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MAY 2023

April, 2023

# LEGAL NEWS BULLETIN

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## FOREIGN LAWYERS PRACTISE IN INDIA: THE IMPACT NOW

**N K Gupta**
**Founder & Managing Partner**

As per "The Advocates Act, 1961" only advocates who are registered with the Bar Council are authorized to practice law in India. Any other individuals, such as a party involved in a legal case, can only represent themselves with the consent of the court, authority, or person overseeing the proceedings.

**The Bar Council of India has been historically opposed to the entry of foreign lawyers and foreign law firms for litigation.**

In a significant development for the legal profession in India, the Regulation body for Lawyers the Bar Council of India has issued a Notification allowing foreign lawyers to practice law in India, albeit with certain limitations. This ruling marks a departure from the earlier stance that foreign lawyers were not allowed to practice in India at all.

The Bar Council of India **Notification has been met with mixed reactions from various stakeholders in the Indian legal community.** While some have hailed the decision as a step towards liberalization and globalization of the legal profession in India, others have raised concerns about the impact of foreign competition on Indian lawyers.

The Bar Council of India now offering new possibilities for foreign lawyers interested in practicing law in India. As the legal profession continues to evolve in India and around the world, it remains to be seen how this development will impact the future of the Indian legal system.

**What we need to understand is that, how the opposition of this move can impact us.**

**1. Limited access to legal expertise:** By preventing foreign lawyers and law firms from operating in India, the Bar Council of India limits the availability of legal expertise to clients who may benefit from it. This can be particularly problematic in cases involving complex cross-border transactions or international disputes.
**2. Reduced competition**: By limiting the number of players in the legal market, the Bar Council of India reduces competition, which can lead to higher fees for legal services and reduced innovation.
**3. Hindrance to foreign investment:** The Bar Council of India's opposition to foreign lawyers and law firms can be seen as a hindrance to foreign investment in the country. Foreign companies may be reluctant to invest in India if they are unable to access legal expertise from their home countries.
**4. Missed opportunities for Indian lawyers:** By preventing foreign lawyers and law firms from operating in India, the Bar Council of India may be missing opportunities for Indian lawyers to work with and learn from their foreign counterparts, which could ultimately benefit the Indian legal system.

**Here are reviewing the notification and marking some of the pros and cons of the notification:**

Pros:
1. Protection of Indian legal profession
2. Promotes reciprocity
3. Enhances quality of legal services
4. Boost Healthy competition

Cons:
1. Restriction on foreign lawyers
2. Limited access to foreign clients
3. Potential violation of international trade agreements

Overall, opposition to foreign lawyers and law firms in India can be seen as a potential impediment to the growth and development of the Indian legal system.

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# ARTIFICIAL CHAT BOTS MAKING A DIFFERENCE

**Prem Chandra Vaish**
**Principal Director**

The Legal Profession is no a cakewalk. It involves managing multiple tasks like handling new clients, dealing with ongoing legal cases, and keeping up with administrative work, all of which require meticulous planning, perseverance, and commitment. Fortunately, the emergence of Artificial Intelligence equipped chatbots has proved to be a boon for lawyers, as they can help manage all aspects of a lawyer's daily routine.

## Artificial Intelligence for Lawyers

Generally, chatbots are primarily known for routing clients to the right lawyer by asking them a few questions. However, legal chatbots offer more than just client navigation. **They are capable of:**

- Addressing questions independently,
- Streamlining manual processes,
- Consulting Clients in petty matters,
- Drafting legal documents,
- Scheduling consultations, and
- Performing various other tasks.

They can also help with client intake by capturing accurate case details and analyzing answers to improve client service. In the legal field, chatbots have the potential **to bridge the access-to-justice gap and improve engagement with potential clients.**

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Legal Drafting takes a great deal of effort, patience, and dedication, but fortunately, Artificial Intelligence equipped chatbots are now available to make a lawyer's life easier and more efficient.

While chatbots are commonly known for directing clients to the right person, they can offer so much more than just simple client routing. These chatbots have the capability to answer clients' questions, automate tedious manual tasks, schedule consultations, and so much more. With the help of chatbots for lawyers, attorneys can maximize their productivity and focus on what they do best - providing legal advice and services.

So, whether you're a solo practitioner or a part of a law firm, incorporating chatbots into your practice can be a game-changer. From streamlining client intake to improving communication, chatbots have the potential to revolutionize the way lawyers work. Discover how you can harness the power of chatbots to optimize your legal practice and elevate your client experience.

However, **concerns about their potential to cause harm have been raised, and it is important to invest in a good chatbot that can effectively handle complex workflows** while providing tailored support to clients.
**In any case the human intellect cannot be ignored**, Human intellect is essential and cannot be ignored because it encompasses a range of cognitive abilities that are unique to humans and enable us to adapt, innovate, and create. The abilities like Creativity, Emotional intelligence, Critical thinking, Adaptability, Ethics and morality will always be a major concern for Artificial Intelligence users.

While artificial intelligence can replicate some of these abilities to some extent, it cannot fully replace the complex, multi-dimensional nature of human intellect. For example, AI-powered systems can process vast amounts of data and provide quick responses, but they lack the creativity, emotional intelligence, and critical thinking skills that humans possess.
Therefore, human intellect is essential and cannot be ignored, as it enables us to leverage our unique abilities to create, innovate, and solve complex problems. By combining the strengths of both humans and AI, we can achieve better results and improve overall.

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# LABOUR LAW: A NOTE ON CASE

**R K Gupta**
**Senior Partner**

The judgment pertains to the Contract Labour (Regulation and Abolition) Act, 1970. The settled law is that if there is no abolition of contract labour under Section 10 of the Act, and the contract between the principal employer and the contractor is not sham or nominal, then the remedy for contract labour is purely under the Industrial Disputes Act.

**Relief may be granted only if the contract between the principal employer and contractor is found to be sham, nominal, or a camouflage, and if there is direct employment by the principal employer.**

The court may apply tests such as who pays the salary, who has the power to remove or dismiss the employee, who can give directions on how the work should be done, and who has direct control over the employee.

If the contract is for the supply of labour, the labour supplied by the contractor will work under the direction, supervision, and control of the principal employer, but that would not make the worker a direct employee of the principal employer if the salary is paid by the contractor and the right to regulate employment is with the contractor.

The Act merely imposes a duty on the principal employer to pay all statutory dues, including salary and provident fund contributions if the same are not paid by the contractor, and that can be deducted from the contractor's bill.

**Merely because sometimes salary or provident fund contributions were paid by the principal employer does not make the contract labour automatically employees of the principal employer.**

The court found that the lower courts had committed a serious error in reinstating the contesting employees and directing the principal employer to absorb them as their employees, and hence the appeals were allowed, the impugned judgments were quashed, and paras 4.1, 4.2, 4.4, and 5 were set aside.

**Kirloskar Brothers Limited Vs Ramcharan and others. CA NO. 8446-8447 of 2022**

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# GOODS AND SERVICES TAX - APRIL 2023

**Rakesh Garg**
**Sr. Mentor IDT & GST**

## Period of interest in case of delayed GST refund on 13.03.2023

Recently in the case of AC Impex vs. UOI- W.P(C) No. 13881/2018 before the Hon'ble Delhi High Court, decided on 13.03.2023, the petitioner is in the business of exporting jewellery. It claimed refund for certain tax periods of the year 2017 in Jan. 2018. A deficiency memo was issued on 13.02.2018, which was cured on 16.02.2018. However, the refund was ultimately disallowed by the Department on 13.05.2018. Complete refund was finally allowed on 24.05.2019 on the direction of the Hon'ble Delhi High Court. The matter was argued by our partner Mr. Puneet Agrawal, Advocate.

Thereafter, the petitioner filed another writ petition before the Hon'ble Delhi High Court and claimed that interest should be triggered from the date when the initial application for refund was filed. On the other hand, the respondent/revenue asserts that in terms of the proviso appended to Section 56 of the CGST Act, interest will get triggered 60 days after the date when the High Court passed an order directing consideration of the application.

Mr. Agrawal argued before the High Court that the interest at the notified rate, which is presently 6%, should run from 60 days after the date when the deficiency application, qua initial application of refund filed on 16.12.2017, was cured.

**The Hon'ble Delhi High Court agreed with the arguments of Mr. Agrawal and opined that the petitioner is right in its contention that interest should trigger in accordance with the main part of Section 56 of the CGST Act, i.e., from 18.04.2018, and that interest should run under the GST up until the date when the amount was remitted to the petitioner.**

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# INCOME TAX: CASES TO LOOK BACK

**Anil Gupta**
**Sr. Mentor, Income Tax**

## AO can interfere with completed assessments u/s 153A only if incriminating material found during search : SC

**"Whether in respect of completed assessments/unabated assessments, the jurisdiction of AO to make assessment is confined to incriminating material found during the course of search under Section 132 or requisition under Section 132A or not ?"**

The revenue contended that AO has the jurisdiction to assess the 'total income' considering other material, though no incriminating material was found during the search, even in respect of completed/unabated assessments.

The matter was reached to different High Courts, and courts held that no addition could be made to completed/unabated assessments without incriminating material. The lead judgment is by the Delhi High Court in the case of Kabul Chawla v. CIT [2015] 61 taxmann.com 412 (Delhi), which has been subsequently followed and approved by the other High Courts. The Delhi High Court held that in the absence of any incriminating material, the AO could make no addition, and the AO has no jurisdiction to re-open the completed assessment.

The Supreme Court held that section 153A was added to the statute to eliminate the practice of conducting two separate assessments and taxing "undisclosed" income at a regular tax rate instead of a special rate. As a result of this amendment, in the event of a search, a block assessment for six years will be conducted.

To initiate a search assessment or block assessment under Section 153A, a valid search must be conducted under Section 132; The very purpose of the search, which is a prerequisite/ trigger for invoking the provisions of section 153A is detecting undisclosed income by undertaking extraordinary power of search and seizure, i.e., the income which cannot be detected in the ordinary course of regular assessment; Thus, the foundation for making search assessments under Sections 153A/153C can be said to be the existence of incriminating material showing undisclosed income detected as a result of the search. Accordingly, the Supreme Court upheld the view taken by the Delhi High Court in the case of Kabul Chawla; Therefore, if incriminating material is discovered during a search conducted under Section 132 or requisition under Section 132A, the AO would have the authority to assess or reassess the "total income," considering the collected material, even if the assessment has been completed; If no incriminating material is found during a search and the assessment is already completed or unabated, the revenue's only option would be to initiate reassessment proceedings under sections 147/48 of the Act, provided the conditions mentioned in sections 147/148 are fulfilled."

**(SC)(Civil Appeal No. 6580 of 2021) PCIT-Central vs. Abhisar Buildwell P. Ltd.(24-4-2023)**

## Loss due to confiscation of smuggled stock-in-trade not allowable u/s 37 :

Assessee was in the business of making jewellery. A search was conducted by the Directorate of Revenue Intelligence (DRI) officers at the premises taken on rent by the assessee and recovered slabs of silver.

Since the assessee failed to explain the source of the acquisition of silver, additions were made under section 69A and an assessment order was passed. Later, the assessee claimed loss of confiscation by the DRI official of the Customs Department was a business loss.

The matter reached the High Court, wherein loss was duly allowed relying upon the Supreme Court Ruling in the case of Piara Singh [1980] 3 Taxman 67 (SC). The revenue filed the instant appeal before the Supreme Court.

The Supreme Court held that the judgement in the case of Piara Singh wrongly relied upon as the same pertained to an assessee who was engaged in the business of smuggling (INFRACTION OF LAW) currency notes and for whom confiscation of the currency notes was a loss occasioned in pursuing his business.

In the instant case, the main business of the assessee was dealing in silver, and his business cannot be said to be the smuggling of silver bars, as was the case in the case of Piara Singh (supra).

In the assessee's case, he was carrying on an otherwise legitimate silver business. To make larger profits, he indulged in the smuggling of silver, which was an infraction of the law.
The word 'any expenditure' mentioned in Section 37 takes in its sweep loss occasioned in the course of business, being incidental to it. As a consequence, any loss incurred by way of expenditure by an assessee for any purpose which is an offence or which is prohibited by law is not deductible in terms of Explanation 1 to Section 37.
Such an expenditure/loss incurred for any purpose which is an offence shall not be deemed to have been incurred for the purpose of business or profession or incidental to it, and hence, no deduction can be made.

A penalty or a confiscation is a proceeding in rem. Therefore, a loss in pursuance to the same is not available for deduction regardless of the nature of the business, as a penalty or confiscation cannot be said to be incidental to any business. Therefore, an appeal of revenue was allowed, and an order passed by the High Court stand set aside.
**CIT vs. Prakash Chand Lunia (Dead/Late) thru LRS [2023] 149 taxmann.com 416 (SC)**

## ALP determined by ITAT can be subject to scrutiny; no absolute proposition of law that its decision is final : SC

The issue before the Supreme Court was:
"Whether the High Court was correct in holding that the determination of arm's length price by the Tribunal shall be final against which the High Court cannot entertain an appeal?"
The Supreme Court held that the Tribunal must follow the guidelines stipulated under Chapter X of the Income-tax Act, namely, Sections 92, 92A to 92CA, 92D, 92E and 92F and Rules 10A to 10E while determining the arm's length price (ALP). Any determination of ALP under Chapter X dehors the relevant provisions of the Income-tax Act is considered perverse and may be considered a substantial question of law as perversity itself can be said to be a substantial question of law.
There cannot be any absolute proposition of law that in all cases where the Tribunal determined ALP, the same is final and cannot be scrutinised by the High Court in an appeal under Section 260A of the Income-tax Act.

When the determination of ALP is challenged before the High Court, it is always open for the High Court to consider and examine whether the ALP was determined considering the relevant guidelines under the Act and the Rules.

When the determination of ALP is challenged before the High Court, it is always open for the High Court to consider and examine whether the ALP was determined considering the relevant guidelines under the Act and the Rules.

Even the High Court can also examine the comparability of two companies or selection of filters and whether the same is done judiciously and based on the relevant material/evidence on record. The High Court can also examine whether the comparable transactions have been taken into consideration properly, i.e., to the extent non-comparable transactions are considered comparable transactions or not.

**Therefore, the view that in the matter of transfer pricing, the determination of ALP by the Tribunal shall be final and cannot be subject matter of scrutiny isn't acceptable. The High Court is not precluded from examining the correctness of the determination of ALP.**

Consequently, the matter was remitted back to the respective High Court for fresh consideration after examining the arm's length price in accordance with the relevant provisions.

# THE NEW FOREIGN TRADE POLICY 2023

**Jagmohan Gupta**
**Senior Mentor,**
**Foreign Trade Policy**

## History of Foreign Trade Policy:

The post-Independence Government of India initially focused on import substitution and growth through public sector undertakings, but later introduced a Foreign Trade Policy in 1985 to promote exports of goods and services. The FTP was initially announced for three years and later for five years, with the objective of increasing exports.

The most recent FTP was implemented from 2015-2020, but due to the pandemic, its provisions were amended and modified, and the policy was extended beyond 2020. A new foreign trade policy was announced from April 2023.

## FTP 2023:

FTP 2023 is a policy document based on the continuity of time-tested schemes facilitating exports and a document that is nimble and responsive to the requirements of the trade. The policy is based on the principles of trust and partnership with exporters and aims at process re-engineering and automation to facilitate ease of doing business for exporters. The two main features of the current FTP are:

No equalization levy needs to be paid where the turnover of the e-commerce operator from the online of supply of goods/services to the specified persons does not exceed 2 crores during the financial year.

Equalization levy should be paid at the rate of 2% on the consideration received/receivable by the e-commerce operator in respect of online supply of goods/provision of services. Non-resident e-commerce operator shall mean a non-resident who owns, operates or manages a digital/electronic facility/platform for online sale of goods or online provision of services or both. Specified Service receiver:

Resident persons (or) any person using a IP address situated in India As per section 10(50) of the Income tax act, income arising to a non-resident e-commerce operator on which equalisation levy under section 165A is levied shall be exempt for the purpose of calculating taxable income for the purpose of paying income tax. Section 10(50) is inserted for the purpose of avoiding double taxation of Income.

As per section 163 of the Finance Act, 2016, any consideration taxed as "royalty" or "FTS" under the Income tax act, 1961 or under the DTAA shall not be subject to equalisation levy.

There are procedural compliances of depositing of taxes and Filing of EL returns which is independent of Income Tax Returns . DR cannot get the credit of EL paid in India since EL is independent of the Treaty .

## What has changed in this year's Finance Act (FA2023 ) w.e.f 01.04.2023

Royalty and FTS not effectively connected with PE are taxed as 10% (plus surcharge and cess) under the Domestic Income Tax Act till 31.03.2023

- FA 2023 increases the rate of tax to 20% (plus surcharge and cess)
- Amendment is effective from 1 April 2023
- Non resident can avail the benefit of DTAA subject to fulfilment of DTAA conditions

10% tax rate (plus surcharge & cess) under Act was beneficial in case of royalty/FTS payment to a resident of Canada.

- NR can avail benefit of DTAA rate subject to satisfaction of treaty eligibility, beneficial ownership, TRC, Form 10F etc.

**Assisted by**
**Mahima Katara**
**Associate Advocate**

# FDI: PRESS NOTE 3 (2020 SERIES)

## A review on FDI Policy for Curbing Opportunistic takeovers/acquisitions of Indian companies during Covid-19 Pandemic

According to the FDI Policy, FDI may be obtained either through the automatic route or the approval/government route, depending on the industry in which the firm receiving FDI is active. Prior to PN3, only FDI projects from Pakistan and Bangladesh needed the GOI's approval despite of any activity or services they are engaged in.

Government of India, Ministry of Commerce & Industry amended the FDI policy vide Press Note 3(2020) dated 17.04.2020 whereby PN3 in Para 3.1.1(a) mandates that FDI from all countries sharing land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route.

The notification also applies to any direct or indirect transfer of ownership of any existing and future FDI and any subsequent change in beneficial ownership. Further, Press Note 3 (2020) was enforced through Foreign Exchange Management (Non-Debt Instruments) Amendment Rules 2020 dated 22.4.2020 and effective from 15.10.2020. To give effect to PN3, Rule 6(a) of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (“NDI Rules”) was amended.

This approval is required for investments made in any sector of the Indian economy, whether or not the investment is made through the automatic route.

It further adds that all foreign investments made in India through the automatic route must comply with the regulations of the Foreign Exchange Management Act, 1999 ("FEMA"). The Government of India has the right to review and approve any foreign investment that is not in compliance with the aforesaid regulations.

**The purpose of Press Note 3 is to ensure that foreign investments from bordering countries or the beneficial owner of any such entity situated in such countries comply with the regulations of FEMA.**

While the government's intention was to limit investment/opportunistic takeovers by China, this has significantly affected investments from HongKong also. According to media reports of 2022, since 2020 nearly 347 proposals have been received under PN3, of which, only 66 have been granted approval so far. While the security risk posed by Chinese entities persists, there is an urgent need for Indian entities to raise funds, particularly in the current geopolitical situation and more so in strategic sectors.

**Contributed by**

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