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FOREIGN DIRECT INVESTMENT IN THE CONSTRUCTION DEVELOPMENT SECTOR

BACKGROUND

The Department of Policy and Promotion ("**DIPP**"), Ministry of Commerce and Industry, Government of India ("**GOI**") has liberalised the terms and conditions governing foreign direct investment ("**FDI**") in the construction development sector in India, vide Press Note no. 10 (2014 Series) dated 3 December 2014 ("**Press Note**").

The term construction development has now been more clearly explained under the Press Note, as follows:

> *"Construction-development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships)."*

FDI in the construction development sector was governed by several specific conditions such as *inter alia,* stipulations as to minimum area for development, minimum capitalization of the company carrying on the construction development activity, lock-in period and restrictions on repatriation of investment, time limit for completion of projects and sale of undeveloped plots. The Press Note has now liberalised some of these conditions in what is hoped to be a boost to the receipt of funding in the recently cash-crunched sector. However, FDI in the real estate business remains prohibited.

REVISED POSITION

Pursuant to the issue of the Press Note, the revised conditions for FDI in the construction development sector are:

- The minimum floor area to be developed under each project in case of construction development projects is reduced to 20,000 square metres from the earlier requirement of 50,000 square metres. There is no prescribed minimum area requirement for development of serviced plots. This is a significant relaxation as compared to the earlier provision under which a minimum land area of 10 hectares was required. Further, the condition of minimum area to be developed in combination projects is removed.

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- The investee company is only required to bring a minimum FDI of USD 5 million (as compared to the earlier requirement of a minimum capitalization of USD 10 million for wholly owned subsidiaries and USD 5 million for joint ventures), within 6 months of commencement of the project (instead of 6 months from commencement of business of the company). The term *commencement of the project* is defined as the date of approval of the building plan/ lay out plan of the relevant statutory authority. Subsequent tranches of FDI may be brought until 10 years from the commencement of the project or before the completion or project, whichever expires earlier. Hence, the Press Note does not differentiate between FDI in wholly owned subsidiaries and joint ventures and further sets a cut-off limit within which the subsequent FDI has to be invested.

- The investor is permitted to exit any time after *completion of the project* or after *development of trunk infrastructure* (i.e. roads, water supply, street lighting, drainage and sewerage). There is no other minimum lock in requirement as opposed to the previous position that mandated a minimum lock in of three years from the date of receipt of each tranche/ instalment of FDI or from the date of capitalization, whichever is later.

- Earlier, an investor could exit the project prior to the lock-in period by making an application to the Foreign Investment Promotion Board ("**FIPB**"). The Press Note provides that the FIPB may, on a case to case basis, permit repatriation of FDI or transfer of stake by one non-resident investor to another non-resident investor, before the completion of the project. The Press Note has made specific reference to the transferee being a non-resident for the first time. In granting such permission the FIPB would *inter alia* specifically consider if the project is completed or the development of the trunk infrastructure is completed.

- Certain conditions pertaining to minimum capitalization, minimum area and exit provisions would continue to not apply to hotels and tourist resorts, hospitals, special economic zones, educational institutions, old age homes and investment by non resident Indians. Further certain conditions pertaining to minimum capitalization and minimum area will not apply to investee/ joint venture companies which commit at least 30% of the total project cost for low cost affordable housing.

CONCLUSION

It is seen that the GOI is trying to liberalise conditions for attracting FDI in certain industrial sectors in India. The liberalisation of minimum area requirement and minimum capitalisation requirement for FDI in construction development activities make it easier to develop smaller plots and carry out smaller projects, which will allow more such projects to be carried out at a lesser risk for the builder/ investing company. In addition to the aforesaid, a more rationalised fulfilment condition before an investor can exit from the project will ensure that only genuine FDI investors will bid/ undertake such investments. It is hoped that the new policy will attract more foreign investors, which can only benefit the infrastructure sector which is one of the high priorities in order to speed up India's development.

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