

Setback for Foreign Law Firms Hoping to Establish Operations in India

The Bombay High Court has ruled that the practice of law in India by U.S. and U.K. law firms is not allowed unless foreign lawyers abide by the Advocates Act that governs the practice of the profession of law in India.

The Bombay High Court has issued a ruling resulting in a major setback for U.S. and U.K. multinational law firms seeking to open offices in India for the practice of U.S. and U.K. law.

On December 16, 2009, the Court held that a decision by the Reserve Bank of India (RBI) allowing foreign law firms to open liaison offices in India was not justified. The Court further interpreted the provisions of the Advocates Act, 1961 as being broad enough to cover lawyers practicing in litigious matters, as well as non-litigious matters. Thus, all lawyers performing non-litigious activities in India were bound to follow the provisions contained in the Advocates Act, 1961. As explained in the judgment, non-litigious activities include an attorney that presents herself as an expert in the field of law and renders legal assistance to another person by drafting documents, advising clients, and giving opinions. In effect, the Court has held that non-Indian lawyers may not perform any legal work in India unless they meet certain bar requirements.

Three law firms -- two of them being U.S. multinationals headquartered in New York and one a U.K. multinational headquartered in London -- were given permission by the RBI to open liaison offices in India under Section 29 of the Foreign Exchange Regulation Act, 1973. The RBI permission was limited to conducting only liaison activities in India.

The U.S. and U.K. law firms claimed they had opened their liaison offices in India to act as a coordination and communications channel between the firms' head offices/branches and clients in and outside of India. The Bombay High Court rejected this notion, citing cases from the United States and India to support its holding that these liaison activities were, in fact, practicing law in non-litigious matters. Since the practice of law was held to be involved, the RBI's granting of permission to open liaison offices under Section 29 of the Act was found to be invalid. Moreover, the Court held that foreign law firms could not carry on non-litigious activities unless their lawyers in India were enrolled as advocates under the Advocates Act, 1961. Under the Act, only a person with a law degree and enrolled with the state bar councils of India may practice law.

This case was on remand from the Supreme Court of India, which had sent the matter back to Bombay High Court for reconsideration and decision as to what practicing the profession of law in India means. It is not known whether the firms plan to appeal this decision. Attorneys and firms found to be in violation of the Advocates Act, 1961 may face civil penalties.

Until a final decision has been rendered in this matter, multinational law firms with clients in India will need to fall back on established practices for ensuring that they do not violate the Advocates Act, 1961, nor create a permanent establishment ("PE") in India.

Firms should continue to control their partners' and associates' time in country, and count the number of days in India so as to avoid violating the 90 day rule. Any time over 90 days in India risks the establishment of a PE, exposes the firm to taxation in India, and raises regulatory issues around the unauthorized practice of law. In the past, firms have entered into associations or secondment agreements with law firms in India. This trend will not only continue but will likely expand as firms continue to see opportunities in this emerging legal market.

PricewaterhouseCoopers' international team of law firm services professionals has extensive experience advising US Law Firm clients with their India business transactions. Please contact Stanley Kolodziejczak at (646) 471-3160, Gregg Sincoff at (646) 471-1335 or Nancy Regan at (646) 471-6104 in New York; or Rahul Garg at +91 124 3306515, Ajay Rastogi +91 124 3306805, or Shailendra Gupta +91 124 3306848 in India.

Contacts

Stanley Kolodziejczak
(646) 471-3160

Gregg Sincoff
(646) 471-1335

Nancy Regan
(646) 471-6104

Rahul Garg
+91 124 3306515

Ajay Rastogi
+91 124 3306805

Shailendra Gupta
+91 124 3306848

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