



## Highlights

- DIPP revises FDI Policy on various sectors
- RBI provides provisions for investments to Person Resident Outside India in an Investment Vehicle
- RBI excludes REIT from the definition of 'Real Estate Business'
- DIPP working on mapping of FDI Policy Paras with NIC Code 2008
- RBI issued revised framework for ECB Policy
- RBI notifies on Evidence of Import
- RBI relaxes facilities for residents for hedging foreign currency borrowings
- SEBI streamlines the process of Public Issue of Equity Shares and Convertibles
- Padmakumari v. Dasayyan (2015) 8 SCC 695

## Corporate Brief

### ➔ *DIPP revises FDI Policy on various sectors*

**DIPP** has reviewed the extant FDI Policy on various sectors and made following amendments in the Consolidated FDI Policy Circular 2015 ('FDI Policy'). Highlights of the amendments are/ (a) FDI in Construction Development Sector/ (a) Minimum area requirement and minimum capitalization requirement have been removed; (ii) Each phase of the project will be considered as separate project; (iii) Investors are permitted to exit and repatriate foreign investment before completion of the project is lock-in period of 3 years has been completed. (iv) Earning of rent on lease of property not amounting to transfer will not be considered as 'real estate business/ (b) FDI in Single Brand Retail Trading: (i) Requirement to procure 30% of the value of goods from India will be reckoned from the date of commencement of business instead of the date of receipt of first tranche of foreign investment; (ii) Foreign investment in Indian Brands will not attract the requirement to sell products under the same brand internationally; (iii) Indian entity engaged in Single Brand Retail Trading shall be permitted to undertake retail trading through ecommerce/ (c) Foreign investment in coffee plantation, rubber plantation, cardamom plantation, palm oil tree plantation, olive oil tree plantation and tea plantation is allowed upto 100% under automatic

route/ (d) Foreign investment in Indian companies not having any operations and downstream investments will be permitted under automatic route. [See DIPP Press Note No. 12 (2015 Series) dated November 24, 2015]

### ➔ *RBI provides provision for investment by Person Resident Outside India in an Investment Vehicle*

**RBI** has amended the FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 1999. Highlights of the amendments are: (a) Regulation 5 has been amended to permit person resident outside India to acquire, purchase, hold, sell or transfer units of an Investment Vehicle; (b) Definition of 'Investment Vehicle' has been inserted in Regulation 2 to mean 'an entity registered and regulated under relevant regulations framed under SEBI or any other authority designated for the purpose and shall include REITs governed by SEBI (REIT) Regulations, 2014, InvITs governed by SEBI (InvITs) Regulations, 2014 and AIFs governed by SEBI (AIFs) Regulations, 2012; (c) Schedule 11 has been inserted to provide conditions for 'Investment by a person resident outside India in an Investment Vehicle, which *inter alia* includes the following: (i) The payment for units of an Investment Vehicle shall be made by an inward remittance through normal banking channel; (ii) Units acquired under this Schedule may be sold or transferred by person resident outside India in any manner as per regulations framed by SEBI or directions issued by RBI; (iii) Downstream investment by an Investment Vehicle shall be regarded as foreign investment if neither the Sponsor nor the Manager nor the Investment Manager is Indian owned and controlled. [See RBI Notification No. FEMA. 355/2015-RB dated November 16, 2015]



➔ ***RBI excludes REIT from the definition of 'Real Estate Business'***

**RBI** has excluded REIT registered and regulated under the SEBI (REITs) Regulations, 2014 from the definition of "real estate business" for the purpose of Regulation 4(b) of the FEM (Permissible Capital Account Transactions) Regulations, 2000. Regulation 4(b) prohibits person resident outside India to make investment in an entity engaged in the sectors including 'real-estate sectors'. Thus investment in REIT by a person resident outside India is not prohibited under the said Regulations. [See *RBI Notification No. FEM 345/2015-RB dated November 16, 2015*]

➔ ***DIPP working on mapping of FDI Policy Paras with NIC Code 2008***

**DIPP** has prepared a draft list to codify the FDI Policy, as an initiative to identify applicability of FDI Policy para as per each identified activity provided in NIC-2008 to provide greater clarity and simplicity to foreign investor. DIPP has also invited comments and suggestions from the stakeholders/investors on the draft list.

➔ ***RBI issues revised framework for ECB Policy***

**RBI** has issued revised framework for External Commercial Borrowings (ECB) Policy based on the following overarching principles: (a) A more liberal approach, with fewer restrictions on end uses, higher all in-cost ceiling, etc. for long term foreign currency borrowings as the extended term makes repayments more sustainable and also minimizes roll-over risks for the borrower; (b) A more liberal regime for INR denominated ECBs where the currency risk is borne by the lender; (c) Expansion of the list of overseas lenders to include long-term lenders, such as, Insurance Companies, Pension Funds, Sovereign Wealth Funds; (d) Only a small negative list of end-use restrictions applicable in case of long-term ECB and INR denominated ECB; (e) Alignment of the

list of infrastructure entities eligible for ECB with the Harmonized List of the Government of India.

➔ ***RBI notifies on Evidence of Import***

**RBI** has notified that, with the establishment of Free Trade Warehousing Zones/ SEZ unit warehouses, imported goods can be stored therein for re-export/ re-selling purposes for which Customs Authorities issue Ex-Bond Bill of Entry. RBI has advised AD Banks to consider the Ex-Bond Bill of Entry issued by Customs Authorities as evidence for physical import of goods for the purpose of Para A.10.1 of A.P. (DIR Series) Circular No. 106 dated June 19, 2003 under which importers are required to submit Evidence of Import with AD Bank. Further, in cases where goods have been imported through couriers, the Courier Bill of Entry declared by the courier companies to the Customs Authorities may be considered as Evidence of Import. [See *A.P. (DIR Series) Circular No. 29 dated November 26, 2015*]

➔ ***RBI relaxes facilities for residents for hedging foreign currency borrowings***

**RBI** has notified that residents having long term foreign currency borrowings are permitted to enter into FCY-INR swaps with Multilateral or International Financial Institutions (MFI/IFI) in which Government of India is a shareholding member subject to the terms and conditions *inter alia* including the following: (a) the FCY-INR swaps shall have a minimum tenor of three years. (b) In the event of a default by the resident borrower on its swap obligations, the MFI/ IFI concerned shall bring in foreign currency funds to meet its corresponding liabilities to the counterparty AD Bank in India; (c) All other operational guidelines, terms and conditions relating to FCY-INR swaps shall be applicable. [See *A.P. (DIR Series) Circular No. 28 dated November 05, 2015*]



## ➔ *SEBI streamlines the process of Public Issue of Equity Shares and Convertibles*

**SEBI** has amended the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 to streamline the process of public issue of equity shares and convertibles by reducing the time taken for listing after the closure of issue to 6 working days from 12 working days. Highlights of the amendments are: (a) All the investors applying in a public issue shall use only ASBA facility for making payment; (b) The Registrar to an Issue, Share Transfer Agents (RTAs) and Depository Participants (DPs) are now permitted to accept application forms in public issues; (c) Stock exchanges shall develop the systems to facilitate the investors to view the status of their public issue applications on their websites and sending the details of applications and allotments through SMS and e-mail alerts to investors; (d) The intermediaries shall provide guidelines to their investors on making applications in public issues. SEBI has also specified revised indicative timelines for various activities. [See *SEBI Circular CIR/CFD/POLICY CELL/11/2015 dated November 10, 2015*]

## Litigation Brief

### ➔ *Padmakumari Vs. Dasayyan (2015) 8 SCC 695*

#### *The facts of the case are as follows:*

Defendants 1 – 11 entered into an agreement of sale on 19.4.1992 in favour of the Plaintiff and executed an unregistered agreement for the sale of suit scheduled property measuring 2.08 acres of land. The Plaintiff paid an advance amount of Rs. 2000 for execution and the remaining Rs. 63,000 was to be paid within nine months from the date of agreement of sale.

On 3.2.1993, Defendants 12 – 15 entered into an agreement with Defendants 1 – 11 to purchase part of the suit scheduled property for Rs. 80000. Some time later a registered sale deed dated 19.04.1993 was executed for 1.70 acres of the suit scheduled property in favour of Defendants 12 – 15.

On 24.4.1993, the Plaintiff issued a legal notice to defendants 1 – 15 demanding execution of the sale deed as per the agreement dated 19.4.1992. The Plaintiff went ahead and filed a suit due to the lack of response from the Defendants' end.

The Trial Court observed that the sale deed dated 19.04.1993 was not valid and Defendants 12-15 had not purchased the suit property in good faith and passed a decree of specific performance in favour of the Plaintiff. The High Court in appeal concurred with the Trial Court and concurrent finding was challenged before the Supreme Court.

The issues before the Supreme Court were:

Whether time was of the essence of the contract and the contract stood repudiated due to the non-payment of the remaining amount by the Plaintiff? Whether Defendants 12 – 15 are protected under S. 19(b) of the Specific Relief Act as they are bonafide purchasers?

Explaining the concept of "time is the essence of the contract", the Court relied on the clause in the agreement to sell wherein the Plaintiff had agreed to pay the balance consideration of Rs. 63,000 within nine months. The Court went on to hold that in a contract wherein a time or date is stipulated and the contract is not performed by such time or date, it would entitle the innocent party to consider such breach as a repudiation of the contract. But the inference that time will be the essence of the contract would be excluded if the contract stipulates a time but has other



clauses that specify penalties for time extensions or delay in performance of work or clauses that allow for postponement of performance. The Plaintiff's contention that the Defendants had failed to perform their part of the agreement i.e, measurement of land, before payment of the balance consideration was rejected by the Court as the question of measurement would not arise before the payment. It was an undisputed fact that the Plaintiff had not made the payment in the stipulated time and the Court held in favour of the Defendants.

On the second issue, the Court observed that Defendants 12 – 15 had obtained an encumbrance certificate and had taken care to verify the status of the property from the concerned authority before entering into an agreement. As the Plaintiff's agreement for sale was unregistered, Defendants 12 – 15 even upon verification could not have reasonably known about the Plaintiff's agreement. Defendant 12 – 15 contended that they were protected under S.19(b) of the Specific Relief Act as they were bona fide purchasers. According to S.19(b) specific performance of a contract cannot be enforced against a transferee for value who has paid his money in good faith and without notice of the original contract. The Court held that as Defendants 12 – 15 had paid the consideration in good faith and without knowledge of the original contract, they would be protected under S.19(b) and the decision of the lower courts was erroneous in law and was set aside.



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