

India – Law Firms

A Distinctly Different Research-Based Entrepreneurial Organization

The Editor interviews Nishith Desai, founder of Nishith Desai Associates, the first firm with a license to practice Indian law in California and Singapore, having developed a niche in identifying innovative structures for cross-border transactions.

Editor: With offices in Mumbai, Bangalore, Palo Alto, California and Singapore your office is at the cutting edge of cross-border transactions. Would you describe a few of the transactions in which your office was involved regarding American Depository Receipts (ADRs) as well as some private equity transactions that may be familiar to our readers?

Desai: We assisted in the ADRs of, Infosys Limited, Satyam Infoway (SIFY) and Rediff Limited, which are listed on NASDAQ, and Wipro and Silverline on the NYSE. In these matters we acted as either underwriters or issuer counsels.

We have been involved in several private equity transactions and have enjoyed our interactions with every single one of them. Some of the well publicized transactions include: General Atlantic Partners investment in Genpac (\$500 million), Patni (\$100 million), Hexaware (\$70 million), Daksh (which was sold to IBM for \$160 million) and GTCR's \$100 million investment in Zenta.

More recently average private equity deal size has been going up. At this time we are busy closing yet another \$400 million deal. India has come of age!

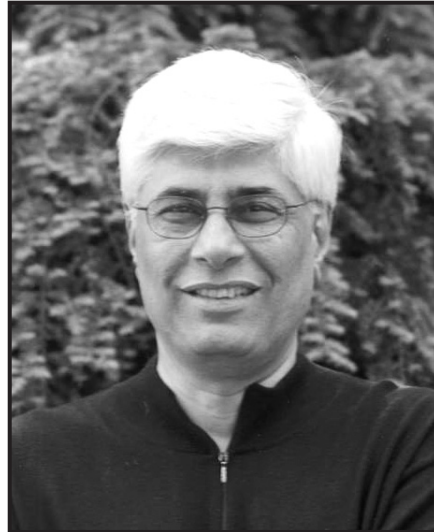
Editor: What type of business is handled by your Palo Alto office?

Desai: Over 70% of our clientele is in the U.S. Our Palo Alto office is a service station. We have been granted a license to practice Indian law from the State Bar of California. We do not practice American law. The office has proved to be of great assistance to our U.S.-based clients, existing as well as potential, in connecting them to the right experts in our firm, anywhere in the world. Along with this, our clients are able to call us at their convenience.

Editor: Your office also has a fine reputation for handling tax matters both for Indian and non-Indian clients. Is this a result of your activity in M&A transactions or is it a separate practice that has been established over the years in the nature of a specialized boutique?

Desai: I, myself, am a lawyer specializing in international tax and corporate law. I began researching these subjects in 1977 and over a period of time managed to personally train several others in these fields. Consequently, a number of the people I trained joined the firm and today are known worldwide for their expertise.

We have done a large number of M&A transactions, but we believe we add tremendous value because of our specialization in international tax and intellectual property laws. We recently completed an IP-driven acquisition by i-flex (now part of Oracle) of Mentas Inc. U.S.A. Strategies and negotiations are



Nishith Desai

the other two key drivers of our practice. That's how we distinguish ourselves.

Our primary goal is to provide high quality research-based legal services to our clients. We heavily emphasize research and are amongst the few law firms which are R & D driven. We are a "distinctly different" firm. What makes our firm special is that besides lawyers, we have engineers, chartered accountants, management graduates and even doctors as members. We are not a multi-discipline law firm but are multi-skilled. For instance, our technology team is headed by an electronics engineer turned lawyer while a surgeon turned lawyer heads our life-sciences practice. This unique combination of professionals allows us to take a holistic approach to understanding all matters. It allows us to raise issues and concerns from a business perspective that the client might have either not thought of or accidentally omitted.

Editor: What influences in the '90s prompted the Indian government to open its borders to foreign investment?

Desai: At the end of the Cold War, like most socialist economies, the Indian economy too was in shambles. The nation's foreign exchange was almost depleted. India had to unleash its caged economic beast. Liberalization was the best way to tactfully release the sleeping giant. Today 95% of the sectors of the Indian economy are open to 100% foreign investment, and more recently the defense sector has also been opened for FDIs (Foreign Direct Investment) subject to certain conditions.

Editor: What business structure, e.g., partnership, joint venture, etc., is best suited for foreign investors wanting to establish a venture in India?

Desai: Generally foreign companies are not allowed to operate through branches except in certain circumstances. But one can set up a private or public limited company. Private limited companies are eligible for "check the box" election in the U.S. Joint ventures are suitable if the foreign entity needs local expertise. In the structuring of funds we extensively use trusts, as we do not have LPs, LLCs or LLPs in India.

Editor: The Special Economic Zones (SEZ) have received substantial newspaper coverage in the U.S. If I were a foreign investor looking to invest in India, would this be an attractive venue? What special incentives are afforded foreign investors in SEZ?

Desai: The Special Economic Zone ("SEZ") Act and Rules, which became operational in 2006 have indeed created a stir in investment circles in India and abroad. Several SEZ's have been approved and over 160 are in the pipeline. The SEZ regime provides great opportunity for foreign entrepreneurs looking to set up export-oriented units in a SEZ ("Entrepreneurs") for manufacture or for providing services and to foreign investors looking at developing a SEZ ("SEZ").

Both Entrepreneurs and Developers can claim significant tax and other benefits which a foreign investor cannot ignore. A SEZ Developer is entitled to a 10-year tax holiday whereas a Unit set up as a SEZ is entitled to a 15-year tax holiday, which is 100% for the first 5 years, 50% for the next 5 years and 50% for the remaining 5 years subject to the reinvestments of the profits in the SEZ reserve account. Also, there are benefits such as exemption from sales tax, value added tax, stamp duty and labour laws in some states.

Editor: Are there tax advantages also afforded to foreign investors outside the SEZ?

Desai: Currently, many tax incentives in India are being withdrawn or will expire shortly. For a foreign investor looking at setting up a unit in India, the following are the main tax incentives available:

- Software Technology Parks Scheme ("STPI"), an exemption of 100% of profits and gains from business for 10 years. However, this exemption is to expire in 2009.

- Research and Development Unit ("R&D") – 80IB (8A) of the Income Tax Act, 1961 provides an exemption of 100% of profits and gains from business for 10 years. However, a company seeking such an exemption has to be exclusively engaged in commercial R&D and requires approval for the R&D facility from the Department of Scientific and Industrial Research ("DSIR"), which is a central authority for granting approvals.

In the light of the above available regimes, SEZs appear as the most favourable regime for investments in the main manufacturing/services sector.

Foreign investors looking to invest in India without an export motive or direct involvement have other avenues available to them which can be structured in a tax efficient manner, through strategic investments made through the Foreign Direct Investment ("FDI") regime, Foreign Venture Capital Investor ("FVCI") regime and also through the Foreign Institutional Investor regime.

Editor: What regulatory hurdles are required to be overcome before I can establish my business : (1) in the SEZ, and (2) outside the SEZ?

Desai: The Indian regulatory climate has been significantly liberalized for foreign investors since 1990. A conducive and sophisticated regulatory climate is being crafted to enable the realization of the investment pipe dream.

Briefly, the three main legislations that are of relevance to foreign investors are:

- Exchange control regulations laid down by the Reserve Bank of India ("RBI")

- Regulations pertaining to the securities transactions regulated by the Securities and Exchange Board of India ("SEBI")

- Income tax laws under the Income Tax Act., 1961 ("ITA")

SEZ: As mentioned above investments into a SEZ are under the 100% automatic route under the FDI regime. To develop a SEZ, an application has to be made by the proposed Developer to the Board of Approval ("BOA"), which is a central body granting approvals to a SEZ. The BOA will review the application after giving due consideration to necessary documents/details provided. The SEZ Act and Rules will govern the activities of a SEZ. Further, the applicable laws in India still apply to a SEZ, though it may be considered as a "designated foreign territory" only for the purposes of availing the import-export benefits. The regime is still evolving.

Outside SEZ. As mentioned above, any investments into India can only be made through the FDI, FVCI, FII or the Non-resident Indian ("NRI") regimes. Investments through the FDI regime will further be subject to the FDI Policy, which specifies sectoral caps on certain industries. Investments under the STPI scheme and the R&D scheme are made under the FDI route. Each of these regimes has a distinct regulatory climate in which it operates.

Editor: Would your law firm be able to handle all the necessary requirements of a foreign subsidiary or branch office opening in India including filings and regulatory approvals?

Desai: We do this all the time. We have helped a large number of technology companies right from the start to a maturity level when they got acquired or went for an IPO, or, for that matter, acquired other companies.

Editor: What is the situation with the Indian court system in terms of judicial fairness toward foreign investors?

Desai: The Indian judiciary is one of the fairest and boldest of judicial systems in the world. It does not discriminate between foreign investors and Indian investors. Precedent has shown that the judiciary has constantly strived to protect interests-right holders, including Intellectual Property Right holders, which in many cases have been foreign parties. This has been true even in tax matters, as can be seen in the recent decision of the Supreme Court, which has protected all foreign investors who invested through Mauritius because of a favourable tax treaty.

Please email the interviewee at nishith@nishithdesai.com with questions about this interview.

