)(ia) of the Act in respect of the transaction charges cannot be sustained.

CONCLUSION

The decision of the high court relating to deduction of 10% tax at source on transaction charges will have a bearing on thousands of brokers who will now have to pay TDS along with interest for delayed payment. However, the move will impact the share investors as most brokers pass on the transaction charge to their clients. At present, NSE levies transaction charge of Rs. 325 for Rs. 1 crore turnover. BSE charges Rs. 265 per Rs. 1 crore turnover in cash segment. In the year ended March, the NSE had collected Rs. 799 crore as transaction charge. ◆◆◆

REVERSE PASSING OFF- A NEW DIMENSION TO INFRINGEMENT

– Himanshu Sharma

INTRODUCTION

A trademark is an identity of an enterprise or business and hence is the most important part of any business in the contemporary period. In the business hierarchy, the trademark is in the forefront, it not only gives a face to a product but in long run the ultimate success is dependent upon the final product delivered under the brand or trademark. Promotion of a brand can provide the recognition to a particular product but ultimately it is the product which should pass the standard in order to survive in the market. Products of the renowned business brands fail due to lack of quality. Therefore, a product is as important for a business as a brand under which it is presented to the customers.

The theft of identity of a business is quite prevalent these days which can also be termed as infringement / passing off but when the defendant try to pass on the goods of the plaintiff under its own brand rather than using his own product then this type of passing off is known as reverse passing off. The defendant markets the plaintiff's product as being the defendant's product under its own trademark. In usual concept of passing off, a person tries to pass on his goods and services under a trademark which belongs to some other person.

It will be recalled that orthodox passing off entails the defendant representing that his product is the plaintiff's product. In many cases, reverse passing off can be explained under the ordinary rules: for example where a defendant may represent that he/she has made goods which are offered under his own brand whereas which were in fact made by the plaintiff in order to pass-off his own business as a branch of the plaintiff's business.

CONCEPT

The concept of the reverse Passing-Off is derived from Section 43(a) Lanham Act of United States.

Section 43(a) of the Lanham Act provides two general theories of liability:

(1) False representations regarding the origin, endorsement or association of goods or services through the wrongful use of another's distinctive mark, name, trade dress, or other device ("false endorsement" or "false association"), and

(2) False representations in advertising concerning the quality of services or goods ("false advertising").

To prevail under Section 43(a) of the Lanham Act, a plaintiff must show that it has 'a valid, protectable trademark and that the defendant's use of a colorable imitation of the trademark is likely to cause confusion among consumers.

INDIAN SCENARIO

Under Indian law the reverse passing off has been recognized by the various courts as being a remedy against the wrongful use of the goods of one person by another. Reverse passing off is based upon the principle that no person is allowed to use the goods of others under his trademark as being his manufactured goods without the permission of the real manufacturer.

In case of **Mrs. Sheila Mahendra Thakkar Vs. Shri Mahesh Naranji Thakkar**[1] The Bombay High court has observed the case of **Plomien Fuel Economiser Coy. Ltd. v. National School of Salesmanship Ltd.**[2] wherein the Court explained the principle of reverse passing off as follows:

"It is perfectly true that there is no evidence that a single person who purchased an economizer from the defendants had ever heard the plaintiffs; but in passing off there is no necessity that the person who is deceived should have known the name of the person who complains of the passing off. In many cases the name is not known at all. It is quite sufficient, in my opinion, to constitute passing off in fact, if a person being minded to obtain goods which are identified in his mind with a definite commercial source is led by false statements to accept goods coming from a different commercial source".

Then the Court further observed

"Having got them in their shop, what do they do? They do not sell those customers the goods which those customers have come to buy: they sell them goods of their own manufacture, which are quite different, in the sense that they are not the required manufacture. If that is not

1 2003(5)BomCR491

2 (1943)60 R.P.C.209

passing off, I really do not know what is. It is perfectly true, and I am willing to assume, that not one single customer who went to the shop (I use the word shop of course metaphorically, it was not a shop at all: it was done by orders by post and by travelers and so forth) had ever heard of the plaintiffs or ever heard that they put on the market an economiser. That, to my mind, matters not one bit when it is realised that those customers were coming with the intention of getting goods from a particular source, namely, the same source as those from which, the satisfied customers had got their goods."

THE DIFFERENCE BETWEEN PASSING OFF AND REVERSE PASSING OFF

The passing off occurred when a person uses the trademark of another person to pass off his goods where as in case of reverse passing off, a person try to pass off goods of other person under his own trademark as being the goods manufactured by him.

In case of ***Zee Telefilms Ltd. and Film and Shot and Anr Vs. Sundial Communicatifons Pvt. Ltd. and Ors***[3], it was observed by the Bombay High Court that "passing-off lies in passing-off one's product as that of another's whereas reverse passing off lies in passing off another's product as one's own.

In this connection, the court has also observed the English case ***Bristol Conservatories ltd. v. Conservatories Custom Built Ltd***[4]., where the plaintiffs' complaint was that the defendants used albums of photographs of conservatories designed and installed by the plaintiffs to show their prospective customers, falsely claiming that the photographs show conservatories of their own design and work. Customers are thereby misled into believing that the defendants are the company which produced the conservatories; that their designs are the same as in the album (which they are not) and that the defendants have a well-established business (which they have not). The Appeal Court, following the earlier decisions came to the conclusion that this was the case of reverse passing off. We find some substance in the submission of the learned counsel that the action of the defendants may also amount to an act of reverse passing off.

In ***Gloag & Sons Ltd v Welsh Distilleries***[5] the complaint of plaintiff was that defendants who were manufacturing welsh whisky were using Scotch Whisky and therefore, activities of the defendants would dilute the reputation and goodwill attached to the Scotch whisky because by selling scotch whisky as welsh whisky, the defendants would be achieving a reputation for welsh whisky which truly belongs to Scotch whisky so that in the end the reputation which belong exclusively to the latter would be shared by welsh whisky as well.

The Court in this case held that *"the borderline between reverse passing off and cases falling outside the tort was difficult to define and the plaintiffs claim was not bound to fail. They had a particular interest in the exclusive reputation of the words "Scotch whisky" which interest clearly extended to preventing those words form being used on a beverage which was not Scotch whisky but which could well extend further to prevent authentic scotch whisky from being used for the purpose of building up or reinforcing a misleading reputation in a misleading geographical denomination"*

A person can be benefited immensely by taking course of reverse passing off because he does not have to work on the manufacturing of a unique product, instead, he take an already established product and pass off the same under his own trademark as being his product. The difference between this in comparison to the classical passing off is regarding the accessory of passing off. In classical passing off the trademark is being used as the accessory where as in reverse passing off, it is the goods that are being used as accessory.

CONCLUSION

A trademark which has acquired goodwill in the market is prone to infringement. This infringement is due to the quality of product, which is the biggest contributing factor in a brand success. Therefore, it is imminent that there would be people who would take the advantage of not only the trademark but also of the product available under the same brand. Hence, it is important that the provision regarding the same should also be included in the Indian Trade Marks Act. ◆◆◆

3 2003(5)BomCR404
4 1989) R.P.C. 455
5 (1998) FSR 718

PROTECTION OF ADVERTISING SLOGANS UNDER COPYRIGHT LAW

– Team IPR

A slogan is a memorable motto or phrase used politically, commercially, religiously and in other context as repetitive expressions of an idea or purpose. Slogans when used by enterprises for an advertisement campaign are known as Advertisement Slogans. They are quick to draw the public attention and leave an impression that is worth a thousand words and hence they become associated to the brand for which they are used and attain an intangible value. '*Have a Break, Have a kit Kat*' for kit Kat chocolate, 'i'm lovin' it' for Mc Donald's, *'Just Do It'* for Nike are few examples of advertisement slogans. The advertising slogans are fundamentally protected under Copyright Act, 1957.

This article analyses the bare text of section 13 of the Copyright Act which governs the law \relating to what can be copyrighted. Later the article proceeds to look whether advertisement slogans can come within its ambit and also the judicial decisions relating to the same.

LAW OF COPYRIGHT

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings which enables them to prevent others from using their work. The obvious question that now arises is what can be copyrighted i.e. what is copyrightable and what is not.

For this, we need to look at section 13 of the Copyright Act which provides the work under which copyright can subsist. These are, namely-

(a) original literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) sound recordings.

Section 13 of the said Act does not customarily protect titles or names, short word combinations, slogans, short phrases, methods, plots or factual information on the basis that short words/phrases cannot claim originality. A slogan or catch phrase however elaborate, would rarely, amount to an original literary work. It is to be seen that the judiciary has taken a view contrary to the above. We will now examine the essentials of the section 13 and also look at the case law related to the same.

JUDICIAL INTERPRETATON

A reading of the Section 13 of the Copyright act makes it evident that if advertisement slogans can be copyrighted then they must fall within one of the categories mentioned in this Section. Sub clause (a) of Section 13 is of relevance here, the sub clause lays down two important conditions. *First* that the work must be an original work and *second* that it should be capable of being called a literary, dramatic, musical or artistic work.

1 Original

Let us now see if advertisement slogans can be regarded as original literary works. In the case of **PepsiCo Inc. and Anr. v. Hindustan Coca Cola and Ors**[1] it was ruled by a single judge bench of the High Court of judicature at Delhi that the advertising slogans are prima facie not protected under the Copyright Act. It was ruled that the slogans might be protected under the law of passing off in case the plaintiffs make out such a case. This proposition was overruled by the Hon'ble Division Bench of the High Court of Delhi in appeal in **PepsiCo, Inc. and Ors. v. Hindustan Coca Cola**[2] wherein the court held that slogans which form the theme of the advertisement of the applicant's products are entitled to copyright protection. Holding that advertising catch phrases are entitled to copyright protection, the court went on to observe that any observation to the contrary would be against the statutory rights of the party and also against the provisions of Copyright Act.[3]

The court, in the above case, reasoned that since the slogan "Yeh Dil Mange More" was not a common place phrase and that it was an original combination of words from two different languages, thereby conveying the theme of the advertising, and since it had acquired distinctiveness and association with the product of the

1 94 (2001) DLT 30

2 2003 (27) PTC 305

3 2003 (27) PTC 305, ¶24 (per, Mehra J.).

appellant it was entitled to such protection. It was because of these reasons that the court held the facts of the case distinguishable from the case of **Sinanida v. La Maison Kosmeo,**[4] **Kirk v. J & R Fleming Limited,**[5] which took a view to the contrary. In the case of Sinanida (Supra) plaintiff had copied already existing slogan, hence it was held that it was not original literary work of the plaintiff. Court further held that "slogan" consists of an original composition in four lines of verse, in which there may be copyright, and the same may be said an original composition in prose. In the case of Kirk (Supra), relying on Sinanida's case, the Court observed that when a sentence is proved to have been in common use then it is not copyrightable nor can be protected.

It is to be seen that the court laid substantial emphasis on the originality of the work. What would be regarded as original under the copyright law can be tested on the yardstick enunciation thereof given by Justice Peterson in the **University of London Press, Ltd. v. University Tutorial Press, Ltd.**[6] approvingly quoted in **Macmillan and Co., Ltd. v. K. and J. Cooper** AIR 1924 PC 75 at p.85 as under:

The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas but with the expression of thought; and in the case of 'literary work,' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought; but the Act does not require that the expression must be in an original or novel form, but the work must not be copied from another work-that it should originate from the author.

The above judgment has been consistently followed in India in the context of successive Copyright legislations.[7] It can thus be concluded that advertising slogans if original can be granted protection under copyright law.

2 Literary work

Let us now see if advertisement slogans can be regarded as literary work under the meaning of 13(1)(a) of the Copyright Act. The above has been answered affirmatively in the case of **Kamdhenu Ispat Ltd v. Registrar of copyrights.**[8] The Delhi High Court in this case granted protection under Copyright law for a short combination of phrase "*Sampurna Suraksha Ki Guarantee*" and approved the work as a literary work.

A decision to the same effect comes from **Enercon System Pvt. Ltd. v. Registrar of Copyrights**,[9] wherein registration of an advertisement slogan was allowed as literary work titled "*Contents of Corporate Campaign*" and "*Contents of Enercon Advertisement.*" It was also observed that copyright law does not rest the copyright ability on the yardstick of the excellence or the merit of the work. The moment there is nothing to doubt as to the work having been copied from some other work, the copyright ability follows ipso facto.

What follows from the above is a clear indication of the stand of the judiciary that advertisement slogans can be considered to be literary work under the meaning of 13(1)(a) of the Copyright Act.

CONCLUSION

When a person produces something with his skill and labour, it normally belongs to him and the other person would not be permitted to make a profit of the skill and labour of the original author. The object of the Copyright Act, 1957 is to protect the author of the copyright work from an unlawful reproduction or exploitation of his works by others. To keep a check on unethical ways of advertising there is a mounting need of higher protection and is significant not only for the advertiser but also for the creator. It is beyond doubt that sufficient labour, skill and creativity is bestowed in creating a slogan or phrase. The recent move of the courts is a step towards the inclusion of advertising slogans under the Copyright law in near future. ◆◆◆

4 139 The Law Times 365

5 1929 Ch. D. 44

6 (1916) 2 Ch. 601

7 Kamdhenu Ispat Ltd v. Registrar of copyrights, 2010 (43) PTC 345, ¶5(per, Singh J.).

8 Id.

9 2008 (37) PTC 599 (CB)

BOMBAY HC DENIES ROYALTY TO MUSICIANS AND COMPOSERS

– Himanshu Sharma & Sayantan Mondal[1]

INTRODUCTION

Private radio channels (owned by Music Broadcast Private Ltd.) in India are breathing free after the Bombay High Court ruled that they don't have to pay separate royalty to composers and lyricists for broadcasting their songs. The decision was ruled against the Indian Performing Right Society (IPRS) and held that FM radio channels, hotels and discotheques which play recorded music are not liable to pay royalty to the music composers and lyricists.

Justice S J Vazirdar ruled, on a reserved verdict on 25 July 2011, in favour of the plaintiff FM radio broadcasting company Music Broadcast Private Limited (MBPL). He said, "Once a sound recording is made, it is only the producer, as the owner thereof, who can exploit it exclusively." He added, "The owners of the underlying musical and literary work (such as lyricists, music composers) embodied in such sound recording cannot interfere with these rights of the owner."

The main issues raised in the matter include:

1. Is IPRS not entitled to claim and/or demand royalty fees and/or license fees from MBPL in respect of the sound recording comprising of musical and/or literary work broadcast by them at their Radio station?
2. Is MBPL entitled to recover and receive a sum of Rs. 1,55,54,885/- in lieu of royalty already paid to IPRS with interest?
3. Whether the understanding stating the grant of license to broadcast music publicly, as recorded vide the letter dated 15th May, 2005 binding upon IPRS?
4. Is ISRL entitled to interfere with the MBPL's broadcast of sound recordings even when the Plaintiff is willing to pay the amount of royalty as per the Copyright Board's order dated 25th August, 2008? (where the Copyright Board had directed the Registrar of Copyrights to grant a compulsory licence on certain terms and conditions)

1 *Final Year Student, B.Com/LLB (Hons), Gujarat National Law University*

HIGH COURT'S FINDINGS

- Section 2(y) read with Section 13(1) of the Copyright Act recognizes only three classes of work viz. (a), literary, dramatic, musical or artistic work; (b) cinematograph films and (c) sound recordings. Each class is independent of the other. Each class of work gives a bundle of right to the owner thereof, which are independent of the other works. The rights therein can be exploited by the owner of the work in each class without the interference by the owners of the works in other classes.
- In sound recordings and cinematograph films, the literary and musical work gets incorporated therein and thereupon independent copyrightable works viz. sound recordings and cinematograph films come into existence and, therefore, rights under section 14 in respect of each sound recording and cinematograph film come into existence which can be exploited by the owner of the sound recording or cinematograph film without interference from the owners of copyright in the underlying literary or musical works therein.
- The owner of a sound recording has, inter-alia, the exclusive right of communicating the sound recording to the public. Though the exercise of such right has the effect of communicating the underlying works viz. musical or literary to the public such communication of underlying works being a part of sound recording does not amount to infringement of the copyright of communicating to the public, the underlying works. The owner of a sound recording has an exclusive right to communicate the sound recording in any form and such communication in exercise of right under Section 14(1)(e)(iii) cannot amount to infringement of any underlying work in such sound recording.
- The owner of a copyright in the underlying works retains the bundle of copyrights therein otherwise than as a part of the sound recording.
- It is clear, therefore, that although Clauses (b) and (c) of Section 13 protects derivative works in a restricted field, whereas Clause (a) thereof protects original works in a broader field, it does not mean

that the rights of an owner of a sound recording are, in any way, inferior to those of an owner of copyright in the original literary or musical work.

- The right of public performance of an underlying work is different from the right to communicate the sound recording in which the musical or literary work is incorporated.

ROYALTY TO BE PAID TO PPL ONLY BUT NOT TO IPRS

MBPL owning 26 radio stations including Radio City had moved the High Court in 2006, MBPL contending that they were paying royalties to IPRS in respect of broadcast of sound recordings under a mistaken belief of law, and they were only liable to pay the same to Phonographic Performance Limited (PPL). Adding to that, PPL collects royalties in respect of public performance of sound recordings, whereas the defendant collects royalties in respect of public performance/communication to the public of the musical compositions and lyrics. MBPL argued that the IPRSL cannot ask them to pay royalty for broadcasting recorded music as that had already been paid to PPL. It is only for live performances that the IPRSL can charge royalty but MBPL submitted that they only broadcast recorded music.

Each radio station is estimated to be paying close to Rs 40 lakhs annually to the IPRSL in royalty. As per MBPL's agreement with IPRSL, the latter charged royalty or license fee at the rate of Rs 750 per hour that was later raised to Rs 1,250 per hour. Between 2003 and 2006, the MBPL had paid Rs 1.27 crores in royalty to IPRSL that it wants refunded. Hon'ble Court accepted the arguments of the MBPL and restrained the IPRSL from collecting royalty or interrupting the MBPL's radio station for non-payment of royalty.

MUSICIANS DO NOT HOLD COPYRIGHT

In reply, Counsel for the IPRS based their argument on the fact that, once a song is recorded, the composers and lyricists do not lose their copyright over the work. They claimed that the owners of the song are only paid to make a sound recording. The owner of the sound recording must again approach the owner of the underlying works for a license and pay the royalty if he wants to communicate it to the public by broadcast. IPRS contended that MBPL having approached the Copyright Board for fixation of the royalty cannot be allowed to challenge the Plaintiff's right to collect royalty/license fees in respect of the work. The Defendant and its members have suffered considerable loss on account of the sales of records having dropped by 33% due to the introduction of FM radio stations. MBPL contended that,

"Upon the owner of a copyright in musical and literary work permitting the making of a sound recording, his right to make or permit to be made another sound recording containing such work comes to an end."

Bombay High Court appreciated MBPL's contention and said it to be well founded. The High Court also rejected the argument that the music companies are only given the right to make CDs and cassettes and they would have to pay copyright fees if they broadcast songs.

IPRS counsel's prayed for an interim order based on their argument that over 200 radio stations pay royalty fees to IPRS and the operation of the order should be put at hold till further order of the Hon'ble Court which was duely accepted and a stay was put till 31st Oct 2011.

CRITICAL ANALYSIS

The Bombay HC ruled that the FM stations would now have to only deal with Phonographic Performances Limited for obtaining a license to play the music. But, after critically examining the judgement, the author finds that the reasons provided by the Hon'ble Court is quite lucid and rehearsed the various arguments and counter arguments in a very articulate manner, the judge unfortunately got the law wrong. The making of a sound recording does not extinguish any of the underlying rights in the music and lyrics (these underlying rights continue to vest with music composer and lyricist). When a song is broadcast on a FM channel, both the rights in the sound recording and, also the right in the underlying works are implicated. And the FM radio station has to pay two separate license fees (one to IPRS which collects on behalf of underlying artists and the other to PPL which collects on behalf of sound recording copyright owners).

It is pertinent to note that the Indian government has taken note of the historical exploitation of Bollywood lyricists and music composers (underlying authors) and attempted to redress the injustice through proposed amendments to the copyright act that provide for compulsory sharing of royalties. Contrast this attitude with the present judgment which effectively perpetrates grave injustice against underlying authors by denying them their rightful license fees. ◆◆◆

PLEA BARGAIN – AN INTERNATIONAL OVERVIEW

– Niharika Kumari & Vandana

INTRODUCTION:

One of the latest developments in the field of criminal justice is the concept of *plea bargaining*. In a lay man language, plea bargaining may be defined as an agreement between prosecution and the accused wherein the accused pleads guilty or 'no contest'[***nolo contendere***][1] to a charge framed against him and in bargain he gets a lesser punishment then the one that he should have got for that kind of offence committed by him.

In many western countries the concept of plea bargaining has stood as a backbone of their justice systems. Therein the accused, at the beginning of his case is given an option to plead guilty and thereupon a lenient view is taken on his punishment. This even helps to reduce the burden on the criminal courts as well. Of course, plea bargaining is done at the approval of court but basically it is an agreement between the prosecution and the accused.

Albeit, the practice of plea bargaining has grown in leaps and bounds in western countries, but conceptual origin of idea, it seems, has been borrowed from Arab countries. Therein the practice of "Blood money", essentially works on the same principle. Blood money is the money paid to the next of kin of a murder victim as a fine. **Blood money** is money or some sort of compensation paid by an offender (usually a murderer) or his family group to the family or kin group of the victim.[2] This would ensure that the accused is exonerated from all the consequences of his illegal actions and also from the vengeance of the kith and kins of the victim. Thus, conceptually, blood money and plea bargaining are somewhat synonymous.

Now with the introduction of the Sections 265-A to 265-L to the Code of Criminal Procedure, 1973 (hereinafter referred to as the CrPC) by the **Criminal Law (Amendment) Act of 2005**[3], plea bargaining has effectively entered the Indian legal domain and is already being hailed as the remedy which will eventually eradicate many evils which spring from the huge back log of cases pending in the nation's courts due to excessive workload.

PLEA BARGAINING IN INDIA BEFORE 2005

Before the amendments, which finally introduced plea bargaining in India, the Supreme Court had a unanimous opinion that plea bargaining is an undesirable practice, and not recognized in the legal framework of our country. This was apparent in several cases where the Supreme Court of India clearly held to the same effect. One of the first cases where this point came up for discussion was the case of *Madanlal Ram Chandra Daga* v. *State of Maharashtra*[4], wherein the Supreme Court held that the High Court was mistaken in allowing a transaction of justice where the complainant received money from the accused and this was treated as a ground for leniency in sentencing. The Court observed that the court may show leniency to the accused if the facts of the case justified such conduct, however the court should under no circumstances be party to such a transaction, rather than trying and punishing the accused based on his own guilt.

Hon'ble Bhagwati J. on a later occasion observed that leading a defendant to plead guilty with promises of a lenient punishment was not only not recognized in India, but subsequently enhancing his sentence in an appeal or revision was also against Article 21 of the Constitution, and sent the case back to trial court.[5]

One of the more recent cases *State of Uttar Pradesh* v. *Chandrika*,[6] in this case the court reiterated from the practice of plea bargaining saying that it was against the public policy in India, and the only scope that the Indian criminal justice system provided for negotiated settlements was covered by Section 360 of the CrPC which provides for compounding of certain offences with and without the permission of the court.

1 ***nolo contendere***, *refers to a plea wherein a defendant neither pleads guilty to nor contests a charge. A plea of nolo contendere is treated as a guilty plea for the purpose of that case; however this cannot be used against a defendant in any subsequent case where the same charge is required to be proved again. (Justice Jitendra N. Bhatt, 'Doctrine of Nolo Contendere' 2005 Cri. L.J. 4413.)*

2 *www.britannica.com*

3 *Criminal Law (Amendment) Act, 2005 is a result of the Criminal Law (Amendment) Bill introduce in 2003.*

4 *AIR 1968 SC 1267*

5 *Thippaswamy v. State of Karnataka, AIR 1983 SC 247.*

6 *AIR 2000 SC 164*

PLEA BARGAINING IN INDIA AFTER THE 2005 AMENDMENTS

The hostile stand that the Supreme Court had taken towards plea bargaining crumbled under the provisions of the Criminal Law (Amendment) Act, 2005, which formally introduced the concept of plea bargaining in India by the inclusion of Section 265-A to 265-L into the Code of Criminal Procedure, and in fact adding a separate chapter, Chapter XXI-A titled "Plea Bargaining". The chapter lays down the procedure to be followed for plea bargaining in India and is a clear sign of the changing nature of criminal justice in India.

This change in attitude of the legal system is clearly brought out in the recent case *State of Gujarat* v. *Natwar Harchanji Thakor*,[7] wherein a division bench of the Gujarat High Court observed, "*We are tempted to mention here that law should be stable but not standstill. The very objective of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases, and considering the present realistic profile of pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable*".

SAFEGUARDS IN THE INDIAN SYSTEM

The important parts of the newly introduced plea bargaining in India to be accounted are firstly that habitual offenders cannot claim the benefits of plea bargaining. Similarly, the accused cannot take advantage of plea bargaining in case of offences committed against the socio-economic condition of the country, or against women or children below the age of fourteen. Section 265-A(b) lays down the abovementioned conditions where plea bargaining proceedings may not be initiated. Further, no statements (or confessions) given by the accused during any stage of the plea bargaining proceedings may be used during any other proceedings except those particular plea bargaining proceedings. The former is a safeguard included to exclude some of the more heinous offences from the mercy of plea bargaining proceedings, and the latter is a safeguard included to ensure that the plea bargaining proceedings are not abused by the prosecutors in order to extract confessions from the accused and then use them to ensure convictions in normal criminal proceedings. Similarly, the conditions that the applications must be made voluntarily and after understanding the punishment prescribed for the offence, and the subsequent verification of these fact by the court by examining the witness in camera are also safeguards put in to ensure that the system is not misused.

7 *2005 CrLJ 2957*

PLEA BARGAINING IN THE UNITED STATES

Plea bargaining in the USA evolved a long time ago. It started as a practice which did not have any judicial recognition, and no laws regulating it. Due to the important nature of the position of Prosecutor in the USA, the prosecutor could enter into negotiations with the accused in a particular case. The prosecutor would demand that the accused plead guilty to certain or all charges that were framed against him and in return he would recommend a lenient or shorter sentence to the judge, or drop certain charges and proceed to get a conviction on some of the lesser included offences only. The judges obviously became aware of such negotiations as time went on, and eventually noticing that this practice was actually resulting in a lot of convictions and also speedy disposal of cases, the practice was formalized by many States by passing legislations regulating plea bargaining. The practice of plea bargaining was held to be constitutional by the United States Supreme Court in the landmark judgment *Brady* v. *United States*[8], wherein the Court observed that those defendants who pleaded guilty would receive lesser punishments than those who did not, and that the practice of plea bargaining allows the state to conserve its overburdened judicial and prosecutorial resources.

However, the essential mode in which plea bargaining is practiced in the USA is also substantially different as compared to India. In America a plea bargain proceeding is given a status approaching a business negotiation, and hence equality of bargaining power is one of the important conditions to be met. As a result, the State Prosecutor is under an obligation to release all the information he has to the accused so that the accused can decide what the best plea for him is. Further, the cases in which plea bargaining can be entered into is not restricted at all in America, and one can enter plea bargains in almost any offence, except a very few federal offences[9].

8 *397 U.S. 742*
9 *www.legalsutra.com*

A COMPARATIVE ANALYSIS VIS-À-VIS INDIA

SIMILARITIES BETWEEN THE INDIAN AND THE AMERICAN SYSTEMS

Firstly, in both the countries plea bargaining is now recognized as an acceptable practice, and hailed as a welcome tool to reduce judicial expenditure as well as to speed up the meting out of criminal justice. Secondly, and very importantly, both the countries insist that the plea bargain must be entered into voluntarily by the accused. Next, it is required in both India as well as America that the accused knows and understands fully the nature of his act and the punishment prescribed for the offence that he is charged with. In America this condition is covered in the requirement that a plea bargain must be "*voluntary and intelligent*", while in India the same is covered in Section 265-B(2) of the CrPC.

Further, in India as well as in the United States there is an arrangement for the withdrawal of the guilty plea by the accused up to a certain stage in the proceedings. Hence, any deliberate act of the accused which indicates his unwillingness to go on with the proceedings will negate the plea bargain and result in withdrawal of the guilty plea. Also, both the countries provide safeguards to the accused in as much as the statements made by the accused cannot be used in any proceedings other than the plea bargain proceedings.

DIFFERENCES BETWEEN THE INDIAN AND THE AMERICAN SYSTEMS

Although plea bargaining in India has been introduced keeping in mind the American system, there are certain marked differences between the two. Firstly, as per the recommendations of the Law Commission of India, plea bargaining in India does not cover all offences. No plea bargaining is available for offences affecting the socio economic condition of the country, for offences which have a punishment greater than 7 years prescribed for them, or offences against women or children below the age of fourteen. This is in sharp contrast to America where plea bargaining is available for almost all offences. This is a very positive aspect in favor of India. If we are to negotiate with criminals then at least let us negotiate with lesser degree of criminality, and not rapists or child molesters. So for instance, while it is theoretically possible in the United States for a person charged with several counts of armed robbery to escape with a single conviction of a minor charge of theft as a result of plea bargaining, such a situation is not possible in India.

Further, in America a plea bargain negotiation often results in the parties involved deciding on a specific/ particular term of incarceration as part of the deal. However, in India, as the language of Section 265-E suggests, the court has certain guidelines laid down in order to decide the quantum of punishment.

Also, in America, the status awarded to a plea bargain arrangement is that of a business agreement, as is clear from the analogies that the American courts have drawn between a plea bargain agreement and a business agreement. As a result, fairness as well as equality of bargaining power is important conditions to be satisfied in America, and the Prosecutor has an obligation to provide all the relevant information that he possesses to the accused so as to allow the accused to determine what the best plea for him is. In India the status of a plea bargain arrangement is still not clear, due to plea bargain being a recent addition to the Indian legal system.

CONCLUSION

The basic idea behind this pivotal approach is that a person, who is not a habitual offender and might have indulged in any of the criminal acts on account of a sudden rush or circumstantial compulsions, should not be made to spend precious years of his life in prison amongst hard core criminals. It is especially so when he has accepted the fact that what was done by him was wrong and now he is ready and willing to compensate it in any manner possible. More so if the charges against him are not that of such serious nature, then it should be considered as a duty of court to give him another chance to amend his behavior and be a useful member of the society. Hence, plea bargaining is indeed a welcome change, but only as long as one considers the chief aim of the criminal justices system to be swift and inexpensive resolution of cases. ◆◆◆

BREATHER TO SAHARA BY THE SUPREME COURT- SEBI V. SAHARA (A CASE ANALYSIS)

– The Litigation Team

INTRODUCTION

In what is termed by many as a breather to Sahara, the apex Court on 28th of November stayed the order issued by the Securities Appellate Tribunal (hereinafter referred to as SAT) on the 18th of October 2011. It was a big blow to Sahara Group of Companies when SAT vide the aforesaid order had affirmed the decision of the Securities Exchange Board of India (hereinafter referred to as SEBI) dated 23rd June 2011. The said order was directed towards two companies of the Sahara Group to refund with 15 per cent interest, the money raised by them from the market through Optionally Fully Convertible Debentures (hereinafter referred to as the OFCD) as it was in blatant violation of the securities regulatory norms within a span of six weeks.

While Sahara was left speechless and shocked by the order of SAT, it decided to go in appeal to the Supreme Court, which it did on 11th November 2011, an effort that seems to have paid off silencing all skeptics who were claiming it to be a death knell for the companies of the Sahara Group rendering no option for the corporate bigwig but to refund the money raised by its companies.

A bench headed by Chief Justice SH Kapadia directed both the Lucknow based entities namely Sahara India Real Estate Corporation Limited (SIRECL) and Sahara Housing Investment Corporation Limited (SHICL) to file a detailed affidavit explaining how they intended to protect the interests of about 2.3 crore investors who had invested their money in these companies and also their strategy to secure liabilities undertaken by them. The apex court also asked both SIRECL (now known as Sahara Commodity Services Corporation Ltd) and SHICL to file their balance sheet for Financial Year 2010-11 and statement of accounts for November 2011 by 8th January, 2012.

The Supreme Court has stayed the refund of the amount returnable as per the orders of the SAT to the next day of hearing i.e. 8th January, 2012.

BACKGROUND

The dispute transpired between the market watchdog SEBI and Sahara, when the latter challenged the interim order of SEBI dated November 2010, restraining SIRECL and SHICL as well as certain promoters and directors from accessing capital markets. The capital market regulator had received complaints from various entities against the said companies and post an investigative probe passed the aforesaid ex-parte interim order.

The companies had been issuing hybrid instruments i.e. OFCDs to the public which were not disclosed in the draft red herring prospectus DRHP. The order was treated as a show-cause notice and proceedings were initiated against both the Sahara companies. In reply, the Companies argued that the OFCDs were being offered only to friends/associates/employees and that they were being issued pursuant to an information memorandum filed with the Registrar of Companies (ROC).

At the heart of the case, lay a very simple but big question whether such offering of the OFCDs by the two unlisted companies with no assets or reserves raise an amount close to 25000 crore and claim that an issue of such magnitude was not to be regulated by SEBI, and if they were whether they should have been offered pursuant to an offering document registered with SEBI.

In this context, SEBI opined vide its interim order that:-

Any offering of securities to 50 persons or more is a public offering by virtue of Section 67(3) of the Companies Act, 1956. It does not matter whether the offerees are all identified or whether they belong to a close group of associates.

- The mere fact that the offering is supported by a special resolution of the issuing company's shareholders under Section 81(1A) of the Act does not override the requirement to comply with the provisions regarding public offering and registration of prospectus.
- The fact that the issuer has filed a red herring prospectus with the ROC indicates that the OFCDs were intended to be offered to the public

- Every company offering securities to the public is required to seek approval for listing of the securities on one or more recognized stock exchanges. SEBI observed:-

  The requirement of listing in respect of a public issue is to ensure that the subscribers to the shares or debentures have a facility to approach a stock exchange for having their holdings converted into cash, whenever they desire and to provide liquidity and exit opportunity to the investors, especially in case when the offer is made to large number of investors (50 or more).

- Section on 60B of the Companies Act (dealing with information memorandum) does not prescribe an alternate procedure that enables issuers to overcome the obligation to comply with provisions of the Act relating to public offering.

Although there was previously some ambiguity on what constitutes a public offering of shares that was put to rest with the Companies (Amendment) Act, 2000 which introduced the numerical test of offering to 50 persons or more in order to constitute a public offering. This test may be criticized as being too rigid and inflexible, but it is clearly an objective test leaving little room for ambiguity.

SEBI ORDERS TO RETURN THE MONEY

SEBI passed its order on 23rd June 2011 confirming its previous interim order. It found that the Sahara companies had offered OFCDs to millions of investors in the garb of a 'private offering" without complying with the requirements applicable to a public offering of securities.[1] It also found the money-raising activity was not in compliance with its public issue rules and ordered the firms to refund the money to investors.

In the Special Leave Appeal filed in the Supreme Court by Sahara, the apex court did not examine the merits of the contentions and vide its order dated 15th July 2011 orders the parties to appear before the SAT. [2]

SAT REITERATES SEBI ORDERS

SAT vide its order dated 18.10.11 observed that If a loss making company with a capital base of Rs. 10 lakhs only, is permitted to gather approximately Rs. 20,000 crores through use of about 2900 branch offices and ten lakh agents, it would have been a sheer mockery of the securities law framework and it is rightly reflected in the SAT's order. Important findings of SAT in the matter are:-

- **A Optionally fully convertible debentures (OFCDs) are "securities" within the meaning of the Securities Contracts (Regulation) Act, 1956 (SCRA) and consequently SEBI Act, 1992 applies-** It had been contented that the OFCD's are not securities for the purpose of the SEBI Act and hence SEBI was held not to possess jurisdiction to regulate them. SAT however conclusively determined that SEBI Act is a complete code in itself pertaining to securities and the definition in the Companies Act cannot be used to determine the scope of the securities under the SEBI Act. It was held that the OFCDs are understood as debentures in the securities market and by those connected with securities under the Act. Furthermore SAT also opined that OFCD's are a combination of a debt and equity instrument , being a hybrid security therein qualifies as 'Securities' under the SEBI Act.

- **OFCDs are 'marketable securities'**- It was contended that the OFCDs are not 'marketable securities' as the transfer of the same was made subject to the approval of the companies. Rejecting the contentions, the SAT held that such a restriction was not permissible in the light of sections 111A (2) r/w Sections 9 and 82 of the Companies Act. It was also held that the product if capable of being brought and sold is marketable and there is no need of an actual sale. Hence it was held that the OFCDs are marketable as they are eligible of being transferred to third parties.

- **Power of SEBI to regulate unlisted Companies and Securities-** The SAT held that interpreting the proviso to Section 67 (3) of the Companies Act , offering of Securities to more than 50 persons would automatically make it a public issue. As in this case it was found that more than 2 crore investors had subscribed to the OFCDs , it was a public issue. The SAT also opined the fact that the company had issued a memorandum was indicative of the fact that the securities were offered to the public as they were trying to assess the demand for the securities. Vide Section 73 of the Companies Act, debentures issued to the public require issuing of the prospectus and also applying to a recognized stock exchange for permission of the listing of the Securities. In a nutshell, the provision of Section 73 has to be

1 *Para 27.2 of the SEBI Order dated June 2011*

2 *Special Leave to Appeal (Civil) No. 11023/2011 with 13204/2011*

complied. The provision of Section 11, 11(A) and 11(B) of the Companies Act cannot be whittled down by Section 55 (A) of the Companies Act. So SEBI has the power to regulate both listed and unlisted companies. By virtue of Section 73 all securities issued to the public by information of memorandum need to be listed and thus amenable to the jurisdiction of SEBI.

- **Convertible bonds and OFCDs-** It was decided by this act that exemption under Section 28 (1) (b) of the Securities Contract (Regulation) Act applicable to convertible bonds were not applied to convertible debentures as they are not the same.
- **ICDR regulation are applicable to unlisted companies -** It was held that the ICDR regulation was applicable to all public issues and no distinction was made between listed and unlisted public issues and listed and unlisted companies.

CONCLUSION

Given the facts in Sahara's case, SAT's order is appreciable and almost unimpeachable, however there are many gray areas that may just give Sahara, a new ray of hope. For instance, SAT's order confounds the applicability of the Companies Act in cases involving unlisted companies. There is also some confusion regarding what makes a security marketable and what constitutes a debenture therein. Most importantly the question needing a decisive stance is whether the SAT's order has given SEBI unfettered powers over fund raising by unlisted companies.

To support that OFCDs are not securities, Sahara relied on the Companies Act definition, but SAT on the other hand reasoned that the SEBI Act is a self contained code and any reference to the Companies Act is not legally tenable But when it came to defining 'public issue', SAT itself referred to the Companies Act drawing the definition from Section 67 (3). The dichotomy in the position is perplexing and confusing.

What SAT has clarified that the arguments which were made by Sahara in their application that since these OFCDs are not marketable, they are not securities. What SAT has demonstrated that these OFCDs are indeed marketable securities. Apart from that, SAT has not laid down any condition." This word marketable is used in several contexts and having different interpretations. So now one would question if anything or everything which can be bought or sold is marketable, then what kind of securities would fall under the category of not-marketable and what would be the purpose of the word marketable or like nature in the definition of securities.

SAT has clarified that the arguments which were made by Sahara in their application that since these OFCDs are not marketable, they are not securities. What SAT has demonstrated that these OFCDs are indeed marketable securities. Apart from that, SAT has not laid down any condition." he way the nomenclature of these marketable securities has been looked at by SAT seems to have added to the confusion! Debenture is not defined by SEBI. Sahara had argued that its Optionally fully convertible debentures were in fact convertible bonds and so 28(1)(b) of the SCRA and the provisions relating to listing would not apply to them. SAT held that Sahara's OFCDs are debentures- one because the company had named them so and also because they shared characteristics with other debentures in the securities markets. But the order misses a definition or description of 'debenture'

There are some who say that when one converts any convertible instrument into a share or whatever instrument is to be created, it is a primary issue because you get it from the company whereas SCRA applies only to the secondary market transactions where you can buy and sell things and that Sec 28(1)(b) does not exempt anything; all the securities are included.

SAT held that the SEBI Act needs to be given 'widest possible interpretation' if investor interest and regulation of the securities market are to be taken care of. One argument that was brought forth was that its not whether you're listed or unlisted that decides SEBI's jurisdiction. If the activity that you carry on, for instance raising public funds, SEBI will have jurisdiction. If that's the line of argument that the apex court takes, unlisted public companies will get concerned.

The situation therein is equitably balanced as both sides have both strong and gray areas to work on and it would be interesting to see in whose favour the apex authority ultimately rules settling the matter therein. ◆◆◆

SURROGATE ADVERTISING: CIRCUMVENTION OF THE CONSTITUTION?

– *Karan Kumar Kamra & Malvika Sharma*[1]

INTRODUCTION

Creative minds always come up with ingenious methods and technique for making a product more acceptable and amenable to consumer demands. Advertising as a medium of promotion of product is universally popular and acceptable. Advertisement creates/leaves an impeccable impression on our mind and thought. More the promotion more is the goodwill of a brand. Buying decisions are often influenced by the advertisements that people we watch. It was this thought that probably led the government to ban any advertising being done as a part of the tele media to propagate unhealthy products like liquor and tobacco having an adverse impact on the social and the moral fibre of the society.

The dictionary meaning of the word Surrogate is Substitute. While Surrogate Advertising as a term has no fixed definition, but it has been described as one where a contentious product (e.g. kingfisher beer) which is different from the main product i.e. parent brand(kingfisher airlines), is advertised and promoted with the same brand name as that of the main product to camouflage the latter.

ORIGIN

The onset of Surrogate advertising in India took place when, as a reaction to the directive of the government to ban advertisements of products that are adverse to health, the major companies of liquor and tobacco sought alternative ways of endorsing their products, through which they could keep on reminding the people of these brands; by introducing new products with the same brand name e.g. Red and White Bravery Awards, Wills Lifestyle, Kingfisher Airlines.

APPLICATION OF DOCTRINE OF COLORABLE LEGISLATION IN CONTEXT OF SURROGATE ADVERTISEMENT

The doctrine of colorable legislation which comes under the Constitution of India talks about an act if not allowed to be done directly cannot be done indirectly. Although, the constitution talks about this doctrine in the context of "a state legislature which cannot make laws that are ultra vires to the constitution". However, this article would try to correlate the doctrine of colorable legislation in regard to the concept of Surrogate Advertising wherein if there is a ban on promotion of some contentious product, that is a blanket ban, its advertisement through a substitute product of the same brand would also not be allowed and if permitted amounts to a clear circumvention of the Constitution.

There has been an upsurge of Guerilla Advertising of late specially by the Tobacco and Liquor industry which involve unusual approaches to promote and push their products among selected audiences by extensively sponsoring sports and cultural events such as international cricket, television programs, and advertisements in newspapers, magazines, transport vehicles including staged encounters in public places such as cars that are covered with brand messages and interactive advertising where the viewer can respond to become part of the advertising message.

The outcome of this phenomenon is more pronounced in India for Advertising has a profound impact on the Indian society as it in a large way shapes consumers 'Choices, Values and Behavior'. This form of hidden advertising creates Brand Recall repeatedly resonating the products in the mind of the consumers and not permitting them to disassociate them from the product. The disguised demand that the companies and the industries create negates the ban on the advertisements of these products, which are detrimental to the health of the society, thus overlooking the doctrine of Colorable legislation embedded in the constitution.

LEGISLATIVE MEASURES

Though there is not much legislation that directly governs the issue of Surrogate advertising in India but in regards to Tobacco and Cigarettes, there is an Act which indirectly tries to regulate the same.

The Cigarettes and other tobacco products (Prohibition of advertisement and regulation of trade and commerce, production, supply and distribution) Act, 2003 (hereinafter referred to as COTPA) was enacted to implement measures to ensure that effective protection

1 *Intern III Year, School of Law Christ university, Bangalore*

is provided to non- smokers from involuntary exposures to tobacco, smoke and to protect children and young people from being addicted to the use of tobacco.

Relevant provisions of the same are as under:

Section 5(1) of the Act states:

'No person engaged in, or purported to be engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise and no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium and no person shall take part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco products.'

Sub-paras (i), (ii), (iii) and (iv) of Rule 2 of the COTPA Rules, clearly set out that the use of a name or brand of tobacco products for marketing, promoting or advertising other products would constitute a form of indirect advertisement. Accordingly, Surrogate Advertising (indirect advertisement) is consequently prohibited under Section 5.

Despite having strong legislative restrictions, the ban on indirect advertisements as afore-mentioned remains a far fulfilled dream to be realized due to the uncooperative conflicting stance taken by the judiciary as opposed to the Legislature and an ineffective and inadequate enforcement mechanism.

In case of Mr. Anbumani Ramadoss, Ex-Union Health Minister vs. Bangalore Indian Premier League (IPL) cricket team, Royal Challengers[2], Mr. Anbumani Ramadoss, Ex-Union Health Minister had challenged the name of the Bangalore Indian Premier League (IPL) cricket team, "Royal Challengers", which was an obvious form of surrogate advertising for liquor brand "Royal Challenge". After which, the Supreme Court of India in August 2008 pointed out that the team was not named 'Royal Challenge', the liquor brand, but "Royal Challengers" so this will not lure the viewers as only those who drink can be attracted by these things. The Supreme Court of India also had a simple advise — "Watch cricket and do not see too much of liquor in it". In the aforementioned matter, the bench observed in a lighter vein, alluding to the fact that a name would not have any effect on non-drinkers.

The current scenario in the light of the aforesaid decision has sparked of a debate wherein both the Legislature and the Industry have certain pertinent points to make. While the Legislature favors the ban on Surrogate Advertising stating that the interconnect between the chief tobacco products /Cigarettes and the allied products being sold under the same brand name is too strong to deny the forging of a link by a reasonable consumer of an average intelligence.

According to the Cable Act, under the Ministry of Information and Broadcasting,- "no broadcaster is permitted to show an advertisement which promotes directly or indirectly, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor or other Intoxicants…" Now a new clause has been added under the act stating that "any advertisement for a product that uses a brand name which is also used for cigarette, tobacco product, wine, alcohol, liquor or any other intoxicant will not be permitted". Finally, in April 2005, the Ministry resorted to a ban on surrogate advertisements of liquor and tobacco products on television. After this directive, the surrogate advertisements are seldom shown on television. Now the companies will have to reframe their policies. But who will take care of print and outdoor media is not certain.

Different brand owners for liquor and tobacco products have claimed that all their advertising has followed the guidelines for sales and marketing. They have clarified that they are not showing any liquor / tobacco advertisements. Hence, these restrictions are totally unwarranted and uncalled for. The producers and manufacturers contend that while the Government allows them to do business on the one hand and taxes a huge chunk of their profits as its revenue, it does not allow them to conduct their business in a profitable manner by banning one of their most important weapon of increasing sales and getting the due returns on their investments. The ban on advertising (direct/ indirect) has adversely impacted the media houses as well who have lost a good and consistent source of income .

CONCLUSION : THE ROAD AHEAD

If the Government wants to get a grip of the situation it has to strike a balance between the social responsibility and the economic interest of the businessmen involved in the growth of the economy. It cannot be negated that some of the biggest companies in India happen to be Tobacco and Liquor and their contribution in any way cannot be undermined. The government and the legislature ought to implement its intentions in a spirited manner evolving tools and techniques that create a comfortable environment for the industry while ensuring false misleading and dishonest advertisements (direct/indirect) are not used for luring the common unsuspecting masses. ◆◆◆

2 (2008) 147 DLT 561: 2008 Bus LR 366 (Del).

NEWSBYTE

RBI INTRODUCED NEW CATEGORY OF NBFCS-NON BANKING FINANCIAL COMPANY-MICRO FINANCE INSTITUTIONS [NBFC-MFI]

RBI vide notification DNBS.CC.PD.No. 250/03.10.01/2011-12 dated 2nd December, 2011 has announced a separate category of NBFCs viz; Non Banking Financial Company-Micro Finance Institution(NBFC-MFI). Consequently there would be following categories of NBFCs:

i) Asset Finance Company (AFC)

ii) Investment Company (IC)

iii) Loan Company (LC)

iv) Infrastructure Finance Company (IFC)

v) Core Investment Company (CIC)

vi) Infrastructure Debt Fund- Non- Banking Financial Company (IDF-NBFC)

vii) Non-Banking Financial Company - Micro Finance Institution (NBFC-MFI).

Further, the Sub-Committee of the Central Board of the RBI has recommended a role for industry associations in monitoring of compliance by NBFC-MFIs with the regulations and has issued NBFC-MFI Directions, 2011.

The above mentioned guidelines issued by RBI sets a minimum Net Owned Fund [NoF] requirement of Rs. 5 crore for an NBFC to qualify as NBFC-MFI. Those located in the North eastern region should have a minimum NoF of Rs. 2 crore for purposes of registration. The existing NBFCs, to be classified as NBFC-MFIs, will be required to comply with this norm from April 01, 2012. As regards the margin cap, the guidelines prescribe that NBFC-MFIs shall be required to maintain an aggregate margin cap of not more than 12%.

Further, NBFC-MFIs can lend to individual borrowers who are not member of Joint Liability Group (JLG)/Self Help Group (SHG) or to borrowers that are members of JLG/SHG. However, a borrower cannot be a member of more than one SHG/JLG and not more than two NBFC-MFIs should lend to the same borrower

The guidelines further clarifies that there shall be only three components in the pricing of the loan viz., the interest charge, the processing charge and the insurance premium (which includes the administrative charges).

Existing NBFCs that satisfy the prudential norms can register with the Regional Office in the jurisdiction of which their Registered Office is located for change in their classification as NBFC-MFIs.

IRDA NOTIFIES IPO NORMS FOR LIFE INSURANCE COMPANIES

Insurance Regulatory and Development Authority (IRDA), vide Gazette Notification 4163 GI/2011 dated 1st December, 2011 issued IRDA(Issuance of Capital by Life Insurance Companies)Regulations, 2011 [hereinafter referred to as 'guidelines'] allowing life insurance companies, which have been in business for over ten years, to raise funds from the public through Initial Public Offerings (IPOs). The guidelines further states that no insurance company shall approach market regulator Securities and Exchange Board of India (SEBI) for a public issue, or any subsequent issue, without a specific previous written approval of the IRDA. While according its approval, the authority may prescribe the extent to which promoters shall dilute their respective shareholding, the maximum subscription which could be allotted to any class of foreign investors.

INDIA AND NEPAL SIGNED REVISED DOUBLE TAXATION AVOIDANCE AGREEMENT

India and Nepal has signed a revised Double Taxation Avoidance Agreement (DTAA) on 27th November, 2011. The new agreement has been signed with a view to encourage Indian investment in Nepal, preventing fiscal evasion, and easing procedures for stakeholders with commercial interests in both countries.

The revised DTAA will provide tax stability, facilitate mutual economic cooperation and stimulate flow of investment, technology and services between India and Nepal.

The new agreement has incorporates provision of taxation related to cross border transaction, services and employment and provision relating to exchange of information, assistance in collection of taxes between tax authorities and anti-abuse provisions. Further, the

threshold withholding tax rates on dividends, interest, etc., have been rationalized.

The new treaty will replace the earlier DTAA between the countries signed in 1987. The revised DTAA will come into force on a date to be notified by both countries.

NOTICE REGARDING TRADEMARK OPPOSITION CASES

The Controller General of Patents, Designs and Trade Marks has issued a Public Notice CG/F/PUBLICNOTICE/2011/140 dated 24th November, 2011 regarding the Opposition files. The notice states that all the trademark opposition files have been arranged systematically in the Trade Marks Offices and the parties to opposition are requested to submit the documents in regards to opposition cases wherein the parties have either withdrawn their opposition or have arrived at settlements or have withdrawn the Trade Mark application, to inform the concerned Registry about such facts by e-mail along with documentary proof of the same to enable the registry to pass appropriate orders. The Trade Mark Office in the notice has also provided the email address of concerned officers which is available on the official website of Indian Trademark Office i.e. www.ipindia.nic.in. Analyzing the notice and the relevance of the same in reference to the working of the Trademark Offices in India, it can be taken a welcome step which would help the Trademark Offices In speedy disposal of Opposition cases.

SET-OFF OF EXPORT RECEIVABLES AGAINST IMPORT PAYABLES

With a view to liberalizing the export-import procedures, Reserve Bank of India [RBI] vide A.P. (DIR Series) Circular No. 47 dated 17th November, 2011, has delegated to authorized banks the power of sanctioning 'set-off' of export receivables against import payables, under which an item or amount is allowed to be set off against another in the settlement of accounts.

Earlier, set-off in export receivables against import payables, in respect of the same overseas buyer and supplier, was allowed only with sanction of the RBI.

RBI, vide above mentioned circular, has now delegated the power to Authorized Dealer Category I banks to allow such set off with immediate effect. However, it requires that the import has to be as per the Foreign Trade Policy in force and the invoices or bills and exchange control copies of bills of entry for home consumption have to be submitted by the importer to the authorized dealer bank.

Further, the payment for the import has to be maintained as outstanding in the books of the importer. Exporters and importers availing the facility will have to report both the transactions of sale and purchase separately in returns.

In the circular, RBI has also stated that the 'set-off' of export receivables against import payments should be in respect of the same overseas buyer and supplier and that consent for 'set-off' has been obtained from him. All the relevant documents have to be submitted to the concerned AD bank who should comply with all the regulatory requirements relating to the transactions.

OIL FIELDS STAKE TRANSFERS TO NRIS TO BE REPORTED UNDER FEMA

Reserve Bank of India [RBI] vide A.P. (DIR Series) Circular No. 45 has notified that the issue/transfer of 'participating interest/ rights' in oil fields to a non-resident will be treated as Foreign Direct Investment (FDI) under the extant FDI policy and FEMA Regulations.

At present, 100% FDI is permitted in exploration and production of oil and gas under automatic route, requiring no prior approval. The above mentioned notification provides that "participating interest/ rights" will have to be reported as FDI transactions in terms of the provisions of Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations, 2000

As per the FEMA regulations, transfer of equity shares or fully and mandatorily convertible debentures or convertible preference shares of an Indian company, from a resident to a foreigner or vice-versa has to be reported to an Authorized Dealer Bank within 60 days of transactions. Further, the receipt of consideration for issue of shares as well as the issue of shares of an Indian company, to a non-resident has to be reported to the RBI through such bank within 30 days of the transaction.

Now in addition to above issue/ transfer of equity shares or fully & mandatorily convertible debentures or convertible preference shares of an Indian Company, any "participating interest/ rights" in oil field shall also be reported at the relevant place in Form FC-TRS/ FC-GPR as the case may be under the heading "Other".

TRADE CREDITS FOR IMPORTS INTO INDIA-REVIEW OF ALL-IN-COST CEILING

The Reserve Bank of India [RBI] vide A.P. [DIR Series] Circular NO. 44 dated November 15, 2011 have revised the all-in-cost ceiling for trade credits for Imports into India with immediate effect, as under:

MATURITY PERIOD	All-in-cost over 6 month LIBOR*	
	Existing	Revised
Upto 1 year	200 bps	350 bps
More than one year and upto three years		

*for the respective currency of credit or applicable benchmark.

EXPORT OF GOODS AND SOFTWARE - REALISATION AND REPATRIATION OF EXPORT PROCEEDS

RBI vide its Circular No. 40 dated 1st November, 2011 has decided, in consultation with the Government of India, to further extend by one year, i.e. from October 01, 2011 till September 30, 2012, the relaxation with respect to the period of realization and repatriation to India, of the amount representing the full value of goods or software exported, from six months to twelve months from the date of export, which was valid up to September 30, 2011.

AMENDMENT OF TRADE MARKS RULES, 2002 FOR MAKING E-FILING OF TRADEMARK APPLICATION MANDATORY

As already informed earlier the Indian parliament has passed the Trademark Amendment Bill, 2009 last year in August and to give effect to the same Ministry of Commerce and Industry vide Notification no 568 dated 13th Oct, 2011 has come up with the draft rules. The Rules are in line to make the Indian Trade Mark Office a paperless office and after the application of the said rules the online filing of the application would be made mandatory. The said amended rules are published for the consideration and suggestion of the public and after a period of forty five days the drafting committee would take in to consideration suggestions given by the general public in this regards.

The said draft Rules are reproduced below:

a) Draft rule 8:

Leaving of documents etc:

1. Any application, notice, statement, opposition, renewal , report, fee, form or other documents authorized or required to be filed, left, served, paid, made or to any persons under the Act or these rules, shall be tendered by using online transmission duly authenticated.
2. The documents referred above shall be drawn in accordance with provisions of rule 13
   Provided that an applicant or a legal entity who is not a trademark agent or an advocate under the Advocate Act, 1961uses the online transmission, he or it may do so, if he or it so desires, without electronic authentication. In such cases the application, notices or other documents shall be duly signed and submitted in paper form also at the appropriate office ordinarily within 15 days of the online submission.
3. Any written communication addressed to an applicant at his address as it appears on the electronic Register of Trade Marks or to an applicant or opponent in any proceedings under the Act or these rules, at the address appearing on the application or notice of opposition, or given for service, shall be deemed to be properly addressed.
4. All notices and written communication addressed to an applicant or the opponent in any proceedings under the Act or these rules and all documents transmitted or forwarded to the applicant or opponent, as the case may be, shall except when they are sent by special messenger, be sent by registered post or speed post or courier service or by online transmission duly authenticated.
5. The date of a notice or a written communication addressed to an applicant or opponent in any proceedings under the act or these rules shall be the date of dispatch of the said notice or written communication, by Registered Post or Speed Post or Courier or fax or online electronic transmission duly authenticated as the case may be unless otherwise specified under the Act or these rules.
6. In case of delay in receipt of document or communication sent by the Trade Marks Registry to a party to any proceedings under the Act or rules, the delay in transmitting or resubmitting a document to the Trade Marks Registry or doing

any act by the party may be condoned by the Registrar if a petition for condonation of such delay is made by the party to the Registrar immediately after receipt of the documents or communication along with the statement regarding circumstances of the facts and evidence in support of his statement.

Provided that the delay condoned by the Registrar shall not exceed the period between the dates on which the party was supposed to have received the document or communication by ordinary course of mail or online electronic transmission and the actual date of receipt of the same.

b) Draft Rule 13, provides the proper format for filing of online document –

Filing of documents and format etc:

1. All documents including copies of any documents, except affidavits sent to the Trade Marks Registry or otherwise submitted to the Registrar shall be submitted by using online electronic transmission facilities in the format provided therewith and shall be-
   a) typewritten or printed in Hindi or in English in large and legible characters not less than 0.30cm high with deep inedible ink with lines widely spaced not less than one and a half cm spaced;
   b) on A/4 size paper of approximately 33cm by 21 cm with a margin of at least 4cm on the top and left hand part and 3cm on the bottom and right part thereof
   c) numbered in consecutive English numerals in centre of the bottom of the page
   d) provided with numbering on every fifth line of each page of the claims at right half of left margin
2. Any signature which is not legible or is other than English or Hindi shall be accompanied by transliteration of the name in Hindi or English in block letters.
3. The reply or response by the applicant or his agent to the Examination report and other documents issued or sent by the Registrar shall be filed electronically using online system of Trade Marks Registry.
   Provided that an applicant or a legal entity who is not a trademark agent or an advocate under the Advocates Act, 1961 uses online transmission he or it may do so, if he or it so desires, without electronic authentication. In such cases the application, notice or other documents shall be duly signed and submitted in paper form also at the appropriate office ordinarily within 15 days from the date of online submission.
4. Where the application or other documents have been filed using online system, additional copies of the application or documents shall not be filed at the appropriate office unless directed otherwise by the Registrar.
   Provided that an applicant or a legal entity who is not a trademark agent or an advocate under the Advocate Act, 1961uses the online transmission, he or it may do so, if he or it so desires, without electronic authentication. In such cases the application, notices or other documents shall be duly signed and submitted in paper form also at the appropriate office ordinarily within 15 days of the online submission.
5. The name and address of the applicant and the other person shall be given in full together with nationality and such other address, if any, as are necessary for their identification.
6. After sub-rule (1) of Rule 12, following sub section to be inserted:
   "(1A) the forms referred to in sub-rule (1) are to be filed, made, sent or submitted electronically."

Moreover, if required, Registrar can ask for the additional copies of application or documents filed where applications have been filed using online system.

In the First Schedule to the Principal Rules after entry number 87 to give effect to the said draft Rules the following note shall be inserted namely:

All prescribed forms, applications, requests, notices and other petitions shall be filed or received by the trade Marks Registry or the Registrar using online transmission system unless otherwise specified in the rules

OMISSIONS

Sub-rules (3) and (4) of Rule 11 shall be omitted.

CONCLUSION

The purpose behind the said draft rule is to make the registration of a trademark hassle free. The recent development in the trademark office wherein 40,000 files goes missing was mainly due to the fact that the files in the paper format are not easily maintainable. Further the passing of the new Trademark Amendment

Bill, 2009 would also require the Indian Trade Mark Office to provide registration to a mark within a span of 18 months and the filing of the application online will certainly help in doing so.

DIPP REITERATES THE ELIGIBLE INSTRUMENTS FOR FDI

Department of Industrial Policy and Promotion [DIPP] vide issuing corrigendum to Circular 2 of 2011 of FDI policy on October 31, 2011 has deleted the paragraph no. 3.3.2.1 which was inserted on September 30, 2011. According to the said paragraph, only equity shares, fully, compulsorily and mandatorily convertible debentures and preference shares, with no in-built options of any type, would qualify as 'Eligible Instruments' for FDI. The other instruments which do not qualify as Eligible Instrument will be treated as foreign debt and will be subjected to the External Commercial Borrowing [ECB] guidelines.

While the insertion of the above said provision in the FDI policy had restricted the choices for structuring equity investments by foreign investor especially private equity players, venture capital funds and other strategic investors whose investments always have a shelf life. Also, it had created uncertainty for exit of foreign investors and private equity players.

However, the decision of the DIPP regarding the deletion of the above clause would be a great relief for corporate, especially venture capital funds, private equity players and other strategic investors.

AMENDMENTS IN FDI POLICY FOR PHARMACEUTICAL SECTOR

The Department of Industrial Policy and Promotion [DIPP] vide Press Note No.3 (2011 Series) reviewed its Consolidated FDI Policy [Circular 2 of 2011] dated September 30, 2011 and modified the FDI Policy in Pharmaceutical Sector.

According to the insertion, FDI, up to 100 percent, would continue to be permitted for greenfield investments in the Pharmaceuticals Sector under the automatic route. However, with respect to the brown field investments (i.e. investments in existing companies), FDI, up to 100 percent, would be permitted under the Government Approval Route.

Accordingly, following new paragraph has been inserted:

6.2.25	**Pharmaceuticals**		
6.2.25.1	Greenfield	100%	Automatic
6.2.25.2	Existing companies	100%	Government

FDI APPROVAL UP TO 26 PERCENT IN THE PENSION SECTOR- A REFORM INITIATIVE

Currently, pension funds of over a million employees in India are managed by domestic players such as IDFC, State Bank of India, Kotak Mahindra Bank, Reliance Capital and insurance major, Life Insurance Corporation of India.

The cabinet has approved foreign direct investment of up to 26 percent in the pension sector, moving forward on a key reform initiative in the financial sector after years of dithering.

The government reintroduced the Pension Fund Regulatory and Development Authority bill in March this year, after which it was sent to a committee on finance. The panel submitted its report in August with some suggestions after which the government decided to fix the FDI cap at 26 percent. The limit will be part of the Pension Fund Regulatory and Development Authority bill that will be considered by parliament in the winter session. ◆◆◆

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ADVOCATES AND SOLICITORS