INVEST INDIA
NATIONAL INVESTMENT PROMOTION & FACILITATION AGENCY

Ease of Doing Business Series

SIMPLIFIED AND LIBERALIZED FOREIGN EXCHANGE REGULATIONS IN INDIA

Foreign Entities – Modes of doing Business in India

- **Establishing / incorporating Company/LLP in India**

Entry Route –	**Automatic Route** **Approval Route**
Automatic route Sectors examples:-	**Manufacturing, Airports, Construction and Development, Industrial Park, Wholesale cash and carry, E-commerce**
Approval (full or part) route sectors:- Examples	**Defense, Print Media, Private Security, Multi Brand Retail Trading,**
Partially under automatic route sectors Examples	**Telecom services, pharmaceuticals, Single Brand Retail Trading**

Foreign Entities – Modes of doing Business in India

- Establishing / incorporating Company/LLP in India

Company Formation by Non-Resident Investor:-

a) Allowed to acquire immovable property (office space etc) by entering in to lease deed for period not exceeding 5 years

b) Non Resident Promoter allowed to remit and pay Security Deposit to Lessor of property

c) Reimbursement of Pre-incorporation expenses allowed up to USD100,000 or 5% of capital brought in

d) Reimbursement of pre-operating expenses allowed subject to certain conditions

Foreign Entities – Modes of doing Business in India

- Establishing Office in India

A) Branch Office – doing business in India in given sectors

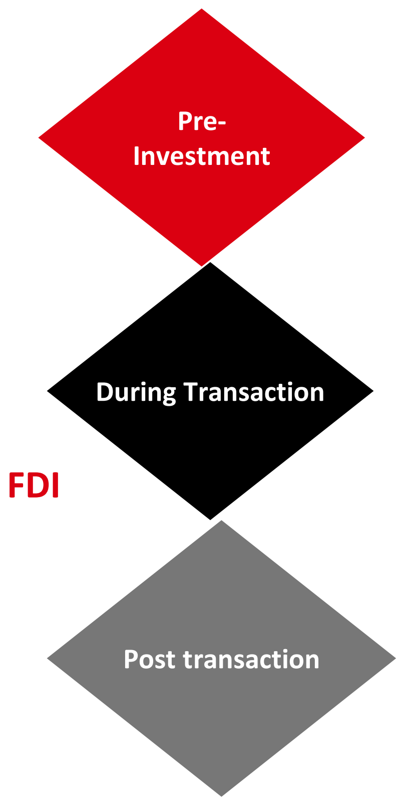
Eligibility Criterion – USD 100,000 equiv networth
profit track for past 5 years

B) Liaison Office – communication / liaison between Indian clients/suppliers and Head office / group entities

Eligibility Criterion – USD 50,000 equiv networth
profit track for past 3 years

A) Project Office – For execution of project in India. - Project awarded by Indian Company

Foreign Direct Investment



Allowed to open non-interest bearing Pre-closure Escrow account with Bank in India for 6 months

Impeding import payments FDI proceeds can be held in foreign currency account for 6 months

Remitter-investor KYC mandatory

Shareholding pattern of Investor entity to check Press Note 3 compliances

Issue equity instruments within 60 days from date of receipt
If to be refunded then within 75 days from date of receipt

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FDI – secondary transaction (transfer of shares)

- **Deferred consideration allowed under general permission**

Up-front consideration	-- minimum 75%
Period to pay balance	-- within 18 months from date of agreement

- **Indemnity payment under Share transfer transaction**

General permission to pay	-- up to 25% of purchase/sale consideration
Period to pay indemnity	-- within 18 months from date of transfer

- **Post closure Escrow for deferred consideration**

General permission	-- for 18 months from date of agreement
maximum amount	-- 25% of purchase/sale consideration
Interest on Escrow Balance	-- Not allowed, non-interest bearing

FDI – Mode of payments

- Foreign Inward Remittance in normal banking channel
- For NRI or OCI debit to NRE or FCNR B Account
- Capitalization of Import of capital goods / machinery
  (Second hand machinery not allowed)
- Capitalization of Pre-operative and Pre-incorporation Expenses
  (up to USD 500,000 equiv or 5% of capital lower of two
  only where FDI is allowed 100% under automatic route)
- Capitalization of Legitimate Dues payable
  (Dues which remittance doesn't need RBI or Govt approval
  only where FDI is allowed 100% under automatic route)

FDI Reporting

- Issuance of shares to be reported in Form FCGPR under Single Master Form on FIRMs portal within 30 days of issuance
- Annual FLA Return to be filed with RBI on or before 15 July
- FDI reporting changed from paper based to e-reporting on FIRMS portal effective September 2018 (in 2016 it was done via eBiz portal).
- Reporting of receipt of Share application money (ARF Intimation) discontinued
- Powers to approve delayed FDI reporting delegated to Authorised Dealer Banks

Repatriation of FDI proceeds

- Optionality Clause in Share Purchase Agreement allowed
  (lock in for 12 months & no assured returns)

- Buy Back of Equity Shares

- Capital Reduction by Company

- Dividend Repatriation

- Transferring Equity Instruments to another non-resident or resident buyer

Repatriation of surplus from India

Subsidiaries/joint ventures of foreign entity in India

	Dividend	Buyback	Capital Reduction
Description	➢ Amount paid back to parent company holding equity in Indian company ➢ Paid from profit available after tax and/or accumulated reserves	➢ Use of accumulated cash on the balance sheet by Indian Company to buy-back shares from foreign equity holder	➢ Parent company reduces its capital contribution in Indian entity
Regulatory Requirement	➢ Indian company should have completed the FDI related regulatory filings with RBI prior to dividend repatriation	➢ Subject to limitations of size – not more than 25% of the paid-up capital & free-reserves in a given financial year	➢ Requires approval of shareholders, creditors, high court / National Company Law Tribunal as applicable
Tax Implication*	➢ Dividend paid to a non-resident are generally subject to withholding at 20%. The withholding tax rate on dividends are subject to applicable surcharge and cess and may be reduced under a tax treaty. ➢ DTAAs between India and other countries provide beneficial rates ranging between 5-15%. Country specific DTAA's has to be looked for beneficial rates applicable subject to fulfillment of beneficial ownership criteria.	➢ Company has to pay Buy-Back Tax (20% plus surcharge and cess – effective tax rate 23.3%) on the net amount distributed(1) ; amount received is exempt in hands of the shareholders	➢ Amount distributed by the company to the shareholders to the extent of its accumulated profits will be considered as deemed dividend. ➢ The company will be required to deduct tax @20% plus surcharge and cess on such payments. The withholding rate on dividend may be reduced under the tax treaty. Distribution over and above the accumulated profits would attract capital gains tax in the hands of the shareholders
Any other consideration	➢ A separate dividend account needs to be opened within 5 days and dividend has to be repatriated within 30 days of declaration		➢ Typically long drawn process

Notes:

1. "Net amount distributed" is defined as consideration paid by the company on buy-back of shares as reduced by the amount, which was received by the company for issue of such shares

- The options listed herein may have certain tax implications. You are requested to seek guidance on taxation from your tax advisors.
- This is not an exhaustive list of options for repatriation. These are basis extant guidelines which are subject to change. You can refer to the RBI website for more details
- Detailed guidelines for all options can be obtained through rules framed by the respective regulatory bodies on these methods of repatriation
- There could be implications of using these methods under the Companies Act and other laws which you would need to assess before opting for any of these routes

* Tax implications are subject to change and clients are requested to check with their Tax consultants for further details

External Commercial Borrowing

i) ECB allowed for Indian companies in all sectors eligible to receive FDI

ii) Recognized Lender category expanded to include third party (not equity holder, non-Bank or non-financial sector) entities as long as they are from FATF and/or ISOCO compliant jurisdiction

iii) Introduced ECB up to FCY usd 50 Mn with 1 year minimum average maturity for Manufacture sector

iv) Expanded ECB end use by introduction of negative list of 4 purposes

v) Allowed to park ECB proceeds meant for rupee expenditure in a fixed deposit for max 12 months period

Note:- Major simplification and liberalization of ECB policy doe in January 2019)

Export and Import of goods and Services

i) Settlement through Central Treasury Arrangement allowed **(Liberalized December 2020)**

ii) Netting of export receivable against import payable – Powers delegated to Authorized Dealer Banks **(Liberalized December 2020)**

iii) Non Resident Exporter or Importer allowed to collect INR invoiced export proceeds or INR invoiced import proceeds through freely repatriable rupee i.e. SNRR Account **(Liberalized effective November 2019)**

iv) Introduced EDPMS and IDPMS ie e-monitoring of export and import of goods and software **(simplified effective 2016)**