

FDI norms across key sectors relaxed

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The Government of India ("GOI") amended its Foreign Direct Investment ("FDI") policy through Press Note issued on 10 November 2015 ("PN 2015"). The amendment makes a leap forward in the FDI regime in India by raising sectoral caps, doing away with certain investment restrictions, bringing more sectors under automatic route of investment instead of Government approval route of investment and liberalizing various conditions relating to foreign investments. . The move is in tandem with the Government of India's 'Make in India Policy' aimed at promoting the ease of doing business in India with the intention of attracting more direct investment into India.

The salient features of the PN 2015 is as follows:

CONSTRUCTION DEVELOPMENT

Way back in 2005, FDI was permitted in development of townships, construction of residential / commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure. However, such investment was subject to restrictions such as minimum capitalization, minimum area, etc. Last year, GOI's Press Note 10 of 2014 ("PN 2014") considerably liberalized the sector. However, certain ambiguities were still prevailing due to which PN 2014 could not achieve the desired result. PN 2015 removes most of the ambiguities that plagued its predecessors at a single stroke. The following are some of the important changes:

Minimum Area Requirement : Originally, the minimum area requirement for construction development project was 50,000 square meters. Due to difficulty in obtaining such large areas in big cities, PN 2014 had reduced the minimum area requirement to 20,000 square meters. PN 2015 however removes the minimum area requirement altogether. The change is quite significant, as more projects can now attract FDI without the entry barrier of area restrictions.

Minimum Capitalization : The existing policy prescribed minimum capitalization of US \$5 million to be brought within 6 months of commencement of business. PN 2015 does away with minimum capitalization requirement completely. This is another significant move as even smaller projects can now attract FDI due to this amendment.

Lock-In : Under the earlier policy, an investor was permitted to exit from an investment upon development of trunk infrastructure or on completion of the project. Accordingly, a foreign investor had to at least wait for development of trunk infrastructure before exiting from the project. PN 2015 provides an additional exit to investor, which is after 3 years from the date of each tranche of foreign investment, in addition to the existing condition of completion of the project or development of trunk infrastructure. As a result, a foreign investor can now exit from a project after expiry of the three-year lock-in period even though development of trunk infrastructure is not yet completed. This will help the investor to exit early in case of delayed projects.

Further, PN 2015 also specifies that each phase of the project be treated as a separate project for purposes of FDI policy. This clears ambiguity regarding development of trunk infrastructure in multiple phase projects. As per the new policy, an investor can exit from a phase, if the trunk infrastructure of that phase has been completed.

PN 2015 also allows transfer of stake by foreign investor to another foreign investor during the lock-in period without any Government approval. The earlier policy required prior approval from Government for such transfer.

NRI INVESTMENT

Non Resident Indian ("NRI") has been treated as a category of investors different from other non-resident investors under the foreign investment regime and has been given certain privileges. They are allowed to make two kinds of direct investment: on repatriation basis and on non-repatriation basis. Press Note 7 of 2015 issued by GOI on 3 June 2015 ("PN 7") further liberalized NRI investment on a non-repatriation basis. According to PN 7, NRI investments on a non-repatriation basis will be treated as domestic investment at par with the investment made by Indian residents. PN 2015 further liberalizes this regime and extends this benefit to investment made by companies, trusts and partnership firms, incorporated outside India and owned and controlled by NRIs. This will help NRIs to structure their investment through investment vehicles situated in appropriate jurisdictions.

FDI IN LIMITED LIABILITY PARTNERSHIP

Earlier, 100% FDI was permitted under the approval route in Limited Liability Partnership operating in sectors where 100% FDI is allowed without any investment restriction. PN 2015 liberalizes this regime and allows 100% FDI in LLPs under automatic route in sectors where 100% FDI is permitted without investment restriction. Further, LLPs are allowed to make down stream investments under automatic route in sectors where 100% FDI is allowed without any investment restriction.

OTHER CHANGES

1. Hitherto, FDI in defense sector was permitted up to 49% under approval route, henceforth, it will be under automatic route.
2. New sectoral caps and entry route have been prescribed for FDI in broadcasting sector.
3. Full fungibility of foreign investment introduced in banking-private sector.
4. Manufactures are allowed to sell their product through wholesale/retail including e-commerce without Government approval.
5. Earlier, e-commerce was not permitted in single band retail trading ("**SBRT**"). PN 2015 allows entities that have obtained permission for SBRT, to undertake e-commerce. Further, PN 2015 relaxed certain sourcing norms for SBRT.
6. Indian manufactures, controlled by Indian residents, are allowed to sell their own branded product in any manner (including wholesale, retail, e-commerce) subject to certain conditions.
7. 100% FDI is allowed in duty free shops located and operated in customs bonded areas.
8. Same entity allowed to carry out both wholesale trading and SBRT.
9. No Government approval required for establishment and transfer of ownership and control of Indian companies in capped sectors, unless investment in such sectors is under approval route.
10. No approval required for investment through share swap
11. Threshold limit for approval foreign investment by Foreign Investment Promotion Board has been raised from the current Rs. 3,000 crores to Rs. 5,000 crores. Proposals exceeding Rs. 5,000 crores, require approval of Cabinet Committee on Economic Affairs.