REVIEW OF FOREIGN DIRECT INVESTMENT POLICY

Keeping in mind the commitments and to further accelerate the entire investment environment and to attract foreign direct investment ("**FDI**") in the country, the Government has further liberalised 15 (fifteen) major sectors, including key sectors such as construction development, civil aviation, defence, mining, broadcasting and agriculture.

The Government of India through Ministry of Commerce & Industry recently issued a press note on 10th November 2015 ("**Press Note**"), reviewing its consolidated Foreign Direct Investment Policy Circular of 2015 ("**FDI Policy**"). This article discusses the reforms and liberalisation introduced by this Press Note upon major sectors of the Indian economy.

Construction Development

Under the Press Note, conditions imposed earlier on the foreign investors on area restriction and minimum capitalization to be brought in within a period of 6 (six) months of the commencement of business, have been removed. Further a foreign investor will now be permitted to exit and repatriate foreign investment before the completion of project under the automatic route, with a lock-in-period of 3 (three) years. Further transfer of stake from one non-resident to another, without repatriation of investment will not be a subject to lock-in period nor any government approval.

Defence

Under the Press Note, foreign investment up to 49 (forty nine) percent will now be allowed under the automatic route. Portfolio investment and investment by foreign venture capital investors (FVCIs) will be allowed up to permitted 49 (forty nine) percent under the automatic route. Further proposals for foreign investment in excess of 49 (forty nine) percent will be considered by Foreign Investment Promotion Board ("**FIPB**"). However in case of infusion of fresh foreign investment within the permitted automatic route, resulting in change in the ownership or transfer of stake by existing investor to new foreign investor, government approval will be required.

Broadcasting

Under the Press Note, FDI is now raised to 100 (hundred) percent [upto 49 (forty nine) percent under the automatic route and beyond 49 (forty nine) percent under the government route] in teleports, direct to home, cable networks, mobile tv, headend-in-the sky broadcasting service. Further FDI is also increased to 49 (forty nine) percent in terrestrial broadcasting FM (FM Radio) under the government route.

Private Banking Sector

Under the Press Note, the Government has introduced a composite cap by removing sub-limits for FDI and

FII, allowing FIIs/FPIs/QFIs to invest up to the sectoral limit of 74 (seventy four) percent, provided there is no change of control and management of the investee company.

Plantation Sector

Under the Press Note, the Government in line with the present FDI Policy in the plantation sector, has decided to open FDI upto 100 (hundred) percent under the automatic route in certain other planation activities, including coffee, rubber, cardamom, palm oil tree and olive oil plantations.

Single Brand Retail Trade and Duty Free Shops

Under the Press Note, the Government has eased several conditions in single brand retail trade ("**SBRT**") and in e-commerce laid by the present FDI Policy. The Government has decided that the sourcing requirement of 30 (thirty) percent has to be reckoned from the opening of first store. Also in high technology segments it was not possible to comply with the sourcing norms by such single brand entities. Therefore incase of 'state-of-art' and 'cutting-edge technology' sourcing norms may be relaxed subject to government approval. Further Government has also decided that an entity which has been granted permission to undertake SBRT will also be permitted to undertake e-commerce activities.

FDI upto 100 (hundred) percent is now allowed under the automatic route in duty free shops located and operated in custom bounded areas.

Also it has been decided by the Government that a single entity will be permitted to undertake both the activities of SBRT and wholesale with the condition that conditions of FDI Policy on wholesale/ cash & carry and SBRT have to be complied by both business arms separately. Under the present FDI Policy, wholesale/cash & carry trader cannot open retail shops to sell to the consumer directly.

Investment by Companies owned and controlled by Non-Resident Indians

Under the Press Note, the Government has decided that investment made by Non-Resident Indians is deemed to be domestic investment at par with the investment made by the residents. This move has been made by the Government to get more support from Non-Resident Indians on various other issues.

Foreign Direct Investment in Limited Liability Partnerships (LLPs)

Under the Press Note, the Government has permitted 100 (hundred) percent FDI under the automatic route in LLPs operating in sectors/ activities where 100 (hundred) percent FDI is allowed, through automatic route and there is no FDI-linked performance conditions. The terms 'ownership' and 'control' with reference to LLPs have also been defined.

Further it has been decided by the Government that an LLP having foreign investment will be permitted to make downstream investment in another company or LLP in sectors where 100 (hundred) percent FDI is allowed under the automatic route and there is no FDI-linked performance conditions.

Civil Aviation

Under the Press Note, the Government has decided that Regional Air Transport Service (RSOP) will also be eligible for foreign investment upto 49 (forty nine) percent under the automatic route, in tune with the Scheduled Air Transport Service/ domestic Scheduled Passenger Airline (SOP) under the present FDI policy.

Further the Government has increased the foreign equity caps of certain activities from 74 (seventy four) percent to 100 (hundred) percent that includes Non-Scheduled Air Transport Service and Ground Handling Services.

Raising the Threshold Limit for Approval by FIPB

Under the present FDI policy, FIPB considers proposals having total foreign equity inflow up to Rs. 30 (thirty) billion and proposals above Rs. 30 (thirty) billion are placed for consideration of Cabinet Committee on Economic Affairs (CCEA). Therefore in order to achieve faster approvals on most of the proposals, it has been decided under the Press Note that the threshold limit for FIPB approval may be increased to Rs. 50 (fifty) billion.

CONCLUSION

The reforms and liberalisation provided under the Press Note by the Government of India has been aimed to attract far more foreign investment. Also the Government has advised Department of Industrial Policy and Promotion (DIPP) to consolidate all FDI related instructions contained in various notifications/ press notes and prepare a booklet so that the foreign investors do not have to refer to several documents of different timeframes. Government's desperation to make India a more investor friendly destination is evident in its twofold move i.e. simplification of the internal policies (for investors) and on the other hand extension of the various sectoral limits.

Legal concerns for Start – ups in India

Setting up a new venture is an exciting experience. However, Starting a new venture is not just about putting an idea on a website or coming up with a mobile application, there are a multitude of legal issues which one should consider. It is always said that "*prevention is better than cure*". If one fails to take into account numerous legal implications with respect to functions and operations of business it may lead to possible obstructions. Needless to say, every unique business vision needs a realistic approach.

Unfortunately, out of 191 world economies, India ranks 134 in terms of doing business. The reason for this is the difficulty to set up businesses in India and complex regulatory, taxation and legal environments. While Prime Minister, Narendra Modi is ambitious about the *Make in India* move, until it becomes a reality entrepreneurs will have to deal with several issues when doing business in India.

This article attempts to provide a bird's eye view on the legal issues revolving around start-ups.

A Legal Structure

One of the very first decisions in starting up a business is what form of legal structure to operate the business would be optimum. Whether one would want to be a sole proprietor, or enter into a partnership or start by incorporating a private or a public company or limited liability partnership are usually the questions that come up. The Indian legal system offers a variety of entry options to an entrepreneur. Choosing the most suited entry option goes a long way and has a greater impact on the continuity, visibility and profit making capacity. While the general tendency is to set up a company, that may not be the most optimum entity especially at the start-up stage. The structure would thus depend on the type of venture, short term and long term goals and of course the business objective. One aspect any businessman must watch out for at this stage is taking into account the tax liability of the venture and its impact on the business before venturing.

The Ownership matters

Once the legal structure is decided, it's the time to enter into a co-founders agreement. This is important for making note and recording the relationship, role, contributions and responsibilities between founders because going forward if there is any departure of thought between the founders; a document will prevail over who said what. A generally start-up co-founders are friends this step is more often than not avoided in the fear of making discussions uncomfortable. It is therefore important to get lawyers involved at this stage so the facts can be presented to all in a neutral and professional manner. It is strongly recommended to avoid a copy-paste job to here to get an agreement in place and the money spent here on professionals will go a long way to save future misery.

Name of the company v/s trademark and logo

Not protecting your own intellectual property is like leaving a bag full of money which is unclaimed on the road. It is important to understand that the entity name is different from the mark or logo you have created for marketing and promoting your business. It is necessary to take care of your intellectual property i.e. Trademarks, Copyrights and Patents Designs if any by registering the same with appropriate authorities. These again are necessary expenses and should be budgeted for upfront.

Employment and Labour

Whether an employer is running a small or big business, it is very important that his employees are satisfied and that they feel secure regarding their work. Every employer has some legal obligations towards his employees which under any circumstances must be abided by. The relationship between employer and employee in India is governed by numerous labour legislations. Employment and labour laws are often ignored; however, just like the other compliances, employment and labour compliances must be met with. Also, start-up entrepreneurs tend to be over zealous and over optimistic and end up making several promises to their employees. However, once promises are put on paper rationality sets in. It is therefore advisable to pen down employer - employee commitments in the form of employment contracts to avoid future disputes.

The Bottom Line

Every idea need wings to fly! The start- up wave has been very aggressive in drawing new and fresh talent. Starting up is about chasing your dream, every start- up idea is different. For a better future it is important to think from a long term perspective. Legal compliances are not just stepping stones to your growing business but lay the very foundation of your set-up. You just cannot afford to neglect some of them. It is important to prioritise to avoid time lost, money and personal liability. So while your business idea may be great, don't forget the necessities to ensure its safety and have a good team of professionals think of matters you cannot or will not want to spend time doing.