



INDIAN LEGAL AND BUSINESS UPDATE
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1. Government releases discussion paper on FDI in retail

The Union government has initiated a move to open the country's multi-brand retail segment to foreign investment. In a 21-page discussion paper, it has sought comments from stakeholders on issues, ranging from allowing retail chains with foreign capital to open stores in select cities to government approval for opening each store, mandatory hiring of rural population and sourcing from small and medium enterprises.

Part of the calibrated opening up plan touched upon by the paper, released by the Department of Industrial Policy and Promotion (DIPP) on its website, is the option of initially allowing foreign investment in cities with a population of at least one million. Feedback has been sought on steps such as a special legal and regulatory framework for protecting the interests of small retailers. In addition, it has touched upon the issue of how to protect the public distribution system after the entry of large foreign players in the multi-brand retail arena.

2. SEBI Panel recommends complete revision of Take over Code

India's merger and acquisition (M&A) rules are all set for a makeover, with a panel set up by the market regulator, SEBI, virtually rewriting the Takeover Code. The Takeover Regulations Advisory Committee, in its 139 page report to the SEBI has proposed sweeping changes on critical issues, including the open offer trigger, offer size, indirect acquisitions, exemptions from open offer obligations, calculating the offer price and competing offers.

This comes nearly 16 years after the guidelines were formally notified for the first time and after 23 amendments to the last major review in 1997. The Takeover Panel, formed by SEBI in September 2009, has recommended an increase in the open offer trigger from 15 per cent to 25 percent. Further, the open offer has to be made for all the shares of the target company, instead of the current practice of an offer for acquiring an additional 20 per cent. The panel has also noted that the 100 per cent open offer requirement could result in an acquirer ending in holding beyond the maximum permissible non public shareholding, which may require the acquirer to either delist or bring down his holding to meet the continuous listing requirements. The panel has recommended that the acquirer may state upfront his intention to delist if his holding in the target company were to cross the delisting threshold pursuant to the open offer.

3. Tax Liability of Foreign Law Firms in India: Tax Tribunal Ruling

In a significant ruling, the Mumbai bench of the Income Tax Appellate Tribunal (ITAT) has held that the UK based law firm, Linklaters has to pay income tax in India on all India-related profits. This is based on the retrospective amendment to section 9(1) of the Income Tax Act made by the Finance Bill 2010. The ITAT differed with the earlier tax tribunal's decision in the case of Clifford Chance and upheld the Assessing Officer's view that all of Linklaters' incomes related to India should be taxable.

In the earlier case involving Clifford Chance, the Bombay High Court accepted Clifford Chance's arguments and decided a non-resident could only be taxed on income for services, if that service was rendered within India and was part of a business or profession carried on by such person in India. The said judgement has been challenged by the Income Tax Authorities in the Supreme Court and is pending before the Supreme Court.

4. Bombay HC grants interim stay on service tax on buildings under construction

The Bombay High Court, on 28 July 2010, granted interim stay on the writ petition filed by the Maharashtra Chambers of Housing Industry (MCHI) on the levy of service tax on buildings under construction introduced by the Finance Act, 2010 w.e.f. 1 July 2010.

The MCHI challenged the constitutional validity of the Finance Act 2010 which sought to introduce the levy of service tax on residential projects, which are still under construction or where a completed building has not received its occupation certificate as on 1 July 2010.

The Finance Act 2010 had introduced the levy of service tax on the 'Construction of complex service' [section 65 (105) (zzzh)] and provided that unless the entire consideration for the property is paid after the completion of construction (i.e. after issuance of completion certificate by the competent authority), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the service tax would be charged accordingly. However, abatement @ 75percent would be allowed if land price has not been deducted from the cost of the flat and no cenvat credit of input, input services or capital goods have been availed by the builder/promoter/developer.

The Bombay High Court, in its decision, has held that no coercive steps shall be taken against MCHI for the recovery of service tax in relation to the provisions in question but assessments may proceed in accordance with the law. The stay is a relief not only to the builder/promoter/developer, but also to the end customer who would have to bear the ultimate brunt of the service tax levy.

5. India and Switzerland renegotiate terms of new tax treaty

The government has concluded the renegotiation for widening the ambit of its tax treaty with Switzerland to access information on Swiss bank accounts, a big step towards tracing Indian money slashed away overseas. The tax treaty has been amended on the lines of the OECD Model Tax Convention, which means it will not provide for roving enquiries, or fishing expeditions. The

new treaty will be notified by India immediately after it is signed, but the Swiss authorities will be able to put the agreement into effect only after it is ratified by their Parliament.

India's Income tax authorities will be able to access information on Swiss bank accounts of Indians more easily, but only in specific cases where they have a prima facie evidence of wrongdoing. The Government had approached Switzerland in April 2009 to renegotiate the DTAA to get access to information on bank accounts. Switzerland has also amended tax treaties with the US, France and Italy.

6. Moving ahead on GST

The Centre and states came closer to a deal on the structure of the ambitious indirect taxes reform, the goods and services tax (GST), after the finance minister agreed to compensate the states fully for any possible loss of revenue from shift to the new tax, brightening the prospects for its rollout from April 1, 2011. The Centre has proposed a three rate structure for GST, in line with the recommendations of the empowered committee of state finance ministers, under which goods will attract a levy of 20 percent, services 16 percent and essential items a concessional rate of 12 percent.

The levy is proposed to be split evenly between the states and the centre. The panel has suggested a dual rate structure for GST with a 10 percent rate for essential items and 20 percent for others. Finance Minister told the empowered panel that the GST should eventually move to a single rate 16 percent (8 percent plus 8 percent) structure in the third year of its operation. In the second year, the rates are proposed to be lowered to 12 percent for essential goods, 18 percent for others and 16 percent for services.
