SERIES ON DOING BUSINESS IN INDIA

2ND RELEASE ON ROUTING PROCESS OF FDI IN INDIA

FEMA/ FDI / INCOME TAX/ GST/ LAND/ LABOUR

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Routing Process of FDI in India:

The following are the steps to route Foreign Direct Investment in India

STEP 1: ISSUE OF SHARES

- **Intimation to RBI for receipt of payment for issue of shares**

On receipt of payment from outside India, an Advance Remittance Form (**ARF**) is required to be filed online ***(www.ebiz.gov.in)*** within **30 days** intimating RBI about receipt of money for such purpose alongwith KYC and FIRC received from recipient's bank.

- **Allotment of shares**

Capital instruments should be issued within **60 days** from day of receipt of inward remittance; else refunded immediately within **15 days** to the non- resident investor by outward remittance through normal banking channels or by credit to NRE/FCNR (B) account.

Issue price of shares: In case of convertible capital instruments, the price/ conversion formula of the instrument should be determined upfront at the time of issue of the instrument. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such capital instruments.

Issue price of shares in the following are-

- In case of **Listed Indian company**, not less than price worked out in accordance with SEBI guidelines.
- In case of **unlisted Indian company**- not less than fair valuation done by SEBI registered Merchant Banker or a Chartered Accountant or practicing cost accountant as per any internationally accepted pricing methodology on an arm's length basis.
- **For non-residents (including NRIs)** making investment in Indian company by way of subscription to its Memorandum of Association, then such investments may be made at face value subject to their eligibility to invest under the FDI scheme.

- **Form to be filed after allotment**

FC-GPR form is required to be filed online (www.ebiz.gov.in) within **30 days** from the date of allotment of shares to such Non-Resident.

STEP 2: TRANSFER OF CAPITAL INSTRUMENT

1. **Permission granted to non-residents / NRIs for acquisition of Capital instrument by way of transfer in the following-**

- **Non – resident (other than NRI or erstwhile OCB/OCI) to Non resident** – transfer by sale/gift shall be permissible subject to FEMA regulations under automatic route. However, prior approval shall be required in case the company is engaged in a sector which requires Govt. approval under the FDI regulations.
- **NRIs/ OCI to PROI*** - transfer by way of sale or gift of Capital instrument provides that prior Government approval shall be obtained for any transfer in case the company is engaged in a sector which requires Government approval

*Note: PROI (Person Resident Outside India) is one who has taken up employment/ business or vacation outside India and/or has not stayed in India for more than 182 during the previous year.

- **Non-resident to resident** - transfer any Capital instrument by way of gift. Transfer of capital instrument, by way of sale/gift under private arrangement, subject to extant guideline.
- A person resident outside India can sell capital instrument of an Indian company on a recognized Stock Exchange in India through a registered stockbroker or a registered merchant banker in manner prescribed by SEBI.
- **Resident to non-resident**- transfer of capital instrument by way of sale subject to extant guidelines.
- **Resident to non-resident**- transfer of capital instruments by way of gift- prior RBI approval required.
- **In respect of transfer of capital instruments between resident and non-resident**, an amount not exceeding **25%** of the total consideration:

  - Can be paid by buyer on a deferred basis within a period not exceeding 18 months from the date of transfer agreement; or
  - can be settled through an escrow arrangement between the buyer and the seller for a period not exceeding 18 months from the date of the transfer agreement; or
  - can be indemnified by the seller for a period not exceeding 18 months from the date of the payment of the full consideration, if the total consideration has been paid by the buyer to the seller.

Note: Transfer is subject to entry routes, sectoral caps/ investment limits and pricing guidelines as per FDI regulations. Disclosure of such transfer shall be required to be reported in Form FC-TRS based on the relevant FDI regulations.

2. **Transfer from NRI to NRI is applicable on following case basis:**

a) **Where the transfer by way of sale/gift is between two NRIs who both hold shares on a repatriable basis** – such a transfer is similar to transfer between non resident and non resident.
b) **Where the transfer by way of sale is between an NRI who holds shares on non repatriable basis and NRI who holds shares on repatriable basis** – such a transfer is similar to transfer between resident and non-resident.
c) **Where the transfer by way of gift is between two NRIs who hold shares on non-repatriable basis**– such a transfer is similar to transfer between a resident and another resident (i.e. domestic transfer) and hence, reporting requirements shall not be applicable.

Note: An NRI is allowed to repatriate only upto USD 1 million on an annual basis for its NRO account. Any remittance made over and above USD 1 million in any financial year from the NRO account would require an RBI approval.

3. **Transfer from resident to non-resident or vice-versa shall not be less than/exceeding:**

a) the price worked out in accordance with the relevant SEBI guidelines in case of a listed Indian company.
b) the price at which a preferential allotment of shares can be made under the SEBI guidelines, as applicable, in case of a listed Indian company.
c) the valuation of capital instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Securities and Exchange Board of India registered Merchant Banker or a practicing Cost Accountant, in case of an unlisted Indian Company.

Reporting of transfer of capital instruments between residents and non-residents and vice versa is to be done in Form **FC-TRS**. The Form FC-TRS should be submitted to the AD Category-I bank, within 60 days of transfer of capital instruments or receipt/remittance of funds whichever ids earlier.

Prior approval of RBI required: Resident to non-residents by way of sale-

- Transfer is at a price which falls outside the pricing guidelines specified by the RBI from time to time.
- Transfer involving deferment of payment of the amount of consideration more than 25% of the total consideration would require RBI approval. Post approval, the same should be reported in Form FC-TRS, to an AD Category-I bank within 60 days from the date of receipt of the full and final amount of consideration.
- Transfer not envisaged under the extant FEMA regulations or for which specific approval is specifically required under the extant exchange control regulations.

STEP 3: CONVERSION INTO EQUITY

Indian companies have been granted general permission for conversion of External Commercial Borrowings (ECB) (including matured but unpaid) in convertible foreign currency into equity shares/ fully compulsorily and mandatorily convertible preference shares, subject to the following conditions-

- Activity of borrowing company is covered under the automatic or government approval for FDI, wherever applicable, for foreign equity participation as per extant FDI policy
- The foreign equity after conversion of ECB into equity is within the sectoral cap, if any
- Pricing of shares as per extant guidelines
- Compliance with the requirements prescribed under any other statute and regulation in force
- General permission is also available for issue of shares/preference shares against lump sum technical know-how fee, royalty due for payment, subject to entry route, sectoral cap and applicable pricing guidelines and compliance with applicable tax laws
- Lender's Consent

STEP 4: REPATRIATION

<u>Repatriation for dividend and interest-</u>

- Dividend is freely repatriable without any restrictions
- Dividend is net after tax deduction at source (TDS) or dividend distribution tax (DDT) (if any as the case may be)
- Dividend is governed by Foreign Exchange Management (Current Account Transactions) Rules, 2000
- Interest on fully, mandatorily & compulsorily convertible debentures is freely repatriable without any restrictions.
- Interest is net of applicable taxes
- Interest is governed by Foreign Exchange Management (Current Account Transactions) Rules, 2000

STEP 5: REMITTANCE

Remittance by way of outward remittance or credit to NRE/FCNR (B) Account.

Sale proceeds* of shares & securities-

Remittance of assets (i.e. sale proceeds of share and securities and their remittance) is governed by the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 under FEMA

- **AD Category-1** can allow remittance of sale proceeds (net of applicable taxes) of a security to the seller of shares outside India provided security has been held on repatriation basis, sale of security has been made in accordance with the prescribed guidelines and NOC/ Tax clearance certificate from the Income Tax department

***Sale proceeds shall be net of taxes.**

Winding up/ liquidation of companies AD Category 1 banks are allowed to remit winding up proceeds of the companies which are under liquidation subject to payment of taxes. The applicant needs to submit the following to the AD Category 1 bank for remittance

- **Auditor's certificate** confirming all liabilities in India have been either fully paid or adequately provided, winding up is in accordance with the provisions of the Companies Act as applicable and lastly in case of winding up otherwise than by a court - no legal proceeding pending in any court in India against the applicant or company under liquidation and there is no legal impediment in the permitting the remittance.

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