PSA LEGAL COUNSELLORS

DIPP AMENDS FDI POLICY

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The Indian Government is focused on promoting brand “Make in India”. This agenda has manifested into various regulatory and policy reforms which aim to provide an investor friendly ecosystem. Realizing the significant role of FDI in manufacture and technology intensive sectors, the Department of Industrial Policy and Promotion (“DIPP”) through its 12th press note of November 24 (“Press Note 12”) revised the Consolidated FDI Policy, 2015. It amends the approval process, sectoral caps, entry and investment conditions, with the objective of facilitating foreign investment in India.

Some of the key changes are:

1. Doing away with FIPB approval: Foreign investment is the cumulative of direct and indirect investment and the total must be within sectoral caps. Under the Consolidated FDI Policy, foreign investment under the Automatic Route in certain scenarios required prior Foreign Investment Promotion Board (FIPB) approval. Press Note 12 liberalizes the rigor and dispenses with the requirement in the following situations:

– Foreign investment in certain Indian companies under the Automatic Route: Press Note 12 permits foreign investment in Indian companies having no operations or downstream investment without FIPB approval for sectors under the Automatic Route, provided there are no prescribed performance conditions. However, FIPB approval is required if such Indian investee company engages in any activity under the Government Route. Earlier, foreign investment into Indian companies without operations or downstream investment required FIPB approval, regardless of the investment value and whether the sector was under the Automatic Route. For instance, broadcasting sector is under the Automatic Route and there are no associated conditions provided for bringing FDI. In light of the changed position, a foreign company can invest in an Indian broadcasting company without prior FIPB approval. Thus, in sectors under Automatic Route setting up a holding company becomes easier, and subsequently, operations can be commenced and downstream investment can be done in compliance with sectoral guidelines.

– Foreign investment through share swaps: Under the old position, FIPB approval was a prerequisite for investment by swap of shares, be it under Government or Automatic Route. Press Note 12 removes this prerequisite for investments by share swap under the Automatic Route.

– Foreign investment for establishing company or acquiring control/ownership: Under the Consolidated FDI Policy, sectors with caps required prior FIPB approval for (i) establishing Indian company with foreign investment and owned or controlled by non-residents, (ii) transfer of ownership and/or control of an Indian company owned or controlled by resident Indian citizens to non-resident entity pursuant to amalgamation, merger/demerger, acquisition, etc. The only exemption was for sectors under the Automatic Route with no caps. This restrictive provision stands revised and now FIPB approval is only required for sectors under the Government Route. This will enable foreign companies to set up Indian subsidiaries, joint-ventures, or acquire ownership and/or control in the Automatic Route without any hindrance.

2. Thresholds for Government approval: As per the old provisions, FIPB recommendations on foreign investment proposals under the Government Route upto INR 2,000 crore (about USD 300 million) were to be approved by the Finance Minister, and those above, by the Cabinet Committee on Economic Affairs. Press Note 12 enhances the threshold. Now FIPB recommendations on proposals upto INR 5,000 crore (about USD 748 million) shall be approved by the Finance Minister, and those above, by the Cabinet Committee. This change is a welcome move as it will reduce the timeline involved in obtaining approvals from Cabinet Committee for investments lesser than INR 5000 crore.

3. Defence sector: Press Note 12 opens the sector to 49% under Automatic Route. FDI above 49% is under the Government Route with approvals being granted on a case-to-case basis and not necessarily by the CCS, provided, such investment has the likelihood of resulting in access to modern and 'state-of-art' technology in India. Further, the exhaustive list of entry conditions (such as prohibition on ownership and control of Indian company by foreign investor, necessity to appoint Indians on management positions and office of Chief Security Officer, furnishing particulars of directors and key officers, purchase preference, etc.) are eliminated and only 4 conditions are prescribed

– Investment is subject to the security clearance and guidelines of the Ministry of Defence.
– Government approval must be obtained for fresh foreign investment within 49% in companies (i) which are not required to obtain industrial license or (ii) which are engaged in dual-use items, if such foreign investment changes ownership pattern or leads to transfer of existing shareholder's stake to the new foreign investor.
– Foreign company must be self-sufficient in areas of product design and development, and should (directly or indirectly) through its joint venture have maintenance and life cycle support facility for products manufactured in India.
– For products which require industrial licensing, license must be obtained from DIPP in consultation with Ministries of Defence and External Affairs.

This simplifies the process and is likely to attract more foreign investment in the sector.

4. Manufacturing sector: Press Note 12 defines "manufacture" to mean change in a non-living physical object which results in (i) transformation of the object into a new and distinct object with a different name, character, and use, or (ii) creation of a new and distinct object with a different chemical composition or integral structure. This brings clarity to the scope of activities which can be classified as manufacturing activities. Further, manufacturing (unless otherwise provided in specific sectors) is covered under the Automatic Route and a manufacturer is permitted to sell products manufactured in India through wholesale as well as retail mode, including e-commerce without Government approval.

5. Other Sectors: Press Note 12 also changes the entry route and sectoral caps for air transport services and satellites. Non-scheduled air transport services (i.e. those which are not scheduled as per places, time tables, or not open to public for use such as cargo airlines) and ground handling services is increased from

40% to 100% under Automatic Route. Further, establishment and operation of satellites is subject to guidelines of Department of Space or ISRO is also enhanced from 74% to 100% under the Government Route.

The changes under Press Note 12 will reduce the levels of approval, channelize resources, and incentivize investments making India a progressive and preferred investment destination.

By:

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