



Global Tax Update

India

Deloitte Tohmatsu Tax Co.

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1. Changes in the FDI Policy

The Government of India has amended the consolidated FDI¹ policy² to increase the limit of investment in the insurance and pension sectors and to clarify certain aspects relating to e-commerce sector.

Key highlights of the amendments are summarized below:

Sl. No.	Sector	Key amendments
1.	Insurance	FDI up to 49% allowed under automatic route ³ (earlier FDI up to 26% was permitted under automatic route and FDI beyond 26% and up to 49% under the Government approval route) subject to approval / verification by IRDA ⁴ .
2.	Pension	FDI up to 49% allowed under automatic route (earlier FDI up to 26% was permitted under automatic route and FDI beyond 26% and up to 49% under the Government approval route) subject to obtaining registration from PFRDA ⁵ and compliances of requirements of PFRDA Act, 2013.
3.	E-commerce ⁶	<ul style="list-style-type: none"> ➤ 100% FDI permitted under automatic route in marketplace based model of e-commerce. No FDI permitted in inventory based model of e-commerce. ➤ Certain key conditions prescribed for marketplace based model of e-commerce entity are as under⁷: <ul style="list-style-type: none"> • The entity may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call center, payment collection and other services. • The entity shall not exercise ownership over inventory i.e. goods

1 Foreign Direct Investment

2 Press Note No. 1 and 2 (2016 Series) dated 23 March 2016 issued by Department Of Industrial Policy & Promotion (DIPP) and Press Note No. 3 (2016 Series) dated 29 March 2016 issued by DIPP

3 General permission for foreign investment without any prior government approval

4 Insurance Regulatory and Development Authority

5 Pension Fund Regulatory and Development Authority

6 Please note that "e-commerce entity" does not cover limited liability partnership (LLP), which means LLP with FDI may not be able to undertake e-commerce business.

7 For all conditions, please refer to the press releases.

		<p>purported to be sold on its platform; such an ownership over the inventory will render the business into inventory based model.</p> <ul style="list-style-type: none"> · The entity shall not permit more than 25% of the sales affected through its marketplace from one vendor or their group companies. · Post sales, delivery of goods to customer, customer satisfaction and warranty/guarantee of goods and services sold will be the responsibility of the seller. · The entity shall not directly or indirectly influence the sale price of goods or services sold and shall maintain level playing field.
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2. CBDT⁸clarifies⁹that consortium arrangements for executing EPC¹⁰/ turnkey contracts, with certain specified attributes, may not be treated as an AOP¹¹

Taxation of consortium of contractors, formed to implement large infrastructure projects, particularly in EPC contracts/ turnkey projects has been a subject matter of tax litigation in India. Tax authorities in many cases have taken a position that such a consortium arrangement constitutes an AOP, i.e., a separate entity for charging tax. This has led to tax disputes, particularly in those cases where each member of the consortium, although jointly and severally liable has a clear and distinct role in scope of work, responsibilities and liabilities of the consortium members.

The term “AOP” has not been specifically defined under the Income-tax Act, 1961 (‘the Act’). To reduce tax litigation and to bring consistency in approach while handling cases of consortium arrangements, the CBDT has specified following attributes of a consortium arrangement, which if present, would result in the arrangement not being treated as an AOP.

- Each member is independently responsible for executing its part of work, through its own resources and also bears the risk of its scope of work and each incurs expenditure only in its specified area of work;
- Each member earns profit or incurs losses, based on performance of the contract falling strictly within its scope of work. However, consortium members may share contract price at gross level, only to facilitate convenience in billing;
- The men and materials used for any area of work are under the risk and control of respective consortium members;
- The control and management of the consortium is not unified and common management is only for the inter-se coordination between the consortium members for administrative convenience.

The CBDT has further clarified that

- There may be other additional factors which may justify that consortium is not an AOP and the same shall depend upon the specific facts and circumstances.
- This circular shall not be applicable in cases where all or some of the members of the consortium are associated enterprises and tax authorities will decide in such cases based on tax laws and judicial precedencies on the matter.

8 Central Board of Direct Taxes

9 Circular No. 7/2016, dated 07 March 2016

10 Engineering, Procurement and Construction

11 Association of Persons

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