

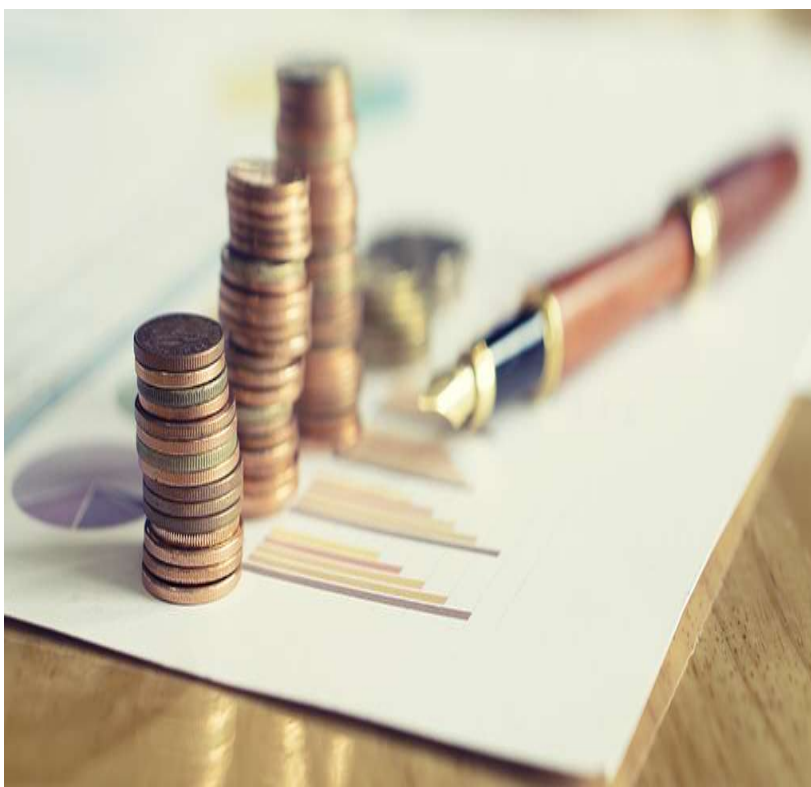


NEWSLETTER

July - 2018

MVDCO ADVISORY SERVICES

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FEMA

Transfer of equity shares – Cases where RBI permission is mandatory:

1) Transfer from Resident to Non-residents by way of sale where:

- a) Transfer is at a price which falls outside the pricing guidelines and the transaction does not fall under specific exceptions;
- b) Purchase of shares by a

Non-resident involves deferment of payment of the amount of consideration. However, the deferment of payment is permitted for up to 25% of the total consideration payable within a period of 18 months from the date of transfer agreement.

FEMA(cont.)

2) Transfer by way of gift by a Resident to Non-resident:

- a) The proposed transferee, the Non-resident, is eligible to hold such shares under FEMA regulations as amended from time to time;
- b) The gift value does not exceed 5 per cent of the paid-up capital of the Indian company;
- c) The applicable sectoral cap limit in the Indian company, if any, is not breached;
- d) The transferor and the proposed transferee are “close relatives” as defined in **Section 2(77) of Companies Act, 2013**;

- e) The value of shares to be transferred together with value of any other capital instruments already transferred by the Resident transferor, as gift, to any person residing outside India does not exceed the USD 50,000 during the financial year.

Details and documents to be submitted in such cases:

- i. Name and Address of donor and donee
- ii. Relationship between them
- iii. Reasons for making the gift
- iv. A certificate from a Chartered Accountant on the value of such shares
- v. A certificate from the Indian Company stating that the proposed transfer would not breach the applicable sectoral cap under FDI and that the proposed number of shares to be held by Non-resident transferee shall not exceed 5% of the paid-up capital of the company.

FEMA(cont.)

vi. An undertaking from the Resident transferee that the value of the shares to be transferred together with value of any other capital instruments already transferred by him, as gift, to any person residing outside India does not exceed the USD 50,000 during the financial year.

vii. In case the shares in question are partly paid, a

declaration from the Non-resident transferee that he is aware of the liability as regards calls in arrear and consequences thereof.

3) Transfer of shares from NRI to non-resident:

RBI permission is mandatory in all cases of transfer of shares from a Non-resident Indian to a Non-resident.

Conversion of ECB into Equity Shares:

An Indian Company is permitted to borrow overseas funds from “Recognised Lenders” under the RBI guidelines on External Commercial Borrowings (ECB). ECB is generally considered to be under Approval route since the agreement between the lender and borrower has to be submitted to the RBI to obtain Loan Registration number (LRN) before the funds can be utilised.

Further various conditions like recognised lender, eligible borrower, repayment period, restrictions on end-use, ceiling on interest cost etc. has to be adhered to and complied with. The Indian Company is also required to file Form ECB-2 with the RBI every month reporting specified financial transactions taken place during the month.

FEMA(cont.)

It may so happen that the Indian company who has borrowed funds from the recognised lender is either not in a position to repay the borrowing or for any other reasons wishes to issue Equity shares in lieu of the ECB. We therefore analyse herewith whether such conversion is permitted and if at all under what conditions.

The Indian Companies have been granted general permission for conversion of ECB into Equity shares or fully compulsorily and mandatorily convertible preference shares ("Equity Shares"), subject to the following conditions and reporting requirements:

Automatic or Approval route:

The activity of the Indian company is covered under the Automatic Route of the Foreign Direct Investment (FDI Policy) or if the company is engaged in the sector that requires Government permission, permission will need to be obtained by the company seeking the conversion;

Sectoral cap:

The foreign equity in the Indian Company, after conversion of ECB into equity, is within the sectoral cap of equity shares, if any, as defined under the FDI Policy. One will therefore have to look at the sector in which the Indian Company is operating and check if there is any sectoral cap on the percentage of foreign equity in that sector. In case of such sectoral cap, the percentage of foreign equity in the Indian Company

should not exceed this sectoral cap after effecting the conversion of CB into Equity shares;

Consent from Lender:

Such conversion shall be with the lender's consent and without any additional cost.

Pricing guidelines:

Price per share at which the ECB is converted into Equity shares in the Indian Company shall not be less than fair value of the shares done by Merchant Banker or Chartered Accountant as per any internationally accepted pricing methodology on arm's length basis as prevailing on the date of conversion.

Exchange rate:

For the purpose of conversion of ECB into Equity, the exchange rate shall be taken at the rate prevailing on the date of agreement between the parties concerned for such conversion, or lesser rate as may be mutually agreed between the parties.

Period:

The conversion facility is available for ECB whether or not such ECB is due for payment or not. Therefore, if the Indian Company has taken ECB for a period of say 5 years and if it wants to convert the ECB before the expiry of 5 years, the same is possible to be done.

FEMA(*cont.*)

Partial conversion:

The conversion of ECB into Equity may be done partially or fully or even in phases.

Other compliance:

The parties will need to be compliant with the requirements prescribed under any other statute and regulations in force.

Reporting requirements:

For partial conversion into Equity, the converted portion will have to be

reported in Form FC-GPR as prescribed for reporting of FDI inflows whereas the non-convertible portion will continue to have to be reported in Form ECB-2 with suitable remarks of “ECB partially converted into Equity.”

For full conversion of ECB into Equity, the entire portion will have to be reported in Form FC-GPR as prescribed for reporting of FDI inflows. The form ECB-2 shall be filed with the suitable remarks of “ECB fully converted into Equity.” Subsequently the Company is not required to file ECB-2 return.



AUDIT

Amendments to Form No. 3CD:

The CBDT has by issue of a notification no. GST 666(E) dt. 20th July, 2018 included certain clauses to be reported in the tax audit report prescribed u/s 44AB in the Form No. 3CD. Following are the additional reporting requirements to be made in Form No. 3CD. **The amendment is applicable w.e.f. 20th day of August, 2018.**

Following are the additional reporting requirements in Form 3CD which has been discussed in brief clause-wise:

1. Clause 4 of 3CD:

Clause 4 has been amended to require *reporting of GST registration number.*

AUDIT(cont.)

2. Clause 19 of 3CD:

Clause 19 has been amended to require reporting of particulars of amount of deduction claimed u/s 32AD.

Subsection 1 of Section 32AD talks about deduction available in case of investment in new plant and machinery in notified backward areas in certain States.

3. Clause 24 of 3CD:

Clause 24 has been amended to require reporting of particulars of amount deemed to be profits or gains u/s 32AD.

Sub-section 2 of section 32AD states that if any asset acquired and installed by an assessee is sold or otherwise transferred, except in case of amalgamation or demerger etc., within 5 years then the amount of deduction allowed u/s 32AD (1) shall be deemed to be the income of the assessee chargeable under the head "Profits and gains of business or profession" of the previous year in which such new asset is sold or otherwise transferred, in addition to taxability of gains, arising

on account of transfer of such new asset.

4. Clause 26(g) of 3CD:

Clause g has been inserted in Section 43B which says that any payment to be done to the Indian Railways for the use of Railway assets shall be allowed as deduction only on payment basis. In clause 26 now such transactions also needs to be reported.

5. Clause 29A of 3CD:

New clause 29A has been inserted which requires reporting of any amount forfeited that was received as advance during negotiation for transfer of a capital asset prescribed u/s 56(2)(ix).

6. Clause 29B of 3CD:

New clause 29B has been inserted which requires reporting of any amount received u/s u/s 56(2)(x).

Section 56(2)(x) talks about amount received by a person without consideration or with inadequate consideration.

AUDIT(cont.)

7. **Clause 30A of 3CD:**

New clause 30A has been inserted which requires *reporting of any primary adjustment made u/s 92CE(1)*.

Section 92CE(1) gives 5 instances where a transfer pricing adjustment could be made.

Further the new clause 30A also requires that where a primary transfer pricing adjustment has been made u/s 92CE(1), *whether the excess money available with the associated enterprise is required to be repatriated to India or not? If yes, then whether the money has been repatriated or not and if no, then the amount of imputed interest on such excess money needs to be reported.*

8. **Clause 30B of 3CD:**

New clause 30B has been inserted which requires *reporting of any interest expense or expenses of similar nature incurred by an assessee exceeding Rs 1 crore as prescribed u/s 94B(1) in respect of debt issued by a non-resident associated enterprise.*

Further the new clause 30B also requires *reporting of the excess interest paid that is calculated in the manner prescribed u/s 94B(2)*.

The calculation of excess interest u/s 94B(2) is:

- any amount of interest paid by the assessee in excess of 30% of its EBIDTA of that previous year or;
- the amount of interests actually paid, whichever is less.

Similarly the clause also requires *reporting of brought forward / carried forward calculated in the manner prescribed u/s 94B(4)*.

9. **Clause 30C of 3CD:**

New clause 30C has been inserted which requires reporting of the *nature of any impermissible avoidance arrangement as prescribed u/s 96 entered into by the assessee and also the amount of tax benefit arising*, in aggregate, to all the parties covered by the arrangement.

Section 96(1) prescribes 4 situations which can give rise to an impermissible avoidance arrangement.

10. **Clause 31(ba) to 31(bd) of 3CD:**

New sub-clauses 31(ba) to 31(bd) has been inserted after clause 31(b).

Clause 31(ba):

Clause 31(ba) requires *reporting of an amount received in cash in excess of Rs 2 lakhs* as specified in Section 269ST from a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion from a person.

AUDIT(cont.)

Clause 31(bb):

Clause 31(bb) requires *reporting of an amount received by cheque or a bank draft not being an account payee cheque or a bank draft* in excess of Rs 2 lakhs as specified in Section 269ST from a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion from a person.

Clause 31(bc):

Clause 31(bc) requires *reporting of an amount paid in cash in excess of Rs 2 lakhs* as specified in Section 269ST to a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion to a person.

Clause 31(bd):

Clause 31(bd) requires *reporting of an amount paid by cheque or a bank draft not being an account payee cheque or a bank draft* in excess of Rs 2 lakhs as specified in Section 269ST to a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion to a person.

11. Minor amendments of insertion of words such as “taken or accepted”, “repayment of” in the existing sub-clauses of Clause 31.

12. Clause 34(b) of 3CD:

Existing clause 34(b) has been replaced with new reporting requirements. Earlier the information in respect of the statement of tax deducted (TDS) or tax collected (TCS) was required to be furnished only if a person has not filed the TDS/TCS return within the prescribed time limit. Now the amended clause 34(b) *requires reporting of all the TDS/TCS return filed by the person.*

13. Clause 36A of 3CD:

Clause 36A has been inserted which requires *reporting of the amount received by a person in the nature of deemed dividend as specified in Section 2(22)(e).*

14. Clause 42 of 3CD:

Clause 42 has been inserted which requires a person to *report the details of Form No. 61 or Form No. 61A or Form No. 61 B filed, if applicable.*

Form No. 61 is a form of declaration to be filed by a person who has agricultural income and is not in receipt of any other income chargeable to income-tax in respect of transactions specified in Rule 114B.

Form No. 61A is a form on Annual Information Return of Statement of Financial Transactions u/s 285 (Rule 114E).

Form No. 61B is a form on Statement of Reportable Account under sub-section (1) section 285BA (Rule 114G(8)).

AUDIT(cont.)

15. Clause 43 of 3CD:

Clauses 43 has been inserted which requires reporting on whether a resident parent entity or an alternate reporting entity has furnished Country by Country Reporting (CbCR) as referred to in Section 286(2).

16. Clause 44 of 3CD:

Clauses 44 has been inserted which requires reporting on the bifurcation of total expenditure into:

- expenses incurred in respect of GST registered entities and;

- expenses incurred in respect of non-GST registered entities.

Further the clause requires reporting of the expenses incurred in respect of GST registered entities be segregated into:

- expenses relating to GST exempt goods or services;
- expenses relating to entities falling under composition scheme;
- expenses relating to other registered entities and
- total payment to registered entities.