Singh & Associates
ADVOCATES AND SOLICITORS

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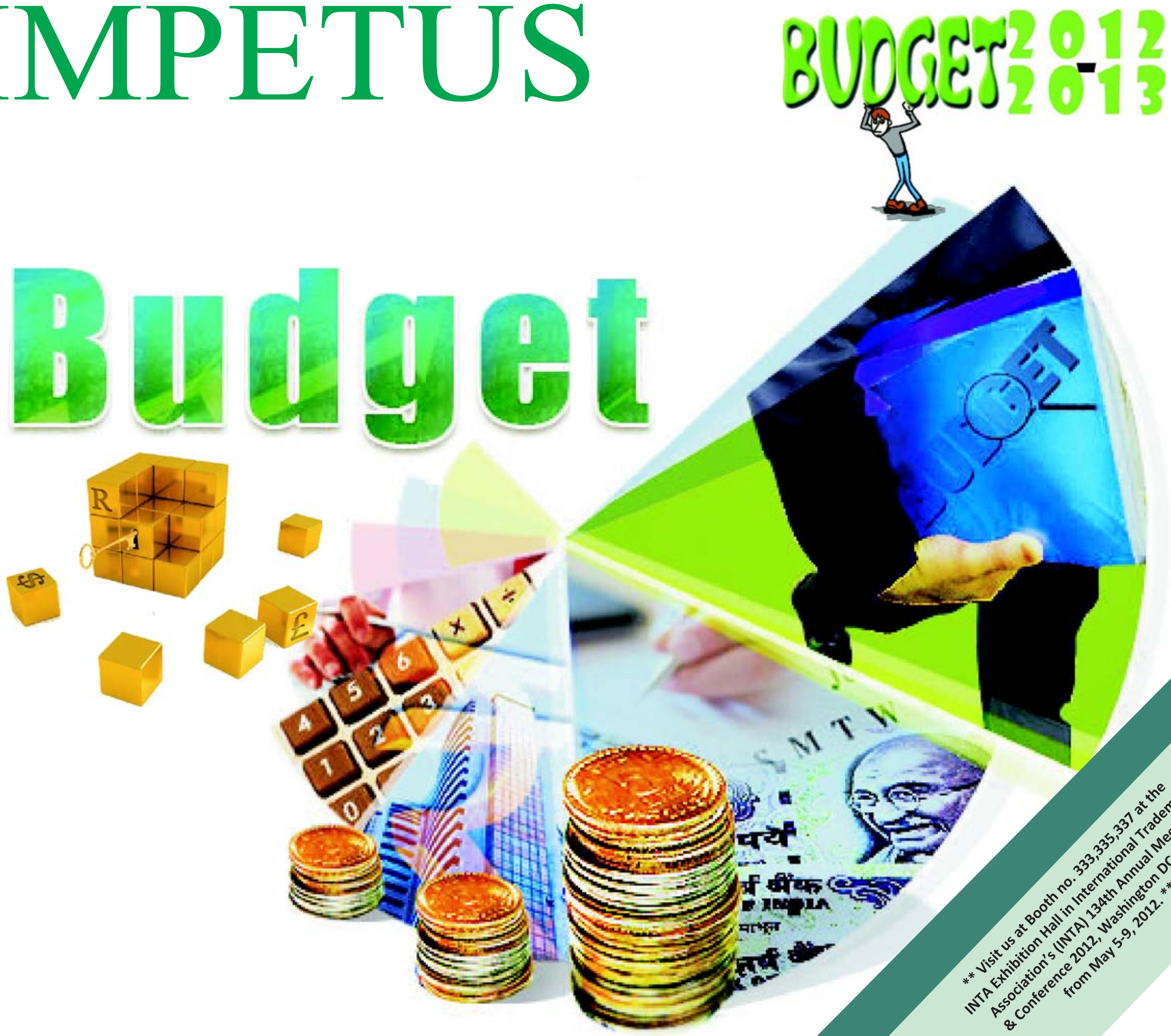
INDIAN LEGAL IMPETUS



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- THE BUDGET HIGHLIGHTS 2012-13
- INDIA'S FIRST COMPULSORY LICENSE- NATCO vs. BAYER INC

Foreword

Manoj K Singh
Founding Partner

It gives me great pleasure in introducing the March Edition of our Newsletter "Indian Legal Impetus". The entire team of Singh & Associates, Advocates and Solicitors, thank our readers for their overwhelming responses towards our endeavors in making the legal information more accessible.

Through this edition, we have tried to bring out a portfolio of recent developments around the corner of law.

Highlighting the summary on proposals in the Union Budget 2012-13, the Edition commences with the historic decision by the Controller of Patents wherein Compulsory Licensing of Bayer's AG's patented Cancer treatment drug "NEXAVAR" has been granted.

This Special Budget Edition is then followed by an insight to specific proposals including the sector of "External Commercial Borrowings"; "General Anti Avoidance Agreements" and extension of "Transfer Pricing Provisions" to certain specific domestic transactions.

Further, an attempt has also been made to discuss the Indian perspective of "Comparative Advertising" intending to influence consumer behavior by comparing the features of the advertiser's products with that of the competitor's product.

The Issue then deals with Reverse Domain Hijacking and the landmark judgments in this regard.

Towards the end of this Edition a recent judgment of the Mumbai bench of Income Tax Tribunal is discussed in the case of Bechtel International Inc dealing with the provisions of the Indian US Tax Treaty.

Last but not the least, the newsbyte section of the issue highlights the latest developments from the various fields of law.

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

"Indian Legal Impetus"

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INDIA'S FIRST COMPULSORY LICENSE- NATCO VS. BAYER INC

Mr Manoj K Singh and Mr. Aayush Sharma

INTRODUCTION

In a historic decision the Controller of Patents granted a Compulsory License to Hyderabad based Indian generic drug manufacturer NATCO pharma Ltd. to make and sell the generic version of the German drug maker Bayer AG's patented cancer treatment drug "Nexavar".

It is the first time that an Indian Pharmaceutical Company has been granted the compulsory license to sell the generic version of the patented drug in the Indian market.

A compulsory license allows a generic drug producer to make and sell generic version of patented drug in the country without the consent of patent holder. According to Section 84 of Indian Patent Act, 1970:

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

- *(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or*
- *(b) that the patented invention is not available to the public at a reasonably affordable price, or*
- *(c) that the patented invention is not worked in the territory of India."*

As stated above the Compulsory License is granted for any patented product or process if three conditions are satisfied, i.e.

- a) Reasonable requirements of the public are not satisfied; or
- b) Not available at reasonable affordable prices; or
- c) Not worked in the territory of India.

The Controller of Patents found that all the 3 criteria above were satisfied in the present case, namely:

- Bayer had supplied the patented drug to only 2% of the total patients i.e. the reasonable requirements of the public with respect to the patented drug (Nexavar) were not met.

- that the cost of the drug is Rs. 2.8 lakh for month's treatment is excessive, which constitute that the drug is not available at reasonably affordable prices.

-that Bayer is only importing the drug and not manufacturing the same in India despite having facilities for the same.

The drug patented by Bayer in India in 2008 is used in the treatment of liver cancer and kidney cancer. According to the company statics the estimated value of the drug in the market is about Rs.2.8 lakh for a month's dosage.

BRIEF FACTS OF THE CASE:

The Patentee M/s Bayer corporation, USA [herein after refer to as "Bayer/Patentee"]; a pharmaceutical giant invented a drug called "sorafenib" useful in the treatment of lungs and kidney cancer. The drug developed by the Bayer is not a life saving drug however it extends the life of the patient suffering from kidney and lung cancer. Bayer filed PCT National Phase dated on 05.07.2001 for the grant of Patent over its drug Sorafenib and the same was granted on 03.03.2008. Bayer launched the drug in the year 2008 under the brand name "Nexavar".

The applicant herein M/s Natco Pharma Ltd *[herein after refer to as "Natco/Applicant"]*, of Hyderabad is an Indian Generic drug Manufacturing Company. The Company has filed an application for the grant of compulsory license to manufacture and sell the Bayer's patented drug Nexavar.

Natco has already developed the generic version of the Nexavar and also received regulatory approval from Drug Controller General of India in April 2011.

Natco has filed compulsory license application under Section 84(1) and Rule 96 of the Patents Act, 1970 and Patent Rules, 2003 in respect of Patent no. 215758.

It is pertinent to mention here that the prior to this application Natco has requested to Bayer for voluntary license to manufacture and sell which was rejected by the Bayer. Aggrieved from the decision, Natco field an application for grant of Compulsory License before the Indian Patent Office.

Natco in his application stated that the drug in question is not reasonably available in India and the same is exorbitantly highly priced. Further it was also proposed that it was ready to market the generic version of the same drug at very low prices i.e. INR 8800 for a month's dosage.

ISSUES DECIDED BY THE CONTROLLER OF PATENTS:

The Controller of Patents after hearing both the parties at length and weighing evidence submitted by the parties stated a well reasoned decision. The main issues of the case are the three conditions mentioned in Section 84 of the Act.

1. REASONABLE REQUIREMENTS OF THE PUBLIC WITH RESPECT TO THE PATENTED INVENTION HAVE NOT BEEN SATISFIED.

APPLICANT'S SUBMISSION [NATCO]:

The applicant submitted that according to GLOBOCAN (publication of WHO) the approximate liver cancer patients are about 20000 and kidney cancer patients are about 8900.

Out of these around 83% of these patients are eligible for drug Nexavar. However as per the working statements *[Form 27 required to be filed every year regarding the working of the Patent during a calendar year]* submitted by the patentee 'Bayer' it is very clear the public demand is not being met.

The drug is only available in metro cities and that too at limited pharmacies attached to certain hospitals. The product is a life saving drug not a item of luxury. Further the applicant stated that the patentee has launched the drug worldwide in 2006 but the same was not launched in India till 2009 however the Patent was granted in 2008. This demonstrates the neglectful conduct of the patentee towards India.

PATENTEE'S SUBMISSION [BAYER]:

The patentee submitted that according to the reading of reports of GLOBCAN the total number of patients eligible for this drug is around 8842 (both RCC and HCC patients). The applicant has provided the misleading facts about the distributors of the patentee and the drug is available at 50 places in public hospitals and institutions. Hence the drug is available to public at large.

The patentee also contended that the applicant shall not be allowed to mix the two grounds i.e. lack of accessibility and lack of affordability. Both the grounds are distinct and shall be appreciated separately. Further the patentee also provides the statics of sale of their drug along with the sales figures of generic version by Cipla.

DECISION:

The Controller on the first issue stated that both the applicant and patentee are relying on the data published by the GLOBCAN. The Controller stated that given that state of healthcare infrastructure and income level of the people, there is no doubt in concluding that India does have much more patient than mentioned in the report who are requiring the drug in question.

The Controller rejected the argument of patentee that the sale of the patentee combined with Cipla met the reasonable requirement. The conduct of any other person will not be taken in consideration, especially where the other person is an alleged infringer. The Patentee is acting as two-facedness by adopting one stand before this tribunal and other before that Delhi High Court in an infringement case against Cipla.

According to the figures admitted by the patentee the drug is made available for only 2% of the total number of patients. Further the conduct of the Patentee of not making the available as per the requirements in India even after four years from the grant of Patent is not at all justifiable.

2. REASONABLE AFFORDABLE PRICES:

APPLICANT'S SUBMISSION [NATCO]:

Applicant submitted that the drug is too highly priced and is unaffordable by the common man in India. The product of the patentee is inaccessible and out of reach of the common man. The applicant submitted reports for calculation of pricing of drugs in the country.

Applicant further submitted that according to the world wide sales figures of the drug it is very evident the that Patentee has recovered all R&D cost in the first year itself. The pricing structure as adopted by the patentee is exorbitant and abuse of monopolistic rights and such practice is unfair and anti-competitive.

PATENTEE'S SUBMISSION [BAYER]:

Patentee submitted that the price of the drug is justifiable as it involves R&D cost whereas the generic manufacturer merely copies the same. Further the patentee also submits that price not only involves that R&D cost but also the cost of the underlying failed R&D and further the addition R&D for next generation of innovations. The Patentee also provided the figures of investment done by him in the ongoing R&D. Further patentee submits that there can be no "reasonable affordable price" below the expenses incurred in the development of the product.

DECISION:

The Controller after the submission of the parties on the issue held that it is not fully agreed with the Patentee that the reasonable affordable prices shall be construed with reference to public and the patentee. Whereas the tribunal is of view that the reasonable affordable prices shall be construed predominantly with reference to public. The Controller also stated that the sales figures of the patentees drug @ Rs. 2,80,000/- for a month's dosage in itself are self explanatory that the patented drug was not bought by the public due to its unaffordable prices. It is concluded that the drug in question is not available to public at reasonable affordable prices.

3. PATENTES INVENTION NOT WORKED IN INDIA.

APPLICANT'S SUBMISSION [NATCO]:

Applicant submits that the patented product is being imported in India and not worked in India to the fullest possible extent. Also the patentee has not furnished any reason for the same. Applicant further submits that the patent has been worked in many countries but not in India despite that fact the patentee is having all the facilities for the same.

PATENTEE'S SUBMISSION [BAYER]:

On this issue patentee submitted that the local working requirements in the patents Act are directed towards ensuring that inventions are domestically worked i.e. supplied to the Indian markets. The applicant is trying to impose local working requirement as local manufacturing. The Patentee further submits that demand of drug in India does not economically justify setting up a manufacturing company in India.

DECISION:

The Controller of Patents on third issue stated that the tem "worked on the territory of India" has not been defined in the Act. Same has to be construed from various international conventions and agreements.

Article 5(A)(1) of the Paris Convention states that importation of the patented products by the patentee shall not entail something less than forfeiture. Further the Paris convention also states that each member shall have a right to provide legislative measures providing for the grant of compulsory license in order to provide any abuse of patent rights. Further the reading of provisions of TRIPS and Paris Convention states that importation of patented product shall not result in forfeiture of a patent.

Further the Section 84 (1) (c) specifically provide working in India as a ground for the grant of compulsory license. The term 'worked in the territory of India' cannot be restricted to mean as 'worked in India on a commercial scale'.

The Controller also stated that Section 83(b) of the Act specifically states that patents are not merely granted to enjoy monopoly for the importation of the patented article and combined reading of Section 83(b) and (f) it is very clear that patentee is obliged to contribute towards the transfer and dissemination of technology nationally and internationally.

The Controller held that it is admitted that the patentee does have manufacturing facilities in India, however after lapse of four year, the patentee failed to manufacture the patent in India. The patentee has also failed to grant any license to anyone to work the invention in the territory of India.

The Controller of Patents after hearing and deciding the above issues held that the all the three conditions as stated in Section 84 of the Act are fulfilled and granted the compulsory license to Applicant to work the patented product in India.

TERM AND CONDITIONS OF THE LICENSE

Main terms and conditions of the compulsory license are as follows:

- Applicant will get the right (Non-exclusive license) to manufacture and sell Nexavar in India (no right to import or export).
- Royalty shall be paid to patentee at the rate 6% on net sales.
- Price of the generic product shall be Rs. 74 per tablet, which works out to be Rs. 8800/- per month for therapy.
- Applicant will provide free medicine to 600 patients per year.

CONCLUSION

This is India's first landmark patent compulsory licensing order in the post TRIPS era. The present order of the Controller of Patents will set the music for future and will definitely provoke other generic manufacturers to curve out way this route. Further the decision will be sign of relief for national and international patient groups, NGO's, Health activists and many more who have been battling with cancer due to excessive prices. On the other hand this decision will pull the attention of other pharma giants and will surely make doubts in their minds regarding new drugs. All in all this will surely affect the Indian pharma industry. .

Further the Controller also cleared the air regarding the working of patent in India. The Controller in the subject case clearly states that as per the intension of the legislature working in India means patent should be worked locally in India and does not mean working of patent commercially in India by way of importing the same. The patent should be locally worked in India in order the fully comply with working requirements.

This decision will certainly bring many significant changes in the policy of the drug manufacturers such as pricing structure, affordability and availability of drug to the significant number of patients in India.

Last but not the least this decision will prompt other generic drug manufacturers to apply for compulsory licenses for other life saving drugs and we will see more action on this in the near future. ◆◆◆

HIGHLIGHTS OF BUDGET 2012-2013

Ms. Vijayata Parmar

On 16th March 2012 the Union Finance Minister announced the Union Budget for the year 2012-13. Herein below we are highlighting some of important proposals of the Budget. The segment has been divided into three head i.e. Direct Taxes, Indirect Taxes including Excise, Custom and Service Tax and lastly a miscellaneous segment which includes other proposals proposed by the Hon'ble Minister.

DIRECT TAXES

1. INDIVIDUAL SLAB RATES

- Basic exemption limit raised from ₹1,80,000/- (in case of men) and ₹1,90,000/- (in case of women), to ₹2,00,000.
- Upper income limit for 20% tax slab, raised from ₹8,00,000/- to ₹10,00,000/-.

2. DEDUCTIONS / RELIEFS

- Premium for Life Insurance Policies to be eligible for deduction under Section 80C of Income Tax Act, 1961 *[herein after referred to as 'the Act']* only where yearly premium does not exceed 10% of the actual capital sum assured in respect of policies taken after 01.04.2012.
- Deduction of upto ₹5,000 for preventive health check-up of assessee/ family/ parents.
- Reduction of the eligible age for senior citizens for certain tax reliefs from 65 years to 60 years.
- Interest from savings bank accounts with banks and post offices deductible upto ₹10,000/-.
- Senior citizens not having any income from business or profession exempt from paying advance tax.

3. MINIMUM ALTERNATE TAX [MAT]

Section 115JB of the Act would bring all companies within the purview of MAT. Now the companies which are not required under Section 211 of the Companies Act, to prepare the Profit and Loss Account in accordance with Schedule VI of the Companies Act shall also be subject to MAT and the profit and loss account prepared in accordance with provisions of the relevant regulatory Act shall be taken as the basis for computing 'book profit' in such cases.

And also, units operating in SEZ have been bought under the purview of MAT. Minimum Alternate Tax at the rate of 18.5% will be levied on the book profits of Special Economic Zone (SEZ) developers and units.

4. ALTERNATE MINIMUM TAX [AMT]

By Amendment under Section 115JC of the Act it is proposed to levy AMT on all persons other than Companies. Earlier, AMT was levied on Limited Liability Partnerships (LLPs) under Chapter XII-BA of the Act, consisting of sections 115JC, 115JD, 115JE and 115JF.

However, no such tax was levied on other business entities such as, partnership firms, sole proprietorships, association of persons, etc.

5. EXTENSION OF BENEFITS TO POWER SECTOR

Extension of the benefit of additional depreciation to an assessee who are engaged in the business of generation or generation and distribution of power under Section 32(1)(iia) of the Act. Further the deduction under Section 80IA of the Act extends till setting up of such business by 31.3.2013.

6. SMALL MEDIUM ENTERPRISE INVESTMENT- RELIEF IN LONG TERM CAPITAL GAINS TAX

To incentivize investment in Small and Medium Enterprises ("SME") in the manufacturing sector, it is proposed to insert new Section 54GB in the Act so as to provide relief from Long Term Capital Gains tax to an individual or an HUF on sale of a residential property (house or plot of land) if the sale consideration is re-invested in the equity of a new start-up SME.

7. REDUCTION IN THE RATE OF SECURITIES TRANSACTION TAX (STT)

Rate of STT in Cash Delivery Segment is proposed to be reduced from the existing 0.125% to 0.1% on any transaction made on or after 01.07.2012.

8. DOMESTIC TRANSACTIONS UNDER TRANSFER PRICING (TP) AMBIT

Pursuant to the recommendation of the Hon'ble Supreme Court, Legislation is proposed for the first time to provide the mechanism for determination of Arm's Length Price for specified domestic Related Party Transactions.

Although determination of Arm's Length Price is enshrined in various Sections, viz, 40 A(2), 80-A, 80-IA, etc of the Income Tax Act, 1961, but between related domestic parties, no rules or methods have been prescribed for such determination. This often resulted in the Assessing Officer exercising his best judgment in estimating the Fair Market Value / Arm's Length Price.

Further, the taxpayer is not required to maintain specific and detailed documentation to support the pricing of such transactions.

9. SCOPE OF INTERNATIONAL TRANSACTIONS

The ambit and scope of international transactions which are subject to transfer pricing regulations is proposed to be enlarged retrospectively from 1.04.2002 by insertion of Explanation to Section 92B of the Act to clarify the meaning of the term "International Transaction"

10. ADVANCE PRICING AGREEMENT (APA)

With a view to bring down tax litigation and provide tax certainty to the foreign investors, it is proposed to insert new sections 92CC and 92CD in the Act to provide a framework for Advance Pricing Agreement (APA).

The Central Board of Direct Taxes has been granted the authority to enter into an APA with any person for determination of Arm's Length Price or the manner in which the Arm's Length Price of an International Transaction to be entered into by such person is to be determined.

Though APA had been included in the Direct Tax Code Bill, 2010 the Government has brought forward its implementation.

11. BENEFICIAL RATE OF TAX FOR INTEREST PAYABLE BY SPECIFIED INDUSTRIES

Section 115A of the Act is proposed to be amended to provide that any interest paid by a specified company to a Non-Resident in respect of borrowing made in Foreign Currency from sources outside India between 1st July, 2012 and 1st July,2015, under an agreement, including rate of interest payable, approved by the Central Government, shall be taxable @5% (plus applicable surcharge and cess).

The specified company shall be an Indian company engaged in the business of construction of dam, operation of aircraft, manufacture or production of fertilizers, construction of port including inland port, construction of road, toll road or bridge; generation, distribution of transmission of power, construction of ships in a shipyard; or developing and building an affordable housing project as is presently referred to in Section 35 AD (8)(c)(vii) of the Income Tax Act, 1961.

It is further proposed to insert new Section 194LC to provide that interest income paid by such specified company to a Non-Resident be subject to tax deduction at source @ 5% (plus applicable surcharge and cess).

12. MEANING ASSIGNED TO A TERM USED IN DOUBLE TAXATION AVOIDANCE AGREEMENT (DTAA)

In terms of the powers conferred upon the Central Government under Section 90 and 90A of the Act, the Central Government has entered into DTAAs with various countries and specified associations for granting relief from 'double taxation' etc.

It is proposed to retrospectively amend Sections 90 and 90A of the Act to provide that any meaning assigned through Notification to a term used in an agreement, which is not defined in the Act or agreement, shall be effective from the date of coming into force of the DTAA.

13. TAX RESIDENCE CERTIFICATE (TRC) FOR CLAIMING RELIEF UNDER DTAA

Benefit under a DTAA is available to resident of the Contracting State. It is proposed to amend Section 90 and Section 90A of the Act to make submission of Tax Residency Certificate containing prescribed particulars, as a necessary condition for availing benefits under the DTAA.

14. INTRODUCTION OF GENERAL ANTI-AVOIDANCE RULES

A new Chapter X-A, dealing with General Anti Avoidance Rules (GAAR) is proposed to be inserted in the Income Tax Act. It is proposed that in certain cases, an arrangement entered into by the assessee may be declared to be an impermissible avoidance arrangement.

General Anti Avoidance Rule has been introduced in the income tax to restrain sharp tax practices coupled with arbitrary powers to Tax Officers. GAAR is introduced to counter aggressive tax avoidance. GAAR (This) provide more power to the authorities to deal with fraudulent (fictitious) transactions. They can cancel the benefit to the company if they find out that company is trying to escape from giving tax.

15. TAX DEDUCTED AT SOURCE ON TRANSFER OF IMMOVABLE PROPERTIES

Section 194LAA is proposed to be inserted in the Act to require the buyer of immovable property (other than agricultural land), at the time of credit of the sale consideration to the account of the transferor or at the time of making payment in cash/ by cheque/ by draft/ any other mode, whichever is earlier, to deduct tax @1% of such sum.

Requirement to withhold tax would arise in case of properties situated in specified urban agglomeration whose value exceeds 50,00,000/- and for properties situated in other areas whose

value exceeds 20,00,000/-. The registering officer appointed under the Indian Registration Act, 1908 shall not register transfer of property unless the buyer furnishes proof of deduction and payment of TDS.

16. TAX DEDUCTED AT SOURCE ON REMUNERATION TO A DIRECTOR

Under the existing provisions of the Act, an employer is required to deduct tax on payment of salary to its employees, including directors. However, there is no provision for deduction of tax on remuneration paid to directors, which is not in nature of salary.

Section 194J of the Act has been amended to provide for deduction of tax @10% on remuneration paid to directors, which is not in nature of salary.

17. FEE AND PENALTY FOR DELAY IN FURNISHING TAX DEDUCTED AT SOURCE/ TAX COLLECTED STATEMENT STATEMENT AND FOR FURNISHING INCORRECT INFORMATION IN SUCH STATEMENTS

Section 234E is inserted to impose a fee of 200 per day for late furnishing of TDS statement, subject to cap of total amount of tax deductible during the period for which TDS statement is delayed.

Section 271H is introduced to levy penalty ranging from 10,000 to 1,00,000 for not furnishing TDS statement within the prescribed time and/ or for furnishing incorrect information in the TDS statement. It is however proposed that no penalty shall be levied if the TDS statement is furnished within one year of the due date, after payment of tax deducted along with applicable interest and fee. Similar amendments are proposed to be made in the provisions relating to TCS statement. The provision shall apply in respect of tax deducted or collected on or after 01.07.2012.

18. PROVISIONS RELATING TO VENTURE CAPITAL FUND (VCF) OR VENTURE CAPITAL COMPANY (VCC)

In order to ensure tax pass through status to SEBI registered venture capital fund (VCF) or venture capital company (VCC), special provisions have been incorporated in Section 115U read with Section 10(23FB) of the Act.

As a result of these provisions, VCF/VCC are regarded as pass-through entities and income earned by them from investments made in Venture Capital Undertaking (VCU) is exempt from tax under the provisions of Section 10(23FB) of the Act.

Tax is payable by the person making investment in VCU through VCF/VCC at the time payment is received by such investor from VCF/VCC. VCF/VCC is also exempt from withholding tax before making payment to the investor.

Under the provision of Section 10(23FB), exemption of income earned by VCC/VCF from investment in VCU has been provided, only if such undertaking (VCU) is engaged in nine specified businesses.

It is proposed to amend Section 10(23FB) to remove the aforesaid Sectoral restriction on businesses carried on by VCU and exemption is proposed to be available from income through investment in VCU registered with SEBI.

II. INDIRECT TAXES

1. EXCISE

- Given the imperative for fiscal correction, standard rate of excise duty to be raised from 10 per cent to 12 per cent, merit rate from 5 per cent to 6 per cent and the lower merit rate from 1 per cent to 2 per cent with few exemptions.
- Excise duty on large cars also proposed to be enhanced.
- Proposals to increase excise duty on 'demerit' goods such as certain cigarettes, hand-rolled bidis, pan masala, gutkha, chewing tobacco, unmanufactured tobacco and zarda scented tobacco.
- Excise Duty increased from 5% to 6% on formulation and 10% to 12% on bulk drugs.
- Concessional Basic custom duty on six specified life saving drugs and vaccines is being reduced from 10% to 5% with full exemption from excise/ countervailing duty (CVD).

2. CUSTOMS

- The duty-free allowance under the Baggage Rules is being increased from ₹25000 to ₹35000 for passengers of Indian origin and from ₹12000 to ₹15000 for children up to 10 years of age.
- Full exemption from basic customs duty for import of equipment for expansion or setting up of Fertilizer Projects upto March 31, 2015.
- Full exemption from basic customs duty to coal mining project imports.
- No change proposed in the peak rate of customs duty of 10 per cent on non-agricultural goods.
- Basic custom duty proposed to be reduced for machinery and instruments needed for surveying and prospecting for minerals.
- Waste Paper is being fully exempts from basic custom duty i.e. nil duty on import of waste paper.

3. SERVICE TAX

- **Proposed new definition of 'Services'**

In the existing system, only the services enlisted in clause (105) of Section 65 of the Finance Act, 1994 (the 'Act') are taxed under the charging Section 66.

In the proposed new system, Service Tax will be levied on all services provided in the taxable territory by a person to another for a consideration, other than the services specified in the negative list and exempt under the proposed Section 66 B. The term 'service' has been defined in clause (44) of Section 65B of the Finance Act.

- **Negative list of services**

Section 66D has been proposed to be added to the Act, which enlists the negative list of services, thereby keeping such services out of the ambit of chargeability of Service Tax

- **Place of Provision of Services Rules, 2012**

An important component of the proposed changes is the introduction of the Place of Provision of Services Rules, 2012, which have been released for comments and feedback for the time being. The new rules will replace the existing Export of Services Rules, 2005 and the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. Rule 5 of the export rules will be incorporated in Service Tax Rules.

- **Other proposals**

1. Exemption to Educational Institutes from Service Tax.
2. Healthcare continues to remain outside the scope of service tax, however, air-conditioned hospitals and hospitals with twenty five or more beds remain within the tax net. Government hospitals are fully exempted from service tax.
3. Rail transportation of passengers in first class or in an air conditioned coach would be liable to service tax.

III. MISCELLANEOUS

1. Twelfth Five Year Plan to be launched with the aim of "faster, sustainable and more inclusive growth".
2. Drafting of model legislation for the Centre and State GST in concert with States is under progress.

GST network to be set up as a National Information Utility and to become operational by August 2012.

3. Government has approved guidelines for establishing joint venture companies by Defence PSUs in PPP mode.
4. ECB to be permitted for working capital requirement of airline industry for a period of one year, subject to a total ceiling of US $ 1 billion.
5. Proposal to allow foreign airlines to participate up to 49 per cent in the equity of an Air Transport undertaking under active consideration of the government.
6. National Food Security Bill, 2011 is before Parliamentary Standing Committee.
7. Proposal to lay a White Paper on Black Money in current session of Parliament.
8. Permission of Venture Capital Investment in media and entertainment industry.
9. Turnover limit for compulsory tax audit of accounts as well as for presumptive taxation is proposed to be raised from ₹ 60,00,000/- to ₹ 10,000,000/-.
10. Proposal to extend the sunset date for setting up power sector undertakings by one year for claiming 100 per cent deduction of profits for 10 years.
11. Efforts to arrive at a broad based consensus in consultation with the State Governments in respect of decision to allow Foreign Direct Investment in multi-brand retail up to 51 per cent.
12. External commercial borrowings permitted on the maintenance and operations of toll systems for roads and highways as long as they are a part of the original project.
13. The Budget has sought to simplify the process of issuing Initial Public Offering (IPOs) by making it mandatory for companies to issue IPOs of ₹100,000,000/- and above in electronic form through nationwide broker network of stock exchanges only. This will help the companies to reach out more retail investors in small towns and will lower the issue related costs.
14. Providing opportunities for larger shareholders' participation in important decisions of the companies through electronic voting facilities, besides existing process for shareholders' voting, this would be made mandatory initially for top listed companies. ◆◆◆

MORE SECTORS TO ENJOY EXTERNAL COMMERCIAL BORROWINGS

Ms. Megha Kapoor

The Finance Minister, in the budget 2012 has allowed the External Commercial Borrowings *[hereinafter referred to as "ECB"]* in various sectors. The proposal is going to help the players in various sectors such as Power, Aviation, Roads and low-cost Housing Projects to go for the borrowings from the external source. Also, there are certain sectors which find it difficult to raise funds through domestic borrowings; the new proposal may help these sectors to go for ECBs.

Further, Withholding tax on External Commercial Borrowings has been proposed to be reduced from 20 percent to 5 percent for Power, Airlines, Roads, Bridges, Affordable Houses and Fertilizer sectors.

ECBs refers to commercial loans in the form of bank loans, buyers' credit, suppliers' credit, securitized instruments (e.g. floating rate notes and fixed rate bonds, non-convertible, optionally convertible or partially convertible preference shares) availed of from non-resident lenders with a minimum average maturity of 3 years. ECBs are being permitted by the Government as a source of finance for Indian Corporate for expansion of existing capacity as well as for fresh investment.

Reserve Bank of India issues guidelines from time to time which govern the provisions relating to issue of ECBs. An Indian Company can access ECB under two routes, viz., (i) Automatic Route and (ii) Approval Route. However, there are various provisions which govern both the routes.

VARIOUS SECTORS WHICH ARE PROPOSED TO TAP ECB

- **Aviation**

The Civil Aviation sector includes Airports, Scheduled and Non-Scheduled domestic passenger airlines, Helicopter services / Seaplane services, Ground Handling Services, Maintenance and Repair organizations; Flying training institutes; and Technical training institutions

In order to help the aviation industry and its players, the Government has proposed ECB for working capital requirements of the Airline Industry for a period of one year, subject to a total ceiling of $1 billion.

Also, a proposal to allow foreign airlines to pick up to 49 per cent in the equity of an air transport undertaking engaged in operation of scheduled and non-scheduled air transport services is under active consideration of the government.

- **Infrastructure**

In order to encourage Road Construction Projects under the Public-Private Partnerships (PPP), the Government has proposed in the budget to allow ECB for Capital Expenditure on the maintenance and operations of toll systems for roads and highways, so long as they constitute the part of the original project.

- **Power Project**

The Government has also proposed ECB to part finance debt of existing Power Projects. Thus, the Power Sector will enjoy the relief however the major point to be considered is that only existing projects will be allowed to go for overseas borrowings to swap their high-cost rupee debt.

- **Housing**

In view of shortage of housing for low income groups in major cities, the Government proposed allowing ECB for low cost affordable housing projects and Set up Credit Guarantee Trust Fund to ensure better flow of institutional credit for housing loans. This will ensure easy access to funds and better capital availability for developers of affordable housing

CONCLUSION

The overall budget proposals are positive for the sectors which are allowed to tap the international market by way of External Commercial Borrowings. The provisions allowing foreign borrowings & reduction of withholding tax on ECB would improve long-term funding availability and also result in a marginal reduction in borrowing costs. ◆◆◆

COMPARITIVE ADVERTISING: INDIAN PERSPECTIVE

Mr. Arvind Thapliyal

ADVERTISING - A JUDICIOUS MIXTURE OF FLATTERY AND THREATS- NORTHROP FRYE

With the advent of Economic Liberalization and entry of some of Major Foreign companies in Indian market, a fierce competition has been let loose in the advertisement sector and every company is using all the tricks up their sleeves to distinguish their product or service from other to attract customer attention. Comparative advertising is one of the major and most effective trick amongst the many.

CONCEPT AND DEFINITION

Comparative advertising is a widely used form of commercial advertising in many countries. This type of advertising intends to influence consumer behavior by comparing the features of the advertiser's product with that of the competitor's product.

Comparative advertisement as observed in case of **Pespsi Co.Inc and anr V. Hindustan CoCa Cola and Anr { 2003(27) PTC 305},** the Hon'ble Delhi H.C has observed,

"the comparative advertising is a part of people's nature, everyone starts very young. They compare everything from their teams to their toys, and most everything in between. It is fun and can be informative. Some of the most effective advertising is comparative, but it is not without its risks. Effective advertising delivers a message that it remembered. It can change the way the world views a product or service and can generate sales. If the market for a service or product is well-defined, comparative advertising can held the product or services distinguish itself from the competition. Nothing seems to do this more efficiently than comparative advertising"

Comparative claims come in a variety of ways. They may directly name a competitor product or may indirectly refer to him. They may describe the similarities (positive comparisons) or the differences (negative comparisons) between the various products offered in the segment. They may state that the advertised product is "better than" (superiority claims) or "as good as" the competitor's (equivalence or parity claims). The aim behind this concept is to allow honest (i.e. not misleading) comparison of the factors of one trader's products with those of another. However it is also important to keep into consideration that such a comparison also includes the use of the trade marks associated with the products in question and absence of provisions controlling this may constitute trade mark infringement.[1]

No Indian statute defines the term, but the UK Regulation defines comparative advertising as meaning any advertisement which "explicitly or by implication, identifies a competitor or goods or services offered by a competitor".[2]

STATUTORY PROVISIONS IN INDIA:

The Monopolies and Restrictive Trade Practices, 1984 and the Trade Marks Act, 1999 are the two major regulations which form the basic structure that govern Comparative Advertising. The Trademarks Act, 1999 has incorporated the provisions related to this concept in Ss. 29(8) and 30(1) with certain limitations as to unfair trade practices. Section 29(8) of the Trade Marks Act provides that a registered trademark is infringed by any advertising of that trade mark if such advertising takes unfair advantage and is contrary to honest practices in industrial or commercial matters, is detrimental to its distinctive character, or is against the reputation of the trade mark.

However the act also provides an escape route under the name of "honest practices" in Section 30(1), for what would otherwise have been an infringing act under Section 29, if the impugned use of the mark is in accordance with "honest practices" in industrial or commercial matters.[3]

"HONEST PRACTICES"- ESCAPE ROUTE FOR COMPARATIVE ADVERTISING:

Comparative advertising seeks to objectively and truthfully inform the consumer or make the consumer

1. *http://legalservicesindia.com/article/article/comparative-advertisement-infringement-of-trademark-604-1.html*
2. *http://marketinomics.com/traditional-marketing-2/comparitive-advertising/*
3. *http://jurisonline.in/2011/10/comparative-advertisements/*

aware, encourages transparency in the market, completion in prices and improving quality of products by stimulating competition. Therefore, it is essential to protect the interests of such competitors by not allowing comparative advertising to cause confusion, mislead, or discredit a competitor's product.

Although there being no concrete definition or explanation as to what constitutes "honest practices", however there is a large and clear shared core concept of what constitutes honest conduct in trade, which may be applied by the courts without great difficulty and without any excessive danger of greatly diverging interpretations.[4]

COMPARATIVE ADVERTISING REGULATED UNDER UNFAIR TRADE PRACTICES

One of the other major regulatory legislation to govern and regulate Comparative advertising finds its basis under the concept of 'unfair trade practices'. In 1984 the MRTP Act was amended to add a chapter on unfair trade practices. Section 36A of the MRTP Act lists several actions to be an 'unfair trade practice' as any unfair method or unfair or deceptive practice which gives false or misleading facts disparaging the goods, services or trade of another person.

The purpose of inserting this section in the Act was to bring honesty and truth in the relationship between the provider of the services and the consumer, and when a problem if so arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such representation on the common man.

Therefore from the context mentioned above it may be gathered that false representation would mean any incorrect or untrue statement or expression which is made to influence and induce a consumer to buy or engage, or use such goods or services.

In this backdrop, the Delhi High Court summarized the law on the subject in the case of **Reckitt & Colman v. Kiwi TTK,**[5] as follows:

1. A tradesman is entitled to declare his goods to be the best in the world, even though the declaration is untrue.

2. He can also say that his goods are better than his competitor's, even though such statement is untrue.

3. For the purpose of saying that his goods are the best in the world or his goods are better than his competitor's he can even compare the advantages of his goods over the goods of others.

4. He, however, cannot while saying his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words he defames his competitors and their goods, which is not permissible.

5. If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

DISPARAGEMENT

Section 36 A of the MRTP Act postulates unfair trade practices which lead to disparagement of the goods, services or trade of another person. Although the term "disparagement" has not been defined in any statute, but various judicial pronouncements have adopted its dictionary meaning to understand and adjudicate disputes pertaining to it. As per The New International Webster's' Comprehensive Dictionary, disparagement means, "to speak of slightingly, undervalue, to bring discredit or dishonor upon, the act of depreciating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation." The Concise Oxford Dictionary defines disparage as under, "to bring dis-crediting or reproach upon; dishonour; lower in esteem; speak on or treat slightingly or vilify; undervalue, and deprecate."[6]

However, it must be noted that a mere opinion, which is not a statement of fact, would not attract Clause (x) of Section 36A (1).

4. http://www.legalserviceindia.com/article/l182-Comparative-Advertising-laws.html

5. 1996 PTC (16) 393

6. http://www.legalserviceindia.com/article/l182-Comparative-Advertising-laws.html

The Delhi HC explained the concept of disparagement stating that "a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing of his goods and the same will not give a cause of action to the other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation or disparagement of the goods of the manufacturer in so doing. However, a manufacturer is not entitled to say that his competitor's goods are bad as to puff and promote his goods, "[7] and concluded that comparative advertising cannot be permitted which discredits or denigrates the trade mark or trade name of the competitor.

In another case, the Supreme Court was of the view, that in a democratic economy, free flow of commercial information is indispensable and advertisement is a facet of "commercial speech" as public at large is benefited by the information made available through the advertisement. Thus, "commercial speech" is a part of Freedom of Speech and Expression guaranteed under Article 19 (1) (a) of the Indian Constitution. [8]

To decide the question of disparagement of another's goods, the manner of commercial is important. Unfair trade practice can be ascertained only in the presence of false or misleading facts through scientific or technical assessment of the claims. It is not actionable if the manner is only to show one's product better or best without derogating the competitor's product. Thus, Courts have taken the position that "publicity and advertisement of one's product with a view to boosting sales is a legitimate market strategy."

In the **New Pepsodent V. Colgate case** [9], HLL advertised its toothpaste 'New Pepsodent' as "102% better than the leading toothpaste". In the television advertisement, samples of saliva are taken from two boys, one who has brushed with the new Pepsodent while another has brushed with, "a leading toothpaste". The saliva of "the leading toothpaste" shows larger number of germs. While the sample was being taken from the boys, they were asked the name of the toothpaste with which they had brushed in the morning. One boy said Pepsodent, the response of the second boy was muted, however, lip movement of the boy would indicate that he was saying "Colgate". Also, when the muting was done, there was a sound of the jingle used in the Colgate advertisement. According to the Commission, the word toothpaste had become synonymous with Colgate over the years and a reference to "leading brand" was to Colgate. Thus it became a case of Comparative Advertisement which led to the disparagement of Colgate's products.

CHERRY BLOSSOM CASE

The principle, thus, emerged that a case of disparagement arises only if the product in question is identifiable. Identification could be explicit or from the facts and circumstances. Thus, in the advertisement of 'Kiwi Liquid Wax Polish', a bottle is described as X from which liquid is dripping while from a bottle marked Kiwi liquid does not drip. From the shape of the bottle marked X, it could be identified as that of Cherry Blossom. Also, Cherry Blossom had a design registration for the shape of the bottle. Thus, the bottle could be identified with Cherry Blossom and the advertisement became a case of disparagement.[10]

UJALA V/S ROBIN BLUE CASE

Ujala whitener was advertised as instant violet concentrate, a post wash for white clothes. The advertisement disparaged 'neel'. The makers of Robin Blue contended that this was a case of disparagement under section 36A(1)(x), as their product was also 'neel'. The makers of Robin Blue claimed that they were the market leaders in India, with a market share of 56.4% in the blue powder category. Thus, disparagement of 'neel' would definitely mean disparagement of their product. The Commission was not in agreement. It noted:

"Simply because Robin Blue is stated to be commanding the market

share to the tune of 56.4 per cent is no ground prima facie to come

to the conclusion that in common parlance it is known as neel"

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7. *Hindustan Lever v. Colgate Palmolive (I) Ltd., 1998 (1) SCC 720,*
8. *1995 AIR (SC) 2438.*
9. *Hindustan Lever Ltd. vs Colgate Palmolive (India) Ltd., Judgment of the MRTP Commission, 18/11/1998. Citation: 1999(2) CPJ 7.*
10. *Reviewed in Reckitt and Coleman India Ltd. vs Jyothi Laboratories Ltd., judgment of the MRTP Commission, 18/11/1998. Citation: 1999(34) CLA 46.*

CONCLUSION

The recent changes in the global economy and advent of liberalization and globalization, a need of better regulation and strengthening of the institutional support is widely felt. However the current scenario depicts an opposite of what is required. The limited protection available through the MRTP Act has been removed. Following the recommendations of the Competition Commission, the government has repealed the MRTP Act and on its place a Competition Act has been enacted to regulate the monopolies and anti-competitive or restrictive trade practices. The Competition Commission was of the view that the Competition Act should not be burdened with unfair trade practices. This was, instead, to be given effect under the Consumer Protection Act, 1986. Since a consumer needed protection not only from being supplied with defective good and deficient service, but also from unfair trade practices, the provisions on unfair trade practices were copied from the MRTP Act into the Consumer Protection Act. While the consumer forums have judged a large number of cases on 'defect in good' or 'deficiency in service,' the cases on unfair trade practices were taken to the MRTP Commission.

Within the Consumer Protection Act, a 'consumer' cannot take up a case of an unfair trade practice before a consumer forum. It can only be taken up by a consumer association, central government or the state governments. Thus, within the existing law, a manufacturer whose product is disparaged has no locus standi to seek a remedy. The only option is to bring it to the notice of a consumer association or represent the case to the central or the state government. These are only oblique routes of seeking justice. Thus, effectively, the field of comparative representation has become unregulated.

Therefore it is essential to understand that the opening up of the economy, on its own, is not going to create and sustain competition. An appropriate law, adequate enforcement, strong infrastructure, and a quick dispute settlement mechanism would be needed to sustain competition. The context of free economy, is not to be misunderstood as the state leaving the economy unregulated. The state would need to develop adequate knowledge of the working of businesses in a free economy, enact laws, and create infrastructure and mechanisms for sustaining competition. In the absence of it, we would only be regressing from a 'license permit raj' to the 'jungle rule of the marketplace.' The processes of liberalization and globalization are nascent and much is needed to be done for the progress of society and growth of economy. ◆◆◆

REVERSE DOMAIN HIJACKING: RISING THREAT TO LEGITIMATE RIGHTS

Mr. Himanhsu Sharma & Ms. Bhuwesh Kumari[1]

INTRODUCTION

Business in today's scenario is not limited to the conventional business methods of face to face negotiations between the parties wherein the actual buyer meets the seller or vice-versa and deal in the commodities and services. In today's business scenario the virtual business has taken over the conventional ways. The deals not only done in the real world but they are also done in the virtual world wherein the buyers and seller does not even know each other or have seen each other. Due to very same reason the domain names have become the most sought after business tools. The importance of the domain name can be seen today from the fact that the more than 50% of business is done through online transactions these days. This importance of the domain name has given rise to the emergence of legal hassles related to the cyber squatting wherein someone registers a domain name which is associated with a famous firm with the sole intention of selling it to them at a higher price and the same is punishable under the Trademark law and under common law remedy of passing-off. But there are certain cases wherein a newly established enterprise tries to take away the rights of a not so well known entity just because they have established their business on a large scale.

CONCEPT OF REVERSE DOMAIN NAME HIJACKING

Reverse domain hijacking is a practice whereby a bigger firm tries to force a smaller firm who has legitimately registered a website to hand it over to them. Trademark holders often attempt to get a domain name from a party who has a legitimate claim in the domain name and where there is no question of infringement or dilution of the trademark. This act is often referred to as 'reverse domain hijacking'.

Reverse domain name hijacking can be defined as "using the Policy in bad faith to attempt to deprive a registered domain-name[2] holder of a domain name." This has become a significant security threat that is largely overlooked by the web hosting community. This form of domain theft involves copyright owners asserting expansive trademark rights in order to take ownership of a domain from its rightful owner.

REVERSE DOMAIN NAME HIJACKING: MODUS OPERANDI

In the case of 'reverse domain name hijacking' the offending party will typically file a report in conjunction with the Uniform Domain-Name Dispute-Resolution Policy (UDRP), which claims that the current domain owner registered the domain in violation of trademark rights. The goal in filing this report is to have the current domain ownership rights revoked and handed over to the offender. Unfortunately, even though in many cases the larger companies are overstepping their trademark rights, most small companies do not have the funds or knowledge needed to defend themselves through any type of opposition.

'REVERSE HIJACK' DOMAIN NAMES: RATIONALE BEHIND IT

Although many large companies have the financial resources to legitimately acquire virtually any domain name, it is often more desirable and affordable for them to simply seize a domain from a smaller company by abusing their newly established trademark rights. Not only it is a more viable solution for larger companies, it is also a very safe way to steal a domain name. The worst that can happen to the offending party is that they would lose the dispute. As long as a small window for success remains, and there are no legal repercussions associated with 'reverse domain name hijacking', one can be assured that companies will continue to file fraudulent and unjust UDRP claims against rightful domain owners.

1. *Final Year Student of Faculty of Law, University of Delhi*

2. *Rule 1Uniform Domain Name Dispute Resolution Policy (UDRP); see also Global Media Resources SA v. Sexplanetsaka SexPlanets Free Hosting (Case No. D2001-1391).*

PROCEDURE TO RECLAIM THE DOMAIN NAME AFTER IT HAS BEEN 'REVERSE HIJACKED'

If the domain name holder has the financial and legal resources, it is possible to file an action in court against the offending party, which states that his registration of the domain was lawful and in accordance with the Anti cyber squatting Consumer Protection Act (ACPA).[3] There are a number of administrative forums where arbitration may be filed under ICANN (Internet Corporation for Assigned Names and Numbers) and UDRP (Uniform Domain-Name Dispute Resolution Policy).

A challenger may also file suit against a registrant in a court of competent jurisdiction which has both subject matter and personal jurisdiction. Subject matter provides the particular court with the power to hear the case and personal jurisdiction is court's power over the people or entities involved in the court.

JUDICIAL DEVELOPMENT

The concept of Reverse Domain name hijacking has been discussed by the various courts in Indian at length. Recently in case of **Stephen Koenig vs. Arbitrator, National Internet Exchange of India (Nixi) & Anr**[4] , the Hon'ble Delhi High Court laid down that:

Once the complainant discharges the initial burden of showing that the Petitioner had no legitimate interest in the domain name, the burden of showing that he did have such interest shifts to the Petitioner. In this context petitioner has to prove the existence of certain ingredients of Para 7 of INDRP viz., the Petitioner's " use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services", that he is "commonly known by the domain name even if he has no trademark" or that he is "making a legitimate non-commercial or fair use of the domain name."

Similarly, the Administrative Panel in **Global Media Resources SA v. Sexplanets aka Sex Planets Free Hosting** [5] and **Harrods Limited v. HDU Inc.**[6] observed:

"…. in order to prevail on the claim of registered domain name, the Respondent must show that the Complainant knew of either the Respondent's unassailable right or legitimate interest in the Domain Name or the clear lack of bad faith registration and use, and nevertheless brought the Complaint in bad faith."

Cyber squatting and Reverse Domain Name Hijacking: Difference

The concept of Reverse domain name hijacking is somewhat appear to be similar on the first instance to that of cyber squatting but when looked in entirety they have conceptual difference.

Reverse domain name hijacking (also sometimes called reverse cyber squatting) is when a trademark owner who wants to obtain a particular domain name files a lawsuit under the Anti cyber squatting Consumer Protection Act ("ACPA") against the domain name owner who acquired the domain name legitimately (either before the trademark owner's mark became famous or distinctive or because of some other legitimate interest in the domain name) in order exert pressure against such owner to turn over the domain name to the trademark owner.

The district court of US in the case of **Sporty's Farm L.L.C v. Sportsman's Market Inc.**[7] noted;

"cyber squatting" occurs when a person other than the trademark holder registers the domain name of a well known trademark and then attempts to profit from this by either ransoming the domain name back to the trademark holder or by using the domain name to divert business from the trademark holder to the domain name holder.

As long as cyber squatter owns the domain name, the trademark owner cannot register its own trademark as a domain name. In this sense the cyber squatter breaches the fundamental right of the trademark owner to use its trademark provided under the Trade Marks Act, 1999.

The basic line of difference between the two is that reverse domain name hijacking is a situation where a properly registered domain is stolen by another person. It is not necessary that this name is a trade mark as compared to cyber squatting.

3. *The ACPA is basically a law that serves to protect domain registrants from the outreaching and unjust claims of trademark owners, which could potentially lead to illegal monopolization in certain markets.*
4. *186(2012)DLT43*
5. *Case No. D2001-1391*
6. *Case No. D2004-0093*
7. *202 F.3d 489 493 (2d Cir.2000).*

CONCLUSION: NEED FOR REFORMS

It is to be noted that larger companies know that most people will not take monetary compensation, as the ACPA is only intended to provide injunctive relief. The only thing that can happen is that the domain is given back to the original registrant, which is not enough to deter most companies from going after a desirable domain name. Until there are stricter penalties for 'reverse domain name hijacking', it is very likely that this trend will continue to grow.

Although domain name disputes almost invariably come down to their specific facts, it is no secret that a number of large companies use their financial resources to muscle domain names away from legitimate holders. The UDRP contains no meaningful disincentive to prevent overzealous trademark owners from filing complaints. At worst, a complainant may be named a "Reverse Domain Name Hijacker." The threat of being so branded does not exactly strike terror into the hearts of corporate giants, and as long as some overreaching claims are successful, these claims will continue to be filed.

Also, amendment of the ACPA is required to allow aggrieved registrants to receive statutory damages which would help to achieve a greater balance between the rights of trademark owners and domain name holders. Although it may take some time for the law to catch up with technology, in general, and the practice of reverse domain name hijacking, in particular, it is incumbent upon those parties with the resources to fight back for their rights. Otherwise, the trademark owners will continue to assert bad faith claims against legitimate registrants. ◆◆◆

TRANSFER PRICING REGULATIONS :

NOW APPLICABLE TO SPECIFIED DOMESTIC TRANSACTIONS ALSO

Ms. Shipra Makkar

The Hon'ble Apex Court of India *in* **Commissioner of Income Tax-IV, Delhi and Anr Vs. Respondent: Glaxo Smithkline Asia (P) Ltd. [(2010) 195 TAXMAN 35(SC)]** *while adjudicating a dispute relating to domestic transactions between related parties observed that "We are informed that the matter has been examined by CBDT and it is of the view that amendments would be required to the provisions of the Act if such Transfer Pricing Regulations are required to be applied to domestic transactions between related parties under Section 40A(2) of the Act.*

In order to reduce litigation, we are of the view that certain provisions of the Act, like Section 40A(2) and Section 80IA(10), need to be amended empowering the Assessing Officer to make adjustments to the income declared by the assessee having regard to the fair market value of the transactions between the related parties. Normally, this Court does not make recommendations or suggestions. However, as stated above, in order to reduce litigation occurring in complicated matters, we are of the view that the question of amendment, as indicated above, may require consideration expeditiously by the Ministry of Finance. In the meantime, CBDT may also consider issuing appropriate instructions in that regard. Accordingly, we direct the Registry to forward copies of this Order both to the Ministry of Finance and CBDT for consideration."

In furtherance to the above suggestions arising from the said dispute, the Finance Minister in the Union Budget 2012-13 has proposed to extend the transfer pricing regulations to certain specified domestic transactions where the aggregate value of such transactions exceeds ₹ 5 Crore.

It is further proposed to amend the meaning of the term Related Persons as provided under Section 40A of the Income Tax Act [hereinafter referred to as 'the Act'] to include companies having same holding company.

The Transaction which would specifically fall under the purview of Transfer Pricing will be:

- Taxpayers operating in Special Economic Zones [SEZ] under Section 10AA of the Income Tax Act, 1961.
- Taxpayers having domestic transactions with certain related parties falling under Section 40A [2] of the Income Tax Act, 1961.
- Taxpayers claiming deductions for undertaking specified business activities under Section 80A, 80IA [Chapter VI-A] etc. of the Income Tax Act, 1961.

In India, Transfer Pricing regulations were introduced in the year 2001 under the anti-abuse provisions of the Income Tax Act, 1961. The said regulations applied only to cross border transactions between the group companies and aimed to ensure that such transactions adhere to the globally accepted Arm's Length Standards.

The Tax law as it stands today empowers the Assessing officer to disallow unreasonable expenditure incurred between related parties [Section 40A of the Act].

Further, under Chapter VI-A and Section 10AA of the Act, the Assessing Officer is empowered to re-compute the income [based on fair market value] of the undertaking to which profit linked deduction is provided if there are transactions with the related parties or other undertakings of the same entity. However the law does not provide any method to determine such reasonableness or fair market value to re-compute the income of such transactions, leading to a lot of litigations.

These new domestic Transfer pricing provisions would have a significant anti- abuse effect to redress any non arm's length pricing of domestic transactions. This would also help taxpayers formalize their product pricing methods and enable legitimate cost management [TCM] opportunities. It would be possible for such taxpayers to utilize Transfer pricing concepts and methodologies for both commercial gains and TCM purposes.

At the same time, affected taxpayers will have to design their domestic Transfer pricing policies based on sound commercial substance and business rationale while maintaining robust documentation to pass any scrutiny of the Revenue.

Where previously only transactions between an Indian Parent Company and its International Subsidiary or vice versa were probed for Transfer Pricing, now the domestic deals between the related parties of a conglomerate will also be supplemented.

The Companies will also find it difficult to transfer the group profit to its domestic Subsidiaries having their units in areas specified for tax holidays or tax-exempted locations like SEZ. ◆◆◆

GENERAL ANTI-AVOIDANCE RULES

Mr. Dilip Kr Niranjan

INTRODUCTION:

In India, the most awaited phenomenon of every year is the 'Budget'. India is viewed as one of the most attractive Investment destination in world, therefore its financial policies are closely watched not only by its own citizens but also from investors all round the world. Recently, Honorable Finance Ministry presented the Budget for the financial year 2012-2013. Financial policies introduced with the Budget have opened a new set of discussions and interpretations. One of the most important set of changes proposed under the head 'Income Tax Act' of the Finance Bill 2012 is in the form of Introduction of General Anti-Avoidance Rules (hereinafter referred to as GAAR). These rules have been introduced with the objective to "counter aggressive tax avoidance schemes".

INSIGHT IN TO GAAR:

GAAR empowers the tax officials to deny the tax benefits on transactions or arrangements which do not have any commercial substance or consideration other than achieving tax benefit. It contains a provision allowing the government to retroactively tax overseas deals involving local assets. It could also be used by the government to target participatory notes (P-Notes). However, Finance Minister said that P-notes won't attract GAAR or taxation. But the question is that, what about FIIs themselves?

The finance minister's clarification that participatory note holders will not be taxed has raised a bigger concern. Does this mean that FIIs investing directly will come under the tax net? It would also be vicious if P-notes – usually used by hedge funds and benami Indian investors keen on investing their overseas money anonymously – are not taxed, but FIIs are.

GAAR could give powers to the tax department to deny double taxation treaty benefits to foreign funds based out of tax-havens like Mauritius. Overseas portfolio investors, routing their investments via countries like Mauritius, currently do not pay any tax on short-term capital gains. If the bill is passed as it is, then from 1st April 2012, FIIs domiciled in such treaty locations may have to prove that they have created this structure for genuine business purposes and not just for avoidance of tax.

The first steps towards adoption and implementation of GAAR has been taken by the Income Tax Authorities in the form of a Ruling given by Authority of Advance Rulings by upholding a tax demand on OTIS Elevators, an Indian firm, and denying capital gains tax benefit provided under the India-Mauritius tax treaty to its holding company OTIS Mauritius. The case has been discussed below.

OTIS CASE : [1]

Facts: In this case, OTIS Elevator (a company incorporated in India, the Companies Act hereinafter reffered as applicant Company) has three major shareholder companies, Mauritius, Singapore and US Companies. The Applicant Company proposed buy-back of its shares form its Shareholders in accordance with Section 77A of the Indian Companies Act. Its Mauritian shareholder OTIS Mauritius accepted the buy-back.. The buyback had resulted in capital gains for OTIS Mauritius which, under the tax treaty, is not taxable in India. It is important to note here that the Company stopped distributing dividends from 2003, year when section 115-O was introduced in the Indian Companies Act.

Issue: Whether the Capital gains arising pursuant to buy-back of shares by OTIS Elevator to OTIS Mauritius would be Exempt from taxation in India, having regard to provisions of para 4 of Article 13 of the India-Mauritius Tax Treaty?

OBSERVATION AND DECISION:

- The Authority observed that no dividend was distributed by the Company to its shareholders after 1.4.2003, the date on which section 115-0 was introduced in the Income Tax Act of 1961[2], as a result reserves of the Company increased considerably.

1. A.A.R. No. P of 2010

2. Section 115-O of the Income Tax Act of 1961 provides for levy of tax on distribution of dividends by a domestic Company to its shareholders

- It was further observed by the Authority, that under ordinary circumstances, buy-back of shares by OTIS Elevator from its Mauritius shareholder, i.e. OTIS Mauritius would amount to Capital gains under section 46A of the Income Tax Act[3] and would not be taxable to Capital gains as per paragraph 4 of Article 13 of the DTAC between India and Mauritius [4]
- However, the Authority in background of the above facts came to the conclusion that the transaction of buy-back proposed to be resorted to, is a colorable transaction. If a proposed transaction is colorable in eye of law, it has to be ignored and once such transaction is ignored, only conclusion that can be drawn is that such distribution of profits by a company to its shareholders is chargeable to tax under para 2 of Article 10 of the DTAC between India and Mauritius.[5]
- Therefore, while capital gain is not taxed as per the India-Mauritius treaty, the 'dividend distributed' can be taxed in India under the treaty.

CONCLUSION

The above ruling given by tax body on March 22, shortly after the Budget has opened up a gamut of complex tax issues with the announcement of the General Anti-Avoidance Rule (GAAR).

The ruling follows the principle of 'substance over form', which means concerned parties structuring a transaction purely to avoid tax will come under the tax net. This is central to the spirit of GAAR, which is awaiting Parliament's approval. ◆◆◆

3. *According to Section 46A profit on purchase of shares by a company of its own shares or other specified securities amounts to Capital gains in the hands of such shareholders.*
4. *As per Article 13 of Indo-Mauritius DTAC, Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this article shall be taxable only in that State.*
5. *Para 2 of Article 10 of DTAC between India and Mauritius provides for taxation of Dividends paid by a company which is a resident of a contracting state to shareholder in other state in that other state.*

INTEREST ON INCOME-TAX REFUND- CHARGEABILITY UNDER THE INDO-US DTAA

Ms. Smeeksha Bhola and Mr. Kumar Satyakam

INTRODUCTION

'Income' can arise from many or any sources, however difficulty arising when there is no clear cut provision provided for taxation of such Income under the relevant Tax Laws. Double Taxation Agreements are provided for saving an Assessee from his/her Income being taxed more than once. A recent judgment of the Mumbai Bench of the Income-Tax Tribunal in the case of M/s Bechtel International Inc.[1] has deliberated on the taxation aspect of interest received on refund of Income tax, the same has been discussed below. Since the taxpayer is a non-resident company incorporated in the United States of America, tax liability of such Company is governed by the provisions of India-US tax treaty.

FACTS OF THE CASE:

The Taxpayer, a non-resident company incorporated in United States had set up Project Office in India in the year 1994 after obtaining approval from RBI. In the year under consideration, the project work undertaken by the Tax-payer had been completed and there was no business activity carried on by the said project office. In the relevant year, the taxpayer received interest on tax refund of INR 6.4 million which was offered to tax at 15% on gross basis under Article 11(2) of the tax treaty. However, the Assessing Officer treated the said interest income as attributable to PE under Article 11(5) read with Article 7 of the tax treaty and thereby taxable at 40%.

ISSUE:

The two main issues involved in the case are as follows:

(a) Whether the interest on Income-tax refund is to be considered as interest income falling within Article 11(2) of the tax treaty or as interest income attributable to permanent establishment or fixed base in India falling under Article 7 of the tax treat?

(b) Extent of operation of the word 'attributable' as used in Article 11(5) of the tax treaty, whether it should be construed as equivalent/ narrower to the term 'effectively connected' as used under Interest Article in other tax treaties with India and thereby squarely covered by the Special Bench decision of Clough Engineering Ltd.

OBSERVATIONS AND DECISION:

1) Tribunal placed reliance on the decision of the Special Bench of ITAT in the case of ACIT vs. Clough Engineering[2]; this case related to provisions contained in the Indo-Australia DTAA and was based on identical facts and circumstances. Issue in this case also related to tax treatment of interest on Income-Tax refund under the Indo- Australia DTAA, whether the same were taxable as Business profits connected to 'Permanent Establishment'(Article 7 read with para No. 4 of Article 11 of the Indo-Australia DTAA) or as 'interest income'(under para 2 of Article 11 of the Indo-Australia DTAA)

In this case the court observed that,

- *The claim is connected with the PE in the sense that it has arisen on account of tax deduction at source from the receipts of the PE. However, it is also a fact that payment of tax is the responsibility of the foreign company. The same is determined after computation of its income and the tax forms not an expenditure for earning the income but an item of appropriation of profit. Therefore, even if the debt is connected with he receipts of the PE, it cannot be said to be effectively connected with such receipts because the responsibility to pay the tax lies on the shoulders of the assessee company from the final profit ascertained as on the last date of the previous year and on closing the books of account. It is for the company to pay the tax from any source available with it. It so happened*

1. *ITA No. 5198 and 6998/Mum/2010*

2. *130 ITD 137(Delhi)*

in this case that the tax got automatically deducted from the receipts of the PE by operation of law. Such collection of tax by force of law would not establish effective connection of the indebtedness with the PE as ultimately it is only the appropriation of profit of the assessee company.

- Therefore, it can be deduced from above observation of the Tribunal that 'interest on income tax refund' cannot be said to be effectively connected with the PE, because such interest income is not directly attributable to the business of such PE. Such 'interest income' in no way has arisen as an outcome from carrying on the business of Multi- National entity (MNE) by its Permanent Establishment in India and hence cannot be taxed as business profits of such non-resident assessee (i.e. MNE).
- Further, though the debt (i.e. interest on Income tax refund) is connected with receipts because the responsibility to pay the tax lies in the hands of the taxpayer company from the final profit ascertained on the last date of the previous year and on closing the books of account.

2) There has been a lot of discussion on the scope of the word 'attributable' as used in Article11(5) of the tax treaty, whether the same can be expanded beyond the extent of business 'effectively connected' with the PE. If such broad interpretation of the word 'attributable' is accepted, then all the income not arising directly from the business of PE will fall within the tax ambit of 'business income' of such PE and hence taxed accordingly. However, it has been observed that the word 'attributable' is in no way different from the expression 'Effectively Connected'. Therefore, the term 'attributable' appearing in US Model Conventions has the same meaning as the expression 'Effectively Connected'. The expression 'attributable' as used in Article 11(5) of the tax treaty has therefore to be construed as equivalent to effectively connected.

3) In the case of ACIT vs. Clough Engineering referred above, domestic law in context of taxability of interest on Income Tax Refund was also discussed. As per the Indian Law, interest is normally taxable under the head 'Income from other sources', unless the source of the interest is the business of the Assessee. Therefore, under Income tax act, 1961, such interest on Income Tax Refund is taxable as Income from other sources, as the same cannot be directly be attributable to the business of the Assessee. Such interest is not earned in the course of business of the assessee.

4) It was held the Mumbai Tribunal held that the interest on tax refund is to be charged to tax at 15% on gross basis under Article 11(2) of the tax treaty and not at 40% under Article 11(5) read with Article 7 of the tax treaty. The court further held that the case of taxpayer is squarely covered by the decision of Special Bench in the case of Clough Engineering Ltd.

CONCLUSION

The word 'Tax' has always been a major point of thinking for Foreign Investors. There should always be clarity on taxation aspect of transactions, specially those which are concerned with Foreign investors or falling within ambit of important international tax treaties/legislations such Double Taxation Avoidance Agreements. Taxability of Interest on Income Tax Refund has been held to be taxable as interest income as per Article 11(2) of the Indo-US DTAA @ 15% and not as Business Income connected to PE as per Article 11(5) read with Article 7, in the later case tax rate would have been 40%. The decision given in the case of Clough Engineering was reaffirmed in this case of M/s. Bechtel International Inc.

This decision comes as big relief for those covered by the DTAA between India and US also provides clarity on taxation aspect of 'interest on Income Tax Refund' falling within the scope of such DTAA. It has been observed that by no reasonable means can interest on income tax refund be attributed to the business of PE. Such interest is not earned as result of any business activity carried on by PE, but by the MNE on account of excess tax paid by the same. Responsibility to pay tax is also of the non-resident entity/MNE and not the PE. Therefore it can be concluded without any ambiguity that interest on Income tax Refund is to be taxed as interest income and not as business income. ◆◆◆

SEBI POLICY OF MARKET INFRASTRUCTURE INSTITUTIONS (MIIS)

Mr. Prashant Kumar

INTRODUCTION

Stock exchanges, depositories and clearing corporations are collectively referred to as securities Market Infrastructure Institutions (MIIs). The present policy as discussed in meeting of Securities and Exchange Board of India (SEBI) allowed the country's stock exchanges to raise capital from the public through the listing of their own shares. On similar issues SEBI in February 2010 had set up a seven-member panel to review the ownership and governance structure norms of MIIs.[1] The Panel submitted the report in November 2010 which was stuck at the finance ministry over suggestions against the listing of bourses and segregation of their regulatory and commercial roles. However the opening lines of the policy says that SEBI has broadly accepted most of the recommendations of the Bimal Jalan Committee.

The SEBI decided to allow stock exchanges to list. No stock exchange shall be permitted to list within three years from the date of approval by SEBI. As per the policy SEBI may permit stock exchanges to list if they put in place the appropriate mechanism for tackling conflicts of interest. No stock exchange will be allowed to list shares on its own equity trading platform, and to float an initial public offering (IPO). Depository may also be allowed to list but not the clearing corporation considering its risk bearing role.

NET WORTH AND OWNERSHIP NORMS

The policy further provides that stock exchanges should have a minimum net worth of Rs.100 crore. The existing stock exchanges would be given three years to achieve this net worth of Rs.100 crore. The minimum net worth for the clearing corporation (CC) and depository will be Rs.300 crore and Rs.100 crore respectively. All existing clearing corporations shall be mandated to build up to the prescribed net worth of Rs.300 crore over three years from the date of notification/circular.

The stock exchanges would have to have diversified ownership. However, no single investor would be allowed to hold more than five per cent except the stock exchange, depository, insurance company, banking company or public financial institution, which might hold up to 15 per cent. The Policy provides that 51 per cent of the holding of the stock exchanges would be held by the public. In case of clearing corporations at least 51 per cent holding would be held by stock exchanges. No single stock exchange, however, would hold more than 51 per cent in any CC. A stock exchange holding 51 per cent in a CC cannot hold more than 15 per cent in any other CC. To ensure diversified ownership for shareholders other than stock exchanges, the limit of 5 per cent and 15 per cent shall apply as in the case of stock exchanges. Any stock exchange now holding more than 51 per cent shall be given three years to bring its holding to the prescribed limit. In case of depositories, minimum 51 per cent holding would be held by sponsors and the existing list of sponsors would continue. No other entity would be allowed to hold more than 5 per cent of the equity share capital. A single stock exchange would, however, not hold more than 24 per cent.

Policy provides that shareholding limit prescribed for each category of investors shall be inclusive of all exposure (both on and off balance sheet) of a shareholder to the MII that facilitates or permits equity or rights over equity at any future date. If any shareholder has exposure more than the prescribed limit of shareholding, such exposure shall have to be reduced to the permissible limit within a period which may extend up to three years from the date of getting approval from SEBI.

GOVERNANCE

The autonomy of regulatory departments in stock exchanges and other MIIs (depositories and clearing organisations) would be maintained to avoid conflict of interest between regulatory and business functions.

1. *The recommendations of Bimal Jalan Committee on 'Review of Ownership and Governance of Market Infrastructure Institutions (MIIs)'.*

The policy prescribes a 'dual reporting' structure, whereby the heads of departments of listing regulation, the member for regulation and listing regulation will directly report to an independent committee of the board of the stock exchange as well as to its MD/CEO.

The board of stock exchanges/CC will not have any trading member/clearing member representative. However, an Advisory Committee shall be constituted by the board, comprising trading members/clearing members, to take benefit of experience of such members. All recommendations of the Advisory Committee shall be placed in the ensuing board meeting for consideration and appropriate decision. A Conflict Resolution Committee (CRC) will be formed by SEBI with majority external and independent members to deal with all issues concerning conflicts of interest. Issues of conflicts will be referred by Exchanges or may be taken up suo motu by CRC. The independent committee of Exchanges responsible for regulatory functions shall have regular interaction with CRC.

The Clearing Corporation (CC) or Clearing House that fully bears the risk of payment and delivery by providing a guaranteed settlement of all transactions on the Exchange. It has therefore been decided, inter alia, that the central role of the clearing function will be separated into an independent corporation with its own prescribed net worth by SEBI. The central role of the clearing function will be separated into an independent corporation with its own prescribed net worth. To bolster the risk management capacity of CC, the stock exchange will be mandated to transfer 25 per cent of their profits to the Settlement Guarantee Fund of the CCs where their trades are settled and in case of depository 25 per cent of the profits will be transferred to Investor Protection Fund of the depositories. The non-core activities of MIIs will have to be segregated to a separate legal entity and when a related business of an MII delivers a service to another MII it will provide equal and fair access to all.

The Public Interest Directors representation on the board of stock exchange will be 50 per cent and will be two-thirds of the board strength on the board of CC. The rest of the board will constitute of shareholder directors. Appointment of all Directors to the Board of Stock Exchanges/ CC will be subject to approval by SEBI. Appointment of MD/CEO of Depository will also be subject to approval by SEBI. The compensation structure for key management personnel are to be based on the principles of sound compensation practices issued by international fora like Financial Stability Board. Compensation structure for key management personnel under the said policy should be based on the principles of sound compensation practices issued by international bodies like the Financial Stability Board. A compensation committee consisting of majority public interest directors (PIDs) and chaired by a PID will determine the compensation of key management personnel. Further, the variable pay component will not exceed one-third of the total pay. Of the variable pay, 50 per cent of it will be paid on a deferred basis after three years. Also, ESOPs and other equity- linked options in an MII will not form part of the compensation for the identified key management personnel. As per the policy brokers were kept out of the governing board. However, this decision is prompted by the need to avoid conflict of interest issues that could arise if brokers were on the board and exerted influence over office bearers.

EXIT ROUTE

To enable the exit of stock exchanges, policy provides that a bourse without any trading on its own platform or annual volume of less than Rs.1,000 crore can apply for voluntary de-recognition and exit.

If a stock exchange entitled for voluntary de-recognition fails to achieve a turnover of Rs1,000 crore on a continuous basis or does not apply for voluntary exit within two years from the date of the regulator's notice, Sebi will initiate a compulsory de-recognition process. The stock exchanges may be permitted to exit subject to payment of statutory dues to SEBI/Govt. and contribution of certain percentage of assets of the exchange towards Investor Protection and Education Fund etc. There was no clear rule so far regarding such exits in the 2010 Jalan Committee Report. The trading members of the de-recognised stock exchange will continue to avail trading opportunity through its existing subsidiary company, which will function as a normal broking entity, at those Exchanges having nationwide trading terminals.

CONCLUSION

It is a step ahead of post-corporatization and demutualization of exchanges in 2004.With the intent to have diversified ownership in the stock exchange SEBI intends that no body should have actice control in such institution as these institutions are market infrastructure. As the board of stock exchanges/CC will not have any trading member/clearing member representative in the event of an IPO, therefore such condition may pose difficulties for BSE, which has several brokers on its board.

Moreover,the policy where 25 per cent of their profits are transferred to the Settlement Guarantee Fund of the CCs is not in lines of the investor sentiments. As the investors invest in companies on the assumption that its management and employees will strive to maximise profits for shareholders and that their effort will be fully reflected in the stock price discovered through fair trading on the bourses. As Settlement Guarantee Fund is a critical part of maintaining stability of exchange operations why it should be funded out profits which will fluctuate from year to year. ◆◆◆

CONSOLIDATED FDI POLICY – 2012

Mr. Karan Gandhi

The Ministry of Commerce and Industry (Department of Industrial Policy and Promotion), Government of India (GOI) had been releasing the Consolidated FDI Policy in the wake of the economic liberalization of India with an intention of regulation and administration of the Foreign Investment in various sectors.

Department of Industrial Policy and Promotion first released the consolidated FDI policy dated 31 March 2010 which was effective from 1 April 2010. The policy document had consolidated all prior policies/ regulations on FDI issued by the Department of Industrial Policy and Promotion (DIPP) and the Reserve Bank of India (RBI). Further, it was indicated that the policy would be in effect up to 30 September 2010 and subject to review every six months to reflect all changes in the regulations during the intervening six months. Accordingly the DIPP had released the revised Consolidated FDI Policy vide Circular 2 of 2010 dated 30 September 2010 which was effective from 1 October 2010 and lapsed on 31 March 2011. The phenomenon of releasing the Consolidated FDI policy has continued so far and now, the DIPP has issued the Consolidated FDI Policy – Circular 1 of 2012 to be effective from 10 April 2012.

Now, the DIPP has announced that the consolidated FDI Policy which was being announced in every six months will now onwards be announced on annual basis. DIPP vide its press release on '***Consolidated FDI Policy – Circular 1 of 2012'*** dated 10 March 2012 highlighted the significant changes introduced in the said circular as follows:

(1) Policy for FDI in Commodity Exchanges

Under the present circular the Hon'ble Department of Industrial policy and promotion [DIPP] has eased up the norms for Foreign Direct investment [FDI] in commodity exchanges through Foreign Institutional Investors [FII's] which were earlier allowed to invest in the commodity exchanges on attaining the prior approval of the Government.

Earlier, the Foreign Institutional Investors [FII's] were allowed to invest in the commodity exchanges under the FDI route with a cap of 49% with the prior approval of Government (Foreign Investment Promotion Board). Within such 49% cap, registered FII's were allowed to invest upto 23% under the Portfolio Investment Scheme and the remaining 26% was under the FDI scheme.

However, now the DIPP has allowed the FII's to invest under the portfolio scheme inside the cap of 23% and no permission is required for the same. The DIPP has made an effort to bring the policy for Foreign Investment in commodity exchanges in the line of the Foreign Investment permitted under the securities market infrastructure companies.

(2) Clarification on leasing for the non Banking Financial Companies [NBFC's]

Under the press release the Hon'ble DIPP has issued a clarification on the leasing activities covered under the activity of 'leasing and finance' where induction of FDI is permitted. It has been clarified by the department that under the NBFC sector where FDI is induced, the activity 'leasing and finance' only covers 'financial leases'

(3) Conversion of Import of capital goods/ machinery/equipment (including second hand machinery) into equity

DIPP on receiving representations and in order to incentivize machinery embodying state-of-the-art technology, compliant with international standards, in terms of being green, clean and energy efficient has excluded second-hand machinery from the purview of the provision providing the conversion of capital goods into equity.

(4) Clarification on investment by FII's in a Company

The DIPP has liberalized the norms for investment in the capital of the Indian Company by removing the cap of 24% provisioning that such cap of 24% can be increased to the level of the sectoral cap/ statutory ceiling by passing the special resolution as defined under the companies Act in the general body meeting on recommendations of the Board of Directors of such Indian Company.

Earlier, FII's were permitted to invest in the capital of the Indian Company under the portfolio investment scheme upto a ceiling of 24% in aggregate where the individual holding of an FII was limited to 10% of the capital of the Indian Company. However, now under the press release the DIPP has permitted the Indian Companies to increase the said cap of 24% upto a level provided by sectoral cap/ceiling on the prior approval of the general body of the company by way of passing a special resolution and the same should also be recommended by the Board of Directors of such Indian Company.

(5) Investment by Foreign Venture Capital Investors [FVCI's]

The FVCI's have been allowed to invest in the eligible securities (equity, equity linked instruments, debt, debt instruments, debentures of an IVCU or VCF, units of schemes/funds set up by a VCF) by way of private arrangement/purchase from a third party also, subject to stipulated terms and conditions.

Further, the DIPP has also allowed the SEBI registered FVCI's to contribute up to 100% of the capital of an Indian Venture Capital Undertaking (IVCU) and they can also set up a domestic asset management company to manage the fund of such IVCU.

(6) Investment by Qualified Financial Investors (QFI's)

The DIPP has permitted the QFI's to invest in equity shares of listed Indian Companies as well as in shares of the Indian Companies which are offered to public in India under the guidelines issued by Securities Exchange Board of India (SEBI) from time to time through Depository Participants registered with SEBI. QFI's can also acquire equity shares by way of right shares, bonus shares or equity shares, on account of stock split/consolidation or equity shares on account of amalgamation, demerger or such corporate actions, subject to the prescribed investment limits.

(7) Liberalization in the limit of Single Brand Retailing

The DIPP has permitted 100% FDI in single brand retailing under the Government Approval Route and shall also be subject to specific conditions as laid down under the Press Note 1 of 2012 issued by DIPP.

CONCLUSION

Apart from the above said changes the DIPP has consolidated the liberalized policy on transfer of shares/convertible debentures of companies engaged in the financial services sector in the Consolidated FDI Policy effective from 10 April 2012.

It is noteworthy that the liberalizations introduced by DIPP, Government of India in the Consolidated FDI Policy – Circular 1 of 2012 will not only bring the new opportunities in India for Foreign Investment but will also boost the international cooperation and relationship. ◆◆◆

NEWSBYTES

1. MORE REGULATIONS FOR NON BANKING FINANCIAL COMPANIES

The Reserve Bank of India [herein after referred to as 'RBI'] has by its Notification dated March 15, 2012 shed its flaw in the Non Banking Finance Institution Regulation which Non Banking Finance Companies (NBFC) take as their advantage to escape tax.

According to Section 45 IA (1) of the RBI Act, 1934, no non-banking financial company shall commence business or carry on the business of a non-banking financial institution without:

a) Obtaining a Certificate of Registration [CoR] from the RBI and

b) Having a net owned fund of twenty five lakh rupees, this was increased to INR 200 Lakh (USD 20 Million) with effect from April 21, 1999.

The regulatory arbitrage that comes to the notice of the RBI is that some NBFCs obtain registration from the Bank and invest their fund in the fixed deposit with the Commercial Banks but do not commence Non Banking Finance Institution activities for several years thereafter. Therefore current notification of the RBI is aiming to block such regulatory arbitrage.

The CoR by the RBI is issued for the specific purpose of conducting NBFI activities. Investing in the fixed deposit cannot be treated as financial assets and receipt of income as interest on fixed deposit with banks cannot be treated as income from financial assets.

As the investment in the fixed deposit with banks are not covered under the activities mentioned in the definition of "financial institution" in Section 45 I (c) of the RBI Act, 1934.

The RBI in its notification said that the NBFC which is in receipt of Certificate of Registration from the Bank must necessarily commence NBFC business within six months of obtaining such Certificate. It further adds that the license of the Finance Companies will be terminated who do not begin lending within six month of getting the license.

RBI further said that the Companies who do not start business of NBFC within six month from the date of issue of Certificate of Registration, then such Registration Certificate will stand withdrawn automatically.

RBI also said that the transfer of ownership will also be restricted and there can be no change in ownership of the NBFC prior to commencement of business and regularization of its Certificate of Registration.

2. INVESTMENT IN INDIAN VENTURE CAPITAL UNDERTAKINGS AND /OR DOMESTIC VENTURE

Capital Funds by SEBI registered Foreign Venture Capital Investors

RBI vide RBI/2011-12/452 A.P. (DIR Series) Circular No. 93, dated March 19, 2012 has allowed a SEBI registered Foreign Venture Capital Investor (FVCI) to invest in equity, equity linked instruments, debt, debt instruments, debentures of an Indian Venture capital Undertaking (IVCU) or of a Venture Capital Funds (VCF) through Initial Public Offer or Private Placement or in units of schemes / funds set up by a VCF, subject to such terms and conditions mentioned therein.

FVCIs are allowed to invest in the eligible securities (equity, equity linked instruments, debt, debt instruments, debentures of an IVCU or VCF, units of schemes / funds set up by a VCF) by way of private arrangement / purchase from a third party also, subject to terms and conditions as stipulated in Schedule 6 of Notification No. FEMA 20 / 2000 -RB dated May 3, 2000 as amended from time to time. The SEBI registered FVCIs would also be allowed to invest in securities on a recognized stock exchange subject to the provisions of the SEBI (FVCI) Regulations, 2000, as amended from time to time, as well as the terms and conditions stipulated therein.

3. PRIOR INTIMATION TO THE RESERVE BANK OF INDIA FOR RAISING THE AGGREGATE FOREIGN INSTITUTIONAL INVESTORS / NON-RESIDENT INDIAN LIMITS FOR INVESTMENTS UNDER THE PORTFOLIO INVESTMENT SCHEME

RBI vide RBI/2011-12/453 A.P. (DIR Series) Circular No. 94, dated March 19, 2012 has raised the aggregate FII investment limit of existing 24 per cent to the sectoral cap/ statutory limit, as applicable to the respective Indian company and raised the aggregate NRI investment limit of existing 10 per cent to 24 per cent. The Company shall intimate the same to the Reserve Bank of India, along with a Certificate from the Company Secretary stating that all the relevant provisions of the extant Foreign Exchange Management Act, 1999 regulations and the Foreign Direct Policy, as amended from time to time, have been complied with.

RBI for effective monitoring of foreign investment ceiling limits has fixed cut-off points of two percentage points lower than the actual ceilings. Once the aggregate net purchases of equity shares of the company by FIIs/NRIs/PIOs reaches the cut-off point of 2 per cent below the overall limit, the Reserve Bank cautions all the designated bank branches not to purchase any more equity shares of the respective company on behalf of any FIIs/ NRIs/ PIOs without prior approval of the Reserve Bank and on reaching the aggregate ceiling limit, the Reserve Bank advises all designated bank branches to stop purchases on behalf of their FIIs/ NRIs/ PIOs clients.

4. FOREIGN EXCHANGE MANAGEMENT (DEPOSIT) REGULATIONS, 2000 - CREDIT TO NON RESIDENT (EXTERNAL) RUPEE ACCOUNTS

RBI vide RBI/2011-12/465 A. P. (DIR Series) Circular No.95 dated March 21, 2012 allowed that individual resident in India who may borrow a sum not exceeding USD 250,000/- or its equivalent from her / his close relatives outside India can make the repayment of such loans to NRE / Foreign Currency Non-Resident (Bank) [FCNR(B)] account of the lender concerned subject to the condition that the loan to the resident individual was extended by way of inward remittance in foreign exchange through normal banking channels or by debit to the NRE / FCNR(B) account of the lender and the lender is eligible to open NRE / FCNR(B) account within meaning of the Foreign Exchange Management (Deposit) Regulations, 2000 notified vide Notification No. FEMA 5/2000-RB dated May 3, 2000. RBI further clarified that such credit shall be treated as an eligible credit to the NRE / FCNR (B) account in terms of Para 3(j) of Schedule-1 read with Para 5 of Scheule-2 of Notification No. FEMA 5/2000-RB.

5. OVERSEAS DIRECT INVESTMENTS BY INDIAN PARTY – RATIONALIZATION

RBI vide RBI/2011-12/473 A.P. (DIR Series) Circular No. 96, dated March 28, 2012 has given more flexibility to the Indian party by liberalizing **various provisions/ regulation of 2004 Notification under following headings:**

a) Creation of charge on immovable / movable property and other financial assets:

Earlier there was regulation only for creation of charge on shares of JV/WOS by Indian Party and there was no regulation for creation of charge on the immovable / movable property and other financial assets of the Indian Party. It has been decided that proposals from the Indian party for creation of charge in the form of pledge / mortgage / hypothecation on the immovable / movable property and other financial assets of the Indian Party and their group companies may be considered by the Reserve Bank under the approval route within the overall limit fixed (presently 400%) for financial commitment subject to submission of a 'No Objection' by the Indian Party and their Group companies from their Indian lenders.

b) Reckoning bank guarantee issued on behalf of JV / WOS for computation of Financial Commitment:

Earlier, the bank guarantee issued on behalf of JV / WOS is not reckoned for the purpose of computing the financial commitment of the Indian Party to its JV / WOS overseas. It has been decided that the bank guarantee issued by a resident bank on behalf of an overseas JV / WOS of the Indian party, which is backed by a counter guarantee / collateral by the Indian party, shall be reckoned for computation of the financial commitment of the Indian Party and reported accordingly.

Please note that, appropriate reporting mechanism for capturing the financial commitment on account of creation of charge on such property / assets and capturing the financial commitment on account of issuance of bank guarantee shall be introduced shortly.

c) Issuance of personal guarantee by the direct / indirect individual promoters of the Indian Party:

It has been decided that issuance of personal guarantee by the promoters of the Indian Party as earlier allowed under the General Permission shall also be extended to the indirect resident individual promoters of the Indian Party with same stipulations as in the case of personal guarantee by the direct promoters.

d) Financial Commitment without equity contribution to JV / WOS:

Earlier, an Indian Party may extend a loan or a guarantee to or on behalf of the Joint Venture / Wholly Owned Subsidiary abroad, within the permissible financial commitment, provided that the Indian party has made investment by way of contribution to the equity capital of the Joint Venture. Keeping in view the business requirement of the Indian party, particularly the legal requirement of the host country, it has now been decided that the proposals from the Indian party for undertaking financial commitment without equity contribution in JV / WOS may be considered by the Reserve Bank under the approval route.

e) Submission of Annual Performance Report:

Earlier, Indian party needs to submit to the Reserve Bank through the designated Authorised Dealer bank every year an Annual Performance Report in Form ODI Part III in respect of each Joint Venture or Wholly Owned Subsidiary outside India, set up or acquired by the Indian party, after the finalization of the audited accounts of the Joint Venture / Wholly Owned Subsidiary outside India. Where the law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS, the Annual Performance Report (APR) may be submitted by the Indian party based on the un-audited annual accounts of the JV / WOS provided:

i) The Statutory Auditors of the Indian party certifies that 'The un-audited annual accounts of the JV / WOS reflect the true and fair picture of the affairs of the JV / WOS' and

ii) That the un-audited annual accounts of the JV / WOS has been adopted and ratified by the Board of the Indian party.

iii) Compulsorily Convertible Preference Shares (CCPS)

The extant provisions of Overseas Direct Investments envisage setting up / acquiring JV / WOS abroad by subscribing / contributing to the equity capital of the JV / WOS. Therefore, contribution to the preference share capital (whether convertible or non-convertible) of the JV / WOS abroad by the Indian party is treated as loan to them. Keeping in view the nature of the Compulsorily Convertible Preference Shares (CCPS), it has been decided that Compulsorily Convertible Preference Shares shall be treated at par with equity shares and the Indian party is allowed to undertake financial commitment based on the exposure to JV by way of CCPS.

6. OVERSEAS INVESTMENTS BY RESIDENT INDIVIDUALS – LIBERALISATION / RATIONALISATION

RBI vide **RBI/2011-12/474 A.P. (DIR Series) Circular No. 97**, dated March 28, 2012 has provided general permission to the resident individuals for acquiring equity shares of a foreign entity by way of / under (i) qualification shares, (ii) professional services rendered and (iii) ESOP scheme in the following manner:

a) Acquiring qualification shares of an overseas company for holding the post of a Director:

Since the necessity of having certain qualification shares by an individual to be appointed as a Director of the company is governed by the law of the host country, it has been decided to remove the existing cap of 1 (one) per cent on the ceiling for resident individuals to acquire qualification shares for holding the post of a Director in the overseas company. Accordingly, henceforth, remittance shall be allowed from resident individuals for acquiring the qualification shares for holding the post of a Director in the overseas company to the extent prescribed as per the law of the host country where the company is located. The limit of remittance for acquiring such qualification shares shall be within the overall ceiling prescribed for the resident individuals under the Liberalized Remittance Scheme (LRS) in force at the time of acquisition.

b) Acquiring shares of a foreign company towards professional services rendered or in lieu of Director's remuneration :

General Permission has been granted to the resident individuals to acquire shares of a foreign entity in part / full consideration of professional services rendered to the foreign company or in lieu of Director's remuneration. The limit of acquiring such shares in terms of value shall be within the overall ceiling prescribed for the resident individuals under the Liberalized Remittance Scheme (LRS) in force at the time of acquisition.

c) Acquiring shares in a foreign company through ESOP Scheme :

The resident employees or Directors may be permitted to accept shares offered under an ESOP Scheme globally, on uniform basis, in a foreign company irrespective of the percentage of the direct or indirect equity stake in the Indian company subject to:

i) the shares under the ESOP Scheme are offered by the issuing company globally on a uniform basis, and

ii) an Annual Return is submitted by the Indian company to the Reserve Bank through the AD Category – I bank giving details of remittances / beneficiaries, etc.

7. DISCONTINUATION OF SUPPLYING PRINTED GR FORMS BY RESERVE BANK

The Reserve Bank of India vide RBI/2011-12/477 A. P. (DIR Series) Circular No. 98 dated March 30, 2012 has decided to discontinue supplying/selling printed GR forms across the counter by Regional Offices of Reserve Bank. Therefore, with effect from July 1, 2012, GR forms shall be available only online at Reserve Bank's website.

This was so done because with the advent of technology and penetration of internet access, the need for printing and supplying of GR forms by Reserve Bank does not exist anymore.

The GR number will be automatically allotted when the document goes to the print queue.

8. EXTERNAL COMMERCIAL BORROWINGS (ECB) POLICY – REVIEW OF ALL-IN-COST CEILING

Reserve Bank of India vide RBI/2011-12/478 A. P. (DIR Series) Circular No. 99 dated March 30, 2012 decided to continue with the enhanced all-in-cost ceiling for a further period of six months in respect of ECBs as under:

Average Maturity Period	All in cost over six Month Libor*
Three years and up to 5 years	350 bps
More than five years	500bps
*for the respective currency of borrowing or applicable benchmark	

Earlier the all-in-cost ceiling for ECBs with average maturity of three and upto five years was enhanced to 6 months Libor+350 bps with effect from November 23, 2011 and was subject to review on March 31, 2012.

Further, the all-in-cost ceiling discussed above is applicable up to September 30, 2012 and subject to review thereafter.

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

Reserve Bank of India vide RBI/2011-12/479 A. P. (DIR Series) Circular No. 100 dated March 30, 2012 has decided to continue with the enhanced all-in-cost ceiling for Trade Credits for a further period of six months as under:

Maturity Period	All-in-cost over six month Libor*
Up to one year more than one year and up to three years	350 bps
*for the respective currency of credit or applicable benchmark	

Earlier the all-in-cost-ceiling for trade credit which was enhanced to 6 months Libor + 350 bps with effect from November 15, 2011 and was subject to review on review on March 31, 2012.

Further, the all-in-cost ceiling will include arranger fee, upfront fee, management fee, handling/ processing charges, out of pocket and legal expenses, if any.

And also further, the all-in-cost ceiling discussed above is applicable up to September 30, 2012 and subject to review thereafter.

10. OVERSEAS DIRECT INVESTMENTS – LIBERALISATION / RATIONALISATION

Reserve Bank of India vide RBI/2011-12/481 A. P. (DIR Series) Circular No.101 dated April 02, 2012 has liberalized the regulations pertaining to opening / holding / maintaining the Foreign Currency Account by Indian party outside India.

Earlier an Indian party is required to obtain prior permission of the Reserve Bank to open, hold and maintain Foreign Currency Account in a foreign country for the purpose of overseas direct investments in that country, in case the regulation of the host country requires that the investment in the country is to be made through a particular account to be opened with the commercial bank of the country.

An Indian party will now be allowed to open, hold and maintain Foreign Currency Account (FCA) abroad for the purpose of overseas direct investments subject to the following terms and conditions:

a) The Indian party is eligible for overseas direct investments in terms of Regulation 6 (Regulation 7, if applicable) of Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time.

b) The host country Regulations stipulate that the investments into the country is required to be routed through a designated account.

c) FCA shall be opened, held and maintained as per the regulation of the host country.

d) The remittances sent to the FCA by the Indian party should be utilized only for making overseas direct investment into the JV / WOS abroad.

e) Any amount received in the account by way of dividend and / or other entitlements from the subsidiary shall be repatriated to India within 30 days from the date of credit.

f) The Indian party should submit the details of debits and credits in the FCA on yearly basis to the designated AD bank with a certificate from the Statutory Auditors of the Indian party certifying that the FCA was maintained as per the host country laws and the extant FEMA regulations / provisions as applicable.

g) The FCA so opened shall be closed immediately or within 30 days from the date of disinvestment from JV / WOS or cessation thereof.

11. USE OF INTERNATIONAL DEBIT CARDS/ STORE VALUE CARDS/CHARGE CARDS/SMART CARDS BY RESIDENT INDIANS WHILE ON A VISIT OUTSIDE INDIA

RBI vide RBI/2011-12/102, A. P. (DIR Series) Circular No.102, dated April 02, 2012 has authorized Authorised Persons to redeem the unutilized balance outstanding in the cards immediately upon request by the resident Indians to whom the cards are issued subject to retention of:-.

a) The amounts that are authorized and remain unclaimed/ not settled by the acquirers as of the date of redemption till the completion of the respective settlement cycle.

b) A small balance not exceeding US$ 100, for meeting any pipeline transactions till the completion of the respective settlement cycle; and

c) Transaction fees/service tax payable in India in Rupees.

For the amounts that are authorized but unclaimed/ not settled by the acquirer, the issuer of such cards can hold such amounts until such transactions are processed/ settled by the acquirers within the prescribed settlement timeframe.

Before this Circular resident Indians who purchase their travel cards, are permitted refund of the unutilised foreign exchange balance only after 10 days from the date of last transaction and accordingly, this condition is stated in the "user guide". It is pertinent to note that the use of such cards is limited to permissible current account transactions and subject to the prescribed limits under the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

All the other instructions contained in the A. P. (DIR Series) Circular No. 46 dated June 14, 2005, as amended from time to time, shall remain unchanged. ◆◆◆

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