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Executive Retainerships, CXO Transitions & The 'Non-Compete' Myth

Navigating Section 194J Retainerships, Section 27 Restraint of Trade, and Section 73 Reliance Damages

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Executive Summary & Takeaway: Executive Strategy: Executive mobility in Indian tech hubs is routinely chilled by aggressive non-compete threats from former employers. Under Section 27 of the Indian Contract Act and established Supreme Court authority (Percept D'Mark v. Zaheer Khan), post-employment non-competes are categorically void against public policy. Concurrently, senior professionals engaged under Section 194J (flat 10% TDS) operate under an independent contract for services. Under the doctrine of approbation and reprobation, enterprises cannot treat them as contractors for tax while imposing employee probation manuals to dismiss them.

1. The Absolute Voidability of Non-Competes Under Section 27

Unlike US jurisdictions where 'reasonable' non-competes are upheld, Indian law admits NO reasonableness exception. Under Section 27 of the Contract Act and *Percept D'Mark (India) v. Zaheer Khan (2006)*, any agreement restraining an individual from exercising a lawful profession or trade post-termination is void ab initio. Courts will not grant injunctions to enforce post-exit employee non-compete clauses.

2. Section 194J Retainership vs. Section 192 Salary

When an enterprise deducts TDS at 10% under Section 194J (Fees for Professional or Technical Services), it legally acknowledges a 'contract for services.' The enterprise is estopped from later invoking internal employee handbooks or probationary termination clauses. The relationship is governed strictly by commercial contract law.

3. Hypothetical Case Study: FinScale Solutions & The VP of Architecture

FinScale recruited Amit Sen, an enterprise architect in Bengaluru, to lead its Gurugram Cyber City platform on a ₹60 lakh annual retainership under Section 194J. Amit relocated his family, incurring ₹12 lakhs in lease deposits and relocation expenses. Seven months later, after the core architecture was deployed, FinScale terminated the retainership with 15 days' notice, alleging probation. Amit claimed Section 73 reliance damages (relocation costs) and unexpired expectation fees. Faced with an estoppel defense over Section 194J TDS slips, FinScale settled, clearing 6 months' fees and issuing an unconditional relieving certificate.

4. Executive Transition Protocol: Company vs. CXO

- **For the Startup Company:** Rely on strict non-disclosure (trade secrets) and non-solicitation of clients/staff, which remain enforceable, rather than void non-competes.
- **For the Exiting CXO:** Audit tax Form 26AS/TDS certificates to establish professional status; preserve relocation directives to enforce Section 73 reliance damages.
- **Mutual Separation Terms:** Secure reciprocal non-disparagement, clear tax Form 16A filings, and prompt release of unvested equity settlement deeds.

About the Author & Chambers

Gaurav Arora is an Advocate (Bar Council of Delhi) and Registered Indian Patent Agent (INPA-1900), serving as Founder and Lead Arguing Counsel at Arora IP Counsel (Chambers of Gaurav Arora) in New Delhi / NCR. He holds an LL.M. in Intellectual Property Law from Benjamin N. Cardozo School of Law, New York (Dean’s Merit Scholar), a B.E. in Mechanical Engineering from Punjab Engineering College (PEC Chandigarh), an LL.B. from GLC Mumbai, and passed the USPTO Patent Bar Examination (2016). He is the author of the statutory treatise "Patently Obvious COMMA: Correct Interpretation of the Patents Act, 1970" (2023), deposited in the permanent collection of the WIPO Knowledge Center in Geneva.

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