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TELECOMMUNICATIONS, MEDIA & TECHNOLOGY (TMT)

TOPICS

» Proposed Relaxation In FDI Cap For The Indian Telecommunications Sector

The Indian telecommunications (telecom) sector has grown in leaps and bounds in recent years. As of August end, the Indian mobile subscriber base had reportedly risen to 40.6 million subscribers, of which GSM subscriber constitutes 32 million and CDMA 8.6 million. By 2007, the fixed line subscriber base is expected to touch 46.7 million and the mobile subscriber base 115.4 million. Market players expect the rate of expansion of the mobile subscriber base to pick up, thanks to the recent price cuts.

Foreign investors have till date pumped into the Indian telecom sector, over US $ 2 billion through direct investments in operations and over US $ 1 billion through holding companies.

Need for investments:

Telecommunication companies (Telcos) usually have high valuations and huge investments. It is estimated that Rs. 50,000 crore will be required in this sector within the next three years to meet growing demand. This money can come in through either domestic investments or through foreign investments. Although it has been argued that the large Telcos can easily raise funds in international markets vide the equity route while the smaller ones can exit. Foreign investment accounts only for 10% of the total investment in the telecom sector in India however owing to the high cost involved operators have been reportedly facing difficulties in meeting funding requirements.

The proposal:

In the Union Budget 2004-05, the Central Government proposed to raise the Foreign Direct Investment (FDI) caps for the telecommunications sector from 49% to 74%. The FDI would include investments through Foreign Institutional Investors (FIIs), Non-Resident Indians (NRIs), Foreign Currency Convertible Bonds (FCCBs), American Depository Receipts (ADRs), Global Depository Receipts (GDRs) and convertible preference shares. Although the Home Ministry has recently withdrawn its objections on security grounds to the proposed increase, the proposal has led to the Left parties submitting notes to the ruling alliance against such an increase, citing examples of foreign nations and security concerns. There are also divisions among the erstwhile National Democratic Alliance regarding the proposed relaxation. Serious doubts currently exist as to whether the proposal will actually go through.

Draft Cabinet Note:

The draft Cabinet Note (Draft Note), prepared by the Department of Telecommunications (DoT), as it stands today does not directly oppose hiking the FDI limit but in addition to recommending that approvals for increase be on a case-to-case basis, the Draft Note has provided that operators should ensure that the 74% ceiling (including pro-rata shareholding by promoter companies and their holding companies) is not crossed through the pyramid route, further in case of violation the license itself would be cancelled. The Finance Ministry in turn has pointed out that it will be very hard for a company to keep track of the shareholding pattern of all its shareholders and subsidiaries. The Finance Ministry reportedly states that the condition will make domestic companies unattractive to foreign investors.

The Draft Note proposes to make *security clearance* necessary for Telcos seeking to raise FDI over 49%. The Telcos will also be obliged to provide total access of its network to security agencies.

The Draft Note also seeks to make it mandatory to amend the Articles of Association and has recommended that when FDI is lifted above 49%, management control should remain with the Indian promoters (with a minimum of 26% of the paid up capital being held by Indians and more than 50% of functional directors, including the Chairman, CEO and MD, be appointed by the Indian promoters).

DoT has proposed that at least 10% of the equity be held by a serious Indian entity, in case foreign equity in the company is to be raised above 49%, the ministry also points out that it will be difficult to determine exactly who is a serious player.

Regulations in other nations:

In Organization for Economic Co-operation and Development (OECD) Economic study, telecom was ranked to be the second most restricted sector, among OECD countries, when it came to FDI. This restriction is reportedly generally justified on grounds of national security and/or national sovereignty, although it may not be justified on social cost-benefit grounds.

There are no foreign ownership restrictions in telecommunications in the United Kingdom. However, although the United States does not have a direct limitation on foreign investment in telecom, it does have equity restrictions on companies holding broadcast and common carrier radio licenses (20% limit for direct foreign ownership; and indirect foreign ownership limited to 25%, if not in public interest, for certain wireless communications licenses). This is, arguably, an important de facto restriction on foreign investment in US telecom, particularly for mobile telephony.

From 2000, under its full liberalization policy, the Hong Kong Government has opened to competition all its sectors of the telecommunications market local and external, services-based and facilities-based. However, the telecom sector in China is heavily regulated, with foreign investments capped at a maximum bracket of 49%, depending on the service being invested in.

Conclusion:

Technological innovation has driven changes in the underlying economics of the industry. There is increasing convergence between different sectors. In addition, the growth of the internet and the emergence of different broadband access technologies create new challenges and opportunities for the sector.

There is a view that from an economic angle, non-discrimination between domestic and foreign investors is generally the best policy in the absence of a clear-cut market failure or threat to national security.

Unlike the case of increase in FDI limit for the insurance sector where an amendment to the IRDA Act will be required, the proposed increase in FDI for the telecom sector is merely a policy decision and as such requires no amendment of any legislation needs and as such no sanction of parliament. After due debate and consideration of all pros and cons, the Central Government, should make a final decision as to whether to go through with its proposed increase or not. While doing so however it should ensure that the huge investments that will be needed could be adequately and readily raised. In the interest of growth in Indias telecomsector and encouraging investment a clear, transparent and long-term FDI policy for the telecom sector is needed.

Rajesh N. Begur and Shawn DAguiar

» New CBDT Circular To Withdraw January 2, 2004 Circular & Tax Bpos Qualifying As Permanent Establishments

The Central Board of Direct Taxes (CBDT) has issued a new circular withdrawing its controversial Circular (CBDT Circular No. 1/ 2004) dated January 2, 2004. The January circular distinguished for tax purposes between core and incidental services and dealt with the various Double Taxation Avoidance Agreements (DTAAs) and the Income Tax Act of 1961 (Act).

As per the new circular CBDT announced that tax however would be levied on the arms-length income of a foreign companies BPO arm, which qualifies as a Permanent Establishment (PE), as guided by Article 5 of the DTAAs.

A non-resident or a foreign company is treated as having a PE in India under Article 5 of the DTAAs entered into by India with different countries, if the said non-resident or foreign company carries on business in India through a branch, sales office etc. or through an agent (other than an independent agent) who habitually exercises an authority to conclude contracts or regularly delivers goods or merchandise or habitually secures orders on behalf of the non-resident principal. In such a case, the profits of the non-resident or foreign company, attributable to the business activities carried out in India by the PE, are taxable in India under Article 7 of the DTAAs. Expenses incurred for the purposes of the PE, including executive and general administrative expenses, whether in the State in which the PE is situated or elsewhere are deductible. The position of taxable foreign entities of non-treaty countries however still remain unclear.

While the circular removes some of the old problems, it introduces several more hurdles, including the concept of independent and dependant agent. As per the circular a start-up local third-party service provider working for only one foreign company can now be classified as a dependant agent and be asked to pay tax. This is expected to affect start-ups or newly set up BPO companies as they typically start up with only one client. The circular has introduced a new concept called habitual conclusion of contracts as the basis for taxation. In according to which, if the BPO entity is responsible for concluding a sales contract in the country then it would be liable for taxes.

The circular envisages that even if the companies follow an arms length policy for reporting revenues and taxation, they would not be exempt from taxes. This has caused great concern in certain sections of the Industry and have made BPOs edgy.

Ashu V Thakur and Shawn DAguiar

[TOP]

» Has Your Copyright Been Infringed?

A person may choose any idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently fromothers. The Copyright Act, 1957 (Act) does not contain an explicit definition of infringement, however, it is settled law that unauthorized use of copyrighted material, inconsistent with the exclusive rights enumerated in section 14, constitutes copyright infringement. However, use of copyrighted material, not touching upon a right secured by section 14, no matter how widespread, is not infringement.

It is not necessary that the alleged infringement should be an exact or verbatim copy of the original. The fundamental fact which has to be determined where a charge of infringement of copyright is made is whether or not the defendant not only adopted the idea of the copyrighted work but has also substantially adopted the manner, arrangement, situation, or scenes, with minor changes, super additions or embellishments here and there. Indeed, if on a perusal of the copyrighted work, the defendants work appears to be a transparent rephrasing or a copy of substantial and material part of the original, the charge of plagiarism stands proved. Care, must however be taken to see whether the defendant has merely disguised his piracy or has actually used the original idea in a different form, tone, or tenor so as to infuse new life into the idea. In the latter, there is no violation of copyright.

The Supreme Court has laid down following propositions on the issue of copyright infringement:

- There can be no copyright in an idea, subject matter, theme, plot or historical or legendary fact and violation of the copyrights in such cases would be confined to the form, manner, arrangement and expression of the idea, etc. by the author of the copyrighted work.
- When the same idea is being developed in a different manner, similarities are bound to occur where the source is common. In order to be actionable, the copy must be a substantial and material one, which leads one to the conclusion that the defendant is guilty of piracy.
- One of the safest and surest tests to determine copyright violation is to see if the reader, spectator or viewer, after having read or seen both works, is of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.
- Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of a violation of copyright would arise.
- Where however apart from similarities appearing in the two works there are also material and broad dissimilarities, this would negate any intention to copy the original. The coincidences thus clearly incidental, there would be no infringement of copyright.
- As an infringement of copyright amounts to piracy it must be proved, by clear and cogent evidence, after applying the various tests laid down.

In *K. R. Venugopal Sarma v. Sangu Ganesan* {1972 Cri LJ 1098 (Mad)}, it was held that an infringement of the copyright was complete even though the reproduction was not exact, but the effect on the mind by study of the two pictures was that the respondents picture was nothing but a copy of the plaintiffs picture. The Court while applying the various tests observed that one picture can be said to be a copy of another picture only if a substantial part of the former picture finds place in the reproduction. The degree of resemblance between the two pictures, which is to be judged by the eye, must be such that the person looking at the respondents picture must get the suggestion that its is that of the appellant.

It was pointed out by Copinger the noted jurist that what is protected is not the original thought but the expression of that thought in some concrete form. In this connection, Copinger observed that there is an infringement only if the defendant has made a substantial and unlawful use of the form in which that thought or information is expressed. He is not liable if he has taken the essential ideas, howsoever original, and expressed them in his own form, or if he used them for his own purposes.

In many cases the alleged infringement merely resembles it in a greater or lesser degree. Copinger has submitted that the test to determine whether an infringement has taken place should be as to whether the defendant has, in producing the alleged infringement, made a substantial use of those features of the plaintiffs work in which copyright subsists; if he has, exercised unlawfully the sole right which is conferred upon the plaintiff, it would amount to a trespass on the private domain owned and occupied by the author of the copyright.

Ashwin Jajal

» Legal Snapshots

Proposed Feeder Schemes for domestic mutual funds:

Presently, the Securities and Exchange Board of India (SEBI) regulations allow domestic mutual funds to invest only up to 10% of their net assets, subject to an overall ceiling of US $50 million, in foreign securities. The Association of Mutual Funds in India (Amfi) has recently sought SEBI approval to allow domestic mutual funds to float feeder schemes. With these schemes investments will be made in mutual fund schemes of other countries. These schemes may fall outside SEBIs US $ 50 million cap.

Overhaul of mutual fund investment envisaged:

The Securities and Exchange Board of India (SEBI) is reportedly working on a proposal to make it mandatory for mutual funds to allocate units to investors on Net Asset Values (NAVs) at the time the payment cheques for the units are cleared, instead of the present practice of allocation at the price prevailing at the time of submission of the applications. SEBI is also considering making Demat accounts single common investment accounts, which may then also be used for buying and selling mutual fund units and NAV allocations, especially since the underlying bank account will facilitate faster payments through the Electronic Clearing Settlement.

Transaction Tax kicked off from 1st October:

The new Securities Transaction Tax (STT) Rules and provisions have been made effective along with the Capital Gains provisions from October 1, 2004. The STT will be levied on the volume weighted average price for all shares. The STT rates are 0.15% on delivery-based trades, where the levy will be equally split between the buyer and the seller. An STT rate of 0.015% will be levied on sellers in non-delivery based equity transactions and 0.01% on sellers of derivates. Wherever STT is paid, long-term capital gains tax will be nil, whereas short-term capital gains will be taxed at 10%. The benefit on set-off on STT against tax paid on business income has also being extended across all categories of investors paying the levy. No STT will be levied on mutual fund units allotted to investors and it will only be imposed when the units are sold back to the Mutual Fund.

T+1 settlement on schedule:

The Chairman of the Securities and Exchange Board of India (SEBI) has recently stated that everything from the securities side is ready and on schedule, for the introduction of T+1 settlement on Indian bourses. There is, however some delay on the cash side that would be settled soon. Further, he expressed concern about Real Time Gross Settlement and stated that unless there are funds coming in T+1 would not succeed.

New licensing structure for telecommunications:

The Telecommunications Regulatory Authority of India (TRAI) has suggested three categories of technology neutral licenses unified license, class license and licensing through authorization. A unified licensee may offer national and international long distance services, fixed and mobile services and even broadcasting services. A class licensee will have one-way connectivity (eg. VSAT services) and the last class of license will allow the licensee to offer bandwidth and infrastructure services to service providers. TRAI has also issued draft recommendations on the Unified License regime and has suggested the reduction of the one time entry license fee by over 80%. For which there will be two components: Rs. 107 crore for National Long Distance and International Long Distance services plus a fee on the number of circles in which they wish to operate their services, to be calculated on the set criteria. Further, the revenue share for the government is also to be reduced to 6%. The new recommendations however do not permit inter-connectivity of different circles.

Proposed Ombudsman for the Telecommunications Sector:

Although consumers can take recourse to the Consumer Courts to voice their grievances, the Telecommunications Regulatory Authority of India (TRAI) has recommended the establishment of an Office of an Ombudsman for the Telecommunications sector in order to facilitate the quick redressal of complaints. However, in light of the telecom service providers not being in favour of funding the proposed Ombudsman, TRAI feels that the same may be funded from License fees (a maximum of an additional 0.01% of the service providers revenue) vide an amendment in the License, to do which the Licensor has full power and authority.

Nod likely for FIIs in news channel:

FIIs are likely to be allowed to invest in Indian news channels. The FII investment may be capped within the existing foreign Direct Investment limit of 26%. The Government is preparing a draft proposal to amend the existing news channels up-linking norms for this purpose. Under the present norms investments by FIIs are not permitted in Indian news channels. The Government is yet to decide whether the FII investment should be allowed only in listed companies or funds should be allowed to be invested in un-listed companies also. The Government is expected to bring in the changes in the news channel up-linking norms before October 31, 2004.

More FDI segments placed under automatic route:

As a means to boost the inflow of Foreign Direct Investment (FDI), the government has decided to liberalize the norms for converting preference shares and foreign loans into equity, allowing these proposals to bypass the need to approach the Foreign Investment Promotion Board (FIPB) and go through the automatic route (managed by the Reserve Bank of India) instead. FDI clearances are also expected to speed up the transfer of shares from residents to non-resident investors and the conversion of loans (including External Commercial Borrowings) into equity. For Financial Services however, transfer of equity from resident to non-resident investors would remain subject to FIPB clearance. Further, all such clearances through the automatic route would be subject to takeover norms, pricing guidelines, sectoral caps and other stipulations.

Changes envisaged in the Companies Bill, 2004:

It has been proposed to include Merchant Bankers, Share Transfer Agents, Registrars and Bankers managing Initial Public Offerings in the definition of officers in default. This has opened them up to the liability of punishment and imprisonment for fraudulent public offers.

Non-executive directors have also been included in the definition of officers in default where any contravention has taken place with his consent, connivance or is attributable to any neglect. Further, promoters and those in control of a companys affairs will be held responsible for corporate defaults and violations. Specific non-executive directors, suspected and found to be directly or indirectly involved in the default will also be held responsible. If liability for an offence cannot be attached to any other employee, then the entire board of directors, including non-executive members, will be held liable. In an attempt to ensure consistency between the definitions in companies law and capital market regulations, a Promoter has been defined to mean a person(s) who has control over the affairs of the company, directly or indirectly, whether as a shareholder, director or otherwise and includes any person(s) named as promoters in any offer document of securities but does not include any person(s) named by reason of his acting in his/her professional capacity.

The Bill also provides for secretarial compliance audits. These will be carried out on the Central Governments orders, where it believes that the company is not carrying out its affairs in accordance with the Act. The audit report will be submitted to the government for necessary action. Further, all documents, forms and returns to be filed by the company with the Registrar of Companies or any other statutory authority must be certified by a company secretary.

Cabinet approves amendments to Banking Regulation Act, SCRA & Depositories Act:

Following a Supreme Court order on the issue, the Union Cabinet approved amendments to the Banking Regulation Act giving powers to the Reserve Bank of India to issue licenses to multi-state cooperatives, and bring them under the ambit of the Deposit Credit Insurance and Guarantee Scheme.

The Cabinet further approved amendments to the Depositories Act, to give a statutory backing to the derivatives market, presently outside the purview of the definition of securities; and the Securities Contracts (Regulation) Act, 1956 (SCRA) enabling the Securities and Exchange Board of India (SEBI) to approve the demutualisation of the stock exchanges in the country. These Amendment Bills will now have to be placed before parliament in order to become law.

Consolidation for public sector banks shortly:

In order to facilitate the creation of world class banks, improved synergy and the implementation of the Basel II norms by commercial banks, the Finance Minister (FM) recently announced that amendments would be made in the banking and income tax (Feb 2005) legislations for public sector bank consolidation. Further, the boards of the concerned banks and not the finance ministry would determine consolidation. Presently, banks may consolidate only vide a special Act of Parliament or under Section 45 of the Banking Regulation Act.

Interchangeability of FII and FDI caps in private banks:

As against the RBI discussion paper on ownership norms of private banks, the committee on liberalization of foreign institutional investment (FII) in India (a government sponsored committee) has supported interchanging of the distinction between foreign institutional investment and foreign direct investment (FDI) in private sector banks up to a limit of 74%. At present foreign institutional investment in private banks can go up to 49%, with the approval of the board of directors of the bank, if the recommendations of the group is accepted by the government, the limits would be interchangeable between FII and FDI up to 74%. However the FDI limit in Banks is still open to speculation and debate with a possibility that may cause differences between the regulator and the Government of India on this issue. The Reserve Bank of India (RBI), upon the fulfillment of certain criteria and its prior approval, will allow investors to hold over 10% equity in a private bank. It will consider, among other things, the source and stability of funds and the ability to access capital. The RBI is also willing to give more time (three years as per its draft guidelines) to the promoters of private banks to dilute their stake holding.

Relaxation on norms for bank investment portfolios:

The Reserve Bank of India (RBI) has recently announced that it would be setting up an internal group to review the guidelines on the classification of investments by banks. The standing committee on financial regulation will thereafter discuss the report. RBI has revised the guidelines and stated that shifting is to be done on the date of transfer at the lower of the acquisition cost, book value or market value. Further, the depreciation, if any, on the transfer is to be fully provided for. Non-Statutory Liquidity Ratio securities part of the HTM category may remain in that category, however no fresh non-SLR securities will be permitted to be included therein.

Venture Capital Funds for the Entertainment Industry:

The NK Singh Committee on venture capital funds (VCFs) for the entertainment industry is expected to shortly submit its report to the Information and Broadcasting Ministry. The mandate of the committee was to draw a roadmap for venture capital investment and suggest policy changes to facilitate greater flow of investments into the entertainment sector.

The Committee has, inter alia, suggested:

- Setting up a venture capital fund with a Rs. 200 crore corpus, as seed money, to finance the entertainment sector in the country;
- Professional management of the fund through an asset management company; and
- All contributions made to the fund be exempt from tax.

Mandate to service providers for installation of security monitoring systems:

The Information Bureau (IB) has taken the view that various service providers have failed to comply with their license requirements of installing security monitoring systems before launching their value added services which allow high-speed data transmission services, like fast internet access and sending and receiving mails and photographs. These services include Packet Switched Data Network (PSDN), General Packet Radio Services (GPRS) and Enhanced Data for GSM Evolution (EDGE), the technology used for various services like SMS and Push-to-talk Over Cellular (POC) Services. If the service providers do not install proper monitoring equipment in a timely manner, they face the prospect of being shut down.

Independent regulatory body for content recommended:

Rejecting the Information and Broadcasting Ministrys suggestion to empower Prasar Bharati to monitor content telecast by broadcasters and cable operators, the Standing Committee on Information Technology (IT) has recommended the constitution of an independent and permanent regulatory body, at the center and state levels, to regulate indecent and immoral content telecast in television. The committee has also called for appropriate amendments to the Cable Television Network (Regulation) Act, 1995. The Ministry, presently in charge of licensing and content in the broadcasting sector, is in favour of a separate Broadcast Regulatory Authority of India. Internal discussions are on regarding whether media and broadcasting should be a part of convergence along with telecom and IT. If not, whether the media authority should have jurisdiction over only content or carriage too.

Payments to foreign companies by another foreign company on behalf of Indian company not taxable:

The Authority for Advance Ruling, in the matter of Airports Authority of India (AAI), has held that payments made abroad by a foreign entity to another foreign company on behalf of an Indian entity, is not taxable in India. The ruling was passed on the reasoning that the income did not arise in India, as AAI did not receive any money from the paying foreign company. Further, the only task performed by AAI in this case was approving the quality of the feasibility study and hence the transaction could not be construed as royalty. Further the ruling pointed out that the US company receiving payment had no permanent base in India, it only engaged some Indian vendors to assist AAI and the its visiting experts and hence would not attract Section 5(2) of the Income Tax Act.

FDI in Real Estate:

The Government is planning to allow 100% Foreign Direct Investment (FDI) through the FIPB route in real estate development in Special Economic Zones (SEZ), a cabinet note is being prepared by Department of Industrial Policy and Promotion (DIPP) to this effect. Further, it is expected that the DIPP will permit 100% FDI under the automatic route in wholesale trading for sales within an SEZ or among SEZs for exports.

Plan to permit international call centers to offer domestic call center services:

The long-pending demand of the call center industry to allow them to use the same infrastructure for serving both domestic and international clients might be accepted, as the Department of Telecommunications (DoT) is planning to do away with the stipulation of the minimum of Rs. 500 crore turnover for permitting international call centers to offer domestic call center services using the same infrastructure

New metering device proposed for CAS:

The Telecommunications Regulatory Authority of India (TRAI) is reportedly looking into alternatives to the set-top box. After the rejection of multi-service operators of the filtering device, TRAP, a new metering device has been suggested, called the Subscriber Addressability Module (SAM), capable of decrypting and sending a single composite analog output, carrying 100+ channels (that one may choose), which can be fed into 75 ohm or 300 ohm TV receiver antenna inputs.

The Down Linking Policy:

The Information and Broadcasting Ministry is preparing a down linking policy whereby it would be mandatory for television companies down linking channels into the country to be registered in India, and any violations would be met with heavy penalties, by way of fine.

» Meet the A.R.A. LAW Team

In each issue, we profile one person who is a part of A.R.A. LAW. They will also be sharing their experiences of being with A.R.A. LAW.

Ashwin Jajal was admitted to the Indian Bar in 1986, as a Solicitor on the rolls of Bombay Incorporated Law Society in 1989 and of the Supreme Court of England and Wales in 1990. Ashwin has joined A.R.A. LAW and heads the Media team.

Ashwin's area of practice is Entertainment and Media Law including Intellectual Property Rights. Ashwin has represented diverse clientele in the entertainment industry including event organizers, production houses, management groups and artists.

A.R.A. LAW is a pulsating and dynamic firm with a very professional approach towards its client. Its ability to grow and adapt to the ever-changing circumstances is commendable. A.R.A. LAW has a very promising future and I consider myself fortunate to be a part of the A.R.A. LAW family.

» Editorial Board

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