

PRESS RELEASE

Text of the speech delivered by Thiru M.C. Sampath, Minister for Commercial Taxes and Registration, Government of Tamil Nadu at the Stakeholder Consultation Meeting on Formulation of Suitable Guidelines on e-Commerce Transactions held at New Delhi on 15th July, 2015

"At the outset, I wish to reiterate the unequivocal stand of our Hon'ble Chief Minister Puratchi Thalaivi Amma that Foreign Direct Investment (FDI) in retail trade will never be allowed in Tamil Nadu in view of its adverse impact on the employment and livelihood of the people dependent on the unorganised retail business. Tamil Nadu had strongly opposed the decision of the previous UPA Government at the Centre to permit FDI upto 51 per cent in multi brand retailing and 100 per cent in single brand retailing which came as a rude shock to the lakhs of traditional retail vendors in the country. The Government of Tamil Nadu under the leadership of our Hon'ble Chief Minister Puratchi Thalaivi Amma believes that any proposals relating to the FDI regulations need to be approached with caution and keeping in mind the balance of costs and benefits and the welfare of various sections of our population.

This meeting has been convened to consider certain representations made by a Writ Petitioner before the Delhi High Court on the issue of creating a level playing field between those who conduct e-commerce business and those who could set up a multi-brand brick and mortar retail business with 51 per cent FDI as permissible under current regulations. The Court has directed that the petition may be considered as a representation by the Government of India. The primary contention of the petitioner appears to be that the "market place" model adopted by many e-commerce platforms is effectively retail trade and is being carried on with FDI and without the conditions that are made applicable to those engaged in multi brand retail business with 51 per cent FDI.

In the realm of retail industry, virtual players and brick and mortar players, particularly the large retail houses, are in a tussle over the Foreign Direct Investment norms pertaining to retail. In the guise that e-tailers are only commission agents and not stockists, FDI in retail is being attempted to be introduced through the backdoor and should be stoutly opposed.

The Background Note prepared by the Ministry of Commerce and Industry indicates that 100 per cent FDI is permitted in e-commerce only for B2B (Business to Business) transactions and not for B2C (Business to Consumer) transactions. Hence the agenda for the meeting focuses primarily on the formulation of suitable guidelines on B2B

e-commerce. In our view there seems to be some confusion in the way in which the agenda for the meeting has been formulated. While on the one hand there is an assertion that FDI in B2C e-commerce is not permitted and the discussion is to focus on framing guidelines for B2B e-commerce, in listing out the areas the guidelines need to cover, some elements of retail trade are also mentioned like “packaging and delivery of goods” and conditions for storage by retailers, etc. This gives rise to the apprehension that in the guise of regulating B2B e-commerce, B2C e-commerce would also be enabled with FDI. This needs to be carefully guarded against. Misuse of B2B platforms to enable B2C transactions would upset the level playing field between brick-and-mortar or physical stores and e-commerce entities and is completely unacceptable to us.

It is proposed to define the term ‘e-commerce’. The proposed definition needs to be consonance with other laws including the Sale of Goods Act and commodity taxation laws. Some e-commerce platforms perform agency functions, as defined under the Sale of Goods Act, 1930 and Indian Contract Act 1872 such as storing and despatching goods on behalf of consumers, collecting payments from customers on behalf of principals, etc., and therefore would fall under the definition of a agent or dealer under VAT laws. This would place those e-commerce platforms with FDI in conflict with the FDI regulations relating to e-commerce and on multi-brand retail trade. Hence, due care needs to be exercised in finalizing the definition.

The agenda mentions the need to define ‘market place’ and ‘inventory base’ models of e-commerce, but indicates that this is an issue for the Ministry of Consumer Affairs to address and does not suggest any specific mechanisms or measures. Almost all e-Commerce players appear to be circumventing the FDI policy by adopting a marketplace model. The market place model is a clear ploy to circumvent the FDI norms in B2C. While there are no official definitions of such models, there appears to be an effort to convey that e-commerce players are only intermediaries facilitating the sale of goods owned by a seller to a purchaser without getting into the element of ownership of such goods, and hence do not amount to retail trader. This does not appear acceptable. The definitions need to be worked out in such a way that the intended policy of restricting and regulating FDI in retail trade does not get suborned by definitional loopholes. The definition of e-Commerce has to be changed to include only the “inventory based” model and not the “market place” model.

Commodity taxation is the main source of revenue for States. Hence, ensuring that the revenue base is not eroded through sharp e-commerce practices is a serious concern for us. We strongly urge that all regulatory and tax laws governing brick-and-mortar retail business should be made equally applicable to e-commerce business also without

any exception to maintain the level playing field. E-commerce transactions should be subjected to levy of appropriate tax, either State VAT (Value Added Tax) or CST (Central Sales Tax), depending upon the nature of the transactions. Such tax liability should fall either on the e-commerce service providers or the person who actually sells the goods through such e-commerce service providers depending upon the contractual relationship between them.

Although transactions relating to B2B e-commerce are at present governed by the existing VAT and CST laws, from the point of view of taxation, this is an emerging area. Thus far, Tamil Nadu's experience shows that the entities carrying out such e-commerce business which are located outside the jurisdiction of the State fail to comply with the provisions of the applicable Sales Tax laws, like registration, filing of returns, replying to the statutory notices and so on. Many of them do not file returns as required under the VAT laws and restrict themselves to data sharing. Further, the existing VAT laws do not have provisions for carrying out VAT audit of such e-commerce platforms situated outside the State jurisdiction thereby posing serious risks to State revenues.

Most of these e-commerce entities have a virtual existence and from their websites, it is very difficult to glean the nature of transactions carried out by them, the identity and location of actual supplier of goods, their contractual relationship, origin and movement of goods, locations where the goods are physically stocked and stored, to determine whether a sales transaction made to a consumer located within the State is liable for levy of State VAT or CST in the cases where the goods are consigned directly to the consumer from another State. Hence, in respect of B2C transactions in particular, the existing VAT and CST laws need to be strengthened to avoid tax evasion.

Many e-commerce platforms hold their data and servers in data centers abroad and this would make enforcing compliance with taxation laws and other statutory regulations difficult. Hence effective provisions mandating residence of data and software within the territory of India or mirroring of such data in local servers within India, furnishing declarations of information on such servers and imposing liability on persons responsible for maintaining and making available access to such data servers to statutory authorities should be ensured.

The agenda proposes to explore whether the guidelines for FDI in Cash and Carry wholesale trading and Wholesale trading could be suitably amended to create a level playing field vis-a-vis FDI policy on B2B e-commerce. Government of Tamil Nadu is clearly of the view that the FDI Policy for cash and carry wholesale trading should be applicable to B2B e-Commerce also. Unambiguous guidelines should be framed for B2B e-Commerce.

It is also not clear whether the entities engaged in e-commerce are complying with the relevant labour, consumer protection and other regulatory laws. There are already many complaints that enforceable warranties are not available to consumers for products that are purchased through e-commerce platforms. Such entities cannot be allowed to bypass or escape the essential regulatory frameworks. This would be against public policy and public interest and provide them with an unjust and unfair advantage vis-a-vis the regular brick-and-mortar retail stores which constitute one of the biggest sources of entrepreneurship and employment in the country.

Any policy action by the Government of India must holistically address the issue and not confine itself to a limited area of only B2B transactions. Hence, we suggest that an omnibus e-commerce law may be enacted to cover B2B, C2C and B2C transactions with a view to protecting consumers besides providing a level playing field to all players in the retail space. Regulatory oversight to prevent concentration of market power in a few hands should be ensured. Interest of consumers should be protected by mandating that e-commerce platforms must declare the name, address and contact details of every online seller on such platforms. A monitoring mechanism has to be put in place to ensure that FDI regulations are not violated or bypassed by e-commerce platforms or sellers, harming the interests of brick-and-mortar retailers.

To conclude, I would like to reiterate the views of our Hon'ble Chief Minister that the interest of small retail trade which provides livelihood to lakhs of small traders and shop owners should be effectively protected and this touchstone should be applied by the Government of India while framing guidelines and policies."

Issued by: Director, Information and Public Relations, Chennai-9.

Date : 16.7.2015