

Joint Ventures Abroad

i Unlike joint ventures in India, Joint venture undertakings are established abroad by the Indian entrepreneurs for building up an export potential for their products manufactured through foreign collaboration in the developing countries where there is a favorable political climate and a demand for the Indian products. For this purpose, the Government offers the following opportunities:

- i opportunities to increase the export potential of the Indian company;
- ii facility of repatriation to India of capital and dividend and royalty and remuneration earned outside India from joint ventures;
- iii incentives under the Income-tax Act.
- iv Compliance with requirements for setting up joint ventures.-The following requirements will have to be complied with for setting up joint ventures abroad :
 - a. Under Companies Act.-Since the Government's policy is to encourage only the corporate bodies to invest in joint ventures abroad application should be made to the Central Government, Department of Company Affairs under section 372 (4) if the Companies Act, 1956 in Form 34-B prescribed under the Companies (Central Government's) General Rules and Forms, 1956. [Form No. 1 below].
 - b. Under FERA.- Section 27 of Foreign Exchange Regulation Act, 1973, requires that persons resident in India including firms and companies (other than foreign nationals) should obtain prior permission of the Government of India to associate themselves with, or participate in, whether as promoters or otherwise, any concern outside India engaged in, or intending to engage in, any activity of a trading, commercial or industrial nature, whether such concern is a body corporate or not. The application has to be made in the prescribed Form PFCE (See Form No. 31 in Chapter 12).
 - c. Approval of Reserve bank.-An application has to be made to the Reserve Bank of India in the prescribed Form GRI/EP (Form Nos. 2 and 3 below) for export of plant and machinery and other capital goods or equipment from India towards the Indian collaborator's contribution to the ventures abroad.
 - d. For sending representatives.-If the Indian company sends its representative abroad for purposes of the overseas venture, application has to be made to the Reserve Bank of India for exchange in the prescribed Form TRB 2 (Form No. 4 below).
 - e. Remittance of cash.-If the Central Government permits remittance of cash towards equality participation on the overseas concern, application for release of foreign exchange will have to be made in the prescribed Form A 2, (Form No. 5 below).
 - f. Holding shares and securities abroad
 - g. Holding shares and securities abroad -An application has to be made in the prescribed Form FADI (Form No. 6 below) to the Controller, Exchange Control Department, Reserve Bank of India, Central Office (Foreign Accounts Division) Bombay-1 for licence to hold the shares or securities abroad.
- ii Tax concessions under Income-tax Act.-The following tax concessions and incentives are provided by the Income-tax Act in respect of joint venture abroad :
 - a. Deduction of 50% (25% up to 31.3.1987) of profits and gains from projects outside India.- Section 80 HHB of the Income-tax Act, inserted w.e.f. 1.4.1983, provides for a deduction of 50% (25% up to 31.3.1987) of profits and gains of an Indian company or a non-corporate resident assessee derived from the business of execution of a foreign project -undertaken by the assessee in pursuance of a contract entered into with the Government of a foreign State or

any statutory or other public authority or agency in a foreign State or a foreign enterprise if the following conditions are fulfilled:

- a. The foreign project must be a project for construction of any buildings, road, dam, bridge or other structure outside India or the assembly or installation of any machinery or plant outside India, or the execution of such other work which may be prescribed.
 - b. The consideration for the execution of the foreign project is payable in convertible foreign exchange.
 - c. The assessee keeps separate accounts of such profits and gains from the foreign project. Where the assessee is a person other than an Indian company or co-operative society, the accounts are audited by an accountant, and a report of such audit in the prescribed form and signed and verified by such accountant is furnished along with his return of income.
 - d. An amount equal to 50% of such profits and gains is debited to the profit and loss account of the previous year of the assessee and credited to a reserve account is to be utilised by the assessee during a period of five years next following for the purpose of its business. It should not be distributed by way of dividend or profits.
 - e. An equal amount of 50% of such profits and gains is brought by the assessee into India in convertible foreign exchange in accordance with the provisions of the Foreign Exchange Regulation Act, 1973, within six months from the end of the previous year. Where the amount brought into India in convertible foreign exchange falls short of 50% , deduction allowed will be limited to the amount credited or brought into India.
- b. Deduction of 50% of royalties, commission, etc., received from foreign enterprises.-Under Section 80-O of the Income-tax Act, a deduction of an amount equal to 50% of income by way of royalty, commission, fees or any similar payment received by an Indian company from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee, is allowed.

For availing this deduction, the following conditions will have to be satisfied:

- i such income should be received under an agreement approved by the Board up to 31.3.1989 or by the Chief Commissioner or the Director General from 1.4.1989.
- ii such, income should be received in convertible foreign exchange in India, or having been received in convertible foreign exchange outside India, or having been converted into convertible foreign exchange outside India, is brought into India, by or on behalf of the assessee in accordance with any law for the time being in force for regulating payments and dealings in foreign exchange.
- iii such income should be received in India within a period of six months from the end of the previous year or within such further period as the Chief Commissioner or Commissioner may allow.

Section 80-O does not specify who the party of the other part to the agreement should be. It is, therefore, difficult to imply that the party of the other part must be the Government of a foreign State or an foreign enterprise. Even in terms of the objects of the section there is no reason why the agreement should be restricted to one entered into with the Government of a foreign State or a foreign enterprise. Regardless of who the party of the other part is, if the conditions of the section have been complied with, there will be an augmentation of the foreign exchange resources of the country. [Petron Engg. Constructions (P.) Ltd. v. CBDI, (1987) 34 Taxman 401 (Bom)].

Further, the words “the Government of a foreign State or foreign enterprise” must be read together. The words ‘foreign enterprise’ must take colour from the words ‘the Government of a foreign State.’ The words ‘foreign enterprise’ cannot, upon an interpretation of section 80-O, be held to apply to an establishment or undertaking or branch or unit of an Indian company in a foreign country. Such establishment, undertaking, branch or unit may well be an ‘enterprise’ but it is not a ‘foreign enterprise’ within the meaning of these words as used in section 80-O. [Petron Engg. Constructions (P.) Ltd. v. CBDT, (1987) 34 Taxman 401 (Bom)].

However, there is nothing in section 80-O which requires that the agreement should necessarily be between the assessee and the foreign party. If the conditions set out in section 80-O are fulfilled, the agreement would qualify for approval. [Indian Hume Pipe Co. Ltd. v. CBDT, (1986) 27 Taxman 90 (Bom)]. If the agreement is entered into by the Indian company with a foreign Government but the Indian company appoints an Indian contractor to execute the work under the agreement, there would be sufficient compliance with the provisions of section 80-O and the agreement would deserve approval. [Ganon Dunkerely & Co. Ltd. v. CBDT, (1986) 156 ITR 162 (Bom)].

The very object of the section is that the identity of the Indian company must be different from that of the foreign company and that the managing or running a foreign company by the Indian company would not amount to rendering of technical services, because when the Indian company manages or runs the foreign company, then the identity of the Indian company would be lost and, therefore, the remuneration obtained from managing or running a foreign company would be in the nature of profits while section 80-O restricts itself to income by way of royalty, commission or fees and excludes all other types of remuneration. [J.K. (Bombay) Ltd. v. CBDT, 91979) 118 ITR 312 (Del), distinguished in Oberoi Hotels (India) (P). Ltd. v. CBDT, (1982) 135 ITR 257 (Del) in connection with managing a modern hotel].

It may be noted that technical services should be rendered outside India and not in India, e.g., testing samples of products in laboratory in India would not amount to rendering technical services outside India. [Scarle (India) Ltd. v. CBDT, (1984) 145 ITR 573 (Bom)].

The information received from Indian consultants by the British Broadcasting Corporation, (BBC) on attitudes of the Indian audience for use by the BBC can be said to be used outside India. [E.P.W..Da Costa v. Union of India, (1980) 121 ITR 751 (Del)].

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- c. Deduction in respect of remuneration of Indian technician for services outside India.-A technical who is a citizen of India is entitled to the deduction from his remuneration received by him in foreign currency from any employer (being a foreign currency from any employer (being a foreign employer or an Indian concern) for any services rendered by him outside India for a period of 3 years, of the higher of the following :
 - i 50% of remuneration, or
 - ii 75% of such remuneration as is brought into India by or on behalf of the assessee in accordance with the Foreign Exchange Regulation Act, 1973 and any rules made thereunder. [See section 80 RRA, Income-tax Act].

It is significant that section 80-O RRA of the Income-tax Act, 1961, uses the expression “remuneration” and not “salary”, for a citizen of India, who receives remuneration in foreign currency for services rendered outside India, to be entitled to the deduction provided therein. There is no warrant for restricting

the meaning of the expression “remuneration “ only to salary received by an employee abroad. “Remuneration” will cover fees paid to a consultant or technician. Further the word “employer” is used in section 80 RRA not in any technical sense but as meaning a person who uses or services of any person : It comprehends whole time servant or part-time engagee. [CBDT v. Aditya V. Birla’ (1988 170 ITR 137 (SC)].

iii Model Forms

Registration No. of the Company.....

Nominal capital Rs.....

THE COMPANIES ACT, 1956

Form of Application to the Central Government for Purchaser by Companies

of Shares of Other Companies

Note :1

- i Company (in this form) means company which proposes to make the investment, and ‘other body corporate’ means the company in which investment is proposed to be made.
- ii Information should be furnished as on the date of application unless otherwise indicated in the form.
- iii The application should be accompanied by the documents mentioned in Appendix 1. The company is advised that, for expeditious disposal of the application , the information regarding the financial position of the company and also of the other body corporate according to the latest published balance sheets, should also be furnished in the proforma contained in Appendix II.
- iv The reference to “debentures” in the proforma should be read with the provisions of section 372 (12).
 - i
 - a. Name of the company.
 - b. Management structure (composition of board of directors giving their names and addresses and particulars regarding manager, managing director, if any).
 - c. Capital structure
 - 1. Share capital Authorised Rs. Subscribed Rs. Paid-up Rs. (Separately indicating equity and preference share capital).
 - 2. Debentures Rs.
 - 3. Long term loans Rs.
- II.
 - a. Name of the other body corporate :
 - b. Management structure (composition of board of directors giving their names and addresses and particulars regarding manager or managing director, if any).
 - c. Capital structure :
 - 1. Share capital Authorised Rs. Subscribed Rs. Paid-up Rs. (Separately indicating equity and preference share capital).
 - 2. Debentures Rs.
 - 3. Long term loans Rs.

Note : In the case of new companies and companies still to be registered particulars of the proposed arrangement should be furnished.

- III. Main business of the company :
- Main business of the other body corporate.
 - In what way would be proposed investment be in the interest of the company and of the other body corporate.
- IV. Particulars of the proposed investment :
- Nature of investment (equity/preference) or debenture with rate of preference / dividend / debenture interest, terms of redemption, etc .
 - Amount to be invested.
 - Number of shares / debentures to be purchased.
 - Nominal value of the shares / debentures.
 - If the shares are quoted on any recognised stock exchange, current market quotations.
 - If the shares are not quoted on any recognised stock exchange, details as to the break-up value, yield and fair value.
 - Rate at which the shares/debentures are to be purchased (in case the price to be paid is higher than the market value or the fair value of the shares justification for the same.)
 - Form of payment , i.e. in cash or by issue of shares of the company or by transfer of property (details to be given).
 - Dividend declared on the shares of the other body corporate during the preceding three year, if any.
 - Whether the shares/debentures are being purchased out of the fresh issue from the company.
 - If the shares/debentures are being purchased from the existing shareholders, indicate the name and address of the transferors and their relationship, if any, with any of the director/directors or manager or the company. In case the transferor is a body corporate, indicate the interest of the director/directors or manager of the company, in the said body corporate with the percentage of their shareholding. State the shares/positions held by them or their relations.
 - Whether section 108-A of the Act is applicable to the proposed acquisition of shares. If so, whether application for approval has been made to the Central Government under the said Section.
 - Indicate the amount of foreign exchange, if any, required to be remitted for this investment with the name of the country to which remittance is to be made.
 - Whether with the proposed investments the burden of foreign exchange remittance regarding dividends, etc., of the other body corporate is likely to be reduced and, if so, give details.
- V.
- Full details of the investment, if any, already made by the company in the shares or debentures of other bodies corporate distinguishing between investment made in bodies corporate in the same group and outside the group indicating the bodies corporate which inter se in the same group though may not be in the same group as that of the company :
 - Names of the other bodies corporate.
 - Nominal value of the shares/debentures of each of them.
 - Cost price of the shares in which investments were made.
 - Present market price of the shares.
 - Whether quoted on any recognised stock exchange.
 - Dividends paid during the last three years separately, in respect of shares of each such other body corporate.
 - Subscribed capital of each company in which investments to the subscribed capital of each.
 - The percentage which the proposed investment (face value) together with any previous investments made by the company would bear in relation to the subscribed capital of the other body corporate.

- c. The percentage which the cost price of the proposed investment along with that of all existing investments in other bodies corporate, bear to the subscribed capital of the company.
- VI. Whether the other body corporate is in the same group as the company within the meaning of section 370 of the Act. If so, state the particular clause of the section which is attracted indicating the circumstances in which the companies are regarded as coming under the same group, and the percentage which the cost price of the proposed investment along with that of all existing investments in the same group bears to the subscribed capital of the company.
- VII. Full details of the existing borrowings of the company indicating the amount due, source from which obtained, rate of interest payable, terms regarding repayment and security and separately showing the amounts due to
 - a. Central State Governments.
 - b. Financial institutions.
 - c. Nationalised banks
 - d. Insurance companies.
 - e. Others.
- VIII.
 - a. The net excess of current assets over current liabilities of the company according to the latest balance sheet, indicating details of the calculations.
 - b. Full details of the cash and bank balance and easily realisable securities and investments according to the latest balance sheet of the company.
- IX.
 - a. Source from which the proposed investment is to be financed, indicating detailed particulars, the period over which the payment will be spread over giving a cash-flow statement.
 - b. If any part of the amount to be invested is to be financed by borrowings, the amount of the loan and the source from which it is to be obtained should be indicated together with the terms regarding interest, repayment, security to be furnished, etc.
- X. Equity /preference shares held by each of the following indicating separately the percentage the same bears to the total equity, preference share capital of the investing company :
 - a. Controlling block :
 - 1. Shares held by directors and their relatives.
 - 2. Other companies in the same management.
 - b. Central /State Governments
 - c. Financial institution (by individual names).
 - d. Nationalised banks.
 - e. Non-residents :]
 - 3. Companies not incorporated in India
 - 4. Foreign nationals
 - f. Shareholders not covered in (a) to (e) above holding 1 per cent or more of the equity shares.
 - g. Others :
 - 5. Companies
 - 6. Individuals.
- XI. Equity/ preference share held by each following indicating separately the percentage the same bears to the total equity/preference share capital of the other body corporate.
 - a. Controlling block :
 - 1. Shares held by directors and their relatives.
 - 2. Others companies in the same management.
 - 3. Investing company.
 - b. Central /State Governments.
 - c. Financial institutions(by Individual names).

- d. National banks.
- e. Non-residents :
 - 1. Companies not incorporate in India.
 - 2. Foreign nationals.
- f. Shareholders not covered in (a) to (e) above holding 1 per cent or more of the equity shares.
- g. Others :
 - 1. Companies.
 - 2. Individuals.
- XII. Equity /preference shares held by each (as in para XI) after making the proposed investment.
- XIII.
 - a. Whether the company is registered under section 26 of the Monopolies and Restrictive Trade Practices Act, 1969. If so, registration No. under the Act ?
 - b. Whether the company has submitted an application under section 21 or 22 or 23 of the Monopolies and Restrictive Trade Practices Act, 1969, also in this regard ?
- XIV. Whether there are any arrears of provident fund in respect of the employees of the investing company ? If so, the details thereof.
- XV. Any other information which may have a bearing on the proposed investment.

Dated.....day of Signature

.....198..... Designation

APPENDIX I

- a. A copy of the resolution passed by the company in general meeting together with a copy of the resolution of the Board approving the investment.
- b. A copy each of the Memorandum and Articles of Association of the company and of the other body corporate.
- c. Copies of the balance sheets of both the companies and of the other body corporate for the last three financial years.
- d. A copy of the prospectus issued by the other body corporate.

APPENDIX II

A. Financial and liquidity position of the company according to the latest balance sheet. Current Assets Rs. Rs. (including investments other than trade investments in subsidiary and/or managed companies).

Less :

Current liabilities (including short-term loans and liabilities)

Liquid surplus

Add :

- a. Fixed assets
- b. Trade investment and investment in subsidiary and and /or managed companies .

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Less :

Long –term loans and liabilities Net worth as on (Date of balance sheet)

Note :

In making the above computation of the net worth adjustments in respect of the following items shall be made :

- i intangible assets, e.g. goodwill, etc.
- ii Doubtful assets, e.g. doubtful and bad debts, etc.
- iii Deferred revenue expenditure
- iv Accumulated losses
- v Arrears of depreciation
- vi Arrears of preference shares dividend
- vii Any other amount, appearing in the balance sheet required to be deducted in accordance with accounting practice.

Total Reconciliation of net worth paid-up capital

Add :

Reserve (Please specify details)

Less :

Intangible assets and any other amount required to be deducted (vide Note above)

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Net worth as on

Date of balance sheet)

B. Financial position of the other body corporate

according to the latest balance sheet

Total assets Rs. Rs.

Less :

- i Intangible assets like goodwill, etc.
- ii Doubtful assets like doubtful and bad debts, etc.
- iii Deferred revenue expenditure.
- iv accumulate losses
- v Arrears of depreciation
- vi Arrears of preference shares dividend.
- vii Any other amount required to be deducted in accordance with accounting practice

Rs.

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Total (X)

Less :

Liabilities

Net worth as on

(Date of balance sheet)

Reconciliation of net worth paid-up capital

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Add:

Reserve (please specify details)

Less :

Intangible assets, etc.

(Vide (X) above)

Net worth as on

(Date of balance sheet)

.....

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Signature

Designation

Date the.....day of.....,2000.