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INDIAN LEGAL IMPETUS

"Singh & Associates at the International Bar Association's Annual Conference (October 19 – 24, 2014) held at Tokyo, Japan."

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FOREWORD

Manoj K. Singh
Founding Partner

It gives me great pleasure in sharing with you this October 2014 issue of our Newsletter "Indian Legal Impetus". I, for and on behalf of the team, thank you for your overwhelming response to our effort and endeavor.

This issue begins with an article on key highlights of the Securities and Exchange Board of India (Share Based Employee Benefits) Regulations, 2014 which discusses the regulations framed by the market regulator SEBI so as to bring into its wide ambit, all the shares related schemes issued by the companies for the benefit of its employees. This article is followed by an insight on the issue relating to levy of Service tax on activities involved in relation to inward remittances from abroad to beneficiaries in India in light of the recent notification issued by the Tax Research Unit under Central Board of Excise and Customs, Department of Revenue, Ministry of Finance regarding levy of Service Tax on the Foreign Remittances in India through MTSOs.

Thereafter, this issue includes two discussion based write ups. One dealing with whether adjustment of previous losses of co-operative societies after amalgamation is permissible under Income Tax Act and the other on the issue whether there shall be levy of penalty for failure to deduct tax at source if assessee shows a reasonable cause for such failure.

Further, an article on rights of a co-director to challenge sale of company property highlights discussion relating to company properties being also sold by dominant directors in an oppressive manner to make personal gains. Even though the concept is not prevalent in Indian legal domain, however (based on our ongoing experience relating to a large litigation matter in US) we incorporated a brief article on strict product liability as applicable in US with a brief status of the principle in India. Taking a departure from corporate topics an article on Clinical Establishments (Registration and Regulation) Act, 2010, its ambit and interesting points of relevance to sponsors is included in this issue. Moreover, an analysis of section 23 of Indian Contract Act, 1872 has been included in this issue based on recent advisory assistance provided to a US based client seeking investments from India.

This issue consists of write up on the restrictive conditions that should be avoided in a contract in light of Section 140 of the Patents Act, 1970. Further, an article discussing the plain packaging laws in relation to packets of cigarettes and other tobacco products keeping in view the recent judgment by a high court has been included. Moreover, a new approach towards patents on the basis of crowd-sourcing has also been incorporated in this issue. Lastly, the newsbyte section provides a few recent and interesting updates for your quick reference.

We hope this issue also helps us in further achieving our objective of making you understand the laws and recent legal developments in India. We welcome all suggestions and comments for our newsletter and hope that the valuable insights provided by our readers would make "Indian Legal Inputs" a valuable reference point and possession for all. You may send your suggestions, opinions, queries or comments to **newsletter@singhassociates.in**

Thank You !

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"Indian Legal Impetus"

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SEBI ISSUED SHARE BASED EMPLOYEE BENEFIT REGULATIONS

Megha Kapoor and Gopal Bageria[1]

INTRODUCTION

The Securities and Exchange Board of India (SEBI), in the year 1999, had framed "Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999" (hereinafter "existing guidelines") which provides for the stock based incentive schemes to employees. On 28th October, 2014, SEBI has notified **Securities and Exchange Board of India (Share Based Employee Benefits) Regulations, 2014,**[2] (hereinafter "Regulations") the provisions of which shall be applicable on the following:

i. employee stock option schemes;
ii. employee stock purchase schemes;
iii. stock appreciation rights schemes;
iv. general employee benefits schemes; and
v. retirement benefit schemes consequent upon which the existing guidelines have been repealed.

The Regulations has been framed by the market regulator SEBI in order to bring into its wide ambit, all the shares related schemes issued by the companies for the benefit of its employees.

APPLICABILITY

As per the Regulation 1 (4), of the Regulations shall be applicable to those companies whose shares are listed on any recognised stock exchange in India, and which fulfills the following:

i. has a scheme for direct or indirect benefit of employees;
ii. involves dealing in or subscribing to or purchasing securities of the company, directly or indirectly; and
iii. which satisfies, directly or indirectly, any one of the following conditions:
   a. the scheme is set up by the company or any other company in its group;
   b. the scheme is funded or guaranteed by the company or any other company in its group;
   c. the scheme is controlled or managed by the company or any other company in its group.

As far as applicability of these regulations are concerned, Regulation 1(5) provides that these Regulations shall not be applicable to shares issued to employees in compliance with the provisions pertaining to preferential allotment as specified in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.

Further, it has been clarified that the provisions pertaining to preferential allotment as specified in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 shall not be applicable in case of a company issuing new shares in pursuance and compliance of these Regulations.

CERTAIN IMPORTANT DEFINITIONS

1. Employee (Regulation 2(f)): "Employee" means,

   (i) a permanent employee of the company who has been working in India or outside India; or
   (ii) a director of the company, whether a whole time director or not but excluding an independent director; or
   (iii) an employee as defined in clauses (a) or (b) of a subsidiary, in India or outside India, or of a holding company of the company or of an associate company but does not include—
      (a) an employee who is a promoter or a person belonging to the promoter group; or
      (b) a director who either himself or through his relative or through any body corporate, directly or indirectly, holds more than ten percent of the outstanding equity shares of the company.

2. Employee Stock Option Scheme or ESOS (Regulation 2(g)): ESOS means a scheme under which a company grants employee stock option directly or through a trust.

3. Employee Stock Purchase Scheme or ESPS (Regulation 2(h)): ESPS means a scheme under

1. *CS Intern*
2. *Notification dated 28.10.14, No. LAD-NRO/GN/2014-15/16/1729*

which a company offers shares to employees, as part of public issue or otherwise, or through a trust where the trust may undertake secondary acquisition for the purposes of the scheme.

4. Exercise (Regulation 2(i)): Exercise means making of an application by an employee to the company or to the trust for issue of shares or appreciation in form of cash, as the case may be, against vested options or vested SARs in pursuance of the schemes covered under Part A or Part C of Chapter III of these regulations, as applicable".

5. General Employee Benefits Scheme or GEBS(Regulation 2(l)): GEBS means any scheme of a company framed in accordance with these regulations, dealing in shares of the company or the shares of its listed holding company, for the purpose of employee welfare including healthcare benefits, hospital care or benefits, or benefits in the event of sickness, accident, disability, death or scholarship funds, or such other benefit as specified by such company.

6. Grant (Regulation 2(m)): Grant means the process by which the company issues options, SARs, shares, or any other benefits under any of the schemes.

7. Secondary Acquisition (Regulation 2(zc): Secondary Acquisition means acquisition of existing shares of the company by the trust on the platform of a recognised stock exchange for cash consideration.

8. Share (Regulation 2(zd): Share means equity shares and securities convertible into equity shares and shall include American Depository Receipts (ADRs), Global Depository Receipts (GDRs) or other depository receipts representing underlying equity shares or securities convertible into equity shares.

9. Trust (Regulation 2(zg): Trust means a trust established under the provisions of Indian Trusts Act, 1882 including any statutory modification or re-enactment thereof, for implementing any of the schemes covered by these regulations.

10. Trustee (Regulation 2(zh): Trustee means the trustee of the trust.

11. Vesting (Regulation 2(zi): Vesting means the process by which the employee becomes entitled to receive the benefit of a grant made to him under any of the schemes.

IMPLEMENTATION OF SCHEMES

Regulation 3 under Chapter II of the Regulations provides that a Company may implement the scheme either directly or by setting up an irrevocable trust(s). However, where the scheme is to be implemented through a trust the same has to be decided upfront at the time of taking approval of the shareholders for setting up the schemes. Moreover in case the scheme involves secondary acquisition or gift or both, then it is mandatory for the company to implement such scheme through a trust.

The Regulations provides that a single trust can be created for the implementation of the various shares related schemes of the company, provided proper books of accounts, records and documents are prepared for each such scheme.

SEBI shall have the power to specify the minimum provisions to be included in the trust deed and such trust deed along with any modifications, if any, shall be required to be mandatorily filed with the stock exchange in India where the shares of the company are listed.

TRUSTEE AND HIS ROLE

Sub regulation (4) of Regulation 3 prohibits a director, key managerial personnel or promoter of the company or its holding, subsidiary or associate company or any relative of such director, key managerial personnel or promoter from holding the position as a trustee. Further, any person beneficially holding 10% or more of the paid-up share capital of the company shall also be ineligible for holding the position as the trustee of the trust.

A minimum of two trustees shall be required in a trust if individuals or One Person Companies are appointed as trustees. In all other cases, there can only be one trustee.

The trustees shall not have any right to vote in respect of the shares held by such trust. The implementation of the scheme as approved by the special resolution of the members is the task of the trustee. Further, undertaking secondary acquisition as per the scheme is also the task of the trustee.

The trust is strictly prohibited from dealing in derivatives. It shall undertake only delivery based transactions for the purposes of secondary acquisition as permitted by these regulations. However, Secondary acquisition in a financial year by the trust shall not exceed two per cent of the paid up equity capital as at the end of the previous financial year. Further, the trust shall be required to hold the shares acquired through secondary acquisition for a minimum period of six months. However, exception has been granted for the transfer of the shares in exceptional circumstances mentioned therein.

All the disclosures and compliance as applicable to insiders or promoters under the SEBI (Prohibition of Insider Trading) Regulations, 1992 are also applicable to be complied with.

ELIGIBLE EMPLOYEES

Regulation 4 empowers the compensation committee of the Company to determine the eligible employee for the purpose of this regulation.

COMPENSATION COMMITTEE

Regulation 5 mandatorily requires a company to constitute compensation committee for the purpose of administration and superintendence of the schemes. Such committee shall consist of members of the board of directors of the company as provided under section 178 of the Companies Act, 2013.

The compensation committee shall, formulate the detailed terms and conditions of the schemes and shall frame suitable policies and procedures to ensure that there is no violation of securities laws.

SHAREHOLDERS' APPROVAL

Regulation 6 provides that no scheme shall be offered to employees of a company unless the shareholders of the company approve it by way of passing special resolution in the General Meeting.

VARIATION IN TERMS OF THE SCHEMES:

Regulation 7 primarily restricts the company to vary the terms of the schemes in any manner, which may be detrimental to the interests of the employees. However, considering the interests of the employees, the variation in the terms of the scheme can be made only with the approval of the shareholders of the company by way of passing special resolution.

WINDING UP OF THE SCHEMES

Regulation 8 provides that in the case of winding up of the schemes, the excess monies or shares remaining with the trust after meeting all the obligations shall be required to be utilised for repayment of loan or by distribution to employees as recommended by the compensation committee, in case of winding up of the schemes.

NON TRANSFERABILITY

As per Regulation 9, the transferability of the Option, SAR or any other benefit granted to an employee under the regulations to any person shall be restricted. Moreover the option, SAR, or any other benefit granted to the employee shall not be pledged, hypothecated, mortgaged or otherwise alienated in any manner.

The benefit of the scheme, in case of death of the employee, shall vest in the legal heirs or nominees of the deceased employee.

CERTIFICATE FROM AUDITOR

The auditors of the Company shall issue a certificate with regards to the scheme that the scheme has been implemented in accordance with the provisions of this regulation and also in accordance with the resolution of the company in the general meeting. Such certificate shall be placed before the members in the Annual General Meeting.

ACCOUNTING POLICIES

Regulation 15 mandates the company which is implementing any of the share based schemes to follow the requirements of the 'Guidance Note on Accounting for employee share-based Payments' (Guidance Note) or Accounting Standards as prescribed by Institute of Chartered Accountants of India from time to time.

KEY POINTS WITH REGARDS TO SOME OF THE SCHEMES:

Employee Stock Option Scheme (ESOS) - A minimum vesting period of one year is prescriber in case of an ESOS. Further, the company has been given the

discretion to determine the lock-in-period for the shares issued pursuant to exercise of option.

In-spite of the employee being eligible for the shares, he shall not be called a shareholder of the company until the shares are issued to him upon exercise of option and consequently, he shall have no right to vote or receive. Further, the amount payable by the employee, if any, at the time of grant of option, may be forfeited by the company if the option is not exercised by the employee within the exercise period.

However, the amount payable by the employee may be refunded if the options are not vested due to non-fulfillment of conditions relating to vesting of option as per the ESOS.

Employee Stock Purchase Scheme (ESPS) - Shares issued under an ESPS shall be locked-in for a minimum period of one year from the date of allotment. If ESPS is part of a public issue and the shares are issued to employees at the same price as in the public issue, the shares issued to employees pursuant to ESPS shall not be subject to any lock-in period.

Stock Appreciation Rights Scheme (SARS) - A minimum vesting period of one year has been prescriber for SAR schemes. Further, no right as to vote or receive dividend or any other benefits of a shareholder is entrusted upon the SAR grantee.

CONCLUSION

To ensure a smooth transition for complying with the Regulations the companies which have an existing scheme related to the shares of the company, have been provided with a timeframe of one year from the date of the notification in the Official Gazette.

The New Regulations aim to prohibit any unfair practices with regards to secondary acquisition. Further, it is highly improbable that the misuse of the new regulation shall take place, as the act requires the directors of the company to place in the Annual General Meeting a certificate from the auditors of the company, regarding compliance of the Regulations.

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LEVY OF SERVICE TAX ON ACTIVITIES INVOLVED IN RELATION TO INWARD REMITTANCES FROM ABROAD TO BENEFICIARIES IN INDIA

Shipra Makkar Devgun and Shefali Shukla[1]

A BRIEF SCENARIO

Prior to July, 2012; Service Tax was applicable on a positive list approach which means earlier all services were exempted from payment of service tax except those specifically mentioned in the Act. However pursuant to July, 2012 a negative list approach is being applied.

As per the new charging Section 66 B of the Finance Act as amended in *2012 "there shall be levied a tax at the rate of 12% on the value of all services, other than those services specified in the negative list,* ***provided or agreed to be provided in the taxable territory*** *by one person to another and collected in such manner as may be prescribed."* Meaning thereby, all the services provided or agreed to be provided within the taxable territory shall be taxable under Service Tax, until and unless they fall under the negative list.

Furthermore, under the earlier system of taxation of services, there were 88 exemption notifications. The need for exemption notification was not obviated with the introduction of taxation of services based on negative list of services. While some earlier exemptions have been built into the negative list, others, wherever necessary have been retained as exemptions in addition to few more which have been granted, the only difference is that for the ease of reference and convenience, all the exemption are now a part of one Mega Exemption Notification No. 25/ 2012.

In all the discussions above, the point which is pertinent to highlight is the meaning of the word **"Taxable Territory"** which according to Section 65B (52) means the territory to which the provisions of this chapter apply i.e to the whole of India except the state of Jammu & Kashmir. At this juncture, it shall also be worth mentioning that the taxing jurisdiction of any service is determined under the place of Provision of Services Rules, 2012.

LEVY OF SERVICE TAX ON THE FOREIGN EXCHANGE REMITTED TO INDIA

On the issue of levy of Service Tax on the activities involved in the inward remittances, the Central Board of Excise and Customs [Board], immediately after the introduction of Mega Exemption notification clarified vide Circular No. 163/14/2012-ST dated 10th July, 2012 that there is no service tax ***per se*** on the foreign exchange remitted to India from outside for the reason that money does not constitute a service and that conversion charges or fee levied for sending such money would also not be liable to service tax as the person sending the money and the company conducting the remittance are both located outside India or the taxable territory.

It was also clarified that the Indian bank or financial institution that provides services to the foreign bank or any other entity is also not liable to Service Tax as the place of provision of Service shall be the location of recipient of service [as per the place of Provision Rules]. It has to be kept in mind that the said clarification covers the scenario where the Indian Bank provides services on principal to principal basis to the foreign bank or entity, on its account, and thus the service is covered by the Rule-3 of the Place of Provision of Service Rules, 2012 which provides that place of provision of service as the 'location of recipient of services.'

LEVY OF SERVICE TAX ON THE FOREIGN REMITTANCES IN INDIA THROUGH MTSOs

It has been observed by the Board that foreign Money Transfer Service Operators [MTSO],[2] conducting remittances to the beneficiaries in India, are appointing Indian banks or entities as their Representatives/ Agents for providing services of remittances to beneficiaries in India and in return pay commission or fee to such representatives/agents.

1. *CS Intern*

2. *Circular No. 180/06/2014/-ST dated 14/10/14*

The entire sequence of transaction through the MTSO route is as follows:

- Remitter approaches a MTSO located outside India for remitting money to a beneficiary in India. The MTSO Charges fee from the Remitter.
- The MTSO avails the services of an Indian agent for delivery of money to the ultimate recepient in India and a commission is paid to the agent.
- The agent may avail further services from a sub agent and pay him commision therafter.
- The money is delivered to the beneficiary and a fee may be charged to him by the agent or the sub agent.

Pursuant to the above sequence of transaction, the Board vide Circular No. 180/06/2014-ST dated 14th October, 2014 has provided the following clarifications in relation to the said activities related to inward remittances from abroad in India through these MTSOs:

1. ***Whether service tax is payable on remittance received in India from abroad?***

   No service tax is payable per se on the amount of foreign currency remitted to India from overseas. As the remittance comprises money, it does not in itself constitute any service in terms of the definition of 'service' as contained in clause (44) of section 65B of the Finance Act 1994.

2. ***Whether the service of an agent or the representation service provided by an Indian entity/ bank to a foreign money transfer service operator (MTSO) in relation to money transfer falls in the category of intermediary service?***

   Yes. The Indian bank or other entity acting as an agent to MTSO in relation to money transfer, facilitates in the delivery of the remittance to the beneficiary in India. In performing this service, the Indian Bank/entity facilitates the provision of Money transfer Service by the MTSO to a beneficiary in India. For their service, agent receives commission or fee. Hence, the agent falls in the category of intermediary as defined in rule 2(f) of the Place of Provision of Service Rules, 2012.

3. ***Whether service tax is leviable on the service provided, as mentioned in point 2 above, by an intermediary/agent located in India (in taxable territory) to MTSOs located outside India?***

   Service provided by an intermediary is covered by rule 9 (c) of the Place of Provision of Service Rules, 2012. As per this rule, the place of provision of service is the location of service provider. Hence, service provided by an agent, located in India (in taxable territory), to MTSO is liable to service tax. The value of intermediary service provided by the agent to MTSO is the commission or fee or any similar amount, by whatever name called, received by it from MTSO and service tax is payable on such commission or fee.

4. ***Whether service tax would apply on the amount charged separately, if any, by the Indian bank/ entity/agent/sub-agent from the person who receives remittance in the taxable territory, for the service provided by such Indian bank/entity/ agent/sub-agent?***

   Yes. As the service is provided by Indian bank/ entity/agent/sub-agent to a person located in taxable territory, the Place of Provision is in the taxable territory. Therefore, service tax is payable on amount charged separately, if any.

5. ***Whether service tax would apply on the services provided by way of currency conversion by a bank /entity located in India (in the taxable territory) to the recipient of remittance in India?***

   Any activity of money changing comprises an independent taxable activity. Therefore, service tax applies on currency conversion in such cases in terms of the Service Tax (Determination of Value) Rules. Service provider has an option to pay service tax at prescribed rates in terms of Rule 6(7B) of the Service Tax Rules 1994.

6. ***Whether services provided by sub-agents to such Indian Bank/entity located in the taxable territory in relation to money transfer is leviable to service tax?***

Sub-agents also fall in the category of intermediary. Therefore, service tax is payable on commission received by sub-agents from Indian bank/entity.

Effect of circular regarding levy of Service Tax on Foreign Remittances:

Since India has large number of persons who send foreign funds to their loved ones, it may be a boon for the Indian economy, the World Bank estimating India to likely to receive more than $71 billion through remittances this year from any service tax on the remittances of foreign Exchanges, however on the other hand, this circular has certainly not provided any benefit to common man i.e. service recipient but has only increases the burden on the pocket of the recipient.

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ADJUSTMENT OF PREVIOUS LOSSES OF CO-OPERATIVE SOCIETIES AFTER AMALGAMATION: WHETHER PERMISSIBLE UNDER INCOME TAX ACT

Rohit K. Gupta

Hon'ble Apex Court in matter 'RAJASTHAN R.S.S. & GINNING MILLS FED. LTD. Vs. DY. COMMISSIONER OF INCOME TAX, JAIPUR[1]' has awarded an important judgment vide which the issue of computing previous losses incurred by Co-operative Societies before their amalgamation into appellant Society was filed under Income Tax return has been elaborated.

The issue in question, which was considered and decided by Hon'ble Supreme Court in present appeal by special leave is: whether the appellant society is entitled to accumulate and carry forward the losses of the societies merged in it, so that the same could be set off against the profits of the appellant society under the provisions of Section 72 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act')?

The facts in brief which lead the filing of subject appeal are as under:

There were four co-operative societies in the State of Rajasthan wherein the Government of Rajasthan had substantial share holding, namely - (i) Rajasthan Co-operative Spinning Mills Ltd.; (ii) Gangapur Cooperative Spinning Mills Ltd.; (iii) Ganganagar Co-operative Spinning Mills Ltd.; and (iv) Gulabpura Cotton Ginning & Pressing Sahkari Samiti Ltd. An administrative decision was taken by the Government of Rajasthan to amalgamate all these co-operative societies into the appellant co- operative society, namely Rajasthan Rajya Sahkari Spinning & Ginning Mills Federation Ltd w.e.f. 01.01.1993. Upon amalgamation of the said societies into the appellant society, the registration of the said four cooperative societies had been cancelled and all the assets and liabilities of the said four societies had been taken over by the appellant society by virtue of the said amalgamation. These four societies were not sound financially and they had substantial accumulative losses.

When Income-Tax returns for the assessment years 1994-95 and 1995-96 were filed by the appellant society after the amalgamation of the four co-operative societies into it, the appellant society wanted to get the accumulated losses of the aforesaid societies, of about Rs.2,68,39,504/-, carried forward, so that the same could be set off against the profits of the appellant society under the provisions of Section 72 of the Act.

The assessing officer declined the appellant's claim for the reason that the said societies were not in existence after their amalgamation into the appellant society. As the said four societies were not in existence, according to the assessing officer, their accumulated losses could not have been carried forward or adjusted against the profits of the appellant society. Assessment orders were passed accordingly.

Being aggrieved by the above stated assessment orders, appeals were filed before the CIT (Appeals) and the CIT (Appeals) dismissed the said appeals. Further appeals were filed before the Income Tax Appellate Tribunal but the Tribunal also dismissed the appeals.

Being aggrieved by the common order passed by the Tribunal, the appellant filed Income Tax Appeal No.19 of 2001 before the High Court of Rajasthan and the said Income Tax Appeal was also dismissed and therefore, the appellant has approached this Court by way of the present appeal.

The contention of the counsel for the appellant was that the view taken by the assessing officer, are not correct for the reason that upon amalgamation of the aforesaid four co-operative societies into the appellant society, by virtue of the provisions of Section 16(8) of the Rajasthan Co- operative Societies Act, rights and obligations of the societies so amalgamated would not be affected and therefore, all the rights which the societies had with regard to carrying forward of their losses would continue, and as the said societies had been amalgamated into the appellant society, the appellant society ought to have been permitted to set off the losses suffered by the amalgamated societies.

1. *2014 STPL(Web) 343 SC*

It was further submitted that reading Section 72(1) of the Act with Section 16(8) of the Rajasthan Co-operative Societies Act, 1965 clearly denotes that the appellant assessee had a right to carry forward losses incurred by the amalgamating societies and set off the business losses of the said societies against the profits and gains of the appellant society. His further contention was that the word 'company' used in Section 72(A) of the Act should be given wide interpretation so as to include societies in the term 'company' because like companies, societies also have a distinct legal personality and there is no reason for the authorities under the Act to give different treatment to co-operative societies.

It was submitted that the appellant society had a vested right to get the accumulated losses of the amalgamated societies adjusted against the profits of the appellant society and the said vested right could not have been taken away by the assessing officer. The appellant relied upon the judgment delivered in the case of Commissioner of Income Tax v. M/s. Shah Sadiq and Sons[2].

However, the learned counsel appearing for the authorities of the Income Tax Department had submitted that the registration of the amalgamating societies had been cancelled upon the amalgamation and as they were not in existence at the time when the appellant society was assessed, there was no question of carrying forward accumulated losses of the amalgamating societies and adjusting them against the profits of the appellant society.

It was further submitted that upon conjoint reading of Section 72 and 72A of the Act, it is clear that the co-operative societies cannot get the benefit of carrying forward and setting off accumulated losses if the said societies were not in existence. Only in case of a 'company', the benefit of set off could be availed by an amalgamated company, if the amalgamating company had accumulated losses which could have been carried forward and adjusted against the profits of the amalgamated company in accordance with the provisions of the Act. Judgments relied by Respondent are 'The Commissioner of Income Tax, Lucknow v. Sh. Madho Pd. Jatia'[3]; 'M/s. Baidyanath Ayurved Bhawan (Pvt.) Ltd., Jhansi v. The Excise Commissioner, U.P. and others[4]' and 'Commissioner of Income Tax, Bombay v. Maharashtra Sugar Mills Ltd., Bombay[5]'. Accordingly learned counsel appearing for the respondent authorities had submitted that the impugned judgment is just and correct and therefore, the appeal deserved to be dismissed.

Hon'ble Apex Court after hearing the arguments, pursuing records and after going through the judgments referred to them are of the view that the judgment delivered by the High Court is absolutely just and proper.

Hon'ble Apex Court has held that reason that for the purpose of getting carried forward losses adjusted or set off against the profits of subsequent years, there must be some provision in the Act. If there is no provision, the societies which are not in existence cannot get any benefit. The losses were suffered by the societies which were in existence at the relevant time and their existence or legal personality had come to an end upon being amalgamated into another society. It was stated further that the normal principle is that a non-existent person cannot file an income tax return and therefore, cannot carry forward its losses after its existence comes to an end. All those four societies, upon their amalgamation into the appellant society, had ceased to exist and registration of those societies had been cancelled. In the circumstances, those societies had no right under the provisions of the Act to file a return to get their earlier losses adjusted against the income of a different legal personality i.e. the appellant society.

Hon'ble Supreme Court clarified that there is a specific provision in the Act in the cases of Companies Amalgamation and the amalgamated company can get those losses set off against its profits subject to the provisions of the Act by virtue of Section 72 A of the Act but there is no such provision in the case of cooperative societies.

It was also ruled out that any discrimination and violation of Article 14 of the Constitution of India as the same would also not help the appellant. It was stated that there is no discrimination. The societies and companies belong to different classes and simply

2. *1987(3) SCC 516*
3. *1976(4) SCC 92*
4. *1971(1) SCC 4*
5. *1971 (3) SCC 543*

because both have a distinct legal personality, it cannot be said that both must be given the same treatment.

Accordingly the view expressed by the High Court was upheld as there is no provision under the Act for setting off accumulated losses of the amalgamating societies against the profits of the amalgamated society, the appellant society could not have got the benefit of carrying forward losses of the erstwhile societies which were not in existence during the relevant Assessment Year. Appeal was accordingly dismissed.

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NO PENALTY FOR FAILURE TO DEDUCT TAX AT SOURCE IF ASSESSEE SHOWS A REASONABLE CAUSE FOR THE FAILURE

Pradhumna Didwania

Tax Deducted at Source (TDS) is a system for collection of Direct Tax in India. Indian Income Tax Act, 1961 [hereinafter referred to as ***"ITA"***], mandates that a specified percentage of Tax is required to be deducted by the payer at the time of making certain payments to the payee. The requirement to deduct tax is there for payments such as payment of Commission, interest, salary, royalty, contract payment, brokerage etc. The Tax deducted has to be deposited by the payer to the revenue department on behalf of the payee. In case the payer doesn't deducts' the tax at source, the payer is liable to pay penalty u/s 271C of the ITA. *Section 271C - Penalty for failure to deduct tax at source* of the ***"ITA"*** can be read as follows:

271C.

1) If any person fails to—

a) deduct the whole or any part of the tax as required by or under the provisions of Chapter XVIIB;

or

b) pay the whole or any part of the tax as required by or under—

i. sub-section (2) of section 115-O; or

ii. the second proviso to section 194B,

then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.

2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner.

However, Section 273B of the ITA provides that in case the payor proves to the revenue department that there was some reasonable cause for the failure to deduct tax then the penalty under Section 271C is waived off. *Section 273B - Penalty not to be imposed in certain cases,* can be read as follows:

273B. ***Notwithstanding anything contained*** *in the provisions of clause (b) of sub-section (1) of section 271, section 271A, section 271AA, section 271B , section 271BA, section 271BB, section 271C, section 271CA, section 271D, section 271E, section 271F, section 271FA, section 271FB, section 271G, section 271H, clause (c) or clause (d) of sub section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section (1) or subsection (1A) of section 272BB or sub-section (1) of section 272BBB or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of section 273,* ***no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.***

There is no definition for the term reasonable cause and it has to be decided upon the facts of each case. Some of the judicial pronouncements with regards to waiver of penalty u/s 271C for bonafide mistake on the part of the payor are as follows:

1. The Hon'ble Supreme Court of India made the following observation in the Case of Commissioner of Income Tax, New Delhi Vs. M/s Eli Lilly & Company (India) Pvt. Ltd. & Ors.[1] with regards to reasonable cause for failure to deposit TDS:

(iv) On the Scope of Section 271C read with Section 273B:

35. Section 271C inter alia states that if any person fails to deduct the whole or any part of the tax as required by the provisions of Chapter XVII-B then such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct. In these cases we are concerned with Section 271C(1)(a). Thus Section 271C(1)(a) makes it clear that the penalty leviable shall be equal to the amount of tax which such person failed to deduct. We cannot hold this provision to be mandatory or compensatory or automatic because under Section 273B Parliament has enacted that penalty shall not be imposed in cases falling thereunder. Section 271C falls in the category of such cases. Section 273B states that notwithstanding anything contained in Section 271C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such

1. *CIVIL APPEAL No. 5114/2007, Order Date 25th March, 2009*

person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on 44 the person who do not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason. In each of the 104 cases before us, we find that non-deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under Section 192 was a nascent issue. It has not be considered by this Court before. Further, in most of these cases, the tax- deductor-assessee has not claimed deduction under Section 40(a)(iii) in computation of its business income. This is one more reason for not imposing penalty under Section 271C because by not claiming deduction under Section 40(a)(iii), in some cases, higher corporate tax has been paid to the extent of Rs. 906.52 lacs (see Civil Appeal No. 1778/06 entitled CIT v. The Bank of Tokyo-Mitsubishi Ltd.). In some of the cases, it is undisputed that each of the expatriate employees have paid directly the taxes due on the foreign salary by way of advance tax/self-assessment tax. ***The tax-deductor-assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/HO and, consequently, we are of the view that in none of the 104 cases penalty was leviable under Section 271C as the respondent in each case has discharged its 45 burden of showing reasonable cause for failure to deduct tax at source***.

2. The Hon'ble Karnataka High Court made the following observation in the Case of The Commissioner of Income Tax and Others Vs. The Rajajinagar Co-operative bank Limited[2], with regards to reasonable cause for failure to deposit TDS:

10. ***In the instant case, the assessee is a Co-operative Bank. Clause 5 of sub-section (3) of Section 194A expressly exempts the Bank from deducting the tax at source on interest payable by the Bank to its members and other Co-operative Societies. As stated by the assessee, they did not properly construe this provision. By mis-construing this provision they also did not deduct tax from the interest payable to non-members. That is the bonafide mistake which they have committed. Their bonfides is demonstrated to the effect that once in a survey the said mistake was notice and pointed out immediately they have paid the tax with interest.*** *Therefore, in the light of this undisputed facts of this case, when the Appellate Commissioner and the Tribunal held that the same constitutes a reasonable cause and when the same is not shown to be false, the assessee has satisfied the requirement of Section 273-B, in which event, no penalty shall be imposable. Therefore the order passed by the Tribunal and the appellate Commissioner is valid and legal and do not suffer from any legal infirmity which calls for interference. Accordingly the substantial question of law framed is answered in favour of the assessee and against the Revenue.*

3. The Hon'ble Income Tax Appellate Tribunal, Delhi Bench made the following observation in the Case of Addl. Commissioner of Income Tax (TDS), Dehradun Vs. District Education Officer[3], with regards to reasonable cause for failure to deposit TDS

7. It is seen that the said issue came up for hearing on identical grounds in the appeal raised by the department in 2007-08 assessment year wherein the departmental appeal was dismissed. We reproduce the relevant finding from order dated 31.05.2013 from ITA-249/Del/2012 in ACIT(TDS) vs District Education Officer, Dehradun:-

"We have heard the submissions and perused the material available on record. On a consideration of the same, ***we are of the view that in the case of the assessee i.e Uttarakhand Educational Department there was bona fide belief under which the assessee operated that it was not required to deduct TDS. The assessee has claimed that adequately qualified staff namely F&A Officer was not available at the relevant point of time; the assessee has also contended that as the assessee was under a bona fide belief that since it had no authority to withhold the funds received from the U.P. Government i.e. UP Rajkiya Nirman Nigam Ltd. after due approvals for the Executing Authority as***

2. *ITA 86 of 2006, Order Date 20th July, 2011*

3. *ITA No.-277/Del/2012, Order Date 19th July, 2013*

per the contract to which the assessee was not even a signatory there was nothing more to be done except to release the funds in favour of the contractor i.e the "Executing Agency". The explanation of the assessee that it believed that it had no choice but to transfer the funds received in its account and that it had no control over the executing agency to detain its payments has rightly been held as a reasonable cause as the bona fide belief is borne out from the fact that as soon as the said fact was pointed out to the assessee, the position was corrected*. Accordingly in the afore-mentioned peculiar facts and circumstances of the case, we are of the view that the judgements relied upon by the CIT(A) fully support the stand taken. Accordingly being satisfied with the reasoning and finding arrived at in the impugned order, the department's ground is dismissed."*

4. The Hon'ble Income Tax Appellate Tribunal, Chandigarh Bench made the following observation in the Case of Sukhdev Singh Vs. The J.C.I.T.(TDS), Chandigarh[4], with regards to reasonable cause for failure to deposit TDS

   "It is well settled law that the penalty need not to be imposed in each and every case and discretionary in nature and the facts and circumstances of the case shall have to be taken into consideration. Section 273B of the Income Tax Act provides that no penalty under section 271C shall be imposable on the person or the assessee as the case may be, for any failure referred to in the said provisions, if he proves that there was reasonable cause for the said failure. ***The circumstances explained by the learned counsel for the assessee clearly reveal that the assessee paid interest to nonbanking financial institution and did not deduct tax because the assessee was under the bonafide belief that no TDS was to be deducted on the payments made to non-banking financial institution.*** *The Assessing Officer made disallowance under section 40(a)(ia) of the Income Tax Act and other additions were also made in the assessment order, which are accepted by the assessee and the demand raised as per assessment order has been paid.* ***Therefore, these circumstances would clearly reveal that the assessee has reasonable cause for failure to comply with the provisions of section. Therefore, in view it being a beginning of the assessee for failure to deduct tax and then the assessee in future has starting deducting TDS would suggest that the penalty may not be imposed in the aforesaid case.*** *Considering the above discussion, we are of the view that the levy of penalty in the facts and circumstances of the case is not warranted. We accordingly set aside the orders of the authorities below and cancel the penalty."*

CONCLUSION

Tax at source is required to be deducted by the payer at the time of making certain payments to the payee. Further the payee has to deposit the aforesaid tax with the government on behalf of the payee. If the payee fails to deduct the tax he is liable to pay the penalty. However, if the payee has failed to deduct tax under some bonafide belief then the penalty can be waived off. The payee has to prove that the failure to deduct tax was not intentional and he corrected his position as soon as the mistake was pointed out to him by deducting tax on future transactions, if any, and also by paying the TDS in default along with interest.

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4. *ITA No. 116/Chd/2014, Order Date 29th September, 2014*

RIGHTS OF A CO-DIRECTOR TO CHALLENGE SALE OF COMPANY PROPERTY

Shujath Ahmed

In the corporate epoch that we live in, many business concerns are run by family owned companies, comprising of directors within the same family. Several times the affairs of such companies are managed by dominant members of the family, who in the position as directors run the company as though it were a sole-proprietorship concern. Although the other directors have equal rights in the managerial affairs of the company, the practical position is that such directors are often oppressed by the dominant directors and have no substantial role to play in the affairs of company, resulting in mismanagement. The dominant directors taking advantage of such a situation often indulge in making personal gains that are not only detrimental to the interest of the company, but also affect the substantial interest of other directors and share holders. The company properties are also sold by such directors in an oppressive manner to make personal gains.

Now the question that arises for consideration is whether such oppressive acts of selling company property, that is detrimental to the interest of other directors/share holders, could be challenged?

Before answering the question in the affirmative, it is important to note that the role of a Director is akin to that of a trustee. A director has to run the affairs of the company in the best interest of the company. Equity prohibits a director from making any personal gains by his management, directly or indirectly. Directors are required to act on behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised for the sole benefit of the company. Any sale of company property by a director who goes beyond his fiduciary capacity and sells company property to make personal gains at the cost of the company, is an act of oppression and the same could be challenged. Further in order to sell a company property there has to be a valid Board Resolution passed by the Board of Directors authorizing the sale of company property, giving justifiable reasons for the sale in the interest of the Company. In the absence of a valid Board Resolution, the sale transacted by some directors is void and is of no consequence.

It is important for directors to be acquainted with their rights and powers. It is the right of every director to participate in the meeting of the Board of Directors. Before passing any Resolution, the Board must call for a meeting and notice of such meeting has to be duly served on all the directors of the Company. It is relevant to note that Section 286 of the Companies Act, 1956, mandates that, *"notice of every meeting of the Board of Directors of a company shall be given in writing to every director"*. Hence it is imperative on the part of the managing director to give notice of the meeting of the Board of Directors before passing any resolution. Without there being a valid notice of the meeting, duly served on all the directors, the validity of the resolution passed by the Board becomes voidable at the option of the aggrieved directors/shareholders.

Time and again Courts have held that 'Notice of Meeting' has to be given to all the directors. The Hon'ble Supreme Court in the case of Parmeshwari Prasad Gupta v. Union of India AIR 1973 SC 2389 has categorically held that *"notice to all the directors of a meeting of the board of directors is essential for the validity of any resolution passed at the meeting. Where no notice is given to one of the directors of the company, the resolution passed at the meeting of the board of directors is invalid"*. Further the said principle has been reiterated by several Courts and the Division bench of the Hon'ble High Court of Kerala in the case of Dr. T.M. Paul Vs City Hospital [1999] 97 CompCas 216 (Ker), has gone a step ahead and held that non compliance of Section 286 amounts to fraud. *"Section 286 requires notice of every meeting of Board of Directors of company to be given in writing to every Director - holding meeting and passing resolutions invalid for want of notice - adoption of resolutions without including them in agenda amounted to fraud"*.

Notice of meeting and the agenda of the same, has to be given as prescribed under Section 172 of the Companies Act. Further it is important to note that mere dispatch of notice as mandated under Section 286 does not amount to service of notice upon the directors. Even assuming the fact that notice was dispatched, the burden is heavy on the managing director to demonstrate that notice was duly

acknowledged by the other directors. The Hon'ble Supreme Court in Parmeshwari Prasad Gupta (supra) has held that *"leaving the notice in the residence of the director in his absence cannot be treated as proper notice"*. Further as held by the Division bench of Kerala High Court in Dr. T.M. Paul (supra), *"adoption of resolutions without including them in agenda amounted to fraud"*. Hence it is imperative that notice of meeting, along with agenda of the meeting has to be duly served on all the directors before passing of a resolution and in the absence of the same, the resolution becomes voidable. Proceeding further it would be relevant to look into the Memorandum and Articles of Association of the company to ascertain the powers of the Board of Directors. Generally the Articles of Association regulate the powers of the Board of Directors. At this juncture it may be relevant to mention Sec 291 of Companies Act, which deals with The General Powers of the Board. The provisio to Sec 291 states that, *"the Board shall not exercise any power which is required to be exercised in General Meeting as stipulated in the Memorandum or Articles of Association"*. Further the provisions of Sec 293 also lay down restrictions on power of the Board.

Section 293 states that, *"the Board of Directors shall not, except in a general meeting, sell, lease or otherwise dispose of the whole or substantially the whole undertaking of the company"*. Sec 293 mandates that for sale of company undertaking, the prior consent in a general body meeting is mandatory and passing of an ordinary resolution in the general meeting is necessary. Although the word "undertaking" as laid down in this section does not necessarily include company property, the test to be applied would be to see whether the capital asset proposed to be disposed of constitutes substantially the bulk of the asset of the company, so as to constitute the integral part of the undertaking of the company.

Hence the Board of Directors do not have authority to pass a resolution for sale of company property without taking the consent of the general body as mandated under section 293(1)(a), for which it will have to be shown that the company property that has been sold falls within the meaning of the term "undertaking" as mentioned above.

Besides challenging the sale of company property on the grounds of insufficient notice of meeting and invalid board resolution, the other important aspect would be regarding the justifiable reasons for the sale of company property. As mentioned earlier, company property can be sold only in the interest of the company and for the benefit of the company. The need or benefit derived by the company has to be clearly stated before authorizing sale of company property. The sale of company property must be in the paramount interest of the company. In the absence of there being a valid reason for sale of company property, the sale transaction is liable to be set aside. The Hon'ble Company Law Board, Chennai in the case of P. Narayanasamy and Ors. Vs. Neela Spinning Mills P. Ltd. and Ors [2010] 1 CompLJ 424 (CLB), while dealing with a mortgage that was unnecessarily created by the Board has held that, *"the need or the benefit derived by the company from and out of such borrowing is not established and lacks bona fides on the part of the respondents. The need for sale, adequacy of consideration or the valid authority for effecting sale of the properties is not borne out by any material. The benefit derived by the company has not been established by the respondents. The sale transactions which have come to the knowledge of the petitioners only after filing of the company petition, must be set aside, considering the paramount interest of the company"*.

CONCLUSION:

In the event of there being illegality in the sale of company property, the remedy available to the Directors/Share holders whose interest has been affected due to the oppressive act of the other directors in unilaterally selling the company property, is twofold, they can challenge the sale transaction by filing a comprehensive suit for declaration before the Civil Court to declare that the board resolution and the sale are illegal and seek for setting aside the illegal sale deed. Further the aggrieved parties could also approach the Company Law Board under the provisions of Section 397, 398 r/w 402 (f) on the grounds of mismanagement and oppression by the board of directors, provided the said application is made within three months from the date of sale.

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AN ANALYSIS OF STRICT PRODUCT LIABILITY

Rahul Pandey

INTRODUCTION:

Strict Product Liability has evolved from the theory of Strict Liability which has itself developed from an English Case called ***Rylands vs Fletcher***[1] which is supposed to be the progenitor of the doctrine of Strict Liability. In that case a reservoir broke through an abandoned mine and flooded an active mine. The active mine owners sued the abandoned mine owners, and won. The court held ***that "if a person for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is natural consequence of its escape".*** Basically Strict liability in tort is the concept that in certain situation a defendant is liable for plaintiff's damages without any requirement on the part of the plaintiff to prove that the defendant was negligent.

In the line of the same theory, Strict Product Liability evolved for protecting consumers and it clearly cast the liability on the manufacturer, seller, or lessor of goods and they would be strictly liable, regardless of intent or the exercise of reasonable care, for any personal injury or property damage to consumers, users, and by-standers caused by the goods it manufactures, sells, or leases. In the matter of ***Greenman v. Yuba Power Products, Inc.***[2], Supreme Court of California duly for the very first time held liable the manufacturer as in the instant case an injury was caused to an ultimate consumer by a defective power tool, the California Supreme Court assigned strict liability to the manufacturer who placed on the market a defective product even though both privity of contract and notice of breach of warranty were lacking. The ratio laid down by the Hon'ble Court clearly stated that "Strict liability does not rest on a consensual foundation but, rather, on one created by law. The liability was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies. The court's avowed purpose was "to insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves."

Later on, the American Law Institute drafted and adopted Restatement (2d) of Torts §402A. It duly states that:

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rules stated in subsection (1) apply although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

PRODUCTS LIABILITY--STRICT LIABILITY IN TORT:

Now the most important aspect of the whole theory is that, who may be held liable for damages caused by the defective products?

After the ruling put forward by the Supreme Court of California in the matter of ***Greenman v. Yuba Power Products, Inc,*** it was construed that any entity involved in the chain of distribution for a defective product may be held liable for injuries caused by the defect. Potentially liable parties include the manufacturer, distributor, and retailer of the product. Generally, to prevail on a strict product liability claim, a plaintiff must prove that an inherent defect in a product caused the damages claimed. In other words, the plaintiff must prove (1) that the product was inherently defective and (2) that the defect in the product caused the injury or damage. Both elements of the strict product liability claim must be specifically and independently proved. That to establish the first element of a strict product

1. *(L.R. 3 H.L. 330)*
2. *(1963) 59 Cal.2d 57 [13 A.L.R.3d 1049]*

liability claim, a plaintiff must prove that the product was inherently defective. That is, the plaintiff must prove that an inherent defect existed in the product at the time the product left the custody and control of the manufacturer/ supplier/retailer. To establish the second element of a strict product liability claim, a plaintiff must prove that the damages were caused by the defect in the product. Proving that the product was inherently defective is not, by itself, sufficient to establish a prima facie product liability claim. A connection must be established between the inherent defect and the injury. A defendant in a product liability case is not liable for damages caused by a defective product unless the damages were actually caused by the defect in the product.

It can very well be summed up that in order to succeed or to prevail in a Product Liability claim under Torts, the Petitioner need to prove or has to show the essential elements of Product liability under torts and those are as follows:-

a. **That the defendant was the manufacturer or the supplier,**
b. **That the product was inherently defective,**
c. **That the defect in the product existed when it left the defendant's possession,**
d. **That the defect in the product caused the injury and damage to the Plaintiff or to his property,**
e. **Plaintiff's injury resulted from a use of the product that was reasonably foreseeable to the defendant.**

NO RECOVERY IN ABSENCE OF PHYSICAL INJURY:

It has been duly held in catena of judgments delivered by various courts of U.S.A that the doctrine of strict liability in torts would not be attracted where the Plaintiff has suffered only economic loss i.e neither physical injury nor any damages to his property. Hon'ble Supreme court of California in the matter of ***Seely vs. White Motor Co***[3]. has clearly held that doctrine of strict product liability in torts does not apply to cases where "no blood has been spilled" as the economic loss is governed by the warranty provisions of Uniform Commercial Code. In the matter of ***Indelco Inc. vs Hanson Industries***[4], Court of Appeals of Texas, (14th District) has also held that no cause of action in strict liability could be maintained where only economic loss has been suffered by the Plaintiff. In the matter of Jim Walter Homes, Inc. v. Reed[5], the Supreme court of Texas held that "the nature of the injury most often determines which duty or duties are breached, when the injury is only the economic loss then doctrine of Product liability would not be attracted. In another matter of ***Nobility Homes of Texas, Inc. v. Shivers***[6], the Supreme Court discussed whether a consumer in the plaintiff's position could bring a cause of action under section 402A of the Restatement (Second) of Torts 1 or the implied warranties of the Uniform Commercial Code when the consumer, without privity with the manufacturer, suffered only economic loss due to the defective product. The court concluded section 402A does not apply when only economic loss is suffered, but held the implied warranties provisions of the Uniform Commercial Code covered such situations.

STRICT PRODUCT LIABILITY AND ITS APPLICABILITY IN INDIA:

The jurisprudence relating to product liability in India has been constantly evolving and in the recent times the Indian courts have also adopted a pro-consumer approach while deciding on product liability claims. It would not be wrong to state that In India there is no specific statute which governs the product liability claims and the term product liability is also not defined under any Indian statute. In the absence of any specific Indian statute the Indian product liability law can be said to have been emerging from different Indian statues and the product liability claims could be ascertained under the following Indian statutes/ laws (hereinafter together referred to as "Indian Laws"): the Consumer Protection Act, 1986, the Sale of Goods Act, 1930, The Indian Contract Act, 1872. Notably in the matter of **Airbus Industrie Vs.Laura Howell Linton**[7], the Hon'ble High Court of Karnataka has held in a plain and lucid manner that doctrine of Strict Product Liability does not exist in India.

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3. *(1965) 63 C2d 9, 18*
4. *14-97-00236-CV*
5. *711 S.W.2d 617, 618 (Tex.1986)*
6. *557 S.W.2d 77, 83 (Tex.1977)*
7. *1994(5)KarLJ63*

AN OVERVIEW OF THE CLINICAL ESTABLISHMENTS (REGISTRATION AND REGULATION) ACT, 2010

Rajdutt S. Singh

INTRODUCTION

The Clinical Establishments (Registration and Regulation) Act, 2010 ("Act") has been enacted by the Central Government to provide for registration and regulation of all clinical establishments in the country with a view to prescribing the minimum standards of facilities and services provided by them.

As per a report submitted by the Government of India, planning commission namely "Clinical Establishments, Professional Services Regulation and Accreditation of Health Care Infrastructure" for the 11th Five-Year Plan,[1] Health regulation in India encompasses a variety of factors and issues. These include promulgation of legislation for health facilities & services, disease control & medical care, human power (Education, Licensing & Professional Responsibility), Ethics and Patients Rights, Pharmaceuticals & Medical Devices, Radiation Protection, Poisons & Hazardous Substances, Occupational Health and Accident Prevention, Elderly, Disabled & Rehabilitation Family, Women and child Health, Mental Health, Smoking/Tobacco Control, Social Security & Health Insurance, Environmental Protection, Nutrition. Hence, the report highlighted for the need for a central legislation for registration of clinical establishments in the country and uniform standards need to be developed for the entire country.

OBJECTIVE OF THE ACT

The Act makes it mandatory for registration of all clinical establishments, including diagnostic centres and single-doctor clinics across all recognized systems of medicine both in the public and private sector except those run by the defence forces. The registering authority facilitates policy formulation, resource allocation and determines standards of treatment. It can impose fines for non-compliance of the provision of the Act. The Act lays down Standard Treatment Guidelines for common disease conditions, for which a core committee of experts has been formed. Further, the Act makes all clinical establishments to provide medical care and treatment necessary to stabilize any individual who comes or is brought to the clinical establishment in an emergency medical condition, particularly women who come for deliveries and accident cases.

IMPLEMENTATION OF THE ACT

Vide the notification dated 28 January, 2010 the Act came into force in four states of India, namely Arunachal Pradesh, Himachal Pradesh, Mizoram, Sikkim and all Union Territories. Later, Uttar Pradesh, Rajasthan and Jharkhand have adopted the Act under clause (1) of article 252 of the Constitution. In 2013, the State of Maharashtra planed a multi-stakeholder committee to formulate the Maharashtra Clinical Establishment Act to an important step towards standardization of quality and costs in the private medical sector. Further, the Kerala Clinical Establishments (Registration, Accreditation and Regulation) Bill, 2009 is awaiting a go-ahead from the Government to be enforced.

AN OVERVIEW OF THE CLINICAL ESTABLISHMENTS (REGISTRATION AND REGULATION) ACT

Article 47 of the Constitution lays down a responsibility upon the State for aiming at improvement in public health and shall consider this responsibility as among its primary duties in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Hence, with the objective to strive at fulfill this responsibility, the Government of India enacted the Act with the objective to provide for the registration and regulation of clinical establishments in India and for matters connected therewith or incidental thereto.

The Act defines "Clinical Establishment" and bring under the ambit of clinical establishment all hospitals, maternity home, nursing home, dispensary, clinic, etc or an institution by whatever name called that offers services, facilities requiring diagnosis, treatment or care

1. *planningcommission.nic.in/aboutus/committee/.../wg11_hclinic.pdf*

for illness, injury, etc or a place establishmed as an independent entity pr part of an establishment in connection with the diagnosis or treatment of certain diseases. It also includes a clinical establishment which is owned, controlled and managed by government or a department of the Government, a trust, a corporation registered under a Central, Provincial or State Act, a local authority and a single doctor.

THE NATIONAL COUNCIL FOR CLINICAL ESTABLISHMENT

The Act lays down establishment for the a Council Body called The National Council for Clinical Establishment which is responsible primarily for setting up standards for ensuring proper healthcare by the clinical establishment and develop the minimum standards and their periodic review.

CLINICAL ESTABLISHMENTS AND PROCEDURE FOR REGISTRATION OF THE CLINICAL ESTABLISHMENT

Section 11 of the Act mandates that no person shall run a clinical establishment unless it has been duly registered in accordance with the provisions of the Act.

In September 2014, the Government of India, the Ministry of Health and Family Welfare[2] issued the Application format for Permanent Registration of Clinical Establishments which requires the applicant to provide information such as, among others, establishment details, types of service, system of medicine, etc.

MINIMUM STANDARDS TO BE FOLLOWED BY CLINICAL ESTABLISHMENTS

Further, Section 12 of the Act lays down that for the registration and continuation of a Clinical Establishment, such clinical establishment shall fulfill the conditions namely,

a. the minimum standards of facilities and services
b. the minimum requirement of personnel
c. provisions for maintenance of records and reporting
d. such other conditions as may be prescribed.

The minimum standards for hospitals are implemented on the basis of level of care provided by such hospitals.

Recently in September 2014, the National Council for Clinical Establishments under the Chairmanship of Director General of Health Services, Government of India in consultation with various stakeholders has prepared following draft Documents with the objective of implementation of the Clinical Establishments Act[3]:

1. Application format for Permanent Registration of Clinical Establishments
2. Minimum Standards
3. Formats for Collection of information and Statistics
4. Template for Display of Rates
5. Standard Treatment Guidelines of Ayurveda

Accordingly, the draft document issued by the Government this September[4] divided hospitals into 4 levels of hospitals, namely -

Hospital Level 1-

Hospital Level 1 are the primary healthcare services provided by qualified doctors. It includes services such as General Medicine, Pediatrics, First aid to emergency patient and Out Patient Services, Obstetrics & Gynecology Non-surgical and Minor Surgery and have a bed strength of not more than 30 which can be provided through trained and qualified manpower with support/supervision of registered medical practitioners with the required support systems for this level of care.

Hospital Level 2-

This level includes services of Surgery and Anesthesia in addition to the services provided at level 1 through registered medical practitioner under supervision and with support of specialists. It will also have other support systems required for these services like pharmacy, laboratory, diagnostic facility, etc.

2. *http://clinicalestablishments.nic.in/En/1070-draft-minimum-standards.aspx*
3. *Available at the official website of Ministry of Health and Family Welfare http://clinicalestablishments.nic.in/En/1070-draft-minimum-standards.aspx*
4. *http://clinicalestablishments.nic.in/En/1070-draft-minimum-standards.aspx*

Hospital Level 3-

This level includes all the services provided at level 1 and 2 and in addition the following as well such as Multi-specialty clinical care with distinct departments, General Dentistry, Intensive Care Unit,. Tertiary healthcare services can be provided through specialists. It will also have other support systems required for these services like pharmacy, Laboratory, and Imaging facility.

Hospital Level 4 –

This level will include all the services provided at level 3.It will however have the distinction of being teaching/ training institution and it will have multiple super-specialties. Tertiary healthcare services that can be provided through specialists. It shall have other support systems required for these services. It shall also include the requirements of MCI/other registering body.

TEMPLATE FOR DISPLAY OF RATES

The Hospitals are required to follow a particular template for display of the various rates related to PD, Investigation /diagnostic, emergencies, etc which is detailed in the draft documents issued by the Ministry.

CONCLUSION

To conclude with, India is already outshining itself in the global strata of pharmaceutical market. It is apparently a boon above that for the fact that India is expected to witness a tremendous improvement in its public health as the Government is showing enthusiastic approach towards striving at the objective of the Clinical Establishments (Registration and Regulation) Act, 2010. With the implementation of the diligently drafted standards through this Act, it is expected that in the coming years each and every clinical establishment in India will be systematized and stringently compelled equipped with all the basic minimum standard of medical care and hence, the scenario of healthcare section in India is expected to grow through a tremendously appreciable revolution.

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SECTION 23 OF INDIAN CONTRACT ACT – LAWFUL CONSIDERATIONS AND OBJECTS

Harsimran Singh

"No polluted hand shall touch the pure fountains of justice."[1]

Section 23[2] of the Indian Contract Act, 1872 ("Act"), enumerates of three issues, i.e. consideration for the agreement, the object the agreement and the agreement per se. Section 23 creates a limitation on the freedom of a person in relation to entering into contracts and subjects the rights of such person to the overriding considerations of public policy and the others enunciated under it.[3] Section 23 also finds its bearing in the other sections of the Act, namely section 26[4], 27[5], 28[6] and 30[7].

The word "object" used in section 23 connotes means "purpose" and does not purport a meaning in the same sense as "consideration". For this reason, even though the consideration of a contract may be lawful and real, that will not prevent the contract from being unlawful if the purpose (object) of the contract is illegal. Section 23 restricts the courts, since the section is not guided by the motive, to the object of the arrangement or transaction per se and not to the reasons which lead to the same.

'If the thing stipulated for is in itself contrary to law, the action by which the execution of the illegal act is stipulated must be held as intrinsically null: *pactis privatorum juri publico non derogatur.*[8]

In a recent assignment[9], our firm advised the client not to include any such terms in the document to be executed between the parties which would contravene any law in India. It was advised to the client that the if the contract is to be enforced by a party to the same, any enforcement in India of such contract or part thereof will not be possible in case the agreement or its object or the consideration involved therein is in violation of a statute in India. Further, that despite the inclusion of disclosures, indemnity, undertaking etc. in the contract and related transactional documents will not be of any advantage for the purpose of any action in India, in case the contract or any part thereof is in violation of any applicable statue, regulations, orders, bye-laws, guidelines etc. in India. In such case the contract will not be valid for the purposes of any action in India in light of the above discussed provision(s) of the Act since a party cannot consent to an agreement which is against the law. Moreover, the benefit of adding the said disclaimer, indemnity and undertaking in the contract will safeguard the interests of the foreign investee company (our client) only in the place whose law has been made applicable to the contract. However, in case any Indian law is violated such disclaimer, indemnity and undertaking will not be a ground for any defense, for any action in India, available to the party claiming a protection there under.

Keeping the above in perspective, it is pertinent to discuss the key elements of section 23 briefly; which are as under.

1. *Per Wilmot, C.J., in Collins v. Blantern, (1867) 1 Smith LC 369*
2. *Section 23 of the Indian Contract Act, 1872 - What considerations and objects are lawful and what not*
   The consideration or object of an agreement is lawful, unless-
   It is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.
   In each of these cases, the consideration or object of an agreement said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
3. *In Re: K.L. Gauba (23.04.1954 - BOMHC) [AIR 1954 Bom 478]. Para 11 : "…The freedom of the citizen, as indeed the freedom of the lawyer, to enter into a contract is always subject to the overriding considerations of public policy as enunciated in S. 23 of the Indian Contract Act. That freedom is also subject to the other considerations set out in S. 23."*
4. *Agreement in restraint of marriage void*
5. *Agreement in restraint of trade void*
6. *Agreements in restraint of legal proceedings void*
7. *Agreements by way of wager void*
8. *Arg., 4 Cl. & F. 241; Broom's Legal Maxims, p. 541*
9. *Review of a Private Placement Memorandum to be issued by a US company to selected investors in India.*

FORBIDDEN BY LAW

The word "forbidden by law" is not synonymous with the word 'void' and hence it is not necessary that whatever is void is also "forbidden by law".[10] The above decision vas approved by the Supreme Court in Gherulal Parakh v. Mahadeodas (AIR 1959 SC 781) and the court held that:

"The word 'immoral' is very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilization of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of Section 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy covers political, social and economic ground of objection. Decided cases and authoritative text-books writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statue, namely, "courts consider immoral" brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognized and settled by Courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot involve a new head so as to bring in wagers within its fold."

The word "law" in section 23(1) means judicial law, that is, the law enacted by government and it is not permissible to a party to a contract to claim on the basis of a contract which is prohibited by a law. The question, whether a particular transaction is forbidden by an Act or tends to defeat its provisions is always one of construction of the Act, the rule for which is that it should be construed according to the intention of the persons passing it and such intention should be gathered from what they have said in the Act.

10. *Mahadeodas and Ors. vs. Gherulal Parakh and Ors. (AIR 1958 Cal 703)*

IF PERMITTED IT WOULD DEFEAT THE PROVISIONS OF ANY LAW

The words "if permitted, it would defeat the provisions of law" mentioned in section 23 ought to be understood as referring to performance of an agreement which necessarily entails the transgression of the provisions of any law. The general rule of law as followed by the courts is based on exception to the maxim *modus et conventio vincunt legem*[11]. Meaning thereby, in case the express provision(s) of any law is violated by a contract, the interests of the parties or of third parties, would be injuriously affected by its fulfillment. The parties to a contract are permitted to regulate their rights and liabilities themselves, and the court will only give effect to the intention of the parties as expressed in the contract in accordance with the applicable laws of the land.

In short three principles arise from the section[12] :

(i) an agreement or contract is void, if its purpose is the commission of an illegal act;

(ii) an agreement or contract is void, if it is expressly or impliedly prohibited by any law;

(iii) an agreement or contract is void, if its performance is not possible without disobedience of any law.

As per section 23, the difference between agreements that are void and agreements those are illegal is very thin or small. According to Anson[13], "The law may either forbid an agreement to be made, or it may merely say that if it is made, the courts will not enforce it. In the former case, it is illegal, in the latter only void, but in as much as illegal contracts are also void, though void contracts are not necessarily, the distinction is for most purposes not important and even judges seem to treat the two as inter-changeable".

In ***Rajat Kumar Rath v. Government of India***[14] , the Orissa High Court has explained the distinction in the following words:
"... A void contract is one which has no legal effect. An illegal contract through resembling the void contract in

11. *the form of agreement and the, convention of the parties overrule the law*
12. *Neminath v. Jamboorao, AIR 1966 Mys 154: (1965) 1 Mys LJ 442*
13. *Principles of the English Law of Contract, 22nd edn.*
14. *AIR 2000 Ori 32, 34-35*

that it also has no legal effect as between the immediate parties, has this further effect that even transactions collateral to it became tainted with illegality and we, therefore, in certain circumstances not enforceable. If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which though void is not prohibited by law, it may be enforced as a collateral agreement. If on the other hand, it is part of a mechanism meant to carry out the law actually prohibited cannot countenance a claim on the agreement, it being tainted with the illegality of the object sought to be achieved which is hit by the law. Where a person entering into an illegal contract promises expressly or by implication that the contract is blameless, such a promise amounts to collateral agreement upon the other party if in fact innocent of turpitude may sue for damages".

FRAUDULENT

'pari delicto est conditio defendentis' [15]

The Hon'ble Supreme Court of India under plethora of judgments has observed / held that there are several exceptions to the above rule. In this connection, the Hon'ble Supreme Court quoted with approval the following observations of Anson: [16]

"... there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered, cases to which the maxim does not apply. They will fall into three classes: (a) where the illegal propose has yet been substantially carried into effect before it is sought to recover money paid or goods supplied or delivered in furtheranceof it; (b) where the plaintiff is not in pari delicto with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim".

Section 23 says that the consideration or object of the agreement is unlawful if it "is fraudulent". [17] But subject to such and similar exceptions, contracts which are not illegal and do not originate in fraud, must in all respects be observed: *pacta conventa quae neque contra leges neque dolo mall inita sunt omnimodo observanda sunt* (contracts which are not illegal, and do not originate in fraud, must in all respects be observed).

INJURY TO PERSON OR PROPERTY OF ANOTHER

As per the provisions of section 23, an agreement which involves causing injury to a person or property of third party is void and cannot be enforced by court and therefore, no claim is sustainable for the breach of such an unlawful agreement.

OPPOSED TO PUBLIC POLICY

It is trite law that one who knowingly enters into a contract with improper object cannot enforce his rights in relation to such contract. Notably, the Act does not anywhere define the expressions "public policy" or "opposed to public policy" or "contrary to public policy". However, one may note that the term "public policy" could plainly mean issues concerning the public or public benefit and the interest of public at large. 'Public Policy' is ".... a vague unsatisfactory term calculated to lead to uncertainty and error when applied to the decision of legal rights; it is capable of being understood in different senses; it may and does in ordinary sense means political expediency or that which is best for common good of the community; and in that sense there may be every variety of opinion; according to education, habits, talents and dispositions of each person who is to decide whether an act is against public policy or not..." According to Lord Atkin[18],

"... the doctrine does not extend only to harmful effects, it has to be applied to harmful tendencies. Here the ground is less safe and treacherous".

The above principle has been followed by the Hon'ble Supreme Court of India in ***Gherulal Parekh v. Mahadevdas Maiya***[19], wherein Hon'ble Justice Subba Rao, referring the observation of Lord Atkin observed: "... Public policy or the policy of the law is an illustrative concept. It has been described as an 'untrustworthy guide', 'variable quality', 'unruly horse', etc.; the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contract which forms the basis of society but in certain cases, the court may relieve them of their duty of a rule

15. both parties are equally at fault
16. Principles of the English Law of Contract, 22nd Edition, p. 343.
17. Relevant Illustrations to Section 23:
(e) A, B and C enter into an agreement for the division among them of gains acquired or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.
(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.
18. Fender v. St. John Milday, 1983 AC 1 (HC)
19. AIR 1959 SC 781

founded on what is called the public policy. For want of better words. Lord Atkin describes that something done contrary to public policy is a harmful thing; but the doctrine is extended not only to harmful cases; but also to harmful tendencies.... it is governed by precedents. The principles have crystalised under different heads.... though the heads are not closed and though the oretically, it may be permissible to evolve a new head under exceptional circumstances of thechanging world, it is advisable in interest of stability of society not to make attempt to discover new heads in these days". In ***Kedar Nath Motani v. Prahlad Rai***[20] , **the Hon'ble Court held that** "the correct view in law .... is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial..... and the plaintiff is not required to rest his case upon that illegality, then public policy demands that defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and should not be allowed to circumvent the illegality by restoring to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail."

The Hon'ble Supreme Court of India has dealt with certain cases under section 23 holding that some actions of entering into contract are void. In the matter titled ***"ONGC Ltd. v. Saw Pipes Ltd."***[21] while interpreting the meaning of 'public policy' in this case, the Hon'ble Court observed that *it has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used.* Therefore, it was held that the term 'public policy' ought to be given a wider meaning. The Hon'ble Court placing reliance on ***"Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr."*** [(1986) IILLJ 171 SC] held that what is good for the public or in public interest or what would be harmful or injurious to the public good or interest varies from time to time. However, an award, which is on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such an award is likely to adversely affect the administration of justice. Hence, the award should be set aside if it is contrary to (i) fundamental policy of Indian Law; (ii) the interest of India; (iii) justice or morality; (iv) in addition, if it is patently illegal. The illegality must go to the root of the matter and if the illegality is of a trivial nature, it cannot be held that the award is against the public policy. An award can also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

CONCLUSION

On the basis of above discussed, it can be easily understood that the ambit and scope of section 23 is vast and therefore the applicability of its provisions is subject to meticulous scrutiny by the court of the consideration and object of an agreement and the agreement itself. Therefore, in order to bring a case within the purview of section 23, it is necessary to show that the object of the agreement or consideration of the agreement or the agreement itself is unlawful.

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20. AIR 1960 SC 213
21. 2003 (2) RAJ 1 (SC)

PREVENTION IS BETTER THAN CURE- AVOIDANCE OF S.140 OF THE PATENTS ACT

Aayush Sharma

The twenty first century is the century of innovation and everybody wants to protect their innovation in a way so that no one can trespass in their jurisdiction of innovative world. As we know Patents is one of the oldest forms of Intellectual property right. This right is granted by the government conferring a monopoly right on an inventor to exploit his invention for a specified time period. For obtaining this right the patentee has to file an application for issuance of patent which is generally issued by the government after certain inquiry and cross objection. And licensing constitutes an important part of this regime.

After the grant of patent, the patentee start exploiting their invention or rather most of the time starts trading their innovation in the form of sale, lease, license and purchase. By granting a license to a person, the patent owner authorizes the person (licensee) to exercise the patent rights under certain circumstances. But when they draft an agreement for the lease and license of patent use they knowingly or unknowingly put some clauses in agreement which is very harmful for the public interest or sometime injurious too. It has been seen that while leasing the patented article, inclusion of certain restrictive condition leads towards the court of law, where any kind of defence is not acceptable.

SECTION 140 OF THE PATENTS ACT, 1970

Avoidance of certain restrictive conditions:

(1) It shall not be lawful to insert—

(i) In any contract for or in relation to the sale or lease of a patented article or an article made by a patented process; or

(ii) in licence to manufacture or use a patented article; or

(iii) in a licence to work any process protected by a patent, a condition the effect of which may be—

a) to require the purchaser, lessee, or licensee to acquire from the vendor, lessor, or licensor or his nominees, or to prohibit from acquiring or to restrict in any manner or to any extent his right to acquire from any person or to prohibit him from acquiring except from the vendor, lessor, or licensor or his nominees any *article other than the patented article or an article other than that made by the patented process*; or

Explanation: Under this clause, vendor, lessor, or licensor or his nominees if prohibits or restrict the purchaser, lessee, or licensee to extent their rights to acquire from any person or to prohibit him from acquiring except from the vendor, lessor, or licensor or his nominees any article other than the patented article or an article other than that made by the patented process, in such cases the license agreement shall be void or null.

b) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee, to use an article other than the patented article or an article other than that made by the patented process, which is not supplied by the vendor, lessor or licensor or his nominee; or

Explanation: Under this clause, vendor, lessor, or licensor or his nominees if prohibits or restrict the purchaser, lessee, or licensee to use an article other than the patented article or an article other than *that made by the patented process, which is not supplied by the vendor, lessor or licensor or his nominee*, in such cases the licensee agreement terms to be void.

c) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee to use *any process other than the patented process,*

Explanation: Under this clause, vendor, lessor, or licensor or his nominees if prohibits or restrict in any manner to use any process other than the patented process, then such contract or licensee is void.

d) to provide exclusive Grant back, prevention to challenges to validity of Patent & Coercive package licensing, and any such condition shall be void.

(2) A condition of the nature referred to in clause (a) or clause (b) or clause (c) of sub-section (1) shall not cease to be a condition falling within that sub-section merely by reason of the fact that the agreement containing it has been entered into separately, whether before or after the contract relating to the sale, lease or licence of the patented article or process.

(3) In proceedings against any person for the infringement of a patent, it shall be a defence to prove that at the time of the infringement there was in force a contract relating to the patent and containing a condition declared unlawful by this section

Explanation: According to this it will be defence against the infringement to prove that at that time of infringement there was in force a contract containing a restrictive condition which is declared void under section 140 of the Patent Act, 1970.

Provided that this sub-section shall not apply if the plaintiff is not a party to the contract and proves to the satisfaction of the court that the restrictive condition was inserted in the contract without his knowledge and consent, express or implied.

(4) Nothing in this section shall—

a) affect a condition in a contract by which a person is prohibited from selling goods other than those of a particular person;
b) validate a contract which, but for this section, would be invalid,
c) affect a condition in a contract for the lease of, or licence to use a patented article, by which the lessor or licensor reserves to himself or his nominee the right to supply such new parts of the patented article as may be required or to put or keep it in repair.

Further to the above said clause, there are two important terms which is required to be understand under the refercne of S.140 of the India Patents Act, 1970.

Coercive Package Licensing- When patent owner licenses a patent, there may be requirement of licensing more than one patent in order to commercialize the invention. Such license for the multiple patents is called as package license. Such package license shall by volunteer and with consent of both parties. In fact, the licensee shall choose each of the patents it wishes to license. Such package licenses are absolutely legal.

However, if the Licensor forces licensee to take license for patent (s) even if it is not required by licensee, such license is called as coercive package license. Coercive package license is not a good practice and paying royalty for such license is extra burden on the licensee. Under Section 84 (7) of the Indian Patent Act, 1970, reasonable requirements of the public are considered not to be fulfilled if the patentee imposes Coercive package license for the patents. Under Section 140 of the Act [Avoidance of certain restrictive conditions], Coercive package license is considered as unlawful.

Grant Back: Many patent license agreements fail to address improvements by the licensee, allowing the licensee to file improvement patents of its own that may make the licensor's technology obsolete or even block the licensor from commercializing its own product with the improvements. By including "grant back" provisions in license agreements, a licensor can ensure that when licensing out patents covering its technology, any improvements by the licensee are granted back to the licensor.

CONCLUSION:

"Precaution is better than cure." With the help of this quotation we can understand the rigidity of section 140 of Patent Law. It is better to draft an agreement in such a form so that none of the restrictive clause mentioned in section 140 create a space. So before handing over the agreement to other party appropriate steps should be taken to keep the agreement valid and enforceable.

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INDIA'S ANOTHER STEP TOWARDS PLAIN PACKAGING OF CIGARETTES AND TOBACCO PRODUCTS-AN OVERVIEW OF THE LEGISLATIONS PRESENT

Vaibhavi Pandey

"Many people in the world quit smoking every day- By Dying"[1]

The irony in the above statement describes in a subtle way the increasing rate of death caused by cancer arising due to smoking of tobacco in various forms. Recently, there has been a tremendous and continuous increase in the percentage of people suffering from cancer caused because of smoking throughout the world. This percentage is even greater in the economically developed countries. India is a home to 12 % of the world's smokers and approximately 900,000 people die every year in India because of smoking (as of 2009)[2]. Coming to the global context, as per the statistics of the year 2014,"Worldwide 1 billion adults (800 million men and 200 million women) currently smoke cigarettes. The situation demands even more concern as the above statistics does not includes the no. of childhood smokers. Tobacco use kills almost 6 million people worldwide each year, with nearly 80% of these deaths in low- and middle-income countries. Each year 600,000 non-smokers worldwide die from exposure to environmental tobacco smoke. By 2030 tobacco will kill a predicted 8 million people worldwide each year. Tobacco use caused 100 million deaths worldwide during the 20th century, and if current trends continue it will kill 1 billion people in the 21st century." [3]

The Governments of different countries have showed their concerns on the matter and have initiated various legislations and policies to ensure the safeguards and make people aware of the dire consequences of smoking.

INDIA AND ITS LEGISLATIONS REGARDING SMOKING-

The very basics of laws confirming the safeguards and health measures of the citizens can be traced from the Constitution itself. Article 47 of the Constitution of India under the Directive Principles of State Policies states *that "It shall be the Duty of the State to raise the level of nutrition and the standard of living and to improve public health The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."*

The Constitutional mandate flowing from the above article lead to the enactment of first legislation that dealt with smoking in India which was **Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975.** The 1975 Act mandated the tobacco industries to provide statutory warnings on the cigarette packets. A landmark judgment on this matter was ***Murli S. Deora vs Union of India And Ors***[4]. In this case the Hon'ble Supreme Court prohibited smoking in public places like hospitals, educational institutions, auditoriums etc. The Court in this case opined that "Tobacco is universally regarded as one of the major public health hazards and is responsible directly or indirectly for an estimated eight lakh deaths annually in the country. It has also been found that treatment of tobacco related diseases and the loss of productivity caused therein cost the country almost Rs. 13,500 crores annually, which more than offsets all the benefits accruing in the form of revenue and employment generated by tobacco industry".

This case acted as a milestone and lead to the enactment of **Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003**. This Act extends to the whole of India including the state of Jammu & Kashmir and is applicable to cigarettes, cigars, bidis, gutka, pan masala (containing tobacco), Mavva, Khaini, snuff and all products containing tobacco in any form.

1. *Author Anonymous*
2. *http://environment.about.com/od/healthenvironment/a/smoking_deaths.htm*
3. *World Lung Foundation/American Cancer Society. The Tobacco Atlas. Available from: http://www.tobaccoatlas.org.*
4. *2001 Supp(4) SCR 650*

Another effective legislation that has been enacted to strengthen and ensure the safeguards measure is **the Cigarettes and Other Tobacco Products (Packaging and Labeling) Rules, 2008**. These Rules further demonstrate the law pertaining to the packaging format and the amount of statutory warning, messages etc on the wrappings of Cigarettes and other Tobacco products.

RECENT DEVELOPMENTS REGARDING PLAIN PACKAGING –

At present, plain packaging laws have been enacted in few countries, Australia being the initiator among them. The plain packaging legislations forbid the use of any kind of logos, attractive packaging measures, emblems, colors, images etc on the packets of cigarettes and other tobacco products.

In July, 2014 Allahabad High Court allowed a petition filed by Love Care Foundation, a non profit organization operating for the welfare of children.[5] The organization argued that the attractive packaging of the cigarette and tobacco products are a pseudo mode of advertisement and children are getting more attracted and allured to such products because of this. Evidences were presented from countries where plain packaging was introduced and which resulted in the decrease of consumption of such products. The Respondents Union of India and State of UP did not raise any argument against the petitioners and accepted that this is a step in the right direction. Further, there was no Respondent from the Tobacco Industry as well. Henceforth, the learned High Court directed the government to take appropriate steps in this direction.

Recently, another notification dated 15.10.14 with the name Cigarettes and Other Tobacco Products (Packaging and Labeling) Amendment Rules, 2014 has been passed which has provisions that will bring amendments in the Cigarettes and Other Tobacco Products (Packaging and Labeling) Rules, 2008. These Rules will come into effect from 1st April, 2015. The key highlights of these notifications have been mentioned below-

- The total area covered by the pictorial and statutory warnings on the packets of cigarettes and Tobacco products has been increased from 60 % to 85 % (60% for pictorial health warning & 25% for textual health warning).
- The textual health warning shall not appear in more than two languages inscribed on the packet.
- The following details of the manufacturer have to be compulsorily mentioned on the packets
  - Name of the product.
  - Name and address of the manufacturer/ importer of the product.
  - Origin of the product (for import tobacco).
  - Date of manufacture.
  - Any other matter as required by the Central Government as per international practice.
- There are further many other elaborated instructions related to the statutory warnings to be mentioned on the packets both in textual and pictorial forms.

CONCLUSION

The legislature's intent with the enactment of these notifications seems to confining and limiting the space available on the packets of cigarettes and other Tobacco products so that the scope of any advertisement attractive packaging etc can be limited to its best extent. Therefore, although we cannot say that it is plain packaging in its true sense but undoubtedly, it is a step on the same line. However, it is to be also kept in mind that the plain packaging laws have also been an issue of controversy in various countries like USA where such laws are still in limbo because of being challenged on grounds of unconstitutionality.

The increase in number of active smokers and the statistics thereto are a matter of utmost concern. Especially, the inclination of children and youngsters towards smoking out of peer pressure and being attracted towards it for its being emerging as a status symbol and fashion statement is highly reprehensible. It is not only the duty of state to bring measures for safeguard of its citizens, but also the responsibility of the citizens to protect their own health and of others living around them.

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5. *Love Care Foundation v. Union of India and Others, Writ Petition No.1078 (M/B) OF 2013.*

CROWD SOURCING- A NEW APPROACH TOWARDS PATENTS

Priyanka Rastogi

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 "Crowd-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.

From funding a new technology startup to finding the best new restaurant in the city, crowd sourcing has impacted how we locate information, make decisions, and it can make seemingly impossible tasks a reality. For example, websites such as Quora.com and Yahoo Answers, influences the crowd to help answer user posed questions ranging from the esoteric to the basic. Kickstarter and Kiva persuade the crowd to fund entrepreneurial and charitable projects. While Yelp and Zagat use the wisdom of the crowd to help with your dining out decisions. X Prize competitions encourage and motivate the crowd to achieve space exploration and other scientific pursuits. The principles of crowdsourcing can be applied to obscure fields such as patents as well.[1]

Today, crowd-sourcing is one of the most developed tools used by IT industries, engineering and pharma knowledge base companies. These companies earn huge profits using crowd-sourcing as a business tool. Wikipedia is one of the best examples for crowd sourcing which uses this concept and is certainly spreading into other knowledge based industries such as the biomedical society. This article summarizes the basic concept of crowd sourcing, working methodology and its application in prospects of Patents.

DEFINITION: CROWD SOURCING

A more complete definition of crowd sourcing as attributed to Arolas Estellés and Ladrón González may be stated as:

"… a type of participative online activity in which an individual, an institution, a non-profit organization, or company proposes to a group of individuals of varying knowledge, heterogeneity, and number, via a flexible open call, the voluntary undertaking of a task. The undertaking of the task, of variable complexity and modularity, and in which the crowd should participate bringing their work, money, knowledge and/or experience, always entails mutual benefit. The user will receive the satisfaction of a given type of need, be it economic, social recognition, self-esteem, or the development of individual skills, while the crowdsourcer will obtain and utilize to their advantage that what the user has brought to the venture, whose form will depend on the type of activity undertaken".[2]

Crowd sourcing can be classified based on the task to be sourced to the crowd, how the crowd is utilized, or a combination of both. Wisdom of the crowd utilizes the crowd to contribute large amounts of information to solve a problem or to aggregate them to create a more complete and accurate picture of a topic (i.e., InnoCentive, which 'enables scientists to receive professional recognition and financial awards for solving R&D challenges where solvers can submit solutions through the web which are reviewed by the seeker).[3]

CROWD SOURCING –CONNECTED 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

1. *https://allthingspatent.wordpress.com/#_edn2, last visited 27/10/2014*
2. *Estellés Arolas, E.; González Ladrón-de-Guevara, F. (2012) Towards an integrated crowdsourcing definition. Journal of Information Science (in press). http://www.crowdsourcing-blog.org/wp-content/uploads/2012/02/Towards-an-integrated-crowdsourcing-definition-Estell%C3%A9s-Gonz%C3%A1lez.pdf. last visited 27/10/2014*
3. *Ibid*

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 PARTNERS (AOP), a company uses crowd sourcing to find prior art of patents for clients as well for specific patents targeted by AOP.

Advisors earn points for activity in the community, and those points can become cash at the end of the year. For advisors earning 1,000 points or more in a calendar year (just registering on the site yields 25 points), a profit-sharing scheme offers 5% of net profits to be split between eligible advisors. In 2009 that amount was $25,000, split between hundreds of AOP advisors.[4] Today more than $520,000 has been awarded to community members. And this model is just gearing up.[5]

APPLICATION OF CROWD SOURCING IN IP-

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 Crowd sourcing comes in IP.

Various aspects of crowd sourcing can be applied to the patent lifecycle. In particular, one of the challenges that may hinder the quality of the patents is the difficulty in uncovering relevant prior art that could impact the patentability or validity of a claim. In the United States, the scope of prior art includes printed publications in this or a foreign country. [6]

HOW CROWD SOURCING IS USED IN IP?

The methodology used to obtain a desired result in crowd sourcing follows three stages (i) the search for documentation on crowd sourcing via using systematic reviews of the literatures, (ii) creation of exhaustive definitions from search results and (iii) testing of its validity.[7]

Many companies perform different aspects to use crowd sourcing 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, 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 crowd sourcing. 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 crowd sourcing 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

4. *http://melaniezoltan.suite101.com/crowdsourcing-and-patent-research--article-one-peer-to-patent-a230357*
5. *http://www.articleonepartners.com/how-it-works/profit-sharing*
6. *See MPEP 2132.01 Publications as 35 U.S.C. 102(a) Prior Art http://www.uspto.gov/web/offices/pac/mpep/s2132.html. last visited 27/10/2014*
7. *http://www.crowdsourcing- blog.org/wp - content / uploads/2012/02/Towards-an-integrated-crowdsourcingdefinition-Estell%C3%A9s-Gonz%C3%A1lez.pdf last visited 30/10/2014*

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[8]. 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.

Some of the patent related crowd sourcing websites include, the Patent Busting Project by the Electronic Frontier Foundation, the newly established Ask Patent Beta by Stack Exchange,Crowd IPR, the Peer-to-Patent project, and the Article One Partners platform.[9]

PROS & CONS OF CROWD SOURCING

Crowd sourcing 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 crowd sourcing 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 participant's leads to more ideas, which makes it like the flood of ideas where some are especially smart ones. Now considering the cons of crowd sourcing 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 crowd sourcing 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, crowd sourcing 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 posted on the internet for everybody to see is enough to blow any confidentiality.

CONCLUSION

Crowd sourcing -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 crowd sourcing, 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. While crowd sourcing has many advantages and disadvantages it can be very effective way of doing business.

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8. *http://yourstory.in/2012/03/crowdipr-crowdsourcingplatform-for-intellectual-property-research/ last visited 30/10/2014*
9. *https://allthingspatent.wordpress.com/#_edn2 last visited 27/10/2014*

NEWSBYTES

1. FDI - CONSTRUCTION DEVELOPMENT PROJECTS

Recently, the Union Cabinet approved a comprehensive proposal by the Department of Industrial Policy & Promotion (DIPP), reducing the minimum 10 hectare rule for serviced housing plots and cutting the minimum floor area for construction development projects to 20,000 sq. mtrs. from 50,000 sq. mtrs. to be eligible for overseas investment.[1]

The minimum FDI amount has also been reduced to $5 million from $10 million and the exit norms are reported to be substantially eased.

The certain major reforms are listed as follows:

1. Minimum foreign investment cut to $5m from $10m
2. Conditions set aside for hospitals, tourism, SEZ's, NRI's and old age homes
3. 3 Year lock-in removed developer can exit on completion or even earlier
4. Minimum floor area cut to 20,000 sq m. form 50,000 sq m.

The Notification / Press Release is not yet available on RBI or DIPP's website.

2. "KHADI - INDIAN OR GERMAN"

While Traditional Knowledge and Practices of the people of India is fading away in the country of its origin, it seems foreigners are very much interested in getting them Patented and trademarked.

After "NEEM" and "HALDI", it's the word "KHADI", which is under controversy. Khadi and village industries commission (KVIC), an arm of the ministry of micro, small & medium enterprises, has pursued cancellation of the trademark hold by a Germany based company named "Khadi Naturprodukte".

Indian government in an attempt has objected the use of Khadi Trademark by German company to sell the fabric of Indian origin, but experts believe that in order to do that Indian government. would have to substantiate irrefutably in EU that its range of products have been selling in that market under the 'khadi' trademark for significantly more number of years and consumers there clearly associate those products with its brand.

With increasing number of such cases India started maintaining a database in the form of a Traditional Knowledge Digital Library. As per government this has allowed it to pre-empt over 200 bio-piracy attempts globally.

3. CGTDM PROJECT APPARATUS TO OBTAIN REAL-TIME INFORMATION ON PATENT APPLICATIONS

Under the Administrative reforms program being executed in Patent Office of India, and to increase the transparency offered by Indian Patent Office (IPO) a new innovation called "Stock & Flow" has been added to the search services. The said tool already existed with the Trademark. With the addition of this feature IPO claims that the work happening in the entire Patent office in India is being thrown open to the world. Reports on this are suggesting India to be the only nation in the world with such a high degree of transparency. The stock and flow feature helps one to track the work at every stage at different location on a real time basis. Joint Secretary of the DIPP, Shri D V Prasad informed that, in order to achieve speedy disposal of IP applications, there will be further intensification of infrastructure and manpower in the intellectual property offices during the 12th Five Year Plan of the Government.

4. RBI REVIEWED GUIDELINES FOR ISSUE OF SHARES/ CONVERTIBLE DEBENTURES UNDER AUTOMATIC ROUTE

Reserve Bank of India (RBI) vide A.P. (DIR Series) Circular No.31 dated September 17, 2014 has reviewed the Guidelines for issue of shares/ convertible debentures under the automatic route.

1. *http://economictimes.indiatimes.com/news/economy/policy/government-relaxes-fdi-norms-for-construction-real-estate-sector/articleshow/44973361.cms*

As per the existing provisions, an Indian company under the automatic route may issue shares/convertible debentures to a person resident outside India against lump-sum technical know-how fee, royalty External Commercial Borrowings (ECBs) (other than import dues deemed as ECB or Trade Credit as per RBI guidelines) and import payables of capital goods by units in Special Economic Zones subject to certain conditions like entry route, sectoral cap, pricing guidelines and compliance with the applicable tax laws.

Upon review of the said Guidelines, it has been decided by RBI to permit issue of equity shares against any other funds payable by the investee company, remittance of which does not require prior permission of the Government of India or Reserve Bank of India under FEMA, 1999 or any rules/ regulations framed or directions issued thereunder, provided that:

i. The equity shares shall be issued in accordance with the extant FDI guidelines on sectoral caps, pricing guidelines etc. as amended by Reserve bank of India, from time to time;

   Explanation: Issue of shares/convertible debentures that require Government approval in terms of paragraph 3 of Schedule 1 of FEMA 20 or import dues deemed as ECB or trade credit or payable against import of second hand machinery shall continue to be dealt in accordance with extant guidelines;

ii. The issue of equity shares under this provision shall be subject to tax laws as applicable to the funds payable and the conversion to equity should be net of applicable taxes.

RBI in its circular has further clarified that all the other conditions with respect to issuance of equity shares under the automatic route and Government approval route shall remain unchanged.

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SUBMISSION OF WORKING STATEMENTS [FORM 27]

Dear Colleagues,

This alert is with respect to submission of Working Statements (Form 27) for Patents granted by the Indian Patent Office. Please be informed that working statements regarding the working of patented inventions in a calendar year is required to be submitted for every granted patent before 3 months from the end of every calendar year i.e. 31st March of every year. Therefore for submission of working statements for calendar year 2014 due date is 31st March 2015.

In the above said working statements the patentee is required to submit the information regarding the working of the patented invention i.e. whether the invention is worked or not, if worked then quantum and value of the patented product. In case the invention is not worked, reason for non working is required to be provided. Further licenses and sub-licenses granted for the patent is also required to be submitted, if any, etc. Please find below the exact information required by the Indian Patent Office in respect of the working and draft Form 27 for your ready reference.

- Worked
- Not worked
- If not worked: reasons for not working and steps being taken for working of the invention.
- If worked: quantum and value (in Rupees), of the patented product:

i. Manufactured in India
ii. Imported from other countries. (give country wise details)

- The licenses and sub-licenses granted during the year
- State whether public requirement has been met partly/adequately/to the fullest extent at reasonable price.

The provisions of the Indian Patents Act, 1970 under which the above working statement is required are mentioned below for your ready reference.

Section 146: Power of Controller to call for information from patentees.
(1) The Controller may, at any time during the continuance of the patent, by notice in writing, require a patentee or a licensee, exclusive or otherwise, to furnish to him within two months from the date of such notice to within such further time as the Controller may allow, such information or such periodical statements as to the extent to which the patented invention has been commercially worked in India as may be specified in the notice.

(2) Without prejudice to the provisions of the sub-section (1), every patentee and every licensee (whether exclusive or otherwise) shall furnish in such manner and form and at such intervals (not being less than six months) as may be prescribed statements as to the extent to which the patented invention has been worked in a commercial scale in India.
(3) The Controller may publish the information received by him undersub-section (1) or sub-section (2) in such manner as may be prescribed.

Rule 131: Form and manner in which statements required under section 146(2) to be furnished.
(1) The statement which shall be furnished by every patentee and every licensee under sub-section (2) of section 146 in Form 27 shall be duly verified by the patentee or the licensee or his authorized agent.

(2) The statements referred to in sub-rule (1) shall be furnished in respect of every calendar year within three months of the end of every year.

(3) The Controller may publish the information received by him under sub-section (1) or sub-section (2) of section 146.

Further, please also note that for refusal or failure to supply information regarding working of patent is punishable with fine which may extend to INR Ten Lakh (Section 122) and same can also be taken as ground for granting of compulsory license for the Patents for not being exploited.

For submission of Working Statements, Patentee can chose to provide either the Original working statements duly signed or provide a 'Power of Attorney' with which Indian Agents can prepare and sign the working statements for any number of Patents, with the information provided by Patentee for working.

Hope you find above in order.

Thanks and regards.

NOTES

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