

PRESENTATION ON FDI IN RETAIL

Samisti Legal

Introduction

- The Central Government notified the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (“**NDI Rules**”) on October 17, 2019 superseding the erstwhile Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations, 2017 (“**TISPRO**”) and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018.
- RBI also notified the Foreign Exchange Management (Debt Instruments) Regulations, 2019 superseding TISPRO, and the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, which provides for reporting requirements in relation to any investment made under the NDI Rules.
- The Foreign Exchange Management (Non-Debt Instruments) (Amendment) Rules, 2019 (“**Amendment Rules**”) notified on December 5, 2019, inter alia, primarily incorporates the provisions of the Press Note 4 of 2019, which were not reflected in the NDI Rules.
- The NDI Rules read with Amendment Rules, lay down the provisions pertaining to foreign direct investment in retail trading.

Cash and Carry Wholesale Trading

Wholesale Trading has been defined to mean as:

- sale of goods to retailers and other business users, basically B2B sale;
- sales for the purpose of trade and business as opposed to sales for personal consumption;
- includes, inter alia, resale, processing and sale, bulk imports and B2B e-Commerce.
- Other prescribed conditions to be fulfilled.

FDI Route:

- Automatic Route: upto 100%.

E-commerce activities

B2B E-commerce activities:

Carry on only B2B e-commerce and not retail trading.

FDI Route:

- Automatic- upto 100%

Market Place E-commerce:

Where e-commerce entity acts as a facilitator between the buyer and seller and does not have ownership on the goods sold over the digital and electronic platform.

FDI Route:

- Automatic- upto 100%

Important conditions for Market Place E-Commerce

- ‘E-commerce’ means buying and selling of goods and services including digital products over digital & electronic network;
- ‘E-commerce entity’ means a company incorporated under Companies Act 1956 or the Companies Act, 2013. Therefore, entities for conducting e-commerce business is limited to companies incorporated under the Companies Act, 1956 or the Companies Act, 2013;
- E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre, payment collection.

Conditions for Market Place E-Commerce

(Contd..)

- does not directly or indirectly influence the pricing of the products being sold on its platform;
- any warranty/ guarantee of goods and services sold will be the responsibility of the seller selling the products on the platform, and not the e-Retail Marketplace entity;
- No e-commerce marketplace entity shall mandate any seller to sell any of their product exclusively on its platform;
- Goods/ services made available for sale electronically on website shall clearly provide name, address and other contact details of the seller and post sales, delivery of goods is the responsibility of the seller;

Conditions for Market Place E-Commerce

(Contd..)

- An entity having equity participation by e-commerce marketplace entity or its group companies or having control on its inventory by e-commerce marketplace entity or its group companies, shall not sell its products on the platform run by such marketplace entity; and
- no vendor / seller operating on the e-Retail Marketplace company's platform (including the e-Retail Marketplace company's group / affiliate companies) can contribute to the sale of more than 25% of the total sales affected through such platform.

Inventory based E-commerce

Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by the e-commerce entity and is sold to the consumers directly, essentially a pure B2C retail.

FDI Route:

Foreign investment is not permitted in inventory based model of e-commerce.

Single Brand Retail Trading (SBRT)

Single Brand Retail has been defined as retail trade of products which are:

- sold under “single brand”
- sold under the same brand internationally
- branded during the manufacturing process.

FDI Route:

- Automatic Route: upto 100%

Single Brand Retail: Cont...

Conditions:

- To comply with the definition stated above.
- For a non-resident entity, who is or not the owner of the brand may be allowed for trading under Single Brand, either directly by the brand owner or through a agreement executed between the Indian entity undertaking single brand retail trading and the brand owner.
- In case of FDI beyond 51%, sourcing of 30% of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors.

SBRT of Indian Brands

- Conditions for products to be sold under the same brand internationally and also the restriction applicable to non-residents for undertaking SBRT shall not be applicable for undertaking SBRT of Indian brands;
- Indian brands should be owned and controlled by residents or companies which are owned and controlled by resident Indian citizens;
- Sourcing norms shall not be applicable up to three years from opening of the first store for entities having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible.

E-Retail by brick and mortar companies:

A single brand retail trading entity operating through brick and mortar stores, is permitted to undertake retail trading through e-commerce, provided it complies with the other conditions as mentioned in the NDI Rules for SBRT.

Multi Brand Retail

51% FDI for Multi Brand e-commerce retail is allowed through government route provided the following conditions are fulfilled:

- Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery and meat products, may be unbranded.
- Minimum amount to be brought in, as FDI, by the foreign investor, would be US \$ 100 million.
- 50% of total FDI brought in the first tranche of US \$ 100 million, shall be invested in 'back-end infrastructure' within three years.
- 30% of the value of procurement of manufactured/processed products purchased shall be sourced from Indian micro, small and medium industries, having total investment in plant and machinery and shall not exceed US \$ 2.00 million.

Multi Brand E-Commerce Retail:

Cont...

- Self-certification by the company to ensure the compliance of above three conditions and to maintain certified books of accounts by statutory auditors.
- Retail sales outlets may be set up only in cities with a population of more than 10 lakh as per 2011 Census or any other cities as per the decision of the respective State Governments.
- Retail locations will be restricted to conforming areas as per the Master/Zonal Plans of the concerned cities.
- Government will have the first right to procurement of agricultural products.
- Retail trading, in any form, by means of e-commerce, shall not be permissible, for companies with foreign investment engaged in multi-brand retail trading.

Multi Brand E-Commerce Retail:

Cont...

- Retailers shall follow the orders/circulars of State Government/Union Territories as they have the discretionary powers to decide whether to allow FDI in MBRT or not.
- Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of multi-brand retail trading.
- Applications would be processed in the Department of Industrial Policy & Promotion for necessary approvals.

E-Trading by Manufacturers

- Permitted to sell its products manufactured in India through wholesale and/ or retail, including through e-commerce without Government approval.
- 100 percent foreign investment under the government approval route is allowed for trading, including through e-commerce, in respect of food products manufactured and/ or produced in India.



Thank You

AUTHORS:

PRASHANT JAIN

ANITA DUGAR

DISCLAIMER: *The content of this presentation is intended to provide a general guide to the subject matter. For any queries, the authors can be reached at (i) prashant@samistilegal.in (ii) anitadugar@samistilegal.in.*