Between the lines...

April, 2016

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Highlights

I. e-Commerce FDI Policy

ii. Stamp duty and rebate on orders of amalgamation

i. e-Commerce FDI Policy

The Ministry of Commerce and Industry has vide Press Note 3 of 2016 series, brought the much awaited clarity for Foreign Direct Investment (FDI) in the e-commerce sector, a move that will bring relief to large e-commerce companies like Amazon, Flipkart and Snapdeal. This ends the uncertainty over the business model being used by India's biggest e-commerce companies which has been challenged in court by brick-and-mortar stores.

Although, retail e-commerce,i.e., business-to-consumer (B2C) is generally not permitted, B2C e-commerce would be permitted under the following three circumstances: (i) manufacturer selling products manufactured in India through e-commerce retail, (ii) single-brand retail trading entity operating through brick and mortar stores and undertaking retail trading through e-commerce route, and (iii) an Indian manufacturer selling its own single brand products, being the owner of the Indian brand and manufacturing in terms of value, at least 70% of its products in-house and sourcing at most 30% from Indian manufacturers.

Before this Press Note was issued, there existed no definition of e-commerce and there was no clear distinction whether an e-commerce business included only trading in goods or also encompassed services within its scope. Majorly, there was a serious lacuna in the previous FDI policy as the different forms of business models were not sufficiently addressed, although there were huge inflows of FDI in this sector.

The Press Note has brought in the much need clarification and defines e-commerce as “buying and selling of goods and services including digital products over the digital and electronic network.” The term 'digital and electronic network' has been stated to include a network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles, etc.

An e-commerce entity is defined as an entity that is engaged in e-commerce activities and fulfills the following conditions:

i) It is a company incorporated under Companies Act, 2013 or Companies Act, 1956, or

ii) A foreign company as defined under section 2(42) of the Companies Act, 2013, or

iii) An office, branch or agency in India as provided in Section 2(v)(iii) of Foreign Exchange Management Act, 1999 owned and controlled by a person resident outside India.

It is pertinent to note here that Limited Liability Partnership (LLP) have not been specifically included and thus FDI in LLPs is not permissible to undertake e-commerce activities.

The Press Note has further clarified and defined the 'market place model' essentially as the information technology platform provider or facilitator between buyer and seller. Further, 100% FDI through automatic route is permitted in this model of e-commerce.Nonetheless, the Government has disallowed FDI for 'inventory based model' where the inventory of goods and services is owned by the e-commerce entity and provides retail services directly to consumers.

However, the most remarkable change introduced by this Press Note is that in the marketplace models, e-commerce entities cannot 'directly or indirectly influence the sale price of goods or services' and are obligated to maintain a 'level playing field'. This is a huge setback for e-commerce giants, as the rules now prohibit marketplaces from offering discounts and capping total sales originating from a group company or one vendor at 25% and therefore is intended to end the huge discount wars that were seen in recent times.

The policy further clarifies that the responsibility of any warranty/guarantee of products or services sold online, their delivery and customer satisfaction will be borne by the sellers and not the e-commerce company. The new policy also mandates that such e-commerce companies to display contact details of the sellers online and will be allowed to provide support services to sellers on their platform such as warehousing, logistics, order fulfilment, call centre, payment collection and other services.

VA view: The Government's clarification on permissible FDI in e-commerce and definition of marketplace is a welcome move to bring clarity to what constitutes online retail in India. The three restrictions on the marketplace model, namely, maintaining a level playing field vis a vis brick and mortar players, one vendor's share of the volume of trade on the marketplace not exceeding 25%, and post-sales delivery and consumer satisfaction being the responsibility of the seller, is against liberalization of the Indian retail sector.

The restriction on pricing freedom is not warranted. Predatory pricing should be the concern of the anti-trust authorities and not made part of the FDI policy. The obligation to maintain a 'level playing field' could possibly hamper passing on heavy discounts by e-commerce companies to its customers.

As regards the second restriction, it is not clear whether the sale from vendors should be measured on weekly, monthly or yearly sales basis. The second restriction can be circumvented by creating separate organizations in respect of the marketplace provider for transactions which have been prohibited. This will only add to the transaction cost and may not benefit the end consumers at large.

In respect of support and other services, the Press Note is silent on whether advertisement issued by e-commerce companies to attract online customers is permissible as it would indirectly help sellers to increase sales.

Moreover, the immediate application of Press Note has provided no room for compliance with the changes introduced by the Press Note especially for the inventory based e-commerce business.

Stamp duty and rebate on orders of amalgamation

The full Bench of Bombay High Court in the case of *Chief Controlling Revenue Authority v. Reliance Industries Limited (Civil Reference No 1 of 2007 in Writ Petition No 1293 of 2007 in Reference Application No 8 of 2005, decided on March 31, 2016),* has ruled that orders of the jurisdictional High Court sanctioning amalgamation scheme under Section 391-394 of the Companies Act, 1956 is the “instrument” on which stamp duty is to be paid under the Bombay Stamp Act, 1958, and that the scheme of amalgamation settled by two companies itself cannot be an “instrument” as it has no force unless and until it is sanctioned by the court. In other words, if the registered offices of the two companies involved in a scheme of amalgamation are situated in different states and the scheme is required to be approved by two different high courts, then the order passed by each jurisdictional high court would be the instrument chargeable to stamp duty in the respective states.

In the aforesaid case, Reliance Industries Limited and Reliance Petroleum Limited (the respondents) were situated in Maharashtra and Gujarat respectively. The scheme of amalgamation between them was sanctioned by the Bombay and the Gujarat High Courts respectively, and stamp duty was paid in State of Gujarat on order of High Court of Gujarat. While paying stamp duty in the State of Maharashtra, the respondents claimed that they were entitled to take credit for the stamp duty already paid in the State of Gujarat.

The Bombay High Court held that *“[As] per the scheme of the [Bombay Stamp Act, 1958], instrument is chargeable to duty and not the transaction and therefore even if the scheme may be the same, i.e., transaction being the same, if the scheme is given effect by a document signed in State of Maharashtra it is chargeable to duty as per rates provided in Schedule I [of the said Act].”*

The Court further held that *"Although the two orders of two different high courts are pertaining to same scheme they are independently different instruments and cannot be said to be same document especially when the two orders of different high courts are upon two different petitions by two different companies. When the scheme of the said Act is based on chargeability on instrument and not on transactions, it is immaterial whether it is pertaining to one and the same transaction. The duty is attracted on the instrument and not on transaction."*

The Court observed that it is the Order of the Court that sanctions such a scheme of amalgamation which results in transferring the property and assets, and therefore, such order alone would be an instrument on which stamp duty is chargeable.

Further, in respect of the companies situated in Maharashtra, pursuant to the aforesaid order, in a scheme, compromise or arrangement sanctioned under Section 391-394 of the Companies Act, 1956, no rebate (in respect of stamp duty paid on the said scheme in another state) will be available to the company in the State of Maharashtra, as the essential ingredients of Section 19 of the Bombay Stamp Act, 1958 are not fulfilled which is a pre-requisite to claim a rebate.

VA view:

The above judgement reinforces the principle that stamp duty is payable on the instrument and not on the transaction per se. Hence, it is advisable for companies opting for a court approved merger to ensure that the registered office of the transferor and transferee company is situate at one jurisdiction.

Contact Details :

www.vaishlaw.com

NEW DELHI
1st, 9th & 11th Floor
Mohan Dev Bldg. 13 Tolstoy Marg
New Delhi - 110001, India
Phone: +91-11-4249 2525
Fax: +91-11-23320484
delhi@vaishlaw.com

MUMBAI
106, Peninsula Centre
Dr. S. S. Rao Road, Parel
Mumbai - 400012, India
Phone: +91-22-4213 4101
Fax: +91-22-4213 4102
mumbai@vaishlaw.com

BENGALURU
Unit No. 305, 3rd Floor
Prestige Meridian-II, Building No. 30
M.G. Road, Bengaluru - 560001, India
Phone: +91-80-40903581/ 88 /89
Fax: +91-80-40903584
bangalore@vaishlaw.com