

FDI in Multi-brand Retail on Track

Service Tax Clarification For Restaurants And Hotels

Update on Competition Law

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The Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India ("DIPP") is, reportedly, expected to approach the cabinet secretariat with a roadmap for permitting Foreign Direct Investment ("FDI") in multi-brand retail. The cabinet secretariat promotes new policy initiatives by ironing out differences among different ministries and assists decision making in the Government.

Given the sensitivity, intense debate and difference of opinion on the issue of permitting FDI in multi-brand retail, the DIPP is expected to advocate liberalization of the sector in a stepwise manner. To start with, the DIPP is expected to propose that:

- FDI in multi-brand retail be limited to a maximum of 51%, most likely with prior Government approval;
- Minimum FDI in any multi-brand retail venture should be USD 100 million;
- 50% of the FDI in any multi-brand venture be invested and deployed in development of back end infrastructure, directly or through a dedicated entity;
- Multi-brand retailers be required to source at least 30% of their products, including food items, from small and medium scale enterprises;
- Multi-brand retailers also be required to sell at least 30% of their products to small retailers;
- Post FDI, multi-brand retailers file periodic statements and reports with the Government showing compliance with the prescribed conditions;
- The number of outlets in big cities be capped; and
- The State Governments to have a final say in whether or not to permit FDI funded multi-brand retail outfits in their respective state(s).

The FDI Policy of India currently prohibits FDI in multi-brand retail activities, while permitting FDI up to 100% in cash and carry wholesale trading and up to 51% (with Government approval) in single brand retail trading activities.

During the past couple of years, the Government has regularly expressed its views that FDI in multi-brand retail trading would create large-scale employment, reduce wastage of farm products currently estimated to be at 40% of India's total farm production, and help in taming inflation. The local industry groups have however opposed the move fearing unequal competition with cash rich multinationals and large scale unemployment of persons engaged at different levels in 'farm to fork' supply chains.

The stringent conditions proposed by the DIPP are therefore oriented to address some of the concerns of the opposition camps. The Government however seems determined to make a start from somewhere, as investment in back end infrastructure is identified as an effective tool to tame inflation. The Government also does not seem to have many options as the only other

method, of increasing interest rates to control inflation, has its own side effect including that of slowing down Indian's economic growth as well.

Service Tax Clarification for Restaurants and Hotels

The Central Board of Excise and Customs, Ministry of Finance, Government of India ("CBEC") has issued a clarification in response to various queries raised by the restaurants and hotels in connection with levy of service tax on services rendered by them.

Service tax has been imposed with effect from May 1, 2011 on air conditioned restaurants serving liquor and on short term accommodation provide by hotels. The CBEC has now clarified that:

- To be subject to service tax, any restaurant should qualify both the criteria, i.e. of being air conditioned and serving liquor. Open spaces of such restaurants will be considered their extension, and food and beverages supplied in such portions will also be subject to service tax;
- However, if the same entity owns more than one restaurant, and they are clearly demarcated and separately named, service tax will be applicable only to those restaurants which satisfy both of the above said criteria individually;
- Service tax would be levied by the hotels on actual amounts charged from the guests and not on their declared tariff. Discounts offered are therefore exempt from service tax;
- When food is served in a hotel room, service tax will not be charged under the 'restaurant service' as the service is not provided within the premises of the restaurant;
- If however the actual amount charged from the guests includes the cost of food and/or beverages, service tax will be levied on the total amount so charged by the hotel. In cases where the bill for food is raised separately, it may not be subject to service tax, unless the bill is otherwise subject to service tax under the category of 'restaurant service' (as discussed above); and
- Value added tax and luxury tax shall be excluded from the taxable value for purposes of service tax.

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The Ministry of Corporate Affairs ("MCA") has exempted the acquisition of enterprises whose turnover is less than INR 7.5 billion (approx. USD 167 million) or whose assets value is less than INR 2.5 billion (approx. USD 56 million) from compulsory pre-notification to the Competition Commission of India ("CCI"). It was however unclear whether the asset value/turnover thresholds should be calculated on a consolidated worldwide basis, or on a standalone India basis for the target entity.

The MCA has now clarified that for the purpose of the aforesaid exemption,