

Corpsec Hotline

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APPLICATION OF PRESS NOTE 18 CHALLENGED IN A CIVIL SUIT

A foreign company, whose application for setting up a Wholly Owned Subsidiary ("WOS") in India was rejected based on Press Note 18, has filed a civil suit in the Delhi High Court challenging the applicability of the same to its case.

As per the current Indian exchange control regulations, foreign direct investment is permitted in various sectors in India without prior regulatory approval. However, this automatic route of making investments into India is not available in the event the foreign investor "has or had any previous joint venture ("JV") or technology transfer / trademark agreement in the same or allied field". This condition is laid down in the Guidelines pertaining to approval of foreign/technical collaborations under the automatic route with previous ventures/tie-up in India issued on December 14, 1998 by the Ministry of Commerce, Government of India and commonly referred to as Press Note 18.

Press Note 18 further stipulate that where the foreign investor does not qualify for the automatic route, he should seek the prior approval of the Foreign Investment Promotion Board ("FIPB") by filing justification and proof before the FIPB that the new undertaking would not jeopardize the interests of the existing JV or technology/trademark partner.

The FIPB recently rejected an application by Draeger Medical AG ("Draeger Medical"), a German medical instruments major, to set up a WOS in India on the grounds of objections received from RKKR Infotech, ("RKKRI") an USHA group company. RKKRI claims that it has an existing 50:50 JV with Draegerwerk AG ("DW-AG") and thus the Indian JV's interest would be jeopardized if Draeger Medical is permitted to set up a WOS in India. RKKRI has contended that the restrictions under Press Note 18 apply to Draeger Medical as Draeger Medical and Draeger cannot be considered as different entities.

Aggrieved by the rejection of its application by FIPB, Draeger Medical has filed a civil suit in the Delhi High Court. In its submissions before the Delhi High Court, Draeger Medical has contended that Press Note 18 has no application to other members of a group of companies wherein any of the companies within that group have an existing tie-up or venture in India. Draeger Medical further disputes the contention that Draeger Medical and DW-AG should be regarded as the same entity for purposes of compliance with Press Note 18. It is explained that DW-AG holds 65% of shares of Draeger Medical while the remaining 35% shares are held by Siemens AG. Further, it is DW-AG who holds 50% in the existing Indian JV with RKKRI, and not Draeger Medical. Thus, Draeger Medical should not be made to comply with the requirements of Press Note 18.

Source: *The Economic Times*, dated June 11, 2004

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