

CASES AND JUDGEMENTS.

Wipro Ltd. v. ITO (278 ITR 57 AT)

The issue for consideration was that when an Indian company makes a payment to a foreign company for using the data base of the foreign company which is invariably located abroad, what is the true nature of the payment made by the Indian company? Can such payment be regarded as payment for 'royalty' or 'fee for technical services', is the foreign company liable to pay tax in India on such payment received by it? The assessing officer held that payment made to the US company should be regarded as 'royalty' or 'fees for technical services', both of which are liable for tax in India under section 9 of the Income-tax Act as well as under the Double Taxation Avoidance Agreements (DTAA) between India and USA. The department argued that the foreign company provides information concerning commercial experience. According to the department, payment for information concerning industrial, commercial or scientific experience would be taxable in India in terms of Article 12 (3) (a) of DTAA between India and the US.

The tribunal after considering the arguments from both sides observed that: "In this case, facts are not in dispute that the GG was a web-based publishing house giving access to the data base to all those who are willing to pay. These payments are towards obtaining market data and client's strategy details, etc. These are publications and not an information or advice given

individually. The information is available on subscription to anyone willing to pay. Further, it is copyrighted information and cannot be passed on to anyone else. The Tribunal further observed: "There is no license granted to the assessee to use in any manner or quote to anyone else. Even the access is restricted to specific individuals named by the assessee and does not extend to anyone wanting to use". Annual subscription is an access fee to Gartner database maintained outside India. Fee is payable even if no service is utilised. It is like a gate pass or entry fee. And cannot be treated as imparting information". According to the tribunal, access to data base cannot be considered the same as passing on information concerning industrial, commercial or scientific experience.

Bihar Assembly Dissolution case

The Supreme Court declared unconstitutional the May 23 Presidential Proclamation dissolving the Bihar Assembly but gave its nod for the elections subsequently held in phases of which the first was scheduled for October 18 by its interim order.

This is the first occasion the apex court has had to exercise the sweeping powers given to it by the 1994 S R Bommai case to check any misuse of Article 356. Yet, on the two applications that were filed before it for interim order, the court was reluctant to follow the radical prescription of the Bommai verdict. Consider the Bommai verdict's emphasis on interim orders: "The court in

appropriate cases will not only be justified in preventing holding of fresh elections but would be duty-bound to do so by granting suitable interim relief to make effective the constitutional remedy of judicial review and to prevent the emasculating of the Constitution."

The Bommai case had anyway given greater latitude to the court on whether the restoration of the Assembly should necessarily follow if its dissolution had been found to be invalid. "The necessary consequence of the invalidation of the Proclamation," according to the Bommai verdict, "could be to restore the status quo ante and, therefore, to restore ... the Legislative Assembly."

But, as the Bommai judgment went on to clarify, it was for the court to "mould the relief" to meet the requirements of the situation. The Bench said "despite [the] unconstitutionality of the impugned Proclamation, having regard to the facts and circumstances of the case, the present is not a case where in exercise of discretionary jurisdiction status quo ante deserves to be ordered to restore the Legislative Assembly as it stood on the date of Proclamation, March 7, when it was kept under suspended animation.



POLITIKING

• Mr. Natwar Singh was relieved from the responsibility of the Ministry of External Affairs following the controversy over Volcker committee report naming him as one of the non-contractual beneficiaries in the United Nation's Oil-for-Food programme for Iraq. Mr. Singh, however, will remain in Government as Minister without portfolio. The Government appointed a judicial commission headed by the former Supreme Court Chief Justice, Mr. R.S. Pathak, to inquire into findings of the Volcker report.

• Senior JD-U leader Nitish Kumar was on Thursday sworn in as the 33rd Chief Minister of Bihar. State BJP president Sushil Kumar Modi was sworn-in as Deputy Chief Minister of the JD (U)-BJP coalition government.

• Former Uttar Pradesh Chief Minister and BJP General Secretary Rajnath Singh will be succeeding L K Advani as party chief. The new president will hold the office till March-April 2007.

• Parliament expelled 11 members — 10 from the Lok Sabha and one from the Rajya Sabha — whose conduct was found to be "unethical and unbecoming" of Members of Parliament.

IN-HOUSE NEWS

• FM New Delhi and FM Chandigarh visited Dubai from 12-15th November 2005 for their annual retreat.

• FM would be celebrating the grand milestone of 110 years of its existence in 2006.

• FM has established new offices at Dhaka (Bangladesh) and also at Bhubneshwar. Currently the total number of Partners, Lawyers and fees earners of Foxmandal is around 180.

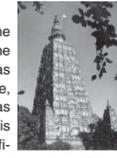


TRAVEL TALK

Among all Indian states, Bihar is the one most intimately linked to the Buddha's life, resulting in a trail of pilgrimages which have come to be known as the Buddhist circuit. Lord Buddha himself taught here and Hieun Tsang, the 7th century Chinese traveler, was a student.

Both Gaya

Bothgaya is one of the most important and sacred Buddhist pilgrimage center in the world. It was here under a banyan tree, the Bodhi Tree; Gautama attained supreme knowledge to become Buddha, the Enlightened One. Born in the foothills of the Himalayas as a Sakya prince of Kapilvastu (now in Nepal), most of the major events of his life, like enlightenment and last sermon, happened in Bihar. Buddhism as a religion was really born in Bihar and evolved here through his preaching and the example of his lifestyle of great simplicity, renunciation and empathy for everything living. Significantly, the state's name of 'Bihar' originated from 'Vihara' meaning monasteries which abounded in Bihar.



Nalanda

Nalanda, founded in the 5th century AD, is famous as the ancient seat of learning. The ruins of the world's most ancient university lies here which is 62 km from Bodhgaya and 90 km south of Patna. Though the Buddha visited Nalanda several times during his lifetime, this famous center of Buddhist learning shot to fame much later, during 5th-12th centuries. Hieun Tsang stayed here in the 7th century AD and left detailed description of the excellence of education system and purity of monastic life practiced here. He also gave a vivid account of both the atmosphere and architecture of this unique university of ancient times. In this first residential international university of the world, 2,000 teachers and 10,000 monks students from all over the Buddhist world lived and studied here. The Gupta kings patronized these monasteries, built in old Kushan architectural style, in a row of cells around a courtyard. Emperor Ashoka and Harshavardhana were some of its most celebrated patrons who built temples, monasteries and viharas here. Recent excavations have unearthed elaborate structures here.



Rajgir

Being located in a valley, Rajgir is a very scenic place. The small hill town is covered with lush green forest which add to the beauty of the place. Rajgir was the capital of the Magadh Mahajanpad (State) when Patliputra was not formed. In those days it was called Rajgrh. Rajgir or Rajgrh means the home of Royalty. This place has been associated with Lord Buddha and Buddhism. Buddha not only spent many years in Rajgir but also delivered sermons here and proselytized emperor Bimbisara at the Griddhakoota hill. The Jivekarmavan monastery was the favorite residence of Buddha. The teachings of Buddha were penned down at Rajgir and it was also the venue for the first Buddhist Council. Today Rajgir has come up as one of the most important pilgrimage for the Buddhist.



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Special Message : We shall appreciate any comments or suggestions that you may have

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Editorial

Globalization has created a vast knowledge and skilled workers market. Accordingly either workers go to the demand source in whatever country it is located or the demand source sends its work to whichever country offers the quality of workers required by it for its tasks at the cheapest price. The developed world and oil rich countries regulate the migration of such workers inflow through various categories of visas. In the developed world the migrant workers have the benefit of advanced legal systems for any disputes concerning their terms of work. But the developing countries whose workers are targets of the work inflow from the developed world are still mired in antiquated dispute settlement mechanisms hinging upon a legal division between labour and officers or supervisors as also outdated court mechanisms. In short, there is no globalised workers law or courts and there is no endeavour towards the same. The aim of an international workers court is a far cry.

Accordingly there is an asymmetry in the developing world having populations which get targeted with the creation of jobs by the knowledge business and specialized work area processing demands from various countries. This asymmetry is in two ways. Firstly, the job-giving units have their associations and organizations. But the Knowledge and skill workers do not have any association or organization. Secondly, the legal system of the countries where such jobs are created rest on legal systems that have become irrelevant to such movement of jobs, namely the division of legally protected labour drawing a specified low salary but not doing any managerial work and the others doing managerial work. While the global legal environment has moved from labour to work and the recognition of trade unions or associations for all level of workers whether labour or managerial in terms of the human right of fair, just and reasonable conditions and terms of work, the developed countries shut their eyes to this movement. Hence in developed countries management gurus talk and managements practice three hundred sixty degree principle of governance from all the workers, developing countries rest on a laissez faire system of equations determined by the job givers in work that travels globally.

How long this asymmetry will continue depends on the good sense of the governments and the already established trade unions in the developing countries. There must be a common understanding that the country's legal system must deal with work and work relations and not merely labour and labour relations. This requires recognition of the fact that like products, demand for workers is part of an economic cycle and when the cycle is global only the demand side cannot remain global. If the supply side of workers is not governed by legal system that matches somewhat the global system then the asymmetry will exact its price sooner or later. This should provide a push to overhauling the labour law towards a workers law, the formulation of a common code of certain principles applicable to all work, the creation of a national corps of a work administrator's service with expertise with expertise in mediation and conciliation and the creation of a national judicial service for workers. If the majority population of each developing country enjoys democracy based on the earnings that their jobs get them then democracy cannot continue for long without effective democratic legal systems for determining the fairness of the terms and conditions of the jobs. A democracy is fractional when most of its workers do not have job or work democracy. Such democracy reduces the legal rights of republican and representative government that form the core of democracy to paper rights. In short developing countries must set their own internal workers order in tune with the developed countries order, to enable the job flow to survive, continue and expand between the two competing streams of workers moving to the jobs and the jobs moving to the workers.

In India the Prime Minister is taking the lead towards imitating the dialogue for labour law reforms, despite constraints of a coalition government with parties representing labour. But still there is a need for a wider international dialogue since its is inevitable that disputes in the outsourcing industry will raise serious issues of place of suing, which law applies and the enforcement of judgment and decrees. The international dialogue will not be effective without the first steps of a rational internal workers regime and may be a regional workers order.

This issue of News Time has a thoughtful article on Legal Outsourcing to India with the latest information on the new trends in FDI law, change in Patent Rules and SEBIs thinking on allowing FII to short sell securities along with regular columns. There is a snapshot of politics and court judgments showing that Indian democracy is alive and kicking. For inner peace FM recommends a trip to the Buddha sites in the state of Bihar. And if inner peace gives you inner warmth how does it matter that Delhi, India's capital, has suffered a record low winter temperature of 0.2 degrees Celsius. Greetings to FM readers for 2006.

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NEWS TIME

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Clippings

The year 2005 will go down as the one in which FDI announcements worth a staggering \$30 billion were made during the year—an all time high. As a signal of what is to come, India has displaced the US as the second most favoured FDI destination, after China, in AT Kearney's FDI Confidence Index.

Prime Minister Manmohan Singh has launched the Rs. 1.74 lakh crore Bharat Nirman programme through the National Bank for Agriculture and Rural Development aimed at developing the rural infrastructure. Dr. Singh said the proposed model of delivery involved the panchayats and the private sector as partners.

The stock market indices touched new highs again on the back of fresh inflows from foreign institutional investors (FIIs) and falling global oil prices. The benchmark Bombay Stock Exchange (BSE) sensitive index (Sensex) crossed the 9000-mark for the first time to 9005.63 in intra-day trading. However, it closed below the 9000-level at a lifetime closing high of 8994.94, gaining 105.91 points as compared to the previous closing.

CORPORATE

• SEBI may allow institutional investors to short sell securities

The Securities and Exchange Board of India (SEBI) is planning to allow institutional investors to short sell securities, thereby paving the way for higher FII interest and increase in market liquidity. In a discussion paper, the market regulator has asked for opinions on allowing institutions to short sell securities. Short sales — a method by which an investor sells a security he does not own — will create a level playing field between various classes of investors. The reasoning given by SEBI in the paper for this development is to bridge the gap between retail and institutional investors and provide equal leveraging opportunities for all classes of investors. Short selling also includes a sale completed by delivery of a security borrowed by the seller. To begin with, SEBI plans to allow short selling in limited stocks in which derivative products are available. Also, all stock brokers would be mandated to maintain sufficient documentation, regarding the ability of their clients to borrow and deliver the securities at the time of settlement so as to ensure sound audit trail.

• International Insurance Companies need IRDA nod for entry

Foreign insurance companies prospecting for business opportunities in India will now need to obtain permission from the insurance regulator before setting up a liaison office. Until now, the RBI granted this permission. The Insurance Regulatory Development Authority (IRDA) has said the practice has been revised in consultation with the government,

and any company registered outside India will need to get permission from it. This condition will apply to other foreign insurance intermediaries regulated by the IRDA. At present, several foreign insurance firms have a liaison office in India. Permission for opening of liaison office in India by an insurance company registered outside India are subject to terms and conditions as may be stipulated by the IRDA from time to time. The entrant will have to provide the IRDA with details such as its shareholding, organisational chart showing subsidiaries and associated companies, countries in which the entrant and its subsidiaries operate.

• 2006 to usher corporate governance clause

A score of publicly listed companies would have ushered in tighter internal controls through the implementation of Clause 49 of the Listing Agreement, stipulated by the Securities and Exchange Board of India. Clause 49, popularly known as Corporate Governance clause, makes it mandatory for all companies to have at least 50 per cent independent directors on its board. The demand of corporate governance for utmost quality, where companies need to attract investment and customers in the face of increasing challenges from global competitors. Increased integration of the world economy and globalisation of business makes it necessary for companies to follow the best practices. The government's move underscores India's desire to continue being seen as a governance trailblazer among emerging economies. Today the world looks to India to be a role model in market regulation and corporate governance. The image can be sustained only by

maintaining the highest standards in regulations and enforcement. The amended Clause 49 is aimed at ensuring transparency at every level of a company's functioning. This has seen companies bring in risk management systems, control framework including IT safeguards to ensure better governance. The date for achieving compliance is — December 31, 2005.

• SAFTA comes into effect

South Asian Free Trade Area (SAFTA), paving way for free trade of goods among countries of the region, would come into being on 1st January but Pakistan was yet to complete the formality of ratifying it. However, according to Indian Commerce Ministry the agreement legally comes into effect from January 1. Operationalisation of SAFTA is a landmark in the history of the SAARC grouping, which comprises India, Pakistan, Bangladesh, Sri Lanka, Maldives, Nepal and Bhutan. Indian Cabinet had ratified the agreement on December 29. As per the agreement, SAARC member countries India, Pakistan and Sri Lanka will bring down their customs duties to 0-5 per cent by 2013 while the Least developed members Bangladesh, Maldives, Nepal and Bhutan will do it by 2018. India being the larger and relatively developed economy will be providing concessions to LDCs, including a mechanism for compensation of revenue loss due to reduction in duties, technical assistance.

FOREIGN DIRECT INVESTMENT (FDI)

• FDI increase in Asset Reconstruction Companies

The government has allowed FDI in Asset Reconstruction Companies ("ARCs"), which buy, stressed assets

from banks and financial institutions and attempt to turn them around. The Foreign Investment Promotion Board (FIPB), vide Circular No. 16 dated November 11, 2005 has announced its decision to consider proposals to infuse FDI in ARCs registered with the RBI, subject to certain conditions.

• FDI increase in FM radio Broadcasting services

The government has also announced, subject to terms and conditions as specified from time to time by the Ministry of Information and Broadcasting, its decision to permit foreign investment, (including Non Resident Indian and Persons of Indian Origin) up to 20 per cent for FM radio's broadcasting services. The move marked a significant shift from the earlier position where foreign investment was permitted only in terrestrial broadcasting under the portfolio investment schemes, while FDI was not permitted by foreign entities. However, the Ministry continues to maintain the ban on news and current affairs programs, which are not allowed on private FM radio.

• Investment from Singapore

With India entering into a Protocol with Singapore to meet Singapore's demand for parity in treatment as in agreements with Mauritius, residents of both treaty partners can now expect more liberal tax treatment with effect from August 2005. Singapore is the third largest investor in India, after the US and Mauritius, and has emerged as the fourth largest trading partner, it is expected that the two-way trade is poised to reach \$15 billion for this year according to the Hindustan Chamber of Commerce estimates. The new Protocol provides for

reduction on tax on royalty and technical fee to 10%. Also under the Protocol capital gains arising from the alienation of shares of a company whose property consists principally, directly or indirectly of immovable property situated in a Contracting state is taxable in that state. This accords with the general principle of taxation that income from immovable property is to be taxed in the state in which it is located. Further it provides that on a request of one of the countries, the Revenue Authority of the other country shall collect and share all information with the other country that it is competent to obtain for its own purposes under its laws. This exchange of information would be done through the Competent Authority of the other country. Thus the new Protocol provides for a specific mechanism for exchange of information and extends even to cases where an enquiry is required by the authorities of one country to be made by the authorities of the other country.

• Government plans new FDI norms for NBFCs

The government is working on a fresh set of FDI guidelines for parts of the NBFC sector. The new guidelines will determine FDI inflow in residential mortgage credit default protection. This is currently not covered under the 19 NBFC financial services activities where foreign investment is allowed. The matter came up after an American financial services company, Genworth Financial, asked for permission to set up a 100% subsidiary in India. The subsidiary, which was to be set up as an NBFC, will offer mortgage guarantee products providing residential credit default protection to lenders. In other words, the product will offer a risk coverage to lenders of home

loans and mortgages like banks and financial institutions. According to the current policy, 100% FDI in NBFC is allowed under the automatic route which is however subject to some minimum capitalisation norms. The department of economic affairs has asked for comments from the RBI/ insurance division.

• 100 per cent FDI in airports under study

The government is actively considering allowing 100 per cent FDI in airports through the automatic route, doing away with the FIPB clearances. The Commerce Ministry has suggested a slew of FDI policy changes and the Group of Ministers headed by Agriculture Minister Sharad Pawar is evaluating the pros and cons before allowing 100 per cent foreign participation in development of airports through the automatic route. Currently, 100 per cent foreign participation in the sector is allowed but there is a sectoral cap of 74 per cent. If the foreign company wants to invest more than 74 per cent, it has to apply for FIPB approval.

TAXATION

• Parliament approves Taxation Bill

Parliament has approved a Bill to amend taxation laws to exempt around 60,000 small exporters from taxes under the Duty Entitlement Pass Book (DEPB) scheme with the Rajya Sabha returning the measure by a voice vote. The Taxation Laws (Amendment) Bill, 2005, is also aimed at extending tax incentives to export business with effect from assessment year 1998-1999 under the DEPB and Duty Free

Replenishment Certificate (DFRC) schemes. It includes amendments to exempt from withholding tax any payment received in respect of a lease of an aircraft or aircraft engine by government of a foreign state or enterprise. The government has decided to extend exemption from withholding tax on sports events such as the mini-World Cup which is to be staged next year following assurance of the Prime Minister to the International Cricket Council.

On extending the date for such exemptions for lease of aircraft, the leasing deals for Air-India and Indian Airlines could be finalised only in May and, thus, it has been extended till March, 31, 2006. The legislation also includes extending the period of tax exemption on specified income of persons, notified by the Centre, participating in any international sporting event conducted in India.

• From next year, IT returns may be filed anywhere

Companies and individual salaried taxpayers may be allowed to file their returns anywhere in the country from next year. The finance ministry is considering a proposal to allow "jurisdiction-free filing and processing of returns of income". Tax experts contend that no significant changes would be required in the law for the move being considered as rules pertaining to filing of returns come within the purview of delegated legislation of the Central Board of Direct Taxes. The CBDT has powers to make the necessary changes in the rules.

PATENTS

Amendment of Patent Rules

In a view to incorporate the interests of the applicants, the **Patent**

(Second Amendment) Rules, 2005 are to be notified soon after tabling in Parliament. The major changes are that:

- The period for filing proof of right under Rule 10 has been raised from three months to six months. Similarly, the time period for filing particulars of corresponding foreign applications under Section 8 (1) of the Act and the time for filing search and or Examination reports under Section 8(2) of the Act has been raised to six months.

- A proviso has been introduced under Rule 24, to the stated effect that publication shall be done within thirty days from the date of request thereof. This has been done to further expedite the Patenting process.

- The period for seeking request for Examination, in cases where an application was filed after 1st January, 2005, has again been raised to forty eight months from the date of priority or from the date of filing of application in India, which ever is earlier, as opposed to thirty six months.

- The period for request for examination in respect of applications, filed before the commencement of the Patents (Second Amendment) Act, 2005 has been raised to forty-eight months. This has been done to facilitate the applicant's decision to commercialise his technology.

- The time for examining an application, under sub clause (2) of sub-rule (3) of Rule 24 B has been fixed at six months to streamline the examination process.

- The time for placing an application in order for acceptance thereof in

sub clause (4), has been fixed at nine months for applications filed after the Commencement of the Patents (Second Amendment) Act, 2005. In case of applications examined after 1st January, 2005, but before the commencement of the Patents (Second Amendment) Rules, 2005, this period is still fixed at six months. This demand by Patent Attorneys, to extend this period was raised on account of difficulties in meeting prosecution requirements and procedures.

- A recent amendment requiring a permit for Indian applicants before filing applications abroad under Section 39 countered some controversial issues. By way of clarification, the period for granting such permit to file abroad, the period has been fixed at twenty-one days from the date of request under Rule 71 sub rule (2).

- The hike in fees for filing an application introduced in January, 2005 on account for fees for claims in excess of ten and pages of description in excess of thirty has been rolled back.

- The fees for making a request for examination has been substantially reduced to Rs 1,000 in case of Individuals and Rs 3,000 in case of Legal persons. This is a substantial relief for applicants and a major boost for outsourcing work related to Patent filing in India. In case of filing pre grant opposition, the time for filing evidence in response to the Notice filed has been increased from one to three months for the applicant. The fees for renewal of patents from fifteenth year of their validity onwards has been reduced from Rs 20,000 to Rs 15,000. This is also a substantial relief for patent rights holders in India.