

CORPORATE

UPDATES ON RECENT CORPORATE REGULATORY DEVELOPMENTS

Issue 001 / 28 May 2011

GREEN SIGNAL TO MULTIPLE JOINT VENTURES IN THE SAME FIELD

The much-awaited abolition of the controversial Press Note 1 of 2005 (“Press Note 1”) has finally been brought in by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India (“DIPP”) with effect from April 1, 2011 through its Consolidated FDI Policy, Circular No. 1 of 2011. It is indeed a welcome development from the perspective of many a foreign investor that has cried itself hoarse about the discriminatory nature of the erstwhile Press Note 1 (a successor of Press Note 18 of 1998).

To recall the history of the overarching policy, attention is drawn to Press Note 18 of 1998 of the DIPP (“Press Note 18”) whereby the automatic route for FDI and / or technology transfer / trade mark agreement in the same or allied field in India was simply not permitted. Such a restriction to carry on business in the same or allied field continued for seven long years till January 12, 2005 when the DIPP came out with Press Note 1 wherein following relaxations were introduced:

- (i) Foreign collaborators having joint ventures or technology transfer / trade mark agreement were not required to seek Government approval;
- (ii) Restriction was narrowed down from ‘same or allied field’ to ‘same field’; and
- (iii) Foreign investors willing to enter into a fresh venture / collaboration in the ‘same field’ were exempted from prior Foreign Investment Promotion Board (“FIPB”) approval requirements in cases where:
 - a. fresh investment was by venture capital fund registered with Securities and Exchange Board of India;
 - b. foreign investors already (up to January 12, 2005) had a sick or defunct venture / collaboration; and
 - c. existing investment in the joint venture by either of the parties was less than 3%.

Though a diluted version of its predecessor Press Note 18, Press Note 1 continued to draw criticism not just for its discriminatory nature but also for the de facto power that it inevitably bestowed upon the Indian Partner by requiring ‘No-Objection’ certificate (“NOC”) from the previous Indian joint venture partner / technology collaborator / trademark licensee where one existed prior to January 13, 2005 for considering fresh proposals of a foreign investor in the same field.



Continued...

To elaborate on the twofold disadvantage faced by foreign investors who had invested before 2005:

- (i) Press Note 1 was discriminatory in that the restrictive condition stipulated therein applied only to “existing ventures” as on January 12, 2005 and not to ventures / technology transfers / trade mark agreements entered into thereafter;
- (ii) Indian joint venture partners / technology collaborators / trade mark licencees would often demand large sums as they enjoyed the power of denying the NOC for any fresh proposals in the same field by their foreign partners.

The change in policy is the consequence of incessant efforts of stakeholders coupled with the realization by DIPP itself that the restrictive condition stipulated in Press Note 1 was not only incompatible with the country’s emerging Competition Law but had also inadvertently resulted in diversion of valuable FDI away from India. It was also not lost upon the Government of India that domestic companies had reached the level of commercial and economic maturity where they could adequately protect their business interests without Government intervention. This shift in approach of the Government is evident from the fact that DIPP has done away with Press Note 1 in toto not retaining even its advisory proposition of embodiment of a ‘conflict of interest’ clause in joint venture / technology collaboration / trade mark agreements post January 12, 2005.

Whatever be the reason behind the abolition of Press Note 1, DIPP has created a level playing field by placing foreign investors who invested before 2005 at par with those who invested thereafter in Indian joint venture or technology transfer/trade mark agreement in the same field. Under the current policy, the Government does not impose any restriction or regulate in any manner multiple joint ventures in the same field. This development should go a long way in channeling greater FDI into India by henceforth providing peace of mind to foreign investors who have entered into / wish to enter into multiple joint ventures in the same field.

If you have any questions or queries regarding this bulletin, please contact:

Rajiv Sharma
Partner
+91-9350820610
rajiv@varenyalaw.com