Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

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Destination India: Welcome Retail

Legal, Tax & Regulatory Primer with Industry insight

September 2018

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1. Introduction

I. The Indian Retail Story

The Indian retail sector has experienced incredible growth over the last decade with a significant shift towards organised retailing format. Despite socio-political challenges and stringent conditionalities on foreign direct investment (**"FDI"**) in retail trading, the Indian retail sector has grown too large to ignore.

India's strong growth fundamentals, increased urbanization, increased digital connectivity and greater acceptance to online retail medium provides immense scope for retail expansion for both domestic and foreign players.

India's retail market contributes to over 10 percent of the country's Gross Domestic Product (GDP) and around 8 percent of the employment. The share of the Indian retail market is expected to increase by 60 percent to reach USD 1.1 trillion by the year 2020.[1]

Both organized and unorganized retail segments co-exist in India and continue to contribute to growth of the retail sector as a whole.

Currently, the organized retail market contributes to 93 percent of the total sector while the unorganized retail market contributes to the rest.[2] This was not the same few years ago when substantial business came from unorganized retail sector such as traditional family run and corner stores. The impressive growth of the organized sector is also largely due to penetration of many large retail companies and introduction of Goods and Service Tax in India.

A. Outlook of Indian Retail Sector

The Indian retail market is expected to become the world's third-largest consumer economy, reaching USD 400 billion in consumption by the year 2025. Further, India is ranked first in the Global Retail Development Index 2017, backed by rising middle class and rapidly growing consumer spending. India's retail market witnessed investments worth USD 800 million by private equity firms and wealth funds in 2017.[3]

II. Global Positioning of the Indian Retail Sector

Markets go through four stages of retail development (opening, peaking, maturing and closing) as they evolve from emerging to mature markets, a process that typically spans five to 10 years.

The window opens when the population becomes wealthier, when logistics start improving, when ownership regulations become friendlier to international firms and when country's various economic, political and social risks settle down to acceptable levels.

Given the current circumstances in India one can say that there exists immense window of opportunity for retail development in India.

India holds a substantial advantage over other emerging retail destinations owing to its strong domestic consumption and low rate of market penetration by overseas retailers.

Accordingly, India remains an attractive destination for investment.

III. Factors Considered by Various Stakeholders

There is a paradigm shift in global investors' destination choices: from 'efficiency seeking' to 'market seeking.' Also, there is a shift from sectors which are heavily regulated to more varied industries including healthcare, retail, education etc.

1. https://www.ibef.org/industry/retail-india.aspx. Last accessed: June 13, 2018.
2. *Ibid*
3. *Ibid*

Particularly in the retail sector, international retailers are now focusing on portfolio of countries – with different levels of risk, at different stages of maturity and with distinct consumer profiles to balance short term and long-term opportunities.

Global players have become more strategic in their expansion and in avoiding the operational pitfalls of entries into developing markets. Accordingly, international players are choosing ownership models such as franchisee or joint venture to tap developing markets.

Governments across the globe have begun to take cognizance of the corresponding benefits in development, export boost and supply chain improvements that foreign direct investment (FDI) in retail can yield.

FDI in retail has been a key driver of productivity growth in many economies, resulting in lower prices and higher consumption.

Large-scale foreign retailers also lead the path of improvements in the productivity chain, for wholesalers and food processors.

Governments across the globe have begun to take cognizance of the corresponding benefits in development, export boost and supply chain improvements that FDI in retail can yield.

More specifically in India's context, opening up the retail sector for FDI has been placed in the context of moderating inflation. The idea is that organized storage and transport chains will help cut nearly 40 percent transport and distribution losses in the present supply chains, one of the factors pushing up food prices to high and unsustainable levels.

In addition, due to availability of cheap raw material and work force, global retailers would also utilize Indian goods for their international outlets leading to an increase in Indian exports and improving the balance of payment position.

Thus, it can be said that attractive Government policy on FDI in retail sector could change the face of retail in India.

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2. Industry Analysis

I. The Concept of Retail

A perfect business model for retail in India is still at the evolutionary stage. AT Kearney terms retail expansion as a portfolio game where an optimal mix of countries, formats and operating models is the key to success.

In this section, we analyze certain formats and models alongside thriving segments. However, the traditional unorganised formats like 'mom and pop' shops, hawkers, grocers etc., continue to co-exist with the modern formats of retailing.

Taking a step back, the very definition of 'retail'/ 'retailer' has changed. In 2004, the High Court of Delhi defined the term 'retail' as a sale for final consumption in contrast to a sale for further sale or processing (i.e. wholesale).[4]

However, the traditional definition of a retail shop referred to business premises where goods are sold to the public, or services are provided to the public, or to which the public is invited to negotiate for the supply of services. Due to the emergence of e-commerce and m-commerce the physical/territorial component of the definition no longer holds true.

Such retailers manage to surpass the barrier of direct personal contact and reach out to the public via alternative media. While customers place orders online, the delivery takes place elsewhere, most likely at their doorsteps. Interestingly, judicial decisions on 'retail' always provided scope for such broad construction, indicating that delivery and sale need not be simultaneous or occurring at the same place.

Retail expansion is a portfolio game where an optimal mix of countries, formats and operating models is the key to success.

The emphasis on the business-to-consumer format remains, which must be differentiated from the business-to-business dealings, i.e. wholesale.

Further, it is important to distinguish between the terms 'retailing' and 'retail trading' which are often used interchangeably. Retail trading is a subset of retailing (which is a far broader term), and foresees the buying and selling of goods to retail consumers. The FDI Policy contains conditions on foreign investment in retail trading and not retailing. Entities selling goods to retail consumers by undertaking manufacturing / contract manufacturing or under franchise and license agreements are said to be engaged in retailing and not retail trading. Examples of entities engaged in retailing in India include Hindustan Unilever Limited & McDonald's.

II. Formats

In modern retail, a key strategic choice is the format; retailers are coming up with various innovative formats to provide an edge to their products and services. Retailers experiment with a variety of formats, from discount stores to supermarkets to hypermarkets to specialty chains etc.

The table below explains some popular formats used in the retail sector:

4. *Association of Traders of Maharashtra v. Union of India*, 2005 (79) DRJ 426.

Popular formats	Meaning
Big box stores	Large stand-alone store with varying market niches.
Category killer	A large retail chain store that is dominant in its product category. The store generally offers an extensive selection of merchandise at prices so low that smaller stores cannot compete.
Chain store	One of a number of retail stores under the same ownership and dealing in the same merchandise.
Co-operative	Any organization that is owned and operated by all of its members for their mutual benefit.
Hardline	A departmental store or product line primarily consisting of merchandise such as hardware, housewares, automotive, electronics, sports goods, health and beauty aids or toys.
Softline	A departmental store or product line primarily consisting of merchandise such as clothing, footwear, linens and towels.
Online retailers	A retailer selling its products via online platforms, (i) either owned and / or operated itself or (ii) that are marketplace platforms provided by third parties.

A. Formats popular in India

i. Hypermarkets, supermarkets and malls

Hypermarts/supermarkets are large self-servicing outlets offering products from a variety of categories. In 2001, Pantaloon Retail launched country's first hypermarket: *'Big Bazaar'*. Hypermarkets turn out to be the most recommended format for Indian retail sector, according to various reports. In fact, Pantaloon Retail is the leader in the hypermarket industry, with 259 Big Bazaar stores and online franchisees. Aditya Birla Retail – More Supermarkets are leading in the supermarket segment with 523 stores in India. Supermarkets are said to have totaled 8500 in 2016 from merely 500 in 2006.[5] Malls are the biggest form of organized retail in India, which offers customers a mix of all types of products and services including entertainment (cinema and gaming) and food under one single roof.

ii. Department Store

A department store is a retail store offering a wide range of consumer goods which allows customers to choose between multiple merchandise lines, at variable price points.

India has number of departmental stores popular ones being Shoppers Stop, Lifestyle, Westlife, which sell a variety of products, including clothing, furniture, home appliances, toys, cosmetics etc. The retail space demand is expected to increase at the rate of 81 percent to 7.8 million square feet in 2018.[6]

Interestingly, in many such department stores we also see a store-within-a-store. A store-within-a-store is a popular American retail format under which a retailer enters into an agreement to rent a part of the retail space to be used by a different company to run another, independent store. Popular examples of this in India are Vijay Sales, Crosswords.

5. https://www.ibef.org/download/Retail-June-20181.pdf. Last accessed: June 15, 2018

6. https://www.ibef.org/download/Retail-June-20181.pdf. Last accessed: June 15, 2018.

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iii. Specialty stores and category killers

Specialty stores are retail chains dealing in specific categories and provide a large variety. Mobile stores can be an example of specialty store.

Category killers are specialty stores that offer a variety of product categories. They are known as 'category killers' since they focus on specific categories, such as electronics and sporting goods. They are also known as Multi Brand Outlets or MBO's. Vijay Sales can be an example of category killer.

iv. Other formats

Traditionally, India has been familiar with departmental stores and discount stores. However, with increased urbanisation and use of technology, several new formats have evolved with passage of time. For example:

i. Gas stations are providing amenities in the form of convenience stores, automated teller machine (ATM), food courts and pharmacies appearing in many outlets.

ii. Vending machine, almost always identified with Japan's retail formats, is a relatively new entrant to India and usage will rise with changing consumer habits and lifestyle.

iii. Along with the modern retail formats, the non-store retailing channels are also witnessing action. Online retail is estimated to reach USD 60 billion by 2020.[7] Post demonetization in India, consumers have seemingly become more comfortable using online services.

v. E- commerce

Electronic commerce commonly known as E-commerce is a more convenient way for buying and selling of products or services through the electronic medium which is growing in popularity. This is the most preferred since it provides a 'click n buy' method. Also the e-retailers provide facilities such as e-payment, home delivery, and gift option. Many companies find e-commerce more profitable than resorting to traditional forms of advertising.

The acceptance of internet coupled with the increasing confidence of the internet users to purchase online has made India an important center for the growth and development of the e-commerce sector. In particular, e-commerce presents one of the greatest opportunities in the retail sector since it shifts from brick and mortar establishments to virtual shops which with low operating costs.

Global and local e-commerce retailers have launched websites that offer Indian consumers wide range of products such as apparel, electronics, baby products, etc. Also, recently we have seen huge FDI inflows and consolidation activity in the e-commerce space in India. Given the regulatory framework in India, most e-commerce retailers could be seen to shift to the marketplace model of business wherein the e-commerce entity merely acts as a facilitator between the buyer and seller and only provides for a platform where the consumer meets the seller. Given the recent FDI relaxations, the Indian e-commerce market could see more retailers adopting this business model.

For detail understanding of the **E-commerce in India,** *you may refer to our research paper on this subject.*

vi. M-commerce

Mobile commerce is a sub–set of E-commerce. The selling and buying of goods and services through mobile devices and smart phones is referred as M-commerce. The advantage of m-commerce is its personalization, flexibility, and distribution. It also promises exceptional business market potential, greater efficiency and higher productivity. With the initiation of mobile internet services the retail industry is also relieved as it provides easy mobile payment options. But as a security concern, there are certain banking regulations which are deterring the growth of m-commerce in India. Most of

7. https://www.ibef.org/download/Retail-June-20181.pdf. Last accessed: June 15, 2018.

the E-commerce players like Flipkart, Amazon etc. have dedicated mobile apps. With the increase in digital banking and payments penetration in India and the Unified Payments Interface[8] platform by the Indian Government, m-commerce has grown considerably.

Examples of various formats

Format	Retailer
Supermarket	Big Bazaar / More / HyperCity / Food World
Hypermarket	D-Mart /Star Bazaar/ Spencer's / Spar
E-commerce	Flipkart / Snapdeal / Amazon
Small fashion stores	Fabindia
Cash and carry	Metro / Walmart
Large Electronic Store	Croma / E-zone / Vijay Sales

III. Segment-wise activity

A. Food and grocery retail

Food and grocery retail in India exceed USD 294 billion representing 16 percent of India's GDP. By 2020, food and grocery segment is estimated to constitute 66 percent of the total revenue in the Indian retail sector.[9]

Hence, a huge opportunity lies ahead as this segment is poised for a significant growth in the years to come.

Leading brands

Indian	International
Food Bazaar, Nature's Basket, Big Basket, Reliance Fresh, Grofers	Metro /Walmart

B. Apparel and footwear retail

This sector has been aligning itself with global trends with retailing companies like Shoppers' Stop and Crossroads entering the sector. While China is ranked at the top for growth opportunities in this segment, India figures as one among the top ten.[10] India has the edge over the markets in the US, Europe and Japan, with a GDP growth rate of 7 percent.[11] Indian conglomerates like Tata and Reliance have also forayed into these segments. Further, this segment also witnessed increasing activity in terms of joint ventures. For example, the Los Angeles-based Forever 21 recently formed a joint venture

8. Unified Payments Interface (UPI) is an instant payment system developed by the National Payments Corporation of India (NPCI), an RBI regulated entity. UPI is built over the IMPS infrastructure and allows you to instantly transfer money between any two parties' bank accounts.

9. https://www.indiaretailing.com/2018/02/13/food/food-grocery/food-retailing-india-way-forward/. Last accessed: June 16, 2018.

10. *Supra* note 4.

11. https://www.indiaretailing.com/2017/10/15/fashion/indian-fashion-apparel-market-2016-beyond/. Last accessed: June 16, 2018.

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with DLF, popular Indian real estate developer. This sector has also witnessed the entry of foreign retail brands such as H&M, Massimo Dutti, etc. in recent times.

Leading brands

Indian	International
Provogue, Wills Lifestyle Reliance Footprint, Woodland	Zara, Mango, Marks & Spencer, Charles & Keith, Hush Puppies, H&M, Massimo Dutti

C. Pharma retail

Pharma retailing in India is said to have a market size of USD 467 billion.[12] In 2015, the initial public offer (IPO) of Dr Lal PathLabs, one of India's largest diagnostic chains, received bids for an overwhelming total of 27.12 crore shares.[13] A few corporates who have already forayed into this segment include Dr. Morepen (with Lifespring and Tango), Medicine Shoppe, Apollo Pharmacies, 98.4 from Global Healthline Pvt Ltd. and CRS Health.

D. Books and Music Retail

The gifting gesture in India has reached a new sensation with e-commerce portals providing a platform for consumers to purchase a wide variety of goods such as books and music CDs. However, book-music-movie retailing in India suffered significantly with the introduction of digital music, movies and books through platforms such as Kindle and iTunes.

Accordingly, many players have reduced their foot print in this segment.

Leading brands

Indian	International
Crosswords, Relay	W H Smith

E. Consumer Durables Retail

The consumer durables market can be segmented into consumer electronics comprising of television sets, audio systems, VCD players and others; and appliances like washing machines, microwave and air conditioners. There are various domestic and foreign players who have entered this segment in the last couple of years.

The home appliance and consumer electronics market is expected to grow by 10 percent on a compounded annual growth rate till 2022.[14]

12. https://www.indianretailer.com/magazine/2006/october/Pharmacy-retail-attracting-robust-returns.m5-2-5/. Last accessed: June 16, 2018.

13. http://www.business-standard.com/article/news-cm/dr-lal-pathlabs-ipo-subscribed-33-41-times-115121100234_1.html. Last accessed: August 14, 2018.

14. https://economictimes.indiatimes.com/industry/cons-products/electronics/home-appliance-and-consumer-electronics-market-likely-to-grow-by-10/articleshow/61560886.cms. Last accessed: June 16, 2018.

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Leading brands

Indian	International
Croma, e-Zone	Samsung, Sony

For the purpose of this paper, we have summarized the factors and the challenges that affect the demand and supply of the retail sector.

IV. Demand in the retail sector

India is the one of the fastest growing major consumer market in the world. In the past few years the whole concept of shopping has been altered in terms of format and consumer buying behavior. With the increasing urbanization, the Indian consumer is emerging as more trend and brand conscious. There has also been a shift from price considerations to designs and quality as there is a greater focus on looking and feeling good (apparel as well as fitness). At the same time, the Indian consumer is not beguiled by retail products which are high on price but commensurately low on value or functionality.

The Indian consumer is also witnessing some changes in its demographics with a large working population being in the age group of 24-35 years. During the past few years, there has been an increase in the number of nuclear families, an increase in working women and emerging opportunities in the service sector which has been the key growth driver of the organized retail sector in India. Consumer spending is said to increase to USD 4 trillion by 2025 with maximum spending likely to occur in food, housing, consumer durables and transport and communication sectors.[15]

India stands first among 63 countries in the global consumer confidence with a scope of 136 points for the quarter ending December 2016.[16]

15. https://www.ibef.org/industry/indian-consumer-market.aspx. Last accessed: June 16, 2018.

16. *Ibid*

In addition to the above, use of digital and social media is revolutionizing the ways people interact and communicate with each other.

V. Opportunities & Challenges

A. Workforce

The retail sector in India is the second largest employer after railways. India's retail sector will need a workforce of around 56 million and will have one of the highest incremental human resource requirements of 17.35 million till 2022.[17] Although, one challenge for an aspiring foreign retailer is to re-train the workforce according to international standards and practices that are being bought in.

B. Infrastructure & Supply Chain

Lack of adequate infrastructure with respect to roads, electricity, cold chains and ports has further led to the impediment of a pan-India network of suppliers. Long intermediation chains would increase the costs by 15 percent. The various initiatives that retailers have started to optimize regarding their entire supply chain include workforce optimization, inventory planning and revamping of technological infrastructure.[18] A study commissioned by the World Bank indicates how the weak storage chain does irreparable damage to India's exports.[19] Of late, India's warehousing and logistics sector has also attracted massive

17. https://retail.economictimes.indiatimes.com/news/industry/-indian-retail-industry-from-potential-to-performance/59141590. Last accessed: June 16, 2018.

18. Issues Monitor, July 2011.

19. Mattoo, A. D.Mishra and A. Narain, *From competition at home to competing abroad: A case study of India's horticulture, 2007.*

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investment from not only foreign retail companies but also from private equity firms. Industry reports claim that the sector received INR 14.38 billion (approx. USD 205 million) in investment through two major deals in 2015 alone. The allowance of 100 percent FDI in warehousing and food storage facilities under the automatic route, alongside tax concessions, has brought this sector under the foreign PE investment radar.[20]

C. Real Estate

Availability of real estate at the right prices and at the right location remains to be the key concern for growth of the retail sector. Further, lack of clear ownership titles and high stamp duty has resulted in a disorganized nature of transactions.

D. Managing Shrinkage

In India, shrinkage is the highest in the world, ranging around 2.38 percent of the total sales.[21] Therefore, dealing with shrinkage and shoplifters continue to trouble foreign players aspiring to enter India.

E. Regulatory Challenges

Government restrictions on FDI lead to an absence of foreign players resulting into limited exposure to best practices, an aspect that has been discussed in detail below, under "Regulatory Regime". On the tax front, even though the government is attempting to implement uniform goods and service tax across the nation, delay in its rollout and implementation thereafter is leading to increased costs and complexities in establishing an effective distribution network.

20. *'Indian Logistics – Taking Giant Leaps Forward'*, JLL Report, August 2015. http://www.jll.co.in/india/en-gb/Research/Indian_logistics_Taking_giant_leaps_forward.pdf

21. Information Memorandum, Future Retail. http://www.futureretail.in/pdf/Information_Memorandum.pdf

2. Regulatory Regime

From the very wide range of retail segments that we have taken a look at, evidently, retail sector cuts across various industries and business models. As a consequence, there is a higher possibility of regulatory overlap. While general corporate, tax, commercial laws and laws related to intellectual property, trade and employment laws remain applicable to the retail industry, as in the case of any other industry, some regulatory aspects might get triggered on account of the format or business model that the investor chooses to adopt, m-commerce, for instance.

I. Regulatory Patterns Across the Globe

As we shall see, there have been proposals for setting up a National Retail Authority, which are yet to attain any momentum in the industry space. With respect to unorganized retail, the Ministry of Housing and Urban Poverty Alleviation has formulated a National Policy for Urban Street Vendors. However, at the moment, there is no single regulatory authority that governs the organized retail sector; nor is there any umbrella legislation. Under List I of Seventh Schedule of the Constitution of India, Inter-State trade and commerce is a subject for the Parliament, the Central legislative body, to enact upon. Under List II, however, trade and commerce within a State is a State subject. A regulatory framework to govern retail sector, consequently, might need the approval of the individual States under the Constitution. However, this position might undergo substantial changes if the Government pays heed to the stakeholders who demand 'industry' status for retail. This is hoped to entail developing a Ministry responsible and accountable for the growth and interests of the sector, a single-window clearance system to streamline license processes associated with establishing retail stores, tax and investment incentives, among other things.[22]

While countries like Spain, Denmark and Bhutan have experimented with a national legislation to regulate retail trading, the general trend has been to leave regulation of retail trading to provincial/regional authorities, as has been done in the UK and Australia.

One can draw a pattern of retail regulation from most jurisdictions including India: retail outlets have been brought within the purview of other generic legislations that deal with taxes, pricing, weights and measures, shopping hours, marketing/advertising practices, licensing, employment etc. Given the complexity of retail structures and diversity of its segments, this approach makes the most sense. Also, one might note that legislations that cater to the needs of one country cannot be replicated in another. For example, some countries have 'blue laws', i.e. laws that deal with religious observances, which might be entirely inapplicable in the context of other countries.

Interestingly, retail trading also provides some scope for 'private regulations' where a powerful retailer might want manufacturers or service providers to comply with in terms of quality, carbon footprint etc. before their products can be sold through that retail chain. The antitrust and trade implications of such private norms enforced solely through the market forces, is an intriguing legal issue.

22. D. Murali, *Assign industry status to the retail sector*, February 15, 2010 available at: http://www.thehindu.com/business/Industry/article106925.ece

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II. Foreign Direct Investment Regime

FDI in India is regulated under Foreign Exchange Management Act, 1999 (**"FEMA"**). The Department of Industrial Policy and Promotion (**"DIPP"**), Ministry of Commerce & Industry, Government of India makes policy pronouncements on FDI through Press Notes/ Press Releases which are notified by the Reserve Bank of India (**"RBI"**) as amendments to Foreign Exchange Management (Transfer or Issue of Security by Persons Resident Outside India) Regulations, 2000.

Paragraph 3.6.1 of consolidated FDI policy[23] (**"FDI Policy"**) lays down two entry routes for investment: the automatic route and the government/approval route. Under the latter, prior approval of the Government of India through DIPP is required. After the abolition of the Foreign Investment Promotion Board, applications for foreign investment in retail sector would directly lie before the DIPP. Investments can be made by non-residents in the capital of a resident entity only to the extent of the percentage of the total capital (sectoral caps) as provided in the FDI Policy.

Accordingly, DIPP in press notes 4 and 5 (2012 Series) inserted/ modified paragraphs 6.2.16.4 and 6.2.16.5 of FDI Policy allowing FDI in single brand product retail trading (100 percent) and multi brand retail trading (51 percent) respectively with prior approval of DIPP subject to compliance of certain conditions. This has now been liberalised by the DIPP in January 2018 whereby it allowed FDI in SBRT up to 100 percent under the automatic route.[24] Further, paragraph 6.2 of the FDI Policy states FDI into cash & carry wholesale trading is allowed up to 100 percent under automatic route provided that certain conditions are satisfied. Additionally, Paragraph 6.2.16.2.1 of FDI Policy states that companies who engage in the activity of buying and selling by a company through the e-commerce platform would engage only in Business to Business (B2B) e-commerce and not in retail trading. However, provision of services by e-commerce companies to retail consumers is not covered under this restriction.

FDI Policy specifies eligible investors. A non-resident entity can invest in India subject to the FDI Policy. A citizen of Bangladesh or an entity incorporated in Bangladesh can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space and atomic energy. FDI Policy also details the types of instruments through which an investor can invest into India. Issue of shares, fully, compulsorily and mandatorily convertible debentures and preference shares are counted as FDI. The inward remittance received by an Indian company by way of issuance of depository receipts and foreign currency convertible bonds is also counted as FDI. Subject to FDI sectoral policy, non-resident investors can also invest in Indian companies by purchasing/acquiring existing shares from Indian shareholders or from other non-resident shareholders. However, if the activity of the Indian company falls outside the automatic route (i.e. in cases where a prior approval from the Government agencies or RBI is required) as multi brand retail trading does, such transfer requires RBI approval.

A general permission is granted for issue of equity shares/preference shares against lump sum technical knowhow fee, royalty, subject to entry route, sectoral cap and pricing guidelines and compliance with applicable tax laws.

As far as the entities into which FDI can be made, non-resident investors enjoy a choice from among companies, partnership firms/ proprietary concerns/ limited liability partnership and Venture Capital Funds (VCFs) subject to adherence to conditions of FDI Policy. For example: 100 percent foreign investment in limited liability partnership is allowed under automatic route in sectors where no

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23. Consolidated FDI Policy 2017 which came into effect from August 28, 2017

24. Our analysis of this press note is available here: http://www.nishithdesai.com/information/news-storage/news-details/article/fdi-reforms-in-india-government-committed-towards-ease-doing-business.html

Government approval is required and is not subject to any sector specific conditionalities. Accordingly, foreign investment is currently not possible in limited liability partnership engaged in retail trading. There are guidelines laid down in FDI Policy on the calculation of total foreign investment i.e. direct and indirect foreign investment in India.

A snapshot of the existing FDI limits in the trading sector under the FDI Policy is as follows:

Sector (Other than Food)	FDI/Sectoral Cap
Wholesale / Wholesale Cash & Carry Trading	Up to 100% [no Government approval]
Single Brand Retail Trading	Up to 100% [no Government approval]
Multi Brand Retail Trading	Up to 51% [with Government approval]

its early and undeveloped stage (particularly the domestic organized retail segment) it is not in a position to compete with large players. As a result, the Government policy has largely been to protect agriculturist and small retailers and therefore has discouraged entry of bigger retailers. Thus, participation of foreign investors in the retail sector was prohibited.

A. FDI in retail sector

India entered into the World Trade Organisation's General Agreement on Trade in Services (GATS), in January 1995 pursuant to the Uruguay Round negotiations. Each WTO Member is required to have a schedule of specific commitments. It is a document which identifies the services sectors, sub-sectors or activities which are subject to market access and national treatment obligations and any limitations attached to them.[25] One of the standard services to the GATS includes distribution services (i.e. commission agent, wholesale trade services, retailing services and franchising), As per India's Revised Offer at WTO on August 24, 2005, India has offered to undertake extensive commitments in a number of new sectors/sub-sectors such as distribution services in the areas of commission agents and wholesale trade services.[26] As a backdrop of this, India is gradually opening up the retail trade sector to foreign investment. Traditionally, the retail sector in India was considered to be a sensitive sector especially due to factors, such as (i) the employment it generates and (ii) being in

B. FDI in food retailing

The FDI Policy treats food retail different from other retailing provisions (whether SBRT or MBRT). Retailing of food products produced / manufactured in India (whether SBRT or MBRT) including via e-commerce requires prior Government approval. Although not expressly mentioned, it may be inferred that retailing of imported food products is not permitted by entities in India having foreign investment.

C. Wholesale cash and carry

According to the FDI Policy, whether a transaction is wholesale or retail would depend on the type of customers to whom the sale is made and not the size and volume of sales. Wholesale trading would mean the sale of goods to retailers, industrial, commercial, other professional business users or to other wholesalers, but not for personal consumption.

The consolidated FDI policy released for the first time in 2009 introduced guidelines that mandate relevant permits and licenses to be obtained.

25. *Supra* note 18.

26. India's Revised Offer dated August 24, 2005 available at: http://commerce.nic.in/trade/faqs_gats.pdf

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It also lists a number of 'valid business customers' with whom wholesale transactions can be entered into (besides the Government). These entities should be either: a) holders of sales tax/ VAT registration/service tax/excise duty registration; b) holders of trade licenses under Shops and Establishment Act, issued by the relevant governmental authority, indicating that the purchaser is engaged in a business involving commercial activity; c) holders of permits/license for undertaking retail trade (like tehbazari and similar license for hawkers) from the relevant authority; or d) institutions having a certificate of incorporation or registration as a society or registration as public trust for their self-consumption.

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. It is expressly clarified that a wholesale trader cannot open retail outlets, whereby sales will be made to the customer directly.

Under the existing FDI Policy, wholesale deals would be permitted among companies of the same group. However, such wholesale trade to group companies taken together could not exceed 25 percent of the total turnover of the wholesale venture. For the purposes of the above, a group company as defined under the DIPP Press Note (2 of 2013) dated 3 June, 2013 means- two or more enterprises, which directly or indirectly are in a position to exercise 26 percent or more voting rights in the other enterprise, or can appoint more than 50 percent of members of the board of directors in the other enterprise.

D. Single-Brand Product Retail Trading (SBRT)

FDI up to 100 percent in SBRT is allowed subject to certain conditions. No Government approval is required for FDI in SBRT.

It is important to know the objectives the Government had in mind while allowing foreign investment in SBRT will be helpful for prospective investors at the stage of formulating their FDI proposals. The objectives were:

a. attracting investments in production and marketing;
b. improving the availability of such goods for the consumer;
c. encouraging increased sourcing of goods from India;
d. enhancing competitiveness of Indian enterprises through access to global designs, technologies and management practices.

FDI in SBRT is subject to following conditions:

a. Products to be sold should be of a 'Single Brand' only.
b. 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.
c. 'Single Brand' product-retailing would cover only products which are branded during manufacturing.

   Any non-resident entity / entities can undertake SBRT in the country for a specific brand directly or through legally tenable agreement with the brand owner. Under the FDI Policy issued by the DIPP on September 30, 2011, only the owner of the brand was permitted to invest in SBRT. This condition was seen to be restrictive as it ignored the IP holding structures prevalent globally. The condition was then modified to permit only one foreign investor whether owner of the brand directly or a licensee / franchisee / sub-licensee to invest in SBRT in the country, for the specific brand for which approval is being sought through a legally tenable agreement with the brand owner. The onus for ensuring compliance with this condition rested with the Indian entity carrying out SBRT in India.

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d. Moreover, the government also may relax sourcing norms for entities undertaking SBRT of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible.

This condition was still seen as restrictive and with the recent change, the requirement has been significantly diluted by allowing one or more non-resident entities to undertake SBRT of a specific brand provided they are owner of the brand or they have some agreement with the brand owner for the specific brand. This will be helpful for structures where for example, more than one foreign entity has been provided with a license for a territory or where the owner and a licensee both invest.

e. Furthermore, entities operating through brick and mortar stores are permitted to undertake retail trading through e-commerce as well.

f. In respect of proposals involving FDI beyond 51 percent, mandatory sourcing of at least 30 percent of the value of goods purchased, must be done from India, preferably from MSMEs,[27] village and cottage industries, artisans and craftsmen, in all sectors. The local procurement requirement would have to be met as an average of five years' total value of the goods purchased, beginning April 1 of the year during which the first tranche of FDI is received. Thereafter, this requirement is to be complied on an annual basis. MSMEs' should be as defined and described under: The Micro, Small and Medium Enterprises Development Act, 2006. 'Micro' enterprises are those that have total investment in plant and machinery less than INR 2.5 million (approx. USD 35,630); Small enterprises having between INR 2.5 million (approx. USD 35,630) and INR 50 million (approx. USD 712,600); and 'Medium' enterprises having between INR 50 million (approx. USD 712,600) and INR 100 million (approx. USD 1.4 million).

One of the changes also introduced in the FDI reforms is on this local sourcing requirement, which provides the retail trading entity having FDI beyond 51 percent with an option to set off its incremental sourcing of goods from India for its global operations, against the mandatory 30 percent domestic sourcing of goods requirement. Goods sourced globally from India by the group companies of the retail trading entity would also be considered for the purpose of availing this set off against the 30 percent local sourcing requirement.

g. Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of SBRT.

E. Multi- Brand Product Retail Trading (MBRT)

FDI up to 51 percent in MBRT is allowed under the Government route i.e. with the prior approval of the DIPP subject to compliance of certain conditions.[28] The current policy does not define the term 'multi brand'. MBRT generally implies the sale of multiple brands to retail customers for personal consumption.

The proposal to allow FDI in MBRT dates back to July 2010, when DIPP first introduced its discussion paper (**"Discussion paper on FDI in retail"**) on allowing FDI in MBRT. The proposal of allowing FDI in MBRT was approved by the Cabinet in November 2011. However, due to adverse political backlash, the proposal was kept on hold.

There was tremendous international pressure on the Government to open up the multi-brand retails sector for FDI, as well as pressure domestically to end the stalemate of policy inaction. The Government has risen from its

27. The word MSMEs is not defined in FDI Policy. However, the same has also being used in provisions relating to FDI in MBRT.

28. Notified by DIPP by way of Press Note 5 (2012 Series) dated September 20, 2012.

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state of policy inaction and tried to establish a reformist image by allowing FDI in MBRT.

As a result, the DIPP by way of Press Note 5 (2012 Series) allowed 51 percent FDI in MBRT under Government approval route subject to the following conditions:

- **Retail sales outlets may be set up in those States which have agreed or agree in future to allow FDI in MBRT**

Under List II of Seventh Schedule of the Constitution of India, trade and commerce within a State is a State subject. A regulatory framework governing retail sector, consequently, needs the approval of States under the Constitution.

States that have enabled FDI in MBRT:

Name of State/Union Territory (Cities in which outlets may be opened)	Population [36]	Geographical area (in square kilometres)
Assam	31,205,576	78,438
Andhra Pradesh (Vishakhapatnam and Vijayawada)	49,386,799	162,970
Delhi	16,787,941	1,484
Haryana (Faridabad)	25,353,081	44,212
Himachal Pradesh	6,864,602	55,673
Jammu and Kashmir (Srinagar)	12,541,302	222,236
Karnataka (Bengaluru)	61,130,704	191,791
Maharashtra (Mumbai, Pune, Nagpur, Nashik, Vasai-Virar, Aurangabad)	112,372,972	307,713
Manipur	2,855,794	22,327
Rajasthan (Jaipur, Jodhpur, Kota)	68,548,437	342,239

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Uttarakhand	10,086,292	53,483
Daman & Diu	242,911	102
Dadra and Nagar Haveli	342,853	491

Further, it has been recently clarified by DIPP that if the foreign investor approaches a State Government not included in the list of states supporting FDI in MBRT, consent from the State Government would be sufficient, and a suitable amendment to the policy will be issued by the Central Government.

Accordingly, it would be the prerogative of the State Governments to decide whether and where a multi-brand retailer, with FDI, is permitted to establish its sales outlets within the State. The establishment of the retail sales outlets will have to be in compliance with applicable State laws/ regulations, such as the Shops and Establishments Act etc. Additionally, the companies engaged in MBRT will also have to comply with local zoning regulations, warehousing requirements, access, traffic, parking and other logistics as prescribed by State Governments from time to time.

With this restriction, each investor will have to comply with policy on FDI at both Centre and State levels. Depending on State policy on MBRT, the investors may or may not be permitted to invest in those States. Interestingly this seems to be the first time that discretion on whether to permit FDI in a sector or not has been left to the States.

- **Retail sales locations may be set up only in certain cities**

The reach of retail sales outlets of foreign multi brand retail trader will be limited to only those 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 (including an area of 10 kilometers around the municipal/urban agglomeration limits of such cities). Previously, the FDI Policy provided that retail outlets could only be set up in cities with a minimum population of 10 lakhs, however this condition was amended by way of Press Note 5 (2013 Series).[30]

While, the previous restriction to Tier 1 and Tier 2 cities seemed reasonable given the sensitivity around the sector and prevalent undeveloped / unorganised retail segment in small towns/ villages which would be unable to compete with large players, the recent change to allow State Governments to determine the cities in which retail outlets can be set up will also ensure that every State Government has the discretion to choose the cities in which multi-brand retail outlets are set up and provide a sense of uniformity amongst the States.

- **Minimum amount to be brought in, as FDI, by the foreign investor, would be USD 100 million.**

The foreign investor has to bring in a minimum investment of USD 100 million in an entity engaged in MBRT.

Retail sector being a capital-intensive sector, the requirement for minimum capitalisation appears logical. This will attract serious investors and allow the government to study the benefit such investment will have on the Indian economy.

- **50 percent of total FDI brought in to be invested in`backend infrastructure` within three years**

Considering the need for investment in back end infrastructure, at least 50 percent of the USD 100 million i.e. total FDI brought in in the first tranche [31] shall be invested in 'back-end infrastructure' within three years. Any subsequent investment in backend infrastructure would be made by the MBRT retailer as needed, depending upon his business requirements. Investment in 'back-end

29. As per the 2011 India census

30. As clarified by Press Note 5 (2013 series), available at: http://dipp.nic.in/sites/default/files/pn5_2013_1.pdf

31. As clarified by Press Note 5 (2013 series), available at: http://dipp.nic.in/sites/default/files/pn5_2013_1.pdf

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infrastructure' will include capital expenditure on all activities such as investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, warehouse, agriculture market produce infrastructure etc. Expenditure incurred on front-end units, land cost and rentals will not be reckoned for purposes of backend investment.

The Indian retail sector is lacking adequate infrastructure and immersed in increased cost and wastage due to disrupted supply chains and middlemen. To address this problem, the requirement for investment in back end infrastructure within a three year timeframe has been introduced. Compliance for the FDI amount invested in back-end infrastructure to be self-certified and checked by statutory auditors and submitted to the DIPP in the prescribed form.

- **30 percent mandatory local sourcing requirement**

Similar to the requirement of mandatory local sourcing as applicable in SBRT (prior to press note 4 of 2012), at least 30 percent of the value of procurement of manufactured/ processed products purchased shall be sourced locally. Such sourcing was earlier limited to 'small industries' which have a total investment in plant and machinery not exceeding USD 1 million. This requirement has now been amended via Press Note 5 (2013 Series)[32] and investors are permitted to source such products from micro, small and medium industries which have a total investment in plant and machinery not exceeding USD 2 million. The amendment further clarifies that such 'small industry' status is only considered at the time of first engagement and that such industry will continue to qualify as a 'small industry' for this purpose even if it outgrows the said investment of USD 2 million. Compliance with this condition will have to be self-certified by the company and then cross-checked as and when required.

This 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 April 1 of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis.

In case of MBRT, the 30 percent sourcing requirement is to be calculated on the purchase of manufactured and processed products and sourcing from agricultural co-operatives and farmers co-operatives would also be considered. The mandatory local sourcing requirement in case of MBRT is aimed to provide a boost to small industries. It may be easier for multi brand retailers to meet this condition since they have a large spectrum of goods to offer.

- **Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of MBRT.**

Company which is recipient of FDI has to ensure compliance of the conditions relating to minimum USD 100 million investment, investment in back- end infrastructure and mandatory local procurement requirement which could be verified, as and when required. Further, the investors shall maintain accounts, duly certified by statutory auditors.

However, the Indian Ministry of Finance has proposed to reduce the corporate tax rate from 30 percent to 25 percent over a period of four years with a view to encourage foreign investors to 'Make in India'. Alongside, the ministry has also made a move to reduce the rates of withholding taxes for royalties and fees for technical services provided by non-residents to 10 percent which would further incentivize foreign companies to set up manufacturing bases in India. It should be noted that FDI in B2C e-commerce is permitted in circumstances where a manufacturer is permitted to sell its single-brand products manufactured in India through e-commerce retail.

32. Press Note 5 of 2013, available at: http://dipp.nic.in/English/acts_rules/Press_Notes/pn5_2013.pdf.

Applications for MBRT would be have to be made to DIPP. DIPP will determine whether the proposed investment satisfies the notified guidelines and after being satisfied will forward the application to be considered by the FIPB for approval.

Further, DIPP came out with certain clarifications on queries raised by prospective investors with respect to the precision on MBRT under the FDI Policy.[33]

F. Challenges moving forward

While the policy framework in relation to FDI in MBRT is now put in place, the implementation of this policy framework is bound to have certain challenges. Some of which include:

i. Implementation at State level

Retail is the only sector where that FDI policy is introduced as an enabling policy and implementation of the same is left to the discretion of the State Governments / Union Territories. This draws support from the fact that 'trade and commerce within the State' is a State subject under the Constitution of India. Such a policy may give unrestricted powers to the State Government / Union Territories to impose conditions in addition to those prescribed by the DIPP. State level regulations could also lead to an inconsistent policy framework which will need to be carefully understood and followed by potential investors. There is also the risk of a State Government changing its policy on MBRT and reversing earlier decisions, especially in the event of a change in political power as this scenario has not been construed by the DIPP in the Press Note.

In effect, a foreign investor will have to be mindful of the local rules and regulations of each State before finalizing the transaction structure / business model, especially when the investor intends to set up outlets in all the States. Further, for the existing entities operating across India, it would be difficult to get FDI in entity without restructuring of its operations.

ii. India's commitments under international investment agreements / treaties

India is a signatory to various international trade agreements / treaties like the General Agreement on Trade in Services, Trade Related Investment Measures, bilateral investment protection agreements [34], and comprehensive economic cooperation agreements in the field of trade and economic affairs signed to promote investment inflow. While the Government in its press release [35] has categorically concluded that the policy framework does not violate any commitments or obligations arising out of India's international agreements, the introduction of FDI in SBRT and MBRT with conditions such as domestic sourcing and state wise implementation has raised a few questions with respect to India's commitments under these treaties and agreements.

iii. Options available with investors if the Government retroactively changes its policy in the future

While the Government has the right to enact, modify or repeal a law/policy at its own discretion in its sovereign capacity, a foreign investor expects the host country to act in a consistent manner, so that it may know

33. You can refer to our analysis on these clarification in our hotline titled "Clarification on FDI in Multi Brand Retail Trading: As Restrictive as it may get", available at: http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/clarifications-on-fdi-in-multi-brand-retail-trading-as-restrictive-as-it-may-get.html?no_cache=1&cHash=34677b5a0db512a7c4b-0b804e8e2450b.

34. India has signed bilateral investment protection agreements with 61 countries, out of which 52 are already in force and the rest are yet to be entered into force as per: http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu

35. Press release of Ministry of Commerce and Industry on "FDI Policy on Multi Brand Retail Trading and India's Commitments under International Investment Agreements" dated September 18, 2012.

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beforehand any and all rules and regulations that will govern its investments and to be able to plan its investment and comply with such regulations accordingly.

The foreign investor also expects the host country to act consistently, without arbitrarily revoking any preexisting decisions or permits issued by the country that were relied upon by the investor to assume its commitments as well as plan and launch its commercial and business activities. Stability and predictability of legal and business framework is an essential element to ensure fair and equitable treatment towards the foreign investor. Evisceration of regulations in future with regards to foreign investment in multi-brand retail by Government, in reliance upon which the foreign investor invests into India could be regarded as a breach of international obligations taken up by Indian under bilateral investment protection agreements and may also attract scrutiny as to the constitutional validity of such actions.

There have been requests from the industry to the Government to allow 100 percent FDI in MBRT and also FDI in B2C e-commerce in a phased manner. The Government had indicated that they were considering the MBRT relaxation provided that the goods were sold with a "Made in India" label.[36]

iv. Regulatory overlap and dealing with multiple authorities

The retail sector cuts across various industries and business models. As a consequence, there is higher scope for regulatory overlap. While general corporate, tax, commercial laws and laws related to intellectual property, trade and employment laws are uniform across industries, state level laws and regulations like the Agricultural Produce Market Committee Act, local zoning regulations differ from each other and foreign investors will have to deal with multiple regulations and authorities.

36. http://www.thehindu.com/business/Industry/Open-multi-brand-retail-e-commerce-education-to-more-FDI-India-Inc./article13986519.ece. Last accessed: August 14, 2018.

G. E-commerce

Currently, 100 percent FDI is allowed under automatic route (no approval required) in companies engaged in Business to Business (B2B) e-commerce and erstwhile restrictions on FDI in domestic trading were also applicable to e-commerce as well. The DIPP Press Notes 4 and 5 (2012 Series) categorically state that retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in SBRT or MBRT. However, with the release of Press note 3 (2016 Series), the DIPP has amended the guidelines applicable for FDI on e-commerce. An important introduction has been the allowance of 100 percent FDI under the automatic route for the marketplace model of e-commerce while not permitting any FDI in the inventory based model at all.

Under the existing FDI Policy:

i. **'E-commerce'** *is defined as buying and selling of goods and services including digital products over digital & electronic network.*[37] [38]

ii. *An* **'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.*[39]

iii. An **'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.*[40]

37. Para 5.2.15.2.4(i) of the FDI Policy clarifies that *"digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc."*

38. Para 5.2.15.2.2(i) of the FDI Policy.

39. Para 5.2.15.2.2(ii) of the FDI Policy

40. Para 5.2.15.2.2(iii) of the FDI Policy

iv. *A* **'marketplace based 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.*[41]

The conditions to be met by e-commerce entities with FDI are as follows:[42]

i. *Marketplace e-commerce entities will be permitted to enter into transactions with sellers registered on its platform on a B2B basis.*

ii. *E-commerce marketplaces may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call center, payment collection and other services.*

iii. *E-commerce entities providing a marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model.*

iv. *An e-commerce entity will not permit more than 25% (twenty-five percent) of the sales value on financial year basis affected through its marketplace from one vendor or their group companies.*

v. *In marketplace models, goods / services made available for sale electronically on websites 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.*

vi. *In marketplace models, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.*

vii. *In marketplace models, any warrantee/ guarantee of goods and services sold will be responsibility of the seller.*

viii. *E-commerce entities providing marketplaces will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.*

41. Para 5.2.15.2.2(iv) of the FDI Policy

42. Para 5.2.15.2.4 of the FDI Policy

III. Other Corporate laws

A. Investment Vehicles

Investments can be made either into unincorporated entities such as liaison office, branch office, project office, limited liability partnership, partnership, trust or into incorporated entities such as a public limited or private limited company. However, this is subject to the restrictions placed by FDI regulations discussed above. For example, FDI is not allowed in trusts.

B. Instruments

FDI can be made into a number of instruments including equity shares, compulsorily convertible preference shares and compulsorily convertible debentures. Prospective investors may be mindful of the fact that any optionality (puts, calls etc.) built into an FDI instrument is viewed with suspicion by the RBI, even though the law itself does not prohibit it. When an FDI instrument does not ensure lasting interest of the investor in the target company, the authorities take the view that the investment lacks the very character of investment, and therefore treat them as coming under the external commercial borrowing (ECB) route, to which a different set of regulations apply.

Earnings out of India can be repatriated as dividends. Dividends are paid usually as a percentage of the nominal or face value of the share. For a foreign investor holding an equity interest, payment of dividend on equity shares is a straightforward way of extracting earnings. However, the dividend distribution tax borne by the company while distributing such dividend may not necessarily qualify as a tax credit against any direct tax payable by the foreign investor who receives such dividend in its home jurisdiction.

Additionally, in case a company issues compulsorily convertible debentures to non-resident investors, any interest paid by the Indian company shall be subject to withholding tax reduced to the rate of tax under the relevant

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treaty. For example: when the interest is paid by Indian company to U.S. corporation, the otherwise applicable Indian withholding tax, reduced to 15 percent under the India-U.S. income tax treaty.

IV. Tax laws

The levy of taxes in India is a constitutional power granted to the Union Government and the State Governments. Each tax levied or collected has to be backed by an accompanying law, passed either by the Parliament or the State Legislature.

V. Direct Taxes

A. Income Tax

Income tax in India is levied under the Income Tax Act, 1961 (**"Income Tax Act"**). India, in terms of direct taxes (Income tax) follows a system of progressive taxation wherein the rate of taxation increases as the income bracket increases. India follows a blend of source and residence bases of taxing income.

In broad terms, profits earned from any trade would be taxed under the ITA under the head of income "profits and gains of business and profession." Therefore, the income from profits and gains from retail trade are similarly computed in the way provided for under this head of income.

However, small business carried on by an individual, Hindu undivided family and partnership who are residents and whose total turnover or gross receipts do not exceed INR 20 million (approx. USD 285,160) have the option of being presumptively taxed at a rate of 8 percent of the total turnover or gross receipts under Section 44AD of the Income Tax Act. Further, in cases where the gross receipts or turnover are received through banking channels, a 6 percent presumptive rate of tax, instead of 8 percent, is applicable.

Domestic resident companies in India are taxed at 30 percent and at 25 percent if the turnover or gross receipts do not exceed INR 500 million (approx. USD 285,160) (excluding surcharge and cess).[43] Limited Liability Partnerships (**"LLP"**) are taxed at 30 percent irrespective of turnover, however the tax benefit lies in the fact that while distributions by companies are effective taxed at 20 percent either as dividend or buyback tax, there are no additional taxes on distributions by LLPs. However, operating a retail business through investments in an LLP would be subject to the regulatory and FDI regime described above in this paper.

A company is said to be resident in India if it is incorporated under the laws of India or when it's Place of Effective Management (**"POEM"**) is in India.[44] POEM has both an objective and a subjective element. Should the objective critieria be met, then it is presumed that the POEM of the company is outside India if the majority of the board meetings are conducted outside India. Please note that for this purpose, the objective criteria would include looking at factors such as where the majority of the employees are located, the proportion of passive income such as dividends, interest or royalties and the proportion of salary expenses to personnel in India. Should the objective test not be met, then the POEM of a company is the place where the key management and commercial decisions that are necessary for the conduct of the business of an entity are, in substance made. This test however, remains substantially subjective and is decided on a case to case basis. The Central Board of Direct Taxes (**"CBDT"**) has however clarified that provisions relating to POEM would not apply to companies

43. Surcharge is applicable @ 7% if the total income is in excess of INR 10 million and 12% if in excess of INR 100 million and education cess is applicable @ 3% on income tax (inclusive of surcharge, if any).

44. Section 6(3) of the ITA

having turnover or gross receipts less than INR 500 million (approx. USD 7.13 million) during a financial year.[45]

Foreign companies (which are not POEM resident) in India are taxed at 40 percent (excluding surcharge and cess) with a disallowance of expenses.[46] These companies are however taxed in India only to the extent the income is sourced from India. Under Section 9 of the ITA, income arising from a 'business connection' in India is deemed to be sourced in India. Business connection is a concept based on the source theory of taxation to justify the source country's right to tax income arising from activities carried out in that country provided certain prescribed nexus thresholds are satisfied. The definition of business connection was further expanded by the Finance Act, 2018 with the introduction of the new concept of Significant Economic Presence (**"SEP"**), the presence of which would constitute a business connection. The definition of SEP has been provided to mean transactions in respect of goods, services or property carried out by a non-resident in India if the aggregate payments arising from such transactions exceed a prescribed amount. It also includes the systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, through digital means as may be prescribed.[47] Considering the wide definition of SEP, foreign companies conducting business of selling products in India would be considered as having a business connection in India and thus taxed on the profits attributable to India. Further, ecommerce activities which involve interaction with Indian users through digital means may also fall under this definition. However, it is to be noted that the thresholds to determine SEP have yet not been notified. However, it is expected that the same shall be soon notified by the CBDT.

Under Section 115-O of the Income Tax Act, an Indian company is required to pay dividend distribution tax (**"DDT"**) at the rate of 15 percent (excluding surcharge and cess) on dividends that are declared, distributed or paid by a domestic company. However, no further taxes are payable in India on such dividend income in the hands of the shareholders once DDT is paid by the company.

When exiting, or restructuring of business wherein sale of assets held by the company takes place, capital gains tax is payable at a rate of up to 40 percent (excluding surcharge and cess) contingent on whether the capital gains are long term or short term. India also contains provisions for levying capital gains tax on the indirect transfer of assets whereby tax is levied on the transfer of assets situated outside India, when such assets derive substantially their value from assets in India.[48] Certain types of payments in India require the payer to withhold tax as 'tax deducted at source'. However, there remain many nagging issues with respect to these taxes. Minimum alternate tax (**"MAT"**) at 18.5 percent is also payable on the book profits of a company, if the company's income due to exemptions is less than 18.5 percent of its book profits.[49]

Moreover, for foreign companies which provide digital advertising or related services to their Indian counterparties, carrying on retail trade in India, an additional tax in the form of 'Equalization Levy' (**"EL"**) may become payable in India. The EL was introduced in 2016 as a response to new business models which operated in jurisdictions with little or no physical presence. New set of tax challenges arose with such models, with difficulties in determining where the income generated should be taxed particularly with respect to nexus, characterization, valuation of data and user contribution. The EL is a 6 percent tax that is to be paid by the resident service recipient on payments made to a non-resident service provider for provision of online advertisement

45. Central Board of Direct Taxes, Circular No. 08 of 2017, dated 23rd February, 2017.

46. Surcharge is applicable @ 2%if the total income is in excess of INR 10 million and 5% where the total income is in excess of INR 100 million. Education cess is applicable @ 3% on income tax (inclusive of surcharge, if any).

47. Explanation 2A, Section 9(1)(i), ITA

48. Explanation 5, Section 9(1)(i), ITA

49. Section 115JB, ITA

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or digital advertising space or facilities for the purposes of online advertisement, when the aggregate consideration is more than INR 100,000 (approx. USD 1,425) in a year. Further, EL has been deliberately kept outside the purview of India's income tax regime and consequently, the government has taken the position that tax treaty relief should not be available. As a consequence, countries of residence of the foreign service providers could potentially refuse to grant tax credits against the EL paid in India thereby leading to double taxation. It is also possible that this regime could be significantly expanded in the future to cover most cross-border digital services. In any event, such services should already be subject to GST, in which case the EL would be an additional levy on top of that.

Separately, recently tax authorities have challenged the deep discounting model in e-commerce by seeking to categorize advertising expenses as capital expenses instead of business expenses. While the Karnataka High Court has remanded the matter back to the tax officer for re-assessment, the final word on this issue is not out yet, despite several rulings in the past on categorization of advertising expenses.

B. General anti-avoidance rules ("GAAR")

Anti-avoidance rules are introduced by countries as a tool for checking aggressive tax planning by businesses that enter into arrangements and transactions with the objective of avoiding tax. Specific Anti-Avoidance Rules (**"SAAR"**) are made applicable to particular scenarios and arrangements. This includes transfer pricing regulations which tax transactions between group companies on an arm's length basis. These regulations have been explained in the section below.

General Anti-Avoidance Rules (**"GAAR"**) on the other hand empower tax authorities to deny transactions or arrangements which do not have any commercial substance or consideration other than achieving tax benefits. Thus, GAAR are rules which check potential avoidance of tax in general based on the doctrine of 'substance over form'. India has also introduced wide GAAR provisions which provide broad powers to the Indian tax authorities to deny tax benefits by characterizing arrangements as 'impermissible avoidance arrangements' if the main purpose of a transaction is to avoid the payment of taxes. GAAR has come into effect from April 1, 2017 in India. The GAAR provisions in India include the power to disregard entities in a structure, reallocate income and expenditure between parties to the arrangement, alter the tax residence of such entities and the legal situs of assets involved, look through an arrangement by disregarding any corporate structure, treat debt as equity and vice versa, and the like.[50] Such wide discretionary powers gives much room for misuse of ambiguous expressions while defining an impermissible avoidance arrangement., which includes terms such as misuse, abuse, bona fide purpose, and commercial substance of arrangements.[51] Further, arrangements lacking commercial substance are deemed to include amongst others, round trip financing, elements that have the effect of offsetting or cancelling each other, and arrangements not having a significant effect upon business risks or net cash flows other than in relation to tax benefits.[52] Even investing though an intermediate jurisdiction into India could potentially trigger GAAR. Thus, there exists a possibility of a wider interpretation given to such subjective terms, leading to a large number of transactions coming under the scrutiny of the tax authorities. In effect, there arise two main concerns - lack of clarity in how these provisions would be applied and the wide discretionary power conferred on the revenue authorities.

Further, the Central Board of Direct Taxes (**"CBDT"**) has clarified that GAAR and SAAR can coexist and applied as and when necessary as per the facts of the situation. It has even laid down that anti-abuse rules in tax treaties may not be sufficient to address all tax avoidance strategies and therefore domestic anti-avoidance rules should be applied. However, it has been

50. Section 98, ITA.

51. Section 96, ITA

52. Section 97, ITA

noted that if avoidance is sufficiently addressed by Limitation of Benefits clauses in treaties, i.e. clauses which limit treaty benefits to those persons who meet certain conditions, GAAR would not apply.[53]

Moreover, investments made prior to March 31, 2017 are grandfathered in and GAAR applies only prospectively, i.e. to investments made after April 1, 2017.

C. Transfer Pricing Framework

i. International Transfer Pricing

Commercial transactions between related entities of multinational corporations increasingly dominate the sphere of world trade. The pricing of these transactions between related parties, which is known as 'transfer pricing', may differ from those that take place between unrelated parties. In India, the transfer pricing regulations (**"Regulations"**) are contained in sections 92 to 92F of the Income Tax Act. The Regulations provide for a transfer pricing mechanism based on computation of income arising out of cross-border transactions having regard to the arm's length price (**"ALP"**). The ALP as codified in the Regulations has its roots in the Organization for Economic Co-operation and Development (**"OECD"**) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. The "ALP" is defined to mean a price, at which transactions between persons other than associated enterprises, in uncon-trolled circumstances are carried out.

The Act stipulates stringent penalties for non-compliance with transfer pricing provisions. Presently, all enterprises having a turnover greater than INR 150 million (approx. USD 3 million) fall within the ambit of compulsory audit by a special Transfer Pricing Officer.

It is important to note that the Finance Act, 2012 has introduced a regime relating to Advanced Pricing Agreements (**"APA"**). An APA brings tax certainty by being an ahead-of-time agreement between the taxpayer and the tax authorities, whereby the transfer price for future years is determined in advance. An APA is valid for a period of maximum of 5 years and the APA would be binding only on the taxpayer and the concerned commissioner and his subordinates. If however there is a change in law or a fact post the execution of the APA, the APA shall cease to be valid from the date of such change. Further, the Central Board of Direct Taxes is empowered to declare any APA as invalid (void ab initio) if it finds that the APA has been obtained by fraud or misrepresentation of facts.

ii. Domestic Transfer Pricing

The ITA also contains specific domestic transfer pricing provisions. It is provided that if the domestic transactions between two related persons or two units of the same entity exceed INR 200 million (USD 2.85 million), then in order to determine the correctness of the income from domestic related party transaction, the transfer pricing regulations (including procedural and penal provisions) would be extended to such domestic transactions as well.

While the rationale for these provisions is under-standable, it no doubt increases the compliance burden of many a corporate tax payer. One significant issue that arises is that while the APA regime has been introduced with respect to international transactions, the same benefit has not been extended in cases of domestic transactions.

Moreover, 'safe harbor rules' have been notified in September 2013, with the aim of providing more certainty to taxpayers and to address the growing risks of transfer pricing litigation in India, Under this regime, the tax authorities would accept the transfer price set by the taxpayer if the taxpayer and transaction meet the eligibility criteria specified in the rules.

53. Central Board of Direct Taxes, Circular No. 07 of 2017, dated 27th January, 2017

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VI. Indirect Taxes

Prior to July 1, 2017, a series of central and state taxes were levied at various stages of the production and distribution process. These included central excise duty on manufacture, central sales tax on inter-state sale, sales tax / value added tax on intra-state sale, and service tax on the rendering of services. Moreover, credit for input taxes paid was not uniformly available across central and state levies thereby leading to a cascading of taxes. With the introduction of the Goods and Services Tax (**"GST"**), India now has unified indirect tax system.

GST has subsumed and broadly replaced the following taxes:

Central Indirect Taxes	State Indirect Taxes
▪ Central Excise Duty	▪ State VAT / Sales Tax
▪ Additional Excise Duty	▪ Entertainment and Amusement Tax (except when levied by local bodies)
▪ Additional Customs Duty (CVD)	▪ Central Sales Tax (levied by Centre and collected by State)
▪ Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955	▪ Luxury Tax
▪ Special Additional Duty of Customs	▪ Octroi and Entry Tax
▪ Service Tax	▪ Purchase Tax
▪ Central Surcharges and Cesses so far as they relate to supply of goods and services	▪ Taxes on lottery, betting and gambling
	▪ Taxes on advertisement
	▪ State surcharges and Cesses so far as they relate to supply of goods and services

A. Goods and Services Tax

The GST regime is comprised of three major pillars: the Central Goods and Services Tax Act, 2017 (**"CGST Act"**) which provides for the taxing powers of the Central Government, individual State / Union Territory Goods and Services Tax Acts (**"SGST Act"** and **"UTGST Act"** respectively) which provide for the taxing powers of each State / Union Territory, and the Integrated Goods and Services Tax Act, 2017 (**"IGST Act"**), which grants exclusive rights to the Centre to tax inter-state commerce.

Under the GST regime the "supply" of goods, or services, or both, is treated as the taxable event, with different taxes applying to inter-state supply and intra-state supply. Every inter-state supply of goods or services is liable to IGST under the IGST Act, while every intra-state supply of goods or services is liable to both CGST under the CGST Act, and SGST / UTGST under the applicable SGST Act / UTGST Act. Supply is treated as either inter-state, or intra-state, depending on the location of the supplier, and the "place of supply" determined in accordance with the provisions of the IGST Act.

GST is levied at rates that vary between nil – 28 percent depending on the rate schedule applicable to the supply in question. To prevent cascading of taxes, a uniform input tax credit system is available in respect of input supplies of goods or services used or intended to be used in the provision of output supplies of goods or services or both. GST is a consumption tax and is typically passed on to the consumer of the good / service as part of the price.

As a general rule, the import of goods or services or both into India qualifies as a taxable inter-state supply chargeable to IGST, while the export of goods or services or both from India is treated as a zero-rated supply not chargeable to tax under the GST regime, subject to certain conditions.

Some basic GST terms are as follows:

1. Taxable events: The levy of tax is on the "supply" of goods or services and on imports. The scope of supply under GST is wide enough to include all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. The term supply includes the following three elements:

   a. Place of Supply: The place of supply of goods or services determines the governing law in relation to the transaction. As discussed, if the supply is inter-state, the IGST law is applicable whereas in case of an intra-state supply, both CGST and SGST laws become applicable. A cross-border supply of good and services crossing the Indian customs frontier is subject to IGST. In order to determine the place of supply, the location of the recipient or that of the supplier, importer or exporter, as the case may be, becomes important to determine.

   b. Time of Supply: The time of supply is important to ascertain since it determines when the tax is to be levied.

   c. Value of Supply: GST is computed on the value of the supply. The value of supply is the transaction value in case of transactions between unrelated parties and where price is the sole consideration.

2. Taxable person: A taxable person is defined under GST as a person who is either registered or is liable to be registered under the provisions of the GST laws. The CGST Act requires that every supplier having an aggregate turnover of INR 2 million (approx. USD 28,504) or more in a financial year shall register from where he makes a taxable supply of goods or services. However, the threshold of INR 2 million (approx. USD 28,504) is not applicable to certain classes of persons who are required to register under the GST regime regardless of their size or the value of the services being supplied by them in India in a financial year. These include foreign companies supplying Online Information Database Access and Retrieval services (**"OIDAR services"**) from outside India to Indian consumers or to non- registered businesses in India, non-resident taxable persons, persons making supply on behalf of other registered taxable persons, persons making supply (except of branded services) through e-commerce operators and e-commerce operators.

3. Rates: Under the GST regime, there are separate provisions of tax rates for goods and services, further bifurcated into separate IGST, CGST, and SGST. These notifications have seen multiple amendments since GST came into force.

   Further, supply of certain goods and services have been designated as 'Zero rated supply' of goods and services, meaning, although it is taxable supply, zero rate of tax would be charged in respect to such supply and Input Tax Credit (**"ITC"**) or refund can be claimed. Such supplies relate to: (a) exports of goods or services (ii) supply of goods or services to a Special Economic Zone developer or a unit. [54]

OIDAR Services

Similar to the service tax regime that preceded it, the GST regime also captures digital services within the definition of OIDAR services, which includes services *'whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention and impossible to ensure in the absence of information technology.'* The definition further includes a list of services within the definition of OIDAR services: advertising on the internet providing cloud services; provision of e-books, movie, music, software and other intangibles through telecommunication networks or internet; providing data or

54. Section 16(1), IGST Act

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information, retrievable or otherwise, to any person in electronic form through a computer network; online supplies of digital content (movies, television shows, music and the like); digital data storage; and online gaming.[55]

B. Ambiguities within the GST regime

i. Cumbersome Registration Regime

Unlike the general provisions requiring the supplier to register in the State from where he is making the supply of services [56] there is no specific provision in relation to a non- resident supplier providing services outside India. This is not only a severely cumbersome requirement for foreign multinational enterprises (**"MNEs"**), but even more so for foreign small and medium enterprises (**"SMEs"**) and start-ups accessing the ever-growing Indian market through the internet.

Another point of significant concern is the registration requirements under the SGST Acts and CGST Act wherein it is stated that a supplier making a taxable supply of goods or services in a state must register in that state, whereby service suppliers may be required to obtain an SGST registration in every state where their customers are located.

A foreseeable hindrance which the absence of an SGST registration may cause is where a supplier seeks to claim input tax credit for SGST discharged in the state other than the state where such supplier is registered. This is because the SGST Acts only contemplate availment of input tax credit with respect to persons registered under the respective SGST Acts. [57] The registration requirement in every destination state is highly onerous to business and the Government should provide the necessary clarifications / amendments to address the above issues. However, it is understood that the tax authorities are enforcing registration only if the company has any physical present or establishment in that state. In any case, it is expected that the GST Council will implement a single registration scheme for such digital companies in the near future.

ii. Tax Collection at Source ("TCS") Obligations for E-commerce Operators

GST has brought in an additional challenge of TCS on e-commerce operators as the scope of the definition of e-commerce operator is broad and includes all forms of e-commerce business models. An e-commerce operator has been defined to mean *"any person who owns, operates or manages digital or electronic facility or platform for electronic commerce"*.[58] Further, e-commerce has been defined as *"supply of goods or services or both, including digital products over digital or electronic network."*[59]

E-commerce operators are mandatorily required to collect and pay GST (by way of TCS) on behalf of the suppliers at the prescribed rate on the net value of taxable supplies of goods or services made through the operator, within 10 days from the end of the month and furnish a monthly statement of outward supplies for the same.[60] The CGST Act further places significant compliance burden on e-commerce operators, which in most cases are start-ups. The Government has currently deferred the applicability of the TCS obligation on e-commerce operators indefinitely for a smooth GST roll out.[61] It will be a mammoth burden on e-commerce operators to claim a refund of TCS paid for the orders which have

55. Section 2(17), IGST Act

56. Section 22(1), CGST Act

57. Section 2(62) of the SGST Acts (particularly, Maharashtra, Karnataka and Tamil Nadu) defines 'input tax' "in relation to a 'registered person' (i.e. a person registered under the concerned SGST Act) as CGST, SGST of the concerned state, IGST or UTGST charged on any goods or services supplied to him.

58. Section 2(45), CGST Act

59. Section 2(44), CGST Act

60. Section 52, CGST Act

61. Deferment of Tax Collection At Source Provision Under GST To Help Sellers: Amazon, NDTV Profit, (June 26, 2017, 22:44 IST)

been returned or canceled. This problem will primarily arise when the return of the order takes place in the following month as it will not have been accounted for while determining the 'net taxable supplies' and TCS would have accordingly been deducted and paid on it.

Imposing such a financial and administrative burden may be considered an unreasonable restriction on the right of e-commerce operators to carry on business in India. While the TCS obligations on e-commerce operators are currently deferred, it is recommended that the same be repealed as these could be harmful to the development of e-commerce which is one of the cornerstones of the digital economy.

The industry has made several representations to the GST Council regarding this issue and it is expected that this provision may be deleted or never implemented. In the meanwhile, the GST Council has continuously extended the period for which this provision shall not be implement.

iii. Intra-entity Transactions

The pre-GST provisions did not subject to tax the transactions within an entity as it required a 'registered dealer' to be the subject of tax. While CGST Act defines 'person' to include a company, the definition of 'person' and 'supplier' should not include a division or unit of a company. A clarification issued by the Central Board for Excise and Customs (**"CBEC"**) provides that *'an unregistered person who is liable to be registered is a taxable person'*. Consequently, it is a moot point on how tax authorities would treat large entities which provide services within the entity or engage in branch transfers. This, coupled with the reiteration in the CBEC Clarification that 'a person making supplies from different States needs to take separate registration in each State', makes compliance onerous. The need for multiple-registrations is reinforced when it is seen that each registered establishment is treated as a separate entity effectively and is required to avail credit. Therefore, a person who has obtained multiple registrations or is legally required to obtain multiple registrations, whether within a state or in different states, is treated as a 'distinct person' in respect of each such registration.[62]

Under the CGST Act, this has been expanded to also cover intra-entity supply of services, and also supplies made between voluntarily registered establishments within a state. Therefore, even services such as back-office functions or Information Technology (**"IT"**) support services provided within the entity by a division or branch of the entity could potentially be treated as a taxable supply. In order to escape the levy of GST on intra-entity support services, it could be argued that the services are not provided in the 'course or furtherance of business'. Having said that, this is likely to result in litigation which could impact all enterprises having multiple branches in the country.

C. Customs Duty

In addition to GST, customs duty is a duty that is levied on goods that are imported into India and exported from India. Customs duty is levied by the Central Government. The Customs Act, 1962 (**"Customs Act"**) provides for the levy and collection of duty on imports and exports, import / export procedures, prohibitions on importation and exportation of goods, penalties, offences, etc. The rates at which customs duty is levied are specified in the Customs Tariff Act, 1975. While export duties are levied occasionally to mop up excess profitability in international prices of goods in respect of which domestic prices may be low at the given time, levy of import duties is quite wide. Prior to the introduction of GST in India, import duties were generally categorized into basic customs duty, additional customs duties, countervailing duty, safeguard duty and anti-dumping duty. With the introduction of GST, the customs framework has been significantly revamped. Import of goods is now subject to IGST at the rate prescribed for inter-state supply of the goods concerned, in addition to basic customs duty, while most other duties have been abolished, or significantly curtailed. While the standard rate of customs duty for import of goods

62. Section 25(4), CGST Act and Schedule 1, CGST Act

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is 28.84 percent (including IGST and education cess), the actual rate may vary according to the product description.

VII. Competition Laws

In this section, we highlight certain issues arising from the competition regime with possible implications for the retail sector. One may note that under Section 32 of the Competition Act, 2002 (**"Competition Act"**), extra territorial application is conferred on its provisions. This is a valid exercise of legislative power under the Constitution of India. This implies that even if an agreement is entered into outside India, it can still be brought under the scrutiny of the Competition Commission of India (**"CCI"**), if it can be shown that such agreement has an appreciable adverse effect on competition in India. Competition Act in its approach, leans more towards the EU competition jurisprudence, as against the antitrust laws of the US.

A. Anti-competitive Agreements

Anti-competitive agreements can be vertical or horizontal. A version of the 'per se' rule is applicable for horizontal agreements in India, where certain agreements are presumed to have an appreciable adverse effect on competition in India. On the other hand, verticals agreements are governed by 'rule of reason' where the onus lies with the anti-trust regulator to prove an arrangement to have an appreciable adverse effect on competition. Though horizontal agreements like cartel are rendered a stricter treatment under the competition law regime, vertical arrangements involving tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, resale price maintenance and exclusive dealings can also be found to have an 'appreciable adverse effect' on competition within the territory of India under Competition Act.

Therefore, retailers will have to be mindful of the competition law implications while entering into agreements which may be held violative of the above principles.

Retail by e-commerce is treated at par with other models in India; competition law and policy, thus, may extend to dealings on a virtual platform as well.

Recently, online retailers came to the limelight where it was alleged that they were indulging in unfair business practices by entering into exclusive agreements to sell products exclusively on select portals and thereby violated competition norms by abusing their dominant position. However, the CCI clarified with its decision that such pacts need not affect competition as it does not create any entry barrier for new entrants as such. Of late, there has also been growing concern that deep discount sales launched by these e-commerce websites are anti-competitive in nature although the decision from the CCI is still pending.

B. Abuse of Dominance

In order to determine whether an enterprise is in a dominant position, there are no arithmetic parameters or particular share of the market size as was the case in the MRTP Act, 1969. The dominance of an enterprise is measured by its power to operate independent of its competitors and to affect its competitors and consumers in its favor, apart from other criterions such as size of the enterprise, entry barriers, economic power etc.

Additionally, predatory pricing if engaged by giant retailers can be regarded as abuse of a dominant position and therefore violative of the provisions of Competition Act.

C. Combinations

On March 4, 2011, the Government of India through the Ministry of Corporate Affairs notified the provisions of the Competition Act relating to "combinations" namely Sections 5 and 6. Although notified as of March 4, 2011, these provisions came into effect from June 1, 2011. The said provisions requires every acquirer undertaking combinations (defined in section 5) above a prescribed threshold limit in India or overseas (with an India connection), to notify the CCI of a combination unless specifi-cally exempted and seek its approval prior to effectuating the same in the manner set out in Section 6 of the Competition Act and regulations governing combination.

D. Important Points

The triggers of the Competition Act relating to combinations are linked to the value of the turnover / asset of parties (the acquirer and the target) or the group [63] to which the target will belong post-acquisition or the target and not the transaction value. In terms of Section 5 of the Act, a 'combination' includes:

1. the acquisition[64] of control, shares or voting rights or assets by a person;
2. the acquisition of control of an enterprise where the acquirer already has direct or indirect control of another engaged in identical business; and
3. a merger or amalgamation between or among enterprises; that crosses the prescribed financial thresholds for the joint assets / turnover.

So consolidation activity in the retail sector will have to be mindful of the thresholds prescribed under the competition laws of India.

Recently, the CCI approved Walmart's USD 16 billion purchase of a 77 percent stake in Flipkart, despite protests from local traders in India over the deal potentially driving small retailers / shops out of business. On deep discounts and preferential treatment of sellers, the CCI acknowledged that such issues were already prevalent prior to the proposed transaction and deferred it to the industry regulator to look into. [65]

VIII. International Trade Law

The industry contends that as per the ex[6]tant foreign trade policy (**"FTP"**), retailers are eligible to get license from Directorate General of Foreign Trade (**"DGFT"**) under Served From India Scheme (**"SFIS"**). However, the same has so far been denied to retailers. Such ambiguity in the policy should be clarified and the SFIS license should be given to retailers who are generating foreign exchange inflows. Any sales using foreign currency / international credit cards must be counted against this and duty credit entitlements must be credited for retailers.

A. Trade Related Investment Measures

One of the questions raised by the Discussion Paper on FDI in retail was whether the restric-tions placed on FDI with respect to local content requirements are compatible with India's TRIMs (defined hereinafter) obligations.

The Agreement on Trade-Related Investment Measures (**"TRIMs Agreement"**), negotiated during the Uruguay Round, applies only to measures that affect trade in goods.[66]

63. Under the Competition Act, as modified by the notification dated March 4, 2011, "group" is defined to mean two or more enterprises which, directly or indirectly are in a position to:
 a. exercise 50% or more of the voting rights in the other enterprise; or
 b. appoint more than 50% of the members of the board of directors in other enterprise; or
 c. control the management or affairs of the other enterprise.

64. As per section 2(a) of the Competition Act "acquisi-tion" means, directly or indirectly, acquiring or agreeing to acquire -(i) shares, voting rights or assets of any enterprise; or (ii) control over management or control over assets of any enterprise;

65.

66. Also see India and TRIMS, available at: http://com-merce.nic.in/wtotrims.htm

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Recognizing that certain investment measures can have trade restrictive and distorting effects, it states that no Member shall apply a measure that is prohibited by the provisions of General Agreement on Tariff and Trade (**"GATT"**) Article III (national treatment)[67] or Article XI (quantitative restrictions).[68] Examples of inconsistent measures, as spelled out in the Annex's Illustrative List, include measures which require particular levels of local procurement by an enterprise (local content requirements) or which restrict the volume or value of imports that an enterprise can purchase or use to an amount related to the level of products it exports (trade balancing requirements). The local content requirements that the discussion paper raised as one among the issues for deliberation will fall within the definition of these prohib6ited measures under TRIMs Agreement.

In this regard, it is interesting to note that the Panel of WTO's Dispute Resolution Body also observed in a dispute more widely known as Indonesia-Autos that: "We recall in this context that internal tax advantages or subsidies are only one of many types of advantages which may be tied to a local content requirement which is a principal focus of the TRIMs Agreement. The TRIMs Agreement is not concerned with subsidies and internal taxes as such but rather with local content requirements, compliance with which may be encouraged through providing any type of advantage. Nor, in any case, do we see why an internal measure would necessarily not govern the treatment of foreign investment."[69]

The significance of this decision, thus, is twofold. The local content requirements do not necessarily have to be in the nature of a restriction or a prohibition. It can also be an advantage or incentive, available to only those who fulfill specified local content requirements. Second, the decision also clarifies the relationship between TRIMs Agreement and the Agreement on Subsidies and Countervailing Measures.

B. Antidumping and Subsidies and Coun-tervailing Measures

GATT (Article 6) allows countries to take action against dumping. The Anti- Dumping Agreement clarifies and expands Article 6, and the two operate together. They allow countries to act in a way that would normally break the GATT principles of binding a tariff and not discriminating between trading partners — typically anti-dumping action means charging extra import duty on the particular product from the particular exporting country in order to bring its price closer to the "normal value" or to remove the injury to domestic industry in the importing country.[70]

It provides three methods to calculate a product's "normal value". The main one is based on the price in the exporter's domestic market. When this cannot be used, two alternatives are available — the price charged by the exporter in another country, or a calculation based on the combination of the exporter's production costs, other expenses and normal profit margins. The agreement also specifies how a fair comparison can be made between the export price and what would be a normal price.[71]

One reason why restriction on FDI in retail are imposed is the potential for dumping that it brings about. Generally speaking, anti-dumping duty investigations are carried out under Sections 9A of the Customs Tariff Act, 1975 read with Section 9B ibid and the rules made thereunder. Antidumping duties are expected to overcome only the problem of dumping. To deal with the problem of direct and indirect

67. That a member State should treat imported goods and domestically produced goods at par with each other.

68. Restrictions that limit the quantum of imported goods by way of a quota, for example, as opposed to imposition of non-quantitative restrictions like a customs duty or otherwise.

69. Panel Report on Indonesia — Autos, para. 14.73, available at: http://www.wto.org/english/res_e/ booksp_e/analytic_index_e/trims_01_e.htm#fnt1.

70. Understanding the WTO: The Agreements, *Anti-dumping, subsidies, safeguards: contingencies, etc.* Available at: http://www.wto.org/english/ thewto_e/whatis_e/tif_e/agrm8_e.htm. Last accessed, August 14, 2018.

71. *Ibid.*

Government subsidies there is provision for countervailing duties. In both cases injury and casual link must necessarily be proved. These investigations are carried out under the amended provisions of the Customs Tariff Act, 1975, and the rules made thereunder.

In the same vein, care should also be exercised while promulgating export-related initiatives for the goods that are exported out of India.[72] When certain conditions are satisfied, such export incentives can also be termed a subsidy, depending on whether there is export target requirements attached to any incentive or advantage that a person can obtain.

IX. Intellectual Property Regime

Under the 9th edition of International Classification of Goods (Nice Classification) retail services are afforded separate trademark protection under category 35. E-tailing, or e-retailing, is also classified under the same category. Interestingly, the issue of whether the activity of retail trading in goods in general or specifically the services rendered in connection with retail selling constitute services for which protection by means of trade mark registration should be granted has long been debated both across the globe.

Care should be taken on dealing with issues of trademarks, copyrights, designs, patents, labeling, packaging, on-pack promotions and retail price promotions, and ancillary intellectual property rights including the negotiation of licences, efficient from a tax and regulatory perspective.

Internet retailers who wish to take advantage of an offshore base for fulfillment will need to be aware of the tax implications of the transfer of assets abroad legislation. Assets such as domain names, brand names, trademarks, customer databases and other similar assets will be utilised by the overseas fulfillment op-erations and therefore tax-efficient strategies should be employed to minimise potential tax liabilities such as royalties, fees for technical services, or income tax.

A recent development of particular interest to retail franchisors is intellectual property securitization that allows companies to account for intangible assets such as intellectual property, royalty and brands and realize their full value. In recent years, a number of large restaurant franchisors have securitized their brands to raise funds, including Dunkin Donuts and Domino's Pizza (Domino's).[73]

X. Employment Laws

As discussed above, the retail sector in India is the second largest employer after agriculture. India ranks 6th in the Retail Talent Index and the retail sector employ approximately 8 percent of India's population,[74] with demand for skilled workers expected to rise. Therefore, in the context of retail, training and retaining work force is one of the biggest challenges that this sector faces. Further, stringent Indian labor laws govern the number of hours worked and minimum wages to be paid leading to limited flexibility of operations and employment of part-time employees. Additionally, multiple local clearances are required by the same company for opening new outlets / stores, adding to the time and costs incurred to expand presence in the country.

Additionally, due to a shortage of talented professionals, especially at the middle-management level, foreign players who wish to depute employees to India will have to comply with employment related Indian immigration laws.

With retail featuring as one of the top five sectors increasingly hiring women work force, it is important to note that recently law on

72. Bhala, Raj. & Kennedy, Kevin. 1998, *World trade law: the GATT-WTO system, regional arrangements, and U.S. law, Lexis Law Pub Charlottesville, Va.*

73. Nisar, T. M., *Intellectual Property Securitization and Growth Capital in Retail Franchising. Journal of Retailing*, 3 JOURN OF RETAILING 87, 393-405 (2011).

74. *Supra* Note 7.

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prevention of sexual harassment against female employees at the work place has been enacted. The Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013 (**"Sexual Harassment Act"**) has been made effective on April 23, 2013 by way of publication in the Gazette of India.

It is also important to note the recent move of the Cabinet to introduce a new model law that would allow malls, cinema halls, restaurants, shops, banks and other workplaces to be open 24/7 for 365 days a year. The interplay of this move with the current labour and employment laws would be an interesting exercise as this would also bring e-commerce companies under the labour law rulebooks. However, the Cabinet notes that with the flexibility available to retailers to open their establishments 24/7, it will not only add thousands of additional skill jobs but also make the retail markets across the country very vibrant.

XI. Telecom and Information Technology Laws

There are a couple of regulations that retailers that resort to e-commerce and m-commerce should be aware of. Telecom Regulatory Authority of India (**"TRAI"**) had issued the Telecom Commercial Communications Customer Preference Regulations, 2010 with the objective of providing an effective mechanism for curbing unsolicited commercial communications (**"UCCs"**). The National Consumer Preference Registry is established with this end in view, which is a database of telephone numbers of subscribers who do not want to receive UCCs.

However, these regulations are being repealed as TRAI has introduced new regulations called the Telecom Commercial Communications Customer Preference Regulations, 2018, which will come into force in phases during 2018. The main problem with the existing regulations was that the existing regulations were primarily complaint and redressal based. Although the masses in India were frustrated with UCC, only a miniscule number of people used to register complaints against senders of UCC. The situation improved but only marginally once the TRAI Do-Not-Disturb (DND) mobile app was launched. Overall, even after 16 amendments; the existing regulations failed to curb the problem of unsolicited commercial communications (UCC). Whilst the new regulations provided a code of conduct, access providers were free to form their own codes of practices to procedurally and operationally implement the provisions of the draft regulations. Further, although the draft regulations were technology-centric, costs involved in implementation should not be exorbitant.

i. for transaction-related communications – there is an implied / inferred consent taken from the subscriber, and

ii. for promotional communications – if the subscriber is not registered on DND, then such communications may be sent by the telemarketer. If the subscriber is registered on the DND, then explicit consent is required to be taken from the subscriber.

The UCC regulations are however, only applicable to voice and SMS communications and not over-the-top communications, for instance such as through WhatsApp, which are becoming more prominent these days.

XII. Payment and Settlement Laws

In India, the payment and settlement systems are regulated by the Payment and Settlement Systems Act, 2007 (**"PSS Act"**) which was legislated in December 2007. The PSS Act as well as the Payment and Settlement System Regulations, 2008 framed thereunder came into effect from August 12, 2008. In terms of Section 4 of the PSS Act, no person other than the RBI can commence or operate a payment system in India unless authorized by the RBI. The RBI has since authorised payment system operators of pre-paid payment instruments, card schemes, cross-border in-bound money transfers, ATM networks and centralised clearing arrangements.

E-commerce companies that encourage online payments for goods and services are required to be compliant of the PSS Act and regulations issued in this regard.

The use of gift cards, e-wallets, pre-loadable cards and other forms of pre-paid instruments are governed under the RBI Master Direction on Issuance and Operation of Prepaid Payment Instruments dated October 11, 2017.

XIII. Consumer Protection Laws

It is important to keep in mind consumer protection issues. In India the Consumer Protection Act 1986 (**"CPA"**) governs the relationship between consumers and service/ goods providers. There is no separate consumer protection law that is specific to and regulates online transactions. Liability under the CPA arises when there is "deficiency in service" or "defect in goods" or occurrence of "unfair trade practice". The CPA specifically excludes from its ambit the rendering of any service that is free of charge. If actual sales are taking place on the online platform, the users will be considered 'consumers' under the CPA and its provision will apply to the sale of products by the online platform. Depending upon who is actually selling the goods or rendering services the liability may trigger. The distributor of goods also comes within the purview of the CPA.

There is a special adjudicating forum (with appellate forums) which is constituted under the CPA. Some of the various sanctions which may be imposed under the CPA are as below:

i. Removal of defects / deficiencies

ii. Replacement of goods

iii. Return of price paid;

iv. Pay compensation as may be awarded;

v. discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

The Prime Minister on October 26, 2017 announced that the Government of India is working on a revised consumer protection law. This announcement was not made in isolation but in fact was done as part of his address at The International Conference on Consumer Protection for East, South & South-East Countries. The revision in law has been on the cards for a while, hence on the occasion of the abovementioned conference the PM seems to have reiterated the fact.

Later, a Consumer Protection Bill, 2018 was tabled before parliament. The Bill also imposes a penalty on anyone who "publishes, or is a party to the publication of an advertisement" of food products liable for penalty if such advertisement is misleading or falsely describes such a food article. We need to examine how the safe harbour available to Intermediaries under the Information Technology Act continues to apply.

Additionally, a term 'unfair contract' has also been inserted which states that contracts which require '*... (v) prohibiting contract relating to terms permitting or having the effect of permitting one party to assign the contract to the detriment of the other party without that other party's consent; or (vi) imposes unreasonable charge, obligation or conditions on consumers.*' – Therefore, terms such as unilateral right to update T&Cs, blanket consent, arbitration clauses etc. included in terms of use would therefore need to be evaluated in this light.

XIV. Miscellaneous

Multiple laws and regulations are in force at the central, state and local levels for governing the retail sector. There are various laws such as the Consumer Protection Act, Essential Commodities Act, the Cold Storage Order, the Weights & Measures Act, the Shops Establishments Acts, code of advertising, local labor laws that may become applicable to retail sector depending on the kind of business the entity is engaged in.

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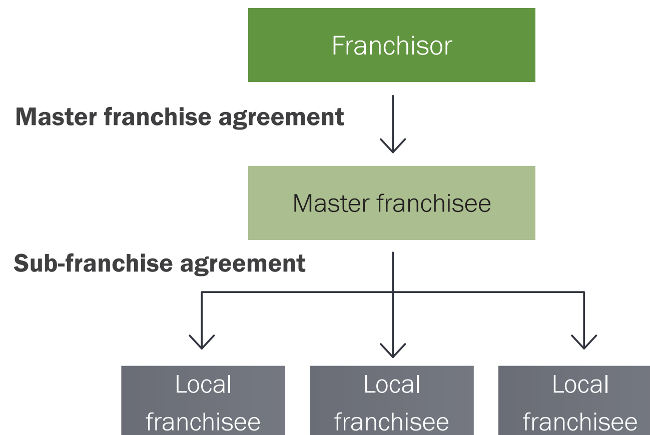
3. Permissible Models for Entry of Foreign Players

While there is no proven model for India as yet, in addition to direct foreign investment in companies engaged in retail trading in compliance with the sectoral cap and conditions that may be applicable, the following are some permissible models for entry into the Indian retail sector.

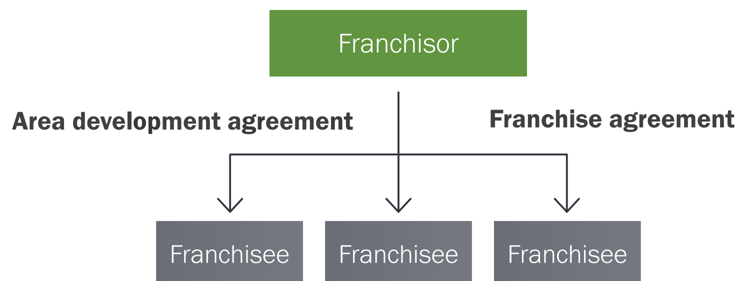
I. Franchise Agreements

Franchising is the easiest and most widely used route by international retailers to enter India. While, the Indian law does not define franchising, it simply means a method of distributing products or services. The *Blacks Law Dictionary defines a franchise as "a license from the owner of a trademark or trade name permitting another to sell a product or service under that name or mark."*[75] Though there is no specific law pertaining to franchising in India, franchising as a business deals with various general commercial laws and industry specific laws. It would be important to understand how these different laws can affect a franchising business in India and what issues could arise. There are various forms of entering into franchising arrangements. Some of the popular franchise models are reproduced below:

Structure 1



Structure 2



75. Blacks Law Dictionary, (6th Ed.) Centennial Edition (1891-1991) at p. 658.

Under the master franchise structure, a multinational company i.e. franchisor will typically enter into a master franchise agreement for a particular territory with the counterpart in effect allowing the master franchisee to sub-franchise the rights to local franchisee in that particular jurisdiction.

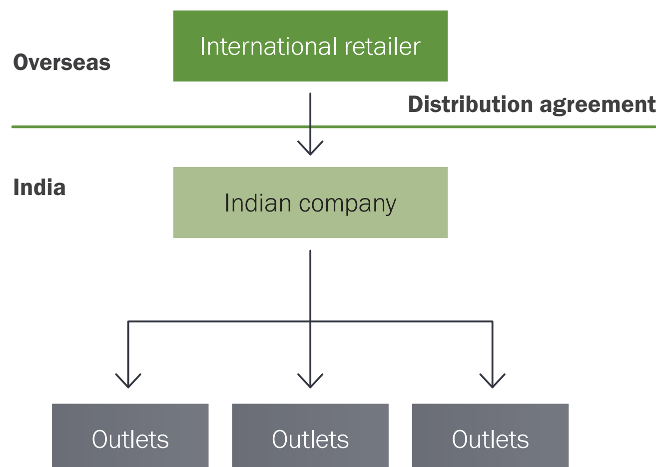
Under the second structure, the franchisor directly enters into franchise agreement with local area franchisee unlike the master franchise structure.

While the concept of franchising seems simple, there are several issues that must be dealt with before entering into a franchising arrangement. For example: In a franchising arrangement, the issues with respect to enforceability of franchise agreement, protection of intellectual property rights of the franchisor / owner, constitution of agency and issues under applicable anti-trust laws must be kept in mind.

Further, from an exchange control perspective, in an international franchise arrangement between an Indian resident and a non-resident, remittance for purchase/ use of trademark/ franchise is freely permitted.[76] Further, withdrawal of foreign exchange by persons for payment of royalty and lump-sum payment under technical collaboration agreements can be made without the approval of Ministry of Commerce and Industry, Government of India.[77]

II. Strategic Licensing Agreements

Under the strategic licensing arrangement, an international retailer licenses distribution rights to Indian companies. Through these rights, Indian companies can either sell it through their own stores, or enter into shop-in-shop arrangements or distribute the brands to franchisees. The diagrammatic representation of the structure is given below:



76. Vide Press Note No. 8 (2009 Series), dated December 16, 2009

77. Vide RBI/2009-10/465 A. P. (DIR Series) Circular No. 52 dated May 13,. 2010

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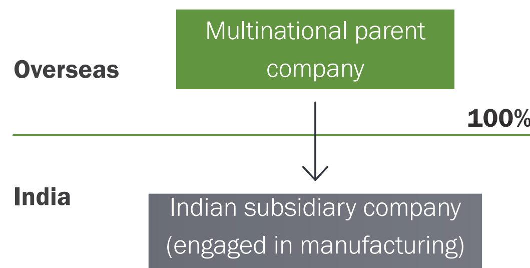
III. Manufacturing and Wholly Owned Subsidiaries

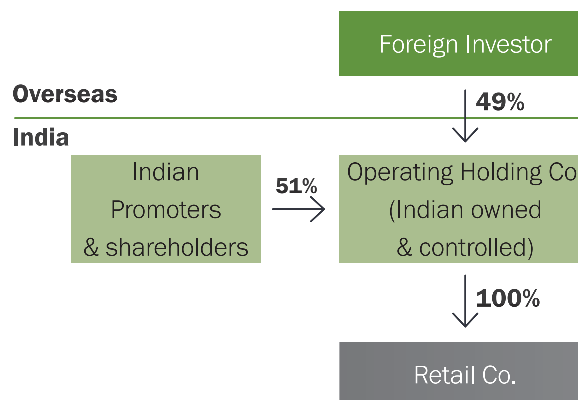
From exchange control perspective, conditionalities in retail trading are applicable to companies engaged in trading (whether SBRT or MBRT or wholesale cash and carry). Therefore, international brands have set up wholly-owned subsidiaries engaged in manufacturing of products are allowed to do retail trading. Further, these manufacturing companies can sell their products in India under franchising, distribution arrangements or through their own outlets. The diagrammatic representation of the structure is given below:



IV. Investment into an Indian owned and controlled company

According to the FDI Policy, an Indian company which is owned and controlled[78] by an Indian resident directly or through Indian companies, will be considered as an Indian company. Thus, any downstream investments made by such a company (which has foreign investment of less than 50 percent) would not be taken as having any indirect foreign investment. However, this methodology for computation of foreign investment will not apply to sectors that are governed specifically by separate statutes, such as the insurance sector.

In light of the above and based on the interpretation of the provisions of the FDI Policy, if an Indian operating and holding company is owned and controlled by Indian promoters/ shareholders, the downstream investment in a company (carrying on retail trading) should not be regarded as FDI even though there is foreign investment in an Indian operating and holding company, provided the investment of foreign investor in Indian operating and holding company is below 50 percent and the foreign investor does not exercise control in Indian operating and holding company. The diagrammatic representation of the structure is given below:



78. The definition of 'control' was recently amended by way of Press Note 4 (2013 Series) and now reads as follows: 'Control' shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements." Available at: http://dipp.nic.in/English/acts_rules/Press_Notes/pn4_2013.pdf.

However, it is possible, that the regulator may take a different view on this structure. This is because the downstream investment is in a subsidiary that is engaged in business falling in a restricted sector and the regulator may view the proposed structure as not aligned with the sectoral caps on retail trading. One must keep this in mind when finalising investment structures in retail sector.

V. Investment in Back end Structure

Investment in retail sector can be made in wholesale trading company (**"WTC"** or **"back end company"**) in which 100 percent FDI is permissible under the automatic route also engaged in back end activities. Such a WTC can undertake transactions with a front end company (**"Retail Co."**) engaged in retail trading. However, such wholesale trade made to Retail Co. if a group company cannot exceed 25 percent of the total turnover of WTC.

Further, WTC may enter into a licensing agreement for use of brands as well as a services agreement whereby WTC may provide certain services to Retail Co.

Given the sensitivity surrounding the retail sector in India any transaction structure that is proposed must be mindful of the overall policy perspective of the Government and to that extent may be exposed to a degree of regulatory scrutiny.

VI. Operating based on Marketplace Model

Marketplaces are platforms that enable a large, fragmented base of buyers and sellers to discover price and transact with one another in an environment that is efficient, transparent and trusted.

As per the FDI Policy, marketplace based 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.

The main feature of this model is that the e-commerce firms like Flipkart, Snapdeal, Amazon, etc. will be providing a platform for customers to interact with a selected number of sellers. When an individual is purchasing a product from an e-commerce retailer, he will be actually buying it from a registered seller in that e-commerce platform. Hence, this entity only provides a platform where a consumer meets a seller. Inventory, stock management, logistics, etc. are not supposed to be actively done by the e-commerce firm.

As per the latest policy, 100 percent FDI under the automatic route is permitted in the marketplace model of e-commerce which means that we could see a shift of most e-commerce players towards adoption of this model.

VII. Operating based on Inventory based Model

As per the FDI Policy, inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and sold to the consumers. The main feature of this model is that the customer buys the product from the e-commerce firm. He manages the inventory, interfaces with customers, runs logistics and is involved in every aspect of the business.

However, the FDI Policy does not allow FDI in this model of e-commerce. This could mean that e-commerce entities who run on this model start restructuring their business method.

percent Companies Act, 2013 in terms of restrictions on layers of subsidiary.

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VIII. Investment under the Foreign Portfolio Investment Route

A foreign investor can also consider making investment in securities of an Indian listed company engaged in retail sector using the foreign portfolio investment route in compliance with the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014 (**"FPI Regulations"**).

Given the investment will be subject to FPI Regulations, the sector specific conditionalities imposed under the FDI Policy on FDI investment in retail sector shall not be applicable.

The foreign investor who satisfies the eligibility criteria prescribed under the FPI Regulations will have to obtain a certificate of registration through designated depository participants on behalf of SEBI in one of three categories prior to making any investments.[79]

Such an FPI can invest in shares, debentures and warrants of companies, unlisted, listed or to be listed on a recognized stock exchange in India, through primary and secondary markets provided that investment in the issued capital of a single retail company by a single FPI or an investor group shall be below 10 percent of the total issued capital of the company. Further, the investment shall be subject to SEBI regulations in relation to issuance of shares and disclosures etc.

79. The FPI Regulations classify FPIs into three categories based on their perceived risk profile. An outline of the three categories as follows: A Category I investor would include governments and government related investors such as sovereign funds, while Category II would include appropriately regulated entities primarily in the banking and financial sector, including banks, broad based funds, asset reconstruction companies, investment/ portfolio managers. Lastly Category III would cover all others not covered under Category I or II such as endowments, charitable societies, charitable trusts, foundations, corporate bodies, trusts, individuals and family offices.

IX. Investment in brands using step down subsidiary model

Where a multinational retail company is owner of various distinct brands as is common in the fashion and luxury space, such a foreign company could consider holding new/ different single brand in a different entity by dropping a step down in the existing structure.

4. Conclusion

The Indian retail sector has matured over the years but is still highly unorganized. The country's estimated annual retail opportunity of USD 600 billion is a great opportunity for both domestic and international retailers.

Cumulative FDI inflow from April 2000 to December 2017 in the retail sector reached USD 1,141 million. The country needs more investment in the retail and allied sectors such as cold chains, warehousing and logistics.

The reforms in FDI in both SBRT, MBRT and further investments by joint ventures with domestic retail players will give the industry a boost and have a trickle-down effect on the agricultural and food sector in India.

– **Retail Team**

You can direct your queries, views, suggestions, and comments on our research paper to **retailteam@nishithdesai.com**

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Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparallel mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

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