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PUBLICATION



ISSUES RELATING TO FOREIGN INVESTMENT

India

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1. Is state governmental permission required for foreign investors to acquire real estate? If so, please identify.

1.1 Foreign direct investment in the real estate sector falls under the automatic route, provided, the investor meets the prescribed conditions (discussed below in 1.2).

1.2 As per the Consolidated Foreign Direct Investment Policy issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, foreign direct investment upto 100% is permitted under the automatic route in townships, housing, built-up infrastructure and construction-development projects, (which includes, but not restricted to, housing, commercial premises, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure) subject to certain conditions mentioned therein. Some of the key conditions are mentioned in brief below:

- (i) The are minimum area development requirements for development of serviced housing plots and for construction-development projects and also for a combination of the above two projects.

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- (ii) Minimum capitalization requirements differ for wholly owned subsidiaries and for joint ventures with Indian partners.
- (iii) There is a lock in on the Original investment from completion of minimum capitalization. However, the investor may be permitted to exit earlier with prior approval of the Government through the Foreign Investment Promotion Board.
- (iv) At least 50% of the project must be developed within a period of five (5) years from the date of obtaining all statutory clearances. The investor would not be permitted to sell undeveloped plots.
- (v) The investor shall be responsible for obtaining all necessary approvals, including those of the building/ layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/ bye-laws/ regulations of the State Government/ Municipal/Local Body concerned.

1.3 Please note that the conditions above do not apply to FDI in industrial parks, development of special economic zones, hotels & tourism sector and hospitals.

1.4 Further, foreign investment in any form is prohibited in a company or a partnership firm or a proprietary concern or any entity, whether incorporated or not (such as Trusts) which is engaged or proposes to engage in among others: (i) the either Real Estate Business, or construction or farm houses, or (ii) trading in transferable development rights. Real Estate Business does not include development of townships, construction of residential/commercial premises, roads or bridges.

2. Are there other state restrictions imposed on ownership of real estate by foreign investors? To acquire interests in entities which own real estate? If so, please identify.

2.1 Investments can be made by non-residents in the shares/fully, compulsorily and mandatorily convertible debentures/ fully, compulsorily and mandatorily convertible preference shares of an Indian company, which own real estate, provided they comply with the conditions mentioned above in 1.2. Further, it is clarified that every projects of the Indian company, in which foreign investment is proposed to be made, must be compliant with the conditions in 1.2 above.

2.2 Foreign investment in any form is prohibited in a company or a partnership firm or a proprietary concern or any entity, whether incorporated or not (such as Trusts) which is engaged or proposes to engage in among others: (i) the either

Real Estate Business, or construction of farm houses, or (ii) trading in transferable development rights. Real Estate Business does not include development of townships, construction of residential/commercial premises, roads or bridges.

3. Are foreign investors required to invest with a local partner? If not, is investment with a local partner advisable?

3.1 No, a foreign investor is not required to invest with a local partner as per the law, however, given the federal complexities of legislations/laws and compliances (including regular interaction with the State Government authorities), we have noted that majority of foreign investors have preferred to invest in India with a local/Indian partner for the sake of convenience.

4. What state taxes are levied solely on foreign individuals or entities acquiring or transferring real estate or interests in entities which acquire real estate?

4.1 There are no specific state taxes that are levied solely on foreign individuals or entities acquiring or transferring real estate or interests in entities which acquire real estate. However, every instrument (including instruments pertaining to transfer of shares of an entity/company) executed in India and specifically included under the India Stamp Act, 1899 or the State Stamp Act is chargeable with a stamp duty equivalent to an amount mentioned in the schedule of the respective Stamp Act itself. Further, all the State Governments prescribe their respective rates of fees for the registration of the documents and other ancillary purposes.

4.2 Government also levies/imposes direct tax in the form of capital gains tax (on the gains/profits arising from the transfer of capital assets). In certain cases, the Government of India prescribes/charges fees in the name of the unearned increase in the value (i.e. the difference between the premium paid and the market value) of the land allotted at the time of the sale, transfer, assignment or parting with the possession of the land and transfer charges etc.

5. Describe reporting requirements for reporting the acquisition, ownership or disposition of real estate which relate solely to foreign direct or indirect owners of real estate.

5.1 An Indian company receiving investment from outside India for issuing shares/convertible debentures/preference shares under the foreign direct investment scheme, should report the details of the amount of consideration to the Regional Office concerned of the Reserve Bank of India within thirty (30) days from the date of receipt in the Advance Reporting Form. Indian companies are required to report the details of the receipt of the amount of consideration for issue of shares/convertible debentures, through an AD Category - I bank, together

- with a copy/ies of the FIRCI/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor from the overseas bank remitting the amount. The report would be acknowledged by the Regional Office concerned, which will allot a Unique Identification Number for the amount reported.
- 5.2 The equity instruments should be issued within one hundred and eighty days (180) days from the date of receipt of the inward remittance or by debit to the NRE/FCNR (B) account of the non-resident investor. After issue of shares (including bonus and shares issued on rights basis) and shares issued under ESOP)/fully and mandatorily convertible debentures/fully and mandatorily preference shares, the Indian company has to file Form FC-GPR, within thirty (30) days from the date of issue of shares. Part A of Form FC-GPR has to be duly filled up and signed by Managing Director/Director/Secretary of the company and submitted to the Authorized Dealer of the company, who will forward it to the Reserve Bank of India along with the relevant documents. Part - B of form FC-GPR should be filed on an annual basis by the Indian company, directly with the Reserve Bank of India.
- 5.3 Reporting of transfer of shares between residents and non-residents and vice-versa is to be done in Form FC-TRS. The Form FC-TRS should be submitted to the AD Category – I bank, within sixty (60) days from the date of receipt of the amount of consideration.