Singh & Associates
ADVOCATES AND SOLICITORS

May 2012. Vol. V, Issue V

# INDIAN LEGAL IMPETUS

## Singh & Associates Booth at
## “134th Annual Meeting, International Trademark Association (INTA)”.

# Foreword


Manoj K Singh
Founding Partner

*Singh & Associates has been very active at the international platform including various conferences and seminars. The Firm has always encouraged its professionals to attend and be apart of these forums so as to meet people of the fraternity from all over the world. The Firm was recently represented by its able team at the 134th Annual Meeting of International Trademark Association (INTA) held from 5th to 9th May 2012 at Washington D.C.  We, hereby, extend our gratitude to all those people who visited our booth at INTA and made the event a great success for the Firm.*

*It gives me an immense pleasure to bring forth the May 2012 edition of our Newsletter "Indian Legal Impetus". Legal arena has always been dynamic and ever evolving, with judgments and legislations being introduced time and again. Recent example of such evolvement can be seen in context of amendments introduced in the Income Tax Act of 1961 vide the Finance Act of 2012.*

*Article "Look through or Look at: Section 9-Recent developments" summarizes the development and changes in law from the verdict, given by the Honorable Supreme Court in the famous case of Vodafone  to subsequent changes in Income Tax Act of 1961. Article on "Alternative Investment Funds Regulations 2012" describes the scope and need of the said regulations recently introduced by Securities and Exchange Board of India (SEBI). The present issue of the month also throws light on the concept of Removal of Directors under the Companies Act, 1956.*

*Further an article on Section 138 of The Negotiable Instruments Act of 1981, discusses the confusion surrounding the interpretation of the said section. The Article on Evidence Act explains the various facets of Section 90, relating to the presumption of authenticity, in case of 30 Year old documents.*

*Article on "Regulations relating to import of Dietary/Food supplements in India" briefly summarizes the current scenario in India. Article on Clinical Trials discusses the current scenario and future prospects in India.*

*This edition further deals with the Burden of Proof in Trademark cases. Article on "Copyright (Amendment) bill, 2012" briefly summarizes the amendments in the Copyright Act, 1957.*

*Moving on, the concept of License of Rights in Patents has been discussed. Further the future prospects of Utility Model Patents in India have been assessed. Lastly, the concept of Crowd-Sourcing for IP Profits has been analyzed in the article.*

*Latest developments in various fields of Law have been summarized in the Newsbytes section of this issue.*

*It has always been our endeavour to bring forth all the latest legal developments in India, with the objective of achieving clarity in concept and enrichment of knowledge in the field of law.*

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

## "Indian Legal Impetus"

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# "LOOK THROUGH" OR "LOOK AT": SECTION 9 - RECENT DEVELOPMENT

*Manoj K. Singh, Smeeksha Bhola & Kumar Satyakam*

'Look through' versus 'Look at'; FDI versus Income Tax; and now the Apex Court versus the Policy Makers; these issues have been dominating the taxation and financial jurisprudence for last many years. This year on 20th day of January overseas investors were ebullient when the Hon'ble Supreme Court of India pronounced a landmark Judgment in the case of **Vodafone International Holdings B.V. vs. Union of India[1].** It cannot be denied that the approach of the Apex Court taken till date in the said case and later when the Apex Court dismissed the review Petition filed by the Government came as a breather for the investors who are keen to plunge into our economy. On the contrary, the tax sleuths along with the policy makers are reluctant to give in easily as they are well aware of the fact that the entire tax liability [2] as per their calculation if realized will add to the revenue and also reduce the deficits that have been troubling the economy for a while. Moreover, Government may be logical when it asserts to tax such a deal as it is a well established fact that big companies do try to benefit their kitty at the cost of national exchequer. In light of such a landmark judgment and the rigidity shown by our policy makers had raised a moot question: ***Is India still a favoured destination for investment.*** In another words - ***Why investors are wary of India?***

From the perspective of a developing economy, both Foreign Direct Investment and Taxation stand on an equal footing being the two important pillars for a country's growth and progress.

With Hon'ble Supreme Court verdict, it seemed that all ambiguities surrounding transactions involving transfers between non-residents investors have been settled. Such clarity is also required as many merger-acquisitions are structured in the way Vodafone- Hutchsion deal was structured. But, the present stand taken by the Government will leave such deals in lurch. There again arises another moot question - ***What will reign supreme: FDI or Tax?***

Much to the dismay of the investors and the Apex Court, the Hon'ble Finance Minister announced in this year's budget the proposed changes'. Such clarificatory amendment introduced by the budget of 2012 is in complete divergence of Supreme Court's views and the same have the effect of nullifying the Apex Court's verdict.

After a brief overview of the entire situation related to the much discoursed and debated tax issue, the Vodafone Verdict, the contentions, observations, decisions, clarificatory amendment related thereto is worth discussion.

## VODAFONE VERDICT:

In this case, the indirect acquisition of controlling stake by Vodafone of Hutchison Essar Ltd. was sought to be taxed by Income Tax Authorities on the premise that such transfer falls within the ambit of Income Tax Act, 1961.

As per Section 5(2)(b) of the Income Tax Act 1961:

"income of a non-resident is liable to be taxed, if such income accrues or is deemed to accrue or arise to him in India during relevant previous year"

From the above said provision, it is clear that income of a non-resident is taxable in India only if such Income is deemed to accrue or arise in India during the previous year.

Further, Section 9 of the Income Tax Act arranges in one place various types of income and directs that income falling under each of the sub-clauses shall be deemed to accrue or arise in India. In the present case last part of section 9(1)(i) was referred, which deals with income arising from "transfer of a Capital asset situate in India".

Section 9(1)(i) of the Income Tax Act reads as follows:

The following income should be deemed to accrue or arise in India:

All income accruing, whether directly or indirectly……..through the transfer of a capital asset situate in India.

1. *(2012)1comp LJ 225(SC)*

2. *As per the ET news reports: total tax liability of Vodafone is computed at Rs. 20000 Crores.*

## CONTENTIONS OF TAX AUTHORITIES:

It was contended by the Income Tax Authorities that section 9(1)(i) is a 'look-through' provision, and therefore transfer of shares of a foreign company holding shares of an Indian Company should be treated as equivalent to transfer of shares of an Indian Company, on the basis that section 9(1)(i) covers indirect transfers of capital assets.

## OBSERVATIONS AND DECISION OF THE HON'BLE SUPREME COURT OF INDIA:

The Hon'ble Apex Court observed that for income of a non-resident to fall within the preview of section 9(1)(i), following requirements should be satisfied:

(1) Existence of a capital asset

(2) Situation of such asset in India

(3) Transfer of such Capital asset.

Therefore, income accruing or arising to a non-resident outside India on transfer of a capital asset situate in India, is fictionally deemed to accrue or arise in India, if all the above requirements of section 9(1)(i) are satisfied. Such income is then made liable to be taxed by reason of Section 5(2)(b) of the Income Tax Act, 1961.

The Hon'ble Apex Court further observed that, only direct transfer of capital asset situated in India is covered by section 9(1)(i), and the same cannot be extended to cover indirect transfers of capital assets/ property situate in India as this would amount to changing the express statuary requirement of the said section. The Hon'ble Apex Court further observed that 'transfer' should be of an asset in respect of which it is possible to compute a capital gain in accordance with the provisions of the Act.

The Hon'ble Apex Court also remarked that the words directly or indirectly in Section 9(1)(i) of the Income Tax Act 1961 go with 'income' and not with the 'transfer of a capital asset(property)'. Therefore, the look-through approach as suggested by the Income Tax authorities was not approved by the apex Court.

The transfer of shares of a foreign company holding shares of an Indian Company was not treated as 'transfer of Capital asset' and therefore was excluded from the scope of section 9(1)(i) of the Income Tax Act by the Supreme Court.

## BUDGET 2012 AND AMENDMENTS IN INCOME TAX ACT, 1961:

With the Apex Court pronouncing its verdict, it seemed that the controversy surrounding Vodafone and other similar structured deals would finally come to rest, but Budget of 2012 opened up with new set of changes, contrary to the views of Hon'ble Supreme Court in the Vodafone Case.

Some of the path breaking changes introduced in the Finance Bill of 2012 are:

**1) Amendment of Section 9 of the Income Tax Act of 1961:**

Explanation was added to section 9(1)(i) which reads as follows-

"For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India."

**2) Amendment of Section 2(47) of the Income Tax Act of 1961:**

" Explanation 2.—For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;'."

The essence of the above mentioned amendments is to bring Vodafone and similar structured deals within the purview of Income Tax Act, 1961.

Explanation added to Section 9, vide Finance Bill 2012, extends the definition of 'Capital Asset' as contained in Section 9 to include shares/interest of a foreign (i.e. non-resident entity) company, if such non-resident entity derives interest from assets situated in India( i.e. holds controlling stake in Indian Company). Therefore transfer of such shares of an

Indian Company by a non-resident entity to another non-resident entity, even though such transfer takes place outside India, which has the effect of transferring controlling stake of such Indian Company would amount to 'transfer of Capital asset' situated in India and hence will be covered by Section 9(1)(i) of the Income Tax Act, 1961.

Explanation added to Section 2(47), vide Finance Bill 2012, has further clarified that 'Transfer' would include indirect transfer of controlling interest/ shares outside India, if such transfer has the effect of transferring share/shares of a company registered in India.

Therefore, both the above amendments have the effect of including indirect transfer of shares/ controlling stake of an Indian Company from one non-resident entity to another within the ambit of taxation Laws of India.

## EFFECT ON OTHER VODAFONE LIKE STRUCTURED DEALS [3]:

Since the above mentioned amendment is effective retrospectively from 1976, many other overseas deals, with underlying Indian assets can fall within the circumference of Section 9(1)(i) of the Income Tax Act. Some of the other cases that may fall within the above mentioned amended of Income- Tax Act and be taxed under the Indian Income Tax Law are as follows:

- GE- Genpact: General Electronic (GE) sold majority stake in Genpact, India's largest business process outsourcing company, in 2004. The buyers were US-based private equity companies, General Atlantic and Oak Hill Partners. They paid $500 million for 60% stake in the Indian company. The transaction was completed overseas, and may have been taxed in the US. The matter is pending before the Delhi High Court.
- Mitsui CO: The Japanese Company had sold 51% interest in mining company Seas Goa to UK- based Vedanta group for $981 million in April 2007. The deal was routed through Finsider International, a company incorporated in the UK, which held the Seas Goa shares. Vedanta bought 100% in Finsider. The dispute is pending before the Goa High Court.
- Idea Cellular: The Idea Cellular stake sale by US telecom operator AT & T to the Tata group have similarities to the Vodafone Essar case. The Tata Group, which later exited Idea Cellular, had bought a Mauritian subsidiary of AT & T that held 16.5% in Idea, for $150 million. The case is pending before the Bombay High Court.
- SABMiller: Foster had acquired 100% shares in Foster's India, the Indian arm of Foster's Australia. In 2006. The matter is pending before a Pune Court. In a separate case. Foster's Australia had approached India's Authority for Advance Ruling (AAR), on the question of whether sale of brand and patent attracts tax in India. AAR answered the question in the affirmative.

It can be observed from above that effect of amendment of Section 9 of the Income Tax Act will be felt not only on Vodafone Case, but also on other similar structured deals. However, it remains to be analyzed and understood that:

*Is the amendment to section 9 an absolute essential tool in hands of the Income tax authorities for improving revenues? Is it the only tool to keep a check on overseas mergers and acquisitions. Whether this section would really cause a dent in foreign investment directed towards India? Whether the foreign investors be discouraged to invest in India just because of its present tax regime? Whether India be allowed to be a tax haven? Whether such clarificatory retrospective amendment is constitutional? …..*

The Apex Court had laid down its opinion vide the Vodafone ruling and at the same time our finance minister is also clear on his stand which echoed in the Parliament [4] as:

- India cannot be turned into a Tax heaven just to attract foreign investments;
- The change is aimed at clarifying the legislative intent that if an asset is located in India and if capital gains are made by its transfer, then tax has to be paid;
- Power to amend vests with the Parliament;
- The companies are liable to withhold tax at the time of such transaction;
- Such retrospective amendment will not affect deals in which assessment has been closed or the

*3. As per the ET news report*

*4. As per the ET news report*

ones routed through the 82 countries with which India has DTAAs.

## CONCLUSION:

Amidst all the discussion, it will not be wrong to conclude that such clarificatory amendment is the prerogative of Government but at the same time Government may re-think its strategy as it may jeopardize the entire investment scenario. However, it can be observed that the steps recently taken by Government are directed towards implementing strong and concrete legislations to keep a tab on overseas mergers and acquisitions and also to prevent circumvention of law by big companies/ business houses to avoid their tax liability. ◆◆◆

# ALTERNATIVE INVESTMENT FUNDS REGULATIONS 2012

*Megha Kapoor and Mariyam*[1]

## INTRODUCTION

An investment fund is a firm that pools funds from a large number of small investors and invests the same for a fee. By aggregating the funds of retail investors into a specific investments, in line with the objectives of the investors, an investment company gives individual investors access to a wider range of securities and also achieving economies of scale by bringing down the trading cost. Private bankers, trust managers or other advisers often direct some or all of the assets of their clients towards fund investments.

***Types of Investment Funds***

Investment funds can be categorized as public funds or private funds. Public funds are open to public and offers high flexibility, liquidity and transparency. Most of these funds have an open-ended structure and allows investors to sell their share in the fund at any time as per their own sweet will. Further, law imposes condition on these kinds of funds to declare the net asset value [NAV] on regular basis.

However, in private funds the number of investors is limited and each of the investor contributing a significant amount of money. The amount contributed as a whole is then invested into a particular class of assets. These funds are however closed ended funds i.e. it requires the investment to be kept locked up for a fixed period of time and are usually selected by people having long term investment horizon.

As of now, there exists no mandatory provision with respect to registration of private investment funds. However, certain private funds are registered as venture capital funds and are eligible to avail various benefits as available through registration under SEBI (Venture Capital Funds) Regulations.

## SEBI (ALTERNATIVE INVESTMENT FUNDS) REGULATIONS, 2012

In order to regulate the private pooled investment funds established in India, SEBI has issued Alternative Investment Funds Regulations, 2012. The regulation has mandated the registration of all types of private pools of capital or investment funds (with some funds as exception) with the capital market regulator, SEBI and to obtain a certificate of registration. However, in case there is an existing fund falling within the definition of Alternative Investment Fund which is not registered with the Board, it may continue to operate for a period of six months from commencement of these regulations. Where any entity fails to make application for registration under the provisions of the regulations, it shall cease to carry on any activity as an Alternative Investment Fund.

The regulations describe various norms setting forth the eligibility, registration procedure and reporting requirements with respect to the funds and to regulate the formation of investment funds which raises capital from a number of High Net Worth investors. The funds could be formed as companies, trusts or body corporate including LLP structure.

***Meaning of Alternative Investment Fund***

As defined by the Regulations, an Alternative Investment Fund [hereinafter referred to as AIF] means any fund established or incorporated in India in the form of a trust or company or limited liability partnership or body corporate which is:

(i) a privately pooled investment vehicle which collects funds from investors, whether Indian or foreign, for investing it in accordance with a defined investment policy for the benefit of its investors; and

(ii) not covered under the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996, Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 or any other regulations of the Board to regulate fund management activities

The Regulations provides for a negative list which covers the entities which shall not be regarded as AIF. It

1. *Intern, LLB IInd Year, Amity Law School, Lucknow Campus*

includes family trusts, ESOP Trusts, Employee welfare trusts or gratuity trusts, Holding companies, funds managed by Asset Reconstruction Companies, Securitization Trust or any such pool of fund which is directly regulated by any other regulator in India.

***Need and Scope***

SEBI issued the regulations in order to create a structure where regulatory framework is available for all shades of private pool of capital or investment vehicles so as to channelize and better regulate the funds.

The regulations provides that irrespective of the operations being conducted as Private Equity, Real Estate or Hedge Funds, AIFs must register with SEBI under the AIF Regulations.

SEBI (Venture Capital Funds) Regulations, 1996 have been repealed. However, existing VCFs shall continue to be regulated by the VCF Regulations till the existing fund or scheme managed by the fund is wound up. However, Existing funds not registered under the VCF Regulations cannot float any new scheme without registration under AIF Regulations.

Further, the regulations intend to regulate private pools of capital where institutions or High Net worth Investors (HNIs) invest as AIF. The need for the framework arises in order to deter fraud, unfair trade practices and minimize conflicts of interest through disclosure, incentive structures, reporting requirement and legal agreements.

***Categories of funds***

Alternative Investment Funds shall seek registration in any one of the categories mentioned hereunder:

Category I AIF: AIFs which invests in start-up or early stage ventures or social ventures or SMEs or infrastructure or other sectors or areas which the government or regulators consider as socially or economically desirable and shall include venture capital funds, SME Funds, social venture funds, infrastructure funds and such other Alternative Investment Funds as may be specified.

Category II AIF: This category involves the AIFs which do not fall in Category I and III and which does not undertake leverage or borrowing other than to meet day-to-day operational requirements and as permitted in these regulations. Under this category private equity funds or debt funds for which no specific incentives or concessions are given by the government or any other Regulator shall be included.

Category III AIF: AIFs which employs diverse or complex trading strategies and may employ leverage including through investment in listed or unlisted derivatives. Under this category, hedge funds or funds which trade with a view to make short term returns or such other funds which are open ended and for which no specific incentives or concessions are given by the government or any other Regulator shall be included.

***Investment Conditions***

Investment in all categories of Alternative Investment Funds shall be subject to the following conditions:

a) AIF may raise funds from any investor whether Indian, foreign or non-resident Indians by way of issue of units;

b) each scheme of the AIF shall have a minimum corpus of Rs. 20 crore;

c) the AIF will not accept an investment of value less than Rs. 1 crore from an investor with an exception to employees or directors of the AIF or the employees or directors of the Manager, in whose case the minimum value of investment shall be Rs. 25 lakh;

d) the Manager or Sponsor will have a continuing interest in the AIF of not less than 2.5% of the corpus or Rs. 5 crore whichever is lower (5% or Rs. 10 crore in case of Category III AIFs);

e) the Manager or Sponsor shall disclose their investment in the Alternative Investment Fund to the investors of the Alternative Investment Fund;

f) Any fund or scheme of the AIF will not have more than 1000 investors;

g) The fund shall not solicit or collect funds except by way of private placement.

Apart from the above conditions, the regulations provide separate set of conditions for each of the three categories of AIFs.

***Miscellaneous Provisions***

- Units of an AIF may be listed on a stock exchange subject to a minimum tradable lot of Rs. 1 crore.
- Category I and II AIFs shall not invest more than 25% of the corpus in one Investee Company (not more than ten percent in case of Category III AIF)
- AIFs will need to provide investors with financial information of portfolio companies as also material

risks and how these are managed on an annual basis.

- Category I and II Alternative Investment Fund or schemes launched by such funds shall have a minimum tenure of three years. However, extension may be permitted subject to fulfillment of certain conditions. Category III Alternative Investment Fund may be open ended or close ended
- The regulations further empowers the AIFs to lay down the procedure for resolution of dispute which may arise between investors, Alternative Investment Fund, Manager or Sponsor through arbitration or any such mechanism as mutually decided between the investors and the Alternative Investment Fund

## CONCLUSION

The new regulations will help in monitoring the unregulated funds, encourage formation of new capital and consumer protection. Also, the alternative investments are sometimes used as a tool to reduce investment risk through diversification thereby helping the investors in the market. AIF Regulation shall endour to extend the perimeter of regulation to unregulated funds with a view of systematic stability, increasing market efficiency. ◆◆◆

# REMOVAL OF DIRECTOR

*Vijayta Parmar*

## INTRODUCTION

When a Company is incorporated under the Companies Act, 1956, it becomes a legal entity capable of exercising all its function. This impersonal creation of law can only act through some agency, and it must be human agency [1]. It being impracticable for all the members of the Company to conduct its affairs, therefore they elect their representatives for this purpose. These elected representatives are usually known as Directors.[2] Directors of a Company collectively are referred to as the "Board of Directors" or the "Board". Directors are described as trustees, agents, however they stand in fiduciary position towards the Company in regard to power conferred on them by the Articles.

## REMOVAL OF DIRECTORS

A director of a company can be removed from office before the expiry of his term by:

a) Shareholders

b) central government, or

c) the Company Law Board

## REMOVAL BY SHAREHOLDER

Section 284 empowers the shareholders of a company to remove a director by passing an ordinary resolution at a general meeting before the expiry of his period of office. It is pertinent to note that the right given under Section 284 is a statutory right which cannot be taken away by the memorandum, articles or by any contract or any other document and if it is sought to be taken away, such a provision will be void.[3] However, the following directors cannot be removed by the Company unless otherwise stipulated in the terms of their appointment:

a) A director appointed by the central government under section 408.

b) A director of a private company holding office for life on the first day of April 1952 whether or not he is subject to retirement under an age limit by virtue of the Articles or otherwise.

c) Director appointed in accordance with the principal of proportional representation, under section 265. This is to ensure that the directors appointed by the minority are not removed by a bare majority.[4]

d) A director appointed by a financial institution /bank under the terms of a loan agreement.

Apart from the directors appointed by the Central Government under Section 408, life directors holding office on 01.04.1952 and nominee directors appointed by the financial institutions, a company has full power under section 284 to remove a permanent director even if articles of association put restrictions on removal of permanent directors.[5]

To remove a director under Section 284 of the Act, certain essential requirements are to be followed. A Special notice is required of any resolution to remove a director or to appoint somebody in his place at the meeting at which he is removed.[6] On receipt of such notice, the company will immediately send a copy thereof to the director concerned. He may make any representation in writing and the copy of such representation may be sent by the company to every member. Where the copy of the representation is not sent to the members, on account of receiving the said representation too late in that case the director concerned may require the representation to be read at the meeting. However, a copy of the representation need not be sent to the members and representation need not be read out at the meeting, if on the

1. *Under Section 253 of the Companies Act, 1956, a body corporate, firm or other association of persons cannot be appointed as director.*
2. *Under Section 2 (13) of the Companies Act, 1956, a director "includes any person occupying the position of director by whatever name called".*
3. *Section 9 of the Companies Act, 1956, Act to override Memorandum, Articles, etc.*
4. *The company has availed itself of the option to appoint not less than two-thirds of the total number of directors according to the principle of proportional representation under Section 265 of the Companies Act, 1956.*
5. *Tarlok Chand Khanna v. Rak Kumar Kapoor, (1983) 54 Comp. Cas. 12 (Delhi)*
6. *Section 284(2)*

application either of the Company or of the aggrieved party, the CLB is satisfied that the rights conferred by the subsection are being abused to secure needless publicity for defamatory matter. Where no special notice of resolution to remove the directors in question was given, the resolution passed in extraordinary general meeting removing the directors was held to be invalid.[7]

A vacancy caused by such removal may be filled at the same meeting provided special notice of the proposed appointment has also been given. The director so appointed shall hold office till the removed director could have held office had he not been removed. If the vacancy is not filled in, at the meeting, it may be filled in by the Board as a casual vacancy. However, the director who has been removed shall not be appointed. Section 284, however, does not deprive a person removed there under of any compensation or damage payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director.

The shareholders cannot be restrained from calling a general meeting to remove existing directors and appoint new directors. The civil court has no jurisdiction to entertain the suit for removal of directors of a limited company as it relates to the internal management of the Company which is governed by the Act. In *Khetan Industries Private Limited v. Maju Ravindra Prasad Khetan*[8], one of the two issues before the High Court was whether the Civil Court has jurisdiction to entertain a suit for removal of directors of a company. The Court held that the shareholders have a right to remove directors under Section 284 of the Act, which provides machinery for enforcement of the right and Civil Court has no jurisdiction to entertain a suit for removal of directors.

Section 284 is attracted only where some charges against an individual director are made and the Company seeks removal of that director.

## REMOVAL BY THE CENTRAL GOVERNMENT

A director can also be removed from the office on recommendation of the Company law Board by the central government.[9] The Central Government may state a case against the person and refer the same to the Company Law Board with the request that Company Law Board may inquire into the case and record the decision as to whether or not such person is a fit and proper person to hold the office of director or other management office. The Central Government may make such a reference to the Company Law Board where it is of the opinion that there are circumstances suggesting :[10]

a) that any person concerned in the conduct and management of the affairs of a company is or has been in connection therewith guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law, or breach of trust; or

b) that the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices; or

c) that a company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade industry or business to which such company pertains; or

d) that the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest,

Every such reference will be made in the form of an application which must contain a statement of material facts. The person against whom such reference is made must be joined as a respondent to the application.

The Company Law Board in the interests of creditors, members directs the respondent not to discharge any of his duties until further orders. The court may also appoint a suitable person in place of the respondent. Every person so appointed is deemed to be a public servant.[11]

7. *Bhankerpur Beverages (P) Ltd. V Sarabhijit Singh, (1996) 86 Comp. Cas. 842*
8. *AIR 1995 Bom 43*

9. *Chapter IVA of the Companies Act comprising Section 388B to 388E provides for power of Centrl Government to remove managerial person of Company from office on recommendation of the CLB.*
10. *Section 388B of the Companies Act, 1956*
11. *Section 388C of the Companies Act, 1956*

At the conclusion of hearing of the case, Company Law Board shall record its decision stating specifically whether or not the respondent is a fit and proper person to hold the office of director. If the finding of Company Law Board is against the respondent the central government shall by order remove such a person from office.

The person who is so removed cannot hold office of a director for a term of five years unless the period is remitted. The person removed cannot claim any compensation for loss or termination of office.

## REMOVAL BY THE COMPANY LAW BOARD

On an application to the Company Law Board for prevention of oppression and mismanagement[12] the Company Law Board may terminate or set aside or modify any agreement between the company and the managing director, or any other director or manager for granting relief as it may think just and equitable. The Company Law Board may constitute an advisory board for proper management of the Company. On such termination, the director cannot serve the company in a managerial capacity for a period of five years from the date of the order of termination, without the permission of the Company Law Board. The director on removal cannot sue the company for damages or compensation for loss of office.

## CONCLUSION

The right given under Section 284 is a statutory right which cannot be taken away by the memorandum, articles or by any contract or any other document and if it is sought to be taken away, such a provision will be void. Section 284 is attracted only where some charges against an individual director are made and the Company seeks removal of that director. ◆◆◆

*12. Under section 397 & 398 of the Companies Act, 1956*

# VICARIOUS LIABILITY OF AUTHORIZED SIGNATORY

*Arpan Behl*

## INTRODUCTION

The legislature with the intention to bring the Negotiable Instruments Act, 1881[hereinafter referred to as 'Act'] in sync with the present times introduced many amendments in the Act in the year 2002. The legislature also introduced the said amendments, for the speedy disposal of the cases which had flooded the Indian Courts. The amendments were also introduced with the objective to promote efficacy of banking to ensure that in commercial or contractual transactions, cheques are not dishonoured and the credibility in transacting business through cheques is maintained. However, dishonour of cheque being a technical law, became amenable to multiple interpretations by various courts and the Hon'ble Supreme Court of India had to come to rescue many times and set the controversy at rest once for all. Its not surprising that Hon'ble Supreme Court of India is being burdened with questions pertaining to dishonour of cheques (Section 138 of the Act) and vicarious liability (Section 141 of the Act) every month. Be that, as it may be, the three bench of Hon'ble Supreme Court of India in the month of April rendered a landmark judgment in the case titled *"Aneeta Hada vs Godfather Travels and Tours Private Limited"* [1]

## QUESTION OF LAW FOR CONSIDERATION BEFORE THE SUPREME COURT

**"WHETHER AN AUTHORISED SIGNATORY OF THE COMPANY WOULD BE LIABLE TO BE PROSECUTED UNDER SECTION 138 OF THE ACT WITHOUT THE COMPANY BEING ARRAYED AS AN ACCUSED"**

## BRIEF FACTS AND HISTORY OF THE CASE

The Appellant i.e. Aneeta Hada, an authorised signatory of International Travels Limited, a company registered under the Companies Act, 1956, issued a cheque dated 17th January, 2011 for a sum of Rs.5,10,000/- in favour of the respondent, namely, M/s. Godfather Travels & Tours Private Limited, which was dishonoured as a consequence of which the said respondent initiated criminal action by filing a complaint before the concerned Judicial Magistrate under Section 138 of the Act. In the complaint petition, the Company was not arrayed as an accused. However, the Magistrate took cognizance of the offence against the accused appellant.

Being aggrieved by the said order, she invoked the jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure for quashing of the criminal proceeding and the High Court, considering the scope of Sections 138 and 139 of the Act and various other factors, opined that the ground urged would be in the sphere of defence of the accused and would not strengthen the edifice for quashing of the proceeding. Being aggrieved by the order of the order of the High Court, the Appellant assailed the Special Leave Petition on various grounds before a two bench of the Hon'ble Supreme Court of India. However, the division bench of

1. *CRIMINAL APPEAL NO. 838 OF 2008, Judgment announced on 27.04.2012. Most of the passages are form the judgment of the Hon'ble Supreme Court of India.*

2. *141. Offences by companies. – (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;*

*Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:*

*Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.*

the Hon'ble Supreme Court of India came to a dissenting opinion, and the matter came to be referred to the three bench of the Hon'ble Supreme Court of India.

## ARGUMENTS/CONTENTIONS OF THE PARTIES

### ARGUMENT OF THE APPLELLANT

The counsel of the Appellant, for supporting its contention that impleadment of the company is a categorical imperative to maintain a prosecution against the directors, various signatories and other categories of officers presented the following arguments before the Hon' ble Supreme Court of India:-

- The language of Section 141[2] of the Act being absolutely plain and clear, a finding has to be returned that the company has committed the offence and such a finding cannot be recorded unless the company is before the court, more so, when it enjoys the status of a separate legal entity. That apart, the liability of the individual as per the provision is vicarious and such culpability arises, ipso facto and ipso jure, from the fact that the individual occupies a decision making position in the corporate entity. It is patent that unless the company, the principal entity, is prosecuted as an accused, the subsidiary entity, the individual, cannot be held liable, for the language used in the provision makes the company the principal offender.
- The essence of vicarious liability is inextricably intertwined with the liability of the principal offender. If both are treated separately, it would amount to causing violence to the language employed in the provision.
- It is a fundamental principle of criminal law that a penal provision must receive strict construction. The deeming fiction has to be applied in its complete sense to have the full effect as the use of the language in the provision really ostracizes or gets away with the concepts like "identification", "attribution" and lifting the corporate veil and, in fact, puts the directors and the officers responsible in a deemed concept compartment on certain guided parameters.
- The company, as per Section 141 of the Act, is the principal offender and when it is in existence, its non-impleadment will create an incurable dent in the prosecution and further, if any punishment is inflicted or an unfavourable finding is recorded, it would affect the reputation of the company which is not countenanced in law.
- The decision in **Sheoratan Agarwal and Another vs. State of Madhya Pradesh**[3] [hereinafter referred to as Sheroatan Agarwal] has incorrectly distinguished the decision in **State of Madhya Pradesh vs. C.V. Parekh and Another**[4] [hereinafter referred to as C.V. Pareks] and has also misconstrued the ratio laid down therein. That apart, in the said decision, a part of the provision contained in Section 10(1) of the Essential Commodities Act, 1955 (for brevity 'the 1955 Act') has been altogether omitted as a consequence of which a patent mistake has occurred.
- The decision in Anil Hada (supra) has not appreciated in proper perspective the ratio decidendi in C.V. Parekh and further there is an inherent contradiction in the judgment as much as at one point, it has been stated that "the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company" but at another place, it has been ruled that "the accused can show that the company has not committed the offence, though such company is not made an accused".
- The terms used "as well as the company" in Section 141(1) of the Act cannot mean that no offence need be committed by the company to attract the vicarious liability of the officers in-charge of the management of the company because the first condition precedent is commission of the offence by a person which is the company.

*(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act, has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.*

3. *(1984) 4 SCC 352*
4. *(1970) 3 SCC 491*

## ARGUMENTS OF THE RESPONDENT

- If the interpretation placed by the appellant is accepted, the scheme, aims, objects and the purpose of the legislature would be defeated inasmuch as Chapter XVII of the Act as introduced by the Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988) is to promote efficacy of banking to ensure that in commercial or contractual transactions, cheques are not dishonoured and the credibility in transacting business through cheques is maintained. The fundamental purpose is to discourage people from not honouring their commitments and punish unscrupulous persons who purport to discharge their liability by issuing cheques without really intending to do so. If the legislative intendment is appositely understood and appreciated, the interpretation of the various provisions of the Act is to be made in favour of the paying-complainant.
- The reliance placed by the appellants on the decision in C.V. Parekh is absolutely misconceived. In the first case, the Court was considering the question of acquittal or conviction of the accused persons after considering the entire evidence led by the parties before the trial court but in the present case, the challenge has been at the threshold where summons have been issued. That apart, the 1955 Act and the Act in question operate in different fields having different legislative intents, objects and purposes and further deal with offences of various nature. In the case at hand, the new dimensions of economic growth development and revolutionary changes and the frequent commercial transactions by use of cheques are to be taken note of. Further, Section 141 creates liability for punishment of offences under Section 138 and it is a deemed liability whereas the criminal liability created for an offence under Section 7 of the 1955 Act is not a deemed offence.
- After the amendment of the Act, the unscrupulous drawers had endeavoured hard to seek many an escape route to avoid the criminal liability but this Court with appropriate interpretative process has discouraged the innovative pleas of such accused persons who had issued cheques as the purpose is to eradicate mischief in the commercial world.
- The company being a legal entity acts through its directors or other authorized officers and it authorizes its directors or other officers to sign and issue cheques and intimate the bank to honour the cheques if signed by such persons. The legislature in its wisdom has used the word 'drawer' in Sections 7 and 138 of the Act but not "an account holder". A notice issued to the Managing Director of the company who has signed the cheques is liable for the offence and a signatory of a cheque is clearly responsible for the incriminating act and, therefore, a complaint under Section 138 of the Act against the director or authorized signatory of the cheque is maintainable.
- There is no postulate under Section 141 of the Act that the director or the signatory of the cheque cannot be separately prosecuted unless the company is arrayed as an accused. The company, as is well-known, acts through its directors or authorised officers and they cannot seek an escape route by seeking quashment of the proceedings under Section 482 of the Code of Criminal Procedure solely on the foundation that the company has not been impleaded as an accused.
- The words "as well as the company" assumes significance inasmuch as the deemed liability includes both the company and the officers in-charge and hence prosecution can exclusively be maintained against the directors or officers in-charge depending on the averments made in the complaint petition.

## OBSERVATIONS OF THE HON'BLE SUPREME COURT OF INDIA

The Hon'ble Supreme Court of India held that Section 141 uses the term 'person' and refers it to a company. There is no trace of doubt that the company is a juristic person. The concept of corporate criminal liability is attracted to a corporation and company and it is so luminescent from the language employed under Section 141 of the Act. It is apposite to note that the present enactment is one where the company itself and certain categories of officers in certain circumstances are deemed to be guilty of the offence.

Further, the court opined that the word 'deemed' used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in charge of the company. What averments should be required to make a person vicariously liable has been dealt with in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another . In the said case, it has been opined that the criminal liability on account of dishonour of cheque primarily falls on the drawee company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied.

The Hon'ble Court further while comparing the observations made by three Judge bench of the Hon'ble Court in the case of C.V. Parekh and observations made by the division bench in the case of Sheoratan Agarwal observed that the Court in the case of C.V. Parekh clearly laid down the first condition is that the company should be held to be liable; a charge has to be framed; a finding has to be recorded, and the liability of the persons in charge of the company only arises when the contravention is by the company itself. Therefore, the decision of the two-Judge Bench in the case of Sheoratan Agarwal, wherein, the Hon'ble court observed that the company alone may be prosecuted or the person in charge only may be prosecuted since there is no statutory compulsion that the person in charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself was contrary to the express law laid down by the Hon'ble three bench Court in the case of C.V. Parekh case.

The Hon'ble Court further held that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. The vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

## CONCLUSION

**The Hon'ble Court thereby concluded that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative.** The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself unless where there is some legal impediment and the doctrine of lex non cogit ad ipossibilia gets attracted. **Therefore, the Hon'ble Court has made it clear that an authorised signatory of the company would be only liable to be prosecuted under section 138, if the company is arrayed as an accused.** ◆◆◆

# LEGAL PRESUMPTIONS: 30 YRS OLD DOCUMENTS PROVE THEMSELVES

*Vandana*

Though presumption has not been defined in law however Stephen defines it as a rule of law that court and judges shall draw a particular inference from a particular fact, or from a particular evidence unless and until the truth of such inference is disproved. Various acts have allowed legal presumption to be raised under different set of circumstances until the truth of such interference is disproved.

Examples of such instances include; A child born of a husband and wife living together is presumed to be the natural child of the husband; A person who has disappeared and not been heard from for seven years is presumed to be dead; An accused person is presumed innocent until proven guilty; Signature or any other part of a document purporting to be in the handwriting of any person may be presumed to be in that person's handwriting and that it was duly executed and attested by the person by whom it purports to be executed and attested.

*Sec 90 of the Evidence Act reads that:*

*Where any document, purporting or proved to be thirty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document, which purports to be in the hand writing of any particular person, is in that persons handwriting and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.*

*Explanation: Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin or if the circumstances of a particular case are such as to render such an origin probable.*

Ordinarily whenever the execution of a document is required to be proved, rules relating to the proof of execution of a document are required to be complied with. But where the document is proved to be thirty years old, compliance with the rules meant for the purpose of proving the execution of documents may be dispensed with.

The principle underlying this Section is that if a private document 30 yrs old or more, is produced from proper custody and is on its face free from suspicion the court may presume that it has been signed or written by the person whose signature it bears or in whose handwriting it purports to be and it has been duly attested and executed, if it purports so to be. In other words 30 yr old documents can prove themselves. However the period of thirty years is to be considered not from the date when the document is filed in the court, but from the date on which the document is tendered in evidence. ***Kesarapu Manikyalu v Venna Perumallayya; AIR 2000 NOC 20(AP)*** Court has held that the period of thirty years is to be calculated from the date of its execution to the date on which it was sought to be put to evidence.

Further is clarified that raising of presumption cannot be claimed as matter of right and a prima facie proof is necessary to show that the document is thirty year old. The expression may presume in this section clearly indicates that the Court has the discretion either to draw the presumption under this Section or not. The expression means that the trial court has discretion to raise the presumption or to require the document to be proved in the ordinary manner. That in ***Gomati v Meghraj Singh; AIR1933All 443*** the Hon'ble Court has held that *"The raising or not of a presumption under Section 90 as to the genuineness of a document is a matter for judicial discretion; and the Court must apply its mind in each case to the question whether it is a proper case to raise such presumption."*

That the confusion regarding the permissibility of taking presumption under Sec 90 with regard to copy and certified copy of the document was settled by the Supreme Court in ***Sri Lakni Baruan and Ors vs Sri Padma Kanta Kalita & Ors; AIR 1996 SC 1253*** whereby the Hon'ble Apex Court has held that *"so far as applicability of presumption arising from Sec 90 of the Evidence Act in respect of copy of the old document is concerned, the earliest decision of the Indian court was made in 1880 in Khettar vs Khettar Paul. Later on in the decision of various High Court the presumption under Section 90 was also made applicable to the certified copy. The Privy Council, upon review of the authorities, however did not accept the decision rendered in khetter and other decision of the High Court, where the presumption was attached also to copies, as correct. It was indicated that in* *view of the clear language of Sec 90 the production of particular document would be necessary for applying the statutory presumption under Sec 90. If the document produced was a copy admitted under Sec 65 as secondary evidence and it was produced from proper custody and was over 30 years old, then the signature authenticating the copy might be presumed to be genuine; but production of the copy was not sufficient to justify the presumption of due execution to the original under Sec 90. In this connection reference may be made to Seetnayya vs Subramaiya and Basant vs Brijraj. In view of these privy Privy Council decisions, disproving the applicability of presumption under Sec 90 to the copy or the certified copy of an old document, in the subsequent decisions of the High Courts, It has been consistently held by different High Courts that production of a copy does not raise the presumption under Sec 90. The position since the aforesaid Privy Council decisions being followed by later decisions of different High Courts is that presumption under Section 90 does not apply to a copy or a certified copy even though thirty years old; but if a foundation is laid for the admission of secondary evidence under Sec 65 of the Evidence Act by proof of loss or destruction of the original and the copy which is thirty year old is produced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine".* ◆◆◆

# REGULATIONS RELATING TO IMPORT OF DIETARY/ FOOD SUPPLEMENTS IN INDIA

*Ruchita Anand*

## INTRODUCTION

The Food Safety and Standard Act 2006 (FSSA) is a single reference point for all matters relating to Food Safety and Standards in India. It consolidates eight laws governing the food sector in the country and establishes the Food Safety and Standards Authority (FSAI) to regulate the sector and other allied committees. FSSA is aided by several scientific panels and a Central Advisory Committee to lay down standards for food safety. These standards include specifications for ingredients, contaminants, pesticide residue, biological hazards, labels and others. The responsibility of framing and regulating standards for nutraceuticals is to rest with the FSAI as outlined in the FSSA. The authority is in charge of categories like functional foods, nutraceuticals, dietetic products and other similar products.

## REGULATORY PROVISIONS

In accordance with FSSA, nutraceuticals, functional food, dietary supplements are defined in Section 22 of the FSSA and it regulates the manufacture, sale, distribution or import of such products. These products include novel foods, genetically modified article of food, irradiated food, organic food, and food for special dietary uses, functional food, nutraceuticals and health supplements.

It is categorically stated under the FSSA that such products should not claim to cure or mitigate any specific disease, disorder or condition (except for certain health benefit or such promotion claims) as may be permitted by the regulations made under this Act;

Chapter V of the FSSA deals with provisions relating to import and Section 25 states that all imports of articles of food shall be subject to this Act and that no person shall import into India any article of food for the import of which a licence is required under any Act or rules or regulations, except in accordance with the conditions of the license.

With regard to licensing, Section 31 of the FSSA deals with Licensing and Registration of food business and states that any person desirous to commence or carry on any food business[1] should make an application for grant of a licence to the Designated Officer in the manner containing the particulars and fees as may be specified by regulations". The forms for registration and licensing are also available on the FSSAI website[2].

The MINISTRY OF HEALTH AND FAMILY WELFARE (Food Safety and Standards Authority of India) vide its notification dated 1st August, 2011 with regard to FOOD SAFETY AND STANDARDS (LICENSING AND REGISTRATION OF FOOD BUSINESSES), REGULATIONS 2011 laid down certain regulations with regard to application and grant of Import License.

- No person shall commence any food business unless he possesses a valid license.
- Non-compliance with this provision by a Food Business Operator[3] will attract penalty under section 55 of the Act.
- License for commencing or carrying on food business, which falls under Schedule 1 (attached as Annexure A), shall be granted by the Central Licensing Authority. Schedule 1 lists Importers importing food items including food ingredients and additives for commercial use thereby the

1. *Defined under Section 3 (n) of the FSSA as "Food business" means any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food, import and includes food services, catering services, sale of food or food ingredients";*
2. *http://www.fssai.gov.in/Portals/0/Pdf/Application%20for%20Registration%20&%20Renewal.pdf*
3. *Defined under Section 3(o) of FSSA as "food business operator" in relation to food business means a person by whom the business is carried on or owned and is responsible for ensuring the compliance of this Act, rules and regulations made there under;"*

import of dietary supplements falls under the purview of Central Licensing Authority.

- An application for the grant of a license shall be made in Form B of Schedule 2 to the concerned Licensing Authority and it should be accompanied by a self-attested declaration in the format provided and copies of documents mentioned along with the applicable fees prescribed.
- A license shall be issued by the concerned Licensing Authority within a period of 60 days from the date of issue of an application ID number as provided in subsection (3).

Since most of the dietary/ food supplements contain Vitamin E they may be considered as a Scheduled Formulation under DPCO, 1995 and hence be subject to the MRP fixation as calculated by the National Pharmaceutical Pricing Authority in accordance with the formula laid down for the calculation of retail price of Scheduled Formulations under Para 7 of the DPCO, 1995.

In a current article by Economic Times dated May 15, 2012[4] it was reported that with regards to the dietary supplements available in India such as Ranbaxy's Revital, Piramal Healthcare's Supractive, Dabur India's Nutrigo and Modicare's Well multi-vitamin, the Government is planning a crackdown on drug companies selling medicines under the garb of dietary supplements, which are not regulated as it allows them to sell the product at a price more than the maximum retail price fixed by the government for the ingredient drug and also helps them avoid inspection by the authorities. Most food and health supplements contain vitamins A, B1, B2, C and E, which are among the 74 drugs whose prices are fixed by the National Pharmaceutical Pricing Authority (NPPA), the drug price regulator. The Department of Pharmaceuticals and the NPPA have now taken up the matter with the Drug Controller General of India (DCGI) and food regulatory bodies to plug this loophole. According to an official of the Food Safety and Standards Authority of India, experts will examine whether such products are being used as drugs or supplements, and those qualifying as drug will be brought under price control.

The issue as to whether dietary supplements containing vitamins A, B1, B2, C and E, which are among the 74 drugs whose prices are usually fixed by the drug price regulator (NPPA) are under the purview of the Authority or not is a matter still under consideration and the Government is yet to come out with a clarification on the issue. At the moment however, several drug makers have secured approval for dietary supplements under the FSSA, where price and other regulations applicable on drugs, do not apply. It is noteworthy that the nutraceuticals segment in India is expected to touch $5 billion by 2015, from $2 billion at present and that dietary supplements are big revenue earners for drug makers. ◆◆◆

4. *http://articles.economictimes.indiatimes.com/2012-05-15/news/31711527_1_dietary-supplements-price-control-drug-price-regulator*

# INDIA: THE NEXT HOT SPOT FOR CLINICAL TRIAL

*Ms. Priyanka Rastogi*

Clinical trials play a vital role for the development of new drugs, formulations, drug delivery systems, dosage regimen, surgical and diagnostic techniques, devices and therapies. India is making a place for itself in the international pharmaceutical ground as a preferred destination for leading global companies for conducting clinical trials. It is a challenge for both the government and the private sector to create equilibrium between ethics and trade. Indian government has played its role by standardizing the guidelines for well-organized conduction of clinical trials and the private sector, which includes pharmaceutical companies and contract research organizations (CRO), has succeeded in conducting global clinical trials in India. In the present IPR regime, importance of timely bound Clinical Trials has become extremely important, as shown by the increasing number of Global studies.

According to a joint study by international consultancy Ernst & Young and Federation of Indian Chambers of Commerce and Industry, India now participates in over 7% of all global Phase III and 3.2% of all global Phase II trials[1]. Furthermore, a report by market research firm RNCOS says that the clinical trial outsourcing market in India is forecast to grow at a compound annual growth rate of over 30% during 2010-2012 to around $600 million by 2012[2]. Besides, availability of skilled manpower and good medical infrastructure will boost the number of clinical trials from 1300 in 2009 to more than 1900 by 2013.

## INTRODUCTION

Clinical trials are studies performed with human subjects to test new drugs or combinations of drugs, new approaches to surgery or radiotherapy or procedures to improve the diagnosis of disease. A protocol is a vigilantly designed and controlled study plan to protect the health of the participants as well as to answer research related doubts. During trial, comprehensive information is come to know about an experimental treatment to determine its safety and effectiveness in humans. The ethical and legal codes that govern medical practices are also applicable to clinical trials. As a clinical trial progresses, the results are accessible in scientific meetings, medical journals, and to specific governmental agencies.

There are two main regulatory bodies, who are involved in the drug approval process in India; local institutional review boards (IRBs) called the Independent Ethics Committee (IEC) and a national regulatory body, the Drug Controller General of India. The studies of new chemical entities (NCEs) must first be approved by the local IRB and then submitted to the DCGI for additional approval. ICMR's Ethical Guidelines for Biomedical Research on Human Subjects and Indian GCP guidelines are followed as an ethical and scientific quality standard for the design and conduct of trials involving human beings. The Ministry of Health, along with DCGI and ICMR has come out with these guidelines for conducting clinical trial in human beings.

It is obligatory to conduct pre clinical and clinical trials for approval of drugs by any regulatory authority. Most importantly the clinical trial data will be accepted by the regulatory authority if it has been conducted in a registered clinical trial centre.

In India, the central government, via Central Drugs Standard Control Organization(CDSCO) largely works on developing standards and regulatory standards for drugs, diagnostics and devices; regulating the market authorization of new drugs all in an effort to standardize clinical research in India and bring safer drugs to the market .

## WHAT MAKES INDIA SO UNIQUE?

India has emerged as a **"hot spot"** for carrying out clinical trials and creates a center of attentions for sponsors due to

- a rich biodiversity and gene pool ; strong availability of study subjects across major therapeutic sections(e.g. the highest number of cancer and diabetes patients are in India),

1. *Ernst &Young/FICCI, The Glorious Metamorphosis: Compelling Reasons for Doing Clinical Research in India, September 2009*
2. *RNCOS, Booming Clinical Trials Market in India, September 2009*

- India possesses quality data at a viable cost,
- high level of ICH-GCP and USFDA standard compliance,
- a favorable regulatory ambiance and expansion speed that allows the conduct of global trials, duty-free imports of drugs intended for use in trials, bioequivalence studies for export of data, etc;
- There is no deficiency of professionals trained in the field of medicine;
- English is a primary language of education and communication among Indians;
- cost competitiveness (depending on the number of patients and investigators, and the amount of analytical work completed in India, most sponsors enjoy a 30-50% cost advantage over a similar trial in Europe or the US);
- increasing occurrence of diseases;
- Central laboratories that are certified by international organizations are also available.

## WHAT SHOULD BE NEXT?

India's potential as a major nucleus for global clinical research has been acknowledged and thus, the regulatory bodies have to bump up themselves to meet international standards. Some main issues that have been recognized as areas need to be upgrade are talked about below:

- There is a need for hospitals to create special beds for clinical trials Research institutions and pharmaceutical companies should establish clinical trial centers that do not overlap with the existing R&D facilities.
- There is acute manpower attrition in India. Qualified and experienced clinical trial investigators are the need of the hour. Also there is a requirement for experienced nurses, biostatisticians, researchers and coordinators in every clinical trial and India must train the manpower available in these areas to suit clinical trial evaluation.
- India has a crisis of auditors as well, who can audit the effectiveness of a clinical trial.
- Effective data collection, storage and maintenance need to be strategically adapted in India.
- India needs to implement a robust GCP-compliant ethical frame work and environment. Although, the Indian Government has revised the ethical guidelines for clinical trials in 2007, CROs must practice and follow the guidelines diligently.[3]
- Opportunities will become limited unless there is a very strong patent law and mechanism to enforce it. Drafting patent laws with the help of industry experts and its implementation is highly essential.
- The regulatory bodies have to elevate themselves to meet international standards.
- The 'Phase lag' had to be maintained before any clinical trial of a foreign made molecule. In other words, a molecule/product developed in a foreign country should never be tested in India for a phase-I trial until the host country where the molecule was invented had not undertaken a full fledge phase-II trial[4].

## FUTURE PROSPECTS OF CLINICAL RESEARCH

With increasing number of trials carried out in India, future of clinical research in India is vivid. Successful completion of the current clinical trials will not just provide plenty of treatment options for various diseases, but will also reduce the cost of widespread drugs. Economy will be high as every active drug molecule will have the purchasers who are willing to pay millions of dollars in India and overseas with the positive clinical trial result. India has already demonstrated its capabilities in discovering and developing molecules. This trend is expected to continue.

New draft guidance of the FDA for industry on adaptive design clinical trials defines an adaptive design clinical trial as "a study that includes a prospectively planned opportunity for modification of one or more specified aspects of the study design and hypotheses based on analysis of data (usually interim data) from subjects in the study." Analyses of the accumulating study data are performed at pre-planned time points within the study, with or without formal statistical hypothesis testing.[5]

3. *Can India handle complex clinical trials? Bio Spectrum - Asia Edition [Serial online]. 2007April 16;*

4. *Bagla P. Despite note that AIDS vaccine had failed, India changed rules and continued trials. The Indian Express. 2007 Dec 23; p.1*

Regulatory agencies in the major markets have developed decisive positions on adaptive design clinical trials. Many software development and information technology companies are developing software and clinical trial management system solutions to support adaptive design clinical trials[6]. Future prospects of these adaptive designed clinical trials are encouraging for both industry and regulatory agencies as well as from the patients' perspective.

## CONCLUSION

India with its intellectual powerhouse, patient population, world-class scientific and technical skills and discipline is an eye-catching target for international players for cost and time suppression. This is the reason why MNCs are outsourcing clinical research and trials to India. Due to significant increase in clinical research institutes, cost of drugs has reduced greatly. Even poor individuals can now afford the medicines, which were earlier available at high prices. India needs to build greater capability and capacity; this would include a sound infrastructure system, favorable regulatory structure, well trained doctors, investigators and researchers, and the highest degree of compliance with ICH-GCP standards viz ethics committees and investigators.

There should be native R&D to stimulate Indian patient centric drug discovery and development. Moreover, awareness should be instilled in the education system in the country to absorb the culture of conducting scientific and ethical clinical research.

Besides major research like the stem cell trials and studies for AIDS and cardiovascular diseases, there is a vast possibility for potential therapies for various disorders to be developed in India in the near future. According to ICH GCP principles, the rights, safety, and well-being of volunteers are the most important considerations, and their well-being should succeed over the benefit of science and society.

Further there is an increased need for review and audits of clinical trials in India, and greater prominence on compliances is required, which will only come with raised wakefulness. Priorities would be the establishment of clearer guidelines, especially for dealing with adverse reactions to drugs taken during a trial. ◆◆◆

5. *Guidance for industry: Adaptive design clinical trials for drugs and biologics. Washington DC, USA: Food and Drug Administration; 2010. Food and Drug Administration.*
6. *Yang R. Clinical trial management: Enabling operational efficiency. Express Pharma. 2010; 5: 16–7.*

# SHIFTING OF ONUS

Himanshu Sharma

## INTRODUCTION

Burden of Proof is the legal obligation on a party to prove the allegation made by him against another party. The burden of proof in a case lies with the plaintiff unless defendant counter with a factual claim based on the allegation, that is when categorical acceptance is made by the defendant and he is disputing a factual position[1].

The burden of proof is often associated with the Latin maxim "semper necessitas probandi incumbit ei qui agit," which means "the necessity of proof always lies with the person who lays charges." This is a statement of a version of the presumption of innocence that underpins the assessment of evidence in some legal systems, and is not a general statement of when one takes on the burden of proof. The burden of proof tends to lie with anyone who is arguing against received wisdom, but does not always, as sometimes the consequences of accepting a statement or the ease of gathering evidence in its defense might alter the burden of proof its proponents shoulder. The burden may also be assigned institutionally[2].

As per section 101 of the Indian Evidence Act 1872 "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

Burden of proof can define the duty placed upon a party to prove or disprove a disputed fact, or it can define which party bears this burden. In criminal cases, the burden of proof is placed on the prosecution, who must demonstrate that the defendant is guilty before a jury may convict him or her. But in some jurisdiction, the defendant has the burden of establishing the existence of certain facts that give rise to a defense, such as the insanity plea. In civil cases, the plaintiff is normally charged with the burden of proof, but the defendant can be required to establish certain defenses[3].

1. *http://www.legal-explanations.com/definitions/burden-of-proof.htm*
2. *http://www.enotes.com/topic/Legal_burden_of_proof*
3. *http://legal-dictionary.thefreedictionary.com/burden+of+proof*

## DIFFERENCE BETWEEN BURDEN OF PROOF AND ONUS OF PROOF

Here it is pertinent to mention that even though terms 'Burden of proof & Onus of proof' are used interchangeably in numerous judgments by Indian Courts but there is a difference between the burden of proof and onus of proof. The rule regarding the Burden and onus of proof can be summarized as below:

- Burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts.
- Burden of proof would be on a party whose suit would fail if no evidence was let in.
- Burden of proof on the pleadings of a party never shifts to the other party.
- Onus of proof by a party would cease the moment opposite party admits the transaction.
- When a party produces evidence in support of his statement, onus would shift on the opposite party to adduce rebutting evidence to meet the case made out by the other party.
- In civil cases, onus of proof is never fixed permanently, but it would fluctuate very frequently.

There are numerous cases wherein the 'burden of proof' has been used in place of 'onus of proof' interchangeably.

## BURDEN ON THE CASES OF TRADEMARK INFRINGEMENT

The Indian Courts on the numerous occasions dealt with the question of burden and onus of proof and shifting of the same during the proceeding. Dealing with the question of burden of proof in an action for infringement of trade mark, in ***Kaviraj Pandit Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories***[4], the Supreme Court observed as follows:

4. *[1965]1SCR737*

"...In an action for infringement the onus (burden of proof) would be on the plaintiff to establish that the trade mark used by the defendant in the course of trade in the goods in respect of which his mark is registered, identical or is deceptively similar. "

Once the fact, that the defendant is infringing his trademark is established by the plaintiff, the onus shifts on the defendant to negate the claim. The burden to prove his case remains with the plaintiff but it is the onus that does keep on shifting during the infringement proceeding.

## IN THE PROCEEDING FOR TRADEMARK OPPOSITION

In opposition proceedings if the Opponent case is based upon his registered trademark or the use of the same and the reputation then these facts has to be established by the Opponent and once these facts are established by the proper evidence then onus shift to the Applicant to prove that his adoption was honest and the trademark applied is not similar to the Opponent's trademark and will not create any confusion and deception in the market.

In case of ***Gupta Enterprises Vs. M/s Gupta Enterprises and Anr***[5] it was held by the Hon'ble High Court of Delhi that "It is well settled principle of law that in an opposition proceeding the burden is ultimately upon the applicant to establish that he is entitled to the registration of the trade mark applied for. Where the opposition is based on the alleged registration of the trade mark or the use and reputation of the opponent's trade mark or on any other fact, the burden of establishing those facts lies upon the opponent. It is only when the opponent initially discharges his burden that the onus shifts to the applicant. In this case opponent miserably failed to discharge his initial burden. Hence, Registrar was not justified in allowing the opposition".

In **Paras Corporation vs. Khemraj Devaramji Sudvesa (Shree Charbhuja Products) & the Joint Registrar of Trade Marks**[6]**:** There was an issue about confusion and deception since the mark 'FEMINA' used by both the Petitioner & Defendant were identical. It was held in such cases when the marks are identical; there is every possibility of confusion and deception being caused. The burden to prove that the registration will not cause confusion or deception will be on the petitioner by user and reputation; the burden will shift to the applicant/defendant, if discharged by the Petitioner.

In **Metropolitan Trading Company, Vs. Shri Mohanlal Agarwal (Shri Ram Baboo Garg), Mrs. Kusumlata Garg, Anil Kumar Garg, and Registrar of Trade Marks**[7] It was held that "Once the opponents have proved that they are the prior users of the mark in question then the burden (onus) shifts on to the applicant to prove that there will be no confusion or deception by use of the mark by them."

The rules related to the opposition under the Trade Marks rules, 2002 provides the equal opportunity to both opponent and applicant to prove their case but the ultimate burden remains with opponent to prove that the registration of the trademark of the applicant will create the confusion and deception in the market and would cause irreparable loss to reputation of his business.

## RECTIFICATION PROCEEDINGS:

In cases of rectification the burden of proof is on the party challenging the validity of a trademark. The plaintiff has to prove that registered trademark does not deserve to be on register due to violation of one or more provision of the Act. A mark that has been registered under the provision of the Act is presumed to be valid until the contrary is proved as per the Section 31.

In case of **Shri Anand Bansal, (Sole Proprietor Ansul Industries) Vs. Shiva Tobacco Co. and Registrar of Trade Marks, Trade Marks Registry**[8] It was held by the court of law that an applicant who seeks relief under Clause (b) or Clause (c) of Section 32 of the Act, the onus (burden) of proof is on him to show that the trade mark attracts either of those provisions. The observations of Justice B. Mukherjee made in Formica case (1971) 75 CWN 663 were quoted:

*"Mark on the register, you want to take off the Register? The onus (burden) is then upon you to prove that the mark deserves to be taken of so. This is plain common sense too. I am on the register. Sure enough, it is not for me to prove that I should be where I am and that the entry in my favour*

*5. AIR1998Delhi232*
*6. MIPR2008(1)13*
*7. MIPR2008(1)24*
*8. MIPR2007 (1)90*

*is valid. Were I to prove so, why register? Registration becomes valueless."*

The applicant, as mentioned earlier, has not stated anything about this in his pleadings. Further, the burden of proof is on the applicant who comes to the Board for rectification of the mark on the ground that the trade mark was not distinctive of the goods of the registered proprietor on the date of filing of the petition. A trade mark must be removed from the register on an objection under Section 11 if on the date of registration the use of mark was likely to cause deception or confusion or registration was otherwise obtained in contravention of that section.

In cases of infringement where the validity of a mark comes into question the court as per section 124 stay the suit for the time and provide the time to the party to initiate the rectification proceeding against the mark alleged to be invalid. In these cases the party alleging the mark to be invalid has the burden to prove the same. The alleged mark would be presumed to be valid until proven contrary.

## CONCLUSION

The burden of proving a fact lies with the person alleging the same and it does not shift. It is the onus which keeps on shifting in a case. In cases related to the trademark law the onus keeps on shifting from the plaintiff to defendant. In opposition proceedings, it is the Opponent who has to prove that the registration of the trademark would be against the law but once the same is established by the opponent the onus shifts on the applicant to negate the claim. In rectification proceedings, it is on the person alleging the mark to be the one that is not capable to remain in the register due to one reason or another and when the same is established by the applicant the onus shift to the registered proprietor to prove the contrary. Whereas in the infringement case the burden remains on the Plaintiff to prove that the impugned mark is similar to his mark and use of the same is causing the injury to his business once it is established by the plaintiff the onus shifts to the defendant to deny the said claim. ◆◆◆

# THE COPYRIGHT (AMENDMENT) BILL, 2012

*Devanshi Grover & Richa Lalwani* [1]

## INTRODUCTION:

Indian Parliament in the concluding phase of its current Budget session has unanimously passed the Copyright (Amendment) Bill 2012, and has taken a huge step towards the major changes in the existing Copyright Act, 1957.[2] The bill now needs its assent from the President and notification to become the law of the land.

Kapil Sibal, Union Minister of HRD, while introducing the bill divided the total of 39 proposed changes into seven broad areas. These are –

1. The rights of authors and music composers
2. The rights conferred to visually impaired.
3. Extension of compulsory licensing regime.
4. Statutory licenses in respect of cover version recordings and statutory license for broadcasters.
5. Making the copyright law consistent with WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
6. Changes in the fair dealing provisions.
7. Prevention against new technologies that infringe the copyright.

The draft of the Bill had a provision for profit sharing for a principal director of a cinematograph film. To ensure that, the amendments in Sections 2, 17 and 26 were made. Section 2(d) defines author and in Sec 2(d)(v), author for the purpose of a cinematograph film and sound recording is a producer. But the amendment in prior Bill added 'principal director' to the meaning of author for the purpose of cinematograph films. This entailed a share in copyright ownership for principal director. The reason for such an amendment was cited to be the huge contribution of a director in the making of a film. However the Standing Committee struck down this amendment because they thought that Indian Industry is still not ready to give directors their share. Further in section 17, where amendments of similar nature were made to make a principal director a joint first owner of the copyright were deleted from the present bill. Section 26 which determines the term of the copyright in cinematograph films, also had amendments proposed in the earlier draft for the director which now have been totally removed.

For the purpose of *visually impaired citizen's rights,* a new Section 31B has been added that lays down a process whereby anyone working for the benefit of such disabled person can get the license to use a copyrighted work for the benefit of these people, as long as such work is non-profit. The draft had a requirement for the applying organization to be registered under Income Tax Act and other such necessary enactments as prescribed. In the Final Bill, such a requirement has been removed and now the application can be made by any person and not necessarily an organization, to obtain the compulsory license for the benefit of such persons. The change seems to be minor but it would give major results in the sense that now anybody working for the benefit of the visually impaired can get a license without being an organization registered under any authority. This has removed a major hassle in the way to ensure the rights of these people and making it even more convenient and simpler. The section provides the procedure as to how such an application is to be disposed off. Also under Sec 52, a new sub clause 52(1)(zb) has been added under which access to any copyrighted material is allowed for the benefit of persons with disabilities and any organization working for the benefit of persons with disabilities can access the same as long as it is done on a non-profit basis and with reasonable steps being taken to prevent entry of reproductions of the copyrighted work into the mainstream. The provision is much more elaborative than the earlier versions. These changes will add greatly to the welfare amendments in the copyright law of India. Cited as a 'progressive exception'[3], this step is a commendable job on the part of the Parliament and

1. *Student of NLIU Bhopal IV Year*
2. *Copyright Bill Cleared; artists entitled to lifelong royalty, The Hindu, May 23, 2012.*
3. *Pranesh Prakash, Analysis of the Copyright (Amendment) Bill 2012, The Centre for Internet and Society (May 23, 2012) ,http://cis-india.org/a2k/blog/analysis-copyright-amendment-bill-2012.*

distinguishes the Copyright Law of India from among the other jurisdictions.

To accord the authors similar status as that of the owner of the copyright, amendments have been made which have been greatly discussed in our earlier issue. However one additional aspect of this which did not exist in the previous version of the bill is the change made in the organizational set-up of the Copyright Societies under Section 33. The current Bill includes proviso to Sec 33(1) which makes any business of granting licenses in case of literary dramatic musical and artistic work in cinematograph film or sound recording to be done through a Copyright Societies only. Moreover by the way of an additional clause 3A, a copyright society will be in existence for a period of 5 year after which it has to get itself re-registered as per the procedure prescribed; and such decision of re-registration will be done subject to the continued collective will of the members of society.

A new provision Sec 33A - Tariff Scheme by Copyright Societies has been introduced. The provision apart from this, also lays down the procedure to be followed by any person who is aggrieved by the published scheme. In Sec 34 and Sec 35 dealing with 'Administration of rights of owner by Copyright society' and 'Control over the copyright society by the owner of rights' respectively, 'owner of rights' has been replaced by 'author and other owner of rights'. Further two clauses have been added to Sec 35 that seek to ensure equal membership of authors with other owners and no discrimination regarding the management. These clauses did not exist in the original version of the Bill. This places authors on an equal footing with the owner of the rights when it comes to a Copyright Society.

Rights Management Information or Technology Protection Measure, which is a system where the copyright owner puts certain technological locks on his work thereby stopping that work from being illegally copied or transferred etc., have been introduced in Indian Copyright Law. A new clause (xa) has been added in Section 2 which defines it. Section 65A and Sec 65B deal with protection of these digital locks, and punishment in case of violation. These have become extremely popular around the world in the light of the extent of digitization happening.

Section 53 which deals with the Importation of the infringing copies has been totally changed. The new provision involves notice to be given to the Commissioner or any authorized officer of the Central Board of Excise and Customs by the author or his agent. The section gives a procedure for filing this notice and how it shall be dealt with.

## OTHER CHANGES

Some of the other changes have also been made that do not exactly fall within the broad areas given above. To name a few,

- Copyright Board will be having only 2 members apart from Chairman now, instead of 14 which was the maximum limit previously.
- Sec 21 of the Copyright Act, which deals with the right of authors to relinquish copyright, have been amended. While earlier one could only relinquish parts of one's copyright by submitting a form to the Registrar of Copyrights, now a simple public notice suffices.
- Also, Sec 30 of the Act, which required licenses to be in writing and signed, now only requires it to be in writing.
- Finally, in Sec 18 and Sec 19 dealing with the 'assignments of copyrights' and 'mode of assignments' respectively, the existing bill makes a provision for different clauses for rights of author of literary and musical work in a cinematograph film and rights of author of literary and musical work not forming the part of a cinematograph film. This seems to be an intelligent move from the point of view of the legislative drafting. ◆◆◆

# LICENSE OF RIGHTS IN PATENTS

*Ms. Suchi Rai*

"License of Rights" seems a good option for Patentees, who are seeking to license their patents, those who do not have resources and time for commercialization of Patents and want to make benefit out-of their Patents. Although other countries have provision for "License of Rights" in Patents, India does not have this provision in Patent Law.

## INTRODUCTION

License of Right Proposal means the patent proprietor can request for making an entry in the register of patents maintained by Patent office that the Patent is available for license. Thereupon, interested parties can apply for getting license under the Patents of their interest which are endorsed with "License of Right" in the register of Patents. The Patentee gets benefit also from Patent Office, for registering his patents to be endorsed with the term "License of Right", by getting 50% rebate on renewal fee for the term of the Patent.

There is no provision for the Registration of "License of Right Proposal" in Indian Patents Act, 1970. Here, it would be worth mentioning that prior to Second Amendment [2002] in Indian Patent Act, 1970, relevant provision was available under Section 86. But after the amendment in 2002 the provision has been deleted. The amended Patents Act, 1970 does not have provisions with respect to "Licenses of Rights".

## PROVISION IN OTHER COUNTRIES:

Provision with regards to "License of Rights" in Patents is available under the Patent Laws of England, Germany and Singapore.

[1]Section 46 of the UK Patent Act 1977 provides a patent proprietor with the option of having an entry made on the register that licenses are available as of right under a patent. By having a patent endorsed "licenses of right", a patent proprietor effectively offers any third party the opportunity to have a license under the patent, on reasonable terms. If terms of a license cannot be agreed between the parties then the UK Patent Office will set the license terms. The patent owner in return for registering his patent gets some rebate in the renewal fees that he is supposed to pay. Section 47 of the Act allows the proprietor to cancel the entry that licenses are available as of right provided that the outstanding renewal fees are paid in full, as if the entry had never been made in the first place, and that there is no existing license under the patent. If licenses have been granted under the Patent then a cancellation of the 'licenses of right' entry requires the consent of all licensees.

## INDIAN SCENARIO:

**License of right provision was abolished being non-compatible with TRIPS.**

A license of right provision had a place in Patent Act of 1970.

The Patent Amendment Act 2002 abolished provision with regards to Licenses of Rights, as it was found to be inconsistent with some of the provisions of TRIPS Agreement i.e. Article 31 (a) of TRIPS Agreement which lays down that use of Patent without authorization of the patentee to be considered only on individual merit.

[2]The governmental power to supersede a patent to provide urgently required medicines to public under the 'License of Right' provision–(Section 86 of the old Indian Patents Act 1970) was removed because it was considered to be non-compatible with TRIPS.

**In the Act of 1970, following relevant provisions were there which now stands repealed:**

[3]86. Endorsement of patent with the words "Licenses of Rights"

(1) At any time after the expiration of three years from the date of the sealing of a patent, the Central Government may make an application to the Controller for an order that the patent may be endorsed with the words "Licenses of right" on the ground that the reasonable requirements of the public with respect to the patented invention have

1. *www.itssd.org*

2. *http://www.idma-assn.org/patents/html*
3. *http://ipindia.nic.in/ipr/patent/patents.htm*

not been satisfied or that the patented invention is not available to the public at a reasonable price.

(2) The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price, may make an order that the patent be endorsed with the words "Licenses of right".

(3) Where a patent of addition is in force, any application made under this section for an endorsement either of the original patent or of the patent of addition shall be treated as an application for the endorsement of both patents, and where a patent of addition is granted in respect of a patent which is already endorsed under this section, the patent of addition shall also be so endorsed.

(4) All endorsements of patents made under this section shall be entered in the register and published in the Official Gazette and in such other manner as the Controller thinks desirable for bringing the endorsement to the notice of manufacturers.

87. Certain patents demand to be endorsed with the words "Licenses of Rights"

(1) Notwithstanding anything contained in this Act,-

every patent in force at the commencement of this Act in respect of inventions relating to-

(i) substances used or capable of being used as food or as medicine or drug;

(ii) the methods or processes for the manufacture or production of any such substance as is referred to in sub-clause (i);

(iii) the methods or processes for the manufacture or production of chemical substances (including alloys, optical glass, semi-conductors and inter-metallic compounds),

shall be deemed to be endorsed with the words "Licenses of right" from the commencement of this Act or from the expiration of three years from the date of sealing of the patent under the Indian Patents and Designs Act, 1911, whichever is later; and

(b) every patent granted after the commencement of this Act in respect of any such invention as is referred to in section 5 shall be deemed to be endorsed with the words "Licenses of right" from the date of expiration of three years from the date of sealing of the patent.

(2) In respect of every patent which is deemed to be endorsed with the words "Licenses of right" under this section, the provisions of section 88 shall apply.

88. Effect of endorsement of patent with the words is "Licenses of Rights".

(1) Where a patent has been endorsed with the words "Licenses of right", any person who is interested in working the patented invention in India may require the patentee to grant him a license for the purpose on such terms as may be mutually agreed upon, notwithstanding that he is already the holder of a license under the patent.

(2) If the parties are unable to agree on the terms of the license, either of them may apply in the prescribed manner to the Controller to settle the terms thereof.

(3) The Controller shall, after giving notice to the parties and hearing them and after making such inquiry as he may deem fit, decide the terms on which the license shall be granted by the patentee.

(4) The Controller may at any time before the terms of the license are mutually agreed upon or decided by the Controller, on application made to him in this behalf by any person who has made any such requisition as is referred to in sub-section (1), permit him to work the patented invention on such terms as the Controller may, pending agreement between the parties or decision by the Controller, think fit to impose.

(5) In the case of every patent in respect of an invention referred to in sub-clause (i), or sub-clause (ii), of clause (a) of sub-section (1) of section 87 and deemed to be endorsed with the words "Licenses of right" under clause (a) or clause (b) of that sub-section, the royalty and other remuneration reserved to the patentee under a license granted to any person after such commencement shall in no case exceed four per cent of the net ex-factory sale price in bulk of the patented article (exclusive of taxes levied under any law for the time being in force and any commissions payable) determined in such manner as may be prescribed.

(6) Save as otherwise provided in sub-section (5), the provisions of sub-sections (1), (2), (4) and (5) of section 93 (regarding the powers of the Controller) and of sections 94 and 95 shall apply to Licenses

granted under this section as they apply to Licenses granted under section 84.

All these sections with regards to Licenses of Rights were repealed with amendment in 2002.

## CURRENT PERSPECTIVE:

Under the current scenario in India, Patent provisions related to [4]Compulsory Licensing exists, whereby any person interested may make an application to the Controller for grant of Compulsory license on Patent, at any time after the expiration of three years from the date of grant of a patent on specific grounds such as, reasonable requirements of public with respect to patented invention have not been satisfied, patented invention is not available to public at reasonable affordable price, or the patented invention is not worked in the territory of India.

## CONCLUSION:

License of Rights in Patents seems a good opportunity for Patentees to license their patented inventions for commercialization. Patentee gets rebate also in renewal fee for registering their Patents to be endorsed with "License of Rights". Such provision can help Patentee to license their invention easily and to a good mass to make benefit out-of Patents for which they do not have resources for commercialization. ◆◆◆

4. *Section 84 of Patents Act 1970.*

# UTILITY MODEL PATENT: ROAD AHEAD

*Mr. Kailash Choudhary & Pratyush Upreti*[1]

## INTRODUCTON

*"Imagine that frame of yours spectacles has solar cells embedded in them which get charged in day time and if you want to read comfortably, with no disturbance, then light may be switched on, thus you can enjoy reading a book in the dark".*

*There are many rural areas in India, where light cannot be reached. Isn't that this spectacle or any is useful in those areas. Can this invention be protected under Patent Act?*

A utility model is an exclusive right granted for an invention, which allows the right holder to prevent others from commercially using the protected invention, without his authorization, for a limited period of time.

There is no universal acceptance of the world "Utility patent", different country have different terminology, like in Australia, utility model protection is referred as "Innovation patent", in Malaysia as "utility innovation", in France as "utility certificate", and in Belgium as "short term patent". Thus "utility model" is a generic term used for inventions which are not the subject matter of Patent.

## MAIN FEATURES OF THE UTILITY MODELS:

1. All Utility model law confers exclusive right on the Inventor;
2. Novelty is one of the criteria in all Utility Model Law, but requirement of inventive step varies from nation to nation;
3. Most of utility model laws protect the technical character of invention.

However beside this common trait, most of the countries have different provision on socio-economic condition of the Country.

## DEVELOPMENT OF UTILITY MODEL PRINCIPLE

The concept of "utility model" principle is not a new phenomenon. The first important international treaties for promotion and protection of industrial property i.e. Paris convention for the protection of Industrial Property, 1883 recognizes the principle of Utility Model system. Under the convention a period of priority can be secured for a utility model application by virtue of a right of priority based on a patent application and vice versa[2]. Under the Convention, if patent application consist two inventions then, applicant can divide his patent application into patent application or utility model[3] either suo-motto or on the receipt of the examination report. Further provision of importation and compulsory licenses are also applicable mutatis mutandis, to utility models . Similarly Patent Corporation Treaty (PCT) also permits to file Utility Model application through National phase utilizing the priority date and flexibilities provided therein as applicable for patent. Though TRIPS lay down minimum standards for the protection of Intellectual Property rights but does not contain any provision regarding utility model patent.

The Utility Model framework was first established in ***Germany*** in 1891, this introduction encouraged innovators who file about 85% of these applications. Under German IP system, requirement of utility models are same as patents, but standard of inventive step is lower down[4] .

In ***Japan,*** the utility model protection system established in 1905 was originally based on the utility model law of Germany. It has been amended several times but now restricted to the protection of device only. Under Japanese, utility law encourages devices by promoting the protection and utilization of devices relating to shape or construction of articles or a combination of articles, so as to contribute to the development of industry[5] .

1. *Intern – Student of 4th year LLB from KIIT, Bhubaneswar.*
2. *Arts 4(E) (1) and 4(E)(2), Paris Convention*
3. *Art 5 of Paris Convention*
4. *Section 1(1) of German Utility Model Law*
5. *Section 1 of Japanese Utility Model Law*

In ***Australia,*** petty patents were introduced in 1979 which has similar provision as German utility model. However under Australian model, process is not excluded as German but invention related to biological processes including product were excluded from protection. Petty Patent did not get popular among inventor because it could not differentiate substantially from standard patent.

In ***china,*** there is no separate utility model law, but under patent law enacted in 1984 governs utility model. Utility model patents have resulted into economic prospers in china and the application filed for utility models have always been more then of invention patent.

Apart from these countries, developing countries like Taiwan, Mongolia, Vietnam, Malaysia, Thailand, Indonesia and Philippines have adopted the Utility model system with aim to promote SMEs.

## DIFFERENCES BETWEEN UTILITY MODELS AND PATENTS:

- The requirements for patents are stricter than the utility model. The invention which has novel, inventive step and industrial application can be protected by Patents however for utility models the only requirement is the novelty.
- Only new substantial inventions are patentable whereas marginal improvements can be protected under utility patents
- Term of protection of utility models is usually lesser than patents. In some countries utility models are granted for 10 or 7 years.
- Process for the grant of utility models is simpler and faster than the patents. Patent Office does not examine the utility applications substantially.
- Utility models are very cheap to obtain and maintain than the patents and can be obtained in only 6 months to 1 year.
- Patents are available in most of the countries whereas utility models are available in specific countries.
- Patents can be converted into utility models but not vice versa.

## DOES INDIA NEED UTILITY MODEL PATENT?

The utility models are considered generally good for developing countries, namely, (a) It secures protection for innovations, which does not require the strict novelty and inventive step as required by patent law. (b) They increase the role of individual & small scale innovators in economic development and promote competitive environment. (c) They act as a spur to enhanced levels of innovation, (d) they are cheaper to acquire than patent and finally they become a source of data on innovative activity and experience in technological management.

In recent years India IP regime has developed with several initiatives taken by government to promote intellectual property. And one of the heated debates is whether India should opt Utility Model patent or not? Voices are yes and it is expected to come out soon.

Indian patent regime is stricter than many other countries. Under the Indian Patent Act, 1970, several exceptions are provided which excludes small and useful inventions. India is growing as a hub for small and medium size enterprises which focuses on the development of new technology with minor improvements or modifications of existing products to meet the changing demands of the market.

In India SMEs plays an important role in economy growth of country and it provides employment to about 27.14 millions persons, which is second only to Agriculture [6]. However this sector is not much aware of patent regime and if so then also they are reluctant, because the slogan of patent system is "you have to invest in it before you can really benefit from it". Thus, Patenting is expensive and time consuming.

In recent years Industrialization process has reached its highest pick and it is expected to have more Foreign Direct Investment. Thus strong IP regime ensure non-disclosure of technology brought by firms and further encourage investment. On this scenario Utility Model patent will be boon to India.

## UTILITY MODEL FOR INDIA:

There are various types of models followed by different countries for the protection of small inventions according to the need of the industry. What kind of

6. *Handbook of Industrial Policy and statistics, 2003-04, Ministry of Commerce and Industry, PP 155, available on the Ministry website at http://eaindustry.nic.in/new_handout.htm*

model should India follow for the protection of utility models is highly debated issue. Do we need to follow country specific utility model or a blend of various countries? However before adopting any model we should identify the best practices followed by various countries and considering socio-economic condition of our country. Utility models protection shall not be restricted only to mechanical devices as followed in various countries, but should be allowed for inventions in the field of information technology, biotechnology, pharmaceuticals and agriculture in order to promote SMEs in every sector.

Another major aspect is what parameters India should adopt with respect to novelty, inventive step, utility, and examination procedure. Should we exempt inventive step criteria for utility models or not and to what extent novelty is to be judged? However for sure utility models requirements shall be less stringent than patents. Utility models will fill the gap between the patentable inventions and non patentable inventions. According to the various studies conducted on the viability of utility models for India it can be derived that the novelty criteria should be followed same as for Patents. Because in case prior art only in India is considered then the patentee cannot commercialize the invention in other jurisdictions as he always have fear of infringing others patents. Inventive step criteria should be lowered down. Minimum cost and time shall be required for the grant of the utility patents and the duration for the same shall not exceed 10 year.

## CONCLUSION

Innovation Culture is growing rapidly but in terms of filling, we are far below the standard. This reflects that we have innovation in mind not in paper because of lack of legal framework. Experience of most Utility model patent looks very promising and beneficial to the SMEs and India opting this model will give its international legal obligation.

We can learn from our neighboring country China whose goods in terms of technology are more in Indian market then ours because they promote small invention through utility model patent. Utility Model patent is a useful tool for enhancing the competitiveness of SMEs, but they must be used in a very careful way so that it can’t be misused. ◆◆◆

# CROWD SOURCING- NEW WAYS TO EARN IP PROFITS

*Aayush Sharma*

## INTRODUCTION

In the contemporary time, use of technology for the purpose of research and study is at its extreme position. The introduction of various platforms for expression of ideas is also at its peak. The combination of two has led to the creation of a new podium for staging of ideas and that is crowd sourcing.

The term "Crow-sourcing" is formed by the combination of the words "crowd" and "source". Crowd sourcing may be defined as the act of outsourcing task, to large group of peoples or community, to utilize the benefits of mass collaboration to reach a desired outcome. Today crowd-sourcing is one of the most developed tools used by IT industries, engineering and pharma knowledge base companies. These companies earned huge profits using crowd-sourcing as a business tool. Wikipedia is one of the best examples for crowdsourcing who uses this concept is certainly spreading into other knowledge based industries such as the biomedical society. This article summarizes the basic concept of crowdsourcing, working methodology and its application in prospects of IP.

**Crowdsourcing –** *harnessed the power of volunteers.*

Crowd sourcing is not a new phenomenon, many times we saw contest hosted by companies to award peoples who can bring a new idea, design a new logo, something which is new for that company or give a whacky/name/tagline etc. In these contests the winner will be only one or maximum two. But in this process company gets maximum cool ideas, knowledge and that is all free of cost. Crowd sourcing is the way to tap the power of masses, rather than getting the task done by employees or getting it outsourced, a company may ask the masses to do it. It is one of the business tools, where companies by using crowd sourcing earned huge profits. For example ARTICLE ONE PARTNER, a company uses crowd sourcing to find prior art of patents for clients as well for specific patents targeted by AOP.[1]

They offer anyone the opportunity to join their online community as an "Advisor" and get to work. Persons with vested interests or insider information on a patent are not permitted to submit information, and anyone who worked for the U.S. Patent and Trademark Office must wait one full year after ending employment there, before being eligible to submit prior art to AOP, they posts patent studies. Community members are encouraged to search everything related to possible prior art, before a specified date. Advisors earn points, and sometimes large rewards (as much as $50,000 per study) for being first and being thorough. The first person to submit prior art wins all or part of the reward. Advisors earn points for activity in the community and those points can become cash at the end of the year. Today more than $520,000 has been awarded to community members.

**Crowdsourcing in IP-** *Can I apply Crowdsourcing to patent research?*

When an inventor submits a patent application, it needs to be researched fully to check the novelty of the application. The procedures performed for search can be extremely difficult and intense, and include such sources as text books, magazine articles, journals, Patent in other countries and newsletters. While this type of research is still specialized, in theory anyone can do searches for prior art using Google Patent Search, USPTO, and other sources. This is where Crowdsourcing comes in IP.

**How crowdsourcing is used in IP?**

The methodology used to obtain a desired result in crowdsourcing follows three stages- the search for documentation on crowdsourcing via using systematic reviews of the literatures, creation of exhaustive definitions from search results and testing of its validity[2].

Many companies perform different aspects to use crowdsourcing as a business tool. An intellectual property research project is posted on various online portals where companies request references to similar solutions for example similar products, patent documents or academic research. Researchers look for relevant documents and links and post them to the IP research projects. Now after getting all references,

1. *http://www.crowdipr.com/blog/history-prior-art-crowdsourcing*

2. *http://www.crowdsourcing-blog.org/wp-content/uploads/2012/02/Towards-an-integrated-crowdsourcing-definition-Estell%C3%A9s-Gonz%C3%A1lez.pdf*

researchers rate and comment on each other's references and tries to find most relevant solution. The researcher who submitted the most high relevancy references and provide the most valuable feedback on others prior art are rewarded.

Another model that successfully implemented in the IP-strategy actually used Crowdsourcing. In this model, companies connect a community of solvers with seekers. Any individual may register as a solver. Solvers pay no fees, but most officially register for a challenge before they receive the full, confidential outline of the project, while seekers pay to register on the site and again to register each challenge.

If a problem is solved, pre-defined reward(s) is/are paid to one or more solvers out of the registration fee. Intellectual property is thus protected under secrecy agreements (formal registration for solvers) and transacted to the seeker as a reward is paid to a solver. When the company made a new discovery it posted the problem (not its solution/discovery). This way, the company was typically able to "purchase" additional solutions to the same problem by paying out rewards. An approach that was much cheaper than inventing these solutions in-house. Patent applications covering the various solutions would then be filed and consequently a much stronger position against invent-around risks resulted.

After understanding the working formula of crowdsourcing in IP, it is believed that by adapting a global scale crowd-sourcing model, companies are able to give their clients right to use broader range of informative sources i.e. patent databases, academic databases etc, information in more languages, creative way of solving query and also bring down the cost effectively[3]. By adopting these models, it makes innovation process more effective and quicker and opens a door for inventors who can easily test the novelty of their invention with the help of huge mass of peoples, communities etc.

**Pros & Cons of Crowdsourcing**

Crowdsourcing is considered to be an economical process, where research cost is very much lower as compared to the traditional research methods. In the process of crowdsourcing it is short span process where in a very short time, huge amount of research and data can be collected. This is a very collaborative process where huge numbers of peoples are working at same or different level and research or data obtained which turns out to be a profitable part for the company.

In fact, there are numerous advantages such as a large pool of participants leads to more ideas, which makes it like the flood of ideas where some are especially smart ones. Now considering the cons of crowdsourcing which directly come from the term "Crowd- sourcing" i.e. crowd which is a part of any project is not a part of business – means crowd are not employees and it is unable to fully control the project as same with traditional jobs and projects. Other cons of crowdsourcing are the valuable trust and secrecy issues. These issues when works with a large team of people it might be turned as a big jeopardy and confront for some projects. When we hire numerous people to do a job, it could easily lead to lack of constancy.

Being having lots of positive side Crowdsourcing is an unreliable way to get a job done and last but not least what about confidentiality?–a major concern for IP giants. The moment if any IP facts is posted on the internet for everybody to see is enough to blow any confidentiality.

While crowdsourcing has many advantages and disadvantages it can be very effective way of doing business.

## CONCLUSION

Crowdsourcing -a term in its infant stage, which looks like a new approach, is undergoing a constant evolution. After considering every aspect, proximities and conditions of crowdsourcing, it is turned out to be best among all business tools and crowd souring sounds very simple gather a crowd and gather to do something, and reap the financials rewards of the crowd work. ◆◆◆

3. *http://yourstory.in/2012/03/crowdipr-crowdsourcing-platform-for-intellectual-property-research/*

# EXTERNAL COMMERCIAL BORROWINGS (ECB) FOR CIVIL AVIATION SECTOR

RBI vide RBI/2011-12/523 A. P. (DIR Series) Circular No. 113, dated April 24, 2012 has decided to allow ECB for working capital as a permissible end-use for the civil aviation sector under the Approval Route. This policy change has been done in view of the announcement made in the Union Budget for the Year 2012-13.

It is pertinent to note that as per the earlier policy the availing of ECB for working capital is not a permissible end-use.

Therefore under Approval Route, ECB for working capital as a permissible end-use for the civil aviation sector is provided subject to the following conditions:

i. Airline companies registered under the Companies Act, 1956 and possessing scheduled operator permit license from DGCA for passenger transportation are eligible to avail of ECB for working capital;

ii. ECB will be allowed to the airline companies based on the cash flow, foreign exchange earnings and its capability to service the debt;

iii. The ECB for working capital should be raised within 12 months from the date of issue of the circular;

iv. The ECB can be raised with a minimum average maturity period of three years; and

v. The overall ECB ceiling for the entire civil aviation sector would be USD one billion and the maximum permissible ECB that can be availed by an individual airline company will be **USD 300 million.** This limit can be utilized for working capital as well as refinancing of the outstanding working capital Rupee loan(s) availed of from the domestic banking system. Airline companies desirous of availing of such ECBs for refinancing their working capital Rupee loans may submit the necessary certification from the domestic lender/s regarding the outstanding Rupee loan/s.

ECB availed for working capital/refinancing of working capital as above will not be allowed to be rolled over.

The application for such ECB should be accompanied by a certificate from a chartered accountant confirming the requirement of the working capital loan and the projected foreign exchange cash flows/earnings which would be used for servicing the loan. Authorised Dealer should ensure that the foreign exchange for repayment of ECB is not accessed from Indian markets and the liability is extinguished only out of the foreign exchange earnings of the borrowing company.

The modifications to the ECB policy will come into force from the date of this circular. All other aspects of the ECB policy shall remain unchanged.

## EXTERNAL COMMERCIAL BORROWINGS (ECB) POLICY – REFINANCING / RESCHEDULING OF ECB

RBI vide RBI/2011-12/520, A. P. (DIR Series) Circular No. 112, dated April 20, 2012 has decided to allow borrowers desirous of refinancing an existing ECB to raise fresh ECB at a higher all-in-cost/reschedule an existing ECB at a higher all-in-cost under the approval route subject to the condition that the enhanced all-in-cost does not exceed the all-in-cost ceiling prescribed as per the extant guidelines.

As per the earlier policy, existing ECB may be refinanced by raising a fresh ECB subject to the condition that the fresh ECB is raised at a lower all-in-cost.

The modifications to the ECB policy will come into force with immediate effect and will be subject to review. All other aspects of ECB policy remain unchanged.

## EXTERNAL COMMERCIAL BORROWINGS (ECB) POLICY – LIBERALISATION AND RATIONALISATION

RBI vide RBI/2011-12/519, A. P. (DIR Series) Circular No. 111, dated April 20, 2012 has decided to review of the policy related to ECB and keeping in view the announcements made in the Union Budget for the Year 2012-13, it has been decided to further rationalize and liberalize the extant guidelines as under:-

**(i) Enhancement of Refinancing limit for Power Sector**

Indian companies in the **power sector** will be allowed to utilise 40 per cent of the fresh ECB raised towards refinancing of the Rupee loan/s availed by them from the domestic banking system, **under the approval route,** subject to the condition that at least 60 per cent of the fresh ECB proposed to be raised should be utilised for fresh capital expenditure for infrastructure project(s). All other terms and conditions relating to refinancing of Rupee loans mentioned in A.P. (DIR Series) Circular No. 25 dated September 23, 2011 remain unchanged.

**(ii) ECB for Maintenance and Operation of Toll systems for Roads and Highways**

ECBs would also be allowed for capital expenditure under the automatic route for the purpose of maintenance and operations of toll systems for roads and highways provided they form part of the original project.

The modifications to the ECB policy will come into force with immediate effect. All other aspects of the ECB policy, such as, maximum permissible limit under the automatic route, eligible borrower, recognized lender, average maturity, all-in-cost, pre-payment, refinancing of existing ECB and reporting arrangements shall remain unchanged.

## TRANSFER OF FUNDS FROM NON-RESIDENT ORDINARY (NRO) ACCOUNT TO NON-RESIDENT EXTERNAL (NRE) ACCOUNT

Reserve Bank of India vide Circular RBI/2011-12/536 A. P. (DIR Series) Circular No.117 dated 7th May, 2012 has permitted the NRI to transfer funds from NRO account to NRE account within the overall ceiling of USD one million per financial year subject to payment of tax, as applicable (i.e. as applicable if funds were remitted abroad).

RBI further clarified that such credit of funds to NRE account shall be treated as eligible credit in terms of paragraph 3(j) of Schedule-1 of Notification No. FEMA.5/2000-RB dated 3rd May 2000.

At present transfer of funds from NRO to NRE account is not permissible.

## RELEASE OF FOREIGN EXCHANGE FOR MISCELLANEOUS REMITTANCES

Reserve Bank of India vide RBI/2011-12/537 A. P. (DIR Series) Circular No.118 dated 7th May, 2012 has liberalized the documentation requirement for foreign exchange remittance for miscellaneous purpose and allowed that the limit for foreign exchange remittance for miscellaneous purposes without documentation formalities, has been raised from USD 5000 to USD 25000 with immediate effect.

RBI clarified that Authorized Dealers need not obtain any document, including Form A-2, except a simple letter from the applicant containing the basic information, viz., names and the addresses of the applicant and the beneficiary, amount to be remitted and the purpose of remittance as long as the foreign exchange is being purchased for a current account transaction (not included in the Schedules I and II of Government Notification on Current Account Transactions), and the amount does not exceed USD 25000 or its equivalent and the payment is made by a cheque drawn on the applicant's bank account or by a Demand Draft. AD banks shall prepare dummy A-2 so as to enable them to provide purpose of remittance for statistical inputs for Balance of Payment.

## GRANT OF FIRST COMPULSORY LICENSE – A HAPPENING BUZZ BETWEEN INDIAN GOVERNMENT & CANCER PATIENTS.

Major Drug Makers cuts price of Cancer Drugs: A day after German pharma Giant Bayer Corp. filed an appeal with IPAB against the grant of compulsory license to Indian generic company NATCO Pharma Ltd, print media were occupied with a happening headlines that Swiss based Roche Holding AG & local drug maker Cipla Ltd have decided to sharply cut prices of five of their high cost oncology brands.

This news is definitely has come as a big relief for cancer patients in a country like India where cancers like oral ,stomach, liver ,Lung & breast cancers kills lakhs of patients every year. Some of the key cancer drugs under patent protection in India- Erlotininb (Lung Cancer), Sunitinib(kidney cancer),sorafenib (liver and kidney cancer ), Rituximab (blood and lymphatic cancer). These drugs are not covered under India's drug price control as these are new drugs.

Affordability Vs Innovation

Many of the medicines available for treatment for fighting these cancers are developed and sold by foreign firms and are beyond the reach of a majority people , with their prices ranging from Rs.1.3 lakhs to Rs. 3lakhs for a month's treatment. Cipla's price cuts (up to 76%) will provide relief to a large number of cancer patients in India.

It is believed that this surprising move of Cipla of cutting its cancer drugs cost has been prompted by grant of generic version of Nexavar patented by Bayer AG. It can be said for now that Compulsory License appears to be serving useful public purpose.

A Major question which is clearly visible and remains unanswered is that foreign firms whose products are subjected to compulsory licensing and others as well may not innovate to create new drugs .Worse will be the case if these foreign firms decides not to introduce new medicines in the Indian market simply because these firms will not be able to recover costs of huge investments vested in developing their new drugs.

Critics are speculating that in the short run compulsory licensing will provide relief to many poor patients but the major concern is that in the long run the pipeline to treat different –many currently incurable diseases like Parkinson's ,Alzheimer's, Tuberculosis , will dry up.

Indian Govt. Needs to Consider the Trade off after granting C.L- the Govt. needs to carefully consider the tradeoffs between making vital medicines available at a reasonable cost and important IP issues that can create problem in times to come. Foreign firms like Bayer A.G, Roche view C.L as a forcible weakening of IP rights because these drug makers based in US and west spend huge amount of money on R&D. Licensing of these drugs threaten profits made by them in a developing country like India.

## EXTERNAL COMMERCIAL BORROWINGS (ECB) POLICY - UTILIZATION OF ECB PROCEEDS FOR RUPEE EXPENDITURE

RBI vide RBI/2011-12/539, A. P. (DIR Series) Circular No.119 dated May 7, 2012 has decided that at the time of availing Loan Registration Number (LRN) from the Reserve Bank, borrowers should provide bifurcation of the utilization of the ECB proceeds towards foreign currency and Rupee expenditure in Form-83. As per the extant guidelines, ECB proceeds can be utilized for permissible foreign currency expenditure and Rupee expenditure.

The primary responsibility to ensure that the ECB proceeds meant for Rupee expenditure in India are repatriated to India for credit to their Rupee accounts with AD Category- I banks in India as per A.P. (DIR Series) Circular No. 52 dated November 23, 2011 is that of the borrower concerned and any contravention of the ECB guidelines will be viewed seriously and will invite penal action under the Foreign Exchange Management Act (FEMA), 1999. The designated AD bank is also required to ensure that the ECB proceeds meant for Rupee expenditure are repatriated to India immediately after drawdown.

The modifications to the ECB policy will come into force with immediate effect and subject to review. All other aspects of the ECB policy shall remain unchanged.

## NAME AVAILABILITY GUIDELINES, 2011

Ministry of Corporate Affairs vide General Circular No. 7/2012 dated 25th April, 2012 has re-examined the Name Availability Guidelines, 2011 with respect to availability of name by the system online without backend process by the Registrar of Companies on certification given by practising professionals and has decided as under:

i) The facility of name approval through "straight through processing" [hereinafter referred to as "STP"] mode on certification by Professional will continue to be available. However, such names will be put to online checked by the system for ascertaining similarity with trademarks, the work item will be transferred for processing in non-STP mode.

ii) All the names applications submitted in STP mode will be put for system check and if there is exact match of any of the two words (other than the words private limited/limited) proposed in new company's name with any existing company's name, then such name will also be processed in non-STP mode.

iii) All the names approved in STP mode will be made available on the dash board of the concerned ROC for immediate examination. Such STP approved names will not be available for filing of incorporation documents upto:-

(a) 1900 hrs. of the same day, if the name through STP mode is approved by the system upto 1100 hrs. on any working day.

(b) 1900 hrs. of the any next working day if the name is approved after 1100 hrs. on any working day or on holiday/non-working day.

iv) Name approval application in case of single word (other than words private limited/limited) shall not be processed in STP mode.

The circular shall be implemented w.e.f 20.05.2012 ◆◆◆

## Singh & Associates Booth at
## "134th Annual Meeting, International Trademark Association (INTA)".


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