

OVERSEAS DIRECT INVESTMENT



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1. Overseas Direct Investment

1.1 Introduction

Direct investment outside India' means investment by way of contribution to the capital or subscription to the Memorandum of Association of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, but does not include portfolio investment.

Joint Ventures/Wholly Owned Subsidiaries abroad promote economic co-operation between India and the host countries. They result in transfer of technology and skills, sharing the results of Research & Development, access to the global market, promotion of the brand image, generation of employment and utilization raw materials available in India and the host country, increased exports of plant and machinery and goods and services from India, foreign exchange earnings through dividend earnings, royalty, technical know-how fee, etc. Since globalization of trade is a two-way process, integration of the Indian economy with the rest of the world with all its attendant benefits is achieved through overseas investment. It is the reverse of Foreign Direct Investment (FDI) i.e. Indian direct investment abroad.

1.2 Conditions for Overseas Direct Investment

- ❖ The direct investment is made in an overseas JV/WOS engaged in a bonafide business activity.
- ❖ The Indian party is not on the RBI's export bankers caution list/list of defaulters to the banking system circulated by RBI or under investigation/enforcement agency or regulatory body.
- ❖ The Indian party has submitted its Annual Performance Report in respect of all its overseas investments in the format given in Part III of form ODI.
- ❖ The Indian party routes all transactions relating to investment in a JV/WOS through only one branch of an authorized dealer to be designated by it.
- ❖ The Indian party submits Part I of form ODI, duly completed, to designated branch of an AD.
- ❖ The Indian party / entity may extend loan / guarantee only to an overseas JV/ WOS in which it has equity participation.
- ❖ No guarantee should be 'open ended' i.e. the amount and period of the guarantee should be specified upfront.
- ❖ As in the case of corporate guarantees, all guarantees (including performance guarantees) are required to be reported to the Reserve Bank, ve in Form ODI-Part II.
- ❖ Specific approval of the Reserve Bank will be required for creating charge on immovable property and pledge of shares of the Indian parent/ group companies in favor of a non-resident entity.
- ❖ In cases where invocation of the performance guarantees breach the ceiling for the financial exposure of 400 per cent of the net worth of the Indian Party, the Indian Party shall seek the prior approval of the Reserve Bank before remitting funds from India, on account of such invocation.

1.3 Permissible sources for funding overseas direct investment

Funding for overseas direct investment can be made by one or more of the following sources:

- ❖ Drawal of foreign exchange from an AD bank in India.
- ❖ Swap of shares (refers to the acquisition of the shares of an overseas entity by way of exchange of the shares of the Indian entity).
- ❖ Capitalization of exports and other dues and entitlements.
- ❖ Proceeds of External Commercial Borrowings / Foreign Currency Convertible Bonds.
- ❖ In exchange of ADRs / GDRs issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and the guidelines issued by Government of India in the matter.
- ❖ Balances held in Exchange Earners Foreign Currency account of the Indian Party maintained with an Authorized Dealer.
- ❖ Proceeds of foreign currency funds raised through ADR / GDR issues.

In respect of (6) and (7) above, the ceiling of 100 per cent of the net worth does not apply. Further, if the source of funding is through availing ECB, the permissible limit is 400% of the net worth of the Indian Party.

1.4 Methodology

1.4.1 Routes of Investment

Automatic	Approval
An Indian Party does not require any prior approval from the Reserve Bank for making overseas direct investments. The Indian Party should approach an Authorized Dealer Category – I bank with an application in Form ODI and the prescribed enclosures / documents for affecting the remittances towards such investments.	Proposals not covered by the conditions under the automatic route require the prior approval of the Reserve Bank for which a specific application in form ODI with the documents prescribed therein is required to be made through the Authorized Dealer Category – I banks.

1.4.2 Automatic Route

An Indian Party is eligible to make overseas direct investment under the Automatic Route:-

- An Indian Party is a company incorporated in India
- A body created under an Act of Parliament
- A partnership firm registered under the Indian Partnership Act 1932
- Any other entity in India as may be notified by the Reserve Bank.

When more than one such company, body or entity makes investment in the foreign entity, such combination will also form an “Indian Party”.

1.4.3 Approval Route

Sectors in which ODI’s are allowed with prior RBI Approval

- ❖ Real Estate Business
- ❖ Banking Business
- ❖ Financial Service Sector
- ❖ Overseas Investments in the energy and natural resources sector exceeding 100% of the net worth of the Indian companies as on the date of the last audited balance sheet;
- ❖ Investments in Overseas Unincorporated entities in the oil sector by resident corporate exceeding 100% of their net worth as on the date of the last audited balance sheet, provided the proposal has been approved by the competent authority and is duly supported by a certified copy of the Board Resolution approving such investment. However, Navaratna Public Sector Undertakings, ONGC Videsh Ltd and Oil India Ltd are allowed to invest in overseas unincorporated / incorporated entities in oil sector (i.e. for exploration and drilling for oil and natural gas, etc.), which are duly approved by the Government of India, without any limits, under the automatic route;
- ❖ Overseas Investments by proprietorship concerns and unregistered partnership firms satisfying certain eligibility criteria;
- ❖ Investments by Registered Trusts / Societies (satisfying certain eligibility criteria) engaged in the manufacturing / educational / hospital sector in the same sector in a JV / WOS outside India;

1.4.4 Related Matters

- ❖ Proprietorship concerns and unregistered partnership firms are permitted to set up JV/WOS with prior approval of Reserve Bank.
- ❖ Registered Trusts and societies engaged in manufacturing/ educational/ hospital sector permitted for overseas investments with prior approval of Reserve Bank
- ❖ All investments should have Unique Identification Number (UIN) from the Reserve Bank of India.

Listed Indian companies are permitted to invest up to 50% of their net worth in shares/bonds/fixed income securities rated not below investment grade issued by listed overseas companies.

1.5 Recurring Obligations

An Indian Party will have to comply with the following: -

- ❖ receive share certificates or any other documentary evidence of investment in the foreign entity as an evidence of investment and submit the same to the designated AD within 6 months;
- ❖ repatriate to India, all dues receivable from the foreign entity, like dividend, royalty, technical fees etc.;
- ❖ Submit to the Reserve Bank through the designated Authorized Dealer, every year, an Annual Performance Report in Part III of Form ODI in respect of each JV or WOS outside India set up or acquired by the Indian party.
- ❖ Report the details of the decisions taken by a JV/WOS regarding diversification of its activities /setting up of step down subsidiaries/alteration in its share holding pattern within 30 days of the approval of those decisions by the competent authority concerned of such JV/WOS in terms of the local laws of the host country. These are also to be included in the relevant Annual Performance Report; and

In case of disinvestment, sale proceeds of shares/securities shall be repatriated to India immediately on receipt thereof and in any case not later than 90 days from the date of sale of the shares /securities and documentary evidence to this effect shall be submitted to the Reserve Bank through the designated Authorised Dealer.

1.6 Repatriation

Indian promoter companies participating in JV/WOS abroad should repatriate to India their foreign exchange entitlements/earnings due from the overseas concern by way of dividend, royalty, technical know-how fees, etc. Bank certificates supporting repatriation should be furnished to the concerned Regional Office of Reserve Bank. They are also required to submit to the concerned Regional Office of Reserve Bank every year an Annual Performance Report in form APR along with certified true copies of audited Profit and Loss Account statement and Balance Sheet together with the report of the Board of Directors of the overseas company adopting the accounts. Till such time the overseas concern commences commercial operations/production, Indian companies are also required to submit to Reserve Bank, a Half-yearly Progress Report in form HPR on the status of implementation of the project. Failure to repatriate the entitlements/earnings and submit the required reports and other information/clarifications, as and when called for by Reserve Bank, will amount to violation of the terms and conditions of the approval granted by Reserve Bank and as such, will be an offence under FERA 1973.

1.7 Disinvestment Procedure and issues

- ❖ Disinvestment by the Indian party from its JV / WOS abroad may be by way of transfer / sale of equity shares to a non-resident / resident or by way of liquidation / merger / amalgamation of the JV / WOS abroad
- ❖ The Indian Party can disinvest in cases where write off is not involved without prior approval from Reserve Bank subject to the following:
 - the sale is to be 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; and
- The Indian party is not under investigation by CBI / DoE/ SEBI / IRDA or any other regulatory authority in India.

❖ Disinvestment of stake in overseas JV/WOS:-

- In cases where the JV / WOS is listed in the overseas stock exchange;
- 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;
- Where the Indian Party is an unlisted company and the investment in the overseas JV / WOS does not exceed USD 10 million and
- Where the Indian Party is a listed company with net worth of less than Rs.100 crore but investment in an overseas JV/WOS does not exceed USD 10 million.

2. Advisory

2.1 Introduction

A client having business in India wishes to acquire a company in UAE.

There are two alternatives available.

- ❖ A company acquiring another company
- ❖ Individual under \$75000 scheme

2.2 Alternative 1 – Acquisition of a company

Investments can be made in new or existing entity. Indian entity can invest in any bonafide activity (except real estate other than development of township, construction of residential/ commercial premises, road or bridges). Also in case of financial service sector, certain additional conditions to be fulfilled.

2.2.1 Limits and regulations to be made under the Automatic Route

- The Indian Party can invest up to 100% of its net worth (as per the last audited Balance Sheet) in JV / WOS for any bonafide activity permitted as per the law of the host country. The ceiling of 100% of net worth will not be applicable where the investment is made out of balances held in the EEFC account of the Indian party or out of funds raised through ADRs/GDRs; Further, if the source of funding is through availing ECB, the permissible limit is 400% of the NET WORTH of the Indian Party.
- The Indian Party is not on the Reserve Bank's exporters' caution list / list of defaulters to the banking system published/ circulated by the Credit Information Bureau of India Ltd. (CIBIL) /RBI or any other credit information company as approved by the Reserve Bank or under investigation by the Directorate of Enforcement or any investigative agency or regulatory authority; and
- The Indian Party routes all the transactions relating to the investment in a JV/WOS through only one branch of an authorized dealer to be designated by the Indian Party.

2.2.2 Valuation norms

- In case of partial / full acquisition of an existing foreign company where the investment is more than USD five million, share valuation of the company has to be done by a Category I Merchant Banker registered with the Securities and Exchange Board of India (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/ Certified Public Accountant.
- However, in the case of investment by acquisition of shares where the consideration is to be paid fully or partly by issue of the Indian Party's shares (swap of shares), irrespective of the amount, the valuation will have to be done 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.

In case of additional overseas direct investments by the Indian promoter to its WOS which is made at premium or discount, the concept of valuation as indicated above shall be applicable

2.2.3 Procedure for direct investment in a JV/WOS under the Automatic Route

The Indian Party intending to make a direct investment under the automatic route is required to:-

- Fill up form ODI duly supported by the documents listed therein, i.e., certified copy of the Board Resolution, Statutory Auditors certificate and Valuation report (in case of acquisition of an existing company) as per the valuation norms*
- Approach an Authorized Dealer (designated Authorized Dealer) for making the investment/remittance.

2.2.4 Procedure to be followed for investment proposed to be made under the Approval Route

Proposals not covered by the conditions under the automatic route require the prior approval of the Reserve Bank for which a specific application in form ODI with the documents prescribed therein is required to be made through the Authorized Dealer Category – I banks.

Applications in Form ODI- Part I may be forwarded through the designated Authorized Dealer Category – I bank to:

*"The Chief General Manager
Reserve Bank of India
Foreign Exchange Department
Overseas Investment Division
Central Office
Amar Building, 5th Floor
Mumbai 400 001."*

2.3 Alternative 2 - As an individual under \$75000 scheme (Remittances)

Resident individuals have now been allowed to set up Joint Ventures (JV) / Wholly Owned Subsidiaries (WOS) outside India for bonafide business activities outside India within the limit of USD 75,000 with effect from August 5, 2013 and subject to the terms and conditions stipulated in Notification No.FEMA 263/RB-2013 dated August 5, 2013.

Once a remittance is made for an amount up to USD 75,000 during the **financial year**, he would not be eligible to make any further remittances under this scheme, even if the proceeds of the investments have been brought back into the country.

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Proposals not covered by the conditions under the automatic route require the prior approval of the Reserve Bank for which a specific application in form ODI with the documents prescribed therein is required to be made through the Authorized Dealer Category – I banks.

Applications in Form ODI- Part I may be forwarded through the designated Authorized Dealer Category – I bank to:

*"The Chief General Manager
Reserve Bank of India
Foreign Exchange Department
Overseas Investment Division
Central Office
Amar Building, 5th Floor
Mumbai 400 001."*

2.3.2 Taxation

Income from Overseas Direct Investment are not taxed in India as the income is neither accruing nor being received in India. Only dividend received is taxable @ 15%