CASES AND JUDGEMENTS.

Dresser Rand S. A.

Vs.

BINDAL Agro Chem Ltd. & K.G. Khosla Compressors Ltd.

Decided On: 12.01.2006

Hon'ble Judges: Arun Kumar and R.V. Raveendran, JJ.

The appellant in this case had received an invitation bid to supply certain equipment and material to the defendant for use in the defendant's "Fertilizer Project". After several correspondences and a meeting where the conditions were discussed, the appellants had received certain Letters of Intent on the letterhead of the second respondent, K. G. Khosla Compressors Ltd. The representatives of BINDAL assured DR that full and total responsibility of the performance would be on BINDAL. Believing these assurances DR signed the Letters of Intent. Afterwards first respondent informed that due to pressure from Government of India, they have to purchase the required equipment from an Indian manufacturer. The appellant alleged breach of contract and opted for arbitration to settle the dispute. But the respondents held forth that no arbitration agreement had been entered into nor any such clause was present in the Letters of Intent. The Apex Court said that the cardinal principle to remember is that it is the duty of the court to construe correspondence to decide whether there was any meeting of mind between the parties, which could create a binding contract between them. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then there would be proof of an arbitration agreement. There is a vast difference between negotiating a bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were completed giving rise to a binding contract. Therefore there was no arbitration agreement.

You One Engineering And Construction Co. Ltd. And Anr.

Vs.

National Highways Authority Of India (NHAI)

Decided On: 10.03.2006

Hon'ble Judges: B.N. Srikrishna, J.

An application was made under Section 11(6) and Section 11(12) of the Arbitration and Conciliation Act, 1996 and Paragraph 2 of the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, for the appointment of a third/Presiding Arbitrator in accordance with an agreement between the parties. The petitioner in each of these applications is a joint venture of two constituents, who entered into a construction contract with the respondent - National Highways Authority of India (for short 'NHAI'). The first petitioner is a company incorporated/registered under the laws of the Republic of Korea, with its registered office at Seoul. Thus, it is a body corporate incorporated in a country other than India within the meaning of Section 2(f)(ii) of the Act. Further, the contract entered into between the parties and the respondent pertains to execution of construction work, which is considered as commercial under the laws in force in India. Each of the three contracts contained an arbitration clause that any arbitration would amount to an international commercial arbitration within the meaning of Section 2(f)(ii) of the Act. A clause in the agreements provided that in case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of Indian Road Congress. Here, the subsequently appointed arbitrator was appointed by the respondent as its arbitrator. The court held that the clause contemplates the appointment of Presiding Arbitrator by the President of the IRC. That there was no appointment of the Presiding Arbitrator within 30 days from the appointment of the Arbitrator appointed subsequently is incontrovertible. There is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. On this basis the court dismissed the petitions.

The new French anti-takeover measures after implementation of the EU Takeover Directive

The advent of liberalization and the increasing economic importance of India in the international market have encouraged Indian entrepreneurs to seek to acquire numerous overseas companies. Thus, during the early months of 2005, *Indian companies paid $1.7 billion - more than quadruple the tally for all of 2001 - for 62 overseas companies, according to the accounting firm KPMG*[1]. In France, the Indian Videocon, based in Mumbai, has acquired the global color-picture-tube business of France's Thomson for $ 289.8 million[2].

Considering that a takeover bid is one of the more preferred methods of overseas acquisitions worldwide, the recent French statute[3] (hereinafter referred to as a "**Statute**"), which transposes certain provisions of the EU Directive[4] on takeover bids (hereinafter referred to as a "**Directive**"), is of particular significance when European companies are targets of takeover bids either by their European or overseas counterparts, such as the current tender offer by Mittal Steel for Arcelor.

Prior to the Statute, companies, which were subject to an offer or were confronted with this threat, had varied means at their disposal to build a defence, decided on in advance or in the course of the offer. One can thus mention the clauses relating to the transfers of securities in certain shareholders agreements, the recourse to holding its own shares within the limit of 10 % of the capital, increase or the reduction of the capital, limitation of the voting rights, multiple voting rights attached to registered securities, "golden shares" held by the State (when in compliance with the European regulation), or the creation of limited partnerships with share capital, which deprive the limited partners of effective control of the company.

Nevertheless, the effectiveness and the frequency of such measurements were limited, being only means of delaying the inevitable. Statutory defences can thus be amended once the initiator reached the threshold of two thirds of the capital, and it can appear difficult to convince the shareholders to resist an offer comprising a significant premium and a real strategic project. Best defences are built over time. Time and a good valuation of its listed shares constitute in this respect the best protection for a potential target.

The Directive is one of the measures adopted under the European Union Financial Services Action Plan. As recommended by the "High Level of Company Law Experts" led by Jaap Winter, the Directive sets out to establish minimum guidelines for the conduct of takeover bids and aims at creating *"Community-wide clarity and transparency in respect of legal issues to be settled in the event of takeover bids and to prevent patterns of corporate restructuring within the Community from being distorted by arbitrary differences in governance and management culture"*[5].

Debates on the legitimacy and the details of implementation of defence measures as well as on *level playing fields* raise the central issue of the takeover of European companies regarded as "crown jewels", whose capital is usually subject to free play of market forces.

Thus, even if both French and European regulations follow the same principles[6] concerning the conduct of public offers, the implementation of the Directive will profoundly change certain French anti-takeover aspects.

Statement of intention

After persistent rumours concerning the possible hostile takeover bid by PepsiCo for Danone, the government introduced an amendment called "*Amendement Danone*" during debates on the draft Bill[7]. This provision[8] was approved and included in the Statute. Thus according to the Statute the French Market Authority (hereinafter referred to as the **"AMF")** can require any company to disclose its intentions through a press release if there are reasonable grounds to think that it is about to launch a takeover. The Statute even specifies that a significant movement of securities of the presumed target company can be regarded as a reasonable ground. Hence, in the event that the offeror files a tender offer though having previously declared its intention of not launching a takeover bid, the AMF will have the possibility to refuse this tender offer as admissible.

Actually, this clause has made a very limited contribution to the current rules governing French regulated market insofar as the AMF Rulings lay down that any company preparing a financial operation on a company whose securities are admitted for trading on a regulated market have already to comply with the duty **of transparency unless it has a legitimate interest not to disclose its intentions and if it has the possibility to ensure their confidentiality.**[9].

Strengthening of shareholders' power

On the one hand, under the new legislation the power of the target company's board will be limited during the takeover bid. Indeed, it lays down that, during the takeover bid for a company of which securities are admitted for trading on regulated market the board shall obtain the prior authorization of the general meeting of shareholders before taking any action, other than seeking alternative bids, which may result in the frustration of the bid. In this respect, should the target company decide either to sell one of its significant assets or to distribute a super dividend to its shareholders or to issue new shares, such decision shall first be approved of by its shareholders' meeting.

On the other hand, shareholders should be called upon to approve or confirm any decision, partly or fully implemented, taken by the board which does not form part of the normal course of the company's business and the implementation of which may result in the frustration of the bid.

Reciprocity clauses

In line with the Article 12 (3) of the Directive, the Statute provides that the above mentioned restrictions on frustrating actions[10] are not applicable in case the takeover has been launched by entities acting on their own or through parties acting in concert or their parent company which are not subject to the French restrictions or equivalent restrictions[11]. It means, for instance, that the target company could be able to use the reciprocity clause in the event of a bid launched by several companies, if one of these companies is not subject to the board passivity rule or if the tender offer is filed by an unlisted company, which, of course, does not apply the "board passivity rule".

In this respect, it is to be reminded that, Indian takeover bids are governed by the provisions of both the Companies Act, 1956 and the Securities and Exchange Board of India Regulations, 1997 (SEBI Takeover Code)[12]. As concerns the takeover situation in India, unless the approval of the general body of shareholders is obtained after the date of the public offer or announcement, the board of directors of the target company is under an obligation not to dispose of any assets of the company otherwise than in the ordinary course of trade. They are further under a comprehensive set of restrictions, which would also include not to issue or allot any securities carrying voting rights and to enter into any material contracts.[13] In this respect we could safely assume that the board of directors of an Indian listed company is subject to the "board passivity rule" as French listed companies. Hence, in the event that an Indian company decides to acquire a French company; the latter would be under an obligation to obtain its shareholders' approval before taking any decision[14], which may frustrate the takeover bid.

Limitations of the articles of association and of shareholders agreements

According to the Statute, any restriction on the transfer of securities provided for in the articles of association of the target company shall not apply *vis-à-vis* the bidder. Furthermore, the target company articles of association themselves may provide that any restriction for the transfer of securities provided by a shareholders agreement shall not apply *vis-à-vis* the bidder. But this neutralization is based only on the target shareholders' will. And the question is to know if the shareholders of the target companies will approve this type of clause.

Furthermore, the 'High Level of Company Law Experts' report had suggested that *"a rule should be introduced allowing a bidder who has acquired a certain threshold percentage of risk-bearing capital in the company after completion of a general takeover bid, to break-through any mechanisms and structures in the offeree company's…which may frustrate the exercise of control by the bidder."*. These recommendations have been followed by the French legislator by stating that the article L.225-125[15] of Commercial Code does not apply in case the company, whose securities are admitted for trading on a regulated market, is subject of a takeover bid and the bidder has acquired a certain percentage of these securities giving him a fraction of the issuing company's capital or voting rights.

Consequently, any memorandum or articles of association would neither apply *vis-à-vis* the bidder during the takeover nor would be binding on him after the bid.

"French poison pill" or "Breton share warrants"

The main innovation of the Statute[16] was to confer on the target company the power to urge the offeror to negotiate the offered price.

According to the Statute, the target company can issue warrants ("*bons de souscription d'actions*"), the so-called "Breton share warrants" in the name of the current French minister of Economy.[17] These warrants are to be allocated to all the shareholders of the target company as at the closing of the tender offer for free and such decision must be announced as at the closing date of the offer at the latest. The issuance must be decided or confirmed by the general meeting of the shareholders of the target company during the offer unless the general meeting of shareholders has expressly authorized the issuance of such warrants within 18 months prior to the offer and the initiator does not apply the same defence measures rules like the target company (absence of reciprocity of the "board passivity rule"). But, the target company has to make public its intention to issue such warrants as at the closing date of the tender offer at the latest.

The amount of the capital increase and the ceiling of number of warrants that may be issued have to be set by the general meeting of the shareholders.

The warrants would allow their holders to subscribe for target company's shares with a huge discount. It is commonly accepted that the warrants would become exercisable once the offer is completed, thus diluting the initiator. According to the Statute, the warrants lapse if the offer and any competing offer are withdrawn, declared unsuccessful or lapse for any reason whatsoever.

The aim of such issuance is to oblige the parties to negotiate the terms of transaction between the two companies.

The initiator is not obliged to include in its offer the warrants or the shares to be subscribed through the issuance of the warrants, since the warrants are exercisable only after the offer. The initiator can withdraw its offer faced with the issue of such warrants, with the prior approval of the AMF.

On the contrary, under current regulation, it appears that the initiator cannot adjust the terms of its offer to take into account the possible dilution and target the warrants in its offer.

Even though the offeror might prepare itself to bargain the offered price due to the possible issuance of warrants by the target company, it can be however noticed that the new French anti-takeover measures are similar to those adopted by USA or UK regarded as the most "open countries". And, in any case, one can underline the fact that France remains, in spite of recent controversial positions adopted by the French government, one of the word's most attractive countries for foreign investments[18]. Disclaimer : Reders may access www.foxmandallittle.com for the detailded article along with Footnotes.

*This article is contributed by Jaswinder Brar who is on a secondment from **Brandford-Griffith & Associés** a Paris based Law Firm.*

POLITIKING

1 Sonia Gandhi has been re-elected to the Lower House of the Parliament with a record victory margin of over 400,000 votes from her nearest rival.

2 The historic trade route of Nathu La between India and China has re-opened after a gap of nearly 44 years.

3 The election results in the assembly polls have brought in new governm ents in Kerela (CPI-M), and Tamilnadu (DMK+Congress). CPI(M) has won again in WestBengal and Congress in Assam and the Union Territory of Pondicherry.

IN-HOUSE NEWS

FML New Delhi and FML Bhubaneshwar organized seminars in Bhubaneshwar and Pune on intellectual property and information technology, which were very well received by the legal fraternity, business entities, government representatives and the media.

FML capital markets team is presently involved in nearly 12 major capital markets and GDR issues.

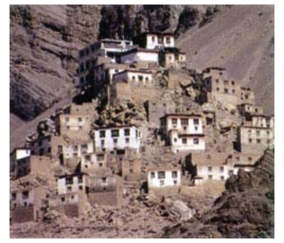
TRAVEL SECTION

We feature in this issue the valley of Lahaul and Spiti. Spiti stems from two words *Sa Piti,* literally meaning, the country (*Sa*) of Piti river (Spiti). Not many people know the meaning and origin of the words- Similarly, the Spiti and upper Lahaulis call themselves *La-Yul-Mis, the folks from the god's land.* The word *Lahouli, Spiti, Laddhakhi and Tibetan* seemed to have come from *Lah*, which means mountain, peak or pass. Mountains command great reverence in the region.

Reaching Spiti A day long Delhi-Manali bus or taxi journey; or a two-hour Delhi-Bhuntar flight, and one is at the sprawling riverside Manali town, enjoying the sylvan environs and the surrounding peaks and meadows. From Manali, one goes driving through 13,050 feet high Alpine Rohtang Pass.

The riverine Spiti is a minuscule civilisation whose spatial and spiritual existence in real and symbolic terms are so intermingled that not only the valley draws its name from the main river, but also most of its tributary valleys and villages are named after their rivers. This river, along its 130 km course, is joined by around 11 tributary streams on the right bank and 13 on the left bank.

Monastic and mystic Spiti is an important plank of the monastic travel circuit of India-Kulu-Lahaul-Spiti-Kinnaur and Leh. Spiti is a sanctum-sanctorum of ancient Lamaist Buddhist monasteries. Mane, Dhankar, Tabo, Gungri, Mud, Lidang, Rangrik, Key, Losar and Hikkim have the best of them. The most important of them is the Key Monastery, the abode of Lochen Tulku. A reincarnate spiritual institution, the Lochen Tulku is held high in Spiti's spiritual traditions.



Pin Valley National Park The Pin Valley National Park is an ideal wildlife tourism spot with a transit camp accommodation at Mud Farka, and bunkers. Chhumurti horses are available for a ride. Two to three days' travel in the Park under the guidance of the forest guides should be enough for sighting an ibex. Wildlife Census, 1999-2000, put the animal population of Pin Valley National Park and Kibber Sanctuary at 12,245, including 508 snow ibex in the Pin valley.

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FOX MANDAL

NEWS TIME

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Editorial

The outstanding international performance of Indian corporates in the IT, BPO, energy and pharmaceuticals sectors has shown that developing countries have the wherewithal to lead the global economy. The sectoral footprint needs to be widened so that the same entrepreneurial synergy covers the socially disadvantaged to make them market viable. This applies especially to the global population of physically and mentally disabled children. They are the most visible symbols of economic and managerial neglect by international trade as well as lack of economic development. But all theorists and funders of economic development never build in a disability coefficient into their theories or their funding terms. The most visible are shut out. Accordingly international banking and investment laws do not correlate the children's disability coefficient with finance and investment policy. Hence there is no international regime de facto or de jure to ensure that development must show a decline in the number of children born into physical or mental disability.

The lack of such an international movement is explained by the national policies of the countries with the highest numbers of the disabled as also with the highest rate of growth of the disabled. The national policies do not integrate disability into public and private economic planning, budgeting or investment. The local development officer, the collector and the primary health centre in charge are not made legally responsible for any rise in the number of the disabled within their jurisdiction. Disability resulting from the malnutrition of the mother and then of the child is nobody's baby. Consequently, even countries professing a fundamental right to a life of human dignity, having affirmative state funded programmes for mother and child and state funded health programmes till the village level have no public accountability regimes to ensure delivery to the target populations of such State funded programmes usually bedeviled by corruption. The career progression of the district and national administrators does not depend in any way on the decline or progression of the disabled in a district. Development becomes an exercise in sustained disability.

The other indicator of the rule of law, legal aid for the disabled, also finds no place in market oriented policies, district planning and funding as also the promotion of officers. District development results in districts of the disabled. The district judiciary and the bar have no accountability for the failure of legal aid in the district. Legal aid delivery to the disabled is not a factor to be taken into account as part of the supervision by the superior courts of the district courts. Accordingly countries with specific laws for legal aid, with Constitutions that declare legal aid to be fundamental in the governance of the country and with enactments for the physically and mentally challenged, produce more and more disabled children. Development becomes an exercise in legal disability.

Given this state of the national eco-legal orders of developing countries, the international movement is for the right to development instead of the right to just development. There is no initiation of a United Nations debate on marrying justice to development, developing indices of eco legal failure with disabled children as one of the indices, defining physical and mental disability and methods of apportioning the liability for such growth of disabled numbers. The legal concept of preventable disability is not even born.Justice is knocked out of development. There is none to blame for the marred economic present and the mortgaged future that the failure of preventable disability represents. The absence of any international pressure on the economic and legal fronts ensures the continuance in the developing countries of colonial legal systems wherein justice is obtainable only by those who can afford to reach the courts. Preventible disability is not a part of the legal vocabulary of even those developing countries that have human rights enactments and infrastructure under such enactments. Legal systems are not seen as systems of administration of justice that economically empower people to reach justice against disability. WHO has predicted a grim life style future of increasingly large numbers of the mentally challenged. Hence the nature of eco-legal systems at the national level having the capacity and ability to meet this predicted future is a matter that affects human kind.

This issue of FM brings you the latest developments in India concerning FDI in the telecom sector, the national pharma policy, the publication of a compendium on India's FDI, RBI master circulars on foreign investments in India, external commercial borrowings and trade credits, the latest tax judgments concerning FIIs and an informative article on the new French anti-takeover measures. The monsoon that gives the waters of life to India, is here with the last variety of luscious mangoes. For those wanting to escape the humidity FM suggests the Lahaul Spiti valley for comfort and peace. Enjoy the reading and the rains.

_KM

Clippings

(Indian PM with the American President at G-8 Summit in St. Petersburg)

The World Bank has approved two credit loans for a total of $ 200 million for the National Agricultural Innovation Project in India, which would enable this significant sector to grow at 4 per cent per annum and usher in the second green revolution..

The development of infrastructure in the country, highways, ports and airports will see an investment of Rs 3,20,000 crore in the next six years.

According to a report released by Kelly Services, major trends in both the in-and outbound call centre industry in the region shows India having the highest recruitment pace at 15-20 per cent.

CORPORATE

• Pharma policy formulated

The government today announced the much-awaited national pharmaceutical policy fixing the generic drug trade margin at 15 per cent for wholesalers and 35 per cent for retailers as against the earlier inflated prevailing margins.

The policy also seeks to strengthen the drug regulatory system and the patent office, while laying emphasis on developing human resources in pharmaceutical sciences by opening more institutions on the pattern of the National Institute of Pharmaceutical Education and Research (NIPER), Mohali. Maximum Retail Price (MRP) would be inclusive of all taxes as in the case of all other packaged commodities. Some exemptions have been provided for certain drugs from the price control. New drugs developed in India through product patent, process patent and new drug delivery systems would be exempted from price control for five years.

Price monitoring cells in the state drug controller offices with funding from the Government of India would be set up under the policy. The draft policy along with Cabinet Note has been circulated to all departments for their comments. On receipt of their comments it would be put up before the Cabinet.

• India Inc upbeat on foreign funds

Companies raised $12.77 bn, up 63% in the first half. Funds raised by Indian companies from overseas markets during January-June 2006 were up 63 per cent over a year earlier. Companies across sectors raised a total of $12.77 billion in the first half of 2006 against $7.83 billion a year earlier. In the whole of 2005, Indian companies raised a total of $17.18 billion from overseas markets.

The aggregate amount raised overseas was higher in the first six months of 2006, but there was a 56 per cent drop in funds raised through depository receipt issues during January-June 2006 compared with a year earlier.

The highest amount raised was in loans. Companies raised $6.96 billion in the first half of 2006, 116 per cent more than $3.21 billion a year earlier. Bharat Oman Refineries raised $1.34 billion, Tata Steel and Reliance Infocomm $ 500 million and ICICI Bank $600 million.

The next most popular instrument for raising funds overseas was foreign currency convertible bonds (FCCBs). Companies raised 4.02 billion in 2006 against $1.60 billion in the first half of 2005. The amount raised through FCCBs was 150 per cent more in 2006 from a year earlier.

Funds raised through overseas equity issues amounted to $1.10 billion, down from $2.68 billion in the first half of 2005. The amount of debt raised from the domestic markets was Rs 32,247 crore, nearly 20 per cent more than Rs 26,900 crore a year ago.

• Regulator for Airline Industry postponed

The Union Cabinet today has deferred its decision on a Bill to set up an independent regulator for the airline industry, while approving extension for compliance of conditions with regard to enhancement of FDI ceiling in the telecom sector. The Cabinet headed by Prime Minister Manmohan Singh discussed the Airport Economic Regulatory Authority (AERA) Bill, but the Defence Ministry has sought some clarifications. The AERA is expected to deal with issues of pricing and competition in airports, particularly in view of private companies entering the airport arena. The new regulator will be independent of the existing Directorate-General of Civil Aviation (DGCA) that deals with technical aspects of aviation.

• Three-month extension for FDI in telecom

Meanwhile, the Cabinet granted three-month extension to the proposal of the Department of Telecom seeking extension for ensuring compliance of conditions with regard to enhancement of FDI ceiling

from 49 per cent to 74 per cent in the telecom sector.

The Department of Telecom had sought the Cabinet approval to extend the deadline for meeting the FDI guidelines by three months from July 3 to October 2. This will give more time for further consultation with different stakeholders and in the meantime maintain the continuity of operation in the telecom and IT sectors, Parliamentary Affairs Minister P R Dasmunsi said after the meeting.

The government received various representations for reconsideration of the conditions imposed by it in the Press Note issued on November 3, 2005, regarding the enhancement of the FDI ceiling from 49 per cent to 74 per cent in the telecom sector. Accordingly, the Cabinet gave its ex-post-facto approval to proposal of DoT to extend the correction time by four months with effect from March 3 to July 2. Now, this deadline has been extended by another three months.

Foreign Direct Investment (“FDI”)

• FDI Policy 2006

The Union Minister of Commerce and Industry, Mr. Kamal Nath, released a compendium on India's FDI on April 19, 2006 which is a compilation of the current FDI policy of India and the relevant Press Notes of the Department of Industrial Policy and Promotion (“DIPP”) on FDI.

The policy contains 3 sections, which are as follows:

- Section A gives an overview of FDI policy. In the sectors listed in the statement, FDI is allowed only in the indicated activities subject to the equity limits and/or other conditions, as indicated. FDI in all sectors/activities is subject to sectoral guidelines and requirements. FDI is not permitted in Retail trade (except Single Brand product retailing); Lottery; Gambling and Atomic Energy. In the remaining sectors/activities, FDI up to 100% would be allowed on the automatic route.
- Section B contains relevant Press Notes on FDI policy and procedures in a chronological order.
- Section C deals with FDI inflow statistics since 1991, including the country-wise and sector wise details. It also gives FDI inflow statistics.

• Press Note 5 of 2006 series

The DIPP issued Press Note 5 of 2006, which amends the enhancement of FDI ceiling from 49 % to 74 % in the telecom sector. This Press Note amends the earlier Press Note 5 of 2005 series, which was dated November 3, 2005 in so far as the time limit allowed for correction is concerned. Under Press Note 5 of 2005, an initial correction time of 4 months from the date of issue of Press Note 5 was allowed to existing licensee companies providing telecom services for ensuring adherence to the revised conditions. This time limit has now been extended till July 2, 2006 now.

• FDI inflows in India

The DIPP, on May 11, 2006 issued a Press Release giving details of FDI inflows in India. The said Press Release states that FDI in equity in 2005-2006, which was USD 5.135 billion is the highest FDI in equity in the country during any year. The Press Release further goes on to say that this represents a 60% increase over the corresponding figure of the last year. Further, FDI for March 2006 has been reported at USD 831 millions, which is 200 %

over the inflows of March 2005. The aggregate FDI flow for the year 2005-2006, as per the Press Release, is expected to be USD 8.3 billion, which would be 50% higher than the aggregate flows for the last year at USD 5.535 billion.

• Master Circular on Foreign Investments in India

The RBI issued a Master Circular (RBI/2006/07/20 Master Circular No.02/ 2006-07) on Foreign Investments in India dated 1st July 2006. The Master Circular also covers “Acquisition of Immovable property” by non – residents and foreign investment in the capital of partnership firms or proprietary concerns. The Master Circular consolidates the existing instructions in respect of above areas in one place and has been issued with a sunset clause of one year and would stand withdrawn on July 1, 2007.

• Master Circular on External Commercial Borrowing and Trade Credits

The RBI issued a Master Circular (RBI/2006-07/25 Master Circular No. /07/ 2006-07) on External Commercial Borrowings and Trade Credits dated 1st July 2006. The Master Circular consolidates all existing instructions on the subject of” External Commercial Borrowings and Trade Credits” at one place .The Master Circular is being issued with a sunset clause of one year. This circular will stand withdrawn on July 1, 2007.

TAXATION

India, Japan exchange notes on amending income tax treaty

India and Japan have exchanged diplomatic notes indicating both countries' legal approval on the protocol amending the income tax treaty between the two nations. The protocol would reduce withholding tax from 20 per cent to ten per cent. The high rate of 20 per cent withholding tax on fees for technical services was a big deterrent to the Indian IT industry's progress in Japan. Japanese companies operating in India are also beneficiaries of this tax reduction.

In Japan, the amendment will be with effect from July 1 this year with respect to taxes withheld at source and India from April 1, 2007.

On the other hand, the amendments will come into force from January 1 next year with respect to taxes on income not withheld at source in Japan and from April 1 next year in India.

FIIs get relief on capital gains tax front

A special bench of the Income-tax Appellate Tribunal in Mumbai ruled that FIIs could set off long-term capital losses against short-term capital gains. The ruling applies to all cases until financial year 2002, as the Income- tax Act was silent on whether the losses could be set off in such a manner. So, FIIs set off long-term capital losses against short-term gains because short-term gains were taxable at a higher rate of 30% whereas long-term gains were taxed at 10%.

Aviation ministry for shifting ATF to declared goods list

With a view to reduce the sales tax incidence on the fuel, which is currently as high as 39% in some States, and thereby bring down the cost of airline operations, the civil aviation ministry has moved a Cabinet note on civil aviation policy which it proposed shifting aviation turbine fuel (ATF) to the declared goods category. Under the Central Sales Tax (CST) Act, a declared good will not attract sales tax at more than 4%. Currently, ATF accounts for 35-40% of the cost of an air ticket in the domestic sector. Besides the varying and normally high sales tax (ATF is outside Vat), there is an 8% central excise duty on the aviation fuel