



INDIAN LEGAL AND BUSINESS UPDATE

DECEMBER 1-DECEMBER 31, 2009

1. Bombay High Court Ruling on foreign law firms

The Bombay High Court has ruled that foreign law firms cannot carry on non litigious practice in India, which includes drafting of applications, consultancy work or any legal work that does not involve appearing before the courts, unless they abide by the Advocates Act that governs the conduct of Indian Lawyers. The two judge bench consisting of Chief Justice Swatanter Kumar and Justice JP Devgadhar said that a decision by the Reserve Bank of India or RBI allowing foreign law firms to open liaison offices was not justified. The ruling means that foreign law firms can function in India only if all the advocates in their offices are enrolled with the bar councils of Indian states or with the Delhi based Bar Council of India, the apex regulatory body for lawyers. Lawyers possessing a degree from international law schools, which are recognized by the Bar Council of India can also practice provided they register themselves. Persons affected could be foreign legal practitioners who visit India to meet and advise their clients without setting up any liaison offices here. Such lawyers will also not be able to do legal work for their Indian clients now, if the High Court ruling is rigorously interpreted. The Indian government defended the RBI's decision before the High Court.

International firms Ashurst, Chadbourne & Parke and White & Case had opened liaison offices in India after Reserve Bank of India granted them permission with the condition that these firms would not earn any income in India. Lawyers Collective had challenged the permission granted by RBI to the foreign firms. The foreign law firms, the Indian government or the RBI can appeal to the Supreme Court if they wish to. Under India's Advocates Act, which was enacted in 1961, only an "advocate" can practice the "profession of law", an advocate being a person with a law degree and enrolled with state bar councils or the Bar Council of India.

The High Court also directed the central government to quickly decide whether foreign law firms can practice in the country as the issue is pending with government for over 15 years. The division bench held that doing non litigious legal work amounts to "practise of law" and is within the purview of the Advocates Act. Counsels for the foreign law firms had argued that non litigious work such as drafting and consultancy does not amount to practice in accordance with the Advocates Act and as such, it was not applicable to them.

2. FDI policy consolidated - to be updated every six months

The government on December 23, promised to bring out an updated foreign direct Investment (FDI) policy every six months as it unveiled a comprehensive press note consolidating the entire regime for foreign investments in one place for easy reference. The draft consolidated document released would be open for comments until January 31, 2010 and a final document will be released by April 1 2010.

This comprehensive press note will have a sunset clause of six months and will automatically lapse on 30th September, 2010. A new press note would be issued every six months, incorporating and reflecting all the changes in the regulations during intervening period of six months. The current foreign investments policy is spread all over, in foreign exchange management act (FEMA), RBI guidelines and press notes. It is cumbersome and difficult to understand. Since 1991, the Department of Industrial Policy and Promotion (DIPP) has issued about 177 Press Notes, covering various aspects of FDI policy, including cross border investment, policy liberalisation, policy rationalisation and foreign technology collaborations, Industrial Policy. The consolidation would ensure the availability of all information on FDI policy at one place, and is expected to lead to: simplification of the policy; greater clarity of understanding of foreign investment rules among foreign investors and sectoral regulators, as also predictability of policy. The government has, however, clarified that the new draft framework is just a consolidation of previous FDI policy regulations and reflects the current regulatory framework. DIPP has not made changes in the extant regulations.

The government would continue to make changes to the policy through press notes whenever required. However, at the time of the six-monthly revision such changes would be incorporated in the compendium.

3. Change in tax rules for employees

Employees will now have to pay taxes on perquisites given to them by their employers as the Central Board of Direct Taxes has notified the much awaited rules for valuation of the benefits. With these rules, the fringe benefit tax (FBT) being paid by employers for giving non cash benefits, including cars, rent-free accommodation, services of personal attendants, interest free loans, gift vouchers, hotel stay exceeding 15 days and medical facilities, employee stock option plants (ESOPs) will be abolished and replaced with a regime that will tax the perquisites in the hands of the employees. It comes with retrospective effect from April 1, 2009. This entire tax liability is to be recovered in the remaining three months of the year if employers have not deducted any tax so far.

4. RBI permits expats to remit entire earnings in India

Foreign nationals working in India can now take their entire post tax salaries home, following a change in rules to this effect by the Reserve Bank of India (RBI). This will benefit sectors such as

aviation, telecom and infrastructure, which employ a large number of expats, making it easier for them to attract talent from abroad. Earlier, expats could take only 75 percent of their salaries abroad. The central bank has changed the regulations under the Foreign Exchange Management Act (FEMA) in this regard. The decision will give flexibility to companies in structuring the salary packages of expats without bothering about forex laws. Indian citizens employed by foreign companies abroad but on deputation to India will also benefit from this move. However, the expatriates have to ensure that they pay proper Indian taxes and any non compliance will expose them to penal provisions of Indian tax laws and exchange control laws. The entire salary of expat employees is taxable in India, according to the current tax provisions. .

5. Bill passed for faster settlement of commercial disputes

The Commercial Division of High Courts Bill 2009, which proposed that high value cases of Rs. 5 crore (USD 1.1 million) and above would be handled by commercial divisions to be set at various high courts, was recently passed in the lower house of the Indian Parliament. Once these commercial divisions are set up, all disputes of high threshold will be filed in the high court and dealt with by the proposed divisions. The move is expected to speed up the disposal of such cases as district courts will have no jurisdiction in such cases. The bill also prescribes fast track procedures to be followed by the proposed commercial divisions. These include pronouncement of judgement within 30 days of conclusion of argument and sending of copies of the judgement to the parties through e-mail.

6. Divestment to gain steam from April

The disinvestments programme is set to enter an ambitious phase in the next financial year with the Department of Disinvestment planning to seek Cabinet approval for a host of companies from January. The Cabinet has so far followed a cautious approach in approving disinvestments in companies, though it has simultaneously come out with a broad policy direction for the disinvestments programme. Based on the policy, the disinvestments department has prepared a list of up to 30 companies that can be considered for disinvestments.

Earlier it had written to the administrative ministries of 60 central public sector undertakings to suggest the names that could be added or removed from the list and the appropriate timing and size of public issues of such entities. The government came out with a disinvestments policy last month, under which PSUs earning net profit for the last three years would be listed and all profitable, listed PSUs not meeting the mandatory public shareholding of 10 per cent would be made compliant. There are 10 listed PSUs where public holding is less than 10 per cent and 50 unlisted state run firms, which are profitable.

7. Centre in favour of GST on alcohol

The Centre has turned down the proposal of the empowered group of state finance ministers to keep alcohol out of goods and services tax (GST). The government has in fact suggested that both

alcohol and tobacco, should be kept under GST, with the states getting the power to levy excise duty over and above GST on alcohol. The center would have the same power in case of tobacco. Currently, the center levies excise duty on tobacco products and the states levy tax on alcohol. The empowered group in its discussion paper on GST had proposed that tobacco products should be subjected to GST, but alcoholic beverages should be kept out of it, and sales tax or value added tax continued to be levied on it as per the existing practice. It said the Centre may be allowed to levy excise duty on tobacco products over and above GST without input tax credit. The center and the states have also agreed to keep octroi and local taxes out of GST. It has been decided to keep entertainment and luxury tax within GST, while no consensus has been reached on purchase tax and tax on natural gas. The empowered group has said that in case purchase tax has to be subsumed under GST, then adequate and continuing compensation should be provided to the states.

8. Delhiites earning over 30,000 a month to pay professional tax

Delhi based professionals earning over Rs.30,000 per month may now have to pay a 'professional tax' under the new tax proposals unveiled by the Municipal Corporation of Delhi (MCD) in its budget for 2010–11. The civic body, MCD, has also sought a 5 percent hike in property tax rates. The civic body is proposing to introduce a "professional tax" for those professionals living in Delhi and having an income of more than Rs. 30,000 per month. MCD has also proposed a 5 percent increase in property tax in all categories and imposition of 20 percent commercial tax on rented non residential properties and high-end non-residential properties like high class hotels, malls, air conditioned gymnasiums and clubs having swimming pools.
