



**INDIAN LEGAL AND BUSINESS UPDATE**  
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**1. FDI norms clarification, banks to be deemed as Indian owned**

The Government plans to bring out a clarification to exclude banks from the purview of its revised foreign investment norms, as it looks to prevent a clutch of Indian private banks from being categorised as foreign owned. The status of investments made prior to the introduction of the new norms this February in Press Notes 2, 3 and 4 could also be subjected to further clarification.

This follows the Reserve Bank of India (RBI) backed by the Finance Ministry, asking DIPP (the agency that sets the foreign investment policy) to review its new foreign investment norms as they could improperly categorise seven leading private banks as foreign owned. The Department of Industrial Policy and Promotion (DIPP) would address and clarify a few key issues like treatment of FDI in the banking sector, shielding FDI prohibitive sectors from foreign capital and treatment of investments made prior to the new FDI calculation norms.

**2. FDI norms clarification - Investment by FIIs to be exempted from Government approval**

The new rule for computing foreign investments in Indian companies, as laid out in Press Notes 2, 3, 4 of 2009 announced in February are in for a clarification, on investments by foreign institutional investors (FIIs) in sectors that have curbs on foreign holdings and where government approval is required for overseas inflows. The Department of Industrial Policy and Promotion (DIPP) is planning to exempt FIIs from seeking government clearance for buying shares on the stock market. The clarification is in response to Finance Ministry objections to treating portfolio investments by FIIs on a par with foreign direct investment (FDI). Clubbing the two types of investments under the new norms would require FIIs to get the Foreign Investment Promotion Board's (FIPB) nod for buying shares of companies in sectors where foreign investment proposals need government permission. The easing of norms would be limited to only exempting foreign funds from seeking FIPB nod. Investments through this route must stay within the overall sectoral cap. February's revised norms club all foreign investments such as FIIs, global depository receipts (GDRs) American depository receipts (ADRs) and foreign currency convertible bonds (FCCBs) together.

### **3. Investment norms for new Pension Scheme finalised**

Paving the way for the New Pension Scheme (NPS), the Pension Fund Regulatory and Development Authority (PFRDA) announced investment guidelines for contributory plans. PFRDA has categorised NPS investments into three asset classes – E (equity), C (Corporate paper) and G (Government securities). According to the guidelines, investments in the E scheme would allocate assets into index funds that replicate the portfolio of a particular index, such as the BSE's 30 share Sensex or the NSE's Nifty 50.

The G scheme would allow investors to park money in government bonds. The C scheme would allocate investments in liquid funds of AMCs with average total assets under management of at least Rs. 5,000 crore (USD 1 billion) over the last six months. The scheme would also park assets in fixed deposits of scheduled commercial banks that full fill the given criteria. The funds of those investors who do not specify an asset class would be routed to the 'Auto Choice' scheme by default. Under this option, 50 per cent of the investments would be allocated to E category assets, 20 per cent would be invested in G category and the rest in the C class of assets for investors up to the age of 35. For investors at the age of 55 years, 10 per cent of the investments would go into the E class, 80 per cent would be invested in the G category and the rest 10 per cent would be parked in the C class of assets under the auto choice option.

### **4. Supreme Court holds that foreign companies to withhold tax on Expat Salaries**

In a recent judgement, the Supreme Court has ruled that foreign companies operating in India through joint ventures are required to deduct TDS (tax deducted at source) from home salary or special allowances paid abroad to their employees working in India. This is an obligation under Section 192 (1) of the Income Tax Act, "particularly when no work stood performed for the foreign company and the total remuneration stood paid only on account of services rendered in India". The court clarified the law in a batch of 104 appeals from various high courts and tribunals, raising the question of obligation of the foreign companies.

On the question of extra territorial operation of the Income Tax Act, the judgment explained that the general concept regarding the scope of the income tax law was that given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him, income tax may extend to that person in respect of his foreign income. "The nexus can be based on the residence of the person or business connection within the territory of the taxing state and the situation within the state of the money or property from which the taxable income is derived," the judgment said. Applying that principle, the court ruled that "if the payments of home salary abroad by the foreign company to be expatriate has any connection or nexus with his rendition of service in India, then such payment would constitute income which is deemed to accrue or arise to the recipient in India as salary earned in India in terms of Section 9(1) (ii)".

However, whether the home salary payment made by the foreign company in foreign currency abroad can be held to be “deemed to accrue or arise in India,” would depend upon the in depth examination of facts of each case. Therefore, the court directed the assessing officers to examine each of the 104 cases to ascertain whether the employee assessee (recipient) has paid the tax due on the home salary /special allowances received from the foreign company.

#### **5. Delhi High Court rejects injunction claim of Roche against Cipla**

The Delhi High Court has dismissed a patent infringement injunction application filed by Swiss drug maker Roche against Mumbai based drug company, Cipla and allowed the Indian company to manufacture and sell its generic version of cancer drug Tarceva in domestic and overseas market. Roche had filed a case against Cipla last year after the Indian company launched a generic version of Tarceva, at one third of the price of the original. The court had then allowed Cipla to sell its drugs in India in public interest, but restricted the Mumbai based company from selling the drug in other countries where Roche holds the patent for Tarceva. It also asked Cipla to maintain the sales record of its drug because if it fails to defend the patent infringement allegations, it will have to pay damages to Roche.

#### **6. Service Tax Relief on Rentals**

The Delhi High Court has ruled the commercial renting of premises will not attract service tax. This ruling is expected to leave the central government about Rs. 8,000 crore (USD 1.6 billion) poorer every year. The government may challenge the order in the Supreme Court. The court, while disposing of petitions by a bunch of retailers, ruled that renting of immovable property for use in the course of furtherance of business cannot be regarded a service, and therefore cannot be taxed. The order comes as a major relief to realtors and all companies operating from rented space, particularly retailers and call centers.

#### **7. Competition Commission of India to finalise regulations soon**

The country’s antitrust body, Competition Commission of India (CCI) will finalise regulations for its functioning by end of May. These regulations deal with predatory pricing, cartels (levying lesser penalty or waving the penalty on cartel members who inform the commission about cartelisation), and smooth and transparent functioning of the commission. The CCI is an independent body responsible for investigating mergers, market shares, and conditions and regulation of firms. It would ultimately replace the Monopolies and Restrictive Trade Practices Commission (MRTPC).

The regulations would have to be ready before the Commission starts enforcement activities. The Competition Act through Section 36(I), has given powers to the commission to regulate its own procedure, while being guided by the principles of natural justice. These draft regulations have been put up on the CCI website to seek comments

by April 26. Upon finalisation, these regulations would be notified by the Commission, along with a filing in Parliament when it is functioning for 30 days. The suggestions or comments arising from Parliament would be implemented with prospective effect, and not retrospective effect.

#### **8. Stiff Imprisonment for violators of clinical test norms**

The government plans to amend the Drugs and Cosmetics Act to slap up to ten years imprisonment and cancellation of licence for violating norms for testing drugs on humans in India. The new guidelines would ensure that those who do not follow the norms approved by the Drug Controller General of India (DCGI) for conducting clinical trials on humans are brought to book and punished. The move comes in the wake of the drug regulator's failure to take action against several companies even after finding gaps in their clinical trials during audits, due to the absence of legal provisions.

The proposed norms for conducting clinical trials of experimental drugs in India, framed by ICMR, have been approved by the Ministry of Law and Health. The move is intended to improve the country's image in this area, which has been sullied by some cases of alleged unethical and sub standard practices. India has become a hub for clinical trials of drugs with a clinical research market estimated at USD 389 million, which is forecast to touch USD 1 billion by 2010. Having a tough, credible regulatory set up is crucial to enable the growth of this industry, which protecting the rights of Indians who volunteer to become test subjects. India does not allow phase 1 trials, or initial experimentation on human subjects after a drug is found effective on laboratory animals, for molecules developed abroad. This prevents Indians from being the initial guinea pigs for foreign drug companies.

#### **9. Separate guidelines for medical devices**

The government has decided to create separate quality guidelines for medical devices and not treat them as drugs. The medical devices shall be classified on the basis of the risks involved. At present, medical devices are treated like drugs and are regulated by state drug regulators under the Drugs and Cosmetics Act. The guidelines would make it mandatory for both domestic as well as global medical device makers to get their products certified by notified bodies like International Organization for Standardization (ISO) and Bureau of Indian Standards (BIS) before selling them in the Indian market. The new norms will help create a level playing field for Indian manufacturers of medical devices with global makers like Siemens, Phillips, General Electric (GE) and LG Electronics, Medical Device manufacturers, who require a free sale licence from the Government of India to export their products, and were facing problems in the absence of clear regulations and necessary licences.

## **10. New partnership law in place, but legal and tax hurdles remain**

The Ministry of Corporate Affairs (MCA) has started registering firms under the newly enacted Limited Liability Partnership (LLP) Act. However, a flow of applications is unlikely till tax laws are changed. At present, the Income Tax Act does not recognize LLP firms. Under the LLP structure, the liability of a partner is limited to his stake and no partner is liable on account of independent or unauthorized acts of other partners. Individual partners are shielded from the joint liability created by another partner's wrongful acts or misconduct. On the other hand, in the traditional law on a partnership firm, every partner is liable, jointly with all other partners and also severally, for all acts of the firm done while he is a partner, irrespective of his stake. Under the LLP model, chartered accountants, company secretaries or even advocates can set up multi-disciplinary firms that will act as "one stop" shop for people to avail of various professional services. Existing laws impose the restriction that these professional services cannot be carried out through companies but only through partnership firms.

## **11. Disclose all overseas fund transfers: CBDT**

Companies and individuals who wish to send funds overseas will have to disclose it to the Income Tax Authorities from July this year, according to a change in tax rules carried out by the Central Board of Direct Taxes (CBDT). The new provision will allow tax authorities to keep a tab on remittances and act in time, if they find money being sent out without paying due taxes. CBDT, the apex direct taxes body, has notified new rules as per which, post-July 1, 2009, details are to be furnished electronically to a dedicated web site for the purpose before affecting a remittance. Subsequently, a signed printout is to be submitted to the tax authorities. This requirement is applicable even if tax is not required to be deducted at source. The move has been prompted by the tax authorities as they are of a view that tax evasion is taking place with increase in remittances. At present, a remitter is required to furnish an undertaking to tax authority accompanied by a certificate from a chartered accountant. But, these documents are submitted to bank through which remittance is affected, who in turn forwards it to the tax authorities. The increase in remittances has made manual handling and tracking of certificates difficult, leading to time lag and thereby preventing prompt action by the tax authorities.

## **12. DoT's plan to have lock-in on promoters gets approved**

The Ministry of Corporate Affairs (MCA) has cleared the Department of Telecom's (DoT) plan to impose a three year ban on equity sales by owners of companies that acquired pan India licences to offer various types of telecom services early last year. In a Communication to the DoT, the Ministry of Corporate Affairs pointed out that while the Companies Act, 1956 did not provide for a lock-in period, the condition is prescribed under the guidelines of market regulator SEBI and the department of industrial policy and promotion.

### **13. Indian shipping companies may get first right of refusal on cargo**

The Director General of Shipping is looking to implement the chartering guidelines. This will ensure that the right of first refusal for cargo handled at various ports is given to Indian shipping companies. The Ministry of Shipping, Director General (DG) of Shipping and industry representatives came together to set up a committee with the intention of plugging the loopholes in Sections 406 and 407 of the Indian Merchant Shipping Act, 1958. This relates to promoting the Indian shipping industry, and makes a mention of domestic shipping companies getting the right of first refusal for cargo loaded and unloaded in India. Indian companies are often not considered for transporting large quantities of goods. Instead, such contracts are given to their foreign counterparts. Even larger Indian oil companies too have given contracts to foreign vessels for transporting their crude requirements. The move will allow domestic shipping companies to ferry a large chunk of commodities that are imported and exported and will help the Indian shipping companies in getting into long term contracts.

### **14. Dollar settlements for FIIs**

The Securities and Exchange Board of India (SEBI) is in talks with the Reserve Bank of India (RBI) to consider a proposal to permit dollar settlements for foreign institutional investors (FIIs) in India. The move would mean a tectonic shift in the way FIIs invest in Indian markets. Dollar settlements would not only mitigate risks of currency fluctuations for FIIs but also help in improving the volume and liquidity of the derivatives market. At present, settlements in India are done in rupee denominations. As a result, a number of FIIs, who intend to trade in Nifty futures, take the Singapore route where CNX Nifty index futures are traded on SGX. If dollar settlement is allowed in India, many participants, who want to take exposure to Indian markets through index buying, will be able to participate freely. This in turn, will give stability to Indian markets as there will be buying of underlying stocks by the sellers of these contracts to FIIs.

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