THE INSTITUTE OF
Company Secretaries of India
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

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CS UPDATE

September 14, 2010

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FORTHCOMING PROGRAMME

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WESTERN INDIA REGIONAL COUNCIL,
NASIK AND AURANGABAD CHAPTERS
Jointly Organizes

PCH-4
PDP-8

FULL DAY SEMINAR AT RELIGIOUS PLACE NASHIK

ON

Changing Laws
- Emerging Vistas for Company Secretaries

Day & Date	:	**Saturday, 18th September 2010**
Time	:	**11.00 am to 07.00 pm**
Venue	:	**Hotel Sai Palace** **Mumbai-Agra Road, Nashik**

Inauguration by

Hon. President of ICSI, Shri Vinayak Khanvalkar

Topics to be covered:

- Takeover regulations
- Public Shareholding in listed companies
- NCLT, GST and Ethical Dilemma in Corporate management

Special Programme

Felicitation of students who have passed final examination of ICSI in June 2010

Faculty:

Eminent faculty would address the seminar

Fees :

(Incl. Backgrounder, breakfast, lunch & snacks) :-

- Members– Rs.1,100/- •Non -Members –Rs.1,200/- •Students - 400/- (spot regn. Rs.100/- extra)
- **Optional Tours – One Day Tour to Shirdi and / or Trimbmak will be arrange on Sunday, 19th September 2010 on actual cost basis**

- **Residential Accommodation – List of Hotels in Nashik and the Hotel Tariff will be mailed on request. Assistance will be provided in room booking. However, hotel bills are to be settled directly by members.**

For enrollment contact:-

ICSI-WIRC Office: Tel Nos.: 22047569/22047580
Cell Nos.: 9223542195
Email: prog.wirc@icsi.edu/wiro@icsi.edu

Nasik Chapter of WIRC of ICSI:
2nd Floor, Prasanna Archade, Near Hotel Mazda,
Old Agra Road, Nasik 422 002.
Tel – (0253) 2509989, 2500150.
E-mail –dateyvs@yahoo.com
Timing: 12 noon to 7.30 pm

Aurangabad Chapter of WIRC of ICSI:
18, Prashant, Mitra Nagar,
Limayawadi,
Aurangabad – 431 005.
Tel – (0240) 2480415
E-mail: arjoshi@sancharnet.in

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RBI Updates

Know Your Customer (KYC) guidelines - accounts of proprietary concerns

RBI/2010 -11/195
RPCD.CO.RF.AML.BC. No.20/07.40.00/2010 -11 September 13, 2010

The Chief Executives of
all State and Central Co-operative Banks

Dear Sir,

Know Your Customer (KYC) guidelines - accounts of proprietary concerns

Please refer to our circular RPCD.CO.RF.AML.BC. No. 83/07.40.00/ 2009-10 dated May 12, 2010 advising banks to lay down criteria in their customer identification procedure for opening accounts of proprietary concerns.

2. In this connection, it is clarified that in addition to the documents listed in paragraph 2(i) of our circular referred to above for opening a bank account in the name of a proprietary concern, banks may also accept any registration/licensing document issued in the name of the proprietary concern by the Central Government or State Government Authority/Department. Banks may also accept IEC (Importer Exporter Code) issued to the proprietary concern by the office of DGFT as an identity document for opening of bank account.

Yours faithfully,
(B.P.Vijayendra)
Chief General Manager

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TAX LAW Updates

Amount of service tax or CENVAT credit specified in a notice for the purpose of adjudication under Section 83A

[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II SECTION 3 SUB-SECTION (i)]

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

Notification No. 48/2010 – SERVICE TAX

New Delhi, the 8th September 2010

G.S.R. (E).- In exercise of the powers conferred by Section 83A of the Finance Act, 1994 (32 of 1994), the Central Board of Excise and Customs hereby makes the following further amendments in the notification of the Government of India, Ministry of Finance, Department of Revenue, No. 30/2005 – Service Tax, dated 10th August 2005, published vide No. G.S.R. 527(E), dated the 10th August, 2005, namely:**-**

In the said notification, for the Table, the following Table shall be substituted, namely:-

Table

Sr. No.	Central Excise Officer	Amount of service tax or CENVAT credit specified in a notice for the purpose of adjudication under Section 83A
(1)	(2)	(3)
(1)	Superintendent of Central Excise	Not exceeding Rs. one lakh **(excluding the cases relating to taxability of services or valuation of services and cases involving extended period of limitation.)**
(2)	Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise	Not exceeding Rs. five lakhs (except cases where Superintendents are empowered to adjudicate.)
(3)	Joint Commissioner of Central Excise	Above Rs. five lakhs but not exceeding Rs. fifty lakhs
(4)	Additional Commissioner of Central Excise	Above Rs. twenty lakhs but not exceeding Rs. fifty lakhs
(5)	Commissioner of Central Excise	Without limit.

[F. No. 137/68/2010 - CX.4]

(Madan Mohan)
Under Secretary to Government of India

Note.- *The principal notification No. 30/2005 – Service Tax, dated 10th August 2005 was published in the Gazette of India, Extraordinary, Part II, section 3, sub-section (i), vide No. G.S.R. 527(E), dated the 10th August, 2005 and was last amended by notification No. 16/2008 – Service Tax, dated 11th March, 2008, [G.S.R.175 (E), dated the 11th March, 2008].*

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DIPP Updates

DISCUSSION PAPER

SUBJECT: APPROVAL OF FOREIGN/ TECHNICAL COLLABORATIONS IN CASE OF EXISTING VENTURES/ TIE-UPS IN INDIA

1. The Department of Industrial Policy and Promotion has decided to release Discussion Papers on various aspects related to FDI. In the series of these Discussion Papers, this is the third paper on 'Approval of foreign/ technical collaborations in case of existing ventures/tie-ups in India'. Views and suggestions are invited on the observations made in the enclosed discussion paper, as also on the entire gamut of issues related to the subject, by October 15, 2010.

2. The views expressed in this discussion paper should not be construed as the views of the Government. The Department hopes to generate informed discussion on the subject, so as to enable the Government to take an appropriate policy decision at an appropriate time.

DISCUSSION PAPER

APPROVAL OF FOREIGN/ TECHNICAL COLLABORATIONS IN CASE OF EXISTING VENTURES/ TIE-UPS IN INDIA

1.0 PRESENT SCENARIO:

1.1 Paragraph 4.2.2 of Circular 1 of 2010 (Consolidated FDI Policy), specifies that investment would be subject to the 'Existing Venture/ tie-up condition'. As per this condition, where a foreign investor had, prior to January 12, 2005, entered into an existing joint venture/ technology transfer/ trademark agreement in the same field, any new proposal for investment/ technology transfer/trademark agreement, requires Government approval. The proposal has to be routed through either the Foreign Investment Promotion Board (FIPB) in the Department of Economic Affairs, if fresh foreign investment is involved or the Project Approval Board (PAB) in the DIPP, if no foreign investment is involved. The 4 digit National Industrial Classification (NIC), 1987 Code, would be the basis for determining if the field was the same.

1.2 The onus to demonstrate that the proposed new tie-up would not jeopardize the existing joint venture or technology transfer/ trademark partner, lies equally on the foreign investor/ technology supplier and the Indian partner.

1.3 The policy aims at protecting the interests of joint venture partners of agreements entered into, prior to January 12, 2005. Foreign collaboration agreements, both financial and technical, entered into after January 12, 2005, have been exempted from this stipulation. This is because such joint venture agreements are expected to include a 'conflict of interest' clause, so as to safeguard the interests of joint venture partners, in the event of one of the partners desiring to set up another joint venture or a wholly owned subsidiary in the same field of economic activity.

1.4 Five categories of investments have, however, been exempted from the requirement of Government approval, even though the foreign investor may be having a joint venture/ technology transfer/ trademark agreement in the same field. These are a) Investments to be made by Venture Capital Funds registered with the Securities and Exchange Board of India (SEBI), b)Investments by Multinational Financial Institutions like the Asian Development Bank (ADB), International Finance Corporation(IFC), Commonwealth Finance Corporation (CDC), Deutsche Entwicklungs Gescelschaft (DEG), c) Where, in the existing joint venture, investment by either of the parties is less than 3 per cent d)Where the existing joint venture / collaboration is defunct or sick and e) Investments in the Information Technology or mining sectors.

2.0 EVOLUTION OF THE PRESENT REGIME:

2.1 PRESS NOTE 18 (1998 SERIES)

In Press Note 18 (1998 series), Government set out the following guidelines for approval of foreign / technical collaborations, under the automatic route, in cases where previous ventures/ tie-ups existed within India.

a) Automatic route for bringing in FDI and/or technology collaboration agreements (including trade-mark agreements), would not be available to those who have or had any previous joint-venture or technology transfer/trade-mark agreement, in the 'same' or 'allied' field, in India.
b) Government approval route was, necessary in such cases. Detailed circumstances under which it was found necessary to set-up a new joint venture/enter into new technology transfer (including trade-mark) were required to be furnished at the time of seeking approval.
c) The onus was clearly on such investors/technology suppliers, to provide the requisite justification /proof, to the satisfaction of the Government, that the new proposal would not, in any manner, jeopardize the interests of the existing joint-venture or technology/trade-mark partner or other stakeholders. It was at the sole discretion of the FIPB/ PAB, to either approve the application with or without conditions or to reject it *in toto,* duly recording the reasons for doing so.

2.2 PRESS NOTE 10 (1999 SERIES)

Press Note 10 (1999 series) defined the meaning of the terms *"same field"* and *"allied field"* as under:

- *"same field"* – four-digit NIC 1987code
- *"allied field"* – three-digit NIC 1987code

The Press Note further clarified that, only proposals for foreign collaboration, falling under same four-digit or three-digit classifications, in terms of their past or existing joint ventures in India, would attract the provisions of Press Note 18 (1998 series).

2.3 PRESS NOTE 2 (2000 SERIES)

With a view to further liberalize the FDI regime, the Government issued Press Note 2 (2000 series), wherein all activities were placed under the automatic route for FDI, except for a specified negative list. Sector-specific guidelines were attached to this Press Note. In respect of the mining sector, it was mentioned that the provisions of Press Note 18 (1998 series) would not be applicable for setting up 100% owned subsidiaries, subject to a declaration from the applicant that he had no existing joint-venture for the same area and/ or the particular mineral.

2.4 PRESS NOTE 8 (2000 SERIES)

Press Note 8 (2000 series), recognized the special nature and needs of the IT sector. With a view to further simplify approval procedures and facilitate greater investment inflows into the IT sector in the country, FDI proposals relating to the IT sector were exempted from the provisions of Press Note 18 (1998 series).

2.5 PRESS NOTE 1 (2001 SERIES)

This Press Note provided for exemptions from the provisions of Press Note 18 for investments made in domestic companies by International Financial Institutions, such as the Asian Development Bank (ADB), International Finance Corporation (IFC), Commonwealth Development Corporation (CDC), Deutsche Entwicklungs Gescelschaft (DEG) etc. Accordingly, such International Financial Institutions were permitted to invest in domestic companies, through the automatic route, subject to SEBI/ RBI regulations and sector-specific caps on FDI.

2.6 PRESS NOTE 1 (2005 SERIES)

1. Following the introduction of Press Note 18 (1998 series), certain representations were made by foreign investors. They pointed out that:

a) The Press Note had the effect of overriding the contractual terms agreed to with the Indian partners.

b) Domestic investors were using the provisions of the Press Note as a means of extracting unreasonable prices / commercial advantage. The Press Note was, thus, becoming a stumbling block for further FDI coming into the country.

c) The term "allied field" was very widely defined, as it included even those products which would not have caused jeopardy to the manufacture of existing products.

d) Foreign investors were being singled out to present their defence, without the Indian partner being asked to justify the existence of jeopardy.

2. Press Note 1 (2005 series), issued on 12 January, 2005, addressed these issues by amending the earlier guidelines. New proposals for foreign investment/technical collaboration were allowed under the automatic route, subject to sectoral policies and the following revised guidelines:

a) Prior approval of the Government would be required only in cases where the foreign investor had a joint venture or technology transfer/trademark agreement in the 'same' field, existing as on the date of the Press Note i.e. 12 January, 2005.

b) The onus to provide requisite justification and proof, to the satisfaction of the Government, that the new proposal would or would not, in any way, jeopardize the interests of the existing joint-venture or technology/ trademark partner or other stakeholders, would lie equally on the foreign investor/ technology supplier and the Indian partner.

c) Even in cases where the foreign investor had a joint-venture or technology transfer/ trademark agreement in the 'same' field, prior approval of the Government would not be required in the following cases:

   i) Investments to be made by Venture Capital Funds registered with the Security and Exchange Board of India (SEBI) or
   ii) where in the existing joint-venture investment by either of the parties was less than 3% or
   iii) where the existing venture/ collaboration was defunct or sick

d) In so far as joint ventures to be entered into after the date of the Press Note were concerned, the joint venture agreements could embody a 'conflict of interest' clause, to safeguard the interests of joint-venture partners, in the event of one of the partners desiring to set up another joint-venture or a wholly-owned-subsidiary, in the 'same' field of economic activity.

2.7 <u>PRESS NOTE 3 (2005 SERIES)</u>

Subsequently, Press Note 3 (2005 series), issued on 15 March, 2005, clarified that:

a) For the purposes of Press Note 1 (2005 Series), the definition of 'same' field would continue to be 4-digit NIC 1987 Code.

b) Proposals in the Information Technology sector, and the mining sector, continued to remain exempt from the application of Press Note 1 (2005 Series).

c) For the purpose of avoiding any ambiguity, it was further reiterated that, joint-ventures/technology transfer/trademark agreements, existing on the date of issue of the said Press Note (i.e. 12.1.2005), would be treated as existing joint-ventures/technology transfer/trademark agreements, for the purposes of that Press Note.

3.0 APPLICATION OF THE PROVISIONS IN PRACTICE:

3.1 FIPB considered 566 proposals during the calendar year 2009, out of which 16% related to matters linked with Press Notes 1 and 3 of 2005, wherein the applicants had a joint-venture / technology transfer agreement, with an Indian partner, as on 12 January, 2005.

3.2 Some of the principles emerging from the cases discussed in the FIPB[1] are set out below:

a) *In case the existing joint-venture has become defunct, there may not be any jeopardy to the Indian partner, in case the foreign collaborator wishes to set up a new venture.*

b) *'Jeopardy' should not be invoked as a measure to stifle legitimate business activity and prevent competition. The issue of 'jeopardy' has to be examined in light of the extant business agreements/ arrangements between the parties.*

c) *'Jeopardy' may not be established in cases where technology licence agreements have expired, as per terms mutually agreed by the joint-venture partners.*

d) *In location specific projects/ activities, the concept of 'jeopardy' cannot be extended beyond the area originally envisaged in the agreement. In such cases, 'jeopardy' needs to be viewed in a location-specific context.*

3.3 The FIPB Review, 2009 has observed that:

"While critics may feel that Press Note 1 has outlived its utility, the high pitched debate on the issue of jeopardy and Indian JV partners alleging foul play by the foreign collaborator cannot make us oblivious to its continuing relevance."

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[1] *FIPB Review, 2009*

4.0 PRACTICES IN OTHER EMERGING MARKETS (CHINA AND BRAZIL):

Emerging economies, such as Brazil and China, do not have any such corresponding requirements, under their foreign investment regimes.

5.0 CONCERNS RELATED TO LIBERALISING THE 'EXISTING VENTURE/ TIE-UP CONDITION':

5.1 In 1998, the main policy concern was to protect the interests of domestic joint-venture partners/ technology collaborators, who may have been less advantageously placed, in comparison to their foreign counterparts, insofar as their ability to influence the terms of future business engagement were concerned. It was felt that an element of Government oversight was necessary, so that future collaborations were subjected to the test of 'jeopardy' and existing domestic joint-venture partners/ technology collaborators were not placed in a position wherein their survival was threatened.

5.2 This policy framework was relaxed in 2005, while maintaining a balance between the need to ensure healthy foreign investment inflows and the need to ensure that survival of the domestic industry was not threatened. The main elements of the 'existing venture/ tie-up condition' were retained, underlining Government's concerns about ensuring the continued sustenance and growth of the domestic joint-venture partners/ technology collaborators, in collaboration with their foreign partners.

6.0 THE CASE FOR REVIEW OF THE EXTANT REGIME:

6.1 The 'existing venture/ tie-up condition' has now been in existence, as a formal measure under the FDI policy, for nearly twelve years. It was last reviewed in 2005. There is a need to examine whether such a conditionality continues to be relevant in the present day context.

6.2 The 'existing venture/ tie-up condition' currently applies only to those joint-ventures which have been in existence as on or prior to 12 January, 2005. With more than five years having elapsed, it can be argued that the issue of 'jeopardy' is, no longer relevant, as the Indian partners could have recovered their investments substantially during this period of time.

6.3 The Indian industry today is in a much stronger position than it was in the 1990s, when the condition was first introduced. It, therefore, needs to be seen whether there is a need to continue with the elements of such a regime even today.

6.4 Further, industry has to increasingly become more competitive. This is particularly relevant in an era of globalization, where a number of Free Trade Agreements (FTAs) and Comprehensive Economic Cooperation/ Partnership Agreements (CEPAs/CEPAs) are in place. In such a scenario, if an industry is discouraged from being set up in India, it could be set up in a neighbouring country, with whom a trade agreement exists or is being negotiated. Competition today, is not only between domestic players inter se but also between international and domestic players. Dumping of goods from some of countries has posed serious threats to the survival of domestic industries. Between 1992 and 2010 (May), the Directorate General for anti Dumping (DGAD) has initiated anti-dumping investigations into 253 cases involving 38 countries/territories (considering 27 EC countries as a single territory). The major product categories on which anti-dumping duty has been levied are chemicals & petrochemicals, pharmaceuticals, fibres /yarns, steel and other metal products and consumer goods. Limiting international technology agreements through measures described above may constrain the growth of strong and competitive domestic industries.

6.5 It is also a moot point whether Government policy should intervene in the commercial sphere and override contractual terms agreed to between the parties, given the need to promote healthy competition, and ensure sustained long-term economic growth. It can be argued that Government should not be concerned about commercial issues between two business partners.

6.6 The measure discriminates between the foreign investors who had shown confidence in India, by investing in the country prior to 2005 and those who invested later.

6.7 The condition may be restricting a number of investors, who may not be able to reach agreement with their Indian partners on their future investment plans, thereby restricting the inflow of foreign capital and technology into the country.

6.8 A related issue is the concept of 'same field'. Press Note 1 of 2005 significantly limited the scope of the provisions of Press Note 18 (1998 series), as the latter applied only to the "same field" and not the much wider "allied field". However, in the present day context, even the concept of "same field" may not be an accurate indicator for determining whether the new venture would jeopardize the interest of the existing joint-venture partner. This is because , the NIC four digit Codes, even after revision , may still not fully reflect the complexities related to the concept of the 'same' industry and may often tend to cover a wide range of industrial activities under the same head. As an example, the activity of 'manufacturing of seat belts' may not jeopardize the activity of 'manufacturing of car steering'. However, both fall under the 'same field' under the NIC Code of 1987. Further, the NIC Codes of 1987 may not accurately represent many of the business situations in the current complex and diversified industrial environment, leading to difficulties in interpretation.

7.0 POLICY OPTIONS FOR CONSIDERATION :

7.1 For the reasons mentioned in Paras 6.1 to 6.8, should the 'existing venture/ tie-up conditions' last amended in Press Notes 1 and 3 of 2005 and now included as paragraph 4.2.2 of Circular 1 of 2010 be totally abolished?

7.2 Alternatively, if it is felt that such a condition should continue for some more time, should calibrated relaxations be introduced? These could include exemptions from the application of the condition in cases where:

a) The existing venture/tie up is more than say 10 years old

b) If the activity of the new venture is demonstrably different from the activity of the existing venture/tie up, even though it has the same NIC field.

Are there any other contingencies where such exemptions should be considered?

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