

# OVERSEAS INVESTMENT ABROAD

# DIRECT INVESTMENT ABROAD - AUTOMATIC ROUTE

- Overseas Investment in Joint Ventures (JV) / Wholly Owned Subsidiaries (WOS) can be made under two routes viz. (i) Automatic Route and (ii) Approval Route.
- Financial commitment for investment abroad under the automatic route in overseas Joint Ventures (JV) / Wholly Owned Subsidiaries (WOS) should be within 400% of the net worth (i.e. paid up capital and free reserves) of the Indian Party as per the last audited balance sheet.
- "Indian Party" means a company incorporated in India or a body created under an Act of Parliament or a partnership firm registered under the Indian Partnership Act, 1932, or a Limited Liability Partnership (LLP), registered under the Limited Liability Partnership Act, 2008 (6 of 2009), making investment in a Joint Venture or Wholly Owned Subsidiary abroad, and includes any other entity in India as may be notified by the Reserve Bank: Provided that when more than one such company, body or entity make an investment in the foreign entity, all such companies or bodies or entities shall together constitute the "Indian Party".
- "Joint Venture (JV)" means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian Party makes a direct investment.
- "Wholly Owned Subsidiary (WOS)" means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country, whose entire capital is held by the Indian Party.

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- The total financial commitment of the Indian Party in all the Joint Ventures / Wholly Owned Subsidiaries shall comprise of the following:
  - ❖ 100% of the amount of equity shares and/ or Compulsorily Convertible Preference Shares (CCPS);
  - ❖ 100% of the amount of other preference shares;
  - ❖ 100% of the amount of loan;
  - ❖ 100% of the amount of guarantee (other than performance guarantee) issued by the Indian Party;
  - ❖ 100% of the amount of bank guarantee issued by a resident bank on behalf of JV or WOS of the Indian Party provided the bank guarantee is backed by a counter guarantee / collateral by the Indian Party.
  - ❖ 50% of the amount of performance guarantee issued by the Indian Party provided that if the outflow on account of invocation of performance guarantee results in the breach of the limit of the financial commitment in force, prior permission of the Reserve Bank is to be obtained before executing remittance beyond the limit prescribed for the financial commitment.

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- All the financial commitments, including all forms of guarantees and creation of charge should be within the overall ceiling prescribed for the Indian Party.
- Any financial commitment exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit.
- The Indian Party / entity may extend loan / guarantee only to an overseas JV / WOS in which it has equity participation. Proposals from the Indian Party for undertaking financial commitment without equity contribution in JV / WOS may be considered by the Reserve Bank under the approval route. AD banks may forward the proposals from their constituents after ensuring that the laws of the host country permit incorporation of a company without equity participation by the Indian Party.
- Indian entities may offer any form of guarantee - corporate or personal (including the personal guarantee by the indirect resident individual promoters of the Indian Party)/ primary or collateral / guarantee by the promoter company / guarantee by group company, sister concern or associate company in India subject to no guarantee being 'open ended', in cases where invocation of the performance guarantee breaches the ceiling for the financial commitment, the Indian Party shall seek the prior approval of the RBI.

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- The Indian Party should not be on the RBI's Exporters' caution list / list of defaulters.
- All transactions relating to a JV / WOS should be routed through one branch of an Authorised Dealer bank to be designated by the Indian Party.
- In case of partial / full acquisition of an existing foreign company, where the investment is more than USD 5 million, valuation of the shares of the company shall be made by a Category I Merchant Banker registered with SEBI or an Investment Banker / Merchant Banker outside India registered with the appropriate regulatory authority in the host country; and, in all other cases by a Chartered Accountant or a Certified Public Accountant.
- In case of investment in overseas JV / WOS abroad by a registered Partnership firm, where the entire funding for such investment is done by the firm, it will be in order for individual partners to hold shares for and on behalf of the firm in the overseas JV / WOS if the host country regulations or operational requirements warrant such holdings.
- Investments in Nepal are permitted only in INR. Investments in Bhutan are permitted in Indian Rupees as well as in freely convertible currencies.
- All dues receivable on investments made in freely convertible currencies, as well as their sale / winding up proceeds are required to be repatriated to India in freely convertible currencies only.

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- Investment in an overseas JV / WOS may be funded out of one or more of the following sources:
  - ❖ i) drawal of foreign exchange from an AD bank in India;
  - ❖ ii) capitalisation of exports;
  - ❖ iii) swap of shares
  - ❖ iv) proceeds of External Commercial Borrowings (ECBs) / Foreign Currency Convertible Bonds (FCCBs);
  - ❖ v) in exchange of ADRs/GDRs issued in accordance with the Scheme for it;
  - ❖ vi) balances held in EEFC account of the Indian Party and
  - ❖ vii) proceeds of foreign currency funds raised through ADR / GDR issues.
- In respect of (vi) and (vii) above, the limit of financial commitment vis-à-vis the net worth will not apply except investment made in the financial sector.
- General permission has been granted to persons resident in India for purchase/ acquisition of securities as well as sell the shares so purchased or acquired in the following manner:
  - ❖ (i) out of funds held in RFC account;
  - ❖ (ii) as bonus shares on existing holding of foreign currency shares; and
  - ❖ (iii) when not permanently resident in India, out of their foreign currency resources outside India.

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- Indian Party is permitted to capitalise the payments due from the foreign entity towards exports, fees, royalties or any other dues from the foreign entity for supply of technical know-how, consultancy, managerial and other services within the ceilings applicable. Capitalisation of export proceeds remaining unrealised beyond the prescribed period of realization will require prior approval of the Reserve Bank.
- Indian software exporters are permitted to receive 25 per cent of the value of their exports to an overseas software start-up company in the form of shares without entering into Joint Venture Agreements, with prior approval of the Reserve Bank.
- Investment in the financial sector requires fulfilling the following additional conditions:
  - ❖ be registered with the regulatory authority in India for conducting the financial sector activities;
  - ❖ has earned net profit during the preceding three financial years from the financial services;
  - ❖ has obtained approval from the regulatory authorities concerned both in India and abroad for venturing into such financial sector activity; and
  - ❖ has fulfilled the prudential norms relating to capital adequacy as prescribed by the concerned regulatory authority in India.
  - ❖ Any additional investment (or financial commitment) by an existing JV/WOS or its step down subsidiary in the financial services sector is also required to comply with the above conditions.

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- **Portfolio investments by listed Indian companies** - Listed Indian companies are permitted to invest up to 50 per cent of their net worth as on the date of the last audited balance sheet in
  - ❖ (i) shares and
  - ❖ (ii) bonds / fixed income securities, rated not below investment grade by accredited / registered credit rating agencies, issued by listed overseas companies.
- Indian Mutual Funds registered with SEBI are permitted to invest within an overall cap of USD 7 billion in ADRs / GDRs, equity of listed companies, IPOs, debt securities, mutual funds etc.
- Domestic Venture Capital Funds / Alternative Investment Funds registered with SEBI may invest in equity and equity linked instruments of off-shore Venture Capital Undertakings, subject to an overall limit of USD 500 million.
- **The proprietorship concern / unregistered partnership firm** in India can invest abroad provided:
  - ❖ they are classified as 'Status Holder' as per the Foreign Trade Policy;
  - ❖ the export outstanding does not exceed 10% of the average export realisation of the preceding three years and a consistently high export performance;

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- ❖ The Authorised Dealer bank is satisfied about the KYC, proposed business and turnover;
- ❖ The proprietorship concern / unregistered partnership firm in India has not come under the adverse notice of any Government agency like the Directorate of Enforcement, Central Bureau of Investigation, Income Tax Department, etc. and does not appear in the exporters' caution list of the Reserve Bank or in the list of defaulters to the banking system in India;
- ❖ The amount of proposed investment outside India does not exceed 10 per cent of the average of last three years' export realisation or 200 per cent of the net owned funds of the proprietorship concern/ unregistered partnership firm in India, whichever is lower.
- ❑ **Registered Trusts and Societies** engaged in manufacturing/ educational/ hospital sector are allowed to make investment (or financial commitment) in the same sector(s) in a JV/WOS outside India, with the prior approval of the Reserve Bank.
- ❑ An application in form ODI may be made to the Chief General Manager, Reserve Bank of India, Foreign Exchange Department, Overseas Investment Division, Central Office, Amar Building, 5th Floor, Fort, Mumbai 400 001, through the AD Category - I bank. AD Category - I banks may forward the application to the Reserve Bank, after ensuring the terms and conditions along with their comments and recommendations, for consideration.

# DIRECT INVESTMENT ABROAD - AUTOMATIC ROUTE

## ❑ Eligibility criteria for Trust / Society

- ❖ The Trust should be registered under the Indian Trust Act, 1882/ The Society should be registered under the Societies Registration Act, 1860.
- ❖ The Trust deed /The Memorandum of Association and rules and regulations of the Society permits the proposed investment overseas/ to make the proposed investment which should also be approved by the.
- ❖ The proposed investment should be approved by the trustee/s / governing body / council or a managing / executive committee
- ❖ The AD Category – I bank is satisfied that the Trust / Society is KYC compliant and is engaged in a bonafide activity;
- ❖ The Trust / Society has been in existence at least for a period of three years;
- ❖ The Trust / Society has not come under the adverse notice of any Regulatory / Enforcement agency like the Directorate of Enforcement, Central Bureau of Investigation (CBI), etc.
- ❖ In addition to the registration, the AD Category – I bank should ensure that the special license / permission has been obtained by the applicant in case the activities require special license / permission either from the Ministry of Home Affairs, Government of India or from the relevant local authority, as the case may be.

# DIRECT INVESTMENT IN JOINT VENTURE (JV) / WHOLLY OWNED SUBSIDIARY (WOS) ABROAD

- Prior approval of the Reserve Bank would be required in all other cases of direct investment (or financial commitment) abroad.
- For this purpose, application together with necessary documents should be submitted in Form ODI through their Authorised Dealer Category – I banks.
- RBI would, inter alia, take into account the following factors while considering such applications:
  - ❖ a) Prima facie viability of the JV / WOS outside India;
  - ❖ b) Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment);
  - ❖ c) Financial position and business track record of the Indian Party and the foreign entity; and
  - ❖ d) Expertise and experience of the Indian Party in the same or related line of activity as of the JV / WOS outside India
- An annual return on Foreign Liabilities and Assets (FLA) in all cases is required to be submitted directly by all the Indian companies which have received FDI and/or made FDI abroad (i.e. overseas investment) in the previous year(s) including the current year, to the Director, External Liabilities and Assets Statistics Division, Department of Statistics and Information Management (DSIM), Reserve Bank of India.

# DIRECT INVESTMENT BY RESIDENTS IN JOINT VENTURE (JV) / WHOLLY OWNED SUBSIDIARY (WOS) ABROAD

- Investment is prohibited in foreign entity engaged in real estate (meaning buying and selling of real estate or trading in TDRs except development of townships, construction of residential/commercial premises, roads or bridges) or banking business, without RBI approval.
- An overseas Indian entity, shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the RBI.
- Indian party shall not make direct investment in an overseas entity [JV/WOS or step down subsidiary] located in countries identified by the Financial Action Task Force (FATF) as non-co-operative countries and territories as available on [www.fatf-gafi.org](http://www.fatf-gafi.org).
- Investments in Nepal are permitted only in Indian Rupees. Investments in Bhutan are permitted in Indian Rupees as well as in freely convertible currencies.
- All dues receivable on investments made in freely convertible currencies, as well as their sale / winding up proceeds are required to be repatriated to India in freely convertible currencies only.
- Investments in JV/WOS abroad by Indian Parties through the medium of a Special Purpose Vehicle (SPV) are also permitted under the Automatic Route.

# DIRECT INVESTMENT BY RESIDENTS IN JOINT VENTURE (JV) / WHOLLY OWNED SUBSIDIARY (WOS) ABROAD

- **Post investment changes / additional investment**
  - ❖ A JV / WOS set up by the Indian Party as per the Regulations may diversify its activities / set up step down subsidiary / alter the shareholding pattern in the overseas entity.
  - ❖ It should be reported to the RBI through the AD Category - I bank, within 30 days of the approval of those decisions by the competent authority of the JV / WOS concerned in terms of local laws of the host country and include the same in the APR.
- **Restructuring of the balance sheet involving write off of capital and receivables**
- The Indian promoters who have set up WOS abroad or have at least 51 per cent stake in an overseas JV, may write off capital (equity / preference shares) or other receivables, such as, loans, royalty, technical knowhow fees and management fees in respect of the JV /WOS, even while such JV /WOS continues to function as under:
  - ❖ Listed Indian companies are permitted to write off capital and other receivables up to 25 per cent of the equity investment in the JV /WOS under the Automatic Route; and
  - ❖ Unlisted companies are permitted to write off capital and other receivables up to 25 per cent of the equity investment in the JV /WOS under the Approval Route.

# DIRECT INVESTMENT BY RESIDENTS IN JOINT VENTURE (JV) / WHOLLY OWNED SUBSIDIARY (WOS) ABROAD

- ❑ The write-off / restructuring have to be reported to the Reserve Bank through the designated AD Category-I bank within 30 days of write-off/ restructuring. The writeoff / restructuring is subject to the condition that the Indian Party should submit the following documents for scrutiny along with the applications to the designated AD Category –I bank under the Automatic as well as the Approval Routes:
  - ❖ a) A certified copy of the balance sheet showing the loss in the overseas WOS/JV set up by the Indian Party; and
  - ❖ b) Projections for the next five years indicating benefit accruing to the Indian company consequent to such write off / restructuring.
- ❑ **Acquisition of a foreign company through bidding or tender procedure**

An Indian Party may remit earnest money deposit or issue a bid bond guarantee for acquisition of a foreign company through bidding and tender procedure and also make subsequent remittances.
- ❑ Eligible Indian Party may open, hold and maintain Foreign Currency Account (FCA) abroad for the purpose of overseas direct investments provided that host country regulations stipulate that the investments into the country are required to be routed through a designated account.

# DIRECT INVESTMENT BY RESIDENTS IN JOINT VENTURE (JV) / WHOLLY OWNED SUBSIDIARY (WOS) ABROAD

- ❑ **Creation of charge on domestic and foreign assets**
  - ❖ (1) An Indian Party may create charge (by way of mortgage, pledge, hypothecation or otherwise) on its assets [including the assets of its group company, sister concern or associate company in India, promoter and / or director] in favour of an overseas lender as security for availing of the fund based and/or non-fund based facility for its Joint Venture (JV) or Wholly Owned Subsidiary (WOS) or Step Down Subsidiary (SDS) outside India subject to the terms and conditions prescribed under Regulation 18A of the Notification and A.P. (DIR Series) Circular No.54 dated December 29, 2014.
  - ❖ (2) An Indian Party may create charge (by way of mortgage, pledge, hypothecation or otherwise) on the assets of its overseas JV or WOS or SDS in favour of an AD bank in India as security for availing of the fund based and/or non-fund based facility for itself or its JV or WOS or SDS outside India subject to the terms and conditions prescribed under Regulation 18A of the Notification and A.P. (DIR Series) Circular No.54 dated December 29, 2014.
- ❑ The shares acquired by persons resident in India in accordance with the provisions of Foreign Exchange Management Act, 1999 or Rules or Regulations made thereunder are allowed to be pledged for obtaining credit facilities in India from an AD Category – I bank / Public Financial Institution.

## OBLIGATIONS OF INDIAN PARTY

- ❑ The Unique Identification Number is allotted to each JV or WOS abroad on submission of form ODI through the Authorised Dealer. This is required to be quoted in all correspondence with the RBI.
- ❑ Share certificates or any other document as an evidence of investment in the foreign entity should be received to the satisfaction of the RBI within six months, or such further period as RBI may permit, from the date of effecting remittance or the date on which the amount to be capitalised became due to the Indian Party or the date on which the amount due was allowed to be capitalised;
- ❑ All dues receivable from the foreign entity, like dividend, royalty, technical fees etc., should be repatriated to India within 60 days of its falling due, or such further period as the RBI permits;
- ❑ Every year on or before December 31, an Annual Performance Report (APR) certified by Statutory Auditor or Chartered Accountant in Part II of Form ODI in respect of each JV or WOS outside India, and other reports or documents as may be prescribed by the RBI from time to time should be submitted to the RBI, through the designated Authorised Dealer. The APR, so required to be submitted, has to be based on the audited annual accounts of the JV/WOS for the preceding year, unless specifically exempted by the Reserve Bank.

## OBLIGATIONS OF INDIAN PARTY

- ❖ In case multiple IPs / RIs have invested in the same overseas JV / WOS, the obligation to submit APR shall lie with the IP / RI having maximum stake in the JV / WOS. Alternatively, the IPs / RIs holding stake in the overseas JV / WOS may mutually agree to assign the responsibility for APR submission to a designated entity which may acknowledge its obligation to submit the APR.
- ❖ Where the law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS, the Annual Performance Report (APR) may be submitted by the Indian Party based on the un-audited annual accounts of the JV / WOS provided the Statutory Auditors of the Indian Party certifies that law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS and the figures in the APR are as per the un-audited accounts of the overseas JV / WOS, the un-audited annual accounts of the JV / WOS have been adopted and ratified by the Board of the Indian Party, the above exemption from filing the APR based on unaudited balance sheet will not be available in respect of JV/WOS in a country / jurisdiction which is either under the observation of the Financial Action Task Force (FATF) or in respect of which enhanced due diligence is recommended by FATF or any other country / jurisdiction as prescribed by Reserve Bank of India.

# TRANSFER BY WAY OF SALE OF SHARES OF A JV / WOS

- ❑ An Indian Party, without prior approval of the RBI, may transfer by way of sale to another Indian Party from time to time, or to a person resident outside India, any share or security held by it in a JV or WOS outside India subject to the following conditions:
  - ❖ the sale does not result in any write off of the investment;
  - ❖ the sale is effected through a stock exchange where the shares of the overseas JV/ WOS are listed;
  - ❖ if the shares are not listed on the stock exchange and the shares are disinvested by a private arrangement, the share price is not less than the value certified by a Chartered Accountant / Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of the JV / WOS;
  - ❖ the Indian Party does not have any outstanding dues by way of dividend, technical know-how fees, royalty, consultancy, commission or other entitlements and / or export proceeds from the JV or WOS;
  - ❖ the overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to the Reserve Bank;
  - ❖ the Indian Party is not under investigation by CBI / DoE/ SEBI / IRDA or any other regulatory authority in India.
  - ❖ The Indian Party is required to submit details of such disinvestment through its designated AD category-I bank within 30 days from the date of disinvestment.

# TRANSFER BY WAY OF SALE OF SHARES OF A JV / WOS

- ❑ **Transfer by way of sale of shares of a JV / WOS involving write off**

Indian Party may disinvest, without prior approval of the Reserve Bank, in any of the under noted cases where the amount repatriated after disinvestment is less than the original amount invested:

  - ❖ i) in case where the JV / WOS is listed in the overseas stock exchange;
  - ❖ ii) in cases where the Indian Party is listed on a stock exchange in India and has a net worth of not less than Rs.100 crore;
  - ❖ iii) where the Indian Party is an unlisted company and the investment (or financial commitment) in the overseas venture does not exceed USD 10 million. and
  - ❖ iv) where the Indian Party is a listed company with net worth of less than Rs.100 crore but investment (or financial commitment) in an overseas JV/WOS does not exceed USD 10 million.
- ❑ An Indian Party, which does not satisfy the conditions laid down above for undertaking any disinvestment in its JV/WOS abroad, shall have to apply to the Reserve Bank for prior permission.
- ❑ An Indian Party may create charge, by way of pledge, on the shares of Joint Venture (JV) or Wholly Owned Subsidiary (WOS) or Step Down Subsidiary (SDS) outside India as a security in favour of an Authorized Dealer or a public financial institution in India or an overseas lender, for availing of fund based or non-fund based facility for itself (i.e. the Indian Party) or for its JV / WOS / SDS whose shares have been pledged, or for any other JV / WOS / SDS of the Indian Party.