

LLP – New Operating Entity of choice to be considered by Singapore investors to invest into India

Recent measures announced on the liberalisation of foreign investments in limited liability partnerships (LLP) in India have made regulatory framework clearer for foreign investors to use LLP's to invest in India.



Background

LLP had emerged in India post enactment of the Limited Liability Partnership Act, 2008 (LLP Act). One of the main advantages of a LLP is that it enshrines benefits of a corporate structure (especially limited liability of shareholders) within the more flexible partnership firm format.

Foreign Direct Investment (FDI) in LLP was first permitted in Indian Foreign Investment Regulations in 2011. However, the rules had many restrictions such as needing prior Government approval for

investment into LLP or conversion of an existing FDI invested company to LLP, prohibition on downstream investments, requirement to have a resident designated partner, etc.

In November 2015, the Government vide Press Note 12/2015, relaxed regulations to bring FDI in LLP under the automatic route in sectors where 100% FDI is allowed through the automatic route and where there are no FDI-linked performance conditions. Further, it also permitted downstream investments by a LLP having FDI into another Company / LLP, in sectors where 100% FDI is allowed under the automatic route and there are no FDI-linked performance conditions.

Following this, the Reserve Bank of India issued notification in February 2016, amending the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000. This gave a statutory framework under the Foreign Exchange Management Act, 1999 (FEMA) to these Government relaxations. The above changes were welcomed by foreign investors in LLP, but did not address some important concerns such as the need for investors to mandatorily have an Indian registered company or an Indian resident individual as a Designated Partner ('DP') in the LLP, prohibition on availing external commercial borrowings (foreign loans) etc.

The Reserve Bank of India (RBI) has therefore responded to such concerns and issued a notification in March 2017 to bring about much needed changes to FDI regulations in LLP.



Requirement of having a resident Designated Partner (DP) deleted

A DP is mandatory in a LLP under the Indian LLP Act, 2008, however such DP can either be an Individual or other person such as another LLP, Company, Trust etc. The old FEMA regulations only permitted such a DP which was a Company registered in India under the provisions of the Companies Act and did not permit such DP to be any other body such as a Trust or a LLP. Further, it was necessary that if an individual was appointed a DP, he/she also needed to be a 'person resident in India' under FEMA.

These conditions have now been relaxed and now a Foreign Company can also be a DP. Further, if an individual is appointed as DP, he need not satisfy the residency test under FEMA. Such DPs would however continue to comply with other conditions prescribed for them under the Indian LLP Act, 2008.

Conversion of a Company with FDI into LLP under automatic route

Conversion of a Company with foreign investment into LLP, which was earlier under the Government approval route, is now permitted under the automatic route for Companies being engaged in a sector where foreign investment up to 100 percent

is permitted under automatic route and there are no FDI linked performance conditions.

Availing External Commercial Borrowings (ECB) by LLP with Foreign Investment permitted

FEMA regulations earlier restricted any LLP with FDI to avail ECB. However, in the revised FEMA regulations, this provision has been deleted. Hence it is expected that RBI will now amend ECB regulations to permit LLP with Foreign investment to avail ECB. Such LLPs wishing to avail ECBs will need to wait until ECB regulations are amended to provide this facility.

With the introduction of above relaxations on the regulatory front for FDI in Indian LLP's, it has certainly become an interesting choice of entity for investing into India.

Additionally, from an Indian tax perspective LLP's stand on a beneficial footing vis a vis a Company which incur a dual layer of tax i.e. corporate tax at company level and dividend distribution tax (DDT) at 20.36% on declaration of dividends. DDT is not applicable in case of Indian LLP's which is a big positive for foreign investors who are considering repatriation of surplus profits from its Indian subsidiaries in a tax efficient manner.



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Also, in light of the recent tax treaty amendments by India with Singapore, Mauritius and Cyprus, company structures have become less beneficial as capital gains tax applies on investment in shares of Indian company (post 1 April 2017) which are subsequently transferred by a Mauritius/ Singapore / Cyprus tax resident investor. Therefore, it is opportune to explore LLP structure (including conversion of existing Indian company into LLP) for various beneficial tax and regulatory reasons.

Few sectors would still be out of purview as FDI into LLP's is not permissible in sectors having FDI linked performance conditions such as Real Estate, Non-Banking Financial companies etc. Our experience also shows that company form of legal entity is preferred out of practice wherein Indian entities have to participate or bid for Government contracts.

Final Thought – A Huge Positive

With much required regulatory relaxations introduced by RBI regarding Designated Partner, External Commercial Borrowings (foreign loans), and conversion of company to LLP and the existing beneficial tax provisions for LLP in India, investing into Indian LLP (except few restricted sectors) may become the operating entity of choice for Singapore investors.

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