It gives me an immense pleasure to bring forth the February 2013 edition of our newsletter “Indian Legal Impetus”. Through this edition, we have tried to bring forth the recent developments of changing and ever evolving legal environment.

Budget has been and will always remain one of the most important events of a year. The month of February brought forward the Budget 2013-2014. This time budget has been targeted to benefit medium income group. A summary of all the important changes introduced by budget have been summarized under the ‘Budget Highlights’.

Then there is an article discussing whether a scheme of arrangement is a mode of revival for a Company under Winding up where winding up Petition is filed by Reserve Bank of India.

Moving further, there is an article detailing the tax implications in India of an Investment by an Indian individual in shares of a foreign company and also an Article analyzing and discussing the Andhra Pradesh High Court judgment, overruling the AAR decision in the Sanofi case.

The Article on “Tax on Distributed Profits” talks about the Section 115-O of The Income Tax Act of 1961, about the taxation of distributed profits of a Domestic Company.

Under the IPR Section, there is an article critically analyzing the pros and cons of the new Drugs Pricing Policy and further, there is an article highlighting the investment scenario in Intangible assets.

Lastly, there is an article detailing International Trade Law concept.

We hope that our esteemed readers find useful the information furnished through this newsletter and also such an effort will enable them to understand and further interpret the recent legal developments thus enabling our readers to avail new gateways. We welcome all suggestions, opinions, queries or comments from our readers. You can also send your valuable insights and thoughts at newsletter@singhassociates.in
All ©Copyrights owned by Singh & Associates

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means without the prior permission in writing of Singh & Associates or as expressly permitted by law. Enquiries concerning the reproduction outside the scope of the above should be sent to the relevant department of Singh & Associates, at the address mentioned herein above.

The readers are advised not to circulate this Newsletter in any other binding or cover and must impose this same condition on any acquirer.

For internal circulation, information purpose only, and for our Clients, Associates and other Law Firms.

Readers shall not act on the basis of the information provided in the Newsletter without and seeking legal advice.

2013 © Singh & Associates
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>BUDGET HIGHLIGHTS</td>
<td>4</td>
</tr>
<tr>
<td>WHETHER A SCHEME OF ARRANGEMENT IS A MODE OF REVIVAL FOR A ‘COMPANY UNDER WINDING UP’ WHERE WINDING UP PETITION IS FILED BY RESERVE BANK OF INDIA</td>
<td>6</td>
</tr>
<tr>
<td>TAXATION OF AN INVESTMENT BY AN INDIAN INDIVIDUAL IN SHARES OF A FOREIGN COMPANY</td>
<td>10</td>
</tr>
<tr>
<td>SANOFI WINS THE INDIRECT WAY!</td>
<td>12</td>
</tr>
<tr>
<td>THE CRITICAL ANALYSIS OF THE NEW DRUGS PRICING POLICY: PROS AND CONS</td>
<td>14</td>
</tr>
<tr>
<td>MAXIMISING INVESTMENT IN INTANGIBLES- A STEP AHEAD BY INDIA</td>
<td>16</td>
</tr>
<tr>
<td>INTERNATIONAL TRADE LAW</td>
<td>19</td>
</tr>
<tr>
<td>NEWSBYTE</td>
<td>21</td>
</tr>
</tbody>
</table>
BUDGET HIGHLIGHTS

The Union Finance Minister Mr. P Chidambaram presented the Union Budget 2013-14 in the Lok Sabha on 28th February, 2013. The segment herein below highlights the proposals made in the Budget.

DIRECT TAXES

1. **Slab rates**
   There is no change in the slabs or the rates of Personal Income tax. However, there is a relief of INR 2000/- to the individuals having total income upto INR 5,00,000/-. The relief is therefore given to the tax payers in the first Income bracket of INR 2,00,000/- to INR 5,00,000/.

2. **Surcharge**
   - Surcharge of 10% will be applicable for individuals having taxable incomes above INR 1,00,00,000/-. The rate of surcharge is increased from 5% to 10% for domestic companies having taxable income above INR 10,00,00,000/-. The rate of surcharge is increased from 2% to 5% for the foreign companies having taxable income above INR 10,00,00,000/-. The rate of surcharge for all the other cases viz. Dividend Distribution Tax [DDT] or Tax on Distribution Income will increase from 5% to 10%.

3. **Deductions**
   - Akin to the Central Government Health Scheme, the contributions made to schemes of Central and State Governments will be eligible for deduction under Section 80D of the Income Tax Act, 1961.
   - The donations made to National Children Fund will be eligible for 100% deduction under Section 80G of Income Tax Act.

4. **Relaxation of premium rate for disabled**
   The Relaxation in the eligibility conditions of Life Insurance Policies for persons suffering from disability or certain ailment has been proposed by increasing the premium rate from 10% to 15%.

5. **Investment allowance to Manufacturing Companies**
   An investment allowance at the rate of 15% has been proposed for the manufacturing companies who invest more than INR 100 Crore in plant and machinery during the period 1.4.2013 to 31.3.2015.

6. **Concessional Tax**
   The concessional tax on dividend received by an Indian company from its foreign subsidiary shall continue at the rate of 15 per cent for one more year.

7. **Exemption of Securitisation Trust from Income Tax**
   The Securitisation Trust will be exempted from the purview of Income Tax. The tax, at the specified rates) will be levied only at the time of distribution of income for companies or individual or HUF as the case may be. The tax rates shall be 30% in the case of companies and 25% in the case of individual or HUF.

8. **Extension of date for power sector projects**
   For the purpose of availing benefit under Section 80-IA, the Eligible Date for the projects in the power sector has been extended from 31.3.2013 to 31.3.2014.

9. **Tax Deductible at Source**
   The levy of Tax Deductible at Source has been proposed at the rate of 1% on the value of the transfer of immovable property where the consideration exceeds INR 50,00,000/-. However, for this purpose, the agricultural land will be exempt.

10. **Withholding Tax**
    It has been proposed to levy final withholding tax at the rate of 20% on profits distributed by unlisted companies to shareholders through buy-back of shares. The whole motive behind this is to eliminate the practice adopted by the unlisted companies who avoid dividend distribution tax by arrangements involving buyback of shares.

11. **Increase in Royalty and Fee for Technical Services**
    Proposal has been made for increase in the rate of tax on payments by way of royalty and fees for technical services to non-residents from 10 percent to 25 percent.

12. **Commodity Transaction Tax**
    Union Budget 2013-14 has introduced the Commodity Transaction Tax [CTT]. This new levy proposed in the Finance Bill, 2013 aims at augmenting the financial resources. The finance minister in his budget speech said that there is no distinction between derivative trading in the securities market and derivative trading in the
commodities market as only the underlying asset is different. Accordingly, it has been proposed to levy CTT on non-agricultural commodities futures contracts at the rate of 0.01% of the price of the trade.

13. Service Tax

- The activities relating to training and testing in relation to agricultural produce will be included in the negative list for service tax thereby exempted from the levy of service tax.
- The courses in designated trades offered by the Industrial Training Institute or Industrial Training Center being affiliated to State Council of Vocational Training will be covered under the negative list.
- The copyright on cinematography limited to films exhibited in cinema halls will be exempted from the purview of Service Tax.
- The Voluntary Compliance Encouragement Scheme, 2013 (VCES) has been introduced in order to encourage the voluntary compliance and broaden the tax base. Under this scheme, one-time remission will be given by way of (i) waiver of interest and penalty and (ii) immunity from prosecution to the stop filers, non-filers or non-registrants or service providers.
- All the restaurants with air-conditioning/central air heating (including restaurants not serving liquor as well) in any part of the establishment at any time during the year been covered within the purview of service tax.
- Any person collecting service tax exceeding INR 50 lakh, but fails to deposit the same to the Central Government within 6 months, shall be punishable with imprisonment for a term which may extend to 7 years but not less than 6 months.
- The exemption limit of INR 25 lakh will not be available in case of charitable organizations.
- The below mentioned exemptions are withdrawn:
  - The services which are provided by an educational institution by way of renting of immovable property or education auxiliary service.
  - Earlier, the temporary transfer or permitting the use or enjoyment of a copyright relating to cinematographic films was fully exempt. This will now be restricted to exhibition of cinematograph films in a cinema hall or a cinema theatre.

14. Customs

Duty free gold limit increased to Rs 50,000 in case of male passenger and Rs 1,00,000 in case of a female passenger subject to conditions.
- The period of concession available for specified part of electric and hybrid vehicles will be extended upto 31.03.2015.

Basic customs duty will be enhanced on the following goods:
- Yachts and motor vehicles
- Raw silk from 5% to 15%.
- Set top boxes from 5% to 10%.
- Luxury cars (duty enhanced from 75% to 100%)
- pre-forms precious and semi-precious stones will be reduced from 10% to 2%.

The speed post with proof of delivery or courier approved by the Central Board of Excise & Customs would also be the prescribed modes of delivery for any decision or order or any summons or notices.

15. Excise duty

- Excise duty on following goods enhanced:
  - Mobile phones of retail sale price exceeding Rs 2000/-.
  - Cigarettes
  - Marble tiles and slabs
- Full exemption has been granted on ships and other vessels. Thus there will be no CVD on import of the same.

In respect of branded readymade garments and made ups, Zero excise duty route has been restored. Specific excise duty has been increased on cigarettes by 18 percent.

The Excise duty has been increased from 27% to 30% on SUVs. This will however be, not applicable for SUVs registered as taxies.
- The Duty on mobile phones priced more than INR 2000/- increased to 6%.
Whether a Scheme of Arrangement is a Mode of Revival for a ‘Company under Winding Up’ Where Winding Up Petition is Filed by Reserve Bank of India

Karan Gandhi & Pradhumna Didwania

Provisions Under Companies Act, 1956

Chapter V of Part VI: Management and Administration of the Indian Companies Act, 1956 [hereinafter referred to as the ‘Act’] regulates Arbitration, Compromises, Arrangements and Reconstructions as covered under Section 390-396A of the said Act. Section 390 of the Act provides interpretation of Sections 391 and 393 as under:

390. Interpretation of Sections 391 and 393

In sections 391 and 393,-

(a) the expression “company” means any company liable to be wound up under this Act;
(b) the expression “arrangement” includes a reorganization of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes or, by both those methods; and
(c) unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

The provisions of Section 390 (a) can be well understood referring to the landmark Judgment pronounced by Hon’ble High Court of Bombay in Khandelwal Udyog Limited Vs. Acme Manufacturing Company as:

- Company means any company liable to be wound up under this Act
- Any company incorporated under this Act, or, under any other previous Companies Act, 1956
  - Whether a going concern
  - Already under the course of winding up
- Any Partnership firm having 8 or more partners- Unregistered company (Section 582)
- Indian business of a foreign company (Section 591)

Section 390 (b) of the Act provides that the term ‘arrangement’ includes a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or, by both those methods. This means a scheme of arrangement under Sections 391 & 393 may be filed for internal arrangements amongst the shareholders holding equity or preference share capital of the company.

It was questioned that whether the provisions of Buy Back of shares as provided under Section 77A of the Act will qualify under arrangement being an internal from of reorganization on which the Securities Appellate Tribunal has held that the provisions contained under the Chapter V of the Companies Act, 1956 are the special provisions and hence the same over rides any other provisions of the said Act. It was also clarified that the term ‘arrangement’ as envisaged under Section 390 (b) of the Act includes the Buy Back of shares by a company.

The interpretation to Section 390 (c) of the Act suggests that if certain unsecured creditors of the company have obtained a decree against such company, and a scheme under Chapter V of the Act is filed before the court by certain class of unsecured creditors other than such unsecured creditors already holding the decree and obtained the approval as contained under the said chapter, the unsecured creditors holding a decree shall compulsorily switch into the scheme of arrangement and the order/decree attained by them shall have no effect by operation of law.

Under the Reserve Bank of India Act, 1934

Chapter III B of the Reserve Bank of India Act, 1934 [hereinafter referred to as the ‘RBI Act’] deals with the ‘Provisions relating to non-banking institutions receiving deposits and financial institutions’ under section 45H-45QB. Section 45 MC of the RBI Act, empowers the Reserve Bank to file a winding up petition in certain cases as follows:

45MC. Power of Bank to file winding up petition.

(1) The Bank, on being satisfied that a non-banking financial company,—
(a) is unable to pay its debt; or
(b) has by virtue of the provisions of section 45-IA become disqualified to carry on the business of a non-banking financial institution; or

(c) has been prohibited by the Bank from receiving deposit by an order and such order has been in force for a period of not less than three months; or

(d) the continuance of the non-banking financial company is detrimental to the public interest or to the interest of the depositors of the company, may file an application for winding up of such non-banking financial company under the Companies Act, 1956.

A non-banking financial company shall be deemed to be unable to pay its debt if it has refused or has failed to meet within five working days any lawful demand made at any of its offices or branches and the Bank certifies in writing that such company is unable to pay its debt.

All the provisions of the Companies Act, 1956 relating to winding up of a company shall apply to a winding up proceeding initiated on the application made by the Bank under this provision.

Also, according to the Section 45Q of the RBI Act, the provisions of Chapter IIIB of the RBI Act override the provisions inconsistent with the provisions of Chapter III B contained in any other Law. Section 45Q provides as under:

**45Q. Chapter IIIB to override other laws.**

The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

In the light of the above mentioned provisions of the RBI Act, the Reserve Bank is empowered to file for winding up of a non-banking institutions receiving deposits and financial institutions which are unable to pay its debts, have received prohibitory orders for receiving deposits, the running of such company is detrimental to public interest etc.

Analysis of the above mention provisions of the Indian Companies Act, 1956 and the Reserve Bank of India Act, 1934

The provisions of the Companies Act, 1956 and Reserve Bank of India Act, 1934 have been interpreted by Hon’ble Courts in India. The Hon’ble Courts on the various instances have held that the provisions of Chapter V of the companies Act, 1956 are the special provisions under such law. The validity of the scheme of arrangement depends on the merits and its effect on the general shareholders and creditors. Even if the scheme is approved by the respective creditors and shareholders of a particular company, such scheme may be improvised by the Hon’ble Authorities after due suggestions and the Hon’ble Court having the powers to incorporate such suggestions into the scheme may make order to suitable make the amendments in the scheme.

In the case of Hindustan Lever Employees’ Union v. Hindustan Lever Ltd. and others 1995 Supp. (1) SCC 499 it was held that “But what was lost sight of was that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction ........... Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered between parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, the courts have evolved, the principle “prudent business management test” or that the scheme should not be a device to evade law. But when the court is concerned with a scheme of merger with a subsidiary of foreign company then test is not only whether the scheme shall result in maximising profits of the shareholders or whether the interest of employees was protected but it has to ensure the merger shall not result in impeding promotion of industry or shall not result in impeding promotion of industry or shall obstruct growth of national economy. Liberalized economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective.

In Reserve bank of India vs CRB Capital Markets Limited (Date of Judgment 21st November, 2012), the Hon’ble High Court of Delhi has held that there is nothing inconsistent in the provision of Section 391 of the Companies Act with the provisions of Chapter III-B of the RBI Act and therefore it cannot be said that in a winding-up petition under Section 45MC of the RBI Act an application under Section 391 of the Companies Act, 1956 for sanctioning a scheme cannot be made to and entertained by the company court. It is another matter
that while considering the scheme the company court has to ensure that no statutory provisions including the provisions of Chapter III-B of the RBI Act are contravened.

The division bench of Hon’ble High Court of Delhi observed as under in Reserve bank of India vs CRB Capital Markets Limited:

**Q.1 Whether a scheme under Section 391-392 of the Companies Act is maintainable in a winding up petition filed by the Reserve Bank of India under Section 45MC(1) of the Reserve Bank of India Act, 1934?**

**Observation**

Although an application for sanction of a scheme could be made under Section 391 of the Companies Act, 1956 even during the pendency of a winding up petition filed by the RBI under Section 45MC of the RBI Act, the terms of the scheme cannot violate or contravene any of the provisions of law including the provisions of Chapter III-B of the RBI Act, and, if the scheme contains any term or condition which is in derogation of any statutory provision, the same cannot be sanctioned. Furthermore, it is a part of public policy itself that statutory provisions are to be followed and are not to be disregarded or contravened. Therefore, a scheme which ignores or side-steps statutory provisions would clearly be opposed to public policy.

Therefore, the answer to the first question is that while a scheme under Sections 391/392 of the Companies Act could be considered by the company court even during the pendency of the winding up petition filed by the RBI under Section 45MC of the RBI Act, such a scheme cannot be sanctioned if it is in violation of any of the statutory provisions including the provisions of Chapter III-B of the RBI Act.

**Q.2 Whether a scheme under Sections 391-392 of the Companies Act could set aside quasi judicial orders passed by a statutory authority like SEBI constituted under the Securities and Exchange Board of India Act, 1992?**

**Q.3 Whether the criminal and income tax proceedings pending against the company and its directors could be stayed by the company court while sanctioning a scheme under Sections 391-392 of the Companies Act, 1956?**

**Observation**

It is clear that quasi-judicial orders passed by a statutory authority like SEBI or orders passed by RBI and the Income Tax Authorities under special enactments cannot be set aside while sanctioning a scheme under Section 391 of the Companies Act. It is also clear that no stay of any criminal or income tax proceedings can be ordered by the company court while considering an application under Sections 391/392 of the Companies Act, 1956. Therefore, the scheme which entails a direction to SEBI to revoke the orders passed under Section 11B of the SEBI Act could not have been sanctioned in law. Similarly, directions regarding “vacation or stay sine die” of all criminal cases could not have been given by the company court. Furthermore, we feel, that directions could not be given to the CBI to release the passport of the propounders of the scheme as also of the Ex-Directors of CRB Capital nor a direction could be given to CBI to hand over all records and documents of CRB Capital including records of fixed deposits, particularly, in view of the fact that the criminal cases were pending against the said Directors/ Ex-Directors of CRB Capital.

A reference to Section 20A of the SEBI Act would also be appropriate. The said Section reads as under:-

“20-A. Bar of jurisdiction.--No order passed by the Board or the Adjudicating Officer under this Act shall be appealable except as provided in Section 15-T or Section 20 and no civil court shall have jurisdiction in respect of any matter which the Board or the adjudicating officer is empowered by, or under, this Act to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by the Board or the adjudicating officer by, or under, this Act.”

The above provision, inter alia, entails that no injunction shall be granted by any court in respect of any action taken or to be taken in pursuance of any order passed by SEBI or its adjudicating officer. This provision also stipulates that no order passed by the SEBI or the Adjudicating Officer under the SEBI Act shall be appealable except as provided under Section 15 or 20. The latter provisions have already been set out above. Therefore, there cannot be any interference with the provisions of SEBI Act while a scheme is sanctioned under Section 391 of the Companies Act.
The two questions have, therefore, to be answered in the negative.

Q.4 Depending on the answer to the questions above, whether the scheme formulated in the instant case is bonafide, feasible and fair?

Observation

It is apparent that the reliefs and concessions as sought under the scheme form an integral part of the scheme. If a majority of reliefs and concessions sought in law cannot be granted, the scheme itself would be unworkable. The learned counsel for CRB Capital, in the course of arguments, submitted that he was willing to give up various parts of the reliefs and concessions but, we fail to understand as to how that would improve the position inasmuch as without the reliefs and concessions, the scheme in itself would become unworkable. For example, one of the reliefs sought is that a direction be given to SEBI to revoke its order passed under Section 11B of the SEBI Act which includes the revocation of a suspension order for trading in shares of CRB Capital as well as its further group of companies in all stock exchanges. It also includes revocation of the suspension of the order passed by SEBI suspending the membership rights of the Ex-Directors of CRB Capital and to allow them to resume security trading business at stock exchanges. A direction has also been sought that SEBI be directed to give its approval for issuing fresh shares to the unsecured creditors (including deposit holders) by way of preferential allotments as envisaged in the scheme. It is obvious that the payment to depositors having deposited in excess of Rs. 5000/- is to be made partly (50%) by issuance of fresh shares of CRB Capital. That cannot happen unless and until this concession and relief is given in the shape of a direction to the SEBI to grant approval for issuance of fresh shares to unsecured creditors. We have already seen that such a direction cannot be given. There are several other such directions which cannot be given including the direction in respect of criminal cases and stay of demands and vacation of ex-parte orders insofar as income tax authorities are concerned. We also find that the release of the passport of the propounders of the scheme would probably be contrary to the direction given by the criminal court inasmuch as that may have been a condition for grant of bail. Such a direction, once again, may be contrary to law. We are, therefore, of the view that once the reliefs and concessions are not there, the scheme itself becomes unworkable. This is apart from the fact that there are other serious concerns with regard to the paltry amount of funds proposed to be brought in by the propounders of the scheme in the context of the overall fund requirement. This is also apart from the fact that the scheme as propounded and as sanctioned by the company court, in fact, contravenes the provisions of the RBI Act particularly those of Section 45QA. We have already held that though a scheme can be envisaged in the course of a winding up petition under Section 45MC of the RBI Act it has to be in conformity with the provisions of Chapter III-B of the RBI Act and not in contravention thereof. For all these reasons we feel that the scheme as formulated in the present case is not bonafide, feasible or fair.

CONCLUSION

In the light of the above, it can be concluded that the scheme of arrangement of the company already under winding up under the provisions may be called valid and approved if it is shown that such scheme is not contrary to Law.
INTRODUCTION

Sometimes Tax treatment of income arising by an Individual may not be clear from direct provisions of the Income tax act, 1961, an interpretation of various clauses of the Income Tax Act, 1961 along with provisions of Double Taxation Avoidance Agreement may clarify the taxation of income arising from such complex transactions. One such situation, where provisions of Income Tax Act, 1961 are to be read in consonance with the provisions of Double taxation avoidance agreement is in the case of an investment by an Indian Individual (ordinarily resident in India) in the shares of a Foreign Company.

An Investment by an Indian Individual in shares of a Foreign Company may result in following types of Incomes:

(a) on dividend received from such investment made in Spain?
(b) Income, as Capital Gains, by way of transfer of such shareholding in Foreign Company

RELEVANT LEGAL PROVISIONS AND OBSERVATIONS

1. As per the provisions of Income Tax, taxability of an Individual depends upon his/her days of residence in India.
2. As per Section 6 of the Indian Income Tax Act, 1961, which defines residence in India for the Taxation purposes, the Indian Individual in present case is ordinarily resident in India.
4. Further, Section 5 of the Income Tax Act, 1961 provides for “Scope of Total Income” in case of an individual ordinarily resident in India. As per the said section, all income received or is deemed to receive in India, accrues or arises or is deemed to accrue or arise in India or accrues or arising outside India, during a previous year from all sources in included and hence liable to taxation.
5. However, Section 10 of the Income Tax Act, 1961 provides for Incomes which do not form part of Total Income. Section 10 (34) of Income Tax Act, 1961 provide exemption to income received by way of dividend only from a domestic company in the hands of the recipient, however all income received by way of dividend from a foreign company is liable to be taxed in India. Therefore, Dividend received from foreign Company is taxed under the head “Income from other sources” under the Indian Income Tax Act of 1961.
6. Relevant provisions of the said DTAA need to be examined to determine taxation of Dividend Income received by an Indian Individual from a Foreign Company. Usually many DTAA’s contain a provision of Withholding tax (i.e. tax deducted at source) on dividend incomes. The rate of tax on such dividends in many cases is 15%.
7. In the above mentioned case, where tax is levied in both the countries, in respect of the same dividend income, DTAA between India and the other country provides relief from effect of such Double taxation. As per the provisions of the DTAA, Indian individual will get a deduction on the Tax already deducted in such other country on such dividend Income. Therefore it can be concluded that though the dividend income received by an Indian Individual from investment of shares in a Foreign Company will be included in his “Total Income” (i.e. Section 5) and is taxable in India, tax already paid in the foreign country on such dividend income will be deducted from tax calculated on such dividend income in India
8. Income from Sale of shares of a Foreign Company by an Indian Individual is taxable in India. As mentioned above, in case of an ordinarily resident India. All income received from all sources is, which received or is deemed to receive in India, accrues or arises or is deemed to accrue or arise in India or accrues or arising outside India, is taxable in India.
9. Sale of shares by an Indian Individual, amounts “Transfer” of “Capital Asset” and is taxable as per the provisions of Section 45 of the Income Tax Act, 1961 and will be taxable under the head “Income from Capital Gains” under the Income Act of 1961. Shares of a Company, the units of Unit Trust of India or any specified Mutual Fund or any security

Smeeksha Bhola
listed in any recognised Stock Exchange are to be considered as short term capital assets if held for twelve months or less and long term capital assets if held for more than twelve months. Therefore, the taxation of sale of shares by the Indian Individual of the Foreign Company treated as short term capital gains or long term capital gains, depending upon the time period within which it is sold after its purchase and its taxation will vary accordingly.

11. Income from sale of foreign investments would generally be liable to be taxed in India. However, in case India has entered into a DTAA with a foreign country, provisions of such DTAA need to be examined for determining the tax treatment on profits arising from transfer of shares by the Indian Individual of a Foreign Company.

12. Lets take the example, that an Indian individual invested in shares of a Spanish Company, in such case provisions of India- Spain DTAA need to be determined.

From the provisions of Article 14 of the said DTAA entered between India and Spain [Point 10 of Annexure attached hereinafter], it is clear that gain from transfer of shares of Spanish company whose immovable property is situated in Spain may be taxed in Spain. It also provides that gain from transfer of 10% shares of a Spanish company, may be taxed in Spain. Profit from transfer of any other asset will be taxed in country of which transferor is resident.

13. Therefore, income on sale of shares of a Spanish Company by an Indian individual will be taxable in Spain, if:
(a) If immovable property of such Spanish Company is situated in Spain and
(b) If the value of such shares transferred exceeds 10% of participation of such Company.

Further, if the income from sale of shares of a Spanish Company is taxable under the head “Capital Gains” in India, as detailed above and a Capital Gain Tax is already paid in Spain, then in such case, in order to avoid double taxation, provisions of Clause 25 of the DTAA between India and Spain will be applicable [Point 7 of Annexure attached hereinafter]. As per the provisions of the said Clause of the DTAA, Indian individual will get a tax credit in India on the Tax already paid in Spain on such Income from sale of shares of Spanish Company.

CONCLUSION

A. Income by way of Dividend earned by an Indian Individual on investment in shares of a Foreign Company will be included in the “Total income” of such individual and will be taxable in India as per the provisions of the Indian Income Tax Act of 1961. However, a deduction of amount of tax already paid in Spain will be available from tax on such dividend income payable in India

B. Income from sale of shares of a Foreign Company, example taken above is of Spanish Company will be taxable in India, however, if the underlying value of such shares are Spanish Assets and the shares sold exceed 10% of the total shares of such Spanish Company, then income from such sale will be taxable in Spain as per the provisions of India – Spain DTAA. In case, a tax on income from sale of shares of Spanish Company is already paid in Spain by the Indian individual, then a deduction of the amount already paid in Spain as tax on such income will be available from the tax calculated on Capital gains in India on the aforesaid sale.
INTRODUCTION

Taxation Environment in a Country has also been and always remains a matter of concern for foreign investors. A foreign investor always looks for certainty and favorable taxation environment. There has been a lot of ambiguity in taxation atmosphere in India. Last year has seen a lot of developments in taxation scenario in India, starting from the Vodafone judgment, amendments in Income Tax Act, 1961 following the Vodafone judgment, revision and deferment of GAAR [General Anti-avoidance rules ] till 2016. Recent judgment of Andhra Pradesh High Court in the case of Sanofi Pasteur Holding SA comes as a breather for foreign investors1.

BRIEF FACTS OF CASE

In the present case, Sanofi Pastuer Holding (Sanofi), a company incorporated under the laws of France had purchased 80.37% of the share capital of another French company (i.e. ShanH) from Merieux Alliance (MA), a French company, and a balance 19.63 % share capital of ShanH from Groupe Industrial Marcel Dassault (GMID), another French company. ShanH held 82.5% of the share capital of Shantha Biotechnics Limited (SBL), a company incorporated under the Companies Act, 1956.

The tax Department passed an order on Sanofi dated 25 May 2010 under Section 201(1)/(1A) of the Act, holding Sanofi as an ‘assessee-in default’ for not withholding taxes on payments made to MA and GMID on acquisition of shares of ShanH. MA and GMID made an application to the Authority for Advance Ruling (the AAR) in November 2011 ruling that the capital gain arising from sale of shares of ShanH by MA and GMID was taxable in India in terms of Article 14(5) of the tax treaty.

The AAR in November 2011 ruled that the capital gain arising from sale of shares of ShanH by MA and GMID was taxable in India in terms of Article 14(5) of the tax treaty. The AAR in November 2011 ruled that the capital gain arising from sale of shares of ShanH by MA and GMID was taxable in India in terms of Article 14(5) of the tax treaty. The AAR in November 2011 ruled that the capital gain arising from sale of shares of ShanH by MA and GMID was taxable in India in terms of Article 14(5) of the tax treaty. The AAR in November 2011 ruled that the capital gain arising from sale of shares of ShanH by MA and GMID was taxable in India in terms of Article 14(5) of the tax treaty.

1) Is ShanH not an entity with commercial substance; is a sham or illusory contrivance, a mere nominee of MA and/or MA/GMID being the real, legal and beneficial owner(s) of SBL shares; and a device incorporated and pursued only for the purpose of avoiding capital gains liability under the Act?

2) Was the investment, initially by MA and thereafter by MA and GMID through ShanH in SBL, a colourable device designed for tax avoidance? If so, whether the corporate veil of ShanH must be lifted and the transaction (of the sale of the entirety of ShanH shares by MA/GMID to Sanofi) treated as a sale of SBL shares?

3) Is the transaction (on a holistic and proper interpretation of relevant provisions of the Act and the DTAA), liable to tax in India?

4) Whether retrospective amendments to provisions of the Act (by the Finance Act, 2012) alter the trajectory or impact provisions of the DTAA and/or otherwise render the transaction liable to tax under the provisions of the Act?

5) Whether the AAR ruling dated 28-11-2011 is sustainable? If not, what is the appropriate relief that could be granted to the petitioners (in W.P. Nos. 3339 and 3358 of 2012); and whether the orders by the Revenue dated 25-05-2010 and 15-11-2011 are valid and sustainable? and

6) Whether the order dated 25-05-2010 (challenged in W.P. No. 14212 of 2010) determining the petitioner-Sanofi to be an “assessee in default” in respect of payments made by it to MA and GMID for acquisition of ShanH shares, u/S. 201(1) of the Act; the consequent notice of demand dated 25-05-2010; and a rectification order dated 15-11-2011 (u/S. 154 of the Act) re-computing the long-term capital gain, the tax thereon and the consequent interest, are valid ?

OBSERVATIONS AND DECISION OF HIGH COURT

1) The Court observed that ShanH has a commercial existence, which is distinct from that of MA and GMID. Main object of incorporation of ShanH was to serve as a an investment vehicle in other words for pumping foreign direct investment in India and this was done by way of participation in SBL. Also, the receipt of dividends by ShanH as a shareholder in SBL is indicative of the fact that ShanH is a distinct

2) KPMG issue dated 19.02.2013 on Capital gains arising from transfer of shares of a France Company which in turn held controlling stake in an Indian operating company is taxable in France and not in India

1 Sanofi Pastuer Holding SA v. Dept of Revenue [2013] 30 taxman.com 222 (AP)
entity as the dividends distributed by SBL are chargeable tax under the Indian law.

2. On going through all the transactional documents, it was observed that ShanH was not established for the purpose of avoiding capital gains liability under the Indian Income tax Act of 1961. ShanH was incorporated in conformity with MA’s established business practices and organizational structure. The fact that ShanH was not incorporated for the purpose of avoidance of tax was reaffirmed by the fact that a higher rate of capital gain tax is payable and has been remitted to revenue in France. Tax Department failed to establish that ShanH was interposed only as a tax avoidant device and hence no case of piercing or lifting of corporate veil of ShanH was made out. The court observed that is in existence as a registered French resident corporate entity and as the legal and beneficial owner of shares of SBL and hence the principle of piercing of corporate veil of ShanH could be made our.

3. According Article 14(5) of the India-France Double Taxation Avoidance of “Gains from the alienation of shares representing a participation of at least 10 per cent in a company which is a resident of a Contracting State may be taxed in that Contracting State.” Therefore the present case falls within the taxation territory of Spain and not India. Controlling stake of ShanH over the assets and management of SBL cannot be distinguished from its shareholding and hence cannot be treated as a separate asset Therefore the given transaction cannot be taxed in India keeping in view the provisions of the DTAA between India and France.

4. The amendment of provisions of the Indian Income Tax Act, 1961 are intended to curb certain mischief targeted to prevent tax avoidance and nowhere are in conflict or alter the provisions of India-Spain DTAA and therefore are not applicable to present case.

5. The finding of AAR that capital gains arising out of the present transaction were taxable in India was unsustainable as the transaction did not involve any tax avoidance. There was no liability on part of Sanofi to deduct tax at source while making payments to MA nad GMID for acquisition of shares of ShamH as the same is contingent upon capital gains arising and being chargeable under the Income Tax Act, 1961 and since it is not approved that the present transaction is chargeable to tax, therefore no liability on Sanofi to deduct is established.

CONCLUSION

The decision of Andhara Pradesh High Court has been welcomed by many present and prospective foreign investors and has been seen as a positive sign of stability for foreign investments. Court restrained itself from applying the principle of lifting of corporate veil because according to its observations the present transaction was not for the purpose of avoiding tax and circumventing Indian Taxation laws. The court rightly upheld the principles of India-France DTAA. Tax treaty between two countries is signed to provide relief from double taxation of same international transaction and the capital gains arising in the present transaction have already been taxed in France and the same cannot be taxed again in India, providing for such double taxation of the same transaction will in no way serve the principles of equity and justice. This case also provided an example of harmonious interpretation of amendments introduced in the Income Tax Act, 1961, (in light of Vodafone judgment) and that of tax treaty signed between two countries.
In simple terms, distributed profits are those earnings which are shared with shareholders as dividend. Section 115-O of the Income Tax, 1961 refers to dividend distribution tax as an additional income tax. Such tax is not in the nature of withholding tax. It is a levy on the post tax profits of the company out of which the dividend is declared or distributed.

Thus, it is clear that the dividend distribution tax is an income tax on the distributable profits of the domestic company.

**PRE-AMENDMENT**

*Section 115-O: — Tax On Distributed Profits of Domestic Companies*

The Domestic Company shall, in addition to the income tax chargeable in respect of its total income, be liable to pay additional income tax on any amount declared, distributed or paid by such company by way of dividend (whether interim or otherwise), whether out of current or accumulated profits and shall be charged to additional income-tax at the rate of 15%. This is also referred as tax on distributed profits.

The amount referred under Section 115-O(1) i.e. dividend to be distributed shall be reduced by

a) the amount of dividend, if any, received by the domestic company during the financial year, if—
   i. such dividend is received from its subsidiary;
   ii. the subsidiary has paid tax under this section on such dividend; and
   iii. the domestic company is not a subsidiary of any other company.

   However, the same amount of dividend shall not be taken into account for reduction more than once.

b) The amount of dividend paid to any person for, or on behalf of, the New Pension System Trust established on the 27th day of February, 2008 under the provisions of the Indian Trusts Act, 1882. The benefit u/s 115-O (1A) is available only to the ultimate holding company. But ultimate holding company can claim the benefit on dividend received from multiple subsidiary companies.

**WHICHEVER IS EARLIER**

Further, the tax on dividend distribution profit shall be treated as the final payment of the tax in respect of the amount declared, distributed or paid as dividends and no further credit shall be claimed by the company or by any other person in respect of the amount so paid.

The company or the shareholder shall not be allowed any deduction in respect of the amount which has been charged to tax or the tax thereon under Sec. 115-O(1). The interpretation of this clause is that no deduction shall be allowed to the shareholder under any provision of the Income tax Act, 1961 in respect of any expenditure which he has incurred on collection or earning of the dividend.

No tax on distributed profits shall be chargeable in respect of the total income of an undertaking or enterprise engaged in developing or operating a Special Economic Zone for any assessment year on any amount declared, distributed or paid by such Developer or enterprise, by way of dividends (whether interim or otherwise) on or after the 1st day of April, 2005 out of the current income either in the hands of the Developer or enterprise or the person receiving such dividend.

Accordingly dividend distribution tax is chargeable on amount declared, distributed by way of dividend by the said undertaking or enterprise after 1-6-2011.

**POST-AMENDMENT**

The Government had been trying to make the tax laws simpler every year; however, there are numerous
amendments required in the tax laws. The union budget for the Financial Year 2013-14 was presented before the Parliament on 28th February 2013 and the finance minister has made many changes in the Income Tax Act.

The Amendment in relation to “tax on distributed profits of the domestic companies” by Financial Bill of 2013 is as follows:-

The Clause 27 of the Bill amended Section 115-O of the Income-tax Act relating to tax on distributed profits of domestic companies.

Under the existing provisions contained in sub-section (1A) of section 115-O, the amount of dividends referred to in sub-section (1) shall be reduced by the amount of dividend, if any, received by the domestic company during the financial year, if—

a. such amount of dividend is received from its subsidiary; and
b. the subsidiary has paid tax payable under this section on such dividend.

The said sub-section also provides that the same amount of dividend shall not be reduced more than once.

It is proposed to amend clause (a) of the aforesaid sub-section (1A) so as to provide that in case a domestic company receives any dividend from any of its subsidiary during the financial year and where such subsidiary—

a. is a domestic company, the subsidiary has paid tax, if any payable, on such dividend; or
b. is a foreign company, the tax is payable by the domestic company under section 115BBD, on such dividend, the dividend received from such subsidiary during the financial year shall be reduced.

The above amendment shall be effective from 1st June 2013.
THE CRITICAL ANALYSIS OF THE NEW DRUGS PRICING POLICY: PROS AND CONS

Mrinali Mudoi

INTRODUCTION
The nod of the Union Cabinet for the new pricing policy is a boon to the Indian pharmaceutical Industry. With the implementation of the policy, the entire scenario of the pharma sector will change because drugs would not be any more a struggle to procure for common man.

But with the benefits, the bill would also bring along with it many lacunas which can prove to be a big ill factor for the foreign pharma companies to lose interest in doing business in the Indian market who until now were the major supplier of many drugs which are not available in India otherwise.

This article throws light on the pros and cons of the pricing policies and its impact on the Indian economy at large.

BRIEF INSIGHT OF THE POLICY
The National Pharmaceutical Pricing Policy (NPPA) aims to put in place a regulatory framework for pricing of drugs to ensure that they are available at reasonable prices to the Indian public. The Indian government is also hoping that it will come up with all measures for ensuring sufficient opportunity for innovation and competition to support the growth of the Pharma industry.

THE PROS OF THE POLICY
At present, the Pharma sector in India is following the method of cost-based mechanism to determine the price of the drugs. Unfortunately the cost-based policy not only creates an inefficient and inconsistent mechanism of price calculation but most importantly and above all, it has proved to be a failure to help medicine reach to the needy ones.

Thus, that is being the prime reason for India lacking behind, in comparison with other developed and developing country, in terms of health aspect of its population.

Under the new policy, the recommended method to be used for determining the price of drugs is the WAP-based price policy which will be a simple average of all brands with one percent market share cut-off.

According to a memorandum prepared by the Associated Chambers of Commerce and Industry in India (ASSOCHAM), the most efficient factors that would be derived on the implementation are as follows:-

• The weighted average price of all brands, having greater than one percent market share formula will result in over 40% - 70% price reduction in 60 percent of the National List of Essential Medicines (NLEM). The WAP mechanism to control the price of essential medicines will achieve twin objectives of public health and industrial growth.

• 348 "essential" drugs, including cancer and HIV medicines will come under the purview of the pricing policy.

• The policy would not only prove to be miracle of reduced price ranging from 40% to 77% but it would also bring hopes to thousands of poor and needy ones who unfortunately are usually deprived from the basic health care as the Government has assured of continued availability of these medicines even after the price reduction after the implementation of the policy.

THE CONS OF THE POLICY
Although the policy is likely to be a boon and major beneficial for that section of the economy who are the consumers i.e patients, however it is not the same for the other section and the one who play significant role in making the drugs available to public i.e the market player of drugs. As quoted by the Indian Pharmaceutical Alliance (IPA) and Organisation of the Pharmaceutical Producers of India (OPPI), the new drug policy would have adversely impact on the profitability of Indian pharmaceutical companies.
If the policy happens to be implemented, the local drug makers will have to cut prices by 20%-25% across portfolios, while multinational drug companies will have to reduce rates by between 30% and 50%. Moreover the drug companies would be under constant pressure to cope up with the competition among the players to ensure that the drugs sold in India are among the cheapest in the world.1

IPA Secretary General DG Shah, during a press conference told Press Trust of India (PT) as “prices of many leading brands will be slashed by 50 percent to 80 percent. This will reduce industry profit by half to Rs 4,000 crore on domestic sale of Rs 67,500 crore,” Forecasting on such estimations, as a consequence, it might result that the big foreign Pharma Companies may lose interest from investing or expanding production capacity in India who are the leading supplier of many essential drugs in India.

Further, it is mentioned in the draft of the NPPA, that in regards to patented drugs, all together separate committee would work on finalizing the pricing of Patented Drugs and decisions on pricing of patented drugs would be taken based on the recommendations of the Committee. It implies that Government would be much stricter in allowing foreign drug companies to carry business in Indian market with their patented drugs. As a consequence, the investor would tend to shift away from the hassle of the lengthy processes to deal with the Government and lose interest in the Indian market.

CONCLUSION

It is expected that the new DPCO, which will replace the existing one, will define the mechanism and other rules for price fixation of medicines, in line with the new drug pricing policy, recently notified by the government. The Government is speeding up its procedure, as much as possible, to come up with the policy. Well, there is no denial that with the implementation of the policies, India will have an all together new phrase in the pharmaceutical aspect with improved health care initiatives from the Government by reduction and availability of the essential drugs.

However, while in the attempt to make it real, it is hoped that the Government does not overlook those considerable factors that could prove to be adverse consequences of the post era of the implementation of the policies in the longer run.

As India is approaching towards globalization in the recent developments in the Pharmaceutical sector occurring worldwide, India portrays to be a prospective hub for many big foreign Pharmaceutical Companies for drug innovation. Lately India is able to grab attention of many big foreign Pharmaceutical Companies to introduce their drugs innovations in our market. However, it should not occur that with the implementation of the policies, India is left as the least preference in the investment initiatives of these big foreign Pharmaceutical companies to introduce their drug in our market. Hence it is suggested that Government should put more efforts in coming up with measures which will balance the benefit of all the sectors of the Pharma industry be it the patient or the drug companies.

---

1 As analysed by Mr. Manoj Garg, a pharmaceuticals analyst at Mumbai-based brokerage Edelweiss Securities Ltd.in a study report,
“Investment”- a high value word whenever comes to mind!

In normal parlance of life, one is always surrounded by a very common question of “Do I invest in gold, share market, online-trading, land property, mutual funds, insurances?” “However, if at any time someone asks, “if I say Do u want to invest in intangible assets?” the answer would be most probably be a big “NO”. For a research oriented person or corporate Inc. investment in intangible assets would be the best investment part to gain a royalty against his invention or research or assets.

Before going further there would a hundred’s of questions that would come in mind regarding intangible & investment, i.e. what, how, where???

WHAT ARE INTANGIBLES?

Intangible assets [IA] are defined as identifiable non-monetary assets that cannot be seen, touched or physically measured, which are created through time and/or effort and that are identifiable as a separate asset. There are two primary forms of intangibles - legal intangibles (such as trade secrets, copyrights, patents, and trademarks) and competitive intangibles (such as knowledge activities, collaboration activities, leverage activities, and structural activities). IA can also be further divided as identifiable and unidentifiable intangible assets. For example, a patent is a grant by the federal government giving the owner the exclusive right to manufacture and sell a particular invention for a period of 20 years. A company may purchase a patent for a specific amount. Same with a copyright which is a grant by the federal government giving an author, creator, or artist the exclusive right to publish, sell, or otherwise control literary or artistic products for the life of the author plus 60 years. A copyright can be purchased for specific amount. In both cases, it is known what it is and how much it cost and it could be sold by the business to someone else. Whereas Unidentifiable intangible assets are those that cannot exist independent of the business as a whole. Goodwill and organization costs are examples. Goodwill can only be included as an intangible asset if it is purchased. If goodwill is developed internally it cannot be added. Goodwill usually represents the difference between the fair value of the net assets being sold and the purchase price.

Intangible assets seem to have an important role in developing organization's productivity and profitability. Intangible assets can affect not only productivity but also the price recovery factor. For example, companies with good image, known brands or highly competent employees are likely to be able to sell their products and services at a higher price, than their competitors that lack these qualities. Similarly, organizations with close relationships with their suppliers or the ones using sophisticated information systems for purchasing are likely to be able to acquire resources at a lower price than their competitors that lack these qualities.

NEED OF IP AND WHY TO INVEST?

Indian companies are already rich in IP assets but have not formally recognized their valuable IP assets. The need of taking IP serious is now because there is great need of business improvement initiatives which will lead to innovations in products, business models, etc.

The ability to attract innovative employees, good partners, agents, collaborators, can not be possible without IP programmes. Today IP opens up new business options such as licensing, cross-licensing, new ventures, collaborations, teaming, outsourcing and franchising which helps the companies to raise their assets value in the market. Earlier if any company was suited by competitors, then its takes a lot of time for legal actions as their are very few IP-law firms in country, but now IP-related threats are no longer a remote possibility for Indian companies. More Technology providers from foreign countries will impose higher costs if Indian companies do not have IP assets for cross licensing.

In the modern world, there is a great demand for IA investments, not only in India but also in the developed countries. For example a student from an university or a research oriented person have his invention but due to the lack of investing knowledge, he won't be able to gain any royalty against his invention after getting patented. In India many new inventions are done, if the licensing, commercialization or invention transfer
would be done, then the owner would definitely gain a huge amount for his invention, this not only provides financial help to the inventor, but also helps in unleash a new wave of entrepreneurship and innovation. For a big corporate IP/IA are key needs for attaining a sequence growth, setting up a brand name in the market, merger & acquisitions, creating a wealth may be in terms of intangibles assets.

WHY NEED OF IA/IP INVESTMENT WAS NOT EARLIER REQUIRED IN INDIA?

At Earlier stage Indian companies had not yet faced any major IP infringement claims. (Apart from those faced by a few pharmaceutical companies like Ranbaxy, Lupin and Reddy Laboratories in the US). This may change soon because over 80 per cent of patent filing in India is by foreign companies. Even now IP claims and damages in India are at earlier stage. Only Few Indian companies had places at the ‘standards-setting’ tables. Earlier Indian companies have been very successful without IP portfolios and they did not find any long-term benefits of IP/IA Investment.

WHERE IN INDIA FITS IN?

Long after India signed the TRIPS (trade-related aspects of intellectual property rights) agreement, there are still have debates in India on the need for IP protection. By now, most, if not all, technology companies should have had IP management roadmaps — benchmarking with the world’s best. To some extent, the success of Indian companies (without IP portfolios) has contributed to the interest in IPR, IPM (IP Management), and the lack of preparedness for what will inevitably occur. Today more and more companies, universities, research organizations are aware about IP and IA Investments. These companies hold their IP in the form of patents, trademarks, copyrights, human capital, trade secrets etc. More & more IP departments/cell organized within the companies, result in higher IP investment policies and need of innovating awareness. Not only by the private sector but by the government, through supportive channels e.g. BCIL, CSIR aids are given to innovators.

WHERE TO INVEST?

IA investment and maximizing can be done through various channels, but the best adopted method would be in contact with IA/IP investment firms.

According to a giant IA/IP investment firm, if student innovators invent something in accordance with requirement as approached from an university, then he/she is paid fixed sums (varying from $700-2,000) at three stages, when he Signs up with a company, when the patent is filed, and finally when a patent is granted. At each stage, the university takes a 20% cut from the amount. Finally, when the patent is licensed for commercial use, the college gets paid 15% of all profits that accrue from the invention. Of this, 70% is paid back to the student innovator.

Before going for any investment, an investor usually approaches financial institutions, investor’s clinics or agents to do investment for us, in the same way investment in IA/IP large investment banks and boutique private equity (PE) firms have begun raising and investing funds targeted at intellectual property (IP) and other intangible assets.

Broadly defined, these big giant firms are targeting the traditional venture capital space, looking for promising early stage innovation and inventions. However, rather than looking for Entrepreneurs and start-up companies, these firms are looking to invest in IP and IA for development and commercialization purposes, even before start up. While funds and firms often differ in structure, enterprises work with companies to either buy the IP/IA or invest in the company for commercialization of the IP/IA.

KEY-PLAYERS

Intellectual Ventures (IV)-US giant-global leader in the business of invention contact large universities, students, inventors for commercializing, transferring-IP , selling their Intangible assets portfolio. The large investment bank Deutsche Bank (DB), however, announced publicly that it is currently managing three IP funds totaling more than 150 million euro’s invested in IP assets. Partnering with IP Bewertungs AG, DB has identified and purchased IP assets for further legal and commercial refinement to be sold and/or licensed.

Ignite IP, full serviced IP placement firm that eventually works with individual inventors and IP owners in order to help in commercialize and license their inventions. These companies help in finding the potential partners and connect with inventors. Altitude Capital, a boutique PRIVATE EQUITY firm, has invested in 16 companies since the firm was created in July 2005. It invests in “portfolio companies that have valuable patents, trademarks/brands, copyrights, royalty streams,
trade secrets, and other intangible assets, which will create a competitive advantage in creating value.

Another leading giant in this industry is IP Bewertungs, company in the field of assessment, development and application of Patent based technologies. These companies are expertise in the commercialization of patents and patent portfolios.

**MORE STEPS TO BE TAKEN FOR IMPROVEMENT**

In India, investing in intangible assets and maximizing IP portfolio is still on a slow path. More steps are to be taken for improvement in this sector and making this a billion $ industry.

Companies should understand the value of IA/IP not only at the initial level but also to make their IP Assets as a strong in their portfolio market.

**RESEARCH ORGANIZATIONS**

More & more awareness programme is to be done at initial level, university level & corporate level.

Setting up technology licensing offices helps corporate, students, inventors and faculty with filing patents, licensing, trade marking and copyright issues.

More tying up with invention-Investment companies which act as interface between inventors and the market and help widen the reach of the new product.

A panel of lawyers should be appointed to explain the facts of intellectual property laws to companies, Inventers, students and faculty.

Giving special incentives to innovators, contests and cash prizes are common among technical institutes by the government which exhibit ideas in ‘innovation fairs’.

Making royalty distribution transparent, so that more and more benefit should be achieved and also, 70% of royalty goes to the student innovator.

**REFERENCES**

http://en.wikipedia.org/wiki/Intangible_asset
http://www.intellectualventures.com/whoweare/worldwide/in.aspx
http://www.tata.com/article.aspx?artid=A33ZHI/Focc=


The concept of International Trade law is a complicated and cumbersome it is an ever expanding area. The International trade relationship consists of four levels, these are Unilateral measures or it is also known as National Law, secondly bilateral relationships, thirdly Plurilateral agreements and lastly multilateral arrangements like GATT, WTO etc. International Law in simple words can be understood as - appropriate rules and customs used for doing international trade between two or more countries. Keeping the fact in view that transactions between the private sectors of different countries is one of the vital parts of the WTO activities, this branch of Law i.e. International Trade law, has become now a days, very important part of the academic works and study throughout the globe. International Trade law developed from the theories of economic liberalism developed in Europe and then the United States from 18th century onwards. International Trade law can also be understood as – an aggregate of legal rules of “International Legislation “and new lex mercatoria. International legislation refers to International treaties and acts of International intergovernmental organizations regulating relations in International Trade. Lex mercatoria i.e. “the law for merchants on land” or can also be said as “any law relating to business”

The most important development in the history of International Trade Law is the establishment of World Trade Organization, a formal International Organization established in 1995. The purpose and the structure of this organization is governed by the “Marrakesh Agreement” which is the agreement establishing the World Trade Organization.

The principle of WTO is – (i) Non Discrimination (ii) market Access i.e. reduction of tariff and non tariffs barriers to trade (iii) balancing trade liberalization and other societal interests (iv) harmony of national regulation for e.g. TRIPS agreement etc. Regarding the Scope of WTO – (i) WTO provides framework for administration and implementation of agreements (ii) WTO acts as a forum also for further negotiations (iii) it also acts as a mechanism for trade policy review (iv) Promote greater coherence among members economics policies.

So far as the International Trade law in reference of the “Goods” is concerned the GATT has been definitely the backbone of International Trade law throughout most of the twentieth century. It contains the rules regarding Unfair trading practices as –dumping, subsidies etc. The general agreement on Trade and Tariffs(GATT) was enacted with the sole purpose to reduce the number of tariffs and trade barriers and also to promote International trade after the World war II. It has served the International community for decades and under the auspices of GATT there have been numerous rounds of trade negotiations on a variety of issues. TIAS1700 and 55 U.N.T.S.194 are the official citations for GATT and its protocol of provisional application can be found at TIAS 1700 and 55U.N.T.S. 308.

Regional trade organizations are multilateral arrangements focused around a geographical area. The goal of a regional trade organization is the liberalization of International Trade between the member nations. Regional Trade agreements are of four types- Free trade areas, customs unions, common markets and economic unions. In the case of free trade areas member countries eliminate tariffs and trade barriers, but maintain individual foreign trade policies. In customs unions, member countries eliminate tariffs and create a common external trade regime. In case of common market, regional integration includes Trade as well as free movement of all aspects of production. There are several regional trade organizations in all areas of the world.

The WTO is the most prominent body for the settlement of the disputes relating to international trade law. This WTO dispute settlement body is in operation since 1995 and is very active and it has dealt with approximately 400 cases till date and it has also lead to amicable solution in hundreds of cases.

Many foreign countries analyse and see India as a ‘rapid globalizer’ and some foreign countries see it as a ‘highly protectionist’ economy. The reason behind this,
probably, is that India has steadily opened up its economy even then its tariffs continue to be high when compared with other countries, and its investment norms are still restrictive.

India was a closed economy till the early 1990s, its average tariffs exceeded 200%, quantitative restrictions on imports were extensive, and its foreign investments were having stringent restrictions. In the 1990s India began to cautiously reform and liberalize only under extreme necessity conditions. Since then, Indian trade reforms have produced remarkable results. India’s trade to GDP ratio has increased from 15% to 35% of GDP in next 15 years. The economy of India is now among the fastest growing economy in the world. The average non-agricultural tariffs of India have fallen below 15%, quantitative restrictions on imports have been eliminated, and foreign investments norms have been relaxed for a number of sectors. Agricultural tariffs average between 30-40%, anti-dumping measures have been liberally used to protect trade and India is among the few in the world that continue to ban foreign investment in retail trade. Although this policy has been somewhat relaxed recently, it remains considerably restrictive. So it can also be said that India retains its rights to protect when need arises.

India is now promoting itself very faster towards becoming more liberal global trade regime, especially in services. It has assumed a leadership role among developing nations in global trade negotiations. India has signed several trade agreements with other foreign countries and is continuously proceeding to seek new ones with other countries.

In the past years the World Bank had been working with the Indian Ministry of commerce in a participatory manner to help the country develop an informed strategy for domestic reform and International negotiations. The World Bank also used to hold a number of workshops and conferences with a view to providing different stakeholders with a forum to express their views on trade related issues.

IITC-INDIA i.e. India International trade centre is most prominent organization responsible for Investment and trade promotion in India and abroad and is dedicated in this work for last seventeen years. The organization provides great support for the Investment, Imports and exports, Industrial as well as Entrepreneurship development. It organizes trade fair, exhibitions, International conferences, Business meetings, delegations, Investment promotions and other trade development activities It also awares the entrepreneurs regarding the latest developments in various fields of Business so as to sustain and compete effectively in the world market. IITC-INDIA plays a vital role for bringing entrepreneurs together from various sectors like – manufacturing, Infrastructure, power, Information technology, telecommunication, Hitech Industry and services from several countries to provide unique opportunities in various fields – technology transfer, joint venture, International collaborations, contract manufacturing, etc. IITC-INDIA is associated and working with various International Organizations, Government agencies, multinational companies, financial institutions to achieve its goals and to organize various activities.
CORPORATES UNDER INVESTIGATION CAN ACCESS ECB UNDER THE AUTOMATIC ROUTE

Reserve Bank of India vide A.P. (DIR Series) Circular No. 87 dated 5th March, 2013 has permitted all entities to avail the External Commercial Borrowings [ECBs] under the automatic route as per the current norms, notwithstanding the pending investigations or adjudications or appeals by the law enforcing agencies, without prejudice to the outcome of such investigations or adjudications or appeals.

However, the notification prescribes that in such cases where the borrowing entity has indicated about the pending investigations or adjudications or appeals, Authorised Dealers while approving the proposal shall intimate the concerned agencies by endorsing the copy of the approval letter.

Further, as per the notification, the same procedure will be followed by the Reserve Bank of India also while approving such proposals.

As per the extant guidelines, corporates that are under investigation by any law enforcing agencies like the Directorate of Enforcement, are not allowed to access ECB under the Automatic route. Any request by such corporates for ECB is examined by RBI under the approval route.

The modifications to the ECB guidelines will come into force with immediate effect.

“WRITE-OFF” OF UNREALIZED EXPORT BILLS – EXPORT OF GOODS AND SERVICES – SIMPLIFICATION OF PROCEDURE

RBI vide RBI/2012-13/435 A.P.(DIR Series) Circular No.88 dated 12th March 2013 has reviewed the procedure whereby the exporters were given limited powers of write-off. Accordingly, it has been decided to effect the following liberalization in the limits of “write-offs” of unrealized export bills, subject to the stipulations regarding surrender of incentives prior to “write-off” as adduced in the A.P.(DIR Series) Circular No.03 issued by RBI dated 22nd July 2010:

a) Self “write-off” by an exporter (Other than Status Holder Exporter) ------------------------------ 5%

b) Self “write-off” by Status Holder Exporters ----------------------------------------- 10%

c) ‘Write-off’ by Authorized Dealer bank ----------------------------------------- 10%

*of the total export proceeds realized during the previous calendar year.

The above mentioned limits will be related to the total export proceeds realized during the previous calendar year and will be cumulatively available in a year.

RBI in the circular has provided that the “write-off” specified will be subject to certain conditions.

However, the circular specifically excludes the following for qualifying for the “write off” facility:

a) Exports made to countries with externalization problem i.e. where the overseas buyer has deposited the value of export in local currency but the amount has not been allowed to be repatriated by the central banking authorities of the country.

b) GR / SDF forms which are under investigation by agencies like, Enforcement Directorate, Directorate of Revenue Intelligence, Central Bureau of Investigation, etc. as also the outstanding bills which are subject matter of civil / criminal suit.

The cases that are not covered by the above instructions / beyond the above limits, may be referred to the concerned Regional Office of Reserve Bank of India.

DTAA BETWEEN INDIAN AND BHUTAN

Indian and Bhutan have signed a Double Taxation Avoidance Agreement [DTAA] for the avoidance of double taxation and prevention of fiscal evasion. The agreement aims to provide tax stability to facilitate mutual economic cooperation and stimulate flow of investment, technology and services.

SSA BETWEEN INDIAN AND PORTUGAL

On 4.03.2013 India and Portugal signed a Social Security Agreement [SSA]. The bilateral Social Security Agreement is significant with respect to employment
opportunities and strengthen the trade and investment between the two countries. The SSA will provide benefits to the Indian nationals working in Portugal.

GUIDELINES FOR ‘ASSOCIATED PERSONS”

SEBI has issued a Notification under regulation 3 of the Securities and Exchange Board of India (Certification of Associated Persons in the Securities Markets) Regulations, 2007, under which SEBI has notified new guidelines for ‘associated persons’ working as compliance officers of market intermediaries making it compulsory for them to get requisite clarifications from the National Institute of Securities Markets (NISM) after passing the relevant examination.

A BRIEF SUMMARY OF THE REPORT ON DRAFT POLICY ON PRICING OF PATENTED DRUGS ISSUED BY DEPARTMENT OF PHARMACEUTICALS DATED ON 21ST FEBRUARY, 2013

INTRODUCTION

The Department of Pharmaceuticals constituted a committee in 2007 to suggest a system for reference pricing or differential pricing that could be applied for price negotiation of patented medicine and medical devices before their marketing approval in India. The committee interacted with various Pharmaceutical Industry Associations and the viewpoints of NGOs and other stakeholders were also considered for the study. Subsequently, next round of consultations was done in March 2010, with various pharmaceutical industry players, FICCI and NGOs. Apart from the committee, a study was also commissioned at the Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur to study the mechanism of price control of patented drug in various other countries. After detailed discussions with various stakeholders and going through several research papers and articles, the committee came out with the opinion that the price of patented drug even after negotiation will remain unaffordable for the wider population.

BASIS OF THE STUDY

According to the study conducted by the committee, patented medicines can be classified into three categories for the purpose of fixing the price.

A medicine that has similar therapeutic effectiveness compared to the existing one.

A medicine that has therapeutic equivalence but also has a therapeutic edge over the existing one.

A totally new class of medicines which have no therapeutic equivalence.

OBSERVATIONS OF THE STUDY

It was observed that even if the prices of patented drugs are calibrated on Gross National Income with purchasing power parity, the affordability of the general masses is still under question due to the very high prices of the patented drugs.

In case the government chooses to fix prices unilaterally with open market as target, such a choice may result in non-availability of the medicine.

RECOMMENDATIONS OF THE COMMITTEE

Wider coverage of healthcare and insurance system

The committee suggests that government should make the healthcare system accessible to the majority of the population by introducing effective insurance scheme atleast for the prescription medicines for all the citizens who are not covered by any insurance or reimbursement scheme.

REFERENCE PRICING

The committee recommends reference pricing keeping in view the Gross National Income (GNI) and Purchasing Power Parity (PPP). Such a reference can be framed based on the countries where there is strong public health policy and the respective government has strong bargaining power while negotiating the prices of the medicines.

METHODOLOGY FOR PRICE FIXATION

The committee also deliberated upon the methodology of price fixation for such patented medicines which are introduced for the first time in India and further suggest evidence based cost based pricing.

IPAB upholds the landmark decision on first ever compulsory license (CL) granted on Bayer’s NEXAVAR
The Intellectual Property Appellate Board (IPAB) on 4th March 2013 has upheld the first compulsory license issued by the Indian Patent Office to NATCO pharma. The Board’s chief Justice (Ms) Prabha Sridevan dictated the order upholding the Controller’s decision for the grant of CL on Bayer’s patented drug sorafenib mesylate (NEXAVAR). The Board stated that “we must bear in mind that these proceedings are in public interest; they are neither against the inventor, nor in favour of the compulsory licensee.” The said statements bolsters the primary objective of the grant of patents is to benefit the larger public.

This decision of IPAB will allow NATCO to manufacture the generic version of the Bayer’s kidney and liver cancer drug NEXAVAR in India. In March 2012, a CL was issued to NATCO pharma to manufacture and sell the generic version of NEXAVAR by the Controller of Patents based on the following observations that,

(a) the reasonable requirements of patients of the drug is not satisfied
(b) the drug is not affordable and
(c) the invention is not worked in India.

Following this decision, Bayer Corporation filed for an appeal against the Union of India, The Controller of Patents and NATCO pharma.

The Compulsory License enables NATCO to sell the drug at a price not exceeding Rs. 8880 for a pack of 120 tablets (one month’s therapy) against Rs. 284,428 being the cost of NEXAVAR sold by Bayer. The license is valid till the expiry of the patent which is 2021. In its order, IPAB has stated that NATCO will pay 7% of royalty to Bayer on the net sales.

The order also makes it mandatory for NATCO to supply the drug free of cost to at least 600 deprived patients per year.
INDIAN LEGAL IMPEMUS

NEW DELHI [HEAD OFFICE]
N-30, Malviya Nagar, Delhi - 110017
Phone: +91-11-46665000, 26680927
Fax: +91-11-26682883, 46665001
newdelhi@singhassociates.in

MUMBAI
# 415, Wing C, 4th Floor, ‘215 Atrium’
Chakala, Andheri-Kurla Road
Andheri (East), Mumbai - 400059
mumbai@singhassociates.in

NEW YORK
260 Madison Avenue
8th Floor, New York NY, 10016 USA
Ph: 18666 034 835 (Toll Free)
newyork@singhassociates.in

BANGLORE
N-304, North Block, Manipal Centre
47, Dickenson Road, Bangalore - 560042
Ph: +91-80-42765000
bangalore@singhassociates.in

HYDERABAD
#404, 4th Floor, Mogul’s Court
Building, Deccan Towers Complex
Basheerbagh, Hyderabad - 500001
hyderabad@singhassociates.in

BEIJING
601, Office Tower C1, No. 1
East Chang An Avenue
Beijing 100738
beijing@singhassociates.in

Ph: +91-11-46665000, 26680331 • Fax: +91-11-46665001, 26682883 • U.S.A. Toll Free No. 18666 034 835
www.singhassociates.in

FEBRUARY 2013, VOL. VI, ISSUE II

For Meet and Greet During INTA
*“Please visit us at booth #426 at the International Trademark Association (INTA) 135th Annual Meeting & Conference, Dallas May 4-8, 2013.”*