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FOREIGN INVESTMENT - E-COMMERCE SECTOR

The Department of Policy and Promotion, Ministry of Commerce and Industry, Government of India (“GOI”) has recently issued Press Note no. 3 (2016 Series) liberalising the terms governing foreign direct investment (“FDI”) in the e-commerce sector in India (“Press Note”).

BACKGROUND

By virtue of the FDI policy dated 12 May 2015 and Press Note No. 12 dated 24 November 2015, 100% FDI was permitted in the Business to Business (“B2B”) e-commerce, while FDI in Business to Consumer (“B2C”) e-commerce was prohibited, except in cases of a manufacturer selling its products manufactured in India through e-commerce retail, or a single brand retail trading entity operating through brick and mortar stores, or an Indian manufacturer selling its own single brand products through e-commerce retail.

REVISED POSITION

The Press Note has now clarified certain aspects as regards FDI in e-commerce, as set out below:

- **Definitions** - The Press Note defines the terms *E-commerce*, *E-commerce entity*, *Inventory based model of e-commerce*, and *Marketplace based model of e-commerce* and *Digital and electronic network*, as follows-
 - ‘*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 the Companies Act 1956 or the Companies Act 2013 or a foreign company covered under section 2(42) of the Companies Act, 2013 or an office, branch or agency in India as provided in Section 2 (v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business*.
 - ‘*Inventory based model of e-commerce*’ means *an ecommerce activity where the inventory of goods and services is owned by e-commerce entity and sold directly to consumers*.
 - ‘*Marketplace based model of e-commerce*’ means *providing of an information technology platform by an e-commerce entity on a digital and electronic network to act as a facilitator between buyer and seller*.

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- *'Digital and electronic network'* includes *network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobile etc.*
- **Inventory based e-commerce** - FDI is not permitted in the inventory based model of e-commerce sector.
- **Marketplace based e-commerce** – The relevant conditions pertaining to Marketplace e-commerce are –
 - 100% FDI under automatic route is permitted in a market place model of e-commerce;
 - marketplace e-commerce entity can enter into transactions with sellers registered on its platform on B2B basis;
 - marketplace e-commerce platform can provide support services to sellers for certain services such as logistics, warehousing, call centre, payment collection and other services;
 - if a marketplace e-commerce entity exercises ownership of goods purported to be sold then this will amount to an inventory based e-commerce model, wherein FDI is not permitted;
 - the payment mechanism facilitated by the e-commerce entity must be in conformation with the Reserve Bank of India (“**RBI**”) guidelines;
 - the entity engaged in the business of e-commerce shall not influence the prices of the goods/ services and maintain level playing field;
 - no group company or seller on a marketplace can contribute more than 25% of the total sales generated by the e-commerce entity; and
 - the seller’s name, contact details etc. must be provided on the website. Further, post sales, delivery of goods to customers and customer satisfaction, warranty and guarantee shall be the seller’s responsibility.
- **Wholesale Trading** - The guidelines for Cash & Carry Wholesale Trading/Wholesale Trading (“**WT**”) as provided under the FDI Policy of 2015 shall apply on B2B e-commerce wherein for undertaking such activities the requisite licenses/ registration/ permits as specified must be obtained.
- **Services sector** - 100% FDI in sale of services through e-commerce shall be permitted under the automatic route subject to conditions of the services sector and other applicable laws/regulations.

CONCLUSION

Although this move of the GOI to liberalise the e-commerce sector brings clarity this sector; it also opens the door to many issues that may follow due to the conditions attached thereto.

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The companies engaging in inventory as well as market place model of e-commerce business will have to take a clear stance on their business model. Companies may have to restructure their business model to make it a market place model to avail the benefits of 100% FDI under the automatic route. They will also have to follow the 25% norm and provide details of the sellers which may become a tedious task.

Further, since e-commerce entities are prohibited from influencing the price, they may not be permitted to offer discounts and daily reduced prices, which was one of the major factors attracting consumers to the e-commerce platform. Also, one cannot be sure that if small sellers that have embraced the online platform will now agree to come under market place e-commerce entities since they are required to take responsibility of the goods sold on the online platform. Despite of the above, it is anticipated that the new policy will attract more foreign investors, which will eventually benefit the e-commerce sector which is gaining momentum in the Indian market.

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