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NEWSLETTER

April – 2018

DAMANIA & VARAIYA

Chartered Accountants

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FEMA

External Commercial Borrowing (ECB) under Foreign Exchange Management Act (FEMA) – Part 2:

In the first part, we discussed about the framework of raising ECB under Track I. In this paper, we will discuss the framework of raising **ECB under Track II**.

Track II: Long Term foreign currency denominated ECB with minimum maturity period of 10 years.

Forms of ECB

ECBs can be raised in any of the following forms:

1. Loans
2. Issue of non-convertible, optionally convertible or partially convertible preference shares/debentures
3. Buyers' credit
4. Suppliers' credit
5. Foreign Currency Convertible Bonds (FCCBs) or
6. Foreign Currency Exchangeable Bonds (FCEBs)

Eligible Borrowers:

Any Indian Company, body corporate or firm can raise money through ECB. Following categories of entities can raise ECB under track II:

i. Real Estate Investment Trusts (**REITs**);
ii. Infrastructure Investment Trusts (**INVITs**);
iii. All the Companies that are mentioned in track I i.e.:
   a) Companies in manufacturing sector
   b) Software development sector
   c) Shipping and Airlines Companies
   d) Units in Special Economic Zones (SEZs)
   e) Companies in infrastructure sector
   f) Certain categories of NBFCs.

Recognised Lenders:

Following non-resident lenders are recognised lenders of ECB under Track II:

All the recognised lenders under Track I **except overseas branches or subsidiaries of Indian banks** are recognised lenders under Track II. They are:

1. International Banks
2. International Capital Markets
3. Multilateral Financial institutions
4. Export Credit Agencies
5. Suppliers' of Equipment
6. Foreign Equity Holder - Foreign Equity Holder would mean direct equity holding of minimum 25% in borrowing Company OR indirect equity holder with minimum indirect equity holding of 51% OR group Company with common parent Company.

These lenders proposing to extend ECB to Indian borrower have to furnish a certificate of due diligence from overseas bank and is subject to regulations of host country which should clearly mention:

i. The lender maintains account with the bank since minimum of 2 years;
ii. The lending entity is organised as per local laws and it held in good esteem by business community and
iii. There is no criminal action pending against it.

This host country must adhere to Financial Action Task Force (FATF) guidelines on Anti-money laundering, combating the financing of terrorism.

Permitted End-use of funds:

The ECB proceeds under Track II can be used for ALL purposes **except the following**:

i. Real estate activities;
ii. Investing in Capital markets;
iii. Using the proceeds of equity investments domestically;
iv. On-lending to other entities with any of the above activities;
v. Purchase of Land.

The respective conditions mentioned for end-use prescription under track I will also be applicable under Track II.

Minimum Average Maturity period:

Under Track II, Indian eligible borrower can accept ECB from non-resident recognised lender with minimum maturity period of **10 years irrespective of the amount**.

All-in-cost ceiling:

Under Track II, the maximum spread over the benchmark allowed is 500 basis points per year.

Penal interest, in case of default or breach of agreement, should not be more than 2% over the contracted rate of interest.

Debt-Equity ratio:

For ECB raised from direct equity holder under automatic route, the ECB liability of the borrower towards foreign equity holder should not be more than 4 times the equity contributed by the foreign equity holder. This mean that the debt equity ratio towards the foreign lender should not be more than **4:1.** For ECB raised under approval route, this ratio should not be more than 7:1. However, for ECBs raised by the borrower is **less than USD 5 million, these restrictions would not apply.**

DIRECT TAX

Foreign directors in Indian Company – Requirement of obtaining Permanent Account Number:

Section 139A of The Indian Income Tax Act specifies the list of persons who are required to obtain Permanent Account Number (PAN card) within the prescribed time limits.

Finance Act, 2018 has introduced clause (v) and (vi) to sub-section (1) to Section 139(1) to include the following categories of persons who are also now required to obtain their PAN card.

1. Every resident, other than individual, which enters into a financial transaction of an amount aggregating to Rs. 250,000/- or more in a financial year.

2. Every person who is a Managing Director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer or office bearer of the person referred to in above clause or any person competent to act on behalf of the person referred to in above clause.

DIRECT TAX*(cont.)*

This signifies that every person, whether resident or non-resident in India, who is a director in an Indian Company that has financial transaction of Rs. 250,000/- or more in a financial year will have to compulsory obtain Indian PAN card.

Let us take an example that say a Company in Italy has set up its Indian Private Limited Company in India (ICo). The ICo has three directors, two of them are Italian resident and one Indian resident. The ICo has financial transaction in excess of Rs. 250,000/- in a financial year. Let us also assume that the Italian directors are not working for Indian company and they are not paid any salary from the ICo.

According to the new provisions in the Act, in addition to the Indian director, both the Italian directors are also required to obtain Indian PAN card.

Similar situation will also prevail if Limited Liability Partnership (LLP) is formed and there are foreign partners in that LLP. In such case the partners in LLP, whether resident in India or non-resident, will have to obtain Indian PAN card.

Penalty for failure to comply with this provision:

If any person fails to comply with the provisions of obtaining PAN card as stated above, the Assessing Officer may, under section 272B of The Indian Income Tax Act, levy penalty of a sum of Rs. 10,000/- for such default.

Compiled by: Malay Damania, Partner

OTHER ALLIED LAWS

Tax-free gratuity ceiling raised to Rs. 20 lakh for private sector employees:

The Centre has recently approved an amendment bill that seeks to increase the maximum limit of gratuity for private and public sector employees from Rs 10 Lakhs to Rs 20 Lakhs. This amendment effective from 29th March 2018, vide **notification S.O. 1420 (E) dated 29.03.2018** increased the limit of amount of gratuity payable to an employee under sub-section (3) of section 4 of the Payment of Gratuity Act, 1972 (39 of 1972) from the existing limit of Rs. 10 Lakhs to Rs. 20 Lakhs.

The notification follows changes in the Payment of Gratuity Act which had empowered the government to fix the ceiling of the retirement benefit through an executive order.

The amendment bill approved by Parliament in the month of March 2018 had also empowered the government to fix the period of maternity leave. Central Government hereby specifies for the purposes of the clause (iv) of the Explanation to sub-section (2) of section 2A of the Payment of Gratuity Act, 1972 that the total period of maternity leave in the case of a female employee shall not exceed twenty-six weeks.

OTHER ALLIED LAWS*(cont.)*

Accordingly, the central government has fixed the total period of maternity leave in the case of a female employee to 26 weeks.

After implementation of the 7th Central Pay Commission, the ceiling of tax-free gratuity amount for the central government employees was increased from Rs 10 lakh to Rs 20 lakh. The unions have been demanding for inclusion of the change in the Payment of Gratuity Act.

So far, formal sector workers with five or more years of service are eligible for Rs 10 lakh tax-free gratuity after leaving job or at time of superannuation.

The Payment of Gratuity Act, 1972, was enacted to provide for gratuity payment to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments.

The law is applicable to employees, who have completed at least five years of continuous service in an establishment that has 10 or more persons.

Compiled by: Brajeswar Pandey, Outsource Manager

PROUD MOMENT FOR DNV

On Thursday, 26th April, 2018 DNV hits the Financial Express front page headlines.

The news on Alok Industries Ltd on front page carried the mention of DNV as an independent agency for verification of trading transactions of Alok Industries Ltd with the perspective of reporting under section 66 of IBC, 2016 caught attentions of its readers including professional / corporate giants in the industry and other stake holders. Once again DNV has successfully proved its presence in rendering the quality professional services to its client and is acknowledged by newspaper headlines. It's a big moment for DNV. Congratulations to the entire Audit team to successfully carry out this assignment.

PROUD MOMENT FOR DNV *(cont.)*

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EDITORIAL

FDI in multi-brand retail a must if FDI in e-tail is allowed

PRANJUL BHANDARI

Soaring deficits mean states' debt has shot up — repayment bill will be high for a few years

COMPANIES, P6

TURBULENT TIMES

Neemuchwala-led Wipro posts 6.7% sequential decline in profit

INTERNATIONAL, P14

MAJOR PHARMA DEAL

Weber-led Takeda agrees to buy Shire for $64 bn

MUMBAI, THURSDAY, APRIL 26, 2018

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IN THE NEWS

Asaram found guilty of rape, gets life term

A JODHPUR court on Wednesday sentenced self-styled godman Asaram to life in prison after finding him guilty of raping a teenage girl in his ashram five years ago, the second case of a powerful spiritual leader being convicted of a sexual offence in less than a year, reports **PTI**. The verdict was read out in Jodhpur Central Jail, where he has spent over four years.

Jugnoo eyes Singapore as Uber drives off

RIDE-HAILING firm Jugnoo plans to enter the Singapore market next month, CEO Samar Singla told **Reuters** on Wednesday, joining other firms eyeing the city state as Uber prepares to leave. The Uber app will continue to operate in Singapore till May 7, though it has shut down in rest of Southeast Asia after selling its regional operations to local competitor Grab.

Govt sends notices to CA, Facebook again

THE GOVERNMENT on Wednesday served a second set of notices to Cambridge Analytica (CA) and Facebook over the recent data breach after finding discrepancies between the earlier responses given by the two companies, sources told **PTI**. They have been asked to reply to the additional

ALOK INDUSTRIES

Debtors were not 'locatable', says RP

Debt collection agency appointed by resolution professional to locate debtors to recover ₹11,037 cr

SHAYAN GHOSH
Mumbai, April 25

STEPS TAKEN BY the resolution professional (RP) for Alok Industries to recover trade outstandings to the tune of ₹11,622 crore from 5,293 debtors of the textile company remained unsuccessful as 2,467 of them could not be traced, documents perused by *FE* show.

"Debtors were not locatable at the addresses that were provided by Alok," the documents, understood to have been made available to the committee of creditors (CoC) ahead of a meeting scheduled for April 13 under the Insolvency and Bankruptcy Code (IBC) process, noted. The RP for Alok Industries is Ajay Joshi.

Outlining the steps taken by the RP to recover the trade outstandings, the papers state:

"Appointed send legal notices to the debtors. Out of 5,293 legal notices sent during December, 2017, 2,822 letters returned undelivered and status of 2,467 legal notices remain unclear." A debt collection agency had been appointed to locate debtors and recover outstanding, the documents said.

According to the papers, the total "trading debt on account of sale of fabric (Trading Transactions) to various traders of Alok (numbering approximately 5,293) ("Trading Debtors") as at June 2017 amounted to about ₹11,622 Crores".

The papers say Damania & Varaiya, a CA firm, was appointed (pursuant to fourth CoC meeting) to conduct an independent verification of the transactions (trading transactions). "DNV was unable to conclude its observations on the trading business segment of Alok with the perspective of reporting under Section 66 of IBC, 2016," the documents say. They also noted that a forensic audit conducted by Grant Thornton — for the period April 1, 2012, to March 31, 2015 — found "no malfeasance on the part of promoters of the Alok or any transfer involving siphoning of funds was observed".

The RP cited some reports that were analysed to understand the reason for the high quantum of outstandings. While the stock audit reports of 2016 stated that "genuineness of sales made to Debtors with outstanding amounts above ₹50 lakh have been verified, the statutory auditor reports of FYs 2015-17 made no comment/qualification with respect to these trading transactions.

Continued on Page 2

EXPOSURE (₹ crore)

Bank	Exposure
SBI	10,379
Axis Bank	1,688
IDBI Bank	1,265
Canara Bank	1,024
Bank of Baroda	877
Dena Bank	783
Andhra Bank	779
Corp Bank	452
BoM*	371
Allahabad Bank	101

SOME RELIEF

Move to cap oilcos' cost recovery dropped

SAURABH KUMAR
New Delhi, April 25

IN WHAT WOULD give a modicum of relief to the high-tax-paying hydrocarbon exploration companies including Reliance Industries and Cairn, the government has withdrawn a decision to virtually deny these firms their contractual right to recover full costs, before sharing profits with it. The Directorate General of Hydrocarbons (DGH) had, while approving the oil companies' budget and work programmes for the current financial year, introduced a clause that the "investment multiple at the end of the year 2018-19 shall not be reduced..."

What this meant was that the government's share of 'profit petroleum' would be intact, even if the companies stepped up capex during the year. The move was patently contrary to the terms of production-sharing contracts (PSC), which allow full cost recovery by the oil explorer-producers.

These terms continue to be part of the earlier PSCs while a simpler revenue-sharing formula that allows minimal scope for uncertainties will be built into new contracts under the Hydrocarbon Exploration Licensing Policy (HELP).

Put simply, profit petroleum is the profit retained after all investments are recovered by the contractor; a part of such profit is required to be shared with the government, the

MUMBAI REALTY

Maximum City finally gets maximum land bank boost

Govt clears 3,685 ha of land tagged as no development zone, will create 1 m affordable housing units by 2034

FE BUREAU
Mumbai, April 25

IN THE BIGGEST ever addition to Mumbai's land bank, the Maharashtra government on Wednesday said it will unlock 3,685 hectares (ha) of public and private land currently tagged as no development zones. The land, it said, will be used to create a million affordable housing units by 2034, besides social infrastructure.

According to the Development Plan 2034 (DP2034) document, the total cost of implementation of the plan by the planning authority Municipal Corporation of Greater Mumbai is estimated at ₹14.15 lakh crore. This includes the acquisition cost of all reserved lands, cost of constructing new roads and widening of existing ones, building construction as well as cost of open space and cemetery development.

Continued on Page 2

Estimated cost for Mumbai Development Plan 2034

Area in sq km / Estimated cost in ₹ crore

	Area in sq km	Estimated cost in ₹ crore
Acquisition of all reserved land (100%)	4,81,21,192	13,44,506
Cost of road construction	1,05,01,254	9,472
Cost of road widening	80,15,228	5,731
Cost of building construction	1,97,67,350	49,418
Cost of open space and cemetery development	1,91,72,011	6,193

Total estimated cost: ₹14,15,320 cr

OTT stuff

ANUSHREE BHATTACHARYYA

Local heroes

Video over-the-top or OTT platforms catering to Hindi and regional audiences command a higher viewership while OTT platforms that primarily have English content are tying up with telcos as well as DTH players in an effort to boost viewership.

Total unique viewers (million)

Watch time (billion minutes)