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INDIAN LEGAL IMPETUS

Treaty Shopping - Is it a Tax Planning tool or a mere Tax Avoidance Strategy

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Foreword

Manoj K Singh
Founding Partner

I take immense pleasure in releasing the February 2012 edition of our newsletter "Indian Legal Impetus" and presenting the latest developments in the legal arena. The refreshing thoughts and a subtle presentation of the ideas are in sync and symbolic of the freshness reflected by the festival of colours.

This edition brings forth the contentious issues involved in the concept of 'Treaty Shopping' which has been deliberated at length in the recent Vodafone Judgment pronounced by the Hon'ble Supreme Court of India. An attempt has been made by the authors to put in simple words the observation of the Apex Court in the said judgment which held that *treaty shopping per se is not illegal*.

Through analysis of two recent judgments of the Apex Court, the current edition brings to the notice of the readers the dynamic jurisprudence of "manufacture" in the Central Excise Act and CENVAT Credit Rules.

Further through article 'Service Tax on Construction Service' in light of department clarification, taxability of various business models in construction sector has been discussed.

In IPR section one of the Articles relate to the rights of a person against the baseless threat of legal proceeding for using his trademark for business. Further, the article has deftly deliberated on the safety net under the Trademark Act 1999 that exists when a person threatens another person with an action for infringement of a trademark or similar proceeding.

Further in the newsletter the concept of Freedom to Operate (FTO) has been very vividly discussed and it has also been highlighted that the proper FTO search and analysis is the need of the hour from the perspective of commercial sagacity thereby curtailing the unnecessary costs as well as litigation /disputes.

Through another article much light has been thrown on the concept of the tacking-on in trademark where the constructive use of a trademark would be helpful for the future registration of a similar trademark of the same applicant.

Pharmaceutical section of this edition discussed the complexities involved in advertisement and promotion of drugs and controversies relating to the practice followed by pharmaceutical companies and their advertisement.

The Corporate Section brings to the fore the new class of investors i.e. Qualified Foreign Investor who can directly invest in Indian equity market thereby opening the gate for fresh funds to be raised from the foreign investors and further this section also deals with the ill effects of "Ambush Marketing" emphasizing that concrete legislation tackling such nuisance is much awaited.

Lastly, keeping in view the growing importance of Carbon Credits and in light of the Guidance Note on accounting recently issued by the ICAI, both the taxation and accounting aspect of Carbon Credits have been discussed in the Article on 'Carbon Credits'. The Newsbyte section is exhaustive having a wide coverage of the recent happenings in various other legal sectors.

I hope that our esteemed readers find useful the information furnished through this newsletter and also such an effort will enable them to understand and further interpret the recent legal developments thus enabling our readers to avail the new gateways. I welcome all suggestions, opinions, queries, or comments from our readers. You can also send your valuable insights and thoughts at newsletter@singhassociates.in.

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TREATY SHOPPING – IS IT A TAX PLANNING TOOL OR A MERE TAX AVOIDANCE STRATEGY

Manoj K. Singh, Kumar Satyakam and Smeeksha Bhola

INTRODUCTION:

What is more important from the perspective of an economy - inflow of Foreign Institutional Investment (FII) or amount of legitimate taxation revenue? This is a rhetorical question with an obvious reply in affirmative i.e. both the issues need to be deftly dealt and finally settled in order to secure a balance between the two which would ultimately benefit the economic health of a country. This is also evident from the FII policies that our policy makers announce quite often and at the same time from the reluctance shown by the Income Tax Authority ("ITA") in acceding to the various claims of cross border transaction made through Indo Mauritian route.

FII coming through the Mauritian route almost account for 40 percent of total inflow and thus abeyance to the principle laid down by the Apex court in the famous Azadi Bachao Andolan[1] case need not be deliberated. Despite such a landmark judgment pronouncing a sacrosanct principle, benefits arising from the provisions laid down in Indo – Mauritius double tax avoidance treaty (The Treaty) has time and again raised eyebrows of the Indian Tax Authorities ("ITA") thereby resulting into innumerable number of disputes on the same issue and subjecting it to a wide ranging discourse.

Thus, the question that arises is that whether treaty shopping is illegal per se or the real nature i.e. substance of each cross border transaction needs to be scrutinized in the light of its distinct set of facts and circumstances. The Hon'ble Supreme Court while pronouncing the landmark Azaadi Bachao judgment was crystal clear with the principle which has been reiterated by the Apex Court in the most recent Vodafone judgment. Therefore, the principle is well settled through catena of landmark judgments but still disputes result considering the fact that each and every cross border transaction ought to be examined in the light of its peculiar set of facts and circumstances.

1. *Tax is not to be levied on transaction involving transfer of shares of an Indian Entity by a Mauritian Company outside India, if such Mauritian Company holds a Tax residency Certificate of Mauritius.*

DEBATE OVER TREATY SHOPPING – LEGAL OR ILLEGAL:

"Treaty Shopping is a graphic expression used to describe the act of a resident of a third country taking advantage of a fiscal treaty between two Contracting States." – Azadi Bachao case

A recent ruling of Authority of Advanced Ruling **(AAR) in Ardex Investments Mauritius Ltd. Case[2]** while reiterating the Azadi principle held that taking advantage of the Treaty by itself is not an objectionable treaty shopping. Thus much to an extent the ruling is the reflection of what was held in Azadi case; the principle laid wherein settled the issue that every transaction that seeks to benefit from a treaty is not equivalent to tax evasion.

Ardex ruling[3] echoed the ruling given in the case of E*Trade Mauritius case and is based on the same premises as was highlighted by the Hon'ble Supreme Court in the Azadi case. It is a well settled principle that a Mauritius based company will not be subjected to capital gains tax in case of such transactions if it can produce a tax residency certificate of Mauritius thereby availing itself of absence of any clause such as "limitation of benefits(LOB)" clause in the Indo - Mauritius treaty. But a vital question still remains i.e. what if the entire transaction has been entered with an intention of avoiding the tax liability and how to determine the substance of such transactions.

Even though the rulings went against the ITA contentions, but it is imperative through these rulings that the Mauritius based companies will now have to demonstrate substance before the ITA. In a way, ITA now seems reluctant to give way to exemptions in each and every transaction so easily and it intends to make a detailed scrutiny based on all related facts, documents, records and transactions. It is manifest that now such enquiry will no more rely solely on the existence of a tax residency certificate and will may require the

2. *Ardex Investments Mauritius Ltd. (AAR No 866 of 2010)*
3. *The AAR in this case held that the capital gains on the proposed sale of shares by the applicant (Ardex Mauritius) to Ardex Germany is not chargeable to tax in India in view of Article 13(4) of the India-Mauritius tax treaty.*

taxpayer (Mauritius based company) to demonstrate that it is satisfactorily controlled and managed from Mauritius and it has been established for sound commercial reasons. Inspite of a well settled principle in the case of Indo – Mauritius Tax Treaty, there has been a lot of litigation and ITA seems inclined to appeal further basing its contentions on the peculiar set of facts, circumstances and material on record. The well settled principle related to the issue of treaty shopping has again been deliberated in the most recent Vodafone judgment.

Remarkable observation of the Apex court needs to be highlighted here for the proper appreciation of the issue under consideration i.e. whether treaty shopping per se is illegal or it is the substance of each cross border transaction that must be scrutinized.

VODAFONE JUDGMENT:

The apex Court observed that the cases of Mc dowell and Azadi Bachao dealt with the concepts of Tax evasion and Tax Avoidance. It further remarked that both the concepts are different and thus the scope and coverage of both the concepts is distinct. The Apex Court even emphasized that one cannot be understood in the light of another. In the present case it was also observed that as per the majority judgment in Mc Dowell which laid down that "tax planning may be legitimate provided it is within the framework of law" and further stated that "colorable device cannot be a part of tax planning and it is wrong to encourage the belief that it is honorable to avoid payment of tax by resorting to dubious methods"

It can be inferred from the above observations of the Apex Court that Tax planning is not barred, however a fine line of distinction between tax planning and tax avoidance must be respected. Unless and until this line is crossed, legitimate tax planning cannot be prohibited.

Thus it can be rightly asserted that all tax planning is not illegal, illegitimate or for that matter impermissible per se. But, If a transaction is entered into merely for tax avoidance or in other words a Special Purpose Vehicle/ Subsidiary set up in Mauritius is used merely for circular trading or round tripping or to pay bribes then such transactions , though having a legal form, should be discarded by applying the test of fiscal nullity.

The mere fact that the Companies set up their subsidiaries in Mauritius to take advantage of the Indo-Mauritius DTAA cannot be the sole basis for 'lifting of corporate veil' between the Parent and Subsidiary Company. Parent Company is bound to have control over its subsidiaries, however the main bone of contention arises in respect of the subsidiary's place of residence (i.e. question of lifting of Corporate veil) only when subsidiary's executive directors are no more than puppets of its Parent Company. Thus, it is the real substance of the transaction what matters.

CONCLUSION:

From the abovesaid discussion it is evident that a treaty shopping per se cannot be treated as nullity if the treaty provision itself does not specifically bar such transactions or for that matter the transaction under dispute is not merely aimed at tax avoidance. Even though the Azadi judgment, Ardex Ruling or Vodafone observations time and again have reiterated the principle underlying the concept of treaty shopping yet ITA will not yield so easily as the facts and circumstances of each and every matter is distinct and thus needs a careful scrutiny before deciding fate of a particular cross border transaction under consideration.

Legal Principle is crystal clear but yet the facts decide whether a particular transaction is eligible to avail of the said principle or not.

INTERPRETATION OF THE TERM MANUFACTURE IN TERMS OF SEC 2 (F) OF THE CENTRAL EXCISE ACT, 1944

Vandana and Amit Shounak

In Commissioner of Central Excise, Banglore II v Osnar Chemical Pvt. Ltd 2012(1)SCALE266, the Hon'ble Supreme Court deliberated on the definition of manufacture under Sec 2 (f) of the Central Excise Act, 1944 (here in after referred as "Act") in reference to the production of Polymer Modified Bitumen (here in after referred as "PMB").

FACTS OF THE CASE:

The assessee was engaged in the supply of PMB and entered into a contract with one M/s Afcons Infrastructure Ltd. (here in after referred as "Afcons") for supply of PMB at their work site at Solur Village, Viswanathpura Post, Bangalore. As per the agreement, the base bitumen and certain additives were to be supplied by Afcons to the Assessee directly at the site, where the Assessee, in its mobile polymer modification plant, was required to heat the bitumen at a temperature of 160^{0}C with the help of burners. To this hot bitumen, 1% Polymer and 0.2% additives were added under constant agitation, for improving its quality by increasing its softening point and penetration. The process of agitation was to be continued for a period of 12 to 18 hours till the mixture becomes homogenous and the required properties were met. The said bitumen in its hot agitated condition was mixed with stone aggregates which were then used for road construction.

That both Bitumen and polymer are classifiable under Chapter Sub Heading 390190.00 of the Central Excise Tariff Act, 1985 (hereinafter referred to as 'the Tariff Act').

The Commissioner Excise held that since PMB fell under different sub heading 271500 90 of the tariff Act the aforesaid process carried out by the Assessee amounted to manufacture of PMB in terms of Section 2(f) of the Act, irrespective of the fact whether such process was carried out on their own account or on job work basis and therefore, was dutiable. The revenue authorities argued that PMB is different from bitumen in as much as polymers and additives are the raw material consumed in the process of manufacture of PMB and therefore covered by the definition of the term manufacture in Sec 2 (f) of the Central Excise Act. While the assessee submitted that process of mixing an insignificant dose of polymer with duty paid bitumen only enhanced the quality of bitumen and did not amount to manufacture. That merely because bitumen (the basic material) and PMB (the end material) are specified under two different headings, it cannot be presumed that the process of obtaining PMB automatically constituted manufacture, unless in fact there has been a transformation of bitumen into a new and different product or alternatively, the Section Notes or Chapter Notes created a deeming fiction by providing an artificial or extended meaning to the expression 'manufacture' in respect of the goods in question.

QUESTION FOR CONSIDERATION BEFORE SUPREME COURT:

The question that arose for consideration is whether the addition and mixing of polymers and additives to base bitumen results in the manufacture of a new marketable commodity and as such exigible to Excise duty

RELEVANT PROVISIONS OF LAW:

Section 2 (f) (i) of the Central Excise Act, 1944.

JUDICIAL INTERPRETATION:

The Hon'ble Supreme Court observed that in order to bring a process in relation to any goods within the ambit of Section 2(f) of the Act, the same is required to be recognized by the legislature as manufacture in relation to such goods in the Section notes or Chapter notes of the First Schedule to the Tariff Act. Similarly, in order to bring petroleum bitumen, falling under CSH 27132000, within the extended or deemed meaning of the expression 'manufacture', so as to fall under CSH 27150090, the process of its treatment with polymers or additives or with any other compound is required to be recognized by the legislature as manufacture under the Chapter notes or Section notes to Chapter 27.

In **Shyam Oil Cake Ltd v Collector of Central Excise, jaipur 2004 (174) E L T 145(SC)** while examining the expression manufacture the Apex Court has inter alia held that:

"The amended definition enlarges the scope of manufacture by roping in processes which may or may not strictly amount to manufacture provided those processes are specified in the Section or Chapter notes of the Tariff Schedule as amounting to manufacture. It is clear that the Legislature realized that it was not possible to put in an exhaustive list of various processes but that some methodology was required for declaring that a particular process amounted to manufacture. The language of the amended Section 2(f) indicates that what is required is not just specification of the goods but a specification of the process and a declaration that the same amounts to manufacture."

In **Commissioner of Central Excise-I, New Delhi v S.R. Tissues Pvt. Ltd. and Anr AIR 2005 SC 3694,** a question arose whether slitting and cutting of toilet tissue paper on aluminium foil amounted to manufacture under Section 2(f) of the Act. Answering the question in the negative, the Apex Court observed that:

"In order to make Section 2(f) applicable, the process of cutting/slitting is required to be recognized by the legislature as a manufacture under the chapter note or the section note to Chapter 48. For example, the cutting and slitting of thermal paper is deemed to be 'manufacture' under Note 13 to Chapter 48. Similarly, Note 3 to Chapter 37 refers to cutting and slitting as amounting to manufacture in the case of photographic goods. However, slitting and cutting of toilet tissue paper on aluminium foil has not been treated as a manufacture by the legislature. In the circumstance, Section 2(f) of the Act has no application."

That the Supreme Court after discussing the above case laws observed that in the present case, a plain reading of the Schedule to the Act makes it clear that no such process or processes have been specified in the Section notes or Chapter notes in respect of petroleum bitumen falling under Tariff Item 27132000 or even in respect of bituminous mixtures falling under Tariff Item 27150090 to indicate that the said process amounts to manufacture. Thus, it is evident that the said process of adding polymers and additives to the heated bitumen to get better quality bitumen, viz. PMB, cannot be given an extended meaning under the expression manufacture in terms of Section 2(f) (ii) of the Act.

The Apex Court further examined whether the process in question, otherwise amounts to manufacture under the expansive Section 2(f) of the Act. The Hon'ble Court held that it is trite to state that 'manufacture' can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use. It is well settled that mere improvement in quality does not amount to manufacture. It is only when the change or a series of changes take the commodity to a point where commercially it can no longer be regarded as the original commodity but is instead recognized as a new and distinct article that manufacture can be said to have taken place.

The Hon'ble Court relied on **Delhi Cloth and General Mills Company Ltd v Commissioner of Sales Tax, Indore AIR1971 SC 2216,** wherein while exploring the concept of manufacture the court echoed the following views:

"...The word 'manufacture' used as a verb is generally understood to mean as 'bringing into existence a new substance' and does not mean merely 'to produce some change in a substance', however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26, from an American judgment. The passage runs thus:

Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

In **S.R. Tissues Pvt. Ltd. (supra)**, the issue for consideration was whether the process of unwinding, cutting and slitting to sizes of jumbo rolls into toilet rolls, napkins and facial tissue papers amounted to manufacture. While holding that the said process did not amount to manufacture the Apex Court inter-alia, held as under:

"...However, the end-use of the tissue paper in the jumbo rolls and the end-use of the toilet rolls, the table napkins and the facial tissues remains the same, namely, for household or sanitary use. The predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue. In the present case, the Tribunal was right in holding that the characteristics of the

tissue paper in the jumbo roll are not different from the characteristics of the tissue paper, after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues."

In **Deputy Commissioner Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Pio Food Packers 1980 (6) E.L.T. 343 (SC),** a three Judge Bench of Supreme Court, while deciding whether conversion of pineapple fruit into pineapple slices for sale in sealed cans amounted to manufacture, observed as follows:

"...Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity."

DECISION OF THE COURT

Having considered the matter on the touchstone of the aforesaid legal position, the Hon'ble Supreme Court held that the process of mixing polymers and additives with bitumen does not amount to manufacture. That the said process merely resulted in the improvement of quality of bitumen, however bitumen remained bitumen. There was no change in the characteristics or identity of bitumen and only its grade or quality was improved. The said process did not result in transformation of bitumen into a new product having a different identity, characteristic and use. The end use also remained the same, namely for mixing of aggregates for constructing the roads. Therefore, hold that PMB cannot be treated as bituminous mixtures falling under CSH 27150090 and shall continue to be classified under CSH 27132000 pertaining to tariff for petroleum bitumen.

IN RELATION TO THE MANUFACTURE OF FINAL PRODUCTS – SUPREME COURT INTERPRETATION

Vivek Singhal and Kumar Satyakam

The Hon'ble Supreme Court in **Flex Engineering Limited Vs. Commissioner of Central Excise, U.P.**[1] **,** deliberated on a well settled legal principle pertaining to allowing credit in respect of duty paid goods used in or in relation to the manufacture of the finished products. The said issue is well settled through catena of judgments but at the same time it again revived the old debate as to what meaning is to be assigned to the expression **"in relation to the manufacture of the finished products".**

FACTS OF THE CASE:

The Assessee (appellant) is engaged in the manufacture of various types of packaging machines (for short 'F&S machines') and manufactures the machines on the specific orders of the customers as all the dimensions of the packaging/sealing pouches, for which the F&S machine is required, are provided by the customer. The Assessee uses Flexible Laminated Plastic Film in roll form & Poly Paper, which is duty paid, for testing, tuning and adjusting various parts of the F&S machine in terms of the conditions mentioned in the purchase order.

The Assessee filed declarations and availed of the benefit of MODVAT credit in respect of duty paid Flexible Laminated Plastic Film on the ground that the material used in testing of the final product is an input in or in relation to the manufacture and benefit of MODVAT credit be granted. It was contented by the Assessee that the testing of the machine being an integral process of the manufacture and marketability of the final product and to avail of the MODVAT credit in respect of an input, it is not necessary that such input must be physically present in the finished product.

The Revenue (Respondent) denied the benefit of MODVAT credit on the goods on the ground that testing of a machine takes place only after the manufacture of the machine is complete and therefore any goods used in a process subsequent to the completion of process of manufacture cannot be termed as inputs within the meaning of Rule 57A of the Rules. All the appeals preferred by the Assessee before the Commissioner (Appeals), the Appellate Tribunal and the High Court were dismissed.

QUESTION FOR CONSIDERATION BEFORE SUPREME COURT:

The question that arose for consideration is whether the input not physically used in the manufacture of the final product but used for testing of the final product would be covered within the expression 'in or in relation to the manufacture of the final products', as appearing in Rule 57A of the Rules. In short, the bone of contention is as to what meaning is to be assigned to the expression 'in relation to the manufacture of final products.'

RELEVANT PROVISIONS OF LAW:

Section 2 (f) (i) of the Central Excise Act, 1944 defines "manufacture" as any process incidental or ancillary to the completion of a manufactured product.

Rule 57A of the Central Excise Rules entitles a manufacturer to take credit of the Central Excise duty paid on the inputs used in or in relation to the manufacture of the final product whether directly or indirectly and whether contained in the final product or not, provided that the input and the finished product are excisable goods and fall under any of the specified chapters in the tariff schedule.

JUDICIAL INTERPRETATION:

The Apex Court in **Union of India Vs. Delhi Cloth Mills Co. Ltd.**[2] , while examining expression 'manufacture', observed that the manufacture means bringing into existence a new substance. Manufacture is end result of one or more processes, through which original commodity passes. Thus, manufacture implies a change but every change is not manufacture. A new and different article must emerge having distinctive name, character or use.

1. S.L.P. (C) Nos. 875 of 2008, 10759 of 2010 and 6501 of 2011

2. AIR 1963 SC 791

The process of manufacture is said to takes place when the raw materials undergo a series of changes and transformation that result in the formation of a commercially distinct commodity having a different name, character and use. The process of manufacture is said to be completed only when the product is rendered marketable.

The Hon'ble Supreme Court in *Dharampal Satyapal v. Commissioner of Central Excise, Delhi-I, New Delhi* [3], while examining the scope and purport of the expression 'marketable' observed that the Marketability is an attribute of manufacture. It is an essential criteria for charging duty. Identity of the product and marketability are the twin aspects to decide chargeability. Dutiability of the product depends on whether the product is known to the market. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. Marketable means saleable. The test of classification is, how the goods are known in the market.

In *Union of India. Vs. Sonic Electrochem (P) Ltd.,*[4] the Hon'ble Supreme Court observed that the essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found. It is the commercial identity of the articles known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no demand in the market would be irrelevant.

Thus, the process of the manufacture is said to continue till the time finished product is recognized as a new and different commercial commodity having distinctive name, character or use. It is well settled that physical presence of an input in the final finished excisable goods is not a pre-requisite for claiming MODVAT credit under Rule 57A of the Rules. It may very well be indirectly related to manufacture and still be necessary for the completion of the manufacture of the final product.

In *Collector of Central Excise, Calcutta-II v. M/s Eastend Paper Industries Ltd.*,[5] the Assessee was manufacturing different kinds of paper. A question arose whether the wrapping paper manufactured and used for wrapping the finished product is a part of manufacture. It was held that wrapping of finished product by wrapping paper is process incidental and ancillary to completion of the manufactured product under Section 2(f) of Act and anything required to make goods marketable, must form a part of manufacture and any raw material or any material used for same would be a component part of the final product.

The Hon'ble Supreme Court in *Collector of Central Excise and Ors. v. Solaris Chemtech Ltd. and Ors.*,[6] observed that the expression 'in the manufacture of goods' indicates the use of the input in the manufacture of the final product. The said expression normally covers the entire process of converting raw materials into finished goods such as caustic soda, cement, etc. The expression also covers inputs 'used in relation to the manufacture of final products'. The Explanation to Rule 57-A also shows an inclusive definition of the word 'inputs'. Therefore, that is a dichotomy between inputs used in the manufacture of the final product and inputs used in relation to the manufacture of final products.

The Court further observed that the expression, namely, 'in relation to' also finds place in the extended definition of the word 'manufacture' in Section 2(f) of the Central Excises and Salt Act, 1944 (for short 'the said Act'). Therefore, the words 'in relation to the manufacture' have been used to widen and expand the scope, meaning and content of the expression 'inputs' so as to attract goods which do not enter into finished goods.

In *Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana, Rajasthan,*[7] the Apex Court held that any operation which results in the emergence of the manufactured goods would come within the ambit of the term manufacture. This is because of the words used in Rule 57A, namely, goods used in or in relation to the manufacture of final products.

At this juncture, it would also be apposite to refer to Circular No. 33/33/94/CX.8, dated 4th May 1994, issued by the Central Board of Excise and Customs, relating to the MODVAT scheme. The relevant part of the Circular reads as under:

"MODVAT credit is available for all excisable goods used as inputs **in or in relation to the manufacture** of finished goods. It is, therefore, clarified that the input credit is admissible whether such input is physically present in the finished excisable goods or not so long such inputs are used **in or in relation to the manufacture of** finished excisable goods."

3. *(2005) 4 SCC 337*
4. *AIR 2002 SC 3288*
5. *(1989) 4 SCC 244*
6. *(2007) 7 SCC 347*
7. *(1991) 4 SCC 473*

DECISION OF THE COURT:

The Court while allowing the appeal observed that the process of testing the F&S machines is inextricably connected with the manufacturing process and the process of manufacture will not be said to be complete till the time the machines are subjected to individual testing and meet the contractual specifications. If the results are not in conformity with the order, then the machine loses its marketability and is of no use to any other customer. Manufacturing process in the instant case is said to be complete on the complete testing of the said machines.

The Revenue failed to discharge the onus of proving the marketability of the machines prior to the stage of testing and even failed to adduce any evidence or contorted the Assessee's claim. Therefore, the stand of the revenue was not accepted.

Hence, the goods viz. the flexible plastic films used for testing the F&S machines were held to be inputs used in relation to the manufacture of the final product and were found eligible for MODVAT credit under Rule 57A of the Rules.

CONCLUSION:

In view of the principle laid down by the Supreme Court in the instant case and in the catena of judgments, it is inferred that the manufacture includes any process which is incidental or ancillary to the completion of manufactured product. The process of manufacture is said to continue till the time a commercially recognized, new and different commodity emerges having different name, character or use.

The corollary to the above is that till the time the step of manufacture continues, all the goods used in or in relation to the manufacture of the finished products will be considered as inputs and thus, entitled to MODVAT credit under Rule 57A of the Rules. It is not necessary that such input must be physically present in the finished product.

SERVICE TAX ON CONSTRUCTION SERVICES

Prashant

Central Board of Excise & Customs vide its Circular No. 151 /2 /2012-ST, dated 10th February, 2012 have clarified the levy and collection of service tax on various business models under taxable category "Construction of Residential Complex Services" and "Construction or renovation of commercial/industrial buildings or pipe lines or conduits Services" [clauses (zzzh) and (zzq) of section 65(105) of the Finance Act, 1994]. It has been observed that across the country, divergent business models and practices are being followed in the construction sector. Some of these business models and practices could be region specific. In light of various clarifications sought on various business models for taxability of service tax on construction services, following business model has been identified, examined and clarified by the department under the above mentioned Circular i.e.:

- Tripartite Business Model
- Redevelopment including slum rehabilitation projects
- Investment model
- Conversion Model
- Non requirement of completion certificate / where completion certificate is waived or not prescribed
- Build- Operate - Transfer (BOT) Projects
- Joint Development Agreement Model

TRIPARTITE BUSINESS MODEL

It is one of the prominent business model practised in the construction sector. Generally in the said business model following parties are involved i.e. landowner; builder or developer and contractor who undertakes construction. The following questions are frequently raised in the said business model:

What is the service tax liability if there is Sale of Land by Land Owner to Developer / Builder?

What is the service tax liability for the Construction service provided by Developer / Builder to the Land Owner for the Consideration received in the form of land/development rights and what is the service tax liability for the Construction service provided by Developer / Builder to the end customers/ buyers for cash consideration?

Department clarified that the no service tax is leviable if there is sale of land by the Land Owner to Developer / Builder as the same is not taxable service. It is further clarified by the Department that Construction service provided by the builder/developer prior to July 1 2010 will not be taxed in terms of Board's Circular No108/02/2009-ST dated January 29, 2009. However, construction service provided by the builder/developer for the period after 01/07/2010 is taxable in case any part of the payment/development rights of the land was received by the builder/ developer before the issuance of completion certificate and the service tax would be required to be paid by builder/developers even for the flats given to the land owner. Department further clarified that consideration for these flats would be the value of land / development rights in the land which may not be ascertainable ordinarily. Accordingly, the value of these flats would be determinable in terms of section 67(1)(iii) read with rule 3(a) of Service Tax (Determination of Value) Rules, 2006. Accordingly, the value of these flats would be equal to the value of similar flats charged by the builder/developer from the other buyers that are sold nearer to the date on which land is being made available for construction. Service Tax is to be paid at the time when the possession or right in the property of the said flats are transferred to the Land Owner by entering into a conveyance deed or similar instrument (eg, allotment letter). Value to be determined in terms of section 67 of the Finance Act, 1994 (normally the cash consideration received by the developer / builder from the buyers)

REDEVELOPMENT INCLUDING SLUM REHABILITATION PROJECTS

In the said business model the, land is owned by a society, comprising members of the society with each member entitled to his share by way of an apartment. In this model generally, society or its flat owners engage builder/developer for undertaking reconstruction (land owned by them) and the builder constructs new flats with same or different carpet area for original owners of flats. Builder / Developer gets consideration through transfer of development rights over the land (including the permission for additional number of flats). Society /

individual flat owners give 'No Objection Certificate' (NOC) or permission to the builder/developer, for re-construction. The builder/developer makes new flats for original owners of flats and additionally may also be involved in arranging for rental accommodation or rent payments for society members/original owners for stay during the period of re-construction, Builder / Developer may also pay an additional amount to the original owners of flats in the society, and also by constructing some additional flats for sale to others by builder / developer

Department clarified that Re-construction undertaken by a building society by directly engaging a builder/ developer is meant for the personal use of the society/ its members and therefore will not be chargeable to service tax.

It is further clarified that construction of additional flats undertaken as part of the reconstruction, for sale to independent end customers / buyers would be taxable from July 1, 2010, in case any payment is made to the builder/ developer before the issuance of completion certificate. It is clarified that the said service was not be a taxable service, during the period prior to 01/07/2010. Value to be determined in terms of section 67 of the Finance Act, 1994 (normally the cash consideration received by the developer / builder from the buyers)

INVESTMENT MODEL

In this model, before the commencement of the project, the same is on offer to investors. Either a specified area of construction is earmarked or a flat of a specified area is allotted to the investors and as it happens in some places, additionally the investor may also be promised a fixed rate of interest. After a certain specified period an investor has the option either to exit from the project on receipt of the amount invested alongwith interest or he can re-sell the said allotment to another buyer or retain the flat for his own use.

It is clarified by the Department that under the said model, after 01/07/2010, investment amount shall be treated as consideration paid in advance for the construction service to be provided by the builder/ developer to the investor and the said amount would be subject to service tax. If the investor decides to exit from the project at a later date, either before or after the issuance of completion certificate, the builder/ developer would be entitled to take credit under rule 6(3) of the Service Tax Rules, 1994(to the extent he has refunded the original amount). If the builder/developer resells the flat before the issuance of completion certificate, again tax liability would arise.

CONVERSION MODEL

Conversion of any hitherto untaxed construction / complex or part thereof into a building or civil structure to be used for commerce or industry, after lapse of a period of time.

It is clarified by the Department that mere change in use of the building does not involve any taxable service, unless conversion falls within the meaning of commercial or industrial construction service.

NON REQUIREMENT OF COMPLETION CERTIFICATE / WHERE COMPLETION CERTIFICATE IS WAIVED OR NOT PRESCRIBED

In certain states, completion certificates have been waived or are considered as not required for certain specified types of buildings. In such situations, doubts have been raised, regarding levy of service tax on the construction service provided.

Department clarified that where completion certificate is waived or is not prescribed for a specified type of building, the equivalent of completion certificate by whatever name called should be used as the dividing line between service and sale. In terms of the Service Tax (Removal of Difficulty) Order, 2010, dated 22/06/2010, authority competent to issue completion certificate includes an architect or chartered engineer or licensed surveyor.

BUILD- OPERATE - TRANSFER (BOT) PROJECTS

It is the most popular business model in the construction sector. Many variants of this model are being followed in different regions of the country, depending on the nature of the project. Build-Own-Operate-Transfer (BOOT) is a popular variant. Generally under BOT model, Government or its agency, concessionaire (who may be a developer/builder himself or may be independent) and the users are the parties. There may be a case where an independent contractor is engaged by the concessionaire for undertaking construction, where the concessionaire is undertaking construction by itself, where concessionaire enters into agreement with several users for commercially exploiting the building developed/constructed by him, during the lease period. Risk taking and sharing ability of the parties concerned is the essence of a BOT project. Government or its agency by an agreement transfers the 'right to use' and/or 'right to develop' for a period specified, usually thirty years or near about, to the concessionaire.

Department clarified that transactions involving taxable service take place usually at three different levels: firstly, between Government or its agency and the concessionaire; secondly, between concessionaire and the contractor and thirdly, between concessionaire and users, all in terms of specific agreements.

At the first level, Government or its agency transfers the right to use and/or develop the land, to the concessionaire, for a specific period, for construction of a building for furtherance of business or commerce (partly or wholly). Consideration for this taxable service may be in the nature of upfront lease amount or annual charges paid by the concessionaire to the Government or its agency. Here the Government or its agency is providing 'renting of immovable property service' (renting of vacant land to be used for furtherance of business or commerce) and in such cases the concessionaire becomes the service receiver.

In this model, though the concessionaire is undertaking construction of a building to be used wholly or partly for furtherance of business or commerce, on the land provided by the government or its agency for temporary use, he will not be treated as a service provider since such construction has been undertaken by him on his own account and he remains the owner of the building during the concession period.

At the second level, transaction can take place between a concessionaire and the contractor. Where the concessionaire himself does not have exposure to construction sector, he may engage a contractor for undertaking construction of a building on the land, in respect of which right to use has been obtained in his favour, from the Government or its agency. If the concessionaire is himself a builder/developer, this level of transaction may not arise. Where an independent contractor is engaged by a concessionaire for undertaking construction for him, then service tax is payable on the construction service provided by the contractor to the concessionaire.

At the third level, the concessionaire enters into agreement with several users for commercially exploiting the building developed/constructed by him, during the lease period. For example, the user may be paying a rent or premium on the sub-lease for temporary use of immovable property or part thereof, to the concessionaire. At this third level, concessionaire is the service provider and user of the building is the service receiver. The concessionaire may provide to the users, taxable services such as 'renting of immovable property service', 'business support service', 'management, maintenance or repair service', 'sale of space for advertisement', etc. Service tax is leviable on the taxable services provided by the concessionaire to the users.

There could be many variants of the BOT model explained above and implications of tax may differ. For example, at times it is possible that the concessionaire may outsource the management or commercial exploitation of the building developed/constructed by him, to another person and may receive a pre-determined amount as commission. Taxable service here will be business auxiliary service and service tax is leviable on the commission. The service provided by the Government or its agency to the concessionaire is liable to service tax; the construction services provided by the contractor to the concessionaire would be examined from the point of taxability as to whether the activity is not otherwise excluded; the services provided by the concessionaire to the user of the facility are liable to service tax; Government or its agency and concessionaire are liable to pay tax on the services being provided by them. There could be several other persons liable to pay service tax, depending on the variant of the BOT model followed.

JOINT DEVELOPMENT AGREEMENT MODEL

Under this model, land owner and builder/developer join hands and may either create a new entity or otherwise operate as an unincorporated association, on partnership /joint / collaboration basis, with mutuality of interest and to share common risk/profit together. The new entity undertakes construction on behalf of landowner and builder/developer.

Department clarified that Circular 148/17/2011-ST dated 13/12/2011, particularly paragraphs 7, 8, 9 would be applicable in such cases. The above Paras basically clarify (in the given context) that :

As per explanation to Sec 65 of the Finance Act, 1994 the taxable service includes any taxable service provided or to be provided by any unincorporated association or body of persons to a member thereof, and such an entity would acquire the character of a "person".

The transactions between it and the other independent entities will be a taxable service based on the nature of the transaction.

Whereas, in case the character of a "person" is not acquired in the business transaction and the transaction is as on principal-to principal basis, the tax is leviable on either of the constituent members based on the nature of the transaction and as per rules of classification of service as embodied under Sec 65A of Finance Act, 1994.

CONCLUSION

Central Board of Excise & Customs vide its Circular No. 151 /2 /2012-ST, dated 10th February, 2012 have clarified the levy and collection of service tax on various business models, the clarification seeks to address certain complex transactions. Although it is not possible to address all kinds of arrangements in the real estate and the infrastructure sector, the clarification will surely increase awareness and set in motion debate on service tax applicability on such complex transactions. At the end, the service tax implication on the various business models, should largely depend on the intention of the parties and the specific terms of Agreement. Under the said clarification service tax is payable on the services provided by Developer/Builder to the Land owner, where consideration is received in the form of land development rights. One of the aspects that are debatable is the value for such services. While the circular clarifies that value of similar flats have to be considered as value for such services, the circular seems to ignore the market value of land as on the date of the Agreement between the land lord and builder/ developer based on which the ratio of sharing flats/ built up space with the land owner is usually agreed by the builders/developers. Also since there is normally a reasonable time gap between when land is being made available and the first flat is being sold, the method prescribed may not be appropriate,

BASELESS THREATS OF PROCEEDINGS

Himanshu Sharma

Rights in a property accrue to a person as a result of his legal position in connection to a particular property in comparison to others. This legal right in the property provides the authority to the proprietor to use the property without any interference from others. When we look at the same concept in reference to a trademark it is quite evident from the provision of Trade Marks Act, 1999 that the primary proprietary right in a trademark accrues due to bona fide use of a particular trademark or due to registration of a mark under the Act. As the intellectual properties have attained importance in the contemporary business scenario where the name of the business is as important as the business itself a new trend has emerged wherein several people started intimidating others with baseless threat for legal proceedings for using a trademark. The same problem has been dealt with in the Trade Marks Act, 1999 in section 142.

Section 142 of the Act states that:

(1) Where a person, by means of circulars, advertisements or otherwise, threatens a person with an action or proceeding for infringement of a trade mark which is registered, or alleged by the first mentioned person to be registered, or with some other like proceeding a person aggrieved may, whether the person making the threats is or is not the registered proprietor or the registered user of the trade mark bring a suit against the first mentioned person and may obtain a declaration to the effect that the threats are unjustifiable and an injunction against the continuance of the threats and may recover such damages (if any) as he has sustained, unless the first-mentioned person satisfies the court that the trade mark is registered and that the acts in respect of which the proceedings were threatened, constitute or, if done would constitute, an infringement of the trade marks.

(2) The last preceding sub-section does not apply if the registered proprietor of the trade mark, or a registered user acting in pursuance of sub-section (1) of section 52 with due diligence commences and prosecutes an action against the person threatened for infringement of the trade mark.

(3) Nothing in this section shall render a legal practitioner or a registered trade marks agent liable to an action under this section in respect of an act done by him in his professional capacity on behalf of a client.

(4) A suit under sub-section (I) shall not be instituted in any court inferior to a District Court.

According to this Section, if a person threatens another person with an action for infringement of a trademark or similar proceeding, the aggrieved person may bring a suit against that person for obtaining a declaration to the effect that the threats are unjustifiable, and for an injunction against the continuance of the threats. He may also recover damages, if any, he has sustained.

Plaintiff in such a suit will not succeed if the defendant is able to prove that his trademark is registered and that the acts of the plaintiff forming the basis for the threats would constitute infringement of such trademarks.

A suit under Sub-section 142(1) will not lie if the registered proprietor of the trademark with due diligence commence and prosecute an action for infringement against the person threatened.

In case of ***Upendra Nath Dass & Sons v T. C. Martin***[1] it was held by the Calcutta High Court that merely challenging the validity of the registration of the defendant's trademark, without initiating proceedings for cancellation of the mark is of no avail, as registration prima facie gives the registered proprietor an exclusive right to use the mark.

Lakshmi PVC products v Lakshmi Polymers[2] the Hon'ble Madras High Court held that the defendants were free to file a separate suit against the Plaintiffs for whatever relief they wanted. Interim injunction was granted to restrain the defendants from continuing to issue threatening notices although they were the prior users of the trademark in question. Neither mark was registered.

This section has very wide scope. The expression "or with some other like proceedings" would include criminal proceedings or passing off. The threat of

1. *SUIT NO. 1199 OF 1960, CAL.*
2. *1991 IPLR 32 (Mad)*

proceeding may be made by any person whether interested in a trade mark or not.

For determining what constitute a threat? It is to be proved that "the use of any such language as would be under stand by a normal reader, if it was a letter or hearer if it was a statement to mean that the writer intended to take proceeding in respect of the act complained of must necessarily constitute a threat of proceeding. It is immaterial if it is expressed in general language stating that the complainant will protect their interests with utmost vigour"[3]

The threat may be made in any manner, directly or indirectly, i.e. by circulars, advertisements or by communication oral or in writing. The communication containing the threat may be addressed to the person threatened or to any other person.

In case of ***Lewis Falk Ltd V Henry Jacobwitz*** [4] it was held that the plaintiff in an action for threat has only to make out a prima facie case that the alleged threats have in fact been made. Then it is for defendant to show that the acts in respect of which proceeding were threatened constitute an infringement of a trade mark or passing off. If he fails to do so this, the plaintiff will be entitled to an injunction.

This section is intended to have application only to prevent holders of monopoly rights from asserting a consequence of possession of their monopoly which they are not prepared to sustain by action.

Sub-section (2) makes it clear that the benefit of the provision contained in section 142 would not be available, if the registered proprietor of the trade mark or a registered user, acting in pursuance of section 52(1), commences with due diligence infringement proceedings against the threatened person under the Act.

In case of ***Rajni Industries v Bhartiya Dhoop Karyalaya***[5] it was held that if the Registered Proprietor of the Trademark commences and prosecutes an action against the person threatened, for infringement of the trademark, then section 120(1)(of the Trade and Merchandise Act, 1958) ceases to apply and action under it cannot be maintained.

RELIEFS IN CASE OF THREATS:

A successful plaintiff in an action for the threat may obtain the following reliefs:

a) A declaration to the effect that the threats are unjustifiable;

b) An injunction against the continuance of the threats;

c) Such damages, if any as he has sustained thereby.

The reliefs granted to a plaintiff in a case of threats are based upon the reliefs sought by the Plaintiff.

In case of ***lusty & sons Ltd. V Morris Wilkinson & Co, (Nottingham) ltd***[6] the court held that, the question, what is the liability in these cases? It must be for the damages done by the threats not the damages which are the result of any rumor getting about in the trade.

Sub-section (3) of Section 142 explicitly clarifies that nothing in this section shall render a legal practitioner or a registered Trade Marks Agent liable to an action in respect of an act done by him in his professional capacity on behalf of a client.

CONCLUSION

Section 142 is a tool which helps a bona-fide user of a trademark to get rid of unwanted threats posted by the unauthorized person who does not have any rights whatsoever in the trademark they are threatening for. It gives a right to the trademark user to bring a suit against the person making such a threat and obtain declaration that the threats are unjustifiable and an injunction against the continuance of the threat and recovery of damages. The basic intention behind this provision is to dissuade people from indulging in baseless threats of legal proceedings with a view to cause injury to another person's trade, and not in a case where the person, who is threatening, would be able to satisfy the court that the threat was not fanciful, that the trademark is registered and the acts in respect of which proceeding were threatened constitute, or would constitute, an infringement of the registered trademark.

3. *Rosedale V Airfix (1956) 73 RPC 360 at 363*
4. *[1944] 61 RPC 116 p. 18*
5. *2001(2)CTMR 1323(Del)*
6. *[1954] 71 RPC174*

FREEDOM TO OPERATE- SECURING INNOVATIONS.

Aayush Sharma and Priyanka Rastogi

INTRODUCTION:

Freedom to Operate (FTO) in simple words is the freedom to operate/commercialize a product/process without infringing valid intellectual property rights of others. In a way FTO acts as a tool that enables the Party to analyze if his product/process is infringing on in-force patents/patent applications, belonging to a third party. FTO is jurisdiction or territory specific i.e. when a particular party possessing the patent on its product/process wants to release that specific product in India, then he has to do FTO search with the relevant technology/product. FTO search gives an information about the patent/applications already made in India, for specific matter/technology.

In recent years, three pharmaceutical companies namely Cambridge Antibody, Micromet AG & Enzen pharmaceuticals announced that they had signed a non-exclusive cross license agreement. In the said agreement all three parties obtained substantial freedom to operate (FTO) under some of each other IP, to conduct research and develop a defined number of therapeutic and diagnostic antibody based products.[1] Today this kind of practice is very common in every prospect of the technology and its development and more and more professionals, inventors & owners now rely on this fact that *"Prevention is better than cure"*.

NEED OF FREEDOM -TO-OPERATE:

Companies today are facing with the many challenges that accompany an economic downturn. Trying to make the most of every dollar invested is the objective of each and every commercial undertaking as a part of their business development plans. With every new product being contemplated for development, one important business decision is whether to perform a freedom to operate analysis or not. There is high-end risk of being infringement suits if one launches a product/process without any freedom to operate analysis and search in the market which can threaten the business of the company itself. At this fatal stage, the IPR lawsuit costs and the ambiguity involved in it, is usually incurable and it may force the company to withdraw itself from the business and exit the market altogether.

A very famous case study which realizes the importance of a freedom to operate search is that of **Polaroid Vs Kodak.** Kodak was a pioneer in the segment of photography in USA. Polaroid made a late entry into the market and developed its proprietary technology for **'instant photography'.** In due course Kodak too decided to make a foray in the instant photography segment. One week after the Kodak's product launch, Polaroid filed infringement suits against Kodak. The Hon'ble Court held that Kodak infringed Polaroid patents. As a result of which Kodak had to pay **$ 900 million** and such a huge penalty ultimately compelled Kodak to withdraw from the instant photography business altogether.[2]

As is evident from the abovesaid case, best method to avoid such an embarrassing situation is to carry out a systematic Freedom to operate search and analysis after or even before one starts making investment in setting up plants for manufacture of the proposed process/product. This will secure the investment and prevent the party from unnecessary litigation/disputes/legal claims, costs.

OBJECTIVE OF FREEDOM-TO-OPERATE:

Freedom to operate Analysis has become vital in today's time. The objective of FTO search and analysis is to understand the 'Scope of freedom' in terms of claims. The main aim is to come out with a product/process that does not contravene a patent or a registered design. It is advisable that FTP search & analysis be carried out at early stages of product/process expansion, in order that inventor/applicant do not incur development costs in potentially infringing products and are not intertwined in a legal issues later. It is realized that a "Freedom to Operate" analysis is a form of due diligence which is to be carried out with patience and seriousness before commencing any built-up activity. This kind of search provides the

1. *http://www.cambridgeantibody.com/html/news/press_releases/2003/20030903micrometenzon.htm*
2. *http://www.oppedahl.com/apl/kodak3.pdf*

detailed idea based on which one can ascertain whether or not the planned product or the existing product can be made, used, licensed or franchised without violating another valid patent. The companies in technology sectors face peculiar challenges as compared to other sectors i.e. whenever there is commercialization of a new product or technology; there is a high probability that it may be blocked or restrained by a competitor holding a patent over that technology which is integrated in the new product. To make the matter even worse , there may be "essential patents" that are obligatory for developing certain types of products or for meeting certain technical standards. In such cases, without prior authorization of the patent owners, the risks of being accused of infringement are extremely high. This is why many companies, prior to launching a new product, and often even prior to initiating a new line of research that may lead to the development of a new product, seek to minimize the risk of infringement by securing their "Freedom to Operate" (FTO), i.e. ensuring that the commercial production, marketing and use of their new product, process or service does not infringe the intellectual property rights of others. Some of the valid objectives to conduct FTO, which may include are:

- Analyze if there is a need for their product;
- Identify a market for the product;
- Study competition;
- Device a marketing plan;
- Come up with pricing strategy.

STRATEGIES FOR OBTAINING FREEDOM-TO-OPERATE:

The approach to FTO follows a logical sequence. It begins with an FTO search on wide databases viz. USPTO, EPO, ORBIT, THOMSON REUTERS etc, where granted and non granted patents are searched, the results of such an analysis allow patent counsel to provide an FTO opinion that discusses the likelihood of the product or process infringing identified IP rights or tangible property rights of others. The resulting FTO status becomes the baseline for formulating an FTO strategy, which then allows management to weigh different risks and make informed business decisions. To obtain authentic, timely, complete and accurate information about existing patents in India to generate an exhaustive FTO report, following strategies must be followed:

- Understand the technology/invention;

- Form key strings using various combinations of keywords/ Boolean operators OR, AND, and NOT (or AND NOT);

- Search the patent database using various search strategies (USPTO, EPO, IPO, WIPO etc);

- Identify patents belonging to key competitors;

- Identify the most relevant patents;

- Analyze the claims of the relevant patents;

- Prepare a reader-friendly FTO report.

FREEDOM TO OPERATE- AN INDIAN PERSPECTIVE:

Taking the example of Bajaj/TVS litigation, the huge losses relating to patent infringement whipped the company's stature in the market. TVS was put under great loss due to a temporary injunction issued against the sale of its bike called 'Flame', after pumping huge capital into product/process development and launch. This kind of judgments reiterate the fact that patent infringement assessment/analysis must be done at a very preface stage viz. making plans for product development, devising research programs, product commence plan formulation and so on.[3]

Today India is a huge market for IP, and lot of multinational companies are investing their money in technological, pharmaceutical, automobiles and research & development. India being a huge hub of intellectual property, there are more chances of IP infringement. Today in India IP awareness is increasing. IT companies and R&D companies are performing lot of researches and a good number of FTO searches are performed by more and more IP associated companies and law firms .This helps their clients and protects them from the unnecessary hassles resulting from infringement litigations/disputes.

DECLARATORY JUDGMENT & FTO:

In an interesting case, India's pharmaceutical giant, Ranbaxy wished to launch cefuroxime axetil in USA. Ranbaxy came across a *US patent number 5847,118*

3. *http://www.expresspharmaonline.com/20110430/management03.shtml*

owned by apotex. Ranbaxy had used the same process for manufacturing cefuroxime axetil as was claimed in the Apotex patent. But in a thorough FTO analysis, Ranbaxy noticed one critical variation in the process of preparation. Ranbaxy's process involves the use of acetic acid as highly polar organic solvent. The claim 1 of the US patent also recited the term "highly polar organic solvent" but in the description acetic acid was not mentioned. Further when Ranbaxy evaluated the prosecution history of the patent, it was revealed that the examiner during the prosecution had raised an objection over the term as indefinite. In order to address this rejection, Apotex defined this term and highly polar organic solvent of the Apotex patent were sulfoxides, amides & formic acid. Apotex also included these amendments as dependant claims, therefore Ranbaxy filed for a declaratory judgment that its process for manufacturing cefuroxime axetil does not infringe Apotex patent. Ranbaxy was able to proof the absence of literal infringement or infringement under doctrine of equivalence.[4] Later United States court of appeals, federal circuit granted a declaratory judgment to Ranbaxy. Ranbaxy could thus, protect its commercial interest with the help of FTO analysis. The above case highlights the importance of FTO search and thorough analysis which may help other companies or enterprises like the Ranbaxy to market their product in the other countries without any fear of infringement of any valid patent or patent application under prosecution. An FTO opinion should be prepared at the very beginning of initiating R&D related to development and launch of any product/process.

CONCLUSION:

An FTO analysis based on the search of patent literature, in many ways is just the first step. If the patent search reveals that there are one or more patents that limit the freedom to operate, the organisation/company will have to decide as to how to proceed. A thorough search and critically analyzed FTO opinion strengthens the organization confidence. The patent search should be systematic, structured and documented properly.. Even where the conclusion of FTO analyses is "no infringement" a regular update of FTO is necessary to rule out any issues in subsequently published patent application. Purposeful anticipation and availing of the opportunity of entering the market through defensive, legal route like declaratory judgment also may be considered in favorable situations. On the other hand if the infringement issues prevail then appropriate decision must be taken. Licensing provisions and detailing the commercialization of the product/process are safe ways to overcome infringement issues.

Therefore one must take a wise decision in the matter of FTO opinions, considering all aspects such as technical, economic and financial aspects and the brand of the competitor.

4. *Nagori BP & Mathur Vipin, basics of writing patent non-infringement & freedom to operate opinions, Journal of Intellectual Property Rights, 14(1) 2009 7-13*

"TACKING-ON"- A RATIONALE BEHIND PERSISTENCE

Himanshu Sharma

A trademark is an asset, value of which increase with each passing day hence the use of a trademark is of great importance. Once a trademark is put to use, the subsequent period is counted as a critical period for the survival and the success of a trademark. At the initial stages of the business, the management takes various business decisions which sometimes have to be revoked keeping in mind the current market position. Sometime various trademarks, which are introduced at the launching of business, have to be revoked or changed as the same does not get success among the public due to the change in the market conditions. For taking the advantage of the initial use of the original trademark, which has to be amended later in order to be in line to the current market conditions, the applicant would file application for the amended trademark taking advantage of the previous use of the similar trademark by them earlier. A legal technicality that allows a trademark owner to make slight alterations in a trademark, without abandoning ownership in the original trademark is known as 'tacking-on' of a trademark.

Tacking as a legal term in the trademark field is not eminent in India but the same is very much in use. An applicant can claim the use of a trademark from the date when he started using the trademark for the very first time even though the appearance of the initial trademark is not same to what is subsequently applied for. Further with the passage of time a trademark is changed to keep pace with the change in time but the use of the same is claimed from the time when the trademark is first used in its initial form.

ORIGIN OF THE CONCEPT:

The 'tacking-on' concept has its roots to the well developed western trademark laws. A number of federal courts have recognized the doctrine of "tacking-on" in trademark cases, pursuant to which a trademark owner can claim priority in a mark based on the first-use date of a similar, but technically distinct mark. Under this constructive-use theory, the trademark owner seeks to tack his first-use date in the earlier mark onto the subsequent mark. 'Tacking-on' as a concept is famous as the same can help a user to claim the use of his trademark from the date on which he has used his previous similar trademark and the amount of time & money invested on that previous trademark can be used for the subsequent trademark. This can prove beneficial to the business in a long run as it can minimize the cost of launching a new mark/business. Tacking does not apply when a plaintiff does not assert priority of use in connection with a new mark. When tacking applies, it provides an effective defense to a claim of abandonment. Sound policy considerations support the notion of tacking by allowing the use of the previously created goodwill of the earlier trademark. In absence of the doctrine, a trademark owner's priority in his mark "would be reduced each time he made the slightest alteration to the mark, which would discourage him from altering the mark in response to changing consumer preferences, evolving aesthetic developments, or new advertising and marketing styles. Further, granting a trademark owner the same rights in a new mark that he has in an old mark helps to protect source-identifying trademarks from appropriation by competitors and thus furthers the trademark law's objective of reducing the costs that customers incur in shopping and making purchasing decisions. Courts have frequently specified that the standard for tacking is very strict.

In case of ***One Industries, LLC v. Jim O'Neal Distributing, Inc*** [1]

O'Neal, a leader in the motocross racing industry, began using a stylized "O" as a mark in 1991 and experimented with additional versions in 1992, 1993, 1997 and 2003. In 1999, its competitor One Industries developed and registered the "One Icon," comprising two interlacing number "1"s that form an "O." When O'Neal accused One Industries of infringing GITS 2003 mark, One Industries countered that the One Icon, registered in 1999, was senior to the 2003 mark. On appeal, O'Neal argued that its 2003 mark should have been tacked back to an earlier version, which would establish priority. Because the One Icon was first used in 1999, the court focused on the O'Neal marks that were developed in 1997 (the "Rounded O' mark") and 2003 (the "Angular O' mark"). The court noted that

1. *No.08-55316, 2009 (9th Cir)*

tacking is allowed only in narrow circumstances in which the marks create the "same, continuing commercial impression and the later mark does not materially differ from or alter the character of the mark attempted to be tacked." Here it found that O'Neal's two marks did not satisfy the standard for tacking, because they differed in several material respects. For example, though both consisted of a stylized "O" followed by an apostrophe, the apostrophes were markedly different. In the 1997 mark, the apostrophe was entirely separate from the "O" and appeared as a standard apostrophe. In the 2003 mark, the apostrophe was connected to the main image and looked like a triangle. In addition, while the 1997 mark was boxy, the 2003 mark looked like the outline of a lemon.

The court cited cases from other circuits and from the Trademark Trial and Appeal Board confirming that tacking is allowed only if the marks are virtually identical. As the Ninth Circuit drove home, the standard for tacking is "exceedingly strict."

A claimant to trademark or service mark rights may rest its claim, in part, upon use of the same mark at an earlier date for a purpose which permits the earlier use to be "tacked" onto the later use, to give the later use a priority over a competing use by a third party which the later use might not otherwise have.

In a more recent decision in case of ***In re Nielsen Business Media, Inc***[2] the Trademark Trial and Appeal Board (TTAB) of the United States Patent and Trade Mark Office have refused registration to the mark THE BOLLYWOOD REPORTER for entertainment-related publication. The TTAB, in its precedential decision, held that Nielsen Media (the Applicant) could not rely on its registrations for the mark THE HOLLYWOOD REPORTER to establish rights of acquired distinctiveness over the BOLLYWOOD REPORTER. The applicant claimed "tacking-on" and claimed that it could transfer distinctiveness to the new mark by virtue of its rights in the previously registered marks.

The TTAB refused to entertain these arguments, and pointed out that the marks were not legal equivalents:

"The marks at issue are not legal equivalents because they have different meanings and engender different commercial impressions. "Bollywood" is "the extravagantly theatrical Indian motion picture industry." "Hollywood" is "the center of the American motion picture industry located in Hollywood, California." THE BOLLYWOOD REPORTER means and creates the commercial impression of a news source regarding the Indian movie industry while THE HOLLYWOOD REPORTER means and creates the commercial impression of a news source regarding the American movie industry."

Hence it is clear that to claim Tacking-on there has to be a similar impression of the new mark to that of old mark. If the new mark is depicting an entirely new idea than claiming tacking would be difficult as the Applicant cannot claim the use of a mark which is not quite similar in nature and ocular expression.

CONSTRUCTIVE USE:

In trade and commerce the initial use of a trademark is according to the prevailing market conditions. The condition may decide the use of the trademark or the promotion of trademark or even the design of a trademark. Even though this initial use of the trademark is according to the prevailing conditions but this use is design to constructively working towards the future use of the trademark. The constructive use of a trademark can said to be done when the present use of a mark is done to take advantage of the same in future. For example the initial use of the brand TATA was in regards to the iron and steel but that initial use has been constructively used till date. Presently TATA is in numerous businesses but the brand is using the goodwill created by it in the past. A new business started under the brand TATA does not need a kind of promotion as needed initially by any other trademark. "Tacking on" of trademark is done to take the advantage of the initial use and constructively using the image and goodwill of a trademark already established.

CONCLUSION

The tacking of trademark is not prevalent in India in express terminology but the same can be deduced from some of the provisions wherein the use of a trademark is given relevance for getting it registered.

Various provision in Indian Trademark Act, 1999 related to the trademark does give preference to the use of the same in past. The use of trademark would help a trademark in acquiring the distinctiveness based upon the use of the trademark known as acquired distinctiveness. The mark use in the beginning of the

2. 93 USPQ2d 1545 (TTAB 2010).

business may be different sometime from the mark which is applied for the registration.

Proviso to section 9(1) provides that "provided that a trademark shall not be refused registration if before the date of application for registration it has acquired a distinctive character as a result of the use made of it or is a well known trademark"

But more importantly the provision has not been used expressly in Indian Intellectual Property field. Even though scope of using the same is very much present, in order to provide the safeguard to the marks which are used for a long period of time but there has been continuous change in the visual representation of these marks. If the mark would not be protected from the first use of the same then the distinctiveness created by it till that point will go waste. Through the concept of "tacking on", the goodwill created by one mark would also be taken into consideration for another mark which is visually similar to the first mark of the same Applicant.

ADVERTISEMENT AND PROMOTION OF DRUGS

Kasturika Sen

INTRODUCTION

The pharmaceutical sector in India is regulated by the Drugs and Cosmetics Act (DCA) and its subordinate legislation i.e. the Drugs and Cosmetics Rules (DCR) and these apply to all medicines all over in India, imported or manufactured in the country. The legislation is enforced by the Central Government (Ministry of Health & Family Affairs) in New Delhi, who is in charge of the supervision of the same and the office of the Drugs Controller General of India (DCGI) has prime responsibility for approving all new formulations that come before it.

However, the State government through its Food and Drug Administration (FDA) contain the power to provide manufacturing and selling licenses which are the two main registrations required to manufacture and sell a drug. FDA also carry out the enforcement of the above mentioned legislations.

In India, all drugs are categorized as 'prescription drugs' and 'non-prescription drugs' (or OTC drugs) under DCR Rules. Prescription Drugs fall under two schedules namely Schedule H and Schedule X of the Drug and Cosmetics Rules, 1945 . The drugs category under Schedule G requires the following mandatory text on the label: "Caution: It is dangerous to take this preparation except under medical supervision" and thus the industry voluntarily does not advertise these to the public .

The Drug & Magic Remedies (Objectionable Advertisement) Act mentions a list of ailments for which advertising is not permitted. It also prohibits misleading advertisements, which, directly or indirectly, give false impressions regarding the true character of the drug; or make false claims, or are otherwise false or misleading in any particular respect. The DCGI's office –in collaboration with Organisation of Pharmaceutical Producers of India (OPPI) -has released a Voluntary Code on OTC (Over The Counter Drugs) Advertising, which is being followed by all OPPI member companies.

The OTC Committee of the Organization of Pharmaceutical Producers of India (OPPI) is working towards the promotion of responsible self-medication with a view to growing OTC sector. It is aiming to get regulatory support for issues such as the accessibility of household OTC remedies and increasing the awareness of the importance of responsible self-medication with the general public and the Government.

DRUGS AND ADVERTISEMENT

Drug promotion and advertising is inherently unethical. Unlike other commodities where consumers are choosers, drug promotion takes place through prescription practices. Due to this nature, the drugs market is ethically driven. In an attempt to support and encourage the improvement of health care through the rational use of drugs and to curb unethical marketing practices, in 1998, the World Health Organization (WHO), introduced the "Ethical criteria for medicinal drug promotion".[1] The document outlines and defines drug promotion as "all the information and persuasive activities by manufacturers and distributors in order to induce the prescription, supply, purchase and/or use of medicinal drugs". But as per WHO, this standard does not constitute legal obligations and governments are allowed to adopt legislation or other measures based on them as they deem fit.

Drug promotion includes various activities of medical representatives, drug advertisements to physicians, provision of gifts and samples, drug package inserts, direct-to-consumer advertisements, periodicals, telemarketing, holding of conferences, symposiums and scientific meetings, sponsoring of medical education and conduct of promotional trials.

GUIDELINES FOR DRUG PROMOTION

Studies have pointed out that out of varied intervention to control or counter the influences of promotion, the effectual outcome is obtained from government regulations, training of students (both before and after graduation), media exposure, and free and abundant provision of reliable non-commercial therapeutic information to professionals and the public. In course

1. *Criteria of Medicinal Drug Promotion (WHO) Available at: http://apps.who.int/medicinedocs/collect/edmweb/pdf/whozip08e/whozip08e.pdf*

of the above, research and policy questions to be addressed in this regard, include the development of effective methods of educating doctors about drug promotion, the impact of guidelines on promotional gifts, and the development of effective strategy for managing conflicts of interest in research.[2] To examine and assure the acceptance of promoted products, the consequences aced by different regulatory frameworks need to be compared as such comparison will assist the government and regulatory bodies to introduce policies to regulate promotional activities and it will provide good evidence of the advantages and drawbacks of different systems while dealing with such issue.[3]

ADVERTISEMENT OF DRUGS IN INDIA

Advertisement is usually used as a direct measure to popularize a distinct drug or a remedy. But due to the restrictions imposed by the Drug & Magic Remedies (Objectionable Advertisement) Act, the practice in India depends upon the prescription of a drug by the doctor where he is the decision maker for the ultimate user, the patient.

In India, the Indian Medical Council Act, 1956, and the Code of Medical Ethics, 2002, administer the conduct of physicians in India. Other necessary guidance is provided by different associations in India for drug promotion. However, these voluntary codes which aim at restricting or regulating drug promotion are in direct conflict with the interests of drug industry. Therefore it is very difficult to introduce and promote new drugs in the country.

The doctors are usually informed about the utility and convenience about the new drugs which may involve marketing strategies adopted by companies effecting prices of drugs due to which there are strict restrictions on its advertisement. Therefore the debate/controversy lies in how a doctor is influenced to decide which drug is to be prescribed to his patients based on the distribution of the information provided to them.

It is accepted that pharmaceutical companies do have trade interests in promoting their products for circulating information about the drug it produces and WHO is of the view that the same is also acceptable if it is carried out in a fair, accurate, and ethical manner. The main question of concern surrounding this issue is the extent of activities of drugs promotion which represent fair practices. In the year 2008, the pharmaceutical industry in India spent a total of Rs 4941.15 crore, in which Advertising expenses were 823.57 crores and drug marketing expenses were 2470.44 crores Indian rupees.[4]

LIMITATIONS TO DRUG PROMOTION

It is important to understand that unsuitable prescriptions to patients could cause dangerous side effects and medical complications. But many experts and commentators have maintained the view that new drugs that are a breakthrough drugs which enter the market early are usually promoted through scientific information, which is a more rationale method of promoting instead vigorous distribution of irrational formulations resulting in excessive sampling. Promotion of drugs in the former approach would be effective in an ethical manner if there was a legal requirement of continuing medical education or periodic recertification in India. Presently no such requirement exists.

It has been observed that improper evaluation of drug due to lack of proper practical sensitivity among physicians is the primary reason for them not being able to interpret information presented in the promotional literature. Therefore it is suggested that physicians must always gauge if a new drug is relevant and suitable to their practice in terms of population studied, the disease and the need for new treatment.[5] The WHO guideline on ethical drug promotion states that "scientific data in the public domain should be made available to prescribers and any other person entitled to receive it, on request, as appropriate to their requirements."

Experts have expressed criticisms on companies who attempt to promote their products on the support of efficacy of drugs through trials conducted by them. It can be gauged that such view has been conveyed, to ensure impartiality in examination of the drug during the trial and reduce attempts to publish fake reports to increase promotion of the drug. However, it is also important to note that, the companies may also conduct the trials on their own to make sure that the same is carried out diligently without possibility of error, because on committing the error, they have to

2. *"Competition Law and Pharmaceutical Industry", Center for Trade and Development, New Delhi 2010.*
3. *Drug promotion database.*
4. *"Competition Law and Pharmaceutical Industry", Center for Trade and Development, New Delhi 2010.*
5. *Shetty VV et. al, 2008*

also bear with its consequences. Therefore, such criticism is very subjective and may not be relevant in all situations.

CONCLUSION: IMPORTANCE OF ETHICAL AND EFFECTIVE ADVERTISEMENT AND PROMOTION OF DRUGS

Advertisement of drug also bears importance for survival of medical journals. Pharmaceutical industries play an important role in investing in advertising in journals by wide circulation of information meant for clinical specialists or general practitioners. This provides a very essential platform for encouraging drug promotion in an ethical manner as mentioned above. However, in India, the basic journals e.g. clinical pharmacology, pathology finds it difficult to manage themselves, because of lack of advertisements.[6] This is due to stringent rules and lack of effective balance by the regulatory authorities to frame a cooperative structure to ensure effectual vigilance and a supportive environment of awareness for promotion, as advertisement in many western journals also carry full text of approved information on a drug. The practice of circulation of approved and competently articulated information could help the reader in getting balanced information on a drug and also help the journal in generating additional revenue.

Problems may occur when consumers find it difficult to evaluate the qualities of the products, as is the case in the pharmaceutical products and this is where effective communication of information may prevent adverse competition between effective brand name generics from innovator products, generic-generics competing with brand name generics and innovator drugs etc. In the pharmaceutical sector, it is known that the innovator drug is the standard of quality; the issue is not whether the innovator is effective, the issue is whether the generic is as effective as the innovator.[7] To avoid ambiguity and allow the prescriber/doctor, and the patient to a certain extent, to comprehend the composition and effect of the drugs which are available and which are introduced, it is very vital that there is a scope of free circulation of information on a broader basis.

Therefore for appropriate evaluation of new drugs which are introduced, authorities shall take stronger initiatives to allow the pharmaceutical companies to approach doctors and physicians, who prescribe drugs by providing them a platform for interaction. Conferences, meetings and seminars are some of the few methods by which information of effectiveness of new drugs can be discussed to empower the physicians to prescribe better relief to the patients. Such activities will also attract minor criticism towards pharmaceutical companies who are usually critcised for holding such conferences and educational programs for doctors and medical institutes for promotion of the drug. Statutory provisions guiding pharmaceuticals and allowing effective promotion of drugs can offer the required encouragement and scrutiny that are necessary for such activities.

6. Roy, Madhiwalla and Pai, Drug promotional practices in Mumbai: a qualitative study, Indian Journal of Medical Ethics, 2007 April-June 4(2)

7. "Competition Law and Pharmaceutical Industry", Center for Trade and Development, New Delhi 2010.

INVITING FOREIGN CAPITAL – QFIS ALLOWED TO INVEST IN INDIAN COMPANIES

Karan Gandhi

Earlier it was Mutual Funds, now it's Equity Shares. The Government of India on 1 January 2012 issued a press note providing the permission to the Qualified Foreign Investors to invest in the equity shares of the Indian Companies.

The Finance Minister, Paranab Mukherjee in his Budget speech of 2011 announced that the foreign investors willing to invest in domestic Mutual Funds schemes shall be allowed. Consequently, the Securities and Exchange Board of India (SEBI) and the Reserve Bank of India (RBI) issued Circulars on 9 August 2011 setting the norms for the stipulated investment in India.

With the recent development by way of permission given by the Government to Qualified Foreign Investors (QFIs), the QFIs can invest in the equity shares of the Indian Companies.

A QFI is an individual, an association or a group from a foreign country complaint with standards mandated by the Financial Action Task Force (an inter-governmental body that formulates policies to combat money laundering and terrorist financing). However, Foreign Institutional Investors (FIIs) and Foreign Venture Capital Investors don't come under the QFI category.

As provided in Para 3.1 of SEBI circular Cir/IMD/DF/14/2011 dated August 09, 2011,

Qualified Foreign Investor (QFI) shall mean a person resident in a country that is compliant with Financial Action Task Force (FATF) standards and that is a signatory to International Organization of Securities Commission's (IOSCO's) Multilateral Memorandum of Understanding (MMOU).

Provided that such person is not resident in India,

Provided further that such person is not registered with SEBI as Foreign Institutional Investor or Foreign Venture Capital Investor.

Explanation - For the purposes of this clause:

(1) the term "Person" shall carry the same meaning under Section 2(31) of the Income Tax Act, 1961

(2) the phrase "resident in India" shall carry the same meaning as in the Income Tax Act, 1961

(3) "resident" in a country, other than India, shall mean resident as per the direct tax laws of that country.

Following to the said allowance by the Government, the Securities Exchange Board of India (SEBI) and the Reserve Bank of India (RBI) issued detailed circulars on 13 January 2012 setting the Permissible Transactions, restrictions, Repatriation etc. for the stipulated investment.

PERMISSIBLE TRANSACTIONS

QFI adhering to the KYC Norms and having its account with the Depository Participant (DP) registered with SEBI shall be allowed to undertake the following transaction through DP:

1. Purchase of equity shares in public issues, to be listed on recognized stock exchange(s).
2. Purchase of listed equity shares through SEBI registered stock brokers, on recognized stock exchanges in India.
3. Sale of equity shares which are held in their de-mat account through SEBI registered stock brokers.
4. Purchase of equity shares against rights issues.
5. Receipt of bonus shares or receipt of shares on stock split/ consolidation.
6. Receipt of equity shares due to amalgamation, demerger or such other corporate actions, subject to the investment limits.
7. Receipt of dividends.
8. Tender equity shares in open offer in accordance with SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
9. Tender equity shares in open offer in accordance with SEBI (Delisting of Equity Shares) Regulations, 2009.
10. Tender equity shares in case of buy-back by listed companies in accordance with SEBI (Buyback of Securities) Regulations, 1998

So, the QFIs will be eligible to invest in equity shares in India from the jurisdictions which are FATF compliant and with whom SEBI has signed MOUs under the IOSCO framework.

INVESTMENT RESTRICTIONS AND LIMITS

The investments made by QFIs shall be limited to the following:

1. QFIs will be permissible to transact in Indian equity shares only on the basis of taking and giving delivery of shares purchased or sold
2. QFIs shall not be permitted to issue offshore derivatives instruments/ participatory notes
3. The total shareholding by an individual QFI shall not exceed five percent of paid up equity capital of the company at any point of time. This investment limit shall be apply to each class of equity shares
4. The aggregate shareholding of all QFIs shall not exceed ten percent of paid up equity capital of the company at any point of time, in respect of each class of equity shares
5. In case the aggregate shareholding of the QFIs exceeds the limit of ten percent for whatsoever reason, the QFI due to whom the limit is breached shall mandatorily divest excess holdings within three working days of such breach being notified by depositories to the DP

It is to be noted that the above stated limits are over and above the Foreign Institutional Investors (FIIs) and Non Resident Indians (NRIs) investment ceilings prescribed under the Portfolio Investment Scheme. However, where composite sectoral caps are prescribed under the FDI policy, the limits for QFI investments shall be within such overall limits.

REPATRIATION

For QFI investments under the said Circular the DP shall maintain a separate single rupee pool bank account with a designated AD Category-1 Bank, exclusively for the purpose of investments by QFI in equity shares in India.

Upon the instructions of the respective QFIs, the DP shall purchase the equity shares within five working days (including the date of credit of funds to the single rupee pool bank account by way of foreign inward remittances through normal banking channels) of the said instruction and where in case, if the purchase as desired by the QFI is not made by the DP, the funds shall be immediately repatriated back to the QFI's designated overseas bank account.

On sale of shares or dividends received on the shares held by QFI in the Indian Company/ies, the repatriation will be done as follows:

1. The sale proceeds of the equity shares shall be received in the single rupee pool bank account of the DP and to be repatriated to the designated overseas bank account of the QFI within five working days (including the date of credit of funds to the single rupee pool bank account by way of sale of equity shares) of having been received in the single rupee pool bank account of the DP
2. If instructed by the QFI, the sale proceeds of the existing investment can also be utilized for fresh purchases of equity shares within five working days (including the date of credit of funds to the single rupee pool bank account by way of sale of equity shares) of having been received in the single rupee pool bank account of the DP
3. Dividends can either be directly remitted to the designated overseas bank accounts of the QFIs or credited to the single rupee pool bank account
4. In case dividends are credited to the single rupee pool bank account they shall be remitted to the designated overseas bank accounts of the QFIs within five working days (including the day of credit of such funds to the single rupee pool bank account)
5. Dividends can also be utilized for fresh purchases of equity shares within five working days (including the day of credit of such funds to the single rupee pool bank account)

CONCLUSION

In order to widen the class of investors, attract more foreign funds, reduce market volatility and to deepen the Indian capital market the Government allowed Qualified Foreign Investors (QFI's) to directly invest in Indian equity market. This has not only opened the gate for fresh funds to be raised from the foreign investors but will also create a positive sentiment amongst the investors in the Indian Market.

AMBUSH MARKETING

Vijayta Parmar

Ambush Marketing[1] is the buzz word associated with any international event. Every mega event is associated with the Sponsors as it is very important marketing tool to make a niche in the market. Commercial sponsorship of events, particularly important sports events, has become a major marketing activity and a major source of revenue for the events. Sponsors derive a number of benefits from sponsorship, ranging from exposure of their brand name to image enhancement by associating the company name with the event. Sponsorship is perhaps most expensive at the Football World Cup, Cricket World Cup, and Olympics.

Ambush Marketing is the counter strategy in the field of sponsorship wherein the advertisers associate themselves with sponsors of those events, and therefore capitalize on, a particular event without paying any sponsorship fee. The strategy called 'Ambush Marketing' involves any communication or activity that implies, or from which one could reasonably infer, that an organization is associated with an event, when in fact it is not. For example, when Coca Cola was the official sponsor of Cricket World Cup, Pepsi commercials used the 'Nothing Official About It' campaign. Many viewers inferred that Pepsi was also associated with the event. One of the oldest acts acknowledged as ambush marketing dates back to the 1984, Olympics when Kodak sponsored television broadcasts of the games as well as the US track team despite Fujifilm being the official sponsor.

Such communications seek to achieve some or all of the benefits of being associated with the sporting event without actually incurring the cost of sponsorship fees, or to overcome the sole sponsorship rights awarded to a competitor.

FORMS OF AMBUSH MARKETING

Ambush Marketing is seen in many variations. One approach is to sponsor media coverage of the event in question. Another is to sponsor a small part of the total event and then to promote that sponsorship heavily. For example, instead of sponsoring the Cricket World Cup, sponsor the Indian Cricket Team and advertise this sponsorship throughout the World Cup.

A very common form of ambush marketing is to advertise heavily throughout the event. Such advertising can be either an advertiser's regular advertising, but in most cases the advertiser uses ads related to the event. The approach a large firm such as Pepsi or Coca Cola adopts is to buy extensive advertising time on a Network during the period of the event. Audience viewing the programme would then see numerous ads of Pepsi or Coke and might conclude that the company is the sponsor. To make it more authentic looking, advertisers might use players taking part in the event as spokespersons, or might use symbols that relate directly or indirectly with the event. The most preferred strategies for ambush marketing include :[2]

- promotions where the prize is a travel package or ticket to the event;
- promotional giveaways using the official logo, words or symbols associated with the event;
- associating with the event without actually using the official logo, words or symbols;
- displaying banners in the stadium or causing a block of spectators attending an event to wear clothing that promotes a competitor product;
- using a sky banner or blimp over a stadium or venue, or in the viewable airspace surrounding stadium or venue where an official match or event is being played; and
- counterfeit merchandising, hospitality and unlicensed ticket re-sales.

The association is without the permission of the event organizer or its official partners, and the desire is to deceive the consumer into believing that there is an official association. Ambush Marketers do not use the trademarks of the third parties but rather creatively

1. *The term "Ambush Marketing" was coined by the famous marketing strategist Jerry Welsh, while he was working as the manager of global marketing efforts for the American Express Company in the 1980s.*

2. *Gopalkrishna, Roshan; Ambush Marketing and Indian Law, SportzLaw Monthly, 24th January, 2011*

allude to a sporting event and use their own trademarks to suggest a connection or affiliation with that sporting event.[3]

APPLICABLE LAWS

It is always debatable that it is not illegal to advertise their product if corporation or entity are getting the advertising right in the event. At present, India has not enacted specific anti-ambush marketing laws and accordingly redress must be had to the Trade Marks Act, 1999, the Copyright Act, 1957, the Emblems and Names Act, 1950 and the common law notion of passing off. There are various acts of Ambush Marketing that come within the ambit of trademark, copyright infringement or passing off, they are not threatening, since they can be resolved through legal means. However the other acts of Ambush Marketing which corporation resorts to by circumventing the above mentioned IP protection, are the ones that are of major concern. Some countries like South Africa, Australia, New Zealand, China, England, Brazil, and Canada have taken pro-active steps and enacted legislations to counter the Ambush Marketing.

In absence of requisite direct legislative provision in the countries, the event organizers have taken it upon themselves to curtail the practice of Ambush Marketing by imposing their manual of rules and regulation for their tournament. Private Contracts are drawn up between event organizers and sponsors, which often consist of anti-ambush marketing clauses.

ISSUES RELATING TO AMBUSH MARKETING

Despite the above mentioned IP protection, the said practice of Ambush Marketing is prevalent because of the very peculiar nature of the Ambush Marketing i.e. short lived marketing campaigns which last for two to three days to market its products, therefore event organizers finds it is very difficult to exercise their legal option to curtail such activity. The other reason which are worth discussing is that Organization behind sporting events are reluctant to sue due to fear of alienating the large corporations, who although not the current sponsors might want to sponsors the event in future. Also the corporations that are wronged by the acts of the ambush marketing by other corporation have resorted to or will at some point of time resort to similar means.

CONCLUSION

To curb the practice of Ambush Marketing, it is advisable to buy up the advertising space surrounding the event stadia and resell only to the official sponsor, oblige stadia owners via contract negotiations to clear all advertising from the ground and its vicinity so as to offer them only to official sponsors, enter into contracts with major media organization obliging them to offer first rights of advertising in intervals in broadcast of the event, to official sponsors and publishing media and public information packs to raise awareness of the rights owned by the event organizer and the action likely if those rights are infringed.

Given trends in the rest of the world whereby anti-ambush marketing law is increasingly viewed as a prerequisite for hosting nations, perhaps the time has come for a major legislative change in the area in India.

3. Miller, Nancy A., Ambush Marketing and the 2010 Vancouver-Whistler Olympic Games: A Prospective View; http://www.imakenews.com/iln/earticle000867643.cfm;last accessed on 29th February, 2012.

CARBON CREDIT- TAXATION AND ACCOUNTING

Smeeksha Bhola

INTRODUCTION

World today is a buzz with the word 'Green Environment'. 'Sustainable development' has been recognised as the need of the hour by all the industry experts. All nations round the world are worried about health of the Environment. It was in this background that Kyoto Protocol (1997) was signed. The Kyoto Protocol is an international treaty binding those developed nations that ratified it to reduce emissions of the six most harmful greenhouse gases. For the first time, the said Kyoto Protocol introduced the concept of Carbon Credit .

CONCEPT

A Carbon credit is a generic term for any tradable certificate or permit representing the right to emit one tonne of Carbon dioxide or the mass of another greenhouse gas with carbon dioxide equivalent to one tonne of carbon dioxide. Therefore carbon credit certificate gives the leverage to holder of such certificate to pollute environment with one tonne of carbon dioxide. Carbon credits are measured in units of Certified Emission Reductions (CERs). Hence, each CER is equivalent to one tonne of carbon dioxide reduction. There were limits set on level of pollution that developed nations could emit in the form of Carbon dioxide under the Kyoto Protocol, while on the other hand there was no such limit set on the developing nations, taking into consideration the development activities required to be carried out by them.

Industries in developed nations started to invest in green projects in developing nations to meet their commitment level under the Kyoto Protocol (i.e. of reduced emission of greenhouse gases).The relevant mechanism in India for such investment is the Clean Development Mechanism(CDM). The reductions in emissions once certified by the CDM executive board are called CERs or Carbon credits and used to meet a nation's commitments under the Protocol. Such CERs can either be self generated or can be traded in the International Carbon Credit market.

However, trading of such Carbon credits resulted in ambiguity in their accounting treatment which further resulted in confusion regarding its taxation aspect.

ACCOUNTING OF CARBON CREDITS

There is a lot of confusion surrounding the accounting treatment of Carbon Credits in India. There are many unresolved questions such as how the expenditure incurred on generation of carbon credits would be treated or how the proceeds generated from sale of such Carbon credits be dealt with and so on.

Some countries have suggested to treat Carbon Credits as Government grants, however this approach is not correct. Government Grants are granted to an organization free of cost or at concessional rates, on the other hand Carbon credits are incentives provided to organizations that contribute towards green environment by using environment friendly technology.

Presently, there are no accounting standards within International Financial Reporting Standards (IFRS) explicitly for transactions involving carbon allowances. International Accounting Standards Board had issued an interpretation on Emission rights to clear the ambiguity surrounding such CERs, but later withdrew these guidelines.

Recently, ICAI has issued a Guidance Note (the 'GN') on Accounting for Self-generated Certified Emission Reductions. The GN is applicable for accounting periods beginning on or after April 1, 2012. These guidelines provide clarity on various accounting aspects of CERs, though some ambiguities have still remained unanswered.

The said accounting note deals with principles relating to accounting treatment of recognition, measurement and disclosures of CERs generated by the entity that has obtained the same under the CDM. On the other hand, these guidelines do not address those situations where CERs are purchased or used in own business. However these guidelines to some extent provided clarity on how such CERs should be accounted for.

Summary of some of the important aspects of Guidance Note dealing with Carbon credits are:

- As per Framework for the Preparation and Presentation of Financial Statements (the 'Framework') issued by ICAI, Asset will be recognised as one in the Balance Sheet, when it is probable that the future economic benefits associated with it will flow to the enterprise and the asset has a cost or value that can be measured reliably. Concept of CER is relatively new and so is its market, therefore an entity should make a proper assessment of future economic benefits that may arise from market for such CERs. If there is a probable future market for such CERs, they should be recognised as an asset;

- Research and Development costs incurred on such CERs should be accounted in accordance with Accounting Standard 26 as Intangible Asset;
- Entities in India engaged in the business of earning and selling CERs should recognise CERs as inventory only on receipt of communication of credit of CER from UNFCC, provided there is probable market for such CERs. The cost of such CERs should consist of only cost of certification of CERs;
- Accounting standard 9 should be applied in respect from revenue recognition from CERs;
- Other presentation and disclosure requirements of the Guidance Note on CERs should be kept in mind while accounting for such CERs.

TAXATION OF CARBON CREDITS

Ideally, Income arising on account of sale of carbon credits should be accounted under the head 'Income from Business and Profession'. However in case such Carbon Credits are treated as intangible assets, proceeds from sale of such of intangible assets should be treated as 'Capital Gains'. Many Companies in India are treating earnings from Carbon Credits as 'Income from Other Sources'. Trading in Carbon credits can be carried out either in spot market or in futures. Carbon credit trading can also fall within the preview of service tax on account of its dealing in Exchange platform

CONCLUSION

Though there is no clear procedure provided for accounting and taxation of Carbon credits, still some interpretations can be drawn from existing accounting and taxation procedures for treatment of income and expenditure in respect of such Carbon credits. The Direct Tax Code provides for treatment of such Carbon credits. Proper procedure has been provided under the said code for taxation of Income arising from sale of such Carbon credits. Market for Carbon credits is expanding at a very fast rate. More and more Companies in India are getting registered under the CDM scheme, which means production of CERs will rise at a tremendous rate in future. CERs are on way of becoming one of the most important commodity to be traded in future.With surge in trading of such CERs, it is important to have clarity on its accounting and taxation aspect. Direct Tax Code provides for such clarity, however until the Direct Tax Code is made operational, there is still no authoritative rules/procedure providing for accounting and taxation treatment of Carbon Credits.

CLARIFICATION FOR FILING OF CONFLICTING RETURNS BY CONTESTING PARTIES

Ministry of Corporate Affairs vide its General Circular No. 1/2012, have superseded the earlier circular No. 19 and 20 of 2011 issued on 02.05.2011 for regulating filing of conflicting returns with regard to appointment of Directors or change of Director/Directors. To avoid such eventualities wherein lack of consent of the removed/changed director or due process of Law were not followed, it has now been decided that now wherever there is management dispute, the company is required to mandatorily file the attachment relating to cause of cessation along with Form 32 with the ROC concerned irrespective of the ground of cessation, viz (a) retirement; (b) disqualification; (c) death; (d) resignation; (e) vacation of office u/s 283 or 313 or 260; (f) removal u/s 284; (g) withdrawal of nomination by appointing authority or (h) absence of re-appointment.

In case, any Director is aggrieved with his cessation in the company, he may file complaint in the Investor Complaint Form. On receipt of such complaint, the ROC concerned will examine the complaint and mark the company as having 'management dispute'. Also, the ROC will issue a letter to the company and the parties to settle the matter amicably or get an order/interim order from a Court or Tribunal of competent jurisdiction. Till such dispute is settled, the documents filed by the company and by the contesting groups of Directors will not be approved/registered/recorded and will thus not be available in the registry for public viewing.

THE INSTITUTIONAL PLACEMENT PROGRAMME (IPP) PROGRAMME INTRODUCES - A NEW MECHANISMS FOR OFFER OF SHARES BY SEBI

SEBI has introduced the Institutional Placement Programme (IPP), vide the SEBI (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2012 dated 30 January 2012 (Amendment). The provisions with respect to IPP shall apply to issue of fresh shares and / or an offer for sale of shares by a listed issuer for the purpose of achieving the minimum public shareholding in terms of Rule 19(2)(b) and Rule 19A of the Securities Contract (Regulation) Rules, 1957 (SCRR). IPP is a further public offer of eligible securities by a listed issuer, promoter / promoter group of a listed issuer (Eligible Seller), in which the offer, allocation and allotment of such securities is made only to qualified institutional buyers (QIBs). The Amendment defines 'eligible securities' as 'equity shares of the same class listed and traded in the stock exchange(s)'. An IPP has to be managed by one or more merchant bankers registered with SEBI.

OFFER FOR SALE OF SHARES BY PROMOTERS THROUGH THE STOCK EXCHANGE MECHANISM

SEBI has introduced provisions in relation to sale of shares held by promoters of listed companies through the stock exchanges vide its circular dated 1 February 2012 (Circular). The Circular facilitates promoters to dilute / offload their holding in listed companies in a transparent manner and allows offer for sale of shares by promoters of such companies through a separate window provided by the stock exchange(s) (OFS). The Bombay Stock Exchange and the National Stock Exchange (Stock Exchanges) are the only stock exchanges eligible to provide OFS.

AMENDMENTS TO THE EQUITY LISTING AGREEMENT

SEBI vide its Circular CIR/CFD/DIL/1/2012 dated 08th February, 2012 have amended the Equity Listing Agreement. Clause 40A, 43 & 43A has been amended. As far as Clause 40 A is concerned, in addition to the existing methods which listed company can adopt to achieve minimum public shareholding, the listed company may also achieve the minimum level of public shareholding through Institutional Placement Programme (IPP) in terms of Chapter VIII-A of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, as amended. Further, sale of shares by promoters through stock exchanges shall be now carried out in terms of SEBI circular CIR/MRD/DP/05/2012 dated February 1, 2012. Under Clause 43A listed entities have been mandated to disclose utilization of funds raised upon conversion/ exercise of warrants issued along with public or rights issue of specified securities.

LEVY OF SERVICE TAX ON TOLL FEE PAID BY USERS FOR USING THE ROADS

Central Board of Excise & Customs vide its Circular No. 152/3 /2012-ST dated, 22nd February, 2012 has clarified the leviability of service tax on toll fee paid by users, for using the roads.

'Tolls' is a matter enumerated (serial number 59) in List-II (State List), in the Seventh Schedule of the Constitution of India and the same is not covered by any of the taxable services at present. Tolls collected under the PPP model by the SPV is collection on own account and not on behalf of the person who has made the land available for construction of the road. Further, a Special Purpose Vehicle formed as a result of agreement between NHAI or State Authority and the concessionaire under the BOT arrangement, cannot be considered as an agent of the NHAI. Renting, leasing or licensing of vacant land by the NHAI or State Authority to an SPV for construction of road and such construction do not attract service tax.

However, if the SPV engages an independent entity to collect toll from users on its behalf and a part of toll collection is retained by that independent entity as commission or is compensated in any other manner, service tax liability arises on such commission or charges, under the Business Auxiliary Service [section 65(105)(zzb) read with section 65(19) of the Finance Act, 1994].

EXEMPTION FROM FILING INCOME TAX RETURN, AVAILABLE TO SALARIED TAXPAYERS HAVING INCOME UP TO INR 5 LACS, EXTENDED TO FY 2011-12

Central Board of Direct Taxes ("CBDT") vide its Notification No. 9/2012 dated February 17, 2012 had once again exempted specified class of salaried tax payers from the requirement of furnishing a return of income for the FY 2011-12 subject to certain conditions. The CBDT has earlier also vide Notification No. 36/2011 [F. NO. 142/09/2011 (TPL)], dated June 23, 2011 issued a notification exempting specified class of salaried tax payers from the requirement of furnishing a return of income for the FY 2010-11 subject to certain conditions. It is pertinent to note that similar to FY 2010-11's notification, the notification for FY 2011-12 also not cover within its ambit individuals having taxable income from any other source except salary income and savings bank interest income (up to the prescribed limit).

RECEIPT OF ADVANCE PAYMENT FOR EXPORT OF GOODS - INVOLVING SHIPMENT (MANUFACTURE AND SHIP) BEYOND ONE YEAR

Reserve Bank of India vide its Circular No. RBI/2011-12/403 A.P. (DIR Series) Circular No.81 dated February 21, 2012 liberalized the procedure for Receipt of advance payment for export of goods. It is been allowed that exporters can now receive advance payment for export of goods which would take more than one year to manufacture and ship and where the 'export agreement' provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment subject to fulfilling following conditions:

i. the KYC and due diligence exercise has been done by the AD Category –I bank for the overseas buyer;

ii. compliance with the Anti Money Laundering standards has been ensured;

iii. the AD Category-I bank should ensure that export advance received by the exporter should be utilized to execute export and not for any other purpose i.e., the transaction is a bona-fide transaction;

iv. progress payment, if any, should be received directly from the overseas buyer strictly in terms of the contract;

v. the rate of interest, if any, payable on the advance payment shall not exceed London Inter-Bank Offered Rate (LIBOR) + 100 basis points;

vi. there should be no instance of refund exceeding 10% of the advance payment received in the last three years;

vii. the documents covering the shipment should be routed through the same authorised dealer bank; and

viii. in the event of the exporter's inability to make the shipment, partly or fully, no remittance towards refund of unutilized portion of advance payment or towards payment of interest should be made without the prior approval of the Reserve Bank.

LIST OF INN'S PUBLISHED BY INDIAN TRADEMARK OFFICE

Readers must recall that we have published the article on the topic of INN's and their status in India in January 2012, edition of our monthly newsletter 'Indian Legal Impetus' and in continuation of the same, we would like to update that the Controller General of Patents Designs and Trade Marks in India had published the list of International Non-proprietary Names declared by the World Health Organisation on February 8th, 2012. The list was overtly due as there was a lot of confusion related to the INN's. The list can be accessed on the official website of Indian Trademark office at http://www.ipindia.nic.in/list_INN_08February2012.pdf. The list of international non- proprietary names has 128 pages in all and it contains the name of the INN and WHO publication number. This would certainly remove the ambiguity over the issue of registration of certain INN's as trademarks, for which some manufacturers have applied for registration. This also gives opportunity to the applicant to check their trademark related to the pharmaceutical field in the list of INN's before applying for the same in the Indian Trademark Office.

HARYANA DRUG CONTROL AUTHORITIES INITIATE ACTION AGAINST HOSPITAL PHARMACIES WITHOUT LICENCE

Haryana drug control authorities raided two major private hospital pharmacies in Panchkula in light of Supreme Court and Kerala High Court decision and seized huge quantum of medicines for not obtaining pharmacy licence from the department and violation of sections 18a and 18c of the Drugs & Cosmetics Act. This is the first incident of cases against hospital pharmacies for selling drugs without licence in a state outside of Kerala after the Supreme Court dismissed the SLP (C), No 6877/11 on 18.3.2011 filed by the QPMPA, an association of doctors running private hospitals.

CDSCO PLANS PERMANENT 'INDIA COUNTRY OFFICE' FOR PHARMACEUTICALS IN 5 OVERSEAS LOCATIONS

The Health Ministry has made a proposal to set up permanent 'India country offices' to inspect the manufacturing facilities which supply drugs and active pharma ingredients to India besides addressing the regulatory issues to help both the importers and exporters from India. The Ministry has now proposed one each such office in at least five countries to begin with.

The Ministry has suggested setting up of offices in China and South Africa to begin with and the other three countries would be decided in consultation with other stakeholders and concerned Departments like Pharmaceuticals and Commerce.

BRITAIN PHARMACEUTICAL COMPANY'S BID TO PATENT GINGER FOILED BY INDIA

India has foiled an attempt by a British pharmaceutical company to claim a patent on using ginger for the treatment of cold. The patent application was filed five years back claiming that the discovery of ginger as an agent to combat cold. The said application was struck down upon scrutiny of evidence provided by CSIR and Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homoeopathy (AYUSH). A patent application (GB2436063) was filed by Nicholas John Larkins, London titled "Pharmaceutical composition for the treatment of excess mucous production" on March 16, 2006 at the British patent office.

ESTABLISHMENT OF BRANCH OFFICES (BO) / LIAISON OFFICES (LO) IN INDIA BY FOREIGN ENTITIES – DELEGATION OF POWERS

Reserve Bank of India (RBI) vide Circular No. A.P. (DIR Series) Circular No.88 dated March 1, 2012 has delegated powers to the Authorized Dealer Category-1 bank regarding submission of Annual Activity Certificate by BO / LOs, extension of the validity period of LOs and closure of BO / LOs of foreign entities in India. It has been further clarified through this Circular that transfer of assets of Liaison / Branch Office to subsidiaries or other LO / BO or any other entity is permitted only with the specific approval of the Central Office of the Foreign Exchange Department, Reserve Bank of India.

LIBERALISED REMITTANCE SCHEME FOR RESIDENT INDIVIDUALS

The Reserve Bank of India vide A.P. (DIR Series) Circular No. 90 dated March 06, 2012 made Clarification with respect to Liberalised Remittance Scheme for Resident Individuals

Following clarification has been made in this regard:

i. The facility is available to all resident individuals including minors. In case of remitter being a minor, the LRS declaration form should be countersigned by the minor's natural guardian. Accordingly, the modified LRS application cum declaration form is enclosed;

ii. Remittances under the facility can be consolidated in respect of family members subject to individual family members complying with the terms and conditions of the scheme; and

iii. Remittances under the scheme can be used for purchasing objects of art subject to the provisions of other applicable laws such as the extant Foreign Trade Policy of the Government of India.

Singh & Associates

ADVOCATES AND SOLICITORS

It gives me immense pleasure to inform you that our very own Singh & Associates Cricket Team has emerged at the top and won the recently concluded Bowl Finals of Westlaw SILF Cup.

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