

Foreign tech-related payments policy eased

By Sawant Singh
and Arun Madhu,
Phoenix Legal



PHOENIX LEGAL

New Delhi

G/F, 15 Birbal Road,
Jangpura Extension
New Delhi - 110 014, India
Tel +91 11 4376 1100-06
Fax: +91 11 4376 1107
Email: delhi@phoenixlegal.in

Mumbai

First Floor, CS-242,
Mathuradas Mill Compound,
NM Joshi Marg, Lower Parel
Mumbai - 400 013, India
Tel: +91 22 4340 8500
Fax: +91 22 4340 8501
Email: mumbai@phoenixlegal.in

The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, in a press release issued in early November, indicated that it would, in the coming months, amend the policy on technology-related payments by Indian firms to foreign persons. Close on the heels of the press release, the DIPP eased the policy on remittance of royalties and similar payments for licensing of trademarks, technology transfers, etc, through Press Note 8 of 2009, dated 16 December.

With the introduction of Press Note 8, payments for royalties, lump sum fees for transfer of technology and payments for use of the trademark/brand name of a foreign party can now be made under the automatic route (i.e. without prior governmental approval) provided certain minimal conditions are met with. Our column this month briefly examines the genesis of this development and its impact.

Popular investment avenue

The manner and extent of payments by Indian parties for technical collaborations and technology transfer arrangements have formed an integral part of India's liberalized foreign investment policy over the past decade or so. Typically, such arrangements involve the use by an Indian party of a foreign party's intellectual property rights (IPR) or the procurement of technical services from a foreign party with the payment of fees or royalties as consideration for the arrangement.

This investment avenue has been oft visited by foreign companies who were pioneers of technologies in their respective fields and who spotted the huge and unending need for advanced technologies in India, which made it

an attractive market. Also, it was and continues to be common practice for a joint-venture (JV) company in India (especially those involving a foreign party) to enter into a technical collaboration arrangement with the foreign JV partner or a group company of the foreign JV partner as a means of providing the technology of the foreign shareholder to the JV company in India and also as a means of extracting additional revenue from the Indian JV company.

Previous situation

However, this route was not without its limitations.

Prior to Press Note 8, foreign technology collaboration related royalties were capped at 5% on domestic sales and 8% on exports. In addition to these limits a one-time lump-sum fee of US\$2 million was also permitted under the automatic route. However, royalties only up to 2% on exports and 1% on domestic sales were allowed under the automatic route if there was no technology transfer involved and merely the trademark or brand name of the foreign collaborator was being licensed out.

In both cases, these percentages were calculated on the basis of the net "ex-factory" sale price (suffice to say an amount which made provisions for cost of components, duties, etc, and is also net of taxes) of the products sold by the Indian recipient of the IPR or services.

While royalty payments did not have any restrictions as far as time periods went, payments beyond these limits nevertheless required the approval of the Project Approval Board, a sectional body within the DIPP chaired by the DIPP secretary.

Therefore, while the technical

collaboration arrangements were permitted, foreign collaborators over the years (especially given the quantum leaps in technology) were wary of the presence of these limits. Their common qualm was that market forces coupled with freedom of contract should be the ideal determinants of the value of any technology and not artificially imposed caps. In effect, at some level these limits deterred the inflow of the latest technological advancements into India and consequently hindered India's growth and transformation from a developing to a developed country.

A new dawn

However, Press Note 8 is set to change all of this. It encourages the inflow of technologies by removing all caps on outflows on account of technical collaborations while retaining minimal conditions of complying with certain foreign exchange related regulations and certain reporting requirements.

All in all, the DIPP's initiative must be applauded. Press Note 8 is a reflection and a logical extension of India's liberalized policy focus. It is an integral part of the measures which the government has sought to introduce to attract state of the art technology which will positively impact, among others, India's manufacturing sector.

For India to move from being a developing nation to a developed nation the easy and abundant availability of state of the art technology is a must. The government's move will now facilitate this.

Sawant Singh is a partner and Arun Madhu an associate at Phoenix Legal in Mumbai. They can be reached at sawant.singh@phoenixlegal.in and arun.madhu@phoenixlegal.in.