

FCPA and its impact on India

In March 2011, Wal-Mart, the US-based company had started a worldwide review of its policies, practices and internal controls for Foreign Corrupt Practices Act (FCPA) compliance. Since the implementation of the global review and the enhanced anti-corruption compliance programme, the company has identified additional allegations regarding potential violations of the FCPA.

According to news reports, Bharti Wal-Mart, Wal-Mart's joint venture with India's Bharti Enterprises suspended a few associates and committed to conduct a complete and thorough investigation as a part of abovementioned ongoing review.

The company has decided to put on hold the opening of new cash-and-carry wholesale stores in India and as the investigation unfolds there is a likelihood that more suspensions may follow.

Why is a U.S. Legislation concerned about corruption in India?

The principal objective of the FCPA is to prohibit United States companies and their employees, officers, directors and agents from paying or promising to pay bribes to foreign officials, political parties, candidates or their conduits to obtain or retain business.

The focus of the FCPA is two-fold:

- it prohibits actions in furtherance of foreign corrupt payments by any person while in the United States, by any U.S. person abroad or by any person abroad working for a US company and
- it includes record-keeping and accounting provisions intended to deter the establishment of off-the-books slush funds to finance the illegal payments.

Subject of FCPA: The anti-bribery provisions of the FCPA acts in furtherance of the direct or indirect bribery of foreign officials -

- by any person while in the territory of the United States,
- by any U.S. person while acting wholly outside the United States or,
- by any person abroad working for a US company.

Prohibition and defenses: The FCPA prohibits those subject to the FCPA from giving or promising to give anything of value to:

- any foreign official for purposes of influencing any act or decision of such official or inducing such official to influence any act or decision of a foreign government or instrumentality to obtain or retain business or for purposes of obtaining any

improper advantage;

- any foreign political party or party official or any candidate for foreign political office for purposes of influencing any act or decision of such party, official or candidate or inducing such party, official or candidate to influence any act or decision of a foreign government or instrumentality to obtain or retain business or for the purposes of obtaining any improper advantage; and
- any person while knowing or having reason to know that such money or thing of value will be offered or given to any foreign official, foreign political party, party official or candidate for foreign political office for purposes of influencing any act or decision or inducing such foreign official, political party, party official or candidate to influence any act or decision of a foreign government or instrumentality to obtain or retain business or for the purposes of obtaining any improper advantage.

The FCPA provides two affirmative defenses for U.S. companies accused of making prohibited payments. First, a U.S. company may make a payment, gift, offer or promise of anything of value to a foreign official, a political party or a candidate's country provided such action is expressly permitted under the written laws of that country. Secondly, a U.S. company may make a payment, gift, offer or promise of anything of value that constitutes a reasonable and bona fide expenditure directly related to the promotion of products and services or the execution of a contract with a foreign country or agency.

Penalties: The penalties for violation of the FCPA are severe for both companies and individuals. There are two sets of penalty provisions: the anti-bribery provisions and the accounting provisions. Both provisions may impose civil and criminal penalties. The largest penalty, so far under the FCPA, has been by Siemens in Germany, which paid \$800 million in 2008. KBR/Halliburton paid \$600 million in the US in 2009. Also there is no limitation for the amount of infraction and even what might be considered small bribes can result in big penalties. Parent entities can be held responsible for their entities and the Penalties can include fines and bouncing of profits that a company might have realized from its unlawful conduct.

FCPA is particularly more challenging for companies operating in corruption-prone countries, such as India.

The India fallout for US Corruption is not only restricted to the cost of an internal investigation, which can be expensive but also large fines and criminal prosecution for Indian Partners, the risks lie in it having to pay compensation on the quantum of fine in case it has indemnified the US Corporation, as is often the case in foreign-local joint ventures.

Thus, any penalty of a heavy quantum can put Indian Companies in the dock, especially if their litigation insurance claim is rejected on grounds that there was willful bribing through intermediaries. It may also limit the Indian Companies in case

Award to be served compulsorily upon the party

The Supreme Court of India in the case of *Benarsi Krishna Committee v. Karmyogi Shelters Pvt. Ltd*¹ has held that it is not sufficient for the Arbitrator/s to only serve the Award only upon the Advocates but also compulsorily serve upon the parties to the arbitral proceedings.

Whilst analyzing Section 31 (5) of the Arbitration and Conciliation Act (the “Act”), the Supreme Court relied on its decision in *Union of India (UOI) v. TeccoTrichy Engineers and Contractor* where it was held that the meaning of “party to an arbitration agreement” as provided in Section 2 (1)(h) and Section 34 (3) would mean “*in the large organizations like Railways, "party" as referred to in Section 2(h) read with Section 34(3) of the Act has to be construed to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before the Arbitrator.*”²

The effect of this decision is that the Section 34 application under the said Act for setting aside the award is to be taken within the prescribed date of limitation as provided under the Act from the date of service of the award upon the party.

1. JT 2012 (9) SC 111

2. AIR 2005 SC 1832

International Contribution

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News 10 @ a glance

14th Finance Commission constituted under the Chairmanship of Y.V.Reddy

The 14th Finance Commission was recently constituted under the chairmanship of the former RBI Governor Y.V.Reddy. Its functions

will include suggesting steps for pricing of public utilities. The Commission is also charged with the responsibility of recommending measures to be taken which would ensure a healthy fiscal management and suggest steps to increase revenues of the cash-strapped states.

Power given to Chairperson of CCI to authorize dawn raids

With the proposed Competition (Amendment) Bill, 2012, the Director General will now only need to seek the approval of the Chairperson of the CCI to initiate the investigation as opposed to the more complicated process before the amendment, thus, making the search and seizure powers given to him under Section 41(3) of the Competition Act more lucrative by simplifying and expediting the process.

Companies Bill, 2012 finally passed by Lok Sabha

The Companies Bill, 2012, was finally passed in the winter session of the Parliament by the Lok Sabha, though still pending in the Rajya Sabha. The main feature of this Bill is that it seeks to do away with the insolvency proceedings under the SICA and establish a new authority called the National Company Law Tribunal (NCLT). Apart from the above-mentioned change, it has brought about several other changes and has

expanded and clarified various provisions and definitions.

RBI imposes stringent conditions on NBFCs

Non-Banking Financial Institutions (NBFCs) will now be subject to more stringent regulation as imposed by the RBI with reference to capital requirements, risk weights, provisioning norms and asset classification. Now, transfer of 25% shareholding in a NBFC will require prior RBI approval. Moreover, the CEO of a NBFC will be appointed with the approval of RBI.

SEBI widens scrutiny in Sahara case

SEBI is widening its scrutiny of the controversial Optionally fully convertible debentures (OFCDs) which came under its analysis in the Sahara case. SEBI has sent notices to banks where Sahara has its accounts in order to ascertain the amount of money raised by these OFCDs which now have to be returned to the bona fide investors. Earlier, the Supreme Court had ordered Sahara to pay back the money of bona fide investors in two installments.

GAAR Postponed for 2 years

In an effort to encourage investments from abroad the government has decided to defer the controversial GAAR rules for a period of two years. GAAR was

intended to check tax avoidance by multi-national firms that use tax havens to route their investments into India. But introduction of GAAR was viewed as a measure which would place unrestrained power in the hands of tax authorities.

CCI to investigate Cartelization Among Oil Firms

Competition Commission of India (CCI) has said that it will seek details from the oil companies regarding their pricing mechanism as it is suspected that cartelization might be playing some role in the fixing of prices of fuel. CCI initially had asked the petroleum ministry to reveal the pricing mechanism, but the ministry replied that they had no role and were not responsible in any way for the fixation of petroleum prices as it is a deregulated commodity. Hence, being satisfied at that end, the CCI is now turning its attention to the oil companies and investigating instances of alleged cartelization.

Three foreign and two national banks shortlisted for NTPC share sale

The government has decided to sell shares worth \$ 2.3 Billion in NTPC. For the purpose of this sale it has shortlisted six banks. These banks include Morgan Stanley, Deutsche Bank, Goldman Sachs, Citigroup and Indian Banks such as SBI Capital markets and Kotak Mahindra. The reason behind this

share sale was to curb the increasing fiscal deficit.

Tax-free bonds may get the axe

The government has decided to do away with tax-free bonds. Interest earned on such bonds is exempt from taxation. Such bonds are designed to encourage investments in the infrastructure sector. The Central Board for Direct Taxes (CBDT) was considering doing away with such bonds because the tax break did not generate the desired results, moreover, the revenue loss caused by such exemption is far greater than the benefits accrued.

Google signs Consent Decree After Probe by FTC

Google, which was embroiled in anti-trust investigations by the Federal Trade Commission (FTC), resolved the dispute by signing a consent decree to charge fair, reasonable and non-discriminatory prices for the licensing of its various patents. This step taken by Google will ensure that it does not prevent competition from mobile devices running on software other than Google's Android system.