

Recent Amendments under FEMA

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FEMA 3(R)/2018-RB

Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 dt 17.12.2018



Important changes vide FEMA 3(R)/2018

- ❖ Overdraft by Authorised Dealer to its Branches/Correspondent Banks/Head Office outside India: Limit increased from INR 50 million to INR 5 billion.
- ❖ Trade Credit Limit: Trade credits can be raised in freely convertible foreign currency as well as in Indian Rupee. Limit increased from up to USD 20 million equivalent to up to USD 50 million equivalents per import transaction for import of capital or non-capital goods in the Automatic Route.
- ❖ Even foreign equity holders and financial institutions in International Financial Services Centres (IFSCs) in India are allowed to lend trade credits in the revised ECB regulation.
- ❖ Period of Trade Credit: Reduced to 3 years from 5 years from date of shipment for import of capital goods.
- ❖ All-in-cost ceiling for Trade credit: Reduced by 1% over 6month Libor.
- ❖ MAM for ECB: Streamlined to 3 years

Important changes vide FEMA 3(R)/2018

- ❖ Henceforth, certain hybrid instruments, such as optionally convertible debentures, presently covered under ECB, would be governed by specific hybrid instruments' Regulations when notified by the Government of India.
- ❖ Eligible Borrowers for ECB: All entities eligible to receive FDI. **Still does not include LLP.**
- ❖ Eligible Lenders for ECB: Resident of FATF/IOSCO compliant country; Multilateral and Regional Financial Institutions. **Has it been kept deliberately open?**
- ❖ End use prescriptions for ECB: Will be notified.
- ❖ Drawal of loan and reporting: Non-adherence will attract penalty similar to Late Submission Fee present for FDI. To unclog compounding applications.
- ❖ **Indian companies can no longer borrow from NRI/PIO in rupees other than by way of rupee denominated ECB.** Presumably to streamline rupee borrowing present simultaneously under erstwhile Notf. 3 & 4.

FEMA 21(R)/2018-RB

Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 dt. 26.03.2018



Immovable Property in India

❖ Additional listing of permitted transactions under Reg. 10:

- A PROI who has acquired any immovable property in India in accordance with foreign exchange laws may transfer such property to a PRI provided the transaction takes place through banking channels in India and provided that the resident is not otherwise prohibited from such acquisition.
- An AD in India being the Indian correspondent of an overseas lender can create a mortgage on an immovable property in India owned by an NRI/OCI, being a director of a company outside India, for a loan to be availed by the company from the said overseas lender, provided -
 - the funds shall be used by the borrowing company only for its core business purposes overseas;
 - in case of invocation of charge, the Indian bank shall sell the immovable property to an eligible acquirer and remit the sale proceeds to the overseas lender.

Immovable Property in India

❖ Joint acquisition by the spouse of an NRI or an OCI

A PROI (not being a NRI/OCI) who is a spouse of a NRI/OCI may acquire **one immovable property** (other than agricultural land/ farm house/ plantation property), **jointly** with his/ her NRI/ OCI spouse, provided that -

- Consideration should be paid by way of inward remittance or from accounts eligible to be maintained in India;
- No payment for any transfer of immovable property should be made either by traveler's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause;
- Provided that the **marriage has been registered and subsisted for a continuous period of not less than 2 years immediately preceding the acquisition of such property**;
- Provided further that the non-resident spouse is not otherwise prohibited from such acquisition.

Immovable Property in India

❖ Acquisition by Long-Term Visa holder

Citizen of Afghanistan, Bangladesh or Pakistan **belonging to minority communities in those countries**, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been **granted a Long Term Visa (LTV)** by CG may purchase **1 residential property in India** as dwelling unit for self-occupation and **1 immovable property for carrying out self-employment** subject to the following conditions-

- Property should not be located in and around restricted/ protected areas so notified by the Central Government and cantonment areas;
- Declaration to the Revenue Authority of the district where the property is located, specifying source of funds;
- Registration documents of the property should mention the nationality;
- Property of such person may be attached/ confiscated in the event of his/ her indulgence in anti-India activities;
- Copy of the property documents to be submitted to DCP/ FRO/ FRRO concerned and MHA(Foreigners Division)
- Can sell property only after acquiring Indian citizenship. Otherwise, only with permission of DCP/ FRO/ FRRO concerned

DIPP Press Note No. 2 (2018 Series)

dt. 26/12/2018



DIPP Press Note 2 (2018 series)

- ❖ Paragraph 15.2 to Regulation 16.B of FEMA Notf. 20(R)/2017 dated 07/11/2017 lays down the Sector Specific policy for Total Foreign Investment pertaining to individual sectors. Para 15.2 was introduced based upon Press Note 3 of 2016 issued by DIPP. With the issuance of Press Note 2 of 2018 (taking effect from 01.02.2019 onwards), it effectively replaces Press Note 3 of 2016. Amendment in FEMA Notf. 20(R)/2017 will be notified over time.

Cond.	Press Note 3/2016	Press Note 2/2018
(iv)	E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model.	E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model. <i>Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.</i>

DIPP Press Note 2 (2018 series)

Cond.	Press Note 3/2016	Press Note 2/2018
(v)	An e-commerce entity will not permit more than 25 percent of the sales affected through its marketplace from one vendor or their group companies.	<i>An entity having equity participation by ecommerce marketplace entity or its group companies or having control on its inventories by ecommerce marketplace entity or its group companies will not be permitted to sell its products on the platform run by such marketplace entity.</i>
(xi)	Absent	<i>E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.</i>
(xii)	Absent	<i>E commerce market place entity will be required to furnish a certificate along with a report of a statutory auditor to Reserve Bank of India confirming compliance of above guidelines by 30th of September of every year for the preceding financial year.</i>

DIPP Press Note 2 (2018 series)

Cond.	Press Note 3/2016	Press Note 2/2018
(ix)	E commerce entities providing market place will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.	E commerce entities providing market place will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. <i>Services should be provided by ecommerce market place entity or other entities which ecommerce market place as direct or indirect equity participation or common control to vendors on the platform at arm's length and in a fair and non-discriminatory manner. Such services will include but not limited to fulfillment logistics warehousing advertisement marketing payments financing etc. Cash back provided by group companies by market place entities to buyers shall be fair and non-discriminatory. For the purposes of this clause provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.</i>

DIPP Press Note 2 (2018 series)

- ❖ Most of the changes introduced in Press Note 2 of 2018 are in line with the spirit of law that has always intended to disallow B2C trading in any manner. There has been no alteration of the definitions segment of Press Note 3 of 2016 (including the definition of Marketplace based model of e-commerce) which bears witness to the stated position that foreign investment was allowed even then only into a marketplace entity which acted as a facilitator between the buyer and a seller.
- ❖ However, there are certain policy changes that have been introduced that (unintentionally) go beyond intended consequences. Conditions (i), (ii), (iii), (vi), (vii), (viii) & (x) have not been modified and continue to remain the same whereas alterations and additions have been introduced under Conditions (iv), (v), (ix), (xi) & (xii).

DIPP Press Note 2 (2018 series)

❖ Clause by clause analysis of Press Note 2 of 2018

Cond.	Analysis
(iv)	Typically wholesale arms of marketplace entities engage in bulk purchase through group companies and undertake onward sales to their related parties who act as vendors on the marketplace. This arrangement has also had a bearing on pricing points of such vendors. Going forward, such arrangements would classify the e-commerce entity as following an inventory based model of e-commerce thus violating FDI policy if more than 25% of purchases of any vendor are made from the marketplace entity or its group companies. The modification is in line with the intent of law that a marketplace entity should only be engaged in acting as a facilitator between buyer and seller rather than engaging as a shadow vendor.
(xii)	Level of compliance with Press Note 3 of 2016 was uncertain since there were no reporting requirements prescribed there under. This new condition puts the onus on statutory auditor to certify compliance with all the conditions of Press Note 2 of 2018 thus enabling essential implementation of true intent of FDI policy on e-commerce.

DIPP Press Note 2 (2018 series)

❖ Clause by clause analysis of Press Note 2 of 2018

Cond.	Analysis
(v)	<p>Previously this condition mandated that not more than 25% of sales value on financial year basis could have been made by any one vendor or its group companies. In replacement of previous condition, going forward, vendors having any equity participation or having control over its inventory by marketplace entity or its group companies will no longer be able to conduct any sales on the marketplace. The modification once again reflects the intention of allowing marketplace entity to be engaged in acting only as a facilitator between buyer and seller. Refinement in the policy will come as a huge setback to many marketplace entities who used to permit related party vendors to sell on the marketplace within the limit of 25% of total sales value of marketplace. It may be noted that the amended condition will not only affect marketplace entities selling goods but also entities operating food marketplaces as well as travel marketplaces. However, it will not affect online food groceries since they are covered under government approval route for FDI in food product retail trading.</p>

DIPP Press Note 2 (2018 series)

❖ Clause by clause analysis of Press Note 2 of 2018

Cond.	Analysis
(ix)	<p>Multiple conditions have been introduced under this clause. Various support services enumerated under Condition (iii) usually provided by marketplace entities or their group companies to vendors cannot be provided in a discriminatory manner between vendors. This may affect logistics and order fulfilment operations of select vendors who were granted preferential treatment by marketplace entities. However, marketplace entities can continue to accord such preferential treatment provided they can demonstrate similarity in circumstances of vendors. Further, cash back cannot be provided by group companies of marketplace entities in a discriminatory manner to buyer. This is intended to provide level playing ground to vendors by not inducing any buyer to favour one vendor over another. These modifications are also in spirit of law to ensure fair growth of all vendors listed on a particular marketplace.</p>

DIPP Press Note 2 (2018 series)

❖ Clause by clause analysis of Press Note 2 of 2018

Cond.	Analysis
(x)	The guidelines on cash and carry wholesale stipulate that wholesale trading of goods to group companies cannot exceed more than 25% of total turnover of wholesale venture. Taking into account Condition (iv), (v) & (x), marketplace entities can still carry on wholesale trading to group companies within cumulative limits of Condition (iv) and (x), however, such group companies may be able to sell only on other platforms and not the one operated by the marketplace entity.
(xi)	This is an additional condition that has been imposed. Though introduction of this additional condition has been guided by strengthening of intention of law, its consequences surpass such intention. Since marketplace entity is supposed to act merely as a facilitator between buyers and sellers, it is not expected to impose any conditions of exclusivity upon any vendor. However, now with introduction of this condition, even if any specific vendor would want to opt for such exclusivity with the aim of enhancing its sales volumes, the marketplace entity may not be able to offer that exclusivity.

Thank You



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