



Tax Flash News



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Ministry of Finance amends Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (NDI Rules)

Background



The Ministry of Finance (Department of Economic Affairs) has issued the Foreign Exchange Management (Non-debt Instruments) (Fourth Amendment) Rules, 2024 (Amended Rules) dated 16 August 2024 to amend the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (NDI Rules). This amendment is in line with the announcement made in the Union Budget 2024-25, to simplify rules and regulations for Foreign Direct Investment (FDI) and Overseas Investment (OI). Key highlights of the Amended Rules are set out below –

Key highlights



(a) Cross border share swap between resident and non-resident.

The Amended Rules now permits swap of equity instruments of an Indian Company and / or equity capital of a foreign entity against transaction involving transfer of equity instruments of an Indian Company between person resident in India and a person resident outside India. The cross border swap is required to be in compliance with the rules and regulations prescribed by the

¹ Ministry of Finance, S.O. 3492(E) Notification dated 16 August 2024

Key highlights



Central Government and the Reserve Bank of India (RBI). Swaps are also permitted in cases where government approval is applicable provided such prior government approval is obtained..

(b) Government approval

Under NDI Rules government approval was required to be obtained for transfer of equity instruments of an Indian company from a Non-Resident to another Non-Resident, if the Indian company was engaged in a sector requiring government approval. The Amended Rules now prescribe that 'prior government approval shall be required to be obtained for transfer of equity instruments of an Indian company from Non-Resident to another Non-Resident in all cases, wherever government approval is applicable.

(c) Downstream investments by Overseas Citizen of India(OCI) owned entities

The NDI Rules provided that in case of investment by a non-resident Indian (NRI)- owned entities on a non-repatriable basis, will not be considered for calculation of indirect foreign investment.

Amended Rules have now brought OCI's at par with NRI's for identifying downstream investment. Investment made by OCI owned and controlled entities on non-repatriable basis shall not be considered for calculation of indirect foreign investment for identifying downstream investments.

(d) Foreign Direct Investment in White label ATM

100 percent FDI under automatic route is allowed in White Label ATM operations subject to fulfillment of other conditionalities. While this was already covered and provided for in the Consolidated FDI Policy 2020, it has now been notified in the Amended Rules.

(e) Approval for Foreign Portfolio Investment

The amended rules now provides that aggregate foreign portfolio investment (FPI) up to the sectoral cap will not require government approval or compliance with sectoral conditions, provided such investment does not result in transfer of ownership or control of resident Indian company from resident Indian citizen to non-residents.

Key highlights



(f) Other amendments - definitions

The meaning of the term 'control' in NDI Rules has been substituted vide a new definition. For an Indian Company, control is now defined to have the meaning assigned to it under the Companies Act, 2013. For a Limited Liability Partnership, control to mean the right to appoint majority of the designated partners who (with specific exclusion to others) have control over the policies of the LLP.

The definition of 'startup company' for Private Limited Company under the Companies Act 2013 linked to those identified as 'startup' under the updated Government of India's notification G.S.R. 127 (E) dated February 19, 2019, issued by the Department for Promotion of Industry and Internal Trade (as amended from time to time).

Our comments



The amendments to NDI Rules intend to facilitate the global expansion of Indian companies through mergers, acquisitions, and other strategic initiative, ensure consistency with other acts and create foreign investor friendly climate.



KPMG in India addresses:

Ahmedabad

Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate Road, Prahlad Nagar, Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Hyderabad

Salarpuria Knowledge City, 6th Floor, Unit 3, Phase III, Sy No. 83/1, Plot No 2, Serilingampally Mandal, Ranga Reddy District, Hyderabad – 500 081.
Tel: +91 40 6111 6000

Noida

Unit No. 501, 5th Floor, Advant Navis Business Park, Tower-A, Plot# 7, Sector 142, Expressway Noida, Gautam Budh Nagar, Noida – 201 305.
Tel: +91 0120 386 8000

Bengaluru

Embassy Golf Links Business Park, Pebble Beach, 'B' Block, 1st & 2nd Floor, Off Intermediate Ring Road, Bengaluru – 560071 Tel: +91 80 6833 5000

Jaipur

Regus Radiant Centre Pvt Ltd., Level 6, Jaipur Centre Mall, B2 By pass Tonk Road, Jaipur – 302 018.
Tel: +91 141 - 7103224

Pune

9th floor, Business Plaza, Westin Hotel Campus, 36/3-B, Koregaon Park Annex, Mundhwa Road, Ghorpadi, Pune – 411 001.
Tel: +91 20 6747 7000

Chandigarh

SCO 22-23 (1st Floor), Sector 8C, Madhya Marg, Chandigarh – 160 009.
Tel: +91 172 664 4000

Kochi

Syama Business Centre, 3rd Floor, NH By Pass Road, Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

Chennai

KRM Towers, Ground Floor, 1, 2 & 3 Floor, Harrington Road, Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Kolkata

Unit No. 604, 6th Floor, Tower – 1, Godrej Waterside, Sector – V, Salt Lake, Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai

2nd Floor, Block T2 (B Wing), Lodha Excelus, Apollo Mills Compound, N M Joshi Marg, Mahalaxmi, Mumbai- 400011 Tel: +91 22 3989 6000

Vadodara

Ocean Building, 303, 3rd Floor, Beside Center Square Mall, Opp. Vadodara Central Mall, Dr. Vikram Sarabhai Marg, Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada

Door No. 54-15-18E, Sai Odyssey, Gurunanak Nagar Road, NH 5, Opp. Executive Club, Vijayawada, Krishna District, Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000

Gurugram

Building No.10, 8th Floor, DLF Cyber City, Phase II, Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

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KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011 Phone: +91 22 3989 6000, Fax: +91 22 3983 6000

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