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FUND MANAGERS OF OFFSHORE FUNDS

SECTION 9A: CERTAIN ACTIVITIES NOT TO CONSTITUTE BUSINESS CONNECTION IN INDIA

- (1) In the case of an eligible investment fund, the fund management activity carried out through an eligible fund manager acting on behalf of such fund shall not constitute business connection in India of the said fund.
- (2) An eligible investment fund shall not be said to be resident in India for the purpose of section 6 merely because the eligible fund manager, undertaking fund management activities on its behalf, is situated in India.
- (3) The eligible investment fund means a fund established or incorporated or registered outside India, which collects funds from its members for investing it for their benefit and fulfills the **following conditions, namely:**
 - (a) the fund is not a person resident in India;
 - (b) the fund is a resident of a country or a specified territory with which an agreement referred to in section 90(1) or section 90A(1) has been entered into or is established or incorporated or registered in a country or a specified territory notified by the Central Government in this behalf;
 - (c) the aggregate participation or investment in the fund, directly or indirectly, by persons resident in India does not exceed 5% of the corpus of the fund;

Provided that for the purposes of calculation of the said aggregate participation or investment in the fund, any contribution made by the eligible fund manager during the first three years of operation of the fund, not exceeding ₹ 25 crores, shall not be taken into account;

(Added by Finance Act, 2020)

EXAMPLE ON AMENDMENT MADE BY FINANCE ACT, 2020

Section 9A provides that income of eligible foreign investment fund is exempt on the condition that the aggregate investment in the fund by persons resident in India does not exceed 5% of the total funds raised by the fund. Finance Act, 2020 amends the law to provide that in computing the said 5%, the investment

made by the resident fund manager during the first 3 years of operation, not exceeding ₹ 25 crores, shall not be taken into account. An eligible investment fund set up on 01.06.2020 has year ended on 31st March. Therefore for the 3 years ending 31.03.2021/ 31.03.2022/ 31.03.2023, condition is said to be met in following case:

Total funds collected by eligible fund ₹ 100 crores
Out of above resident fund invested by resident fund manager ₹ 25 crores (25%)

However, condition will not be met if the resident fund manager invests ₹ 26 crores.

- (d) the fund and its activities are subject to applicable **investor protection regulations in the country** or specified territory where it is established or incorporated or is a resident;
- (e) the fund has a minimum of **25 members** who are, directly or indirectly, not connected persons;
- (f) **any member of the fund** along with connected persons shall not have any participation interest, directly or indirectly, **in the fund exceeding 10%**;
- (g) the aggregate participation interest, directly or indirectly, **of 10 or less members** along with their connected persons in the fund, **shall be less than 50%**;
- (h) the fund shall not invest **more than 20% of its corpus in any entity**;
 - (i) the fund shall **not make any investment in its associate entity**;
 - (j) the monthly average of the corpus of the fund shall not be **less than ₹ 100 crore**:

Provided that if the fund has been established or incorporated in the previous year, the corpus of fund shall not be less than ₹ 100 crores AT THE END OF A PERIOD OF 12 MONTHS FROM THE LAST DAY OF THE MONTH OF ITS ESTABLISHMENT OR INCORPORATION:

(Amendment by Finance Act, 2020)

Provided further that nothing contained in this clause shall apply to a fund which has been wound up in the previous year.

For example, an eligible investment fund is established/ incorporated on

CASE I: 2nd June, 2022

CASE II: 2nd March, 2023

Now, the eligible fund should raise at least ₹ 100 crores upto

CASE I: By 30th June, 2023

CASE II: By 31st March, 2024

- (k) the fund shall not carry on or control and manage, directly or indirectly, any business in India **or from India**:

- (l) the fund is neither engaged in any activity which constitutes a business connection in India nor has any person acting on its behalf whose activities constitute a business connection in India **other than the activities undertaken by the eligible fund manager on its behalf;**
- (m) **the remuneration paid by the fund to an eligible fund manager** in respect of fund management activity undertaken by him on its behalf is not less than **THE AMOUNT CALCULATED IN PRESCRIBED MANNER;**
- (4) The **eligible fund manager**, in respect of an eligible investment fund, means any person who is engaged in the activity of fund management and fulfils the following conditions:—
- (a) the person is not an employee of the eligible investment fund;
 - (b) the person is registered as a fund manager or an investment advisor;
 - (c) the person is acting in the ordinary course of his business as a fund manager;
 - (d) the person along with his connected persons shall not be entitled, directly or indirectly, to more than 20% of the profits accruing or arising to the eligible investment fund from the transactions carried out by the fund through the fund manager.
- (5) Every eligible investment fund shall, in respect of its activities in a financial year, furnish **within 90 days** from the end of the financial year, a statement in the prescribed form to the prescribed income-tax authority containing information relating to the fulfillment of the above conditions or any information or document which may be prescribed. In case of non-furnishing of the prescribed information or document or statement, a **penalty of ₹5 lakh** shall be leviable on the fund (**section 271FAB**).

Note: It may be noted that income of eligible investment fund is exempt. However, the income of fund manager who is resident in India shall be taxable.

For a fund manager located in IFSC, having commenced its operations on or before 31.03.2024, the conditions under section 9A shall be modified as follows:

1. Clauses (e), (f) and (g) of section 9A(3) shall not apply
2. Clause (k) of section 9A(3) shall be read as:

“The fund shall not carry on, or participate in, the day to day operations of any person in India and for this purpose the monitoring mechanism to protect the investment in such person including the right to appoint directors or executive directors shall not be considered as participation in day to day operations of such person in India.”

3. Clause (b) of section 9A(4) shall be read as:

“The person is registered as portfolio manager/ investment advisor in accordance with IFSC Authority (Capital Market Intermediary) Regulations 2021.