Note on

RECENT LEGAL DEVELOPMENTS

Juris Legal

DISCLAIMER: No person should rely on the contents of this document without first obtaining advice from a qualified professional. This document is contributed on the understanding that the Firm, its employees and consultants are not responsible for the results of actions taken on the basis of information in this document, nor for any error in or omission from this document. Further, the Firm, its employees and consultants, expressly disclaim all and any liability and responsibility to any person who reads this document in respect of anything, and of the consequences of anything done or omitted to be done by such person in reliance, whether wholly or partially upon the whole or any part of this document.

For Private Circulation Only
© Juris Legal & Financial Services
2010

INTELLECTUAL PROPERTY

In August, 2010, the Rajya Sabha passed by voice vote the Trade Marks (Amendment) Bill, 2009 that allows any person or enterprise to seek registration or trade mark in any of the 84 member countries of the Madrid Protocol through a single application. The new law aligns Indian trade mark laws with provisions of the Madrid Protocol. It also allows international enterprises and persons to apply in India.

TAXATION

The Direct Taxes Code Bill, 2010 ("**DTC**") was introduced in the Parliament on August 30, 2010. The proposed code, once enacted, would come into force from April 1, 2012. Some of the key changes proposed under the DTC are as follows:

Under extant law, there are limited specific anti-abuse provisions. The DTC seeks to introduce General Anti Avoidance Rules ("**GAAR**") which provide sweeping powers to the Revenue authorities, applicable to both domestic as well as international arrangements.

GAAR provisions empower the Commissioner of Income-tax to declare any arrangement as "*impermissible avoidance arrangement*" provided the same has been entered into with the objective of obtaining tax benefit and satisfies any one of the following conditions:

- It is not at arm's length;
- It represents misuse or abuse of the provisions of the DTC;
- It lacks commercial substance; or
- It is carried out in a manner not normally employed for *bona fide* business purposes.

An arrangement would be presumed to be for obtaining tax benefit unless the tax payer demonstrates that obtaining tax benefit was not the main objective of the arrangement.

The other key proposals are as follows:

1. Change in the concept of residence for foreign entities;

2. Income from transfer outside India, of any share or interest in a foreign company, is taxable in India, if at any time during the 12 months prior to transfer, the assets owned, directly or indirectly, by such company represent at least 50% of the fair market value of all the assets owned by it;

3. Corporate tax rate for both, domestic and foreign companies, to be the same *i.e.* 30%;

4. Capital gains would be taxed at marginal rates applicable to tax payers, subject to certain conditions;

5. Withholding tax rate on royalty and fees for technical services to non-residents increased from 10% to 20%.

CAPITAL MARKETS AND SECURITIES LAW

The Takeover Regulations Advisory Committee (the "**Committee**") constituted by the Securities and Exchange Board of India ("**SEBI**") in September, 2009, submitted its recommendations for a revised SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ('**Takeover Code**') on July 19, 2010. The draft regulations propose to fully rewrite the existing Takeover Code and aim to provide for a simpler and less ambiguous regulatory regime. The ***two most significant changes*** in proposed regulations are the ***increase in threshold limit for a public offer from 15% to 25%*** and the ***requirement to give an exit opportunity to 100% of the public shareholders via a public offer*** as compared to the minimum 20% now. Another significant proposal is the removal of the current exemption to 25% of the total consideration from inclusion in the open offer price. Currently, up to 25% of the total consideration paid to promoter shareholders may be treated as a non-compete fee and need not be included in the calculation of the open offer price. It is recommended that no distinction be made between the price paid to promoters and public shareholders. The Committee has argued this to be a pro minority shareholder proposal and one which would prevent payments to promoters couched as 'control premium' or 'non compete fee'.

Following are some of the other key amendments suggested by the Committee:

1. For direct acquisitions, the price for the open offer is to be determined *inter alia* on the basis of the volume weighted average price paid by the acquirer (and persons acting in concert) in the preceding year and the sixty-trading day volume-weighted average market price preceding the acquisition. For indirect acquisitions, the highest price paid by the acquirer or persons acting in concert between the date of the primary acquisition and the date of public announcement of the indirectly acquired target company must also be taken into account;
2. Creeping acquisition of 5% per financial year should be computed on a gross basis for all shareholders holding more than 25% of the voting rights so long as the maximum non-public shareholding limit is not breached;
3. The independent directors of the target should be required to make a reasoned recommendation on the offer;
4. An indirect acquisition of a company which is a predominant part (in excess of 80% as per the most recent audited annual financial statements) of the business or entity being acquired should be treated as a direct acquisition for all practical purposes including pricing, timing for making a public announcement *etc*.;
5. A short public announcement of the open offer should be made on the day of occurrence of the transaction that triggered the open offer, followed by a detailed public statement within five business days from the date of the short public announcement. The timeline for the entire open offer process should be shortened to 57 business days;
6. The current categories of exemptions under the Takeover Code have been analyzed by the Committee depending on the nature of the transaction;

7. The definition of '**control**' has been proposed to be amended to include not just the '**right**' but also the '**ability**' to appoint a majority of the directors on the board of the target company or to control the management or policy decisions of such company;
8. For a ***voluntary open offer***, a minimum limit has been proposed at 10% of the shareholding; and
9. ***Grounds for withdrawal of an open offer*** should be widened. Obligations of a merchant banker should also be increased, with the merchant banker being required to demonstrate *bona fide* efforts.

SEBI, by way of press release dated August 27, 2010 ('**Press Release**'), issued guidelines for mandatory disclosure by media companies of their stake in listed companies. SEBI noted that private arrangements by media companies, without appropriate and adequate disclosures may not be in the interest of investors and financial markets. The ***Press Council of India*** has mandated the following guidelines to media companies on August 2, 2010:

1. Disclosures regarding the ***stake held by the media company in any company*** should be made by the media company in any news report, article or editorial relating to such company, whether in print or on television.

2. Media groups should disclose on their websites details of the ***percentage shareholding held by them in various companies*** under such private arrangements.

3. It is also now mandatory for a media company to disclose any agreements which entitle such media company to appoint its nominee on the board of directors of another company, or which provide such media company management control over another company or which may create a potential conflict of interest for such media company *vis-à-vis* another company.

BANKING AND FINANCE

The Reserve Bank of India ("**RBI**") has notified the regulatory framework for Core Investment Companies (**"CICs"**) by way of a notification dated August 12, 2010 (**"CIC Notification"**). CICs are holding companies whose primary asset is the shares of group company(ies). Such companies do not undertake share trading activities, nor carry out other financial activities and do not accept public deposits. Prior to the CIC Notification, CICs were not considered to be in the business of acquisition of shares and securities if (i) at least 90% of such company's total assets were in the form of investments in shares of investee companies purely for the purpose of holding stake; (ii) they were not trading in such shares except to divest or dilute their holding; (iii) they were not carrying out any other financial activity; and (iv) they were non-deposit taking companies. Such companies were not required to register themselves with RBI. However, the CIC Notification now defines CICs with an asset size of not less than Indian Rupees 1 billion as '***Systemically Important Core Investment Companies***' and requires such companies to register with RBI. CICs with an asset size of less than Indian Rupees 1 billion are exempt from this registration requirement.

FOREIGN EXCHANGE

With an objective to issue an updated foreign direct investment policy every six months, bringing into one document all changes brought in vide various Press Notes, Press Releases, Clarifications, the Department of Industrial Policy and Promotion ("**DIPP**") has issued the Consolidated Circular No. 2 ("**Circular**") in September, 2010. This Circular is effective from October 01, 2010. The Circular includes all Press Notes, Press Releases, Clarifications issued by the DIPP in force as on September 30, 2010.

Some of the amendments / clarifications introduced in this Circular are set out below.

- *Partly Paid shares and Warrants* – It is clarified that issue of partly paid shares and warrants to persons resident outside India would be permitted after prior approval from the Government. However, these instruments would not be considered as part of the 'capital' of the company.

- *Share Swaps* – The DIPP has introduced a specific clause allowing share swap transactions with prior Foreign Investment Promotion Board ("**FIPB**") approval. Valuation of the shares will need to be undertaken by a Category 1 merchant banker registered with SEBI or a registered investment banker in the host country.

- *Valuation Norms* - For issue / transfer of shares, the valuation norms have been updated to reflect valuation based on discounted cash flow methodology.

- *Internal Accruals* - Downstream investments are now permissible through use of internal accruals, subject to such investments complying with sectoral caps / policy.

- *Existing venture/Tie-up* – It has been clarified that approval requirements will apply to all "new proposals" in the same field and not only to "new joint ventures".

- *Share Premium* - For sectors having minimum capitalisation norms such as Non Banking Finance Companies ("**NBFC**") and construction development projects, it has been clarified that share premium received along with face value of the shares upon issue of the shares to non-resident investors would be counted as part the capital of the relevant company for the purposes of minimum capitalisation calculation.

On July 22, 2010, RBI announced that it will put in place a scheme to allow refinancing of Indian Rupee loans from domestic Indian banks with external commercial borrowings ("**ECB**") from foreign lenders via take-out financing arrangements subject to certain conditions. Prior to this announcement, end-use restrictions under ECB guidelines prohibited Indian borrowers from using ECBs to refinance domestic Rupee loans. The new scheme will limit permitted ECB take-outs to new projects in the sea port and airport, roads (including bridges) and power sectors.

To put in place permitted take-out financing, the Indian corporate will be required to enter into a tripartite agreement with the domestic bank and overseas ECB lender providing for the take-out of the

domestic Rupee loan within three years of the commercial operation date. The scheme will allow both conditional and unconditional take-out financing, provided that the scheduled take-out date is included in the agreement.

The ECB take-out financing will be subject to a minimum average maturity of not less than seven years and a 100 bps per annum cap on fees payable to the take-out bank. The domestic bank should otherwise comply with the existing extant norms related to take-out financing, and on take-out, the residual loan would be considered ECB and should be designated in a convertible foreign currency (and all other extant norms relating to ECB should be complied with). The parties will also be required to adhere to prescribed ECB reporting requirements. Finally, domestic banks and financial institutions will not be permitted to guarantee take-out financing and the domestic Rupee loan provider will not be permitted to carry any obligation on its balance sheet after the relevant take-out event.