

Indian government amends FEMA for permitting FDI in LLPs

Vide RBI/2013-14/566 A.P. (DIR Series) Circular No. 123 dated April 16, 2014 Indian government has allowed Foreign Direct Investment (FDI) in Limited Liability Partnership (LLP). Earlier, Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (the "Regulations") only permitted FDI in a company incorporated under the Companies Act, 1956 or a Venture Capital Fund. Now, even a LLP formed and registered under the Limited Liability Partnership Act, 2008 is allowed to receive FDI subject to certain conditions as detailed under the above mentioned Circular.

This change is brought about by the Reserve Bank of India (RBI) by amending the Regulations through the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Third Amendment) Regulations, 2014. The instructions issued in the above mentioned Circular shall be effective from May 20, 2011. However, reporting requirement of FDI in LLP shall come into force from the date of issue of instructions by the RBI in this regard. The LLP which have received foreign investment in terms of Foreign Investment Promotion Board (FIPB) approval between May 20, 2011 to the date of above mentioned Circular (i.e., April 16, 2014) shall comply with the reporting requirement in respect of FDI within 30 or 60 days, as applicable, from the date of above mentioned Circular (i.e., April 16, 2014).

The above mentioned Circular contains "Scheme for Acquisition/ Transfer by a person resident outside India of capital contribution or profit share of Limited Liability Partnerships (LLPs)" which details the conditions to which FDI in LLP is subject to. This Scheme lays down the following conditions/ criteria:

■ **Eligible Investors**

A person resident outside India or an entity incorporated outside India shall be eligible investor for the purpose of FDI in LLPs. However, the following persons shall not be eligible to invest in LLPs:

- i. a citizen/entity of Pakistan and Bangladesh or
- ii. a Securities and Exchange Board of India (SEBI) registered Foreign Institutional Investor (FII) or
- iii. a SEBI registered Foreign Venture Capital Investor (FVCI) or
- iv. a SEBI registered Qualified Foreign Investor (QFI) or
- v. a Foreign Portfolio Investor registered in accordance with SEBI(Foreign Portfolio Investors) Regulations, 2014 (RFPI).

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■ Eligibility of LLP for accepting foreign Investment

- i. An LLP, existing or new, operating in sectors/activities where 100% FDI is allowed under the automatic route of FDI Scheme would be eligible to receive FDI.
- ii. An LLP engaged in the following sectors/activities shall not be eligible to accept FDI:
 - a. Sectors eligible to accept 100% FDI under automatic route but are subject to FDI-linked performance related conditions (for example minimum capitalisation norms applicable to 'Non-Banking Finance Companies' or 'Development of Townships, Housing, Built-up infrastructure and Construction-development projects', etc.); or
 - b. Sectors eligible to accept less than 100% FDI under automatic route; or
 - c. Sectors eligible to accept FDI under Government Approval route; or
 - d. Agricultural/plantation activity and print media; or
 - e. Sectors not eligible to accept FDI i.e. any sector which is prohibited under the extant FDI policy as well as sectors/activities prohibited in terms of Regulation 4(b) to Notification No. FEMA. 1 / 2000-RB dated 3rd May 2000, as amended from time to time.

■ Eligible investment

Contribution to the capital of a LLP would be an eligible investment under the Scheme. However, investment by way of 'profit share' will fall under the category of reinvestment of earnings.

■ Entry Route

- i. Any FDI in a LLP shall require prior Government/FIPB approval.
- ii. Any form of foreign investment in an LLP, direct or indirect (regardless of nature of 'ownership' or 'control' of an Indian Company) shall require Government/FIPB approval.

■ Pricing

FDI in an LLP either by way of capital contribution or by way of acquisition / transfer of 'profit shares', would have to be more than or equal to the fair price as worked out with any valuation norm which is internationally accepted/ adopted as per market practice (hereinafter referred to as "fair price of capital contribution/profit share of an LLP") and a valuation certificate to that effect

shall be issued by a Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.

In case of transfer of capital contribution/profit share from a resident to a non-resident, the transfer shall be for a consideration equal to or more than the fair price of capital contribution/profit share of an LLP. Further, in case of transfer of capital contribution/profit share from a non-resident to a resident, the transfer shall be for a consideration which is less than or equal to the fair price of the capital contribution/profit share of an LLP.

■ **Mode of payment for an eligible investor**

Payment by an eligible investor towards capital contribution/profit share of LLPs will be allowed only by way of cash consideration to be received -

- i. by way of inward remittance through normal banking channels; or
- ii. by debit to NRE/FCNR(B) account of the person concerned, maintained with an AD Category - I bank,

■ **Reporting**

- i. LLPs shall report to the Regional Office concerned of the Reserve Bank, the details of the receipt of the amount of consideration for capital contribution and profit shares in the assigned form, together with a copy/ies of the FIRC/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor in required format, through an AD Category – I bank, and valuation certificate as regards pricing at the earliest but not later than 30 days from the date of receipt of the amount of consideration.
- ii. Disinvestment / transfer of capital contribution or profit share between a resident and a non-resident (or vice versa) shall require to be reported within 60 days from the date of receipt of funds in the assigned form.

■ **Downstream investment**

- i. An Indian company, having foreign investment (direct or indirect, irrespective of percentage of such foreign investment), will be permitted to make downstream investment in an LLP only if both, the company as well as the LLP, are operating in sectors where 100% FDI is allowed under the automatic route and there are no FDI-linked performance related conditions. Onus shall be on the LLP accepting investment from the Indian Company registered under the provisions of the Companies Act, as applicable, to ensure compliance with downstream investment requirement as stated above.
- ii. An LLP with FDI under this scheme will not be eligible to make any

downstream investments in any entity in India.

■ **Other Conditions**

- i. In case, an LLP with FDI, has a body corporate as a designated partner or nominates an individual to act as a designated partner in accordance with the provisions of Section 7 of the Limited Liability Partnership Act, 2008, such a body corporate should only be a company registered in India under the provisions of the Companies Act, as applicable and not any other body, such as an LLP or a Trust. For such LLPs, the designated partner "resident in India", as defined under the 'Explanation' to Section 7(1) of the Limited Liability Partnership Act, 2008, would also have to satisfy the definition of "person resident in India", as prescribed under Section 2(v)(i) of the Foreign Exchange Management Act, 1999.
- ii. The designated partners will be responsible for compliance with all the above conditions and also liable for all penalties imposed on the LLP for their contravention, if any.
- iii. Conversion of a company with FDI, into an LLP, will be allowed only if the above stipulations (except the stipulation as regards mode of payment) are met and with the prior approval of FIPB/Government.
- iv. LLPs shall not be permitted to avail External Commercial Borrowings (ECBs).

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CCI amends procedural rules to ensure stricter compliance

Competition Commission of India (CCI) in a bid to ensure stricter compliance has amended procedural regulations i.e., Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 through the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2014. Consequently, now the substance of the proposed combinations rather than structure would be the focus of CCI, while giving its approval to such combinations.

Thus, to help CCI understand the nature of the proposed transaction, parties to the combination are now required to furnish some more information such as their audited annual accounts of preceding two (2) financial years, information on whether the proposed transaction is subject to filing requirements in other jurisdictions, etc. CCI, has also significantly raised the fees for various forms, like fee for filing Form I has been hiked to Rs 15 lakhs from Rs 10 lakhs and fee for filling Form II has also been increased to Rs 50 lakhs from Rs 40 lakhs.

Some mandatory instructions under Companies Act 2013

As Ministry of Corporate Affairs (MCA) notified new bunch of sections, which came into effect from 1st April 2014, there are a few thing that has been made mandatory like the requirement with respect to resident director and mentioning of Corporate Identification Number (CIN) on the letterhead of the Company.

As per Section 149 of the Companies Act 2013, there must be at least one resident director in every company. In other words every company must have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year. This requirement is applicable to all companies including private companies. Consequently, foreign companies with Indian subsidiaries will now have to appoint a resident director on the Board. This Section immediately comes into effect and there is no transition period. If violated, it will attract a penalty of up to INR 10,000, that will be imposed on the company and every officer of the company. Moreover, if such default continues, a fine of INR 1,000 per day till the date this default continues is applicable.

Furthermore, as per Section 12 of the Companies Act, 2013, it is now mandatory for every company to mention its Corporate Identification Number (CIN) along with other details like with telephone number, fax number (if any), e-mail and website addresses (if any) on all its business letters, billheads, letter papers and in all its notices and other official publications. If this is not complied with than the defaulting company and every officer who is in default will be liable to a penalty of one thousand rupees for every day during which the default continues, however, the maximum penalty shall not exceed one lakh rupees.

ECB Scheme for civil aviation sector extended

It was earlier permitted [vide A.P. (DIR Series) Circular No. 113 dated 24th April 2012] that External Commercial Borrowing (ECB) can be raised by airline companies for working capital as a permissible end-use, under the approval route, subject to the conditions stipulated in the said Circular. This Scheme of raising ECB for working capital for Civil Aviation Sector has now been extended till 31st March 2015, in place of earlier permitted date of 31st December 2013.

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