

Overseas Direct Investment

2018 MHA Legal



Limit & conditions

- 400% of the Net worth as per latest audited balance sheet permitted under automatic route. Net worth means paid up capital + free reserve
- Any financial commitment exceeding USD 1 billion in a financial year require prior approval of RBI even when the total financial commitment is within 400%.
- 400% financial commitment condition not applicable to investments made out of EEFC account or proceeds of ADR/GDR.
- Total financial commitment to include:
 - Remittance of foreign exchange including investment in shares/ loan including CCPS/ other preference shares
 - Capitalization of the export proceeds
 - 100% of the guarantees / bank guarantees issued in favor of or on behalf of JV /WOS
 - 50% of the performance guarantee.
- Investment (or financial commitment) in a foreign entity engaged in real estate meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs) is prohibited.

Valuation of shares

Form Certificate needs to be accompanied by a valuation certificate In case of partial / full acquisition of an existing foreign company,

- where the investment is more than USD 5 million, valuation of the shares of the company shall be made 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; and,
- in all other cases by a Chartered Accountant or a Certified Public Accountant.

Method of Funding

Form Certificate needs to be accompanied by a valuation certificate In case of partial / full acquisition of an existing foreign company,

- Drawal of foreign exchange from an AD bank in India;
- Capitalization of exports;
- Swap of shares;
- Proceeds of External Commercial Borrowings (ECBs) / Foreign Currency Convertible Bonds (FCCBs);
- 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 thereunder from time to time by the Government of India;
- Balances held in EEFC account of the Indian Party and
- Proceeds of foreign currency funds raised through ADR / GDR issues.

Transfer of shares

Automatic route available to the Indian entities to transfer its shareholding complying with the following conditions:

- the sale does not result in any write off of the investment made;
- 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;

Transfer of shares

- the Indian party is not under investigation by CBI/DoE/SEBI/IRDA or any other regulatory authority in India.

An Indian Party may disinvest, if the amount to be repatriated on disinvestment is less than the amount of the original investment in the following cases

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

Write off of capital and receivables

Indian companies having at least 51 % stake in an overseas JV, may write off capital (equity / preference shares) or other receivables, such as, loans, royalty, technical knowhow fees and management fees in respect of the JV /WOS can undertake write off of capital / receivables :

- Listed Indian companies - 25 % of the equity investment in the JV /WOS under automatic route
- Unlisted companies - 25 % of the equity investment in the JV /WOS under the Approval Route.

The write-off / restructuring needs to be reported to the Reserve Bank through the designated AD Category-I bank within 30 days of write-off/ restructuring.

Pledge of Shares

Indian Companies can pledge the share of JV/ WOS or Step Down Subsidiary (SDS) outside India as a security in favor of

- AD Bank /Public financial institution in India
- an overseas lender,

for availing of fund based or non-fund based facility for

- Itself (i.e. the Indian party) or
- its JV / WOS / SDS whose shares have been pledged, or
- for any other JV / WOS / SDS of the Indian party

Creation of charge on assets

Indian Companies can create charge on the assets (by way of mortgage, pledge, hypothecation or otherwise) on its assets [including the assets of its group company, sister concern or associate company in India, promoter and / or director] :

- In favour of the overseas lender on its assets [including the assets of its group company, sister concern or associate company in India, promoter and / or director] for availing of the fund based and/or non-fund based facility for its JV / WOS / SDS
- In favour of AD Bank in India on the assets of its overseas JV/ WOS/ SDS as security for availing of the fund based and/or non-fund based facility for itself or its JV or WOS or SDS outside India

Issue of Corporate Guarantee

- Indian Companies are permitted to give corporate guarantees on behalf of their
 - first level step down operating JV /WOS
 - set up by their JV / WOS operating as a Special Purpose Vehicle (SPV)under the Automatic Route subject to compliance with the 400% net worth limit

- Issuance of corporate guarantee on behalf of second generation or subsequent level step down operating subsidiaries require prior approval of RBI provided Indian Party indirectly holds 51 % or more stake in the overseas subsidiary for which such guarantee is intended to be issued

Capitalization of dues

- Payments due from the foreign entity towards exports, fees, royalties or any other dues from the foreign entity for supply of technical know-how, consultancy, managerial and other services can be capitalized under the automatic route.
- Capitalization of export proceeds remaining unrealized beyond the prescribed period of realization will require prior approval of the Reserve Bank.
- Indian software exporters are permitted to receive 25 per cent of the value of their exports to an overseas software start-up company in the form of shares without entering into Joint Venture Agreements, with prior approval of RBI.

Investment in Financial Services Sector

- Investment (or financial commitment) in an entity outside India engaged in the financial sector must in compliance with the following conditions:
 - Indian entity should be registered with the regulatory authority in India for conducting the financial sector activities;
 - Indian entity should have earned net profit during the preceding three financial years from the financial services activities;
 - Indian entity has obtained approval from the regulatory authorities concerned both in India and abroad for venturing into such financial sector activity; and
 - Indian entity has fulfilled the prudential norms relating to capital adequacy as prescribed by the concerned regulatory authority in India.
- Any additional investment (or financial commitment) through an SPV or by an existing JV/WOS or its step down subsidiary in the financial services sector is also required to comply with the above conditions.

Hedging

- Resident entities having overseas direct investments are permitted to hedge the foreign exchange rate risk arising out of such investments.
- AD Banks may enter into forward option contracts with resident entities who wish to hedge their overseas direct investments.
- If a hedge becomes naked in part or full owing to shrinking of the market value of the overseas direct investment, the hedge may continue to the original maturity.
- Rollovers on the due date are permitted up to the extent of market value as on that date.

Opening of Foreign Currency Account

Indian entities are permitted to open, hold and maintain Foreign Currency Account abroad for the purpose of ODI subject to the following terms and conditions:

- The host country regulations stipulate that the investments into the country are required to be routed through a designated account.
- FCA shall be opened, held and maintained as per the regulation of the host country.
- The remittances sent to the FCA by the Indian party should be utilized only for making overseas direct investment into the JV / WOS abroad.
- Any amount received in the account by way of dividend and / or other entitlements from the subsidiary shall be repatriated to India within 30 days from the date of credit.

Opening of Foreign Currency Account

- The Indian Party should submit the details of debits and credits in the FCA on yearly basis to the designated AD bank with a certificate from the Statutory Auditors of the Indian party certifying that the FCA was maintained as per the host country laws and the extant FEMA regulations / provisions as applicable.
- The FCA so opened shall be closed immediately or within 30 days from the date of disinvestment from JV / WOS or cessation thereof.

Other means of Investment

Mode	Automatic route
Gift / inheritance from Non Resident	√
ESOP without cash	√
ESOP with Cash	√ as per LRS
Qualification shares for becoming a director	√ as per LRS
Part / full consideration of professional services rendered to the foreign company or in lieu of Director's remuneration	√ as per LRS
Rights / Bonus shares	√

Obligation of the Indian Investor

- Intimate RBI, within 30 days of any post investment changes / setting up of downstream company / change in shareholding pattern.
- Receive share certificates with 6 months from the date of remittance.
- Repatriate to India all dues receivable from foreign entity like, dividend, royalty, technical fee etc. within 60 days of its falling due.
- Sale proceeds on account of transfer of shares of the overseas JV / WOS needs to be repatriated to India within 90 days.
- File APR with RBI every year, within in all other cases by a Chartered Accountant or a Certified Public Accountant. APR to be based on audited Accounts. In case accounts of foreign JV / subsidiary are not audited Indian Company need to adopt and ratify the unaudited account and the statutory auditor of the Indian company needs to certify the same.
- File Annual Return on Foreign Liabilities and Assets (FLA) by July 31 of every year with RBI.

Investment by Resident Individuals

- Only upto LRS (EEFC/ RFC account included in LRS).
- Real estate business, banking business or financial services sectors are prohibited
- The JV/WOS has to be operating entity only and no step down subsidiary is permitted to be acquired / setup by the JV /WOS.
- Valuation guidelines at par with Indian Companies
- Disinvest (partially/ fully) only by way of transfer / sale / liquidation / merger of JV/WOS permitted, post completion of one year from the date of first remittance.
- Disinvestment proceeds needs to be repatriated within 60 days
- Form ODI needs to be filed with the AD bank

A photograph of a desk setup. On the left, a small potted plant with green, feathery foliage sits in a dark glass jar. A modern, white, conical desk lamp is positioned above the plant, casting a warm glow. In the background, a laptop is open on the desk, and another lamp is visible. The overall scene is a clean, professional workspace.

Thank you

In the event you need any further information or clarification. Please feel free to contact:

Mr. Manish K Tyagi
Partner- MHA Legal
manish@mhalegal.in

About MHA Legal

MHA Legal is a full service firm composed of highly skilled professionals offering expertise in a wide range of transactions and business consulting services. With skilled and experienced members in nearly each and every field of law and taxation, MHA provide outstanding legal solutions in the chosen practice areas with a strong emphasis on ethics and excellence.

Clients benefit from the expertise and experience of the team members holding experience of the large consultancy firm while enjoying the privilege of personal attention and responsiveness of a small firm.

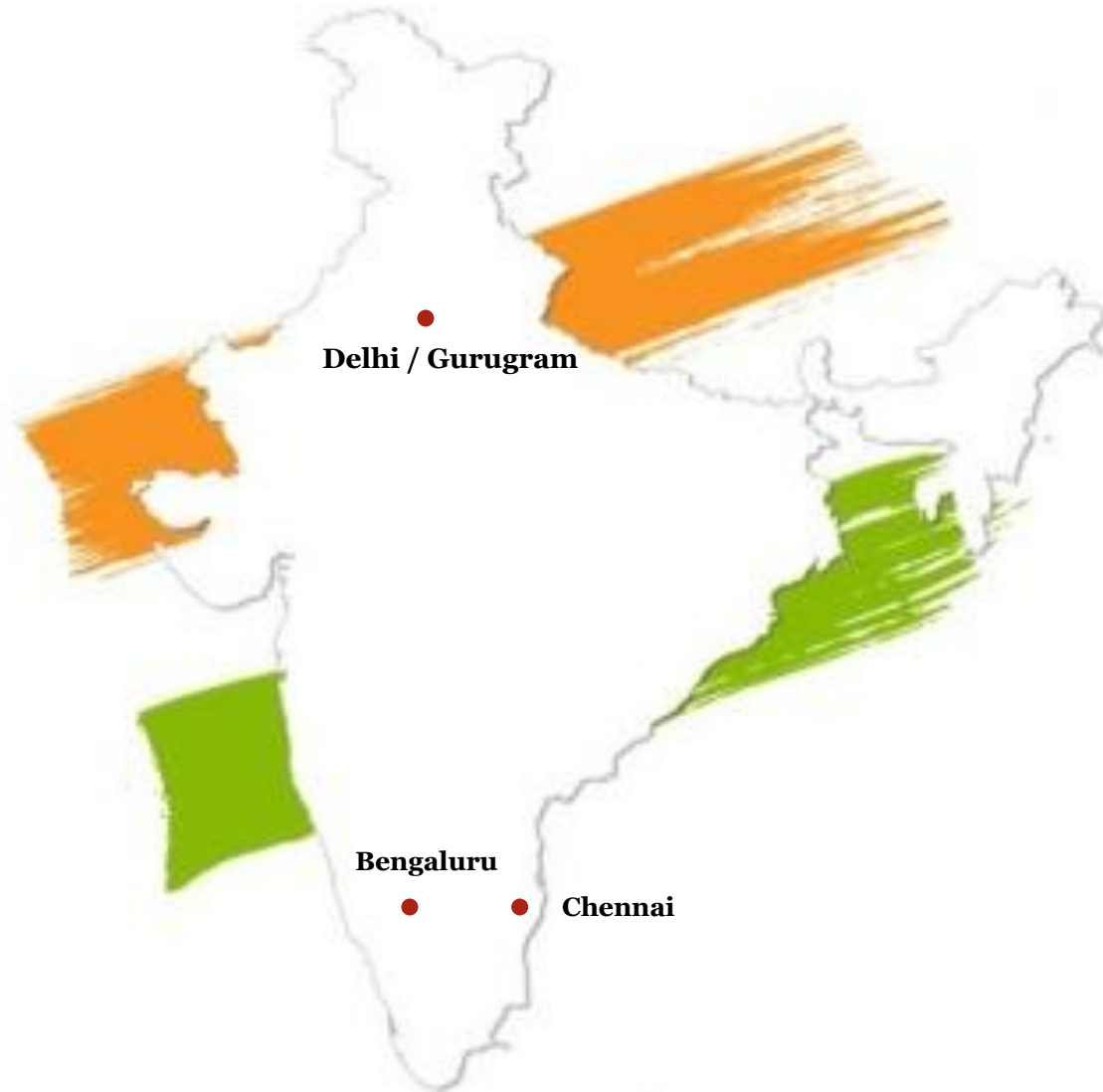
Team members hold specializing in the areas of corporate and commercial laws, Foreign Direct Investment Policy of Government of India, Foreign Exchange Regulations, mergers and acquisitions, Taxation, real estate projects, foreign trade, international transactions, trademarks and patents, and environmental law.

MHA Legal has its offices in New Delhi, Gurugram, Bengaluru, Chennai and a network of correspondents covering all Indian States.

How We Can help you

- Providing assistance in structuring of overseas investment to achieve business objective in compliance with tax and regulatory requirements.
- Drafting / Vetting Joint Venture Agreement, if required.
- Preparation and filing of documents with the AD bank / RBI for obtaining UIN for Overseas Investment
- Preparation and filing of APR.

Office Locations



Thank you



**Mind, Heart, Aspiration =
Passion, Integrity, Excellence**

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