

Global Tax Update

India

Deloitte Tohmatsu Tax Co.

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1. Changes in Foreign Direct Investment (FDI¹) conditions in e-commerce activities

Government of India (GOI) had amended the FDI Policy on e-commerce² and permitted 100 per cent FDI in the marketplace model of e-commerce (e-commerce marketplace entities) under the automatic route³. FDI was not allowed in inventory based model of e-commerce. In order to provide clarity and strengthen the regulatory framework governing FDI in ecommerce marketplace entities in India and to bring level playing field among online and offline traders, GOI has further amended the consolidated FDI policy Circular of 2017 (FDI Policy) in relation to FDI in e-commerce entities⁴. The amendments shall be applicable to all e-commerce marketplace entities having FDI with effect from 1 February 2019.

Highlights of the amendments are as under:

	Clause before amendment	Clause after amendment	Remarks
1	<p>Clause (iv)</p> <p>E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model</p>	<p>Clause (iv)</p> <p>E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies..</p>	<ul style="list-style-type: none"> ■ If a vendor purchases more than 25% of its inventory from Ecommerce marketplace entity or its "group" companies, the sale of inventory of such vendor shall be deemed to be controlled by the market place ecommerce entity. ■ In addition to the ownership of inventory, if the ecommerce marketplace exercises control (as defined) over inventory, it will be deemed to be an inventory based model where FDI is not permitted. ■ There would be practical challenges for E-commerce marketplace entity to ascertain if more than 25% of total purchases of such vendors are from the marketplace entity or its group companies. This aspect requires further clarity from the GOI.
2	<p>Clause (v)</p> <p>An e-commerce entity will not permit more than 25% of</p>	<p>Clause (v)</p> <p>An entity having equity participation by ecommerce</p>	<ul style="list-style-type: none"> ■ The earlier 25% cap of sales by one vendor on e-commerce platform is now done away with.

1 Policy for foreign investment into Indian Companies / entities

2 vide Press Note No.3 dated 29 March 2016

3 Route under which no government approval is required by a foreign entity to invest into India

4 by Press Note No. 2 dated 26 December 2018 (PN-2 of 2018)

	the sales value on financial year basis affected through its marketplace from one vendor or their group companies	marketplace entity or its group companies, or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity.	<ul style="list-style-type: none"> ■ E-commerce marketplace entities now cannot sell inventory of group companies or entities where it holds equity stake or where it has control on inventory as mentioned in clause (iv) above.
3	<p>Clause (ix)</p> <p>E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.</p>	<p>Clause (ix)</p> <p>E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be provided by e-commerce marketplace entity or other entities in which ecommerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and nondiscriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/ marketing, payments, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For the purposes of this clause, provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.</p>	<ul style="list-style-type: none"> ■ Various services to be provided by Ecommerce marketplace entity or its group companies to the vendors shall be at arm's length basis and on similar terms which are made available to all other vendors. ■ Further, group companies of Ecommerce marketplace entity are now restricted from providing cash back offers to buyers at favourable terms and now it has to be fair and nondiscriminatory.
4	No such clause	<p>New Clause (xi) added</p> <p>E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.</p>	<ul style="list-style-type: none"> ■ This will prevent exclusive tie-up arrangements with vendors and ecommerce marketplace entities.
5	No such clause	<p>New Clause (xii) added</p> <p>E-commerce marketplace entity will be required to furnish a certificate along with a report of statutory auditor to Reserve Bank of India, confirming compliance of above guidelines, by 30th of September of every year for the preceding financial year.</p>	<ul style="list-style-type: none"> ■ This will cast a formal independently verifiable obligation on e-commerce marketplace entities to ensure that the FDI Policy is complied with.

2. Reserve Bank of India notifies FEMA5 (Borrowing and Lending) Regulations, 2018 and announces New External Commercial Borrowings (ECB) Framework

In order to simplify the provisions dealing with borrowing and lending in foreign exchange and Indian Rupees, the Reserve Bank of India (RBI) had notified consolidated Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 (the Borrowing and Lending Regulation)⁶. The consolidation of regulations were proposed by RBI in its Bi-monthly Monetary Policy statement of 5 December 2018. The Borrowing and Lending Regulation supersedes:

- Foreign Exchange Management (Borrowing and Lending in Indian Rupee) Regulations, 2000; and
- Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2000.

In furtherance to the above and to rationalise and provide operational framework for ECB and Rupee denominated bonds, on 16 January 2019 RBI, announced the New External Commercial Borrowing Framework (New ECB Framework).

The highlights can be accessed here

<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/Regulatory%20Alert/in-tax-ra-fema-regulations-new-ecb-framework-noexp.pdf>

5 Foreign Exchange Management Act

6 on 17 December 2018

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