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India

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This article surveys significant legal developments in India during the year 2014.[1]

I. India Securities Law Update

Sustained economic growth is contingent on a well-functioning securities market, which satisfies the entities' need for capital and the investors' need for liquidity. The Securities and Exchange Board of India (SEBI), the Indian securities regulator, introduced a series of changes in 2014 designed to strengthen the corporate governance framework. To increase market depth, for example, SEBI has introduced new regulations for investment vehicles for the real estate and infrastructure sectors. SEBI has also combined portfolio investment classes—Foreign Institutional Investors (FIIs), including sub-accounts, and Qualified Foreign Investors (QFIs)—to a single investment class, Foreign Portfolio Investors. A snapshot of these changes is set out below.

A. Strengthening Corporate Governance Norms to Boost Investor Confidence

SEBI amended Clauses 35B and 49 of the Equity Listing Agreement to bring corporate governance norms into alignment with provisions in the Companies Act, 2013 (2013

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1. This article provides legal developments occurring primarily from January 2014 through November 2014.

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Act).[2] One of the key changes includes the establishment of a Risk Management Committee. SEBI also imposed additional requirements, for example: approval from the audit committee for all related party transactions, and shareholder approval through a special resolution for reducing shareholding below fifty percent in material subsidiaries.[3] SEBI has also advised the stock exchanges to equip their monitoring framework to identify and monitor practices that are not in compliance with the corporate governance norms laid down in Clause 49.

B. Introduction of REITs and InvITs

Recognizing the funding deficit in the real estate and infrastructure sectors, SEBI introduced a new framework for the registration and regulation of Real Estate Investment Trusts (REITs) and Infrastructure Investment Funds (InvITs).[4] The new regulations require REITs and InvITs to be set up as trusts with registered debenture trustees. REITs and InvITs must also invest in real estate and infrastructure projects, respectively, either by themselves or through Special Purpose Vehicles (wherein REIT or InvIT hold controlling interests and at least a fifty percent share of capital or interest). The regulations further provide that the units of REITs and InvITs shall be mandatorily listed on recognized stock exchanges.

In order to operationalize and facilitate the framework on REITs and InvITs, the government has taken it upon itself to promote REITs and InvITs and has proposed a specific tax regime that would provide tax incentives to attract investors.[5]

C. Introduction of the Foreign Portfolio Investment Scheme

Through the Foreign Portfolio Investors Regulations, 2014 (2014 Regulations), SEBI introduced a single investment scheme with uniform entry norms for portfolio investors, including Foreign Institutional Investors (FIIs) and Qualified Foreign Investors (QFIs).[6] The 2014 Regulations repealed both the 1995 FII Regulations as well as the prior QFI regulatory framework.

Under the new framework, registration powers for Foreign Portfolio Investors (FPIs) are delegated to Designated Depository Participants in order to reduce processing time and administrative backlog.[7] All FPIs, including foreign corporations or individuals registered as sub-accounts and QFIs, are now allowed to invest up to ten percent in equity share capital of a company. These investments were earlier limited to five percent of

2. The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India) (entered into force Apr. 2014).
3. Clause 49 (VI)(C), Clause 49 (VII)(D) and Clause 49 (V)(F) of the Equity Listing Agreement (as amended by SEBI Circular No: CIR/CFD/POLICY CELL/2/2014 dated April 17, 2014 and SEBI Circular No: CIR/CFD/POLICY CELL/7/2014 dated September 15, 2014).
4. Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014, Gazette of India, section III(4) (Sept. 26, 2014);Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014, Gazette of India, section III(4) (Sept. 26, 2014).
5. ArunJaitley, Minister of Finance, India, Union Budget Speech 2014–2015 (July 10, 2014),¶ 26, *available at* http://indiabudget.nic.in/ub2014-15/bs/bs.pdf.
6. Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014, Gazette of India, ¶¶ 2(1)(h), 4, section III(4) (Jan. 7, 2014).
7. Under the old framework, FIIs and sub-accounts were required to be registered with SEBI itself.

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equity share capital. Unlike the FII Regulations where FIIs and sub-accounts were permitted to invest in unlisted equity shares, FPIs are not allowed to invest in unlisted equity shares.

The 2014 Regulations leave the tax treatment of FPIs unclear, and steps should be taken in the near future to clarify this issue.

D. Introduction of New Prohibition of Insider Trading Regulations

A high-level committee constituted to review the Prohibition of Insider Trading Regulations, 1992 (1992 PIT Regulations) highlighted the need to tighten insider-trading norms, and proposed new prohibition of insider-trading regulations to replace the 1992 PIT Regulations.[8] On November 19, 2014, SEBI considered this report and approved the introduction of new prohibition of insider trading regulations. Accordingly, SEBI (Prohibition of Insider Trading) Regulations, 2015 (2015 PIT Regulations) were notified on January 15, 2015 and shall come into force on May 15, 2015.[9]

The 2015 PIT Regulations shall apply to an entity whose securities are either listed or proposed to be listed on the stock exchanges. Unlike the 1992 PIT Regulations, under which mere communication of unpublished price-sensitive information (UPSI) was not an offense, the 2015 PIT Regulations prohibit insiders from communicating, providing, or allowing access to UPSI.[10]

E. Regulation of Research Analysts

In a proactive step, SEBI has also recently introduced regulations such as the Research Analysts Regulations, 2014, which seek to register and regulate research analysts and that prescribe limitations on certain activities, including trading by research analysts, the publication of research reports, public appearances, and conducting business.[11]

SEBI undertook the reforms described above with the objective of protecting the interests of investors while ensuring fairness and efficiency in the market. Through these efforts, SEBI is keeping up with the swiftly changing paradigms of the securities market.

II. Key Regulatory Developments Regarding Inbound and Outbound Investments

A. Foreign Direct Investments

Under Prime Minister Narendra Modi's government, various new initiatives are being undertaken to encourage Foreign Direct Investment (FDI). Significant developments have taken place regarding the liberalization of FDI in various sectors, including defense, the railways, and real estate construction development projects.

8. Report of The High Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992, Part III.
9. Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Gazette of India, section III(4) (Jan. 15, 2015).
10. *Id.*¶3.
11. Securities and Exchange Board of India (Research Analysts) Regulations, 2014, Gazette of India, ¶¶ 16, 18, section III(4) (Sept. 1, 2014).

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India has also recently embarked on an ambitious "Make in India" program to make the country an investor-friendly destination by streamlining existing bureaucratic processes by setting up single window clearances, e-Business portals, and investor facilitation cells.[12]

Some prominent changes in the realm of FDIs in India are highlighted below.

B. Key Sectoral Developments

1. *Defense Sector*

The cap for FDI in the defense sector has been increased from twenty-six to forty-nine percent, subject to specific conditions. The Cabinet Committee on Security (CCS) will consider FDI proposals over the forty-nine percent cap on a case-by-case basis, especially when the investment is likely to result in access to modern and state-of-the-art technology.[13]

2. *Railway Infrastructure*

FDI in the construction, operation, and maintenance of specified projects (including suburban corridor projects through a public-private partnership model, high speed train projects, and infrastructure in industrial Mass Rapid Transport System) has been opened to private participation, and FDI has been allowed up to one-hundred percent under the automatic route in such activities. Proposals involving FDI beyond forty-nine percent in security-sensitive areas still need to be brought before the CCS for consideration on a case-by-case basis.[14]

3. *Construction Development Sector*

During the budget announcements for the year 2014, key reforms were suggested for FDI in the construction development sector. These included relaxation in minimum area and minimum capitalization requirements and the introduction of schemes for promotion of affordable housing projects. The Union Cabinet subsequently approved a proposal along these lines.[15] With effect from December 3, 2014 100 percent FDI under the automatic route in the construction development sector has been permitted, which shall be subject to certain conditions.

4. *Pharmaceuticals Sector*

FDI in the pharmaceutical sector up to the extent of 100 percent in green field project under automatic route and up to the extent of 100 percent in brown field under the approval route is permitted. Also FDI up to 100 percent under the automatic route is permitted for manufacturing of medical devices.[16]

12. Make in India, http://www.makeinindia.com (last visited Mar. 24, 2015).
13. Ministry of Commerce & Industry, Press Note No. 7 (2014 series) (Aug. 26, 2014) (India)
14. Ministry of Commerce & Industry, Press Note No. 8 (2014 series) (Aug. 27, 2014) (India).
15. *See Government relaxes FDI norms for construction, real estate sector*, The Indian EXPRESS (Oct. 29, 2014, 10:00PM),http://indianexpress.com/article/business/economy/government-relaxes-fdi-norms-for-construction-real-estate-sector/; Reserve Bank of India, A.P. (DIR Series) Circular No. 60 (January 22, 2015).
16. *See* Reserve Bank of India, Notification 334/2015-RB (January 9, 2015).

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C. Other Regulatory Developments

1. *FDI in Limited Liability Partnerships*

The Reserve Bank of India (RBI) has operationalized guidelines in relation to FDI in Limited Liability Partnerships permitted under the government approval route with retroactive effect from May 20, 2011. Direct or indirect foreign investment, regardless of the nature of "ownership" or "control" of an Indian company, shall require government approval. Also, specific pricing guidelines have been prescribed with respect to capital contribution and acquisition or transfer of profit shares.[17]

2. *FDI in Equity Instruments with Optionality Clauses*

The RBI has legitimized option arrangements. Equity instruments under the FDI scheme with option clauses can now be issued to foreign investors provided that the option, when exercised, should not entitle the non-resident investor to exit at an assured return. Further, the exit is required to comply with the prescribed requirements, including compliance with the minimum lock-in period and specified pricing guidelines.[18]

3. *Revision in Pricing Guidelines for Unlisted Equity Shares or Equity Instruments*

In the case of issue or transfer of unlisted equity instruments under the FDI route, price or consideration must now be determined according to an internationally accepted pricing methodology (instead of the discounted cash flow method methodology previously allowed) for valuation of shares on arm's-length basis, duly certified by a chartered accountant or a SEBI-registered merchant banker.[19]

4. *Issue of Partly-Paid Equity Shares or Warrants*

The RBI has permitted issuance of partly-paid equity shares or warrants by Indian companies, under the respective automatic or approval routes, subject to compliance with the prescribed conditions. The pricing of partly-paid equity shares or warrants would need to be determined upfront. Also, twenty-five percent of the total consideration would need to be received upfront, with the balance receivable within twelve (for equity shares) or eighteen months (for equity warrants), subject to certain exceptions.[20]

5. *Issuance of Equity Shares Against Legitimate Dues*

The RBI has allowed Indian companies to issue shares to non-resident investors against any other funds payable by the investee company, remittance of which does not require prior government/RBI permission. This, however, is subject to compliance with the terms and conditions of the FDI policy, including sectoral caps, pricing guidelines, and applicable income tax laws.[21]

17. Reserve Bank of India, A.P. (DIR Series) Circular No. 123 (Apr. 16, 2014).
18. Reserve Bank of India, A.P. (DIR Series) Circular No. 86 (Jan. 9, 2014).
19. Reserve Bank of India, A.P. (DIR Series) Circular No. 04 (July 15, 2014).
20. Reserve Bank of India, A.P. (DIR Series) Circular No. 03 (July 14, 2014).
21. Reserve Bank of India, A.P. (DIR Series) Circular No. 31 (Sept. 17, 2014).

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D. Overseas Direct Investments

Over the past few months, increased foreign investment due to a stable government in the Indian parliament and an increase in the foreign exchange reserves position has resulted in an improvement in India's macroeconomic scenario. In view of the same, the RBI has introduced certain changes that are expected to have a significantly favorable impact on outbound investments by Indian corporations.

The RBI has increased the limit of financial commitment by an Indian party under the Overseas Direct Investment (ODI) route from one-hundred percent of the net worth of an Indian Party (as per the last audited balance sheet of the Indian entity) to four-hundred percent of its net worth.[22] Any financial commitment exceeding USD one billion in a particular financial year, however, shall require prior RBI approval, even if such financial commitment is within the eligible ODI limit of four-hundred percent of net worth under the automatic route.

The limit for overseas remittance under the Liberalized Remittance Scheme (LRS) Facility has been increased from USD 75,000 to USD 125,000.[23] Also, RBI clarified that remittances under the LRS Facility can be used for acquisition of immovable property outside India and also for the acquisition/setting up of joint ventures and wholly-owned subsidiaries abroad.[24] Further, now an Indian Alternative Investment Fund (AIF), registered with SEBI can make overseas direct investment subject to some terms and conditions.

Going forward, it is widely expected that foreign investment in and out of the country will gain further momentum as both foreign investors and domestic investors are gaining confidence in India's new government. India is likely to witness a substantial increase in foreign investment inflows, benefiting a wide range of sectors (including infrastructure, construction development, power, services, and telecommunications), thereby enhancing India's global competitiveness and trade across sectors.

III. Another Triumph For Vodafone, or Recipe for Retrospective Amendment—An Analysis of the Bombay High Court's Judgment

The great jurist Nani A. Palkhivala once quoted Francis Bacon:

"*When Bacon said that: 'Knowledge is Power,' he meant it from the individual's standpoint and not from the national standpoint.*

A nation progresses gloriously when knowledge and power are combined in the same individual. It faces a grave crisis when some have knowledge and others have power."[25]

What follows is an intriguing case of the use of fiction and imagination in the zeal of tax collection.

During the assessment year 2009–10, Vodafone India Services Limited (Vodafone), a wholly-owned subsidiary of Vodafone Tele-Services (India) Holdings Limited (Holding

22. Reserve Bank of India, A.P. (DIR Series) Circular No. 1 (July 3, 2014).

23. Reserve Bank of India, A.P. (DIR Series) Circular No. 131 (May 19, 2014). The proposed limit is to increase from USD 1,25,000/- to USD 2,50,000 as per the Sixth Bi-Monthly Monetary Policy Statement, 2014-15, dated February 3, 2015.

24. Reserve Bank of India, A.P. (DIR Series) Circular No.48 (December 09, 2014).

25. S. Rajaratnam, Landmark Cases in Direct Tax Laws 93 (Institute of India, 2011).

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Company), issued 289,224 equity shares of a face value of ten Indian Rupees (Rs.) at a premium of 8,509 Rs. per share to its Holding Company. The Income Tax Department (ITD) questioned the transaction on the ground that Vodafone should have valued each share at Rs. 53,775 (a shortfall of Rs. 45,256 per share). The ITD concluded that the valuation error resulted in an aggregate shortfall of Rs. 1,308.91 crores. The ITD sought to treat the aggregate shortfall as "income" and, as a consequence, the deficit amount was to be treated as a loan given by Vodafone to the Holding Company.[26]

Vodafone challenged the ITD's finding. Vodafone's primary argument was that the shortfall did not constitute income and, secondarily, that Chapter X of the Income Tax Act, 1961, relating to transfer pricing, was not applicable to this case. The High Court referred the jurisdictional issue to the Dispute Resolution Panel (DRP) under Section 144C(2) of the Income Tax Act. After consideration of the issues, the DRP held that the ITD had jurisdiction over Vodafone's issuance of shares to its Holding Company, and authority to tax the shortfall as income.

Thereafter, Vodafone presented a writ petition before the Honorable Bombay High Court (the Court) against the DRP Order.[27]

A. Revenue's Contentions

Before the Court, Revenue argued that the legislative history of the 1961 Income Tax Act supports its position that, even in the absence of actual income, notional income can be taxed. Revenue further argued that, under Chapter X, if Parliament had intended taxing powers to be limited to "real income" (as argued by Vodafone), it would have used the words "actual income."[28] Therefore, the difference between the arm's-length price (ALP) and the contracted price should be added to the total income

Chapter X is a complete code by itself and not merely a machinery provision to compute the ALP. It applies wherever the ALP is to be determined by the Assessing Officer. Therefore, the charging section is inherent in Chapter X.

B. Vodafone's Contentions

In contrast, Vodafone argued that Section 92(1) of the 1961 Income Tax Act deals with income arising from international transactions, and the same formula should be used for the ALP.[29] However, in the present case, no income arose from issue of equity shares by Vodafone to its holding company.

Vodafone further argued that "income" is not defined separately under Chapter X, and that the DRP inappropriately interpreted that word. Vodafone argued that the word "income" should instead be understood as it is defined under Section 2(24) of the 1961 Income Tax Act. Moreover, Vodafone argued, the Act should be given a strict interpretation as a fiscal statute.

26. Vodafone India Services Pvt. Ltd. v. DRP II & Others,(2014) 368ITR1, ¶2 (India) [hereinafter Vodafone v. DRP II].
27. DRP II Order (Feb. 11, 2014).
28. Vodafone v. DRP II,*supra* note 24, Paragraph ¶18(d).
29. *Id.*¶ 2.

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Vodafone further contended that an issuance of shares is the creation of, not a transfer of shares. Therefore, Section 45 of the Act is inapplicable.

Further, Vodafone contended that the issuance of shares to its Holding Company and receipt of consideration for the same was a capital receipt under the Act and, therefore, could not come within the ambit of the word "income" under the 1961 Income Tax Act, save as expressly provided for in Section 2(24)(vi).

Subsequently, Vodafone drew attention to the definition of "income" under section 2(24)(xvi), which includes amounts received arising or accruing within the provisions of Section 56(2)(viib). However, the same applied only to issue of shares to a "resident" and, here, sought to tax consideration received in excess of the fair market value and not the alleged short-fall in the price of equity shares.

C. Conclusions of the Court

After hearing the contentions of both parties and after examining the conclusions and reasoning by the tax authorities, the Court arrived at the following conclusions:

Chargeability to tax: The Court observed that the share premium has been made taxable by a legal fiction under Section 56(2)(viib) and is enumerated as income in Section 2(24)(xvi). However, what is bought into the ambit of income is the premium received from a resident in excess of the fair market value of the shares. In this case, by contrast, what Revenue sought to taxwas capital not received from a nonresident (i.e., the premium allegedly not received on application of ALP). Therefore, the Court concluded, absent express legislation, no amount received, accrued, or arising on capital account transactions can be subjected to tax as income.[30]

Interpretation of the word "income": The Court observed that while interpreting a fiscal or taxation statute, the intent or purpose is irrelevant and the words of the taxation statute must be strictly interpreted.[31] With regards to this, it is apt to highlight the judgment of the Honorable Supreme Court in *Mathuram Agarwal v. State of M.P.*,[32] wherein the court held that it is impermissible to forgo the strict rules of interpretation.

Application of Measure of ALP: In tax jurisprudence, it is well-settled that there is difference between a "charge to tax" and the "measure of tax." This distinction was highlighted by the Supreme Court in *Bombay Tyres India Ltd. v. Union of India*,[33] wherein it held that the charge of excise duty is on manufacture, while the measure of the tax is the selling price of the manufactured goods.

Further, the Court observed that it is a well-settled position in law that a charge to tax must be specifically mentioned in the Act. In the absence of a charging section in Chapter X of the 1961 Income Tax Act, it is not possible to read a charging provision into it.[34]

Therefore, the Court held that issue of shares at a premium by Vodafone to its non-resident Holding Company does not give rise to any income from an admitted International Transaction.[35]

30. *Id.*¶ 25.
31. *Id.*¶ 28.
32. (1999) 8 S.C.C. 667 (India).
33. (1984) 1 S.C.C. 467 (India).
34. Vodafone v. DRP II,*supra* note 24, Paragraph ¶44.
35. *Id.*¶ 49.

D. Analysis

The judgment by the Court in the *Vodafone* case clarifies certain fundamental aspects of taxability arising out of transfer pricing adjustments. The ITD made an unsuccessful attempt to revalue the net worth of Vodafone by taking int o consideration intangible additions made in the past, thereby creating a fictional net worth. Although the Court did not engage in direct discussion on this aspect of the case, it appears that such intangible additions cannot form the basis of computing net worth and, in a way, such exercise is similar to the principle of telescoping,[36] which in any case may no longer be a good principle.

The *Vodafone* judgment also underlines the principle of *casus omissus*. While it is undisputed that legislation has the power to make notional income into real income for taxation purposes, this interpretation cannot be read into the legislation in absence of a specific provision in the law. In *Navneet Lal C. Javeri v. ITAA Commissioner*,[37] the Honorable Supreme Court had held that resort to a legal fiction is permissible wherever it is necessary to deal with a device to avoid legitimate taxation. Long before that, Lord MacNaghtan in *London County Council v. Attorney General*[38] had said: "Income tax, if I may be pardoned for saying so, is a tax on income." Therefore, the Parliament has power to create a legal fiction; however, in the absence of specific provision, ITD cannot assume its existence of that legal fiction and, by doing so, violate the doctrine of *casus omissus*. The *Vodafone* judgment reaffirms this proposition without expressly stating so.

E. Recent Development

A similar issue came up before the Court in the case of Shell India Markets Pvt. Ltd. v. ACIT[39] and in the case of Vodafone India Services Pvt. Ltd. v UOI[40] wherein the Court followed its earlier decision which is the subject matter of this section.

Subsequently, the Indian Ministry of Finance accepted the present decision by the Honorable Bombay High Court through an instruction issued by Central Board of Direct Taxes,[41] and further directed that the field officers in all cases where this issue is involved must adhere to the *ratio decidendi* of the present judgment.

IV. Anti-trust Laws in India: The Way Forward

After India set out on the path to economic liberalisation in 1991, it enacted the Competition Act, 2002[42] in January 2003. The 2002 Act marked a shift in focus, from curbing monopolies (under the erstwhile Monopolies and Restrictive Trade Practices Act, 1969)[43] to promoting competition. The 2002 Competition Act established India's anti-trust regulator, the Competition Commission of India (CCI). CCI became operational in May

36. Telescoping is a concept whereby the taxpayer justifies the source of a disputed transaction to an intangible adjustment made by the Tax Authorities in one of the preceding tax assessments.
37. A.I.R. 1965 S.C. 1375 (India).
38. 4 T.C. 265 (HL).
39. 369 ITR 516 (Bom.).
40. *Id.*
41. Instruction No. 2/2015 dated 2nd January, 2015.
42. No.12, Acts of Parliament (2003) (India).
43. No. 54, Acts of Parliament (1969) (India).

2009,[44] and is responsible for preventing practices that have an adverse effect on competition and for ensuring freedom of trade.[45]

In the last five years, CCI has regulated merger combinations and anti-competitive practices across various sectors, including automobiles, aviation, financial services, pharmaceuticals, and real estate.[46]

A. Abuse Of Dominant Position

In August 2011, CCI penalized DLF Limited, one of the largest commercial real estate development companies in India, for abusing its dominant position in the relevant market and for imposing "unfair" terms in its agreements with apartment buyers.[47]

The Competition Appellate Tribunal (COMPAT) upheld CCI's May 2014 order holding DLF guilty of abusing its dominant position.[48] In August 2014, while DLF's appeal against the COMPAT order was pending, the Supreme Court of India directed DLF to deposit the penalty fee of USD 140 million. The DLF case is one of the first that dealt with the "exploitative" nature of abuse of customers as against the "exclusionary" nature of abuse. COMPAT's confirmation of the CCI order and the Supreme Court's directions to DLF to deposit the penalty appear, to some extent, to have validated CCI's stance.

B. Combinations

While CCI approved the combination of Tesco Overseas Investments Limited and Trent Hypermarket Limited,[49] it levied a penalty on the parties for failure to provide notification about the combination within thirty days of the trigger event.[50] In doing so, CCI held that the trigger event for an acquisition is the date on which the enterprise communicates its intention to acquire to any statutory body.[51] A potential acquirer is now required to make combination notification even when it is in pre-merger negotiations, but has communicated its intention to make an acquisition to a regulatory body for pre-transaction regulatory clearance. Besides sending mixed signals regarding the timing for filing the combination notification, this strict interpretation may increase the cost of evaluating and making acquisitions.

44. Annual Report of the Competition Commission of India (2009–10), *available at* http://www.cci.gov.in/May2011/Advocacy/PubAnnRep0910-060911.pdf.

45. The Competition Act, *supra* note 37, Statement of Purpose.

46. Any acquisition, merger, or amalgamation exceeding the monetary thresholds as per Section 5 of the Act requires CCI's prior approval.

47. CCI Order,, Belaire Owners Association v. DLF Limited, Case No.19 of 2010(Aug. 12, 2011), *available at* http://www.cci.gov.in/May2011/OrderOfCommission/DLFMainOrder110811.pdf.

48. COMPAT Order, DLF Limited v. Competition Commission of India & Ors, Appeal No.20 of 2011 (May 19, 2014), *available at* http://compat.nic.in/upload/PDFs/mayordersApp2014/19_05_14.pdf.

49. CCI Order, Notice under Section 6 (2) of the Competition Act, 2002 given by Tesco Overseas Investments Limited, Combination Registration No. C- 014/03/162 (May 22, 2014), *available at* http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2014-03-162.pdf.

50. *Id.* § 43A (power to impose penalty for non-furnishing of information).

51. Regulation 5(8), the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, *available at* http://www.cci.gov.in/images/media/Regulations/CCI_Combination_Regulations_as_amended_upto_23_02_2012.pdf.

C. Notable Orders Passed by CCI In 2014

An association was penalized for anti-competitive conduct in taking decisions relating to distribution and supply of products on behalf of its members. Its senior officers were held to be personally liable for endorsing such anti-competitive conduct.[52]

A penalty was imposed on Google USA and Google India[53] for failure to provide information sought by CCI within the stipulated timeline.

In a significant ruling on vertical restraints and excessive pricing,[54] a fine of USD 420 million was imposed on fourteen car manufacturers[55] for restricting the sale and supply of spare parts in the open market and directing them to stop anti-competitive prices. It has been reported that certain car manufacturers have obtained stays on the CCI Order from the Delhi High Court and the Madras High Court.[56]

D. Imposition of Penalty

The 2002 Competition Act empowers CCI to penalize enterprises for all violations and pass such orders as it deems fit.[57] Penalties levied by the CCI on each enterprise can extend up to 10% of its average turnover for the three preceding financial years.

E. Way Forward

Exclusive jurisdiction on all competition matters is vested with CCI and the COMPAT, with the overriding jurisdiction of the Supreme Court. Typically, most parties appeal to COMPAT to challenge CCI orders. COMPAT has, in turn, upheld the CCI orders in majority of cases. Some companies have also approached various High Courts as a delay tactic.

The CCI has also reviewed over 180 mergers in the last three years, taking an average of seventeen days to review mergers and acquisitions.[58] This is a welcome change considering India's track record of long delays in its legal and regulatory fora.

While competition law jurisprudence is at a nascent stage in India, the CCI is emerging as a pragmatic economic regulator committed to ensuring a level playing field for all enterprises. Companies are now waking up to the importance of operating their businesses within the contours of competition law.

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52. CCI Order, Re: Bengal Chemist and Druggist Association, *Suo moto* Case No. 02 of 2012 and Reference Case No. 01 of 2013 (Mar. 11, 2014), *available at* http://www.cci.gov.in/May2011/OrderOfCommission/27/022012.pdf.
53. CCI Order,Consim Info Private Limited v. Google Inc. & Anr, Case No. 07 of 2012 (Mar. 26, 2014), *available at* http://www.cci.gov.in/May2011/OrderOfCommission/other/07302012.pdf.
54. *Id.* § 4 (abuse of dominant position).
55. CCI Order, Shri Shamsher Kataria v. Honda Siel Cars India Ltd & Ors, Case No. 03 of 2011 (Aug. 25, 2014), *available at* http://www.cci.gov.in/May2011/OrderOfCommission/27/032011.pdf (Original Equipment Manufacturers).
56. *Delhi High Court grants 3-weeks protection to Mercedes Benz from CCI's order*,The Economic Times(Sept. 24, 2014, 10:05PM), http://articles.economictimes.indiatimes.com/2014-09-24/news/54279448_1_trade-norms-bmw-india-spare-parts.
57. *Id.* § 27 (orders by CCI after inquiry into agreements or a dominant position abuse).
58. Transcript of Chairman of CCI's speech (Aug. 8, 2014), *available at* http://www.cci.gov.in/images/media/speeches/ILS%20Pune%208.8.2014.pdf.

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V. The Lokpal And Lokayuktas Act, 2013

On January 16, 2014, The Lokpal and Lokayuktas Act, 2013 (Lokpal Act), a historic Indian anti-corruption law, came into effect.[59] Versions of the bill have been proposed, debated, and deferred for years. In the last few years, amidst well-publicized corruption scandals such as "Coalgate"[60] and the 2-G Telecom licensing kerfuffle,[61] India has seen incredible grassroots movements and public engagement against corruption. The Lokpal Act will establish independent bodies that have the power to investigate and prosecute public corruption, even against high-level government officials.

A. Background

In the first half of 2011, Indian civic engagement to urge governmental action against corruption was at an all-time high. In April 2011, anti-graft activist and grassroots leader Anna Hazare inspired massive public protests to seek action from the Indian government against public corruption. Hazare even initiated a hunger strike to increase pressure on the government to create an entity with the power to prosecute allegations of corruption.[62] A version of the Lokpal Act was drafted, proposed, and vigorously debated in Parliament, but ultimately did not pass. In May 2012, a slightly revised version of the bill was proposed again. On December 17 and 18, 2013, respectively, the Rajya Sabha and Lok Sabha passed the Lokpal Act. President Pranab Mukherjee approved the Act on January 1, 2014, and on January 16, 2014, the Lokpal Act came into effect.

In general, the law provides a framework to create independent entities that will field public complaints and allegations, and have the power to investigate and prosecute public corruption. The Lokpal Act was intended to encompass certain United Nations anti-corruption conventions, which India has ratified.

B. Highlights of the Act

Key features of the Lokpal Act include:

- *National and State-level Bodies*: The Act will establish a national-level Lokpal, which will include a chairperson and a maximum of eight members, and Lokayukta at the state level.
- *Broad Jurisdiction*: The jurisdiction of the Lokpal will include all levels of public servants, including the Prime Minister.
- *High-level Authority*: The Lokpal will have power to oversee and direct the investigative agencies, including the Central Bureau of Investigation, that are inquiring into allegations received by the Lokpal.

59. *See* The Lokpal and Lokayuktas Act, 2013, at 5, *available at* http://www.prsindia.org/uploads/media/Lokpal/Lokpal%20and%20Lokayuktas%20(A)%202014.pdf.
60. *See* Karl Mathiesen, *Coalgate: India urges supreme court not to close coal mines*, Guardian UK (Sept. 1, 2014, 10:45AM), http://www.theguardian.com/environment/2014/sep/01/coalgate-india-supreme-court-narendra-modi.
61. *SeeIndian media: '2G scam' probe*,BBC News(Nov. 21, 2014, 02:12AM), http://www.bbc.com/news/world-asia-india-30140856.
62. *See* Jason Burke, *Anna Hazare's anti-corruption protest sees Delhi signal compromise*, Guardian UK(Aug. 23, 2011, 12:42PM), http://www.theguardian.com/world/2011/aug/23/anna-hazare-anti-corruption-protest.

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- *Clear Timelines*: The Act establishes clear timeframes in which allegations should be investigated and tried. A preliminary inquiry into allegations must be completed in three months (although this period may be extended by three months); the investigation should be completed in six months (may be extended by six months at a time); and a trial must commence within one year after an investigation is complete (may be extended by one year).
- *Harsher Penalties*: The maximum jail time under the Prevention of Corruption Act was increased from seven to ten years. Minimum punishments for certain sections of the Prevention of Corruption Act were also increased.

VI. Companies Act, 2013

The newly enacted Indian Companies Act, 2013[63] (2013 Companies Act) places great focus on promoting ethical business practices, accountability, and improving internal processes. Among the various provisions, the 2013 Companies Act requires the appointment of a fixed number of independent directors[64] and places great emphasis on their integrity, impartiality, and autonomy.[65]

A remarkable provision in the 2013 Companies Act is the one that defines "fraud"[66] and makes it a grounds for winding up a company.[67] In relation to affairs of a company, "fraud" includes any act, omission, concealment of any fact, or abuse of position committed by any person or any other person with the connivance, in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholder or its creditors or any other person, whether or not there is any wrongful gain or loss.[68]

The broad definition of "fraud" contained in the 2013 Companies Act is still to be tested in a court of law. Indeed, an act or omission by which one abuses his or her position for gaining an undue advantage may fall foul of the prohibitions set forth under the Prevention of Corruption Act, 1988—the special statute that deals with bribery in India.

Auditors found to have acted in a fraudulent manner or abetting or colluding in a fraud can be removed.[69] Further, an auditor who has contravened the provisions of the Act to deceive the company is punishable with imprisonment and/or a fine.[70]

Making of a false statement in any return, financial statement, or other document under the 2013 Companies Act is an offence punishable by imprisonment and fine.[71] Every listed company (and other companies, as prescribed) must constitute an Audit Committee which is required to evaluate internal financial controls and risk management systems.[72] Such companies are also required to establish a vigil mechanism for directors and employ-

63. No. 18, Acts of Parliament, 2013 (India). Enacted on August 30, 2013, this Act replaces the Companies Act of 1956. Several provisions are yet to come into force.
64. *Id.*¶ 149(4).
65. *Id.*¶ 149(6).
66. *Id.*¶ 447.
67. *Id.*¶ 271.
68. *Id.*¶ 447.
69. *Id.*¶140(5) (yet to be enforced).
70. *Id.*¶ 147.
71. *Id.*¶ 448.
72. *Id.*¶¶ 177(1), 177(4)(vii).

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ees to report genuine concerns.[73] If it is found that the accounts of a company were prepared in a fraudulent manner or that the affairs of a company were mismanaged during a particular period, the accounts may be reopened.[74]

VII. Changes to the Indian Immigration System with a View to Woo U.S. Nationals and Indian Americans

With a view to boosting tourism and business activities in India, Prime Minister Modi made several key announcements in 2014 pertaining to the entry, stay, and exit of foreign nationals in India. In the presence of several U.S. business and political leaders—many of the Indian diaspora—Modi announced that the time limits that applied to the validity of Person of Indian Origin (PIO) Cards and registration requirements would be eliminated and that U.S. nationals could look forward to receiving electronic visas or visas on arrival for travel tourism to India.[75]

A. PIO Cards

PIO Cards are generally issued to (1) a foreign national who at any time has held an Indian Passport; or whose parents or grandparents were born in or were permanently resident in India as defined in the Government of India Act, 1935 and other territories that became part of India thereafter, provided neither was at any time a citizen of Afghanistan, Bhutan, China, Nepal, Pakistan, or Sri Lanka; or (2) one who is a spouse of a citizen of India or a person of Indian origin, as described above.[76]

Until recently, these PIO Cards were valid for a period of fifteen years after which they could be renewed for additional periods. PIO Card holders were also required to register with the Foreigners Registration Office or Foreigners Regional Registration Office (collectively, the FRRO) if they desired to stay in India for extended durations. In keeping with Prime Minister Modi's announcements, in September 2014, the Ministry of Home Affairs published modifications to the PIO Card system.[77] PIO Cards are now valid for the lifetime of the qualifying individual, and registration with the local FRROs is no longer required. PIO Card holders can live and work in India with very few restrictions (e.g., the holding of public office, voting in government elections, visiting restricted or protected areas, and undertaking mountaineering, research, or missionary work). Some of these activities—barring government positions and the right to vote—may be permitted upon obtaining additional permissions.

The PIO Card is now almost on par with the status that was earlier granted only under the Overseas Citizenship of India (OCI) scheme launched at the beginning of 2006.[78] Eligible foreign nationals, including certain persons of Indian origin and individuals

73. *Id.*¶ 177(9).
74. *Id.*¶ 130 (yet to be enforced).
75. *See, e.g.*, Vibhuti Agarwal, *Modi's Visa Announcement in the U.S. Not All It Seems*, WALL ST. J. (Sept. 30, 2014, 2:56PM), http://blogs.wsj.com/indiarealtime/2014/09/30/modis-visa-announcement-in-the-u-s-not-all-it-seems/.
76. BUREAU OF IMMIGRATION INDIA, http://boi.gov.in/content/person-indian-origin-pio (last visited Mar. 24, 2015).
77. MHA Gazette notification number 25024/9/2014/F.1.
78. OCI REGISTRATION, http://www.ociregistration.com/oci_eligibility.htm (last visited Mar. 24, 2015).

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whose parents or grandparents migrated from India after January 26, 1950 as well as their minor children are allowed to register as OCIs. This is subject to the applicant being a citizen of a country that allows dual citizenship in some form or the other, though an OCI does not grant full "citizenship" rights in any way. Citizens of all countries except those who ever held citizenship of Pakistan and Bangladesh may qualify under this scheme. Registration as an OCI is a one-time process that grants all the benefits that are available to PIO Card holders with some additional benefits. Further, OCI Card holders have never been required to register with an FRRO for any length of stay in India.

It is important to note that one of the main advantages that the OCI scheme has over the PIO, is that a person who has been registered as an OCI for five years and who has lived in India continuously for one year is eligible naturalize as an Indian Citizen, whereas as per the amendment introduced to section 5(1)(a) & 5(1)(c) of the Citizenship Act in 2003, other persons of Indian origin have to reside in India for a minimum of seven years (with the last year on continuous stay) before being eligible for Indian citizenship. In both instances, a foreign national must relinquish his or her foreign nationality before naturalization as India does not recognize dual citizenship. However, from the recent announcements and changes it is unclear whether existing PIO Card holders will be allowed to naturalize in the way OCI Card holders can do currently.

B. Visa on Arrival

The Indian government also introduced visa on arrival, which is a quick and easy way to visit India for casual business visit or short business meetings. On making the online application, the traveler can arrive in India five days after the application and within thirty days, giving flexibility of twenty-four days in which to plan the travel.[79]

It can be used for business activities incident to a trip for another purpose. For example, one could visit a factory while on a family trip. There is no definition if what constitutes "casual business." On making inquiries with the government we were verbally informed that a trip for 4 to 5 days just for a few meetings would be fine.[80]

The applicant is required to carry a copy of the ETA at the time of travel, validity of which will be 30 days from the date of arrival in India. Biometric details of the applicant will be mandatorily captured at the port of Immigration on arrival in India.[81]

Electronic Travel Authorization (ETA) is currently valid for entry through following nine designated Airports-Bengaluru, Chennai, Cochin, Delhi, Goa, Hyderabad, Kolkata, Mumbai & Trivandrum. This facility is made available in addition to the existing visa services.

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79. Ismat Sarah Mangla, *India Launches 'Tourist Visa On Arrival' Program*, *Int'l Business Times* (Dec. 3, 2014), http://www.ibtimes.com/india-launches-tourist-visa-arrival-program-1732663.

80. *Id.*

81. *Australians unhappy with Indian biometric visa plan*, Planet Biometrics (Nov. 7, 2014), http://www.planetbiometrics.com/article-details/i/2373/.

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