

IMPLICATIONS OF “RETURN TO OFFICE” DIRECTION TO SEZ UNITS IN MAHARASHTRA

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Amidst continuing uncertainty regarding the pandemic, the office of the Development Commissioner, Santacruz Electronic Export Processing Zone (“SEEPZ”) Special Economic Zone (“SEZ”) through an order dated March 22, 2022 (the “SEEPZ Circular”), has revised its “Work from Home” guidelines. As per the SEEPZ Circular, the SEZ units located in Maharashtra, Goa, Dadra and Nagar Haveli, and Daman and Diu, are required to start functioning from office with 50% capacity from July 1, 2022, and with 100% capacity from September 1, 2022, after ensuring double dose vaccinations and adherence to the COVID-19 protocol.

Background of “Work from Home” model of SEZ units

In May 2021, the Ministry of Commerce and Industry, Government of India, issued a letter to the Development Commissioners of SEZs to consider the requests from the industry and approve the extension of the work from home facility in a liberal manner until such time that the National Disaster Management Authority or State Governments issued orders regarding the pandemic management. Basis this, Development Commissioners of SEZs permitted the SEZ units to function remotely under Rule 43 of the SEZ Rules, 2006, that prescribes conditions to allow work from home or from a place outside the SEZ for employees:

engaged in the Information Technology (“IT”) and Information Technology enabled Services (“ITES”) SEZ units;

engaged in IT and ITES SEZ units and registered as Other Service Provider with the Department of Telecommunications;

who have been temporarily incapacitated; or

who are travelling or off-site.

Due to decreasing COVID-19 cases, the Maharashtra government, through a circular dated March 1, 2022, has allowed government and private offices to function at full capacity but ensuring that they follow the prescribed COVID-19 protocol. The SEEPZ Circular references this relaxation of the Maharashtra government and specifies that although the IT/ITES SEZ units have requested for more flexibility on the March 1, 2022 deadline, they have agreed to commence work from office in a phased manner.

Effect of the SEEPZ Circular

The SEEPZ Circular makes it mandatory for SEZ units to restart as per the deadlines prescribed from their SEZ premises. The work from home model will not be permitted with effect from September 1, 2022, and this move is likely to impact employees who had the flexibility to work from home or from a place outside the SEZ. Interestingly, the SEEPZ SEZ is currently the only authority that has directed the SEZ units to resume offices with 100% capacity with effect from September 1, 2022. While the Madras Export Processing Zone SEZ (“MEPZ”), in its circular dated March 15, 2022, extended the work from home facility until June 30, 2022, and stated that SEZ units should plan appropriate measures to operate from their SEZ premises fully or partially from July 2022, it did not mandate on the exact employee strength required to remain present in the SEZ. Having said that, it is likely that in the coming days, other SEZs across India may follow the SEEPZ Circular and mandate resumption of work from the SEZ premises.

Our Comments

As we see it, most employees prefer a hybrid working model, and most companies are opting for hybrid models in the post-Covid world. Employees are seeking flexibility and are preferring to work from the office as needed, as it saves commuting time and cost, promotes work-life balance, enhances productivity and allows inclusive workforce hiring beyond the location of the office. Going forward, SEZ units will face challenges in retaining employees who seek a hybrid model as the SEEPZ Circular does not provide any flexibility.

Separately, a concern exists that an aggressive interpretation of Indian tax law could lead to instances where tax officials may consider the work done remotely by workers of the SEZ unit as ineligible for tax holiday benefits. Section 10AA of the India’s Income-tax Act, 1961, *inter alia*, allows SEZ units to avail income tax exemptions for fifteen (15) years in a staggered manner, subject to the condition that the SEZ unit has commenced manufacture or production of articles or things or provision of any services from the SEZ location. While Indian tax authorities have informally mentioned that remote work should not be a concern as the Indian government is working to see that pandemic-induced disruptions do not impact functioning of businesses; in our view, a clarification on the treatment of services rendered from home in case of SEZ units will be helpful to avoid tax litigation. This will provide relief to companies operating in SEZ locations, where work from home had almost acquired levels of permanency. Some organisations have announced long-term plans on work from home, while a few have already made this arrangement permanent.

In the budget speech of February 1, 2022, India’s Finance Minister had announced that a new legislation will be enacted to replace the Special Economic Zones Act, 2005. Press reports suggest that the IT business process management industry and NASSCOM are working with the Indian government to ensure that a hybrid work structure is built into the new legislation. In our view, some of these clarifications, which could be amendments to existing policies, will go a long way in securing long-term commitments for companies working from SEZ units.