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FDI IN E-COMMERCE IN INDIA *

INTRODUCTION

In today's world as we can see that the developing economies are opening their economies by leaps and bounds to the Foreign Direct Investment commonly referred as "FDI". It has many attainable objectives and one of the principal objectives is to aggrandize the competitiveness of the domestic market with the usage of network, technological and to an extent organizational skill. Paving a way for Foreign Direct Investment in e-commerce sectors and multi brand retail India is expected to show more prosperity. Capacity of firms and the competitiveness among industries or different firms induces the competition. It has been a keen observation that absorptive capacities of firms have many robust effects on indirect benefits derived from FDI in yielding competitiveness. In 1991 Foreign Exchange Management Act (FEMA) established Foreign Investment under its name. Overseas corporate bodies (OCB) were disallowed to invest in India. A survey conducted by UNCTAD in the year 2012 envisaged India as the second most important destination for FDI, first being China. As per the projections, there were numerous sectors that attracted higher inflows and they are services, activities that involves construction, telecommunication etc. the list not being potentially infinite. As per the latest survey conducted in the first half of the year 2015, India emerged as the top most destinations surpassing the world's biggest economy: China.

India stands second on using internet and there are about 243 million users which is a great number if we see it from economic point of view also. Digital India programme is working as a catalyser for technical revolution as it is for the transformation of entire governing system into information technology based because of which it can reach to more and more citizens[1]. All these types of programmes and the usage of internet lead to growth of our Indian economy. Some instances of irregularity in the functioning of e-commerce have come to the government's notice, but there is no proposal to enact a separate law to regulate this emerging area.[2] Online giants such as Flipkart and Snapdeal are not only establishing their business but also they are trying and testing the practise that would apparently work for India. There exists several ways to bring FDI in e-commerce through all plausible means. The businesses to consumer companies directly deal with the consumers and issue the invoices.

WHAT IS E-COMMERCE?

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[1] Digital India Programme | department of electronics & information technology, government of India (Jun. 30, 2015), http://www.digitalindia.gov.in.

[2] Article: No proposal to enact separate law to regulate e-commerce: Ram Vilas Paswan - the economic times (The Economic Times Jul. 4, 2015), http://economictimes.indiatimes.com/news/economy/policy/no-proposal-to-enact- separate-law-to-regulate-e-commerce-ram-vilas-paswan/articleshow/48344084.cms?intenttarget=no.

E-commerce, popularly known as Electronic Commerce is a term that is used for any type of commercial transaction or any business which involves the exchange of information across the globe. E-commerce was first introduced in 1960's *via* an Electronic Data Interchange (EDI) on Value Added Networks[3]. These business transactions take place in business to business, business to consumer (Amazon), consumer to consumer (eBay) or consumer to business. E-commerce has emerged as one of the most important aspects of the globalised era. E-commerce does not put any barriers of distance and time and allow the consumers to exchange the goods and services electronically. B2B commonly known as Business to Business refers to exchange of goods electronically between e-commerce and business rather than the exchange of goods between business and consumer. E-commerce is at times even referred as e-business. Any process involving transactions around online retail is referred as e-tail. E-commerce has developed at a great pace and has led to the development of those electronic market place where the manufacturers or suppliers and customers are clubbed together so that they can themselves mutually conduct beneficial trade. Social media has paved a lot in the regard of the development of e-commerce. To create a successful online store, one must be fully versed with the principles of e-commerce and what it is supposed to do so that it flourishes ones online store. E-commerce does not only refer to the selling of physical products, it can also refer to the selling of services where the payments of services are made online[4]. As a general principle, a platform or a forum or precisely a website where transfer of funds is controlled electronically. It permits for highly reduces lead times, furthermore, delivery of products is done in a more efficient manner. It has enabled the consumer to complete or fulfil the transactions from the comfort while sitting at the home which usually happens in the confinement within the four walls of a room. As first generation companies in the sector, a lot of the existing online retailers are "building the road" that will take the sector towards a destination[5].

FDI IN E-COMMERCE

The Foreign Direct Investment (FDI) policy of India went through many transformations since the time when Liberalisation was put into picture during 1991. The scope of FDI extended in the manufacturing sector but gradually it got expanded to services and infrastructure sectors. In the present era, almost all the sectors are open for FDI with varying degrees except for a few prohibited ones.[6] In early 1997, FDI allowed the full ownership in the sector of wholesale trading which includes resale, processing and thereafter sale, bulk imports with export/ ex bonded warehouse business sales and business to business (B2B) e-commerce[7]. In the year 2000, FDI was allowed upto 51% by the government in single brand retail trading (SBRT) and the attainable objective was to attract foreign investment in production and even in marketing by aggrandizing the availability of the products in variety and to exhilarate competitiveness among entrepreneurs. Business to Business or B2B refers to the trade taking place between a manufacturer and a wholesaler or between a wholesaler and a retailer[8]. Moreover, 100% FDI was allowed in India in e-commerce sector provided that the

[3] Katherine Arline and News Daily Contributor, What is e-commerce? (Business News Daily Feb. 26, 2015), http://www.businessnewsdaily.com/4872-what-is-e-commerce.html.

[4] *Domain name & web hosting*, netregistery (Netregistry), http://www.netregistry.com.au/resources/what-is/ecommerce/what-is-ecommerce/.

[5] Itika Sharma Punit, *Why Do E-Commerce Firms Need the Billions?*, Feb. 25, 2015, http://www.business-standard.com/article/companies/why-do-e-commerce-firms-need-the-billions-115022401032_1.html.
http://www.business-standard.com/article/companies/why-do-e-commerce-firms-need-the-billions-115022401032_1.html.

[6] Anjali Prasad, Department of Industrial Policy and Promotion Ministry of Commerce and Industry Government of India Consolidated FDI Policy(Apr. 17, 2014), http://dipp.gov.in/English/Policies/FDI_Circular_2014.pdf.

[7] Id. at 6

[8] Discussion Paper on E-commerce in India, http://dipp.nic.in/English/Discuss_paper/Discussion_paper_ecommerce_07012014.pdf.

companies must be engaged only in B2B e-commerce activities. E- commerce activities have been categorised into many divisions based on the criterion of their business model. One among them is the market place model which briefly explains us that under this, the platform of e-commerce portal provides for the business transactions that involves buyers and sellers and the commission earned by the buyer from the seller of its good or its services provided. On 12thAug'15, the Indian Government said that it has not taken any decision to implement FDI in multi brand retail. In the current situation FDI allowed in multi brand retail sector is 51% in business to consumer sector but the BJP government is firm and is not at all supportive of implementing any foreign investment in this kind of sector. Current laws bring to screeching the laws Indian companies that are in operation in the sector of multi brand retail and are abstained from accepting FDI. Had the government contended that it is not within the purview to implement FDI in this sector, public would have considered it once. But the issue is they have not even thought of putting the proposal.

HOW E-COMMERCE HELPS IN ECONOMIC GROWTH?

We owe a great deal of gratitude to the e-commerce sector which is considered as the most primary stage of economic transactions which involves the exchange or buying and selling of the goods and it even continues to undergo the amendments that may have or probably will definitely have some kind of mysterious impact on the way the companies are managing their supply chains. In simple words, e-commerce has renovated the practice, timing and technology of business to business (B2B) and business to consumer (B2C) commerce. It has severely affected the pricing, the availability of the products, transportation patterns, and the behavior of the consumers in the developed economies spread worldwide.[9] Raped technological progress in Information and Communication Technologies (ICTs) along with their widespread diffusion have led to speculation about "frictionless" economies in which transaction costs are nearly zero, barriers to entry and contestability disappear, and makes clear instantly[10]. The growth by leaps and bounds in business to business (B2B) e-commerce has given altogether a different scenario in front of us by changing the pictures of the cost and profit happening around the globe. Considering the microeconomic level, the growth of business to business has resulted in a substantial reduction in the costs which involved transactions, in improving the management of the supply chain and for reducing the costs for the purpose of domestic and global sourcing. Now considering the other side of the coin, that is, now if we look at the macroeconomic level, then, the steady growth exhibited by business to business e-commerce has placed itself on a downward pressure on the scale or measurement of inflation and the increment in productivity, profit margins and competitiveness among the entrepreneurs. This we discussed the growth that was displayed by the business to business e- commerce sector. Now let's have a glance over the growth that is displayed by the business to consumer sector. As we are clearly aware of the fact that retail in e-commerce has become the fastest growing trade sector by surpassing every other trade and manufacturing sector since the year 1999, because at that time the U.S. Census Bureau just initiated the collecting and published the data that was available to them on e-commerce or the data that was easily accessible to them. When the "Great Recession" overhauled the world during 2007-2209, the sectors including manufacturing, wholesale, retail sales took a very heavy beating. By the fourth quarter of 2010, they still had not fully recovered because of some discrepancy, yet U.S. Gross Domestic Product (GDP) and personal spending (adjusted inflation) had overcome their previous peaks seen in late 2007[11]. E-commerce to a much greater extent has changed our lives by amending the face if retail and other sectors that are required for the economy to function. It has made a

[9] Chris G. Christopher, *The economic impact of e-commerce – CSCMP's supply chain quarterly*, CSCMP'S Supply Chain[Quarterly] (Oct. 29, 2011), http://www.supplychainquarterly.com/columns/scq201102monetarymatters/.

[10] OECD, Economic and social impact of e-commerce, OECD iLibrary 169 (OECD Publishing Jan. 1, 1999), http://www.oecdilibrary.org/docserver/download/5kzdcc6tnfmp.pdf?expires=1445982448&id=id&accname=guest&ch ecksum=BFDACDAAD6C3A67B2688AD44BF675E97.

[11] Id. at 10

intellectual on the society and its members because now people can shop online and place the orders of their choice by surfing or browsing the net enjoying the privacy in their homes. E-commerce not only affects the economy, but also it has a huge deal of impact on the job market as it enables newer position in the feeding of data, about the creation of the website which further requires its maintenance coupled with the processing of the credit card and the security of the internet. E-commerce websites have laid the variety of choices in front of the people and they have the choice to surf the site and select any item which is needed by the customers from books to furniture to smart kitchen and the list stands potentially infinite. It has benefited in other numerous ways like it has reduced the search cost of the consumer and more importantly it has reduced price dispersion for many other consumer goods. As we cited the example of great recession in the aforesaid subhead, we realised that it possibly must have taken couple of years for the happening of events that took place in one country which would have likely to affect the economy of another country. Now, for this purpose again, we owe thanks to the advancement of technology and the communication which has become very instant that the resulting impact could also be almost immediate.

CURRENT SITUATION OF LAW OF FDI IN THE SECTOR OF E-COMMERCE

The Indian Government is paying its attention on ejecting out the rules and regulations for the fast paced industry of e-commerce prevailing in the nation. There have been lot of meeting with the ministry of foreign exchange, a lot of debated with the expert panel, but the government was adamant on its decision not to implement the laws related to e-commerce in FDI. As discussed earlier in this paper, India permits 100% FDI in business to business activities that involve e- commerce. We can even consider the example of the company, Walmart, because it is very actively engaged and its registered business to business merchants have to continue doing the bulk order on their e-commerce portal. Considering the single brand retail or multi brand retail, then we observe that FDI policy in this context that trading involving retail and that too in any form, precisely by means of e-commerce is not permissible for the companies parallel to FDI and any kind of engagement in any activity of Single Brand Retail Trading (SBRT) or Multi brand Retail Trading. The companies that we are talking about in this paper are merely that these companies are not the online retailers but at a greater note, they are 'JUST' providing online market place. And in these circumstances, FDI is allowed. If we contend that these companies are not the actual sellers then the question arises that how do they manage to offer such big discounts? And the presumption to this question or the answer to this question may be that they share a close relationship with these sellers as these online stores act as intermediary or they have registered themselves as a seller with some other name which we cannot call a pseudonym, but a name which is a complete different entity. In the subsequent sections of this paper, we would discuss the case that shaken these online giants as they made huge sales but unfortunately could not make huge profits. The reason that could be attributed to the huge deal of sales by these stores amounts to billion dollar per day. The business to business companies has a two tier structure where once can be described as wholesale and the other can be described as one retail company. Any FDI in the sector of wholesale or its entity, which is allowed under the norms of FDI policy, like for example, if we order a book with the Flipkart and the company places a back to back order something to that effect with the wholesaler.

LACUNA IN THE CURRENT LAW

E-commerce has become a much observed sector in the recent days in India, particularly with some home grown companies like Flipkart and Snapdeal and they continue to dominate the market, while sector has also been caught or trapped by the garnished global giants like China's Alibaba and U.S.' Amazon. All are competing with one another to have a bigger share of the cake. There are instances that have been very irregular when it comes to the functioning of e-commerce and still there is no proposal to implement or to legislate a separate law so that this emerging area can be regulated. In a meeting with the ministry of consumer affairs, the Consumer Affairs minister Ram Vilas Paswan explicitly in a writing said, “There is no proposal for specific law/ regulations for e-commerce industry.”

In the previous sections of this paper, we have had enough discussion on the current law which talks that in business to business, India allows 100% FDI in single brand retail, but unfortunately, it does not provide in business to consumer or in multi brand retail sector. However, to devise the problems we can divide this particular section into three subheads

i) Trickling with the policies of the Government:
As all of us are now aware that the Indian Government does not allow FDI in multi brand sector retail, this could be the sole reason that the sites are considered just market places because they do not sell the goods directly to the consumer and let other sellers sale their product by using the platform provided by them. The cruel motive or the profit earning motive behind allowing other sellers is that they need to enjoy the huge benefits of FDI. A very significant example is of the case that occurred in the Flipkart store as it is said to be that it is operated by “close” contacts of Flipkart[12].

ii) Messing with the schemes of Tax.
When the customer purchases any product, the value or the price he pays and the tax imposed on that price is known as sales tax. And to sell the products below their actual price allows the sellers to derive the tax refunds that are received from the government. It further increases the chances of giving higher discounts.

iii) Providing the direct refund to sellers.
These online stores even provide or refund the discounted amount in the name of “promotional efforts” in some cases[13]. The NDA government approved the new “Consumer Protection Bill, 2015” in July’15. The new bill has replaced the 29 year old legislature and has proposed to set up a Consumer Protection Authority which will exercise the power so that the class suit can be initiated against the companies who commit default on their part. In this fast paced society, where everyone is busy with their overload work, a study was conducted by the Indian Institute of Management-Ahmadabad (IIM-A) in which they emphasised the need for enactment of a separate legislature to implement e-commerce laws in FDI sector in FDI. The study further says that a consumer needs to be protected when he buys the goods and services through the platform of e-commerce and they need a separate law. The drawback of this sector of e-commerce is a consumer does not have the fair chance to inspect the sample of the goods. The consumer protection bill, 2015 popped up against the backdrop of emergence of complicated factors and in the production of services in the era of today’s world which is surrounded by completely e-commerce sector. E-commerce has rendered the consumers by exploring them to some vulnerable forms of unfair trade practices and unethical or mal business practices. In e-commerce, when a consumer makes a payment through his credit card, then at that instance also there might arise a fraud in card payment.

FEW CASE STUDIES

- **FLIPKART’S ALLEGED VIOLATION OF THE FDI POLICY**

[12] Rishabhj, demystifying e-commerce giants, E-commerce (Rishabh Jain Oct. 21, 2014), http://rishabhjain.in/demystifying-e-commerce-giants/.
[13] Id. at 12

It was the time of November 2013, where, Flipkart, one of India's largest online store, the platform for retail business and has been under constant investigation by the Enforcement Directorate (ED) for the ostensible infringement of FDI norms of its policy. Any violation of regulations laid down for FDI is covered by the penalised provisions of the Foreign Exchange Management Act, 1999. If we trace the events that happened in last couple of years, it will create a clear picture in our minds that why Flipkart has become the subject of scanning of ED. Flipkart floated its share in the year 2008 and commenced its operation in business to consumer model. In the latter half of the year 2012, the foreign investment policy implies that any online retailer like Flipkart could not enjoy FDI because of its business to consumer entity. Soon Flipkart shifted its model to business to business from business to consumer model. It was then in the month of April, 2013 that Flipkart ensured the terms of compliance with the FDI in retail sector. When the ED started its investigation, it was curiously observed the capital that Flipkart pertained before converting itself to the business to business model or a market place model just to enjoy the status of 100% FDI. The business structure that was created by the Flipkart was much complex because it integrated its business to business operations. Furthermore, in the year 2009 a company known as WS Retail allegedly acted as a 'front' in relation to the Flipkart online services this received the foreign investment. While this structure appears prima facie that it complies with the FDI regulations in spirit, Flipkart must inaugurate that it does not exercise any influence over WS Retail, and that WS Retail maintains an arm's length relationship with the Flipkart online services[14]. Following the path of Flipkart, other online giants including myntra, jabong etc. were also investigated by ED and that too on the similar grounds on which Flipkart was investigated. Since ED has the power or enjoys its status and may impose a fine which is even up to the three times than the actual investment that was allegedly made in violation of FDI norms or its policy.

- **AMAZON'S CASE**

The Prime Minister Narendra Modi set up a committee to analyse outdated laws which hinder governance by fabricating avoidable confusion. If we take the case of Amazon store, then Karnataka tax authorities have stopped Amazon India from selling some products from its warehouse in the state by cancelling the licenses of third party merchants who supply goods to the Amazon's Karnataka warehouse[15]. The issue that was raised in this concern was of the interpretation of the law and not of the tax levied by Amazon or any of its merchants. The issue raised was obvious as India lacks behind in the imposition as it does not have the one to implement. So, ultimately imposition of tax rests with the local authorities and how do they interpret. 'Additional place of business' or Branch certification is a concept which falls under the purview of sales tax or value added tax[16]. As these online giants act as an intermediary, and they have to pay a service tax for service they provide. But in today's highly competitive world, no one are plain vanilla platform providers. And so the software was developed to check customer's preferences and to analyse briefly which products will occupy the market structure. To save the time and earn extra money, Amazon developed such software and this was the root cause of the case between Amazon India and the tax authority of Karnataka. It was further observed that taxmen say Amazon is liable to pay the tax because the ownership of the good is transferred from the e-commerce till the time they sell it. On the other hand, tax authorities contended that demanding tax

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[14] FDI in B2C e-retail, PSA Legal (Jun. 2014), http://www.psalegal.com/upload/publication/assocFile/ENewslineJune2014.pdf.

[15] Shishir Asthana, *All You Want to Know about Amazon India's Tax Issue*, Sept. 17, 2014, http://www.business-standard.com/article/companies/all-you-want-to-know-about-amazon-india-s-tax-issue-114091700898_1.html.

[16] Id. at 15

from Amazon there is an involvement of value added. On the part of the Government, there is no loss of revenue because if the tax is not collected from Amazon, it is being collected from the merchant.

- **THE CASE OF SNAPDEAL**

  The sale of prescribed medicines using the online forum is still not considered as a matter by Indian Government which is to be taken seriously. As we see in the daily news piece that there are people or companies who are openly engaged in unregulated and illegal sales of prescribed medicines circulated in India. The Maharashtra's Food and Drug Administration (FDA) has ordered filing of FIR's against the online store Snapdeal for it was involved in the online sale of prescription drugs that are in derogation of Indian laws. Snapdeal contended that it is assisting the FDA team in this probation. Further, Snapdeal contented that it has stopped the sale of such products by delisting it and the sellers who used the forum, their payment was also stopped by the Snapdeal. However, this ground does not absolves Snapdeal and protect it from the legal obligations that it had to serve all the liabilities that were mentioned under various Indian health care laws. To look and to inspect in this infringement done by the Snapdeal, a special investigation was constituted. It was found that e- commerce giant, Snapdeal displayed and offered for sale about 45 drugs with objectionable claims which contravenes the provisions of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954[17]. It was then observed that only a licensed retailer can put an offer for the sale of schedule drugs and furthermore, only on the criteria of prescription given by the doctor. And as per the guidelines of such act, sale of such type of online drugs is not permitted or forbidden.

CONCLUSION

Considering the rule book, that is the franchise or the distributor, majority of the large brands have reached a solution that in this given model, the foreign brands can smoothly run an e-commerce store accessible to the consumers. It is the need of an hour to introduce the laws of e-commerce in FDI sector in business to consumer model. Some suggestions that the author would like to highlight in implementation of the law are distributors can establish their store according to their own brand guideline, they can even manage merchandizing, or devise ways to design promotions and the list is endless. The distributor who is the ultimate seller has the powers of ownership vested in his hands. And so they need one among so many distributors to fulfil the order, and to process and look into the billing of all the placed orders. This is attainable but because of the lacuna in the existing law, at present it seems a distant dream and this is the sole complaint with the policy of FDI norms prevailing in India because the online business provides e-commerce platform but due to the absence it cannot involve itself in any retail transactions and lags behind in the direct selling of the product to the consumer. The regulations that would protect the credit card consumer shelter less number of sophisticated parties by preventing them from any kind of fraud while making online payment and error risks

[17] Perry for Law Organization PTLB, Maharashtra's FDA orders filing of FIRs against Snapdeal, its CEO Kunal Bahl, directors and distributors for online sale of prescription drugs (May 3, 2015), http://ptlb.in/ecommerce/.

that could not be controlled, reason being attribute to forcing those sophisticated parties to invest in procedural securities so as to reduce the risks till the extent it is possible for a common man. This type of legislation would help a consumer to a greatest deal and will effectively help the entire system to be in operation in a much more efficient manner than it would have been operated if transactions were governed by any standard form of contracts drawn by the issuers of such card.