CLT NEWSLETTER

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FOR PRIVATE CIRCULATION AND FOR EDUCATIONAL PURPOSES ONLY.

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"The key to success is to never give up."

Dear friends,

The CLT Newsletter marked its beginning on 2nd February, 2009 when the Official Inaugural Ceremony took place at the SEMINAR HALL of NALSAR University of Law, Hyderabad. It was graced by Hon'ble Dr. K.V.S.Sarma, Registrar, Dr. V. Balakista Reddy, Professor and Dr. T. Raghavendra Rao, Associate Professor, NALSAR University of Law, Hyderabad. The first ever publications (January 2009 Issues) were officially distributed and Dr. K.V.S. Sarma applauded the effort put in by CLT Team and called it a commendable job, which he wanted the LL.M. Batch to diligently continue and take to greater heights.

This issue of CLT Newsletter has its focus on recent developments, which are many in the area of Securities Laws and Foreign Exchange Laws. The first article is contemporary in the Indian context with the Vote On Account power having been exercised by the current Government in order to announce an Interim Budget. It will interest the readers that the article deals with CENVAT Credit System and GTA Services highlighting the announced rate cuts of 2% on both union excise duty and service tax. The second article in this issue concentrates on what has today changed the face of the world we live in – Globalization and its effect on International Institutions. With this second issue, the CLT team has now assumed a structure and plans a wider circulation extending it to other leading Law Universities and other Institutions as well. We urge our readers to have a look at our new website for easier access and wider circulation. We welcome feedback and contributions from our readers. Hope you will help us in taking our aspirations higher with each issue and enjoy reading the FEBRUARY issue!

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Reader's Voice

I am delighted to go through the CLT News Letter, Vol.1, No.1 of January, 2009 a publication that has been conceived by the LL.M Students of NALSAR with in a short span of time.

The CLT News Letter devoted wholly to the study and analysis of Corporate and IPR Laws. CLT News Letter would serve as a platform for serious and thought provoking ideas. Its first volume is considered to be a trend setter both in terms of significance to the field of study in the areas of Corporate and IPR Laws as well as the direction it provides for future initiatives.

I have no doubt that the CLT News Letter covering a wide range of issues will live up to the high standards and will prove invaluable to academics and practioners alike.

I wish the CLT News Letter and its Editorial Team success in all their future endeavours.

(Dr. T. Raghavendra Rao,
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CENVAT SYSTEM AND GTA SERVICES*

CENVAT Credit System – An Introduction:

Service tax in India has been increasingly fetching revenue to our country since its inception. The inclusion of new services within the ambit of the Finance Act, 1994 has made not only the revenue department flourish but has also burdened the courts with disputes. Any assessee would try to avoid payment of the taxes in all legal techniques known to him and availment of cenvat credit is one such technique. Generally an assessee will have a Permanent Ledger Account (PLA) and a Cenvat Account out of which the latter is used for taking or availing credit with respect to inputs, capital goods and input services that were used in the manufacture of final product or in providing output service.

The purpose of introducing Cenvat (Central Value Added Tax), which was earlier, called as Modvat (Modified Value Added Tax) was to reduce the cascading effect of tax payment. Normally, there are various stages in manufacture through which the raw materials get converted into a final product. In India, the payment of tax is purely based on the selling price of the final product. Thus, the final product of one manufacturer will become the input for another, who will further add certain value to it and manufacture his final product. In such a situation, the same product becomes taxable at two different stages (both by the first and the second manufacturer). This is called as the 'cascading effect'. The system of Cenvat was introduced in order to avoid this kind of burden, which is imposed on the ultimate buyer or the customer. 'Taking Credit' in practice means availing the benefit of payment of duty through the Cenvat Account so that the assessee can be freed from making cash payment.

Before service tax was introduced in the Indian Revenue system, Cenvat credit was availed by manufacturers paying excise duty. According to this system, a manufacturer can take credit of the tax paid on inputs and capital goods that were used in the manufacture of his final product, which he clears from the factory after payment of excise duty. Taking credit essentially implies using of the cenvat account for payment of excise duty on the final products manufactured and cleared from the factory. This system was extended to service tax paid on input services. In other words, an assessee can take credit of the service tax paid on input services, which were used by him in providing an output service. This was considered as the beginning of integration of goods and services for the purpose of assessing tax.

The procedures and rules with respect to availment cenvat credit are provided under the Cenvat Credit Rules, 2004 (which replaced the Cenvat Credit Rules, 2002) and it includes availment of credit for both inputs and output services. The main criteria for availing the credit are that the inputs/ input services must be used in the manufacture of the final product or in providing an output service. However, this credit will not be available if the final product or the output service is exempted from excise duty or service tax by way of any CBEC Notification.

GTA Services:

This article will specifically deal with availment of cenvat credit for the service tax paid on Goods Transport Agency Services (GTA Services). GTA Services are those services provided by transport booking agents for inward and outward transportation of goods from and into the factory premises of a manufacturer or a service provider. It does not include all kinds of goods transporting services. As per Section 65 (50b) of the Finance Act, 1994, any person who provides services in relation to transport of goods by road and issues consignment note by whatever name it is called, is said to provide a GTA service. Most taxation litigation is found to be in this area, since there is enormous confusion with respect to availment of credit. The primary reason for this confusion lies in Rule 2(1)(d)(v) of Service Tax Rules, 2004 which deals with persons who are liable to pay service tax. In general, a service provider is the person who is liable to pay service tax. But however, there are certain cases where the service receiver is made to pay the service tax. One such case is that of GTA services where the service tax must be paid by the consignor/ consignee who is availing such service.

Position before Budget 2008-09:

The Cenvat Credit Rules, 2004 has defined Input services under Rule 2 (l) and Output services under Rule 2 (p). These definitions are as follows:

Rule 2 (l) - "input service' means any service,

(ii) Used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products *from the place of removal*, and includes service used in relation to setting up, modernization, renovation or repairs of a factory premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, *inward transportation of inputs or capital goods and outward transportation up to the place of removal*.

Rule 2 (p) - "output service" means any taxable service provided by the provider of taxable service, to a customer, client, subscriber, policy holder or any other person, as the case may be, and the expressions ‘provider’ and ‘provided’ shall be construed accordingly;

Explanation **-** *For the removal of doubts it is hereby clarified that if a person liable for paying service tax does not provide any taxable service or does not manufacture final products, the service for which he is liable to pay service tax shall be deemed to be the output service.*

The persons who avails the GTA services and pay service tax for the same were taking cenvat credit by considering the said service as an input service according to the above definition. However, the Department on the strength of two major issues disputed the said Credit availment as follows:

1. For the purpose of availment of credit, the preliminary condition is that there must be an output service provided by the assessee, which was not fulfilled by the service receivers in case of GTA service.
2. The service can be defined as an ‘input service’ only if it involves transportation ‘upto the place of removal’ which means that it does not include the transportation of goods from depots to the buyers’ place.

These two issues were initially resolved by the Hon’ble CESTAT of New Delhi in the case of *Gujarat Ambuja Cements Ltd. v. Commissioner of Central Excise*[1] by holding the following:

“The credit covers duty paid on input materials as well as tax paid on services, used in or in relation to the manufacture of the 'final product'. Therefore, extending the credit beyond the point of duty paid removal of the final product, would be contrary to the Scheme of Cenvat Credit Rules”

However, this credit denial was overruled later in many decisions by way of a different interpretations given to the above two rules of the Cenvat Credit Rules, 2004. The Commissioners and CESTAT had interpreted these provisions in much number of cases where they had held that cenvat credit was available for the service tax paid on GTA and the **service receiver** can take the same once he had paid the service tax on

[1] [2007] 8 STT 122

outward transportation of goods. There were two issues that were raised and decided in favour of the assessee.

1. Firstly, with respect to outward transportation of goods from the factory to the place of removal and whether this comes within the purview of the words 'from the place of removal' as provided under Rule 2 (l), the court gave an affirmative answer, thereby overruling the decision of *Gujarat Ambuja*;[2]
2. Secondly, though the service receiver did not provide an output service, GTA was deemed to be an output service by virtue of the explanation to Rule 2 (p) as provided above.[3]

As a result of such interpretation, the Government never got any revenue with respect to GTA service since the service receiver who paid the tax would avail the credit for the same and there was no real cash revenue and it was only book revenue that was actually paid. The Credit availed for the previous transaction was used to pay the service tax on GTA services for subsequent transactions by the assessees.

Changes made in Budget 2008-09:

The main changes that were introduced in Budget 2008 were with respect to the above two rules in which the words 'from the place of removal' in Rule 2 (l) was replaced with 'upto the place of removal' and GTA was expressly excluded from the purview of the definition of output service provided under Rule 2 (p). This vital change has effectively prevented the service receivers of GTA from availing the cenvat credit as they did earlier and this was done with an intention to make the GTA service providers liable to pay the service tax indirectly. The object behind this change was that the Government expected actual revenue in its pockets instead of ledger revenue.

However, these changes were made with effect from 1st March 2008, without retrospective effect and hence the burden of the courts still continues. The cases that are pending date back to the year 2006 and these can be judged only on the basis of the then provision. The prospective nature of the change in the rule has failed to bring in any change in the existing cases**.** Instead of making provisions and amendments during every Budget to earn actual revenue, the Government might as well make the GTA service providers liable to pay such service tax, thereby relieving the service receivers as well as the Commissioners and Courts from undergoing such tedious process.

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NOTE: CLTNEWSLETTER INVITING ARTICLES AND CASE COMMENTS FOR FURTHER ISSUES.SEND YOUR ARTICLES OR CASE COMMENTS ON cltnewsletter@gmail.com FOR FURTHER INFORMATION PLEASE VISIT TO OUR WEBSITE.

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[2] R.R.D. Tex Pvt. Ltd. v. Commissioner of Central Excise, 2007[8]S.T.R.186; India Cements Ltd. CCE, 2008 (223) ELT 78; Commissioner of Central Excise, Chandigarh v. Nahar Industrial Enterprises Ltd. 2007-TIOL-555-CESTAT-DEL; Iswari Spinning Mills Ltd. v. CCE, MANU/CC/8146/2007

[3] Though the said explanation was omitted vide *Notification No. 08/2006-CE (NT) dated April 19, 2006*, the period of dispute was before the said notification; See India Cements Ltd. v. Commissioner of Central Excise, MANU/CC/8121/2007

GLOBALIZATION AND RELATED INSTITUTIONAL ISSUES*

The phenomena of Globalization and the consequential realities have evoked starkly extreme approaches and responses in the domain of ideas and ideologies of mankind. The first step towards a better appreciation of the resulting realities would be to understand the inherent connotation of the term itself. The most common understanding of the process of globalization is the view through the prism of barrier-less markets. But the process of globalization permeates to not simply the purse of a society, but also the ideas and values. As pointed out by Joseph E. Stiglitz and Anya Schiffrin[4], "While economic and business reporters naturally focus on *economic* globalisation — there are other important dimensions to globalisation: globalisation of knowledge, ideas, ideology, civil society, culture. These other dimensions represent both some of the greatest virtues and some of the most important criticisms of globalisation." One of the more reasonable definitions of Globalization has been suggested by Sunil Khilnani[5] as "a set of palpably real processes, economic, political, cultural — each complicated in itself, and when taken together, of quite mind-boggling intricacy."

One of the fundamental facts that has to be appreciated is that Globalization is not a culmination or a result, it is a continuous process. It has been described as the process of transformation of local or regional phenomena into global ones. It can be described as a process by which the people of the world are unified into a single society and function together. This process is a combination of economic, technological, socio-cultural and political forces.[6]

[4] Joseph E. Stiglitz and Anya Schiffrin, What the Reporter Saw, Globalization, The Little Magazine, Volume V, issue 4 and 5

[5] Sunil Khilnani, Balanced on a Billion, Globalization , The Little Magazine, Volume V, issue 4 and 5

[6] Sheila L. Croucher. Globalization and Belonging: The Politics of Identity in a Changing World, p.10 Rowman & Littlefield. (2004).

No phenomenon can be categorized *per se* as beneficial or hazardous: the effects of a development or a process depend on the manner in which it is controlled and the manner in which the various elements of the process are arranged. The primary concern now is to fathom the possible and in many cases, operating, implications of Gloalization and devise arrangements to control the implications that are detrimental and further those that are beneficial.

One of the most revealing features of Globalization has been the universality of influences that countries exert upon each other. The decisions of domestic jurisdiction have acquired extra-territorial ramifications. The increased and ever increasing connectivity and inter-dependence marked by accessibility and the cushion of technology have created an effective integrity of shared-fate as distinct from isolated and self-sufficient mechanisms. An insulated economic or even political environment is no more even in the realm of possibility in the 21st Century. As has been noted by Joseph E. Stiglitz and Anya Schiffrin[7], "Today, domestic economic policies have global impacts. This is particularly true of the policies of the advanced industrial countries: US or EU agriculture subsidies mean that developing countries such as those in Africa find it harder to export their products. In adopting its $4 billion cotton subsidies, America meant only to help its 25,000 (mostly well-off) cotton farmers; the unintended consequence was to lower further the living standards of 10 million African cotton farmers, many of whom are already living at subsistence levels."

The phenomena of Globalization cannot be reverted. That is no more even a contention. The point to be deliberated upon is whether the process of Globalization is being managed properly. Globalization is as

[7] Joseph E. Stiglitz and Anya Schiffrin, What the Reporter Saw, Globalization, The Little Magazine, Volume V, issue 4 and 5

much an Economic process as it is a Socio-Political one. The developments and processes of the same nature within a country are managed and regulated by State Agencies. And the organization of the State Agencies is based on certain agreed principles of equitable representation and effective participation by the affected parties in the process of decision making. When we see that even domestic policies of countries can have severe global impacts, there is the need to have International Regulatory Mechanisms in place to promote co-ordination and cooperation.

As Claude Smadja, former managing director of the World Economic Forum (WEF) points out[8]; there should be global mechanism for the governance of globalization. The issue of fundamental significance is determining the underlying principles that should guide the international institutional arrangements of any such global mechanism which are in charge of regulating the process of Globalization and then to appraise whether the existing institutional arrangement correspond to the guiding principles.

Note here must be taken of Article 8 of the Charter of Economic Rights and Duties of the State[9] which provides that "States should co-operate in facilitating more rational and equitable international economic relations and in encouraging structural changes in the context of a balanced world economy in harmony with the needs and interests of all countries, especially developing countries, and should take appropriate measures to this end." Article 10 of the same Charter provides that "All States are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems, *inter alia*, through the appropriate international organizations in accordance with their existing and evolving rules, and to share in the benefits resulting there from." It is submitted that the provisions of the Charter do not have any binding value and strict adherence to the same cannot be enforced. But they at least should be respected while conducting international relations and even when not strictly adhered to, at least must not be trampled upon.

But the power arrangement in the Institutions in charge of the International Order reflects indeed a mockery of these principles. Most of the Institutions follow a weighted system of voting which has resulted in a very lopsided process of decision making. In the International Bank of Reconstruction and Development, Twenty One countries control 70.07% of the total voting power. In the International Finance Corporation 78.22% of the total voting power is controlled by Twenty One countries. The Part-I countries of International Development Association, totaling 30 countries, share 58.23% of the voting power. And in the Multilateral Investment Guarantee Agency, 25 countries constituting Category I countries have 59.08% of the voting powers[10].

In the General Assembly of the United Nations, the principle of equality of members is indeed followed in terms of representative capacity. But then, the General Assembly is essentially a deliberative body[11]. It can at best make recommendations to the member States and the Security Council and such recommendations have no binding value. In the International Monetary Fund also, Twenty one countries of the total

[8] Governing Globalization, Times of India, 30.08.02

[9] GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50

[10] http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:21429866~isCURL:Y~menuPK:271153~pagePK:34542~piPK:36600~theSitePK:29708,00.html, Last visited on 18.02.09

[11] H.O. Agarwal, International Law and Human Rights, Page 347, Central Law Publications, Fifth Edition 1999, Allahabad

membership control 71.18% of the voting power[12].

Equations of this nature cast serious aspersions on the credibility and fairness of the entire system. When the IMF tried to change its charter to enable it to push capital market liberalisation on countries around the world at the Hong Kong meeting of the IMF in September 1997[13], a very serious question arises. When any decision is being taken by the IMF, can it be said to be reflecting the general consensus among the member-states? The reality is that the power of decision making is in the hands of a couple of countries only. The decision that affects all the member-states is not necessarily taken by even a majority of the member-states. The problem is even graver when countries with dissimilar economic situations are given very similar advice when they receive IMF and World Bank aid and where much of such advice is solely oriented to bring them into the global economy, such as trade liberalization or privatization which can lead to foreign ownership of local companies, which in fact serves the interest of the powers taking such decision.

It is one of the fundamental principles of democracy that any decision taken must not be serving only the vested interests but of as many as possible. To extrapolate the theory of Bentham[14] into the context of an International Institutional Arrangement; "the function of any World Organization should be the promotion of the greatest happiness of the greatest number." But for such an objective to be fulfilled, it is necessary that the Organization in its structural arrangement and functional dynamic be oriented towards such an objective. The reality at present is strikingly otherwise. The injustices that characterize the world are closely related to various omissions and commissions that need to be overcome, particularly in institutional arrangements.[15]

It is pertinent here to take note of the words of Amartya Sen[16] when he says that "It is, ultimately, not a question of rubbishing global economic relations, but of making the benefits of globalization more fairly distributed." It has to be conceded that because of Globalization, there have been some benefits or the other to all the sections of the International Community. But the issue lays a step further. The question therefore to be asked is whether the distribution of gains is *fair* or *acceptable*, and not just whether there *exist* some gains for all parties. The search has to be for a fairer deal, a more just distribution of opportunities in a modified global order[17]. Globalizations of markets only cannot result in automated world prosperity.

* *Rangin Pallav Tripathy*, *LL.M. First Year, National Law School of India University, Bangalore.*

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[12] http://www.imf.org/external/np/sec/memdir/members.htm, Content Accessed on 20.02.09

[13] Joseph E. Stiglitz and Anya Schiffrin, What the Reporter Saw, Globalization, The Little Magazine, Volume V, issue 4 and 5

[14] Dias, Jurisprudence, Aditya Books Private Limited,New Delhi-1994, page 424. Bentham puts forth the proposition that "the function of laws should be the promotion of the greatest happiness of the greatest number.

[15] Amartya Sen, Sharing the World, Globalization, The Little Magazine, Volume V, Issue 4 and 5

[16] ibid

[17] ibid

RECENT LANDMARK JUDGEMENTS

[1] *Ikea Trading* v. *Director of Income Tax*, [2009] 308 ITR 422

After the Department's partial victory of sorts in the *Vodafone* tax battle, recent decisions of various Tribunals holding that liaison offices are generally not subject to taxation come as a much needed relief for MNCs.

This, however, is subject to a few qualifications, and in present judgment AAR held that an MNC can avail of this benefit for its liaison office only if the scope of the latter's commercial activity is extremely limited.

The present case involves The IKEA Group which is a well known multinational furniture retailer, and has established units all over the world. It allocates its operations in such a manner that each company in its group is responsible for sales of IKEA products in predefined geographically contiguous areas. In this connection, a liaison office was set up in New Delhi to assist in selection of suppliers, quality control, collecting samples from manufacturers, monitoring with Indian exporters, ensuring that suppliers adhered to applicable environmental standards and so on. The question was whether this liaison office was liable to pay income tax on money received under Section 9(1)(i) of the Income Tax Act, 1961. Section 9(1)(i) states that any income that accrues or arises, even indirectly, through any "business connection" in India is deemed to accrue or arise in India for the purposes of the Act. Under Section 5(2) of the Act, the total income of a non-resident includes any income that is deemed to accrue or arise in India.

The Department argued that the liaison office is an 'intermediate entity' – an entity which gets 'remuneration for services' rendered by it in its capacity as an 'agent' of the wholesale companies of the IKEA Group.

The AAR rejected this contention, holding that the activities of the liaison office are confined to the purchase of goods which are then exported by other entities. The AAR applied Explanation 1(b) to Section 9(1)(i), which states "*in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export*".

This decision comes on the back of other rulings of Tribunals holding that liaison offices cannot be characterized as permanent establishments.

[2] *Tata Finance Limited Now Tata Motors Limited vs. N. Poongodi and Another [Supreme Court Of India, 15 JAN 2009]*

Though this judgment does not lay down any serious question of law, but apex court has given an adverse remark on manner MRTP commission's work is conducted.

In present case, an appeal lies against MRTP commission ratio related to issue of maintainability of the Compensation Application under MRTP Act.Apex court found error in commission's holding that the question of maintainability of compensation application is a question of fact and law. Court remarked that there are various instances of abuse of process even after years of establishment of the commission. Hence court stated that commission should frame rules and regulations to consider maintainability of compensation applications.

[3] Delaware Supreme Court Issues Major Ruling on Shareholder Ratification Doctrine and Duties of Corporate Officers; *Gantler v. Stephens*, (Del. Supr., Jan. 27, 2009)

The Delaware Supreme Court first time confirmed and clarified that officers of Delaware corporations have the same fiduciary duties as directors of Delaware corporations. This judgment becomes more relevant, when satyam chapter is still a curious case for corporate lawyers.

In the present case court laid down two principles; first issue of "shareholder ratification" and second officers share same fiduciary duties as directors.

Court relied on the Business Judgment Rule and held the equal liability of directors and officers.

Facts of the case in brief; The plaintiffs in this breach of fiduciary duty action, who are certain shareholders of First Niles Financial, Inc. ("First Niles" or the "Company"), appeal from the dismissal of their complaint by the Court of Chancery. In the complaint it was alleged that the defendants, who are the officers and the directors of First Niles, violated their fiduciary duties by rejecting a valuable opportunity to sell the company, deciding instead to reclassify the company's shares in order to benefit themselves, and by disseminating a materially misleading proxy statement to induce shareholder approval.

The three basic claims in the complaint were that the board members breached their fiduciary duties to the First Niles shareholders by rejecting an offer from a potential buyer and abandoning the sale of the company. Secondly, the claim was that the defendant directors breached their fiduciary duty of disclosure by disseminating a materially false and misleading proxy regarding the reclassification. Third, the amended complaint alleges that it was a breach of fiduciary duty to implement the reclassification plan.

Apex court of the state of Delaware accepted the appeal and enumerated in decision that "*officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and the fiduciary duties of officers are the same of directors. And in case of liability division both will be equally responsible".*

In modern corporate jurisprudence, where uniform standard of corporate governance becomes an initial question of fair market, this decision would give positive message to all adjudicative bodies through out the world to define liabilities of directors and officers.

[4] Jurisdictional Issues in Internet Activity; *Banyan Tree Holdings Ltd v. M. Murali Krishna Reddy and Another* 2008(38) PTC 288(Del)

In this case, the fundamental question for consideration before the High Court of Delhi was with respect to territorial jurisdiction of Court as to whether the defendants have presence in the place of forum only through internet activitys .

The plaintiff company having is registered in Singapore and is engaged in managing hotels, resorts and spas in various parts of the world. Since the year 1994 the plaintiff and its sister concerns were using the word mark "Banyan Tree" and also the "Banyan Tree Device". The plaintiff has advertised its services and products through the print and electronic media, which have a substantial circulation in India. They are also maintaining websites (www.banyantree.com; www.banyantreespa.com), which are accessible in India, since the year 1996. The said marks have become highly distinctive due to the plaintiffs reputation and goodwill. From the year 2002 onwards the plaintiff in collaboration with the Oberoi Group operates 15 spas across India. The plaintiff is a registered proprietor of marks in various countries but it does not hold any registration for the said marks in India. In October 2006, the plaintiff company came to know that the defendants who are residents of Hyderabad, Andhra Pradesh had initiated work on a project under the name "Banyan Tree Retreat". The plaintiff submitted that the word mark is deceptively similar to their mark. Moreover the defendants have advertised their project in their website (www.makprojects.com/banyantree). It also submitted that the act of the defendant is to unlawfully appropriate the reputation and goodwill of the plaintiff and also to create deception among the public.

Hence it filed a suit, before the Hon'ble High Court of Delhi, for an ex parte interim injunction restraining the defendants from using the said marks.

The Court found that the precedent was not very clear as there were two important cases dealing with substantially the same issue and coming to seemingly opposite conclusions. In one case it was held that the circumstance of the defendant's website being capable of being accessed from Delhi was sufficient to invoke the territorial jurisdiction of the court. In the second case the court reached the conclusion that personal jurisdiction cannot be exercised over non-residents merely because their website is accessible within the jurisdiction of the court. There has to be something more to indicate purposeful direction of activity to the forum state in a substantial way. Hence court found it appropriate to ask the division bench to decide; "*Whether this court can entertain the present suit, having regard to the averments and documents, in the context of special provisions into the Trademark and Copyright Acts, which do not provide for exercise of jurisdiction based on internet or web presence of such alleged infringers, even while making explicit departure from the general law as to the territorial jurisdiction;*"

While doing so court did not fail to take notice of the prevailing positions in various other jurisdictions. The Court observed that in US, the mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world. Rather there must be evidence that the defendant purposefully availed itself of conducting activity in the forum state, by directly targeting its website to the state, knowingly interacting with residents of the forum state via its website, or through sufficiently other related contacts.

Similarly in UK the position is that the mere fact that website can be accessed anywhere in the world does not mean, for trademark purposes, that the law should regard them as being used everywhere in the world. It depends upon the circumstances, particularly the intention of the website owner and what the reader will understand if he accesses the site.

CORPORATE LINGO

"Getting yourself familiarized with Commercial terms"

Special Drawing Rights (SDRs): A form of credit extended by the International Monetary Fund (IMF) to its member countries as an addition to the credit they already hold. SDRs do not represent actual money, they are simply a form of credit, but they do not have to be repaid to the IMF and thus form a permanent addition to the reserves of each member country. At first SDRs were valued in relation to the value of gold, but have since been valued in relation to the member country's own currency. They may be exchanged between member countries or between those countries and the IMF.

Leverage: The use of various financial instruments or borrowed capital to increase the potential return of an investment. It is the amount of debt used to finance a firm's assets. A firm with significantly more debt than equity is considered to be highly leveraged. Leverage is most commonly used in real estate transactions through the use of mortgages to purchase a home.

Hedge Funds: An aggressively managed portfolio of investments that uses advanced investment strategies such as leveraged, long, short and derivative positions in both domestic and international markets with the goal of generating high returns. Legally, hedge funds are most often unregulated and are set up as private investment partnerships that are open to a limited number of investors and require a very large initial minimum investment.

IP UPDATES

a. The New Controller's Attempt to Speedy Disposal of Pending Cases.

Controller General of Patents, Designs & Trade Marks has issued office circular to dispose off Patents and Trade Marks contested pending cases as expeditiously as possible latest by 31st March, 2009 in order to avoid unreasonable delays. The circular says that a number of opposition cases both pre grant and post grant are pending for disposal after final hearing. The said circular dated 17th February 2009issued to Joint controllers Deputy Controllers, Assistant controllers directed that from April 1st 2009, there shall not be any case pending for orders for more than 3 months on post grant cases and one month in pre grant cases after final hearing.

b. Protection of Yoga Poses Through Traditional Knowledge Digital Library.

India has set up a team of Hindu yoga gurus and 200 scientists from the Council of Scientific and Industrial Research to identify all yoga positions and asanas in order to protect these positions from being patented by the so-called gurus in US and Europe. Their main work is to identify and register each asanas in the TKDL. In India it is a traditional collective knowledge. But by the increase in the number of western yoga teachers, there has been a hike in the patent application claiming each pose in the yoga practice. I US alone there have been more than 130 yoga related patents, 150 copy rights, and 2300 trademarks. Researchers scanning 35 Sanskrit texts have so far documented 600 asanas. Project head Vinod Kumar Gupta said he hoped to have at least 1500 poses recorded by the end of the year. "Besides photos and explanation of the postures, video clips of an expert performing them will be put inside the TKDL. A voice-over will also point out which text mentions the posture," he said. Dr Gupta said the traditional knowledge database would eventually be available to patent offices worldwide. However, the information would be allowed only for patent research purposes.

c. GOOGLE Issues Public Notice For Copyright Settlement.

At last Google Inc. finds a way to settle the long running case of copyright violation by inviting the authors and publishers to accept the royalty and come to a solution on agreeable terms. On February 21, Google Inc. issued a public notice inviting the claims on the books and inserts published in the internet by Google as a part of digitizing the library. In 2004, the Google begin its project on digitizing the library by scanning the books and uploading them in the internet for the access of common man. Against this project, in 2005, a class action law suit was filed by the authors and the publishers, claiming that Google has violated their copyrights and those of other rights holders of books and inserts *[The Authors Guild, Inc., et al. v. Google Inc., Case No. CV8136(S.D.N.Y.)]*.

After many hearings, on 28th October, Google inc. and the authors' guild came to the settlement and as a part of this settlement Google was required to invite the authors and publishers in countries other than USA to claim their copyright and come to a settlement by accepting a fair booty. As per this settlement Google has to pay 63% of the revenue earned from the sale of subscription to electronic books database, sale of online access to books, advertising revenues, and other commercial use.

For this purpose Google has launched a website, www.googlebookssettlement.com. Through this website the authors or the publishers can online settle their claims or may choose to opt out. 5th January 2010 is the dead line for the same.

SECURITIES LAW UPDATES

a. Amendments to SEBI (Disclosure and Investor Protection) Guidelines, 2000 through circular SEBI/CFD/DIL/DIP/ 34/2009/24/09 February 24, 2009.

(i) Non-applicability of certain provisions of Chapter XIII of the SEBI (DIP) Guidelines.

The most import amendment recently, is that SEBI has relaxed norms for preferential issue of shares to those target companies whose boards have been superseded by government and which have already been exempted from strict compliance of certain provisions of SEBI's takeover regulations. SEBI had amended its takeover regulations on February 13 inserting a Regulation (29A) providing relaxation from the strict compliance of certain clauses under Chapter III of the regulations to companies whose boards were superseded by government. Chapter III relates to the timing, pricing and size of open offers by acquirer companies. The latest amendments to the guidelines to provide relaxation on preferential issue norms pertain to those companies which had sought exemption under Regulation 29 A of the takeover code subject to other conditions. This venture by SEBI is done to clear another hurdle in the path for any possible sale of Satyam Computers.

Other amendments to the regulations are relating to chapter II, IV, V, VIII, X, XI, XIII, XV.

(ii) Reduction in timelines for completion of bonus issues: Accordingly, where no shareholders' approval is required as per the Articles of Association of the issuer, the bonus issue shall be completed within fifteen days from the date of the approval by the board of directors of the issuer in this regard. Where approval is required in such instance bonus shares shall be issued within 60 days time subject conditions.

(iii) Enhancing the validity period of observations: The validity of SEBI's observations to a public issue has also been stretched to 12 months, from the earlier three months. And also amendment says Before opening of the issue, every issuer shall be required to file an updated offer document with SEBI, highlighting all changes made in the document shall be filed with SEBI at least one month before filing the same with Registrar of Companies or with Designated Stock Exchange as the case may be

(iv) Announcement of price band: The price band for an initial public offering of shares can now be announced up to two working days before its date of opening. The company has to supply financial justification for the upper and lower bands.

The last is the matter of preferential issue of warrants to promoters, where the upfront payment has been raised to 25 per cent, from 10 per cent earlier.

b. Policy on relaxation from strict enforcement of rule 19(2)(b) of the Securities Contracts (Regulation) Rules, 1957 (SCRR).

The DIP Guidelines have now been amended to provide for the policy for considering relaxation from strict enforcement of requirements of rule 19(2)(b) of SCRR in case of proposal for listing of following securities by a listed issuer: -

(i) Equity shares with differential rights as to dividend, voting or otherwise, offered through rights or bonus issue.

(ii) Warrants issued along with Non Convertible Debentures through Qualified Institutions Placement.

c. Securities and Exchange Board of India Has Amended Insider Trading Regulations- Some Highlights

SEBI has amended the SEBI Prohibition of Insider Trading Regulations 1992 vide a notification dated **19th November 2008** which has some far reaching impact on insider trading. In brief those amendments are as follows: Firstly, SEBI redefined the meaning of "Insider". Before the amendment, an Insider had to be a person connected or deemed to be connected to the Company. Such connected person should then *either* be reasonably expected to have access to unpublished price sensitive information ("UPSI") *or* should have received it *or* had access to it. Now, the amendment says that an Insider: i) a person connected or deemed to be connected to the Company *and* who can be reasonably expected to have access to UPSI or ii) A person who receives or has access to UPSI.

Secondly, listed companies and certain other persons are required to frame a code of internal procedures intended to prevent Insider Trading ("the Code"). The Code should be framed "as near thereto the Model Code" provided. It is now provided that the framing of the Code as near to such model should be "without diluting it in any manner". Further, the Company should "ensure compliance of the same".

Thirdly, disclosures of holding and changes therein are now required in respect of even dependents (as defined by the Company) of the directors or officers of the listed company. Disclosure of such changes is required to be made now to the stock exchanges also. Disclosure of holdings in derivatives is also to be made when a person becomes a director or officer. Fourthly, the Model Code itself has been amended. There are two major changes.

Clause 4.2 of the Model Code has been amended and accordingly, directors/ officers/designated employees, who buy or sell shares, *cannot* now carry out a reverse transaction for six months. Thus, if such person buys even 1 share, he cannot sell any shares for six months and if he sells even 1 share, he cannot buy any shares for six months. This bar does not apply to promoters though it applies to those Promoters who are directors, officers or designated employees would face the bar. Also, the prohibition on Insider Trading generally would continue to apply.

d. Sebi Clarification On Direct Market Access (DMA) MRD/ DoP/SE/Cir- 03 /2009

Dated February 20, 2009

Institutional investors may use DMA facility through investment managers after due authorization and upon furnishing to the broker/ exchange suitable agreements/ undertakings between the institution and investment manager stating, inter alia, that the institutional investor shall be responsible for all actions undertaken by its authorized investment manager.

e. SEBI circular on Allocation methodology of debt investment limits to Foreign Institutional Investors (FIIs)

Cir No. IMD/FII & C/ 37/2009 dated February 06, 2009 says: The Government of India has reviewed the External Commercial Borrowing policy and has increased the cumulative debt investment limit by USD 9 billion (from USD 6 billion to USD 15 billion) for FII investments in Corporate Debt. It has been decided that USD 8 billion shall be allocated to the market participants in an open bidding platform. SEBI has also changed allocation method of debt investment limits to FIIs and the minimum bidding amount by each debt FII will be kept at Rs 250 crore.

f. Amendments to Equity Listing Agreement SEBI/CFD/DIL/LA/2009/3/2

February 3, 2009 It has been decided to amend certain clauses in the Equity Listing Agreement to enhance disclosures regarding shareholding of promoters and promoter group.

Accordingly, the exchanges have been instructed to amend the formats as prescribed in the annexure to the circular to carry out the policy. The main amendment in the formats relating to Clause 35 and 41 of the listing agreement.

g. The Companies (Issue of Indian depository Receipts) (Amendment) Rules, 2009.

The ministry of corporate affairs published the amended rules through NOTIFICATION NO. G.S.R. 35(E), DATED 19-1-2009

The amendment contains; amendments in rules 3, 5, 6,7, 9, 10, 11 and in the schedule of principal rules.

- ✓ IDRs issued by an issuing company may be purchased, possessed and transferred by a person other than a person resident in India [in addition to person resident in India as earlier] if such Issuing Company obtains specific approval from Reserve Bank of India in this regard or complies with any policy or guidelines that may be issued by RBI on the subject matter".
- ✓ The definition of "Overseas Custodian Bank" is also amended as "a banking company which is established in a country outside India and which acts as custodian for the equity shares of Issuing Company, against which IDRs are proposed to be issued by having a custodial arrangement or agreement with the Domestic Depository or by establishing a place of business in India".
- ✓ The words "Indian resident" wherever occurring shall be substituted with the words "holder of IDRs". The new substitution has been made to the procedure of filing an annual statutory audit of the company accounts of the issuing company.
- ✓ No letter of offer for issue of IDR, only prospectus shall be filed with SEBI.
- ✓ IDRs may be redeemable into the underlying equity shares even before the expiry of the erstwhile one-year period from the date of the issue of the IDRs.
- ✓ Depository as per Depositories Act is not connected with the rules and hence the definition is deleted. The IDR rules is concerned only with the "Domestic Depository" which means custodian of securities registered with SEBI and authorised by the issuing company to issue IDR.

h. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2009, amended on February 13th 2009.

Paving the way for sale of crisis-ridden Satyam, market regulator SEBI on Friday relaxed its takeover regulations involving companies whose boards have been superseded by the government.

Following the amendment, SEBI can exempt suitors of such companies from provisions of Chapter-III of takeover code that deals with open offer, including its timing, size and pricing. Hence now SEBI can exempt companies from the provisions of Regulation 10 to 29A (the crucial disclosures) when Target Company makes an application subject to certain conditions.

Regulation 10 to 29A of Takeover provide for the provisions of disclosure on crossing the prescribed limits of 15% to 55%/75% by making a public offer of shares after complying with prescribed norms. Further, after such exemption is granted and publicly announced by the Acquirer, no competitive bidding is allowed. Competitive bidding as per Regulation 25 implies a bid made within 21 days of public announcement of first offer for the equal number of shares.

i. SEBI provides disclosure formats for pledged shares of Promoters [SEBI / CFD / DCR / TO / 152758 /2009 February 3, 2009]

SEBI has issued on 3rd February 2009, two circulars that essentially lay down formats for disclosures of pledged shares by Promoters and related matters. The first one gives the format for disclosures pursuant to newly introduced Regulation 8A of the

Takeover Regulations and the second one provides for amendment to Clause 35/41 of the Listing Agreement for disclosures. Firstly, Clause 35 of the Listing Agreement has been amended to provide for disclosure of such pledged shares of Promoters in the right contextual format of shareholding pattern of that clause. Secondly, the format requires disclosure not merely of pledged shares but even of those shares that are "otherwise encumbered. The format under Clause 41 also requires disclosure of shares "encumbered". Thirdly, one of the formats under Regulation 8A requires disclosure even of pledge "revoked". Regulation 8A requires only disclosure of shares pledged and pledges invoked but not of pledges "revoked". Finally, there are thus now more occasions of reporting of pledged shares, apart from the periodic/adhoc disclosures under Regulation 8A.

FOREIGN EXCHANGE LAWS UPDATES

a. Foreign investment in Print Media dealing with news and current affairs.

The Ministry of Commerce & Industry through **Press Note No. 1 of 2009** has decided to allow Foreign Direct Investment (FDI) upto 100% in publication of facsimile edition of foreign newspapers. Foreign investment in Indian edition of foreign magazines dealing with news and current affairs, including FDI and investment by NRIs/PIOs/FII, up to 26%, is permitted with prior approval of the Government.

b. Guidelines for calculation of total foreign investment i.e. direct and indirect foreign investment in Indian companies.

Recognising the need to bring in clarity, uniformity, consistency and homogeneity into the exact methodology of calculation across sectors/activities for all direct and indirect foreign investment in Indian companies, Government of India has issued Guidelines for calculation of total foreign investment i.e. direct and indirect foreign investment in an Indian company which has been made effective from 13th February 2009 through **Press Note No. 2 of 2009**.

c. Guidelines for transfer of ownership or control of Indian companies in sectors with caps from resident Indian citizens to non-resident entities.

At present, the transfer of shares from residents to non-residents, including acquisition of shares in an existing company, is on the automatic route, subject to the sectoral policy on FDI. Concerns have been raised on recent acquisitions of certain Indian companies by non-resident entities in sectors with caps. Accordingly, guidelines for transfer of ownership or control of Indian companies in sectors with caps from resident Indian citizens to non-resident entities have been formulated and been made effective through **Press Note No. 3 of 2009**. The guidelines are applicable only in sectors with caps, including *interalia* defence production, air transport services, ground handling services, asset reconstruction companies, private sector banking, broadcasting, commodity exchanges, credit information companies, insurance, print media, telecommunications and satellites, in which Government approval/FIPB approval would be required and will not apply for sectors/activities where there are no foreign investment caps, that is, 100% foreign investment is permitted under the automatic route.