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OTHER LAWS
FEMA Update

In this article, we have discussed changes in FEMA through recent RBI circulars:

1. External Commercial Borrowings (ECB) Policy – ECB by Small Industries Development Bank of India (SIDBI)

Upon review of the extant External Commercial Borrowings Policy, RBI has included SIDBI as an eligible borrower for availing of ECB for on-lending to MSME sector, as defined under Micro, Small and Medium Enterprises Development (MSMED) Act , 2006 subject to the following conditions :–

a) such on-lending by SIDBI shall be to the borrowers' directly either in INR or in foreign currency (FCY);

   (i) the foreign currency risk shall be hedged by SIDBI in full in case of on-lending to MSME sector in INR; and

   (ii) on-lending in foreign currency shall be subject to Regulation 5(5) of FEMA Notification No. 3/2000-RB dated May 3, 2000, as amended from time to time and shall only be to those beneficiaries which have natural hedge by way of foreign exchange earnings;

b) availment of ECBs, including the outstanding ECBs, up to 50 per cent of their owned funds, for on-lending to MSME sector, will be under the automatic route and beyond 50 per cent of owned funds, will be under the approval route, subject to a ceiling of USD 500 million per financial year; and

c) the proceeds of ECB availed by SIDBI, shall be used for on-lending to MSME sector only for the permissible end-uses as provided under the extant ECB policy.

All other conditions of ECB, such as recognised lender, all-in-cost, average maturity, prepayment, refinancing of existing ECB and reporting arrangements shall remain unchanged.

(A.P. (DIR Series) Circular No. 48 dated 6th November, 2012)

This is a welcome move by RBI which will increase the flow of cheaper foreign currency funds to SIDBI/ the eligible MSME Borrowers.

2. Money Transfer Service Scheme – List of Sub-Agents

Presently, Authorised Persons (APs), who are Indian Agents under the Money Transfer Service Scheme (MTSS), have to submit list of their Sub-Agents to the Foreign Exchange Department (FED), Central Office (CO) of the Reserve Bank on a half yearly basis.

On a review, RBI has discontinued the submission of the said half yearly statement to FED and CO. The list of Sub-Agents has already been placed on the RBI website. Authorised Persons (Indian Agents) have to inform any addition/deletion to the list (names and addresses of Sub-Agents) immediately, as and when they appoint/remove any Sub-Agent under the scheme, to the concerned Regional Offices (ROs) of the Foreign Exchange Department (FED) of the Reserve Bank, under whose jurisdiction their registered offices fall and the Forex Markets Division, Foreign Exchange Department, Reserve Bank of India, Central Office, Mumbai – 400 001. Authorised Persons (Indian Agents) should visit the RBI website and verify the list of Sub-Agents on regular intervals and any aberration to the list observed is to immediately brought to the notice of the concerned FED ROs and FED Central Office (CO). Further, Authorised Persons (Indian Agents) should confirm the veracity of the list placed on RBI wesbite to FED CO either in form of a letter or by e-mail at within 15 days of the end of a quarter.

(A.P. (DIR Series) Circular No. 49 dated 7th November, 2012)

This is a welcome move by the RBI to streamline reporting procedures for the Authorised Persons in respect of their Sub-Agents.

3. Memorandum of Instructions governing Money Changing Activities

In terms of Para 17 of Part E of the Annex-I to the Memorandum of Instructions to Authorised Money Changers (AMCs) issued *vide* A.P. (DIR Series) Circular No. 57 dated March 9, 2009 all single branch Authorised Money Changers (AMCs) having a turnover of more than US $ 100,000 or equivalent per month and all multiple branch AMCs have to institute a system of monthly audit.

On the basis of representations received, RBI has allowed AMCs having multiple branches to put in place a system of Concurrent Audit which will cover 80 per cent of the transactions value-wise under a system of monthly audit and rest 20 per cent of the transactions value-wise under quarterly audit.

(A.P. (DIR Series) Circular No. 50 dated 7th November, 2012)

This is a welcome move by the RBI which will provide much needed relief to the Authorised Money Changers (AMCs) through relaxation in the requirement of monthly audit.

4. KYC norms/AML standards/ CFT obligation of Authorised Persons under PMLA 2002, as amended by PML Amendment Act, 2009 – Money changing activities

Based on several representations received from Full Fledged Money Changers (FFMCs), regarding difficulties in obtaining documents other than passport, and taking into account the procedure followed for money changing in other countries, RBI has amended certain instructions contained in F-Part II of the Annex to the A.P. (DIR Series) Circular No. 17 dated November 27, 2009 as amended by the A.P. (DIR Series) Circular No. 60 dated 22, 2011.

All other instructions contained in the A.P. (DIR Series) Circular no. 17 dated November 27, 2009, as amended from time to time shall remain unchanged.

These Revised Guidelines are also applicable *mutadis mutandis* to all agents/ franchises of Authorised Persons and it will be the sole responsibility of the franchisers to ensure that their agents/ franchises also adhere to these guidelines.

(A.P. (DIR Series) Circular No. 51 dt. 15th November, 2012)

5. Export of Goods and Software – Realisation and repatriation of export proceeds – Liberalisation

In terms of A.P. (DIR Series) Circular No. 40 dated November 01, 2011, the period of realisation and repatriation to India of the amount representing the full export value of goods or software exported was enhanced, from six months to twelve months from the date of export. This relaxation was available up to September 30, 2012.

RBI has since reviewed this issue and has extended, in consultation with the Government of India, the above relaxation w.e.f. October 1, 2012 till March 31, 2013.

The provisions in regard to period of realisation and repatriation to India of the full export value of goods or software exported by a unit situated in a Special Economic Zone (SEZ) as well as exports made to warehouses established outside India remain unchanged.

(A.P. (DIR Series) Circular No. 52 dt. 20th November, 2012)

This is a welcome move by the RBI to extend the relaxation period of 12 months to help exporters as the global liquidity crunch has still continued.

6. Deferred Payment Protocols between Government of India and erstwhile USSR

In terms of A.P. (DIR Series) Circular No. 38 dated October 4, 2012, the Rupee value of the Special Currency Basket was indicated as ₹ 75.037184 effective from September 27, 2012.

Upon revision, RBI has fixed the Rupee value of the Special Currency Basket at ₹ 75.570411 with effect from October 25, 2012.

(A.P. (DIR Series) Circular No. 53 dated 20th November, 2012)

7. External Commercial Borrowings (ECB) Policy for 2G spectrum allocation

Presently, eligible borrowers in the telecommunication sector are permitted to avail of ECB for the purpose of payment for spectrum allocation, under the automatic route.

Successful bidders of 3G auction were also permitted to make the payment for spectrum allocation initially out of Rupee resources to be refinanced with a long term ECB under the approval route subject to certain conditions.

As large outlay of funds is required to be paid directly to the Government within a limited period of time, RBI has provided following relaxations for the 2G Spectrum auction :

1. Refinancing of Rupee Resources

The payment for spectrum allocation is to be initially met out of Rupee resources by the successful bidders, to be refinanced with a long-term ECB, under the automatic route, subject to fulfilment of the undermentioned conditions :

a) the long-term ECB shall be raised within a period of 18 months from the date of sanction of such Rupee loans for the stated purpose from the domestic lenders;

b) the designated AD Category I bank has evidenced the payment of upfront fees to GoI in the form of a receipt/challan from DoT; and

c) the designated AD - Category I bank shall monitor the end-use of funds.

2. Relaxation in ECB-liability ratio and percentage of shareholding

The successful bidders in the 2G auction will be allowed to avail of ECB under the 'automatic route' from their ultimate parent company without any maximum ECB liability-equity ratio subject to the condition that the lender holds minimum paid-up equity of 25 per cent in the borrower company, either directly or indirectly.

3. Bridge finance facility

The successful bidders can avail of short term foreign currency loan in the nature of bridge finance under the 'automatic route' for the purpose of making upfront payment towards 2G spectrum allocation and replace the same with a long-term ECB under the automatic route subject to the following conditions:-

a) the long-term ECB is raised within a period of 18 months from the date of drawdown of bridge finance; and

b) the long-term ECB is in compliance with all the extant guidelines on ECB.

The relaxations in respect of the ECB liability-equity ratio, percentage of shareholding by the ultimate parent, refinancing of Rupee loans and bridge finance are part of a special dispensation applicable only to the successful bidders in the upcoming 2G spectrum auction.

All other aspects of ECB policy, such as USD 750 million limit per company per financial year under the automatic route, eligible borrower, recognised lender, end-use, average maturity period, prepayment, refinancing of existing ECB and reporting arrangements remain unchanged.

(A.P. (DIR Series) Circular No. 54 dated 26th November, 2012)

This is a welcome move by the RBI necessitated by the need to ensure success of the auction for 3G Spectrum which could provide much needed resources to the GOI and also help contain the fiscal deficit. This move will also ensure cheaper forex funds to the successful bidders in the 3G Spectrum Auction.

8. Liaison Office (LO)/Branch Office (BO) in India by Foreign Entities – Reporting to Income Tax Authorities

In terms of A. P. (DIR Series) Circular No. 24 dated 30-12-2009, Loos/BOs have to furnish the Annual Activity Certificate (AAC) to AD Category – I banks and a copy to Director General of Income Tax (International Taxation), Drum Shaped Building, I.P. Estate, New Delhi - 110 002.

RBI has clarified that the copies of AACs submitted to the DGIT (International Taxation) will have to be accompanied by Audited Financial Statements including Receipt and Payment Account.

RBI further clarified that at the time of renewal of permission of LOs by AD Banks, the copy of the same will have to be submitted to the office of the DGIT (International Taxation).

(A.P. (DIR Series) Circular No. 55 dated 26th November, 2012)

It was being reported in newspapers that many Liaison Offices (LO) / Branch Offices (BO) have carried out their operations which are much beyond the scope of LOs/ BOs permissible under the RBI guidelines. This move by the RBI will enable DGIT (International Taxation) to keep a watch on the activities of LOs/ BOs in India.

9. Exim Bank's Line of Credit of USD 13.095 million to the Government of the Republic of Togo

The Credit Agreement under the LOC is effective from April 27, 2012 and the date of execution of Agreement is January 12, 2012.

(A.P. (DIR Series) Circular No. 56 dated 27th November, 2012)

10. Exim Bank's Line of Credit of USD 178.125 million to the Government of the United Republic of Tanzania

The Credit Agreement under the LOC is effective from November 21, 2012 and the date of execution of Agreement is October 2, 2012.

(A.P. (DIR Series) Circular No. 57 dated 11 th December, 2012)

11. Trade Credits for Imports into India – Review of in all-in-cost ceiling

The RBI has extended the all-in-cost ceilings of 350 basis points over six months LIBOR for maturity periods from one year and above to 3 years LIBOR as specified in A.P. (DIR Series) Circular No. 44 dated November 15, 2011 for trade credits for imports into India till March 31, 2013 and subject to further review.

All other aspects of Trade Credit Policy will remain unchanged.

(A.P. (DIR Series) Circular No. 58 dated 14th December, 2012)

This is a welcome move by the RBI to extend the relaxation of all –in-cost ceiling till 31st March, 2013 as the global liquidity crunch has still continued increasing cost of borrowings overseas.

12. Trade Credits for Imports into India

In terms of A.P. (DIR Series) Circular No. 28 dated 11-9-2012, RBI has allowed companies in the infrastructure sector, where "infrastructure" is as defined under the extant guidelines on External Commercial Borrowings to avail of trade credit up to a maximum period of five years for import of capital goods as classified by DGFT subject to the following conditions :

(i) The trade credit must be *ab initio* contracted for a period not less than fifteen months and should not be in the nature of short-term roll overs; and

(ii) AD banks are not permitted to issue Letters of Credit/guarantees/Letter of Undertaking (LoU) /Letter of Comfort (LoC) in favour of overseas supplier, bank and financial institution for the extended period beyond three years.

The RBI has further relaxed the condition of *'ab initio'* buyers' credit for fifteen months to six months for existing trade credits. However, the condition regarding *'ab initio'* buyers' credit for fifteen months will prevail for future trade credit.

(A.P. (DIR Series) Circular No. 59 dated 14th December, 2012)

This is welcome development for companies in the infrastructure sector. Earlier circular had enabled such companies to extend original maturity period of buyers/ suppliers credit only when the *ab initio* maturity period was for at least for 15 months. Now companies with *ab initio* maturity period of at least six months will also be able to extend the maturity period by maximum of two years in addition to the original contracted period, provided the overall credit period does not exceed 5 years. This will help companies in the infrastructure sector to avail long term buyers/ suppliers credit at much cheaper rates and simultaneously this measure will also help reduce pressure on the Indian rupee.

13. External Commercial Borrowings (ECB) Policy – Review of in all-in-cost ceiling

The RBI has extended the all-in-cost ceilings of 350 basis points over six months LIBOR for maturity periods from three years and above to 5 years LIBOR and 500 basis points over six months LIBOR for maturity periods above five years LIBOR as specified in A.P. (DIR Series) Circular No. 99 dated March 30, 2012 for ECB till March 31, 2013 and subject to further review.

All other aspects of ECB Policy will remain unchanged.

(A.P. (DIR Series) Circular No. 60 dated 14th December, 2012)

This is a welcome move by the RBI to extend the relaxation of all-in-cost ceiling till 31st March, 2013 as the global liquidity crunch has still continued increasing the cost of borrowings overseas.

14. External Commercial Borrowings (ECB) for the low cost affordable housing projects

1. On review of extant guidelines relating to ECB Policy contained in A.P. (DIR Series) Circular No. 5 dated August 1, 2005, RBI has allowed ECB for low cost affordable housing projects as a permissible end-use, under the approval route.

2. ECB can be availed by developers/builders, Housing Finance Companies (HFCs)/ National Housing Bank (NHB) for financing prospective owners of low cost affordable housing units.

3. Detailed guidelines to avail ECB for low cost affordable housing scheme are set out in this circular, in relation to :–

   a) Definition of Eligible Project

b) Eligible Borrowers

c) End-use

d) Nodal Agency for deciding project's eligibility for low cost affordable housing.

4. Developers/Builders, Housing Finance Companies (HFCs) / National Housing Bank (NHB) will not be permitted to raise Foreign Currency Convertible Bonds (FCCBs) under this scheme.

5. For the financial year 2012-13, an aggregate limit of USD one billion is fixed for ECB under the low cost affordable housing scheme which includes ECBs to be raised by developers/builders and NHB/specified HFCs. This limit will be subject to annual review.

6. All other ECB parameters, such as, recognised lender, minimum average maturity period, all-in-cost ceilings, restrictions on issuance of guarantee, choice of security, parking of ECB proceeds, prepayment, refinancing of ECB, reporting requirements remain unchanged and will have to be complied with.

(A.P. (DIR Series) Circular No. 61 dated 17th December, 2012)

This is a welcome move by the RBI which will provide much needed boost to the low cost housing sector through cheaper financing.

15. Exim Bank's Line of Credit of USD 16.88 million to the Government of the Republic of Gambia

The Credit Agreement under the LOC is effective from December 4, 2012 and the date of execution of Agreement is October 19, 2012.

(A.P. (DIR Series) Circular No. 62 dated 18th December, 2012)

16. External Commercial Borrowings (ECB) for Micro Finance Institutions (MFIs) and Non-Government Organisations (NGOs) – Engaged in micro finance activities under Automatic Route

The extant guidelines in terms of A.P. (DIR Series) Circular No. 59 dated December 19, 2011 wherein MFIs were permitted to raise ECB up to USD 10 million or equivalent during a financial year for permitted end-uses, under the Automatic Route subject to fulfilment of detailed guidelines; has been allowed by RBI to continue to be applicable until further review.

ECB by MFIs/NGOs is to be fully hedged. Designated AD has to ensure at the time of drawdown that the forex exposure of the borrower is fully hedged.

(A.P. (DIR Series) Circular No. 63 dated 20th December, 2012)

This is a welcome move by the RBI to regularise and continue the window of cheaper ECB funds for MFIs in times of global liquidity crunch.

17. Exim Bank's Line of Credit of USD 19 million to the Government of the Co-operative Republic of Guyana

The Credit Agreement under the LOC is effective from December 20, 2012 and the date of execution of Agreement is October 30, 2012.

(A.P. (DIR Series) Circular No. 64 dated 27 th December, 2012)

18. Exim Bank's Line of Credit of USD 250 million to the Government of the Republic of Mozambique

The Credit Agreement under the LOC is effective from December 26, 2012 and the date of execution of Agreement is September 20, 2012.

(A.P. (DIR Series) Circular No. 65 dated 27th December, 2012)