

FDI IN TRADING

CA CHINTAN JITENDRA SHAH

Trading covers what??

FEMA Notification No. 20(R) deals with Foreign Direct Investment in India and Sectors permitting FDI. As per the said Notification, Trading covers,

- Cash & Carry Wholesale Trading
- E-Commerce
- Single Brand Retail Trading (SBRT)
- Multi Brand Retail Trading (MBRT)
- Duty Free Shops

FDI in Trading

- Is Trading a Sector?
- Sectoral cap for the following sectors/ activities is the limit indicated against each sector. The total foreign investment shall not exceed the sectoral/ statutory cap.

I. CASH & CARRY WHOLESALE TRADING

A. Definition

B. Sectoral Limit

C. Conditions

D. Existing Companies & following case studies

A. Definition:

Cash & Carry Wholesale trading/Wholesale trading means,

- Sale of goods/merchandise to retailers, industrial, commercial, institutional or other professional business users or to other wholesalers and related subordinated service providers.
- Wholesale trading shall, accordingly, imply sales for the purpose of trade, business and profession, as opposed to sales for the purpose of personal consumption.
- The yardstick to determine whether the sale is wholesale or not would be the type of customers to whom the sale is made and not the size and volume of sales.
- Wholesale trading shall include resale, processing and thereafter sale, bulk imports with ex-port/ex-bonded warehouse business sales and B2B e-Commerce.

B. Sectoral Limit.

Sector/Activity	% of Equity/ FDI Cap	Entry Route
Cash & Carry Wholesale Trading/Wholesale Trading (including sourcing from MSEs)	100%	Automatic

C. Conditions/Guidelines.

- For undertaking Wholesale Trading, License/registration/permit under relevant Act/Regulation/rules/order of State Government/Government Body/Government Authority/Local Self-Government Body under that State Government should be obtained.
- In case of sales to Government, sales made by the wholesaler would be considered as 'cash & carry wholesale trading/wholesale trading' with valid business customers, only when WT are made to the following entities:

Other conditions – Fulfill anyone of the below conditions

Entities holding sales tax/ VAT registration/service tax/excise duty registration

Entities holding trade licenses i.e. a license/registration certificate/membership certificate/registration under Shops and Establishment Act, issued by a Government Authority/Government Body/Local Self-Government Authority, reflecting that the entity/person holding the license/registration certificate/ membership certificate, as the case may be, is itself/himself/herself engaged in a business involving commercial activity

Entities holding permits/license etc. for undertaking retail trade (like tehbazari and similar license for hawkers) from Government Authorities/Local Self Government Bodies

Institutions having certificate of incorporation or registration as a society or registration as public trust for their self consumption.

Other conditions

- Full records indicating all the details of such sales like name of entity, kind of entity, registration/license/permit etc. number, amount of sale etc. should be maintained on a day to day basis.
- WT to group companies taken together should not exceed 25% of the total turnover of the wholesale venture
- WT can be undertaken as per normal business practice, including extending credit facilities subject to applicable regulations.
- Single Brand Retail trading permitted subject to maintain separate books of accounts for these two arms of the business and duly audited by the statutory auditors. Conditions of the FDI policy for wholesale/cash and carry business and for retail business have to be separately complied with by the respective business arms.

II. E-COMMERCE

A. Definition

B. Models of E-commerce

C. Conditions

D. Existing Companies & following case studies

A. Definition

1. E-COMMERCE :

E-commerce means,

- buying and selling of goods and services
- including digital products over digital & electronic network.

2 : E-COMMERCE ENTITY:

E-commerce entity means,

- a company incorporated under the Companies Act 1956 or the Companies Act 2013
or
- a foreign company covered under section 2 (42) of the Companies Act, 2013 or
- an office, branch or agency in India as provided in section 2 (v) (iii) of FEMA 1999,
owned or controlled by a person resident outside India and
- conducting the e-commerce business.

3. DIGITAL & ELECTRONIC NETWORK

Digitally & electronic network will include,

Network of computers

Television channels and

Any other internet application used in automated manner such as web pages, extranet, mobiles etc.

B. Models of E-commerce.

Particulars	Inventory based model of E-commerce	Market place model of E-commerce	B2B E-commerce activities
Definitions	Inventory based model of e-commerce' means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly	Market place model of e-commerce' means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.	B2B E-commerce activities has no specific definition but it includes companies would engage only in Business to Business (B2B) e-commerce and not in retail trading, inter alia implying that existing restrictions on FDI in domestic trading would be applicable to e-commerce as well.
FDI Limit	Approval Route	100 % Automatic Route	100% Automatic Route.

II. OTHER CONDITIONS:

- Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on basis of B2B basis.
- In marketplace model, payment for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
- E-commerce marketplace may provide support services to sellers in respect of,
 - Warehousing
 - Logistics
 - Order fulfillment
 - Call centre
 - Payment collection and
 - Other services

- E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold.
 - Explanation: Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies which will render the business into inventory based model.
- An entity having equity participation by e-commerce marketplace entity or its group companies or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity.
- Goods/ services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.
- Any warranty/ guarantee of goods and services sold will be the responsibility of the seller.

- Guidelines on cash and carry wholesale trading as given in Sl No. 15.1.2 above shall apply to B2B e-commerce activities.(refer to slide no 7&8)
- No e-commerce marketplace entity shall mandate any seller to sell any of their product exclusively on its platform.
- All existing investments shall have to be in compliance with the above conditions from the date of issue of this Notification.
- E commerce entities providing marketplace will not, directly or indirectly, influence the sale price of any goods or services and shall maintain level playing field. Services should be provided by e-commerce marketplace entity or other entities in which e-commerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and non discriminatory manner.
 - Explanation: Such services will include but not limited to fulfillment, logistics, warehousing, advertisement/marketing, payments, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For the purposes of this clause, provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.

NOTE:

Sale of services through e-commerce shall be under automatic route subject to the sector specific conditions, applicable laws/ regulations, security and other conditionalities.

III: SINGLE BRAND PRODUCT RETAIL TRADING

A. Objectives

B. Sectoral Limit

C. Conditions

D. Existing Companies & following case studies

A. Objectives

- Foreign investment in Single Brand Product Retail Trading (SBRT) is aimed at
 - attracting investments in production and marketing,
 - improving the availability of such goods for the consumer,
 - encouraging increased sourcing of goods from India and
 - enhancing competitiveness of Indian enterprises through access to global designs, technologies and management practices.

B. Sectoral Limit.

Sector/Activity	% of Equity/ FDI Cap	Entry Route
Single Brand Product Retail Trading	100%	Automatic

C. Conditions/Guidelines:

1. Products to be sold should be of a 'Single Brand' only.
2. Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India.
3. 'Single Brand' product-retail trading would cover only products which are branded during manufacturing.
4. Subject to the conditions mentioned in this Para, a single brand retail trading entity operating through brick and mortar stores, is permitted to undertake retail trading through e-commerce.

5. A person resident outside India, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, either directly by the brand owner or through a legally tenable agreement executed between the Indian entity undertaking single brand retail trading and the brand owner.

6. In respect of proposals involving foreign investment beyond 51 percent,

- sourcing of 30 percent of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors.
- The quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company will be required to maintain.
- The procurement requirement is to be met in the first instance as an average of five years total value of goods purchased beginning 1st April of the year of the commencement of the business.
- Thereafter it shall be met on an annual basis.
- For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of foreign investment for the purpose of carrying out single brand product retail trading.

7. Single brand retail trading entity shall be permitted to set off its incremental sourcing of goods from India for global operations during initial 5 years, beginning 1st April of the year of the opening of first store, against the mandatory sourcing requirement of 30% of purchases from India.

For this purpose, incremental sourcing shall mean the increase in terms of value of such global sourcing from India for that single brand (in INR terms) in a particular financial year from India over the preceding financial year, by the non-resident entities undertaking single brand retail trading, either directly or through their group companies.

After completion of this 5 years period, the SBRT entity shall be required to meet the 30% sourcing norms directly towards its India's operation, on an annual basis.

NOTES:

- Conditions mentioned at 2 and 5 above shall not be applicable for undertaking SBRT of Indian brands.
- Indian brands should be owned and controlled by resident Indian citizens and/ or companies which are owned and controlled by resident Indian citizens.
- Sourcing norms will not be applicable up to three years from commencement of the business i.e. opening of the first store for entities undertaking single brand retail trading of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible.
- Thereafter, condition mentioned at 6 above will be applicable. A Committee under the Chairmanship of Secretary, DIPP, with representatives from NITI Aayog, concerned Administrative Ministry and independent technical expert(s) on the subject will examine the claim of applicants on the issue of the products being in the nature of 'state-of-art' and 'cutting-edge' technology where local sourcing is not possible and give recommendations for such relaxation.

Clarification on FDI Policy on Single Brand Retail Trading

Issue	Clarification/ Comment
<ul style="list-style-type: none">• Can the brand owner or non-resident entity/entities undertake single brand retail trading of the specific brand through more than one company in India?	<p>A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, directly or through a legally tenable agreement with the brand owner for undertaking single brand product retail trading. Such non-resident entity or entities can undertake single brand retail trading business through one or more wholly owned subsidiaries or joint ventures.</p>
<ul style="list-style-type: none">• Does the FDI policy on single brand retail trading apply to Indian brands seeking foreign investment?	<p>It is clarified that FDI policy on single brand retail trading as contained in para 6.2.16.3 of Consolidated FDI Policy Circular of 2015 equally applies to Indian brands.</p>

IV: MULTI BRAND RETAIL TRADING

A. Sectoral Limit

B. Conditions

C. Existing Companies & following case studies

A. Sectoral Limit.

Sector/Activity	% of Equity/ FDI Cap	Entry Route
Multi Brand Retail Trading	51%	Government

B. Conditions/Guidelines:

1. Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery and meat products, can be unbranded.

2. Minimum amount to be brought in as foreign investment would be USD 100 million.

3. At least 50 percent of the total foreign investment brought in the first tranche of USD 100 million, shall be invested in 'back-end infrastructure' within three years, where 'back-end infrastructure' will include
 - capital expenditure on all activities, excluding that on front-end units;
 - back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, warehouse, agriculture market produce infrastructure etc.
 - Expenditure on land cost and rentals, if any, will not be counted for purposes of back-end infrastructure.

Subsequent investment in the back-end infrastructure would be made by the MBRT retailer as needed, depending upon its business requirements.

4. At least 30 percent of the value of procurement of manufactured/ processed products purchased shall be sourced from Indian micro, small and medium industries, which have a total investment in plant & machinery not exceeding USD 2 million.

Note: This valuation refers to the value at the time of installation, without providing for depreciation.

The 'small industry' status would be reckoned only at the time of first engagement with the retailer and such industry shall continue to qualify as a 'small industry' for this purpose, even if it outgrows the said investment of USD 2 million during the course of its relationship with the said retailer.

Sourcing from agricultural co-operatives and farmers co-operatives would also be considered in this category.

The procurement requirement would have to be met, in the first instance, as an average of five years total value of the manufactured/ processed products purchased, beginning 1st April of the year during which the first tranche of foreign investment is received. Thereafter, it would have to be met on an annual basis.

5. Self-certification is required by the company, to ensure compliance of the conditions at serial nos. 2, 3 and 4 above, which could be cross-checked, as and when required. Accordingly, the investors shall maintain accounts, duly certified by statutory auditors.

6. Government will have the first right to procure agricultural products.

7. Retail sales outlets may be set up only in cities with a population of more than 10 lakh as per the 2011 Census or any other cities as per the decision of the respective State Governments, and may also cover an area of 10 kms. Around the municipal/ urban agglomeration limits of such cities; retail locations will be restricted to conforming areas as per the Master/ Zonal Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking.

8. Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with foreign investment engaged in multi-brand retail trading.

9. The above policy is an enabling policy only and the State Governments/ Union Territories would be free to take their own decisions in regard to implementation of the policy. Therefore, retail sales outlets may be set up in those States/ Union Territories which have agreed, or agree in future, to allow foreign investment in MBRT under this policy.

10. States/ Union Territories who have agreed to allow foreign investment in MBRT are Andhra Pradesh, Assam, Delhi, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Maharashtra, Manipur, Rajasthan, Uttarakhand, Daman & Diu and Dadra and Nagar Haveli (Union Territories)

11. Such agreement, in future, to permit establishment of retail outlets under this policy, would be conveyed to the Government of India through the Department of Industrial Policy and Promotion and additions would be made to the said list.

12. The establishment of the retail sales outlets will be in compliance of applicable State/ Union Territory laws/ regulations, such as the Shops and Establishments Act etc.

13. Applications would be processed in the Department of Industrial Policy and Promotion, to determine whether the proposed investment satisfies the notified guidelines, before being considered for Government approval.

V: DUTY FREE SHOP

- Duty Free Shops would mean shops set up in,
 - custom bonded area at International Airports
 - International Seaports and
 - Land Custom Stations where there is transit of international passengers.
- Foreign investment in Duty Free Shops is subject to compliance of conditions stipulated under the Customs Act, 1962 and other laws, rules and regulations.
- Duty Free Shop entity shall not engage into any retail trading activity in the Domestic Tariff Area of the country.

Thank You