FOREIGN DIRECT INVESTMENT POLICY
GOVERNMENT OF INDIA

ABOLITION OF PRESS NOTE 1 OF 2005

The Department of Industrial Policy and Promotion ("**DIPP**"), Ministry of Commerce & Industry, Government of India has recently released the third edition of the Consolidated Foreign Direct Investment ("**FDI**") Policy, Circular No. 1 of 2011 (the "**Circular 1 of 2011**") which came into effect from April 1, 2011.

In the Circular 1 of 2011, with the objective of providing a level playing field, the DIPP has brought the most awaited change by abolishing the most controversial condition in the FDI policy. The earlier FDI policies imposed the condition of prior approval, on the foreign investor, from the Government [through Foreign Investment Promotion Board ("**FIPB**")] in cases where in the foreign investor had an existing joint venture/ technology transfer/ trademark agreement as on January 12, 2005 and such a foreign investor proposed to make fresh investment/ technology transfer/ trademark agreement in the "*same*" field in India. The term "*same*" field was defined as 4 digit National Industrial Classification ("**NIC**"), 1987 Code.

With the abolition of the aforesaid condition from the FDI policy, announced as part of Circular 1 of 2011, FDI policy has cleared way for foreign investors who wish to enter into fresh joint ventures or technology transfers or trademark agreements or set up wholly owned subsidiaries notwithstanding their existing joint ventures or technology/ trademark agreements in the "*same"* field.

It may be relevant to note that the controversial condition/ requirement was introduced in its primitive form in Press Note 18 (1998 Series) ("**Press Note 18**"), and subsequently watered down in Press Note 1 of 2005 issued on January 12, 2005 ("**Press Note 1 / 2005**") before it formed part of the first Consolidated FDI Policy, Circular No. 1 of 2010 (*Para 4.2.2*).

Since the introduction of Press Note 1/2005, the onus to establish whether or not the new proposal would jeopardize the existing joint venture/ arrangement was equally on the foreign investor/ technology/ trademark partner as well as the Indian partner. This provided an upper hand to the Indian partner as FIPB required a no-objection letter (NOC) from the previous joint venture partner while considering new proposals of a foreign investor in the "same" field. It also led to many litigations initiated by the Indian JV partners.

The only exceptions provided in Press Note 1/2005 wherein no Government approval was required, irrespective of the non-resident investor being hit by the prerequisites of the above Press Note, were as follows:

(a) Investments to be made by Venture Capital Funds (VCF) registered with the Security and Exchange Board of India (SEBI); or

(b) Where in the existing joint venture investment by either of the parties is less than 3 (three) per cent; or

(c) Where the existing joint venture or collaboration is defunct or sick; or

(d) Investments in sectors like Information Technology or Mining (as covered by Press Note 8 and Press Note 2, both of 2000 Series, respectively).

It is relevant to point out that the restrictive condition evolved since the days of Press Note 18 where the Government had set out guidelines for approval of foreign or technical collaborations under the Government approval route, in cases of 'existing ventures' / tie-ups in 'same' or 'allied' fields in India. This policy framework was further relaxed and diluted in the year 2005 *vide* Press Note 1/2005. This time a cut-off date was stipulated whereby the restrictive condition applied only to 'existing ventures' as of January 12, 2005 (i.e. the date of issuance of Press Note 1/2005) and that the same was not applicable to ventures / tie-ups entered thereafter. Significantly, Press Note 1/2005 also narrowed down the scope of

the referred condition by doing away with the much wider "allied field" and retaining the "same field" criterion whilst maintaining a balance between the need to ensure foreign investment inflows on one hand and shielding the domestic industry on the other.

Now, with the introduction of Circular 1 of 2011 it is evident that the Government recognized the fact that Press Note 1/2005 was discouraging the FDI into India, creating a negative impact on the foreign investors which directly curtailed the economic growth of India and proved to be the highly misused tool by the Indian JV partners.

The abolition of Press Note 1/2005 would not only present a positive and serious picture of the Government of India but would also undoubtedly promote healthy competition and be instrumental in attracting FDI and technology inflows into India.

With the abolition of Press Note 1/2005, a foreign investor having an existing joint venture or technology transfer or trademark agreement in India (even if entered into prior to January 12, 2005) in a field (covered by 4 digit NIC Code) would no longer require any Government approval for new proposals for investment in the "same field" (as per the said 4 digit NIC Code), as long as the new FDI otherwise falls within the sector which is on the automatic route [no prior Government (FIPB) approval is required] or no cap for FDI exists.

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