Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 - FDI Part 4A

Person Resident Outside India
Or
Foreign Entity

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Company;
Proprietary firm
Firm
AOP
Investment Vehicle
Venture Capital Fund

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Investment

⇩

Capital

- **Equity – Non-Debt instruments**
- **Debt – Debt Instruments**

What are Non-Debt Instruments?

Equity Investments

- **Equity Shares** issued under Companies Act, 2013
  Partly paid-up shares but it shall be fully paid-up within 12 months and at the time of issue 25% consideration was paid.

- **1) Convertible Debentures**
  2) Convertible Preference shares
  3) Share warrants as per SEBI regulations (25% consideration should be paid upfront and maximum tenure 18 months)

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  Pref. shares and debentures can contain optionality clause subject to a **minimum lock-in period of one year or as prescribed for the specific sector, whichever is higher**

Investment by Person Resident Outside India –

Investments by person resident outside India –

A person resident outside India may subscribe, purchase or sell equity instruments of an Indian company as per the provisions of FEMA

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A person who is a citizen of Bangladesh or Pakistan or is an entity incorporated in Bangladesh or Pakistan cannot purchase equity instruments without the prior government approval. It means they have to obtain prior approval of government.

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A citizen of Pakistan or an entity incorporated in Pakistan cannot invest in –

a) defence,
b) space,
c) atomic energy and
d) sectors prohibited for foreign investment

even through the government route.

Purchase or sale of equity instruments of an Indian company by a person resident outside India –

A) In case of listed companies –

1) Indian company may issue equity instruments to PROI according to Foreign Exchange Management (Non-debt Instruments) Rules, 2019.
2) PROI should purchase shares through stock market
3) If SEBI (SAST) Regulations, 2011 is applicable then it should also be followed
4) All the consideration and dividend payments to be made to PROI should be made as per RBI guidelines

B) Expenses –

A wholly owned subsidiary set up by foreign entity may issue =

Upto 5% of authorised capital;
Or
5,00,000 USD

whichever is less

C) Indian Company in Automatic Route –

If an Indian company is in automatic route then Indian company may also give shares to PROI in any of the following manner –

1) swap of equity instruments; or
2) import of capital goods or machinery or equipment (excluding second-hand machinery); or
3) pre-operative or pre-incorporation expenses

Investment by a person resident outside India in a Limited Liability Partnership (LLP)

Who can invest in LLP in India?

1) A person resident outside India may invest in LLP in India.
2) Citizen of Bangladesh or Pakistan or an entity incorporated in Bangladesh or Pakistan cannot invest in LLP in India
3) Foreign Portfolio Investor (FPI) or a Foreign Venture Capital Investor (FVCI) cannot invest in LLP in India.

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Terms and conditions –

a) LLP should be incorporated as per LLP Act, 2008
b) LLP should be in sector where 100% FDI is allowed under automatic route.
c) There should be no FDI linked performance.
d) Mode of Investment –
    1) By way of capital contribution; or
    2) By way of transfer of share in profit by reinvesting of profit; or
e) Conversion of Indian Entity into LLP and vice-versa –
    An Indian company with foreign investments can be converted into LLP if 100% FDI is allowed in automatic route.
f) Valuation of Investments –
    Investments should be valued as per –
    a) Fair market price;
    b) Internationally accepted principles;
    c) Valuation should be done by registered valuers or PCA/PCMA
g) The mode of payment and other conditions for remittance of sale or maturity proceeds shall be specified by the Reserve Bank.

Investment by a person resident outside India in an Investment Vehicle –

Who can invest in Investment Vehicle in India?

1) A person resident outside India may invest in **Investment Vehicle** in India.
2) Citizen of Bangladesh or Pakistan or an entity incorporated in Bangladesh or Pakistan cannot invest in **Investment Vehicle** in India

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Terms and conditions –

- A person resident outside India may invest in units of Investment Vehicles.
- A person resident outside India who has purchased units may sell or transfer as per the gudelines of SEBI and RBI.
- An Investment vehicle may issue its units to a person resident outside India against swap of equity instruments of a Special Purpose Vehicle (SPV) proposed to be acquired by such Investment Vehicle.
- Investment made by an Investment Vehicle into an Indian entity shall be counted as indirect foreign investment for the investee Indian entity if the Sponsor or the Manager or the Investment Manager –
    a) is not owned and not controlled by resident Indian citizens or
    b) is owned or controlled by persons resident outside India.
- The mode of payment and other conditions for remittance of sale or maturity proceeds shall be specified by the Reserve Bank.

Investment in Depository Receipts by a person resident outside India –

Who can invest in DRs in India?

PROI is allowed to invest in DR (ADR / GDR)

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Terms and conditions –

1) Securities to be offered by way of DR should be instruments which are allowed under f Depository Receipts Scheme, 2014
2) Limits –
   Aggregate of DR to be issued shall be within the limits of FDI and foreign investments already made.
3) Price of DRs –
   Price of DRs should not be less than the price charged to the Indian investors for the same instrument in India.

PROI acquiring shares through rights issue or bonus issue –

When can a PROI acquire shares through rights issue or bonus issue?

PROI already having shares of Indian company can acquire rights issue or bonus issue

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Terms and conditions –

1) **Rights issue or bonus issue should be made as per Companies Act, 2013**
2) Issue should not breach the sectoral limit;
3) Price –
   a) In case of listed company = as decided by the company;
   b) In case of unlisted company = Price of right issue should not be less than the price charged to the Indian investors for the same instrument in India.
4) the mode of payment and attendant conditions for such transactions shall be specified by the Reserve Bank

PROI acquiring ESOP / Sweat Equity shares –

1) An Indian company may issue "employees' stock option" and/or "sweat equity shares" to its –
   - employees/ directors or
   - employees/directors of its holding company or
   - employees/directors of joint venture or
   - employees/directors of wholly owned overseas subsidiary,

   who are resident outside India
2) Following conditions should be fulfilled –
   - Scheme is in compliance with the provisions of SEBI and Companies Act, 2013
   - Issue of ESOPs / Sweat Equity are in compliance with the sectoral cap applicable to the company.
   - Issue of "employee's stock option"/ "sweat equity shares" by a company where foreign investment is under the approval route shall require prior approval of Government of India.
   - Issue of "employee's stock option"/ "sweat equity shares" to an employee/director who is a citizen of Bangladesh/Pakistan shall require prior approval of the Government of India

- The issuing company shall furnish to the RBI within 30 days from the date of issue of employees' stock option or sweat equity shares, a return as per the Form-ESOP.

Transfer of equity instruments of an Indian company by or to a person resident outside India –

Transfer

By PROOI to PROI

- Transfer by way of sale; or
- Transfer by way of gift
- Conditions –
  a) If government approval was required at the time of purchase then at the time of transfer also, government approval should be required.
  b) If shares were held on non-repatriable basis and transfer is to be made on repatriable basis then following conditions should be complied –
     1) Entry route;
     2) Investment limits
     3) Pricing rules;
     4) RBI guidelines

By PROI to PRI

- Transfer by way of sale; or
- Transfer by way of gift
- Conditions –
  a) Sale at stock exchange should be as per SEBI Regulations;
  b) RBI guidelines should be followed.

By PRI to PROI

- Transfer by way of sale; or (Conditions of Entry route, Investment limits, Pricing rules, RBI guidelines should be followed)
- Transfer by way of gift
- Conditions for transfer by way of gift –
  a) Prior approval of RBI is compulsory;
  b) Donor and Donee should be relative as per Companies Act, 2013;
  c) Donee should be eligible to make investments in India;
  d) Limit of gift –
     1) Maximum 5% of paid-up capital or debentures or bonds;
     2) Maximum value of gift = 50,000 USD
  e) Sectoral cap should be followed.

<u>Payment of Transfer consideration between PROI and PRI –</u>

1) Time limit for payment of consideration –

a) 75% Consideration should be transferred immediately;

b) Remaining 25% can be on deferred payment system and shall be completed within 18 months;

2) Escrow Account –

a) PROI may open ESCROW account.

b) Amount in the escrow account should be funded through normal banking channels;

c) Guarantee of the payments should be given by authorized dealer.