ACQUISITION OF SHARES/STAKE IN AN INDIAN COMPANY BY A FOREIGN COMPANY

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By: Priya Agrawal

The industry, in the present case is financial services, which is the exception to the sectors where the FDI Cap is 100% and the entry route is Automatic.

In case of such a proposal for acquisition of shares in an existing Indian company in the financial services sector, the application of the **Securities & Exchange Board of India** (Substantial Acquisition of Shares and Takeovers) **Regulations**, **1997** is attracted and **prior approval of the Government** is required. These activities are considered by **the Foreign Investment Promotion Board (FIPB)**, Ministry of Finance. For these acquisitions application can be made in Form FC-IL; plain paper applications carrying all relevant details are also accepted and no fee is payable.

Indian companies having foreign investment approval through FIPB route do not require any further clearance from RBI for receiving inward remittance and issue of shares to the foreign investors. The companies are required to notify the concerned Regional office of the RBI of receipt of inward remittances within 30 days of such receipt and within 30 days of issue of shares to the foreign investors or NRIs.

THE PROCEDURE

The following procedure is to be followed after investment is made with Government approval:
On receipt of money for investment:

Within 30 days of receipt of money from the foreign investor, the Indian company will report to the Regional Office of RBI under whose jurisdiction its Registered Office is located, a report containing details such as:

- Name and address of the foreign investors
- Date of receipt of funds and their rupee equivalent
- Name and address of the authorized dealer through whom the funds have been received
- Details of the Government approval, if any;

On issue of shares to foreign investor:

Within 30 days from the date of issue of shares, a report in Form FC-GPR together with the following documents should be filed with the Regional Office of RBI:

- Certificate from the Company Secretary of the company accepting investment from persons resident outside India certifying that:
  - All the requirements of the Companies Act, 1956 have been complied with;
  - Terms and conditions of the Government approval, if any, have been complied with;
  - The company is eligible to issue shares under these Regulations; and
  - The company has all original certificates issued by authorised dealers in India evidencing receipt of amount of consideration;
- Certificate from Statutory Auditors or Chartered Accountant indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

The pricing guidelines and documentation requirements, in such a case where SEBI guidelines are attracted, are to be in compliance with those specified by RBI from time to time.

The investee company being in the financial sector, the FDI policy and FEMA regulations in terms of entry route, sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation etc., are to be complied with.

METHOD OF PAYMENT OF CONSIDERATION

The sale consideration in respect of the shares purchased by a person resident outside India shall be remitted to India through normal banking channels, by way of debit to the NRE/FCNR account of the person concerned maintained with an authorised dealer/bank; by debit to non-interest bearing Escrow account (in Indian Rupees) maintained in India with the AD bank in accordance with Foreign Exchange Management (Deposit) Regulations, 2000; the consideration amount may also be paid out of the dividend payable by Indian investee company, in which the said non-resident holds control, provided the right to receive dividend is established and the dividend amount has been credited to specially designated non-interest bearing rupee account for acquisition of shares on the floor of stock exchange. In case the buyer is a Foreign Institutional Investor (FII), payment should be made by debit to its Special Non-Resident Rupee Account.

VALUATION OF SHARES IN CASE OF EXISTING COMPANIES

The price of shares transferred from resident to a non-resident should be determined as under:

a) In case of listed shares, at a price which is not less than the price at which a preferential allotment of shares would be made under SEBI guidelines.

b) In case of unlisted shares at a price which is not less than the fair valuation as per any internationally accepted pricing methodology on arm's length basis to be determined by a SEBI registered Category-I- Merchant Banker/Chartered Accountant.

KINDS OF FOREIGN INVESTMENT

1) PREFERENCE SHARES

Foreign investment through preference shares is allowed by foreign investors and is treated as foreign direct investment. However, the preference shares should be fully and mandatorily convertible into equity shares within a specified time to be reckoned as part of share capital under FDI. Investment in other forms of preference shares requires to comply with the External Commercial Borrowings (ECB) norms.

2) DEBENTURES

Debentures which are fully and mandatorily convertible into equity within a specified time would also be reckoned as part of share capital under the FDI Policy.

3) RIGHTS SHARES

FEMA has no restrictions for investment in Rights shares issued at a discount by an Indian company, provided the rights shares so issued are being offered at the same price to residents and non-residents. The offer on right basis to the person’s resident outside India shall be:

(a) in the case of shares of a company listed on a recognized stock exchange in India, at a price as determined by the company; and

(b) in the case of shares of a company not listed on a recognized stock exchange in India, at a price which is not less than the price at which the offer on right basis is made to resident shareholders.

COMPANIES LIKE PAYTM WHICH MAY BE COVERED IN E-COMMERCE

Press Note No 3 (2016 Series) issued on 29 March 2016 allowed 100% (One hundred per cent) FDI under the automatic route in "marketplace model of e-commerce". The "marketplace model" has been defined as a model where the e-commerce entity provides an information technology platform on a digital and electronic network to act as a facilitator between buyers and sellers. It has also been clarified that FDI is not permitted in "inventory based model of e-commerce". The "inventory based model" has been defined as a model where the e-commerce entity owns the inventory of goods and services which are sold to the consumers directly.

- For more specific details regarding FDI in the Financial Services Sector, reference shall be made to pages 42 to 48 of the FDI Circular, 2016 available at: http://dipp.nic.in/English/Policies/FDI_Circular_2016.pdf

SOURCES

1) https://www.rbi.org.in/scripts/FAQView.aspx?Id=26
2) http://www.icsi.edu/webmodules/icsiweb/works/Schdiary/upload/FDI-%20Important%20Points.doc
3) http://dipp.nic.in/English/faqs/faqs.pdf
4) http://www.mondaq.com/india/x/499690/Inward+Foreign+Investment/Key+Changes+In+The+Consolidated+Fdi+Policy+Of+2016

LAWYERS

MANISH MODAK

PARTNER

Email id: manishmodak@astrealegal.com

Expertise: IT, Retail, Due Diligence, Licence and Registration, Transaction, Asset Management, FDI, Risk, Assessment, Election Laws, Corruption and Bribery Laws, Adoption, Legal Strategy.

PARVEZ MIRZA

SR. CONSULTANT

Email id: parvez@astrealegal.com

Expertise: Appellate, International Law, Criminal Laws, Muslim Laws, Immigration, Cyber Crime, Identity theft, Mass tort, Mining & Metal.

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EMAIL AT: www.astrealegal.com

QUICK CONTACT: +91 9822720483, +91 020 – 65108782