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Reserve Bank of India

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Eighteenth Amendment) Regulations, 2016

Reserve Bank of India ("RBI") vide its Circular dated January 02, 2017 has provided an amendment to the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 ("**FEMA Transfer of Security Regulations 2004**"). These Regulations are to be called the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Second Amendment) Regulations, 2016. The amendment made in the Regulation 6 (2) (vi) of the FEMA Transfer of Security Regulations 2004 to be inserted as Clause vii provides that-

Indian Party shall make no direct investment in an overseas entity which is set up or acquired abroad directly as Joint Venture ("**J.V.**")/ Wholly Owned Subsidiary ("**WOS**") or indirectly as Step Down Subsidiary located in the countries identified by the Financial Action Task Force ("**FATF**") as non co-operative countries and territories or as notified by the RBI from time to time. The countries mentioned in the FATF listed as non co-operative countries and territories are -

- a. Afghanistan
- b. Bosnia and Herzegovina
- c. Democratic People's Republic of Korea (DPRK)
- d. Iran
- e. Iraq
- f. Lao People's Democratic Republic
- g. Syria
- h. Uganda
- i. Vanuatu
- j. Yemen



Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Fifteenth Amendment) Regulations, 2016

RBI vide its Circular dated January 10, 2017 ("**Fifteenth Amendment To 2016 FEMA Transfer of Security Rules Circular**"), the RBI has provided for amendments in amendments in the Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000 (FEMA Transfer of Security Regulations 2000)". These amendments are to be called the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Fifteenth Amendment) Regulations, 2016. These Fifteenth Amendment To 2016 FEMA Transfer of Security Rules Circular provide for the following amendments-

1. Amendments to Regulation 2-

In the FEMA Transfer of Security Regulations 2000 the below clause has to be inserted in Regulation 2 Clause (ii) namely clause (iiA) which contains the following -

'convertible note' means an instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding 5 (five) years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument.

2. After the existing Regulation 6C, the following 6D shall be inserted, namely-

Issue of Convertible Notes by startup companies-

- a. A person resident outside India (other than an individual who is citizen of Pakistan or Bangladesh or an entity which is registered / incorporated in Pakistan or Bangladesh), may purchase convertible notes issued by an Indian startup company for an amount of Rs. 25,00,000/- (Rupees Twenty-Five Lakhs Only) or more in a single tranche.

Explanation: For the purpose of this Regulation, a 'startup company' means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with notification number G.S.R. 180(E) dated February 17, 2016 issued by the Department of Industrial Policy and



Promotion, Ministry of Commerce and Industry.

- b. A startup company engaged in a sector where foreign investment requires Government approval may issue convertible notes to a non-resident only with approval of the Government.

Explanation: For the purpose of this regulation, the issue of shares against such convertible notes shall have to be in accordance with the Schedule 1 of the FEMA Transfer of Security Regulations 2000.

- c. A startup company issuing convertible notes to a person resident outside India shall receive the amount of consideration by inward remittance through banking channels or by debit to the Non-Resident External (“NRE”) / Foreign Currency Non Resident Bank Account (“FCNR (B)”) / Escrow account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016, as amended from time to time. Provided that an escrow account for the above purpose shall be closed immediately after the requirements are completed or within a period of 6 (six) months, which ever is earlier. However, in no case continuance of such escrow account shall be permitted beyond a period of 6 (six) months.
- d. Non Resident Indians (“NRIs”) may acquire convertible notes on non-repatriation basis in accordance with Schedule 4 of the FEMA Transfer of Security Regulations 2000.
- e. A person resident outside India may acquire or transfer, by way of sale, convertible notes, from or to, a person resident in or outside India, provided the transfer takes place in accordance with the pricing guidelines as prescribed by RBI. Prior approval from the Government shall be obtained for such transfers in case the startup company is engaged in a sector which requires Government approval.
- f. The startup company issuing convertible notes shall be required to furnish reports as prescribed by Reserve Bank.



Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Amendment) Regulations, 2017

RBI vide its Circular dated January 10, 2017 (“**FEMA Transfer of Security 2017 Circular**”) provided amendments to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 (FEMA Transfer of Security Regulations 2000)). These amendments are to be called the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Amendment) Regulations, 2017. This FEMA Transfer of Security 2017 Circular provides for the following amendments in the Schedule 1, in Annex B-

1. The existing Para 4 has to be substituted by the following-
 - a. F.4. Sector- Infrastructure Company in the Securities Market
 - b. F.4.1 Infrastructure companies in Securities Markets, namely, stock exchanges, commodity derivative exchanges, depositories and clearing corporations, in compliance with Securities and Exchange Board of India (“**SEBI**”) Regulations.
Foreign Investment cap- 49%
Route- Automatic
 - c. F. 4.2- Conditions-
 - i. Foreign investment, including investment by FPIs, will be subject to the Guidelines/ Regulations issued by the Central Government, SEBI and the Reserve Bank from time to time.
 - ii. Words and expressions mentioned above are defined in the Companies Act, 2013 (18 of 2013) or the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) or in the concerned Regulations issued by SEBI shall have the same meanings respectively assigned to them in those Acts/ Regulations.
2. The existing Paragraph F.6 shall be deleted.
3. The existing Paragraphs F.7, F.8, F.9 and F.10 shall be re-numbered as F.6, F.7, F.8 and F.9 respectively.



Order of the Hon'ble Maharashtra Electricity Regulatory Commission ("MERC"/ "Hon'ble Commission") in Case no. 83 of 2016 of M/S. Western Precicast Pvt. Ltd. V/s Maharashtra State Electricity Distribution Company Limited

1. M/s. Western Precicast Pvt. Ltd. ("WPPL"/ "Petitioner") is a manufacturer of corrosion resistant grade castings in stainless steel series and high nickel super alloys, with its foundry unit situated near the MIDC Kupwad Industrial Area, Dist.Sangli. WPPL has wind power projects situated at Chakala in Dhule and Sinnar in Nashik for which WPPL had entered into Energy Purchase Agreements ("EPA") with Maharashtra State Electricity Distribution Co. Ltd ("MSEDCL"/ "Respondent") for 13 years which were terminated on account of delayed payment for a period of 12 months. Despite repeated requests of WPPL, MSEDCL failed and neglected to make payments of principal as well as delayed payment surcharge. The termination of EPA was also not challenged by MSEDCL.
2. WPPL had filed a Petition, citing Section 42 of the Electricity Act, 2003 ("EA 2003"), on June 15, 2016 regarding denial of Short Term Open Access ("STOA") by MSEDCL. MSEDCL had denied open access on the ground of the WPPL having EPA with MSEDCL. However, the EPA was already terminated by WPPL on account of non-payment of principal as well as delayed payment surcharge for a period of 12 months. WPPL submitted that as MSEDCL had stopped making payments for the principal amounts to WPPL from August 2015. WPPL gave sufficient opportunities to MSEDCL to cure the breach. However when MSEDCL did not cure the breach in the mentioned period of 30 (thirty) days, WPPL in April, 2016 sent a legal notice to MSEDCL for termination of the EPA.
3. Following this, WPPL submitted two (2) STOA applications for self-use of wind energy generated from its wind energy units at Chakala and Sinnar.
4. MSEDCL rejected the STOA applications of WPPL on the grounds that the term of the EPA was thirteen (13) years and that the non-payments of dues to WPPL were owing to MSEDCL's bad financial condition. They also stated that such termination of EPA would result in huge monetary losses to MSEDCL as they would have to purchase the renewable energy required for fulfilling their Renewable Power Obligation ("RPO") requirements from the market, which would cost them more than cost to be paid to



WPPL for the same.

5. The Hon'ble Commission held that the termination of EPAs by WPPL was held valid on the ground that sufficient opportunity was given to MSEDCL to cure their breach of payments and also cited various sections of the EPA relating to Term and Termination (Section 4.01), Payments (Section 12.02), Event of Default (Section 13.01), Consequences of Termination (Section 13.02), etc. Hon'ble Commission also quoted Section 39 of the Indian Contract Act, 1872 which provides as below-

“When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.”

Accordingly the Hon'ble Commission directed MSEDCL to clear its dues which includes the principal amount as well as the interest as the premature termination did not discharge MSEDCL from its obligation to make payments that are due.

6. The Hon'ble Commission also held that the only ground cited by MSEDCL for rejection of WPPL's STOA applications, namely that premature termination of the EPAs by WPPL was not permissible, is untenable and the Hon'ble Commission directed MSEDCL to adjust the units injected by WPPL into the grid from May, 2016 onwards in the respective billing cycles of consumption subject to payment of the applicable fees and charges, and to provide Open Access to WPPL upon application henceforth if it otherwise satisfies the requirements of the relevant Regulations.

WPPL was represented by Eternity legal at the Hon'ble Commission in Case No.83 of 2016. In similar matter viz; Case no. 122 of 2016 of Jsons Foundry Private Limited Hon'ble Commission allowed termination of EPA on grounds of non-payment.

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Warm Regards,

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