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FDI in India: Issue/Transfer of Shares or Convertible Debentures - Revised pricing guidelines

Reserve Bank of India (RBI) vide its circular RBI/2014-15/129 A. P. (DIR Series) Circular No. 4 dated 15th July 2014 drew attention to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 (the Principal Regulations) notified vide Notification No. FEMA.20/2000-RB dated May 3, 2000 as amended from time to time, in terms of which, transfer/issue of shares of an Indian company is subject to pricing guidelines stipulated by the Reserve Bank and to A.P. (DIR Series) Circular No. 49 dated May 04, 2010, depicting the comprehensive position in this regard. RBI also brought in focus Regulation 9 of the Principal Regulations read with A.P. (DIR Series) Circular No. 86 dated January 9, 2014 in terms of which optionality clauses have been allowed in equity shares and compulsorily and mandatorily convertible preference shares/debentures to be issued to a person resident outside India under the Foreign Direct Investment (FDI) scheme subject to conditions mentioned therein.

Accordingly, the extant pricing guidelines in respect of transfer/issue of shares and for exit from investment in equity shares with or without optionality clauses of listed/unlisted Indian companies have since been reviewed so as to provide greater freedom and flexibility to the parties concerned under the FDI framework. The new pricing guidelines shall be as under:

In case of listed companies

- The issue and transfer of shares including compulsorily convertible preference shares and compulsorily convertible debentures shall be as per the SEBI guidelines.
- The pricing guidelines for FDI instruments with optionality clauses shall continue to be in accordance with A.P. (DIR Series) Circular No. 86 dated January 9, 2014, i.e., the non-resident investor shall be eligible to exit at the market price prevailing on the recognized stock exchanges subject to lock-in period as stipulated, without any assured return.

In case of unlisted companies

The issue and transfer of shares including compulsorily convertible preference shares and compulsorily convertible debentures with or without optionality clauses shall be at a price worked out as per any internationally accepted pricing methodology on arm's length basis. Thus, the guiding principle will be that the non-resident investor is not guaranteed any assured exit price at the time of making such investment/agreement and shall exit at a fair price computed as above at the time of exit subject to lock-in period requirement as applicable in terms of A.P. (DIR Series)

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Circular No. 86 dated January 9, 2014.

Other important points laid under this Circular are as under:

- The changes in the existing pricing guidelines for FDI applicable to transfer/issue of shares and for exit from FDI with optionality clauses for the unlisted Indian companies are given in the annexes to this Circular.
- An Indian company taking on record in its books any transfer of its shares or convertible debenture by way of sale from a resident to a non-resident and a non-resident to a resident shall disclose in its balance sheet for the financial year, in which the transaction took place, the details of valuation of share or convertible debentures, the pricing methodology adopted for the same as well as the agency that has given/certified the valuation.
- These directions shall be effective from date of the publication in the Official Gazette.
- All the other instructions of A. P. (DIR Series) Circular No.16 dated October 4, 2004 read with A.P. (DIR Series) Circular No. 49 dated May 4, 2010 and A.P. (DIR Series) Circular No. 86 dated January 9, 2014 shall remain unchanged.

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Clarification regarding appointment of Key Managerial Personnel

Ministry of Corporate Affairs on 25th July 2014 came out with a clarification notification on Section 203 (1) of the Companies Act 2013 with respect to appointment of Key Managerial Personnel. Section 203 (1) reads as "Every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key managerial personnel,–

(i) managing director, or Chief Executive Officer or manager and in their absence, a whole-time director;
(ii) company secretary; and
(iii) Chief Financial Officer:

Provided that an individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the managing director or Chief Executive Officer of the company at the same time after the date of commencement of this Act unless,–

a) the articles of such a company provide otherwise; or
b) the company does not carry multiple businesses:

Provided further that nothing contained in the first proviso shall apply to such class of companies engaged in multiple businesses and which has appointed one or more Chief Executive Officers for each such business as may be notified by the Central

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Government."

Vide this notification, government has laid down that for the purposes of second proviso of this section, the class of companies are those public companies having paid-up share capital (as per latest audited balance sheet) of rupees one hundred crore or more and annual turnover (as per latest audited balance sheet) of rupees one thousand crore or more which are engaged in multiple businesses and have appointed Chief Executive Officer for each such business.

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Reporting under FDI Scheme

RBI vide Circular RBI/2014-15/133 A.P. (DIR Series) Circular No. 6 dated July 18, 2014 has drawn attention to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations 2000, as amended from time to time and also the requirement of reporting under Schedules to the FEMA Notification No. 20 dated May 03, 2000 as amended from time to time. According to which (i) Indian companies are required to report the details of the issue of shares, convertible debentures, partly paid shares & warrants in form FC-GPR, to the Regional Office concerned, within 30 days of issue of shares / convertible debentures; and (ii) transfer of shares, convertible debentures, partly paid shares and warrants by way of sale from a person resident in India to a person resident outside India or vice versa, are required to be reported by the transferor/transferee resident in India to the AD Bank in form FCTRS, within 60 days from the date of receipt or payment of the amount of consideration.

The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, Government of India has, vide Press Note 4 (2014 Series) dated June 26, 2014 decided to switch over to the National Industrial Classification 2008 (NIC 2008) from the NIC 1987 version, for the purpose of classification of activities under the industrial classification system. Thus, Indian companies are required to report the NIC Codes in the FCGPR and FCTRS forms as per the NIC 2008 version, henceforth.

Moreover, it has also been decided to introduce a uniform State and District code list for reporting of details of FDI by Indian companies in Form FCGPR. The list can be accessed on the RBI website.

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