

OVERSEAS DIRECT INVESTMENT –VOL III

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SIGNIFICANT CHANGES

- Enhance Clarity of definitions
- Concepts Redefined
- New Concept of Strategic Sector
- Dispensing of Approvals:
 - ❖ Deferred Payment Consideration.
 - ❖ Investment or Disinvestment by persons resident in India under investigation by any investigative agency or any regulatory body (CBI,ED,SEBI,SFIO,DRI) earlier prohibited to make Overseas Investment, Now only **NOC needed from the agency concerned.**
 - ❖ Issuance of corporate guarantee on behalf of second or subsequent level of Step-Down Subsidiary (SDS)
 - ❖ Write off an account of disinvestment.
- Introduction of concept of Late Submission Fee for reporting delays Rs. 7500+0.025% of amount of cash flow /commitments per year (even old documents – LSF apply for 3 years).

PERMISSION FOR MAKING OVERSEAS INVESTMENT

- Foreign entity to be engaged in a genuine (bonafide) business.
- Investment can be directly in the foreign entity or through SDS or SPV.
- Indian entity/Resident individual
 - ❖ Make application in from FC giving details contained therein.
 - ❖ Attach require documents.
 - ❖ Approach Authorised Dealer Bank.
 - ❖ Incase of Approval Route Foreign Investment –AD will forward application to RBI with its recommendations.

OVERSEAS INVESTMENT APPROVAL ROUTE

- Form FC
- Background and brief details of the Transaction
- Provision under which Approval Sought
- AD bank to make observation on:
 - ❖ Prima Facie viability of foreign entity
 - ❖ Benefits which may accrue to India
 - ❖ Financial position & Business track record of India entity and foreign entity
 - ❖ Any other material aspect
- Confirm Board of Directors approval of Investor
- Indian Entity Corporate Structure Details including SDS with operation details (Status)
- Valuation certificate for foreign entity (incase of existing company acquisition)
- Other documents relevant for the proposed investment

OVERSEAS INVESTMENT APPROVAL ROUTE

- Government Approval Route
 - ❖ Investment in Pakistan
 - ❖ Investment in Strategic Sector – as defined
 - ❖ Investment in other Specific Geography, as may be notified by Central Govt.
- Reserve Bank Approval Route
 - ❖ Financial commitment of US \$ 1 Billion or more in a financial year
 - ❖ Investment beyond eligible limits.

NO OBJECTION CERTIFICATE

- Resident person making investment or undertaking disinvestment of financial commitment
- NOC from lender bank
 - ❖ Investor having any account classified as Non-Performing Asset(NPA); or
 - ❖ Investor Declared Willful Defaulter
- NOC from Financial Sector Regulator
 - ❖ If under investigation by a financial sector regulator e.g. SEBI,RBI,IRDA,.....
- NOC from Respective Investigating Agency
 - ❖ If under investigation by an Investigating Agency e.g. CBI,ED,SFIO,.....
- No NOC required for existing financial commitment including guarantee obligations

RIGHT ISSUE AND BONUS ISSUE OF SHARES

- Right Issue of Shares
 - Permitted ODI in terms of Rules and Regulation and limits
 - No reporting required if right issue entitlement renounced
- Bonus Issue of Shares
 - Not treated as afresh or additional financial commitment

ACQUISITION OF FOREIGN ENTITY

- Bidding or Tender Procedure
 - ❖ Earnest money deposit permitted
 - ❖ Bid Bond Guarantee by AD Bank
 - ❖ After winning tender or bid additional remittance permitted – Form FC to be submitted with necessary documents.
 - ❖ EMD to repatriate to India in case of un-successful bid.
 - ❖ After being successful – If Investor do not wish to proceed-EMD or Bid Bond Guarantee may be forfeited - AD Bank to examine Bonafide of transaction
- Debt –Acquisition funding several alternative structures
 - ❖ International banks or lender loans
 - ❖ Equity funding secured by :
 - Future cash flows
 - Monetisation of assets
 - ❖ Corporate Guarantee
 - ❖ Trust Structure

ODI IN START-UPS

- Not permitted out of borrowed funds
- Statutory Auditors/CA of Indian Investor to certify

ODI-ACQUISITION OR TRANSFER BY WAY OF DEFERRED PAYMENT

- AD bank to verify bonafide of transactions
 - ❖ Underlying agreement
 - ❖ Related documents including proposal details
 - ❖ Period of deferment to define upfront
 - ❖ Deferred consideration to treat as financial commitment – Report in Form FC
(Deferred amount treated as Non-Fund based commitment)
 - ❖ Valuation in accordance with pricing guidelines

MODE OF PAYMENT – ODI

- Indian entity can open a foreign currency account abroad for making ODI investment or Remit through Normal Banking Channels.
- Cash Payment Not Permitted
- No remittance by Branch office or Project office outside India
- No payment to third parties on behalf of foreign entity except as permitted by RBI
- Remittance only towards Financial Commitment - Equity or Debt or Non-Fund based commitments (guarantees) and disinvestment
- Nepal/Bhutan-investment in freely convertible foreign currency only
- Swap of Shares- Valuation by Merchant Banker-ODI compliance on both legs of transaction

OBLIGATION OF PERSON RESIDENT IN INDIA

- To submit evidence of investment to Authorised Dealer (Bank) within 6 months of repatriation
 - ❖ Evidence including allotment or transfer of security or copy of share certificates or securities issued
 - ❖ Evidence to be retained by AD
 - ❖ AD to satisfy about bonafide of documents so received
- Form FC to submit to AD Bank for obtaining UIN or on before making investment
- Annual Performance Report duly certified by a Statutory Auditor in case of Corporate Investor and by any CA in case of Investment by Resident Indian (Individual)

RESIDENT INDIVIDUALS INVESTMENT

- Resident Indian (RI) making overseas investment with acquisition of control (more than 10% equity and /or other criteria) has same obligations of ODI Compliance and submission of Form FC and all other supporting documents.
- RI investment can be made only within limit for Liberalised Remittance Scheme (LRS)
- Acquisition of shares /investment by way of inheritance or gift not within LRS limit
 - ❖ No reporting under LRS in such cases required.

RESTRICTION AND PROHIBITION – ODI

- No outward remittance/further financial commitment until delay in reporting regularized in respect of earlier ODI
- No investment in countries/jurisdictions prohibited by Central Government
- No investment in prohibited sectors
 - ❖ Banking
 - ❖ Real Estate Business
 - ❖ Lottery or Gambling
- Financial products linked to Indian Rupee (include non deliverable trade involving foreign currency – INR exchange rates)

OVERSEAS INVESTMENT BY RESIDENT

- Investment in India by foreign entity having ODI from India
- Financial commitments by a person resident in India in a foreign entity that has
- Invested or invest in India at the time of making financial commitment or at any time thereafter
 - ❖ Either directly or
 - ❖ Indirectlyresulting into a structure with more than two layers of subsidiaries in India is not permitted
- No further layer or subsidiaries shall be added to any structure having two or more layers of subsidiaries after notification of FEM (Overseas Investment) Directions, Rules and Regulations
- **Subsidiaries for above purpose shall include all entities in which investor foreign entity has control(including 10% or more stake in the entity)**

OVERSEAS INVESTMENT BY RESIDENT INDIVIDUALS

- Resident individual (single or in association with other RI or Indian Entity) are permitted to make overseas investment.
- Where ODI investment made without control that subsequently acquire or set up a subsidiary-such RI shall not acquire control in foreign entity
- 10% or more investment to be reckoned as ODI - also in case of investment (whether listed or unlisted) by way of
 - ❖ Capitalisation
 - ❖ Swap of securities
 - ❖ Right/Bonus
 - ❖ Gift
 - ❖ Inheritance
 - ❖ Any other manner

OVERSEAS INVESTMENT BY RESIDENT INDIVIDUALS

- All investment below 10% of paid up capital or stock of foreign entity - which do not lead to control – shall be reckoned as Overseas Portfolio Investment (OPI)
- In case of swap of securities-both the legs of investment to comply FEMA Regulations
 - ❖ Non confirming portion to disinvest within 6 months
- Resident individual can not transfer any foreign investment by way of gift to persons resident outside india
- Shares / interest in Foreign Entities acquired on behalf of employees, in terms of ESOP / Employee Benefit Scheme - AD bank may allow remittance through a SPV/SDS
- OPI investment form OPI to be submitted
- ODI investment form FC to be submitted

OVERSEAS INVESTMENT BY A PERSON RESIDENT IN INDIA- OTHER THAN RESIDENT INDIAN OR INDIAN ENTITY (OPI)

- Mutual Funds within overall limit of 7 Billion US \$
- VC and AIF - within overall limit of 1.5 Billion US \$
- SEBI may permit investment by Mutual Funds up to 1 Billion US \$ cumulatively
- Branch of Indian Banks (AD) outside India-during normal course of Banking business may acquire foreign equity/security –No ODI control

CREATION OF PRIVATE TRUST (OUTSIDE INDIA)

- Selection of jurisdiction
- Settlor-a relative resident outside India
- Trustee Company or
- Atleast 2 individuals resident outside India
- Beneficiary-Resident in India (one or more member of family)
- Trust can own assets, investment outside India
- Corporate Structure
- Funding from outside India
 - ❖ Equity
 - ❖ Debt
- Unrelated to indian entity or Resident Indian Income Tax Return disclosure
 - ❖ Beneficial interest
 - ❖ Signatory
- Full freedom to invest or disinvest
- POEM to manage
- Black Money Law-Benami Law not to violate



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