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Review of Foreign Direct Investment (FDI) Policy on various sectors

The Department of Industrial Policy and Promotion (DIPP) vide Press Note No. 12 (2015 Series) dated 24th day of November, 2015 has codified the amendments in respect of Foreign Direct Investment (FDI) Policy on 10th day of November, 2015 proposed to 15 major sectors including, defence, construction & development, retail, broadcasting, civil aviation, banking and manufacturing. Changes introduced in the policy include increase in sectoral caps, bringing more activities under automatic route and easing of conditionalilities for foreign investment. Further, new sectors have also been opened to foreign investments.

One of the major changes in the policy is that the companies, trusts and partnership firms, which are incorporated outside India but are owned and controlled by NRIs, can now invest in India with special dispensation as available to NRIs under the FDI policy. This reform is particularly huge in terms of attracting the foreign investment largely from the overseas entities owned/controlled by Non-resident Indians (NRIs).

Further, the policy clearly defines 'manufacturing' which is crucial to the policy on e-commerce. Under the policy, a company manufacturing goods in India is free to sell online without any restriction.

These broad based reforms touching upon a variety of sectors have removed some of the key hurdles that were impeding inflow of capital in sectors in need of foreign funds. These reforms are also another example of the Government's emphasis on the ease of doing business and further these amendments are path breaking and provide a new direction to foreign investment regime in the country.

The Key Reforms are as follows:

1. **Limited Liability Partnership (LLP)**

FDI in LLPs is now permitted under the automatic route in sectors in which 100% FDI is allowed under the automatic route and in which there are no FDI linked performance conditions. Further, LLPs with FDI are now permitted to make downstream investments in companies or LLPs engaged in sectors in which 100% FDI is allowed under the automatic route and in which there are no FDI linked performance conditions.

2. **Investment by Companies/Trusts/Partnerships Owned & Controlled by NRIs**

NRIs include non-residents who are Indian citizens or are Overseas Citizens of India (**OCI**) cardholders. Currently, investments made by NRIs on non-repatriation basis are treated at par with domestic investments made by residents. Further, for investments made by NRIs on non-repatriation basis, special dispensation for investment is allowed in construction development (i.e. FDI-linked conditions are not applicable) and civil aviation sector (there are no caps). However, the Government of India realised that larger investments can be attracted not through individuals but largely through corporate entities.

Pursuant to the Reforms, the above-mentioned special dispensation is also extended to companies, trusts and partnership firms, which are incorporated outside India but are owned and controlled by NRIs. Henceforth, such entities owned and controlled by NRIs will be treated at par with NRIs for investment in India.

3. **Transfer of Ownership and Control of Indian Companies**

Currently, the FDI Policy provides that approval of the Government will be required for establishment and ownership or control of an Indian company in sectors/activities with caps.

However, as per the Reforms, this provision has been amended to provide that approval of the Government will be required if the company concerned is operating in sectors/ activities which are under Government approval route rather than capped sectors. Further, no approval of the Government is required for investment in automatic route sectors by way of swap of shares.

4. **Tea / Coffee / Rubber / Cardamom / Palm Oil & Olive Oil Plantations**

Currently, FDI is not allowed in either of the above sectors **except** tea plantation where FDI is allowed under the approval route. As per the reforms, 100% FDI is allowed under automatic route in all of the aforesaid sectors.

5. **Defence Sector**

Currently, foreign investment up to 49% is allowed in the Defence Sector under the Government approval route. As per the reforms, foreign investment up to 49% will be allowed under automatic route. Foreign investment above 49% is also permitted, subject to approval of Government on case to case basis, wherever the investment is likely to result in access to modern and ‘state-of-art’ technology in the country.

6. **Broadcasting Sector**

FDI policy on broadcasting sector has also been amended. New sectoral caps and entry routes are as provided herein below:

Activity	**Announced cap and route**	**Existing cap and route**
Teleports(setting up of up-linking HUBs/Teleports);	100% (Up to 49% - Automatic route; Beyond 49% - under Government approval route)	74% (Up to 49% - Automatic route; Beyond 49% and up to 74%- under Government approval route)
Direct to Home (DTH);		
Cable Networks (Multi System operators (MSOs) operating at National or State or District level and undertaking upgradation of networks towards digitalization and addressability)		
Mobile TV		
Headend-in-the Sky Broadcasting Service(HITS)		
Cable Networks (Other MSOs not undertaking upgradation of networks towards digitalization and addressability and Local Cable Operators (LCOs))		
Terrestrial Broadcasting FM (FM Radio)	49% Government route	26% Government route
Up-linking of 'News & Current Affairs' TV Channels		
Up-linking of Non-'News & Current Affairs' TV Channels	100% Automatic route	100% Government route
Down-linking of TV Channels		

7. **Construction Development Sector**

FDI in the construction projects is permitted under the automatic route, subject to fulfilment of certain conditions. The Reforms have liberalised fulfilment of certain conditions, namely:

a) Conditions of restriction of floor area of 20000 square meters in construction development projects have been removed;
b) Investee company's obligation to bring in a minimum of USD 5 million within 6 months of commencement of the project has been done away with;
c) For projects under the automatic route, a foreign investor will be permitted to exit and repatriate the foreign investment before the completion of the project, provided that the lock-in requirement of three years is complied with;
d) Transfer of stake from one non-resident to another non-resident on a non-repatriation basis will not be subject to any lock-in period or to any government approval;
e) Exit is permitted at any time if the project or trunk infrastructure is completed before the lock in period;

f) Condition of lock-in period will not apply to Hotels &Tourist Resorts, Hospitals, Special Economic Zones (**SEZs**), Educational Institutions, Old Age Homes and investment by NRIs; and

g) 100% FDI under automatic route is permitted in completed projects for operation and management of townships, malls/ shopping complexes and business centres. Consequent to foreign investment, transfer of ownership and/or control of the investee company from residents to non-residents is also permitted. However, there would be a lock-in-period of three years, calculated with reference to each tranche of FDI, and transfer of immovable property or part thereof is not permitted during this period.

Further, the definition of real estate business has also been modified and accordingly earning of rent/income on lease of the property, not amounting to transfer, will not amount to real estate business. Transfer in relation to the FDI Policy on the sector includes:

a) The sale, exchange or relinquishment of asset; or
b) The extinguishment of any rights therein; or
c) The compulsory acquisition thereof under any law; or
d) Any transaction involving the allowing of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882; or
e) Any transaction, by acquiring shares in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property

8. **Single Brand Retail Trading (SBRT)**

Currently, the FDI Policy on SBRT mandates that: (i) sourcing of 30% of the value of goods purchased should be reckoned from the date of receipt of FDI; (ii) products are required to be sold under the same brand internationally and that the foreign investor is required to be the brand owner or have the right to use the brand name under a legally tenable agreement with the brand owner. Also, SBRT by means of e-commerce is not permissible.

As per the Reforms, the 30% sourcing rule would be triggered only after the first store is set up (and not immediately post receipt of foreign investment). For ‘state-of-art’ and ‘cutting-edge technology’, sourcing norms may be relaxed with Government approval.

Also, entities with foreign investment in SBRT can sell products with an Indian brand name, and in that case, the requirement of using the same brand name internationally and the foreign investor having right to use or own the brand name does not apply. Instead, Indian brands are required to be owned and controlled by resident Indian citizens and/or companies, which are owned and controlled by resident Indian citizens. Further, SBRT can now be undertaken through e-commerce platform.

9. **Opening up FDI in Duty Free Shops**

100% FDI is allowed in Duty Free Shops under the automatic route. Duty Free Shop mean shops set up in custom bonded area at International Airports/International Seaports and Land Custom Stations where there is a transit of international passengers. It shall not engage into any retail trading activity in Domestic Tariff area of the Country.

10. **Wholesale and Retail without Government Approval**

As per the Reforms, Indian manufacturers with foreign investment would be allowed to sell their products through wholesale and/or retail formats, including through e-commerce platform, without Government approval. However, for this purpose, the manufacturer is required to be the owner of the Indian brand and manufacture at least 70% of its products (in terms of value) in-house, i.e. in India, and source at most 30% from Indian manufacturers. It is pertinent to mention herein that the requirement of sourcing 30% from Indian manufacturers is a new concept introduced by the government

11. **Banking Sector**

The Government has decided to introduce full fungibility of foreign investment in the private banking sector. Accordingly, FIIs/FPIs/QFIs can now invest up to sectoral limit of 74% after following the due procedures provided that there is no change of control and management of the investee company.

12. **Single entity to carry out both Wholesale and Retail Business**

As per the current FDI policy, 100% foreign investment is permitted under the automatic route in wholesale cash & carry activities (e.g. Metro Cash and Carry Stores), but a wholesale/cash & carry trader cannot open retail shops to sell to the consumer directly (i.e. only B2B is permitted).

Now, as per the Reforms, it has now been decided that a single entity will be permitted to undertake both the activities of single brand retail trading and wholesale with the condition that conditions of FDI policy on wholesale/ cash & carry and retail business have to be complied by both the business arms separately.

13. **Enhancing limits for certain sectors**

Foreign equity caps of (a) Non-Scheduled Air Transport Service; (b) Ground Handling Services; (c) Satellites- establishment and operation; and (d) Credit Information Companies have now been increased from 74% to 100%. Further, sectors other than Satellites-establishment and operation have been placed under the automatic route.

14. **Opening up FDI in Regional Air Transport Service**

    In case of scheduled air transport service/domestic passenger airline and regional air transport service FDI is allowed up to 49% (for NRIs 100%) under automatic route.

15. **Simplification of Conditionalities**

    It has been announced in the Reforms that certain conditions of FDI policy on Agriculture and Animal Husbandry, and Mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities have been simplified. However, the details with respect to these reforms have not been announced yet.

    As per the FDI policy, Foreign Investment Promotion Board (**FIPB**) considers proposals having total foreign equity inflow up to Rs. 3000 Crore and proposals above Rs. 3000 Crore are placed for consideration of Cabinet Committee on Economic Affairs (**CCEA**). In order to achieve faster approvals on most of the proposals, it has been decided that the threshold limit for FIPB approval may be increased to Rs.5000 Crore.

Conclusion

Overall, we believe the aforesaid Reforms are a dynamic step to integrate the Indian market with the rest of the world for attracting investments, technology, and enhancing India's position as a destination for foreign investments.

These amendments will further ease, rationalize and simplify the process of foreign investments, thereby encouraging "*minimum government; maximum governance*".

With these amendments, the Government has attempted to accept some of the long standing demands of industry, and to make India a more attractive destination for foreign investors. Further, these kinds of radical changes in the FDI policy have also been made to attract and promote the "Make in India" campaign.

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