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DOING BUSINESS IN INDIA

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Introduction

After the apparent brakes demonetisation and introduction of the Goods & Services Tax (GST) applied on the growth rate in the country, recent reports issued by the International Monetary Fund (IMF) suggest that India has stepped up the gas on its rate of development. Earlier in 2017, it overtook France to become the sixth largest economy in the world, measured in terms of GDP, and is expected to take over from the UK in 2018 to get onto the fifth position. This is particularly impressive considering the overall strain the global economy (except for the possible exception of the US), including China, is continuing to experience. If this upward trend continues, India's GDP is expected to touch US$ 9.6 trillion by 2020.

The Indian economy is classified in three sectors — Agriculture and allied segments, Industry and Services.

The Agriculture sector includes Agriculture (agriculture proper and livestock), forestry and logging, and fishing and related activities.

Industry includes mining and quarrying, manufacturing (registered and unregistered), electricity, gas, water supply and construction.

The Services sector includes trade, hotels, transport, communication and services related to broadcasting, financial, real estate and professional services; public administration, and defense and other services.

The Services sector is the largest segment in India. The Gross Value Added (GVA) at current prices for the sector was estimated at INR 73.79 lakh crore in 2016-17. It accounts for 53.66% of total India's GVA of INR 137.51 lakh crore.

With a GVA of INR 39.90 lakh crore, the Industry sector contributes 29.02% to the economy, while the Agriculture and allied segments share 17.32% with a GVA is around of INR 23.82 lakh crore.

At current prices, the Agriculture sector and allied segments, the Industry and the Services sectors account for 9.64%, 8.32% and 11.87%, respectively, in their GVA growth rates. At current rates, India has registered the highest growth of 16.50% in Public Administration, Defence and other services segments, and the lowest at 4.44% in mining and quarrying.

The following include some key developments over the past 12 months, which have accounted for the resurgence in India's growth rate:

FDI reforms

Foreign Direct Investment (FDI) is a major driver of economic growth and a source of non-debt finance for economic development in India. The Government has put in place an investor-friendly policy, under which FDI up to 100% is permitted in the automatic route in most sectors and activities.

In the recent past, the Government has implemented reforms in its FDI policy in a number of segments including Defence, Construction Development,Insurance, Pension, Other Financial Services, Asset Reconstruction Companies, Broadcasting, Civil Aviation, Pharmaceuticals, Trading, etc. Measures undertaken by it have resulted in increased FDI inflows into the country. During 2014-15, total FDI inflows into India amounted to US$ 45.15 billion as against US$ 36.05 billion in 2013-14. In 2015-16, it received total FDI of US$ 55.46 billion. In the financial year 2016-17, total FDI of US$ 60.08 billion was received an all-time high.

The following are some of the key amendments in the FDI policy during the past 12 months:

- 100% FDI under the automatic route for Single Brand Retail Trading
- 100% FDI under the automatic route in Construction Development
- Foreign airlines being allowed to invest in Air India up to 49% under the approval route
- FIIs and FPIs being allowed to invest in power exchanges through the primary market
- Definition of 'medical devices' amended in the FDI Policy

Ease of doing business

India has recorded a jump of 23 positions against its rank of 100 in 2017 to be placed now at 77^{th} rank among 190 countries assessed by the World Bank. India's leap of 23 ranks in the Ease of Doing Business ranking is significant considering that last year India had improved its rank by 30 places, a rare feat for any large and diverse country of the size of India. As a result of continued efforts by the Government, India has improved its rank by 53 positions in last two years and 65positions in last four years.

Universal Health Care

India has announced a budget of INR 62,659.12 crore for schemes and initiatives planned to address health-related problems holistically. Its initiatives are well-timed with the WHO's initiative to strengthen efforts to make universal health coverage a reality.

The National Health Protection Scheme, a progressive program, will cover over 10 crore poor and vulnerable families (around 50 crore beneficiaries), providing coverage of up to INR 5 lakh per family per year for secondary and tertiary hospitalization. Timely implementation of the scheme is of prime importance.

The other major initiative taken by the Government is putting in place Health and Wellness Centers and making these the foundation of India's health system. INR 1200 crores has been allocated for this flagship program. The 1.5 lakh centers will bring good and affordable health care facilities close to the homes of people, and provide comprehensive care for communicable diseases, and maternal and child health services. These government health centers will provide free essential drugs and diagnostic services. This, however, will require putting in place of proper health care infrastructure, both public and private, and adequately meet the needs of those covered by the scheme.

Infrastructure

The Infrastructure sector has become the largest focus area of the Government of India. Under the Union Budget 2019-20, Indian Rupees 100 million was allocated to the sector.

India needs investment of INR 50 trillion (US$ 777.73 billion) in infrastructure by 2022 to achieve sustainabledevelopment in the country. It is attracting the interest of international investors in the Infrastructure space. Some key investments in the sector are given below:

- In June 2018, the Asian Infrastructure Investment Bank (AIIB) announced a US$ 200 million investment in the National Investment & Infrastructure Fund (NIIF).
- Private equity and venture capital (PE and VC) investments in the Infrastructure sector reached US$ 10.1 billion with 159 deals for the quarter ended March 2019.
- India's Infrastructure sector witnessed 91 M&A deals worth US$ 5.4 billion in 2017.
- In February 2018, the Government of India signed a loan agreement (worth US$ 345 million) with the New Development Bank (NDB) for the Rajasthan Water Sector Restructuring Project for desert areas.
- In January 2018, the National Investment and Infrastructure Fund (NIIF) partnered with UAE-based DP World to create a platform that will mobilize investments worth US$ 3 billion into ports, terminals, and the transportation and logistics businesses in India.

Resolution of insolvency

The Insolvency and Bankruptcy Code is considered one of the most important economic reforms in recent times. The Code provides flexibility to financial and operational creditors and enables them to initiate insolvency-resolution procedures against companies that have defaulted in making payment of INR 1 lakh or more to repay the legitimate dues of financial or operational creditors. The entire process is altogether different from that prescribed by the erstwhile legislation, the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA).

The new law makes a commitment to deal swiftly with failing companies, removing the owners and blocking them from trying to buy back the businesses out of bankruptcy. Its architects have set a nine-month limit for completion of the entire process. This makes it one of the world's fastest bankruptcy regimes on paper, and strikes a marked contrast with the sluggish pace of other Indian legal processes. This process enables the emergence of new competitive firms and enables them to remain in business as long as they are competitive, but makes place for new entrants when they lose their competiveness.

Up to 31 March 2018, 701 cases were admitted for resolution of issues by the National Company Law Tribunal. Among these, 22 cases have been approved for a resolution plan and liquidation has commenced in 87 cases.

Recapitalization of Banks

The Government announced a major recapitalization drive in October 2017 by utilizing three channels– the Budget, market borrowings and issue of recapitalization bonds. According to the plan, a total of INR 2.11 lakh crores will be injected into public sector banks to enable them to meet their stressed asset-related problems at the earliest. The following are the three modes of mobilization of funds under the recapitalization effort:

- Budgetary allocations: The Government will buy INR 180 Billion worth of public sector bank shares.
- Market borrowings: PSBs will mobilize INR 580 Billion through borrowings from the market.
- Recapitalization bonds: The Government will issue Bank Recapitalization Bonds worth INR 1350 Billion, which will be used to buy additional shares in public sector banks.

In Budget 2019, public sector banks (PSBs) will be provided with a capital infusion of Indian Rupees 700 Billion, giving a much-needed boost to the stressed banks who are under pressure owing to the rising NPAs'.

Digital Governance

In Budget 2018, the Finance Minister announced a host of technology-driven projects in areas including budgeting, depositing of fees and penalties, among others. The Government will implement these e-Governance projects to make its functions more transparent and efficient, and ease citizens' interactions with it. The following are some of the highlights of the initiative:

- Allocation for the Digital India Programme doubled to INR 3,073 crore
- Announcement of the launch of a mission on cyber physical systems to support the establishment of Centers of Excellence for research on training and skilling in robotics, Artificial Intelligence (AI), digital manufacturing, analysis of Big Data and quantum communication
- NITI Ayogto commence a national program for research and development of AI
- Department of Telecommunications to support setting up of an indigenous 5G Test Bed at IIT Chennai
- Focus on eliminating the use of crypto-assets in illegitimate activities
- Exploration of the use of Block Chain technology to propel India to a digital economy
- e-Assessment of Income Tax to be initiated to modernize the age-old assessment procedure

The UN e-Government Survey 2018 (July 2018) has ranked India at the 96th position for its development and execution of Information Technology, up from 107 in 2016 and 118 in 2014 a significant leap.

Macro Economic Review

India’s GDP is estimated to have increased 7.2 per cent in 2017-18 and 7 per cent in 2018-19. India has retained its position as the third largest startup base in the world with over 4,750 technology start-ups.

India’s labor force is expected to touch 160-170 million by 2020, based on rate of population growth, increased labor force participation, and higher education enrolment, among other factors.

India’s foreign exchange reserves were US$ 405.64 billion in the week up to March 15, 2019, according to data from the RBI.

Investment into India

With the basic understanding of the Indian legal system, international companies or investors seeking to set up operations or make investments in India need to structure their activities on three pillars:

Strategy

- Observing the economic and political environment in India from the perspective of the investment;

- Understanding the ability of the investor to carry out operations in India, the location of its customers, the quality and location of its workforce.

Law

- Exchange Control Laws: Primarily the Foreign Exchange Management Act, 1999 ("FEMA") and circulars, notifications and press notes issued under the same;
- Corporate Laws: Primarily the Companies Act, 1956 and Companies Act, 2013 (collectively the "Companies Act") and the regulations laid down by the Securities and Exchanges Board of India ("SEBI") for listed companies in India;
- Labor Laws: India has many central labor laws such as the Industrial Disputes Act, 1947, Minimum Wages Act, 1948 as well as state specific laws. The applicability of such laws is determined by various parameters (such as the nature of work to be performed, type of establishment, number of employees, etc.).

- Sector Specific Laws: In addition to the abovementioned general legislations, specific laws relating to Financial Services (banking, non-banking financial services), Infrastructure (highways, airports) and other sectors are also applicable.

Tax

- Domestic Taxation Laws: The Income Tax Act, 1961 ("ITA"); indirect tax laws including laws relating to value added tax, service tax, customs, excise etc.;
- International Tax Treaties: Treaties with favorable jurisdictions such as Mauritius, Singapore, the Netherlands etc

Foreign Direct Investment

Setting up India operations or investing in India by non-residents requires conformity with India's foreign exchange regulations, specifically, the regulations governing FDI. Most aspects of foreign currency transactions with India are governed by FEMA and the delegated legislations thereunder. Investments in, and acquisitions (complete and partial) of, Indian companies by foreign entities, are governed by the terms of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 ("TISPRO Regulations") and the provisions of the annual Consolidated Foreign Direct Investment Policy Circular ("FDI Policy") issued by the Department of Industrial Policy and Promotion ("DIPP") in the Ministry of Commerce and Industry, Government of India.

FDI limits with respect to the shareholding of non-residents in an Indian company can be divided into the following categories:

A) Prohibited Sectors

The following is the list of sectors where FDI is prohibited:

Activities/sectors not open to private sector investment like

- Atomic Energy
- Gambling and betting including casinos/ Lottery business including government/ lottery, online lotteries etc.

- Chit funds
- Nidhi company
- Real estate business or construction of farm houses
- Trading in Transferable Development Rights (TDRs)
- Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes

B) Permitted Sectors

In the sectors/activities, which don't fall within 'Prohibited Sectors', FDI is (i) either permitted upto the limit indicated against each sector/activity or (ii) is permitted upto 100% under the automatic route, subject to applicable laws/regulations; security and conditionalities. In few sectors, additional conditions are required to be complied with such minimum capitalization requirements.

Under the automatic route, for investments into an Indian company prior approval of India's central bank, the Reserve Bank of India ("RBI") or the approval of the Central Government (through the concerned administrative ministry/department) is not required.

Foreign investment in certain sectors is permitted under the automatic route upto certain percentage of investment and investment beyond such percentage is either not permitted or would require prior approval of the government (as indicated in the FDI Policy).

FDI up to 100%, is permitted in most sectors under the 'automatic route'. However, listed below are few examples, which illustrate the sectors with threshold for FDI; sectors which are partially under automatic route and partially under government approval route; sectors where there are conditionalities for FDI etc.

Banking in private sector-74% foreign investment is permitted including investment by Foreign Institutional Investor ("FII")/Foreign Portfolio Investor ("FPI") in which up to 49% is under the automatic route and foreign investment beyond 49% and up to 74% is under government approval route.

Civil Aviation-100% FDI is permitted under automatic route for both greenfield and existing projects for "Airports" and for NonScheduled Air Transport Service. 100% FDI in "Air Transport Services" being Scheduled Air Transport Service/ Domestic Scheduled Passenger Airline and Regional Air Transport Service is permitted where up to 49% is under automatic route and beyond 49% requires government approval (Automatic upto 100% for Non-Resident Indians ("NRIs"). 100% FDI is also permitted under the automatic route for Helicopter services/ seaplane services requiring DGCA approval.

Defence - 100% FDI into defence sector (subject to the industrial license under Industries (Development and Regulation) Act, 1951) and manufacturing of small arms and ammunition under Arms Act, 1959 has been permitted where up to 49% is under the automatic route. For investment above 49% approval of government will be required wherever it is likely to result in access to modern technology or for other reasons to be recorded.

Infrastructure Company in securities market like stock exchanges, commodity exchanges, depositories and clearing corporations – 49% foreign investment is permitted under automatic route, which should be in compliance with the applicable SEBI Regulations.

Insurance – FDI cap into the insurance sector (insurance companies, insurance brokers, etc.)is 49% under the automatic route subject to approval/verification by Insurance Regulatory and Development Authority ("IRDA") and compliance of other prescribed conditions.

Multi brand retail trading – 51% foreign investment is permitted under the government approval route, which investment shall be in compliance with conditions prescribed including (i) minimum capitalization of USD 100 million (ii) 50% of the total FDI in the first tranche of USD 100 million to be invested in the backend infrastructure within 3 years (iii) retail sales outlets may be set up in those States which have agreed or agree in future to allow FDI in multi brand retail trade (iv) 30% mandatory local sourcing requirement from Indian micro, small, medium industries which have a total investment in plant and machinery not exceeding USD 2 million etc.

Other Financial Services ("NBFC") – 100% FDI in is allowed under the automatic route in other financial services and activities regulated by financial sector regulators, viz., RBI, SEBI, IRDA, Pension Fund Regulatory and Development Authority, National Housing Bank or any other financial sector regulator as may be notified by the Government of India, subject to conditionalities, including minimum capitalization norms, as specified by the concerned Regulator/Government Agency.

Print Media – (i) Print media, specifically publishing of newspaper and periodicals dealing with news and current affairs and publication of Indian editions of foreign magazines dealing with news and current affairs is allowed upto 26% FDI under the government approval route (ii) Print media, specifically publishing/printing of scientific and technical magazines/ specialty journals/periodicals (subject to compliance with the legal framework as applicable and guidelines issued in this regard from time to time by Ministry of Information and Broadcasting) and publication of facsimile edition of foreign newspapers is allowed to have 100% foreign investment with prior approval of government.

Railways – while 100% FDI is allowed in the railways infrastructure sector under the automatic route, proposals involving FDI beyond 49% in sensitive areas are required to be brought before the CCS for consideration by the Ministry of Railways ("MoR") from a security point of view. The MoR has issued sectorial guidelines for domestic/foreign direct investment in railways. The guidelines set out conditions and approvals that are required for private/foreign participation in the railways sector. Under the FDI Policy the list of 'prohibited sectors' has been revised to replace 'railway transport' with 'railway operations', thus permitting foreign investment in 'railway transport' under the automatic route.

Single brand product retail trading (SBRT) - Foreign investment is allowed up to 100% under the automatic route. Foreign investment in SBRT is subject to conditions namely (i) products to be sold should be of a 'single brand' and the products should be sold under the same brand internationally (ii) to be covered within 'single brand' product retail trading, products should be branded during manufacturing (iii) non-resident entity/ entities, whether owner of the brand or otherwise, shall be permitted to undertake single brand product retail trading in India for the specific brand, directly or through legally tenable agreement with the brand owner for undertaking single brand product retail trading (iv) if the FDI is proposed to be beyond 51% then sourcing of 30% of the value of the goods purchased should be done from India, preferably from Indian micro, small and medium enterprises (v) single brand product retail trading entity operating through brick and mortar stores, is permitted to undertake retail trading through e-commerce, subject to compliance with all conditions (vi) SBRT entity may set off the mandatory sourcing requirement against its incremental sourcing of goods from India for global operations during initial 5 years (starting April 1 of that year) of opening the first store in India. The incremental sourcing for the purpose of set off shall be equal to the annual

increase in the value of goods sourced from India for global operations (in INR terms), either directly or through their group companies. After completion of this 5 year period, the SBRT entity is required to meet the 30% sourcing norms directly towards its India's operation, on an annual basis.

B2B E-Commerce – 100% FDI permitted in companies engaged in the activity of buying and selling through the e-commerce platform only in the Business to Business ("B2B") segment.

B2C E-Commerce – FDI in Business to Consumer ("B2C") segment is permitted in the following circumstances, subject to conditions:

100% FDI under automatic route is permitted in marketplace model of e-commerce. Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

FDI is not permitted in inventory based model of e-commerce. Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

Limited Liability Partnerships: FDI in Limited Liability Partnerships ("LLP") is permitted under the automatic route, for LLPs operating in sectors/ activities where 100% FDI is allowed, through the automatic route and there are no FDI linked performance conditions. An LLP with FDI operating in sectors/activities where (i) 100% FDI is allowed through the automatic route; and (ii) there are no FDI linked performance conditions, can be converted into a company, under the automatic route. Similarly, conversion of a company with FDI operating in sectors/ activities where (i) 100% FDI is allowed through the automatic route; and (ii) there are no FDI linked performance conditions, can be converted into an LLP, under the automatic route.

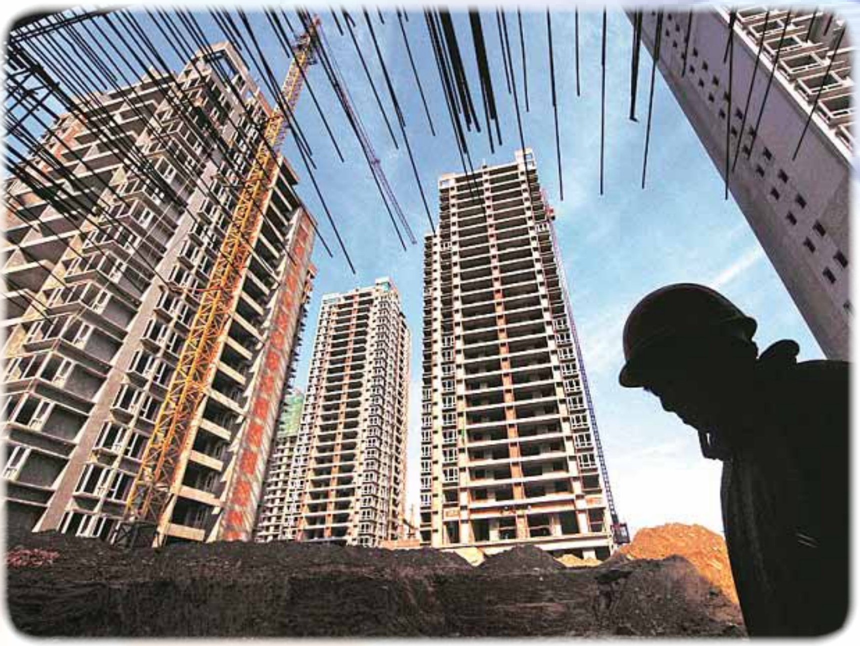
C) FDI Policy Reforms

Government, in keeping with its promise of ease of doing business in India, came up with many reforms to the foreign investment. Key highlights of the changes are as stated here:

Real estate and development sector

100% FDI is allowed under automatic route, subject to the following conditionalities attached to the investment:

- No minimum area requirements or minimum capitalization requirements



- The investor is permitted to exit from the investment: (i) after 3 years from the date of each tranche of foreign investment, or (ii) on the completion of the project; or (iii) on the completion / development of trunk infrastructure.
- Further, transfer of stake from one nonresident to another non-resident, without repatriation of investment will neither be subject to any lock-in period nor to any government approval.
- Each phase of a project to be considered a separate project for the purposes of the FDI Policy

Further, real-estate broking service does not constitute a real-estate business and hence, FDI in such services is permitted up to 100% under automatic route.

FDI in Investment Companies and Core Investment Companies

FDI into investing companies registered as Non-Banking Financial Companies (NBFC) with the RBI, being overall regulated, is under automatic route up to 100%.

Foreign investment in core investment companies (CICs) and other investing companies, engaged in the activity of investing in the capital of other Indian company(ies)/LLP, is permitted under Government approval route. CICs will have to additionally follow RBI's regulatory framework for CICs.

FDI by swap of shares

Any investment involving swap of shares, is permitted under the automatic route for sectors which are under automatic route.

Entities controlled by NRI

A company, trust and partnership firm incorporated outside India and owned and controlled by non-resident Indians can invest in India with special dispensation as available to NRIs under the FDI Policy.

Abolishment of FIPB

The process of phasing out the FIPB was completed with the release of Standard Operating Procedure ("SOP") for processing the FDI proposals by the DIPP on June 29, 2017. The SOP has been prepared by DIPP in consultation with administrative ministries/departments/ sector regulators to guide the administrative ministries/departments in processing of the FDI proposals and ensure consistency of treatment and uniformity of approach across sectors. The focus of the SOP is to process such applications in a time bound manner so that the new regime for foreign investments may be simpler in execution and expeditious in disposal.

Issue of Shares for non-cash considerations

Earlier, issue of equity shares against non-cash considerations like pre-incorporation expenses, import of machinery and others was permitted under government approval route. However, the Government has now allowed the issue of equity shares against non-cash considerations such as pre-incorporation expense, import of machinery etc. under the automatic route in case of sectors under the automatic route.

Joint Audits by Indian Investee Companies receiving FDI

A new provision has been introduced in the FDI Policy pertaining to joint audits of the investee company receiving foreign investments. It has been decided by the Government that wherever the foreign investor wishes to specify a particular auditor/audit firm having international network for the Indian investee company, then audit of such investee companies should be carried out as joint audit wherein one of the auditors should not be part of the same network. In other words, joint audits are now mandatory for Indian companies that receive foreign investments if an international investor insists on audit by a global firm, or its Indian affiliate.

Transfer of shares on deferred consideration basis

A cross border transfer of shares is permitted on a deferred consideration basis subject to complying with the following conditions:

- Upto 25% of the total consideration may be paid on a deferred basis, subject to the total consideration being complaint with the applicable pricing guidelines
- the deferred consideration should be paid within a period of 18 months from the date of the share transfer agreement
- the deferred consideration may be paid under an escrow arrangement, whose term shall not exceed 18 months
- if the total consideration is paid, the seller can furnish an indemnity, valid for a period of 18 months, for the deferred portion of the consideration

Revised Definition of Medical Devices

Earlier, the definition of 'Medical Device' under the FDI Policy was subject to amendment to the Drugs and Cosmetic Act, 1940 ("D & C Act"). It has been decided that the said definition would no longer be subject to the amendment to D & C Act.

Downstream Investment

FDI into Indian companies/LLPs may be direct or indirect. FDI norms apply to both direct and indirect foreign investments into an Indian company/LLP. In case of direct investment, the non-resident investor invests directly into an Indian company/LLP.

Indirect FDI is referred to as the downstream investment made by an Indian company/ LLP, which is owned or controlled by nonresidents, into another Indian company/LLP. As per the FDI Policy such downstream investment is also required to comply with the same norms as applicable to direct FDI in respect of relevant sectorial conditions on entry route, conditionalities and caps with regard to the sectors in which the downstream entity is operating. Such downstream investments would be regarded as Indirect FDI in an Indian entity if they have been made in the following manner:

a) Another Indian entity which has received foreign investment and (i) is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India ("either referred to as Non-Indian Entity"); or

b) An investment vehicle whose sponsor or manager or investment manager (i) is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India.

Downstream Investment into Indian entities are subject to conditions prescribed under the FDI Policy including prior approval of the Board of Directors, pricing guidelines and requirement of fund for investments to be brought from abroad or arranged through internal accruals (i.e. profits transferred to reserve account after payment of taxes). Similar conditions have also been included in the TISPRO Regulations with following additional conditions:

a) Capital Instrument of an Indian entity held by a Non-Indian Entity may be transferred to:

1. A person resident outside India, subject to reporting requirements in Form FC-TRS/ Form FDI LLP (II), as the case may be;

2. A person resident in India subject to adherence to pricing guidelines.

3. An Indian entity which has received foreign investment and is not owned and not controlled by resident Indian citizens, or is owned or controlled by person resident outside India (i.e. another Non-Indian Entity)

b) The first level Indian entity making downstream investment shall be responsible for ensuring compliance with the provisions of the TISPRO Regulations for the downstream investment made by it at second level and so on and so forth. Such first level company shall obtain a certificate to this effect from its statutory auditor on an annual basis. Such compliance of these regulations shall be mentioned in the Director's report in the Annual Report of the Indian company. In case statutory auditor has given a qualified report, the same shall be immediately brought to the notice of the Regional Office of the RBI in whose jurisdiction the Registered Office of the company is located and shall also obtain acknowledgement from the Regional Office of the RBI in this regard.

Based on the above conditions, it may be noted that in case of a downstream investment, a Non-Indian Entity is being treated as resident entity for the purpose of transfer of Capital Instruments to a person resident outside India and /or another NonIndian entity set up in India and accordingly the transfers have been subjected to filing of Form FC-TRS and /or exempted thereof respectively. In case of former, while Form FC-TRS is required to be filed, it is not clear if the pricing guidelines shall apply to such transfers. Further, the Non-Indian entity is being treated as a non-resident for the purpose of transfer of Capital Instrument of its subsidiary to a person resident in India and hence required to adhere to the pricing guidelines.

Additional Procedural Requirements

Foreign investment is usually in the form of subscription to or purchase of equity shares, convertible preference shares, convertible debentures and/or share warrants of the company ("Capital Instruments"). The investment amount is normally remitted through normal banking channels or by debit to the Non-Resident External Rupee ("NRE")/Foreign Currency Nonresident (B) ("FCNR") account of the non-resident investor with a registered Authorized Dealer or AD (a designated bank authorized by the RBI to participate in foreign exchange transactions). Transfer or issue of shares of an Indian company to a non-resident will be subject to certain, pricing guidelines. These guidelines have been laid down by the RBI (in the case of companies not listed on a stock exchange) and by SEBI (in the case of listed companies). RBI pricing guidelines prescribe any "internationally accepted pricing methodologies for companies not listed on a stock exchange. The pricing guidelines for companies listed on a stock exchange shall be as per SEBI guidelines.

Indian companies are permitted to issue of partly paid shares and warrants to non-residents (under the FDI and the FPI route) subject to compliance with the other provisions.

The company is required to report the details of the consideration received for issuing its securities to the regional office of the RBI in the prescribed forms together with copies of the Foreign Inward Remittance Certificate ("FIRC"), arranged for by the AD evidencing the receipt of the remittance along with the submission of the "Know Your Customer" ("KYC") report of the non-resident investor. A certificate from the Merchant Banker or Chartered Accountant indicating the manner of calculating the price of the shares also needs to be submitted.

All these documents must be submitted within thirty days of the receipt of the foreign investment and must be acknowledged by the RBI's concerned regional office, which will subsequently allot a Unique Identification Number ("UIN") for the amount reported. The Indian company is required to issue its securities within 60 days from the date of receipt of foreign investment. Should the Indian company fail to do so, the investment so received would have to be returned to the person concerned within this time-frame.

Foreign investments made in Indian companies or limited liability partnerships by way of allotment or transfer of equity shares or partnership interest, as the case may be, are required to be reported to the RBI through the authorized dealer banks.

Recently there has been a shift in the reporting regime, where the regulator has introduced a single master form for various kinds of reporting (including, among others, form FC-GPR, which is filed to report subscription of capital instruments and form FC-TRS which is filed to report transfer of capital instruments) as compared to the earlier regime where multiple reporting was required for different legs of the same or multiple transactions. The proposed regime is currently a work in progress and once fully implemented it would replace the old model of reporting, where the investee entities or the resident transferors/transferees, as the case may be, were required to do the filing on e-Biz portal (i.e. a Government portal designated for reporting, among others, to the RBI), with a new platform to be created on the RBI's website.

Other Foreign Investments

A) FVCI

In addition to investing under the FDI regime, foreign investors which are registered with SEBI as a foreign venture capital investor ("FVCI") are allowed to invest in Indian companies. FVCIs are allowed to invest in Core Investment Companies ("CICs") in the infrastructure sector, Asset Finance Companies ("AFCs") and Infrastructure Finance Companies ("IFCs"). FVCIs are also allowed to invest in sectors such as Biotechnology, Nanotechnology, IT related to hardware and software development, Dairy Industry, etc. SEBI and the RBI have extended certain benefits to FVCIs some of which include:

i. Free pricing

Registered FVCIs benefit from free entry and exit pricing and are not bound by the pricing restrictions applicable to the FDI investment route. However, under the income tax laws in India, FVCIs may be liable to pay tax on the income generated through equity investments made at a price lower than the fair market value, in a company which does not have substantial public interest. This limits the benefits available to a FVCI especially with respect to exits from unlisted companies through strategic sales or through buy-back arrangements with the promoters and the company.

ii. Lock-In

Under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (“ICDR Regulations”) the entire pre-issue share capital (other than certain promoter contributions which are locked in for a longer period) of a company conducting an initial public offering (“IPO”) is locked for a period of 1 year from the date of allotment in the public issue. However, an exemption from this requirement has been granted to registered FVCIs, provided, the shares have been held by them for a period of at least 1 year from the date of purchase by the FVCI. This exemption permits the FVCI to exit from its investments, post-listing

iii. FVCI investment in start-ups

The FDI Policy allows startups, irrespective of the sector they operate in, to raise 100% funds from SEBI registered FVCI under the automatic route. Start-ups can issue equity or equity linked instruments or debt instruments to FVCI against receipt of foreign remittance.

B. Foreign Portfolio Investments

Separate and varying degrees of regulations have been prescribed to govern foreign portfolio investment regimes in India. SEBI and the RBI under extant securities and exchange control laws, allow portfolio investments in India by SEBI registered FIIs and by certain qualified foreign investors (“QFIs”) without being subjected to FDI restrictions. Subject to applicable conditions, the regulations permit FIIs (and its sub-account) and QFIs to invest in unlisted or listed shares, convertible or nonconvertible debentures (listed and unlisted), Indian depository receipts, domestic mutual fund units, exchange traded derivatives and similar securities.

In 2014, SEBI notified the SEBI (Foreign Portfolio Investors) Regulations, 2014, (“FPI Regulations”) which harmonized the portfolio investment routes of FIIs and QFIs into a new class of FPI. FPI is a dis-intermediated platform for trading in securities without SEBI approval.

Any investment made by a person resident outside India through Capital Instruments where such investment is less than 10 percent of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or less than 10 percent of the paid-up value of each series of Capital Instruments of a listed Indian company, it shall be regarded as Foreign Portfolio Investment (“FPI”).

The investment made under the FPI route shall be subject to the 10 percent limit as applicable to each foreign portfolio investor or an investor group as referred in FPI Regulations, however if it increases to 10 percent or more of the total paid up equity capital on a fully diluted basis or 10 percent or more of the paid up value of each series of Capital Instruments of a listed Indian company, such investments by the FPIs are re-classified as FDI subject to the conditions as specified by SEBI and the RBI in this regard, and the investee and the investor companies complying with the reporting requirements prescribed in Regulation 13 of the TISPRO Regulations.

C. Investment by Non-Resident Indians

TISPRO Regulations allow NRI investors to invest in India, either on repatriation basis or non-repatriation basis. Investments made on repatriation basis are such investments, sale/ maturity proceeds (net of taxes) of which are eligible of being fully repatriated outside India. However, such investments are subject to conditions, as prescribed under the TISPRO Regulations, similar to that applicable to any nonresident investor. On the other hand, investments made by NRIs on non-repatriation basis, as prescribed under Schedule 4 of the TISPRO Regulations, cannot be repatriated outside India and hence, such investments are also deemed to be domestic investment at par with the investments made by resident investors.

Start-up India Initiative

The government's initiative of "Start-up India" to give boost to ecosystem of entrepreneurship and innovation has garnered a lot of attention and response. A start-up has been defined and the process of its recognition (through mobile application/portal of DIPP) and eligibility for obtaining tax benefits has been notified by DIPP. An entity (i.e. a private limited company/ limited liability partnership/a registered partnership firm) incorporated/registered in India shall be considered as a 'startup':

a. Up to 7 years from the date of its incorporation/ registration or upto 10 years in case of startups in biotechnology sector

b. If its turnover for any of the financial years has not exceeded INR 25 crores, and

c. It is working towards innovation, development, or improvement of products or processes or services or if it is scalable business model with a high potential of employment generation or wealth creation.

Various ministries have also come forward with measures to ease doing of business in India. Some of these are:

- Real time registration of a company
- No licences/ permits/ approvals/tax for start-ups in which non-risk non-hazardous activities
- Overriding effect on many legislations including legislations on tax (both direct and indirect), environmental legislations, labor legislations etc.
- Tax sops and incentives
- Loans to be treated as priority sector lending
- Credit guarantee for loans
- Strong Intellectual Property Rights ("IPR") regime and strengthening of IPR enforcement
- Simpler listing requirements
- Facilitate easy exit

RBI has also announced a list of clarifications/ reforms/ proposals which would be applicable to foreign investments in Start-ups. Some of the key changes are:

- FVCI will be permitted to invest in all startups regardless of the sector that the startup would fall under
- Transfer of shares or ownership with deferred considerations and facilities for escrow or indemnity arrangements for a period of 18 months is allowed
- Simplification in the process for dealing with delayed reporting of FDI related transaction by building a penalty structure into the regulation itself
- Enabling online submission of A2 forms for outward remittances on the basis of the form alone or with upload/ submission of document(s), depending on the nature of remittance
- Indian startups may issue shares against any other funds payable by the startup company

- Opened up a new avenue for investments into start-ups in India by allowing foreign investors to invest in Indian start-ups by subscribing to "convertible-notes" issued by such companies subject to specified conditions.

Establishing a Presence
(Unincorporated and Incorporated Options)

Once the foreign exchange regulations have been complied with, a foreign investor must choose how it wishes to set up its operations in India. The entities that foreign investors may set up in India may either be unincorporated or incorporated.

I. Unincorporated Entities

A foreign company can use unincorporated entities to do business in India via 'offices' of certain types. These options are as follows:

A. Liaison Office

Setting up a liaison office in a sector in which 100% FDI is allowed under the automatic route requires the prior consent of the AD. For the remaining sectors, RBI grants its approval after consultation with the Ministry of Finance.

A liaison office acts as a representative of the parent foreign company in India. However, a liaison office cannot undertake any commercial activities and must maintain itself from the remittances received from its parent foreign company. The approval for setting up a liaison office is generally valid for 3 years and can be extended by making an application to AD before the date of expiry of validity. It is an option usually preferred by foreign companies that wish to explore business opportunities in India.

B. Branch Office

Similar to a liaison office, the branch office of a foreign company in India must be set up with the prior consent of the AD for sectors under which 100% FDI is permissible under automatic route, with approval under other sectors accorded after consultation with Ministry of Finance. It can represent the foreign parent company in India and act as its buying or selling agent in India. However, a branch office cannot carry out any retail, manufacturing or processing activities. The branch office is permitted to remit surplus revenues to its foreign parent company subject to the taxes applicable. Operations of a branch office are restricted due to limitation on the activities that it can undertake. The tax on branch offices is 40% plus applicable surcharges and the education cess. It is an option that is useful for companies that intend to undertake research and development activities in India.

C. Project Office

A foreign company, subject to obtaining approval from the AD, may set up a project office in India under the automatic route subject to certain conditions being fulfilled including existence of a contract with an Indian company to execute a project in India. A project office is permitted to operate a bank account in India and may remit surplus revenue from the project to the foreign parent company. The tax on project offices is 40% plus applicable surcharges and the education cess. Project offices are generally preferred by companies engaged in one-time turnkey or installation projects.

D. Partnership

A partnership is a relationship created between persons who have agreed to share the profits of a business carried on by all of them, or any of them acting for all of them. A partnership is not a legal entity independent of its partners. The partners own the business assets together and are personally liable for business debts and taxes. In the absence of a partnership agreement, each partner has an equal right to participate in the management and control of the business and the profits / losses are shared equally amongst the partners. Any partner can bind the firm and the firm is liable for all the liabilities incurred by any partner on behalf of the firm. Investment by foreign entities is permitted in Indian partnership firms subject to prior approval of RBI.

E. Trust

A trust arises when one person (the “trustee”) holds legal title to property but is under an equitable duty to deal with the property for the benefit of some other person or class of persons called beneficiaries. Like a partnership, a business trust is not regarded as a legal entity. The trust, as such, does not incur rights or liabilities. The beneficiaries do not generally obtain rights against or incur liabilities to third parties because of the transactions or actions undertaken by the trustee in exercising its powers and carrying out its duties as a trustee. If the trustee of a business trust is a corporation, the participants may effectively limit their liability to the assets of the corporate trustee and the assets held by the corporation on trust for the beneficiaries. A foreign resident may only be the beneficiary of a trust, which is set up as a venture capital fund and only after receiving the prior consent of the concerned department of Government of India.

II. Incorporated Entities

Incorporated entities in India are governed by the provisions of the Companies Act/Limited Liability Partnership Act, 2008.

A. Limited Liability Partnership

A LLP is a form of business entity which permits individual partners to be shielded from the liabilities created by another partner's business decision or misconduct. In India, LLPs are governed by the Limited Liability Partnership Act, 2008. LLP is a body corporate and exists as a legal person separate from its partners.

B. Companies under the Companies Act

With effect from April 1, 2014, the Companies Act, 2013 has replaced the previous Companies Act, 1956. The Companies Act, 2013 sets out, inter alia, provisions related to incorporation of a company, issuance of shares, roles and responsibilities of a company and its directors, and dissolution of a company (winding up).

The authority that oversees companies and their compliances is the Registrar of Companies ("RoC"). Companies may either be 'private limited companies' or 'public limited companies'.

i. Private Limited Company

A private limited company has certain distinguishing characteristics. It must, in its articles of association, restrict the right to transfer shares; the number of members in a private limited company is minimum of 2 and a maximum of 200 members (excluding the present and past employees of the company); its Articles of Association must prohibit any invitation to the public to subscribe to the securities of the company.

Under the Companies Act, 2013 a natural person who is an Indian citizen and resident in India can incorporate a one person company. However, it shall be required to convert itself into public or private company, in case its paid up share capital is increased beyond INR 5 million or its average annual turnover exceeds INR 20 million.

ii. Public Limited Company

A public limited company is defined as a company which is not a private company (but includes a private company that is the subsidiary of a public company). A public limited company shall have a minimum of 7 members but may have more than 200 shareholders and may invite public to subscribe to its securities.

A public limited company may also list its shares on a recognized stock exchange by way of an IPO. Every listed company shall maintain public shareholding of at least 25% (with a maximum period of 12 months to restore the same from the date of a fall).

MCA initially introduced a major reform for entrepreneurs in India on the occasion of World Labor Day. Effective May 1, 2015, incorporation of a new company required only one e-form to be filed as against five e-forms. This process was known as Integrated Incorporation Procedure and it was an additional procedure apart from regular procedure of incorporation.

However, MCA took a valiant and a versatile step by launching a Simplified Performa for Incorporating a Company Electronically (SPICe – form INC 32) vide notification dated October 1, 2016 replacing e-form INC 29 which was introduced on May 1, 2015. By introduction of SPICe, MCA seek to achieve a speedy incorporation service with specified time frames which are in line with international best practices.

SPICe form INC 32 has undergone many changes from the date of its introduction and the new facility introduced in SPICe form INC 32 is allotment of PAN and TAN for the company along with the incorporation certificate."

A foreign company shall, within a period of 30 days of the establishment of its place of business in India, register itself with the registrar of companies, as either a private or a public company.

Advantages and Disadvantages of a Private Company

- More flexibility than public companies in conducting operations, including the management of the company and the payment of managerial remuneration
- Faster incorporation process
- Restrictions on invitation to public to subscribe to securities.
- Limited exit options

III. Incorporation Process (As per Companies Act, 2013)

The process for incorporating a company in India is not exceptionally different from the processes in other Commonwealth nations. The important steps with an indicative time frame involved in the incorporation process are:

A. PAN – DSC – DIN

- Permanent Account Number ("PAN"), Digital Signature ("DSC") preferably with PAN encryption and Directors Identification Number ("DIN") is mandatory for initiating the incorporation process. All forms are required to be filed electronically.
- No person can be appointed as a Director without DIN and having duplicate DIN is an offence.
- DSC should be PAN encrypted as, all filings relating to Income Tax has to be done by a director whose DSC is PAN encrypted.

B. Name Approval

- The RoC must be provided with 2 preferred name which should not be similar to the names of any existing companies. A no-objection certificate must be obtained in the event that the word is not an 'invented word'.
- The proposed name must not violate the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950.
- MCA has introduced Central Registration Centre having territorial jurisdiction all over India to process and dispose of the name reservation applications.

C. Filing of Charter Documents

- The memorandum and articles of the company have to be prepared in accordance with the needs of the business and the same must be filed with the RoC. Individual subscribers having valid DIN shall file the memorandum and articles of the company in electronic form by digitally signing e-form INC 33 and e-form INC 34. However, individual subscribers who do not have a valid DIN and subscribers which are body corporate shall sign the memorandum and articles in physical and file along with SPICe e-form INC 32.
- The RoC will need to be provided with certain information, such as the proposed first directors of the company and the proposed address of its registered office. The registered office is required to be finalized within 15 days and intimated within 30 days of incorporation.
- Affidavits and declarations to be provided by subscribers and requires notarisation and apostillisation in the respective home countries.
- A private limited company must have at least 2 shareholders and 2 directors whereas a public limited company must have at least 7 shareholders and 3 directors.
- One of the directors has to be resident in India, for at least 182 days in the previous calendar year.
- Companies that meet certain thresholds must have independent directors and women director on the Board.

D. Certificate of Incorporation

- The Certificate of Incorporation provided by the RoC at the end of the incorporation process acts as proof of the incorporation of the company.
- The company should be capitalized and the corresponding share certificates be issued within a period of 2 months of receiving the certificate of incorporation.

E. Post Incorporation

Once a company is incorporated, it must undertake certain other actions in order to become fully functional:

- The company must, within 30 days from incorporation, hold its first board meeting.
- The first auditor should be appointed by the Board within 30 days from the date of its incorporation who shall hold the office till the conclusion of it first annual general meeting. If in case, the Board fails to appoint within 30 days, shareholders can appoint the first auditor, within 90 days of incorporation.
- The company may appoint additional directors (if required).
- The company must register itself with statutory authorities such as indirect tax authorities and labor authorities.
- The company must open a bank account.
- The company must put in place the contracts with suppliers and customers that are essential to running the business.

Pursuant to various reform measures brought in by the MCA, the procedure for incorporation of a company in India has become single-form and single window with a time frame of less than 96 hours after submission of the requisite documents Additionally with the no-minimum capital requirement, the MCA is looking to attract start-up culture. With many advantages to doing business in India via an incorporated entity, company is definitely one of the leading option.

IV. Types of Securities

Indian companies may issue various types of securities. The primary types of securities used in foreign investments into India are:

A. Equity Shares

Equity shares are ordinary shares in the share capital of a company and are entitled to voting rights and dividend rights.

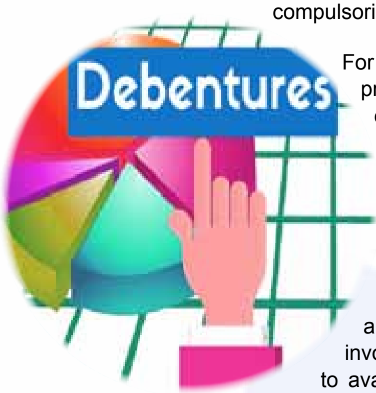
B. Preference Shares

Preference shares are shares which carry a preferential right to receive dividends at a fixed rate as well as preferential rights during liquidation over the equity shares. Convertible preference shares are a popular investment option. Further the preference shares may also be redeemable. An Indian company can issue only compulsorily convertible preference shares to a non-resident.

C. Debentures

Debentures are debt securities issued by a company, and typically represent a loan taken by the issuer company with an agreed rate of interest. Debentures may either be secured or unsecured.

Like preference shares, debentures issued to nonresidents are also required to be compulsorily convertible to equity shares.



For the purposes of FDI, fully and compulsorily convertible preference shares and debentures are treated on par with equity and need not comply with the external commercial borrowings guidelines (“ECB Guidelines”).

The ECB Guidelines place certain restrictions and requirements on the use of ECB. Indian companies are permitted to avail ECB, which limits are in the range of USD 100 million to USD 750 million per under the automatic route depending on the sectors the companies are doing business. For example Indian companies involved in the software development sector are allowed to avail of ECB upto USD 200 million or its equivalent in a financial year under the automatic route. In order to raise ECB, the Indian company and the foreign financier must fulfill the criteria of an eligible borrower and a recognized lender respectively, under the ECB Guidelines. Further, there remain restrictions on average maturity period and the permitted end-uses of foreign currency expenditure such as for the import of capital goods and for overseas investments.

V. Return on Investments

Extracting earnings out of India can be effected in numerous ways. However it is essential to consider the tax and regulatory issues around each mode of exit:

A. Dividend

Companies in India, as in other jurisdictions, pay their shareholders dividends on their shares, usually a percentage of the nominal or face value of the share.

For a foreign investor holding an equity interest, payment of dividend on equity shares is a straightforward way of extracting earnings. However, the company has to bear the dividend distribution tax and it may not necessarily receive credit against any direct tax payable by the foreign investor who receives such dividend in its home jurisdiction.

B. Buyback

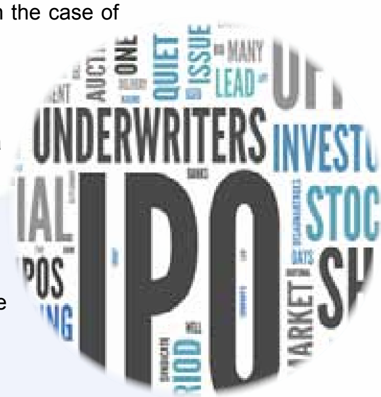
Buyback of securities provides an investor the ability to extract earnings as capital gains and consequently take advantage of tax treaty benefits. However, buybacks in India have certain restrictions and thus need to be strategically planned. For instance, a company may not, except with a special resolution, buy company per year in back more than 25% of its outstanding equity shares in a year. Further, a buyback may be effected only from certain permitted sources.

C. Redemption

Preference shares and debentures can both be redeemed for cash. While redemption is perhaps the most convenient exit option for investors, optionally convertible securities, which are effectively redeemable, have been classified as ECB. This entails greater restrictions. Also, there is a restriction on issuing preference shares redeemable beyond a period exceeding 20 years from their issue (except in the case of infrastructure companies).

D. IPO

An IPO is the first offer for sale of the shares of a company to the public at large via listing the company's stock on a stock exchange. While an initial public offering may usually be regarded as a long term exit option, it is also usually included as an exit option in transaction documents as it may provide investors with large returns. IPOs are discussed in further detail in the next chapter.



E. Put Options

The use of 'Put Options', wherein foreign investors retain a right to 'put' or sell securities to Indian promoters as an exit option, has been a contentious issue for some time. The issue was settled to a certain extent by SEBI recognizing put and call options in shareholders' agreement, subject to certain prescribed restrictions. The RBI has also allowed put options to foreign investors, with certain conditions. In this regard non-resident persons holding shares of an Indian company containing an "optionality clause" and exercising the option/right shall be allowed to exit, without any assured return, subject to the following conditions:

i. Lock-in Period

Exit can be achieved only after fulfilling a minimum lock-in of 1 year;

ii. Pricing Restriction

Exit price cannot be pre-agreed and will be arrived at using any of the internationally accepted pricing methodology at the time of exit duly certified by a chartered accountant or a SEBI registered merchant banker.

VI. Important Issues under the Companies Act, 2013

A. Duties and Liabilities of Director

The general duties of a director have been specifically provided for, which include:

- to act in accordance with the articles of association of the company;
- to act in good faith in order to promote the objects of the company and in best interest of stakeholders;
- to exercise his duties with due and reasonable care, skills and independent judgment;
- to not involve in a situation in which his interest conflicts with the interest of the company;
- to not achieve or attempt to achieve any undue gain or advantage tither himself or through his relatives, partners or associates;
- to not assign his office and any assignment so made shall be void.

It may be noted that if a director fails in performing his duties mentioned above, he shall be punishable with fine of INR 100,000 to INR 500,000.

Further, every director of a company, who is aware of a contravention of the Companies Act or had consented to any such contravention, shall be liable for the punishment prescribed for the contravention. The penalty for the directors has been increased and a fine of upto INR 20 million may be imposed for certain offences.

B. Director's Report

The Director's Report is quite detailed and is required to include amongst other statements:

- a statement, on the performance and financial position of subsidiaries, associate companies and joint venture companies, included in consolidated financial statement;
- that directors have devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively;

- on the risk management policy for the company including identification of elements of risk, if any, which may threaten the existence of the company;
- on the manner in which formal evaluation has been made by the board of its own performance, committees and individual directors (for listed and public companies with Paid up capital of INR 25 crores (approx. USD 3.5 million). The liability for contravention includes fine on the company upto INR 25 lakhs (approx. USD 35,600) and every officer of the Company shall be punishable with imprisonment upto 3 years or fine upto INR 5 lakhs or both.

C. Liability of Directors

Every director of a company who is aware of a contravention of the Companies Act or if the contravention was done with his/her consent, shall be liable for the punishment prescribed for the contravention. It is also important to note that the penalty for the directors has increased and a fine of upto INR 20 million may be imposed for certain offences.

D. Merger of an Indian Company with a Foreign Company

The Companies Act, 2013 provides for a merger of an Indian company with a company incorporated in certain notified jurisdictions. The merger will be subject to prior approval of the RBI. The consideration for the merger can be in the form of cash, depository receipts or both.

E. Related Parties Transactions

The Companies Act, 2013 has expanded the scope of the provisions relating to transactions with directors and introduced them within the concept of "Related Party Transactions". Further such transactions require consent of the board and ordinary resolution of the shareholders in relation to certain transactions.

Definition of "related party" now includes a key managerial personnel or his relative;

a public company in which a director / manager is a director or holds along with his relatives more than 2% of its paid up share capital; anybodycorporate of which a director or manager of the company is a shadow director; shadow director of the company; a company which is a holding, subsidiary or an associate company of such company (only for public companies).

The contracts that are covered under these transactions have been widened to include selling or disposing of or buying or leasing of property of any kind, availing or rendering of any services, appointment of agents for purchase or sale of goods materials, services or property, the related party's appointment to any office or place of profit in the company, its subsidiary or associate company etc.

It excludes only those transactions which are entered into by the company in its ordinary course of business and which are on an arm's length basis.

The exemption limit for contracts or arrangements in which directors are interested in, that need to be entered in the Register of contracts or arrangements has been increased to INR 5 lakhs (approx. USD 7,100).

Transactions in the nature of loans to and guarantees on behalf of directors and their related parties are prohibited, unless the same is pursuant to a scheme approved by the shareholders or if the company provides loans in its ordinary course of business. Related parties of directors also include companies in which director holds common directorship. However, providing guarantee by holding company on behalf of subsidiaries, if they have common directors, has been specifically excluded.

F. Corporate Social Responsibility

Every company with a net worth of INR 5 billion or more, or turnover of INR 10 billion or more or a net profit of rupees INR 50 million or more during any financial year will spend at least 2% of the average net profits of the company made during the three immediately preceding financial years towards its corporate social responsibility obligations.

G. Class Action suits

Any class of members or depositors, in specified numbers, may initiate proceedings against the company, or its directors if they are of the opinion that its affairs are being carried out in a manner unfairly prejudicial to the interests of the company. Damages as a result of the suit may be claimed against directors, auditors, expert or advisor or consultant. “Expert” includes an engineer, a valuer, a chartered accountant, a company secretary, a cost accountant and any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force.

VII. Companies (Amendment) Act, 2015 and further changes to the Companies Act, 2013

There have been amendments to certain sections of the Companies Act, 2013 vide the Companies (Amendment) Act, 2015. Further, notification on exemptions to private companies dated June 5, 2015 has provided certain important exemptions to private companies bringing in relief to the business community. Some of the important changes are as follows:

- Requirement of having a minimum paid up share capital has been done away with for public and private companies
- The requirement of filing a declaration before commencement of business has been done away with
- A private company can now freely issue hybrid instruments including preference shares with differential rights by virtue of its articles. The issuance of shares with differential rights by a private company are not subject any conditions.
- Relaxation is provided with respect to ESOPs i.e. obtaining ordinary resolution for approval of ESOP Scheme from shareholders in place of special resolution required earlier.
- The creation of charge/mortgage on assets of the company to secure borrowings will not require shareholders' approval.
- Section 185 of CA 2013 prohibits companies from advancing loan including in form of book debt, giving guarantee or security to its directors and to persons in whom directors are interested. However, the provisions of Section 185 are not required to be complied with by a private company satisfying the following conditions:
  a) in whose share capital, no other body corporate has invested any money; and
  b) its borrowings from banks, financial institution or body corporate do not exceed twice the amount of paid up share capital or INR 50 Crores – whichever is lower and there are no subsisting defaults in repayment of such borrowings at the time of making transaction; and
  c) there are no subsisting defaults in repayment of such borrowings at the time of making transaction.

The compliance of Section 185 is exempted for all companies when the transaction is between holding company and its wholly owned subsidiary and between holding company and its subsidiary as stated below:

A. Holding Company and Wholly Owned Subsidiary

Any loan, made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company is exempted from the compliance of Section 185 of the Companies Act, 2013. Provided that the loan advanced by the holding company is utilized by the subsidiary company for its principal business activities.

B. Holding Company and Subsidiary

Any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company is exempted from the requirements of Section 185 provided that such loans made are utilized by the subsidiary company for its principle business activities.

Mergers and Acquisitions

The term 'merger' is not defined under the Companies Act, the ITA or any other Indian law. A merger in normal parlance means a combination of two or more companies into one. Sections 230 to 232 of the Companies Act, 2013 deal with the analogous concept of schemes of arrangement or compromise between a company, its shareholders and/or its creditors.

An acquisition or takeover is the purchase by one company of controlling interest in the share capital, or all or substantially all of the assets and/or liabilities, of another company. A takeover may be friendly or hostile, depending on the offeror company's approach, and may be affected through agreements between the offeror and the majority shareholders, purchase of shares from the open market, or by making an offer for acquisition of the offeree's shares to the entire body of shareholders. Acquisitions may be by way of purchase of shares of the target, or purchase of assets and liabilities of the target. The modes most commonly adopted are a share acquisition or an asset purchase:

1. **A share acquisition** may take place by purchase of all existing shares of the target by the acquirer, or by way of subscription to new shares in the target so as to acquire a controlling stake in the target or a combination of the two methods.
2. **An asset purchase** involves the sale of the whole or part of the assets of the target to the acquirer. There are several laws and regulations that govern a merger or acquisition in India, either directly or indirectly. Given below is a brief on the same.

A. Companies Act, 2013

The Companies Act, 2013 has introduced a number of changes relating to mergers and acquisitions in India. Most provisions relating to mergers and acquisitions were notified towards the end of 2016. Additionally, the Ministry of Corporate Affairs notified the Companies (Compromises, Arrangements & Amalgamations) Rules, 2016 which deals with the procedure to be followed for mergers, amalgamations, compromises etc. We have discussed some of the significant provisions applicable to mergers and acquisitions in India introduced vide the Companies Act, 2013.

i. Mergers/Demergers

Sections 230 to 232 (the "Merger Provisions") of the Companies Act, 2013 govern a merger of two or more companies under Indian law. The most significant changes, relating to mergers, introduced under the Companies Act, 2013 are:

a. National Company Law Tribunal ("NCLT")

The government constituted the NCLT to consolidate multiple forums which existed for resolving company law matters and bring about speed and efficiency in resolution of company matters. Companies which intend to merge must make an application to the NCLT having jurisdiction over such company for calling meetings of its respective shareholders and/or creditors. The NCLT may then order a meeting of the creditors/shareholders of the company. If the majority in number representing 3/4th in value of the creditors and shareholders present and voting at such meeting agree to the merger, then the merger, if sanctioned by the NCLT, is binding on all creditors and shareholders of the company. The Ministry of Corporate Affairs on June 1, 2016 issued notifications constituting benches of NCLT and the National Company Law Appellate Tribunal ("NCLAT"). The notification also mandated the transfer of all proceedings pending before the erstwhile Company Law Board to the NCLT. A notification dated December 7, 2016 transferred proceedings pending before the district and high courts to the NCLT.

b. Provisions for fast track mergers/amalgamations/demergers introduced

Under this process, no approval from the NCLT is required. Only private companies having a paid up capital of less than INR 5 million or turnover of less than INR 20 million as per last audited financial statements can apply for a fast track merger. The section relating to fast track merger process was also notified on June 1, 2016.

c. Provisions for merger of an Indian company into a foreign company introduced

This is in addition to the exiting provision for merger of a foreign company into an Indian company. However, mergers only with foreign companies in permitted jurisdictions shall be permitted and prior RBI approval is required for such cross border merger. Please note that a foreign company means any company or body corporate incorporated outside India. Section 234 of the Companies Act, 2013 which provides for merger or amalgamation of an Indian company with foreign company, along with rules for the same were notified and thus mergers of an Indian company with a foreign company is permissible subject to the following conditions:

- The foreign company should be incorporated in a permitted jurisdiction which meets certain conditions.
- The transferee company is to ensure that the valuation is done by a recognized professional body in its jurisdiction and is in accordance with internationally accepted principles of accounting and valuation.
- Procedures under Section 230-232 must be followed.

i. Acquisitions

In case the acquisition of a company which involves issuance of new shares or securities to the acquirer, it would be necessary for the shareholders of the company to pass a special resolution under the provisions of Section 62 of the Companies Act, 2013. A special resolution is one that is passed by at least 3/4th of the shareholders present and voting at a meeting of the shareholders.

RBI has required that all NBFCs will have to take prior approval of the central bank in case (i) there is any takeover or acquisition of control of a NBFC which may or may not result in change in management; (ii) any shareholding pattern changes which results in acquisition/ transfer of 26% or more of the shareholding (iii) any change in the management of the NBFC which results in change of more than 30% of the directors excluding independent directors through mergers and acquisitions.

ii. Purchase of an undertaking or part of an undertaking

The Companies Act, 2013 allows for disposal (including sale) of a specific undertaking of the business, in which the investment of the company exceeds 20% of company's net worth or which generates 20% of the total income of the company. This can be done by passing a resolution by atleast 75% of the shareholders who cast their vote. This is also applicable in case of disposal of 20% or more of the value of any undertaking. However, this resolution needs to be passed only by a public company or subsidiaries of public companies.

B. Takeover Code

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Code") governs the acquisition of shares in an Indian public listed company.

The main objective of the Takeover Code is to regulate direct or indirect acquisition of shares or control and takeovers of Indian listed companies through a system of disclosure of information and exit opportunity for the public shareholders.

The Takeover Code requires an acquirer to, inter alia, disclose its aggregate shareholding to the company and the stock exchanges whenever the acquirer becomes entitled to more than 5% of the shares or voting rights in a company. Thereafter, there are additional disclosure requirements based on shareholding thresholds.

Acquisition of, voting rights in excess of 26% and/or control of the target company will require the acquirer to offer a mandatory exit to the public shareholders by offering to acquire at least additional 26% shares of the target. The offer price will be determined on the basis of the parameters laid down in the Takeover Code.

C. Listing Regulations

SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (the "Listing Regulations") regulates all listed Indian companies and prescribes the mandatory conditions to be complied with by listed companies for ensuring continuous listing. This includes fair, prompt and adequate disclosure of material information for the benefit of the public shareholders. The Listing Regulations also require the companies to execute a listing agreement with a stock exchange for the purpose of listing its shares with the stock exchange and agreeing to abide by the provisions of the Listing Agreement. In addition, listed entities are obligated to file the draft scheme of arrangement through which a merger/acquisition is occurring, before the stock exchanges and obtain a no-objection letter from them prior to filing the scheme of arrangement before the NCLT for approval. The merger of a wholly owned subsidiary with its holding company can be carried out without such no-objection letter. Per a recent amendment to the Listing Regulations, subsequent to December 05, 2018, the transfer of listed securities may be only carried out if the securities are in dematerialized form.

D. Insider Trading Regulations

Akin to insider trading regulations in other jurisdictions, SEBI (Prohibition of Insider Trading Regulations) 2015 ("Insider Trading Regulations") is intended to restrict insiders from trading in securities to the disadvantage of the public shareholders. Use and dissemination of price sensitive information are regulated by the Insider Trading Regulations.

Under the Insider Trading Regulations, an 'insider' has been defined to mean any person who is (i) a connected person; or (ii) in possession of or having access to unpublished price sensitive information ("UPSI"). Information relating to a company's merger, demerger,

acquisition etc. forms part of UPSI. Every connected person is an 'insider' under the Regulations. An outsider i.e. a person who is not a 'connected person' would qualify as an 'insider' if such person was 'in possession of' or 'having access to' UPSI.

The Insider Trading Regulations prohibit (i) communication of unpublished price sensitive information (ii) procurement of unpublished price sensitive information and (iii) trading in securities when in possession of unpublished price sensitive information.

The Insider Trading Regulations also mandate continual disclosures by the promoters, key managerial persons and directors.

E. Competition Law

The Government of India enacted the Competition Act, 2002 ("Competition Act") to replace the Monopolies and Restrictive Trade Practices Act, 1969. The Competition Act takes a new look at competition altogether and contains specific provisions on (i) anticompetitive agreements, (ii) abuse of dominant positions and (iii) mergers, amalgamations and takeovers ("Combinations"). The Competition Commission of India ("CCI") has been established to monitor, regulate, control and adjudicate on anti-competitive agreements, abuse of dominant position and Combinations.

Combinations which meet certain thresholds have to be notified under the Competition Act. The Competition Act requires mandatory pre-transaction notification to the CCI of all Combinations that exceed any of the asset or turnover thresholds which apply to either the acquirer or the target or both; or to the group to which the target/ merged entity would belong post acquisition or merger. For the purposes of the Competition Act, 'acquisitions' would mean direct or indirect acquisition of any shares, voting rights or assets of any enterprise, or control over management or assets of an enterprise. A filing/notification will be required if the merger/acquisition satisfies the following criteria and does not fall within one of the specified exceptions.

However, for a period of 5 years (from March 2016 being the date of notification), enterprises that have assets of not more than INR 3.5 billion or turnover of not more than INR 10 billion will be exempt from application of the regulation.

Further, similar exemption has also been provided for a period of 5 years (from March 2017) for acquisitions, mergers or amalgamations where the value of assets being acquired, taken control of, merged, or amalgamated, is less than INR 3.5 billion or their turnover is less than INR 10 billion. Additionally, (i) regional rural banks, (ii) nationalized banks, and (iii) central public sector enterprises operating in the oil and gas sectors looking to combine with their partially or wholly owned subsidiaries, were also exempted from the application of such regulation for a period of 5 years (from August 10, 2017), 10 years (from August 30, 2017), and 5 years (from November 27, 2017) respectively.

F. Exchange Control Regulations

Cross border mergers and acquisitions are required to be in conformity with the foreign exchange regulatory framework in addition to the provisions of Companies Act, 2013. The Reserve Bank of India recently published the Foreign Exchange Management (Cross Border Merger) Regulations, 2018, which introduced the concept of 'deemed approval' by the RBI for cross border mergers. In order to avoid the requirement of explicit prior approval of RBI, the cross-border merger must satisfy, inter alia, the following conditions:

- In case the resultant company is an Indian company ("Inbound Merger"), the issuance or transfer of such company's securities to a person resident outside India must be in consonance with the conditions in the FDI Regulations;
- In case the resultant company is a foreign company ("Outbound Merger"), the acquisition/ holding of securities in such company by an Indian resident must be in consonance with the ODI Regulations (as defined hereinafter);

- The guarantees or borrowings from outside sources inherited by a resultant Indian company must conform to the external commercial borrowing norms or trade credit norms, as the case may be, laid down under the regulations under the Foreign Exchange Management Act, 2000, within two years of such merger;
- Impermissible assets (i.e., assets that are not permitted to be held by the resultant company (Indian or foreign as the case may be) under India's foreign exchange regulations) held by the resultant company (Indian or foreign) as a consequence of the merger, must be disposed of within two years of the sanction of the scheme of amalgamation by the NCLT and the proceeds must be repatriated to India or outside India, as applicable, immediately;
- An office inside India, in the case of an Outbound Merger, and an office in India, in case of an Inbound Merger, must satisfy the respective regulations under the Foreign Exchange Management Act, 2000, governing branch/liaison offices (i) of a foreign company, inside India, and (ii) of an Indian company, outside India, respectively.

G. Overseas Direct Investment

An Indian company that wishes to acquire or invest in a foreign company outside India must comply with the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 (the "ODI Regulations"). Such an investment can be made by Indian Companies in overseas joint ventures/wholly owned subsidiaries, of a total financial commitment of up to 400% of the net worth of the Indian company, which is calculated as per the latest audited balance sheet of the Indian company.

I. Taxes and Duties

A. Income Tax

A number of acquisition and restructuring options are recognized under Indian tax laws, each with different set of considerations:

- Amalgamation (i.e. a merger which satisfies the conditions specified in the ITA)

- Asset sale/Slump sale (which satisfies the conditions specified in the ITA);
- Transfer of shares; and
- Demerger or spin-off (which satisfies the conditions specified in the ITA).

Share transfers may give rise to capital gains tax at rates which depend on holding period of the securities (rates mentioned in Chapter 7 of this paper). Capital gains income is computed by deducting the following from the value of the consideration received – (a) expenditure incurred wholly and exclusively with such transfer, and (b) cost of acquisition of the capital asset and any cost of improvement of the capital asset.

Mergers and spin-offs may be structured as tax neutral transfers provided conditions specified under the ITA are met with respect to transfer of assets / liabilities and continuity of shareholding. There are also provisions for carry forward of losses to the resulting entity.

Transfer of foreign securities may be taxed if the securities substantially derive value from assets situated in India (indirect transfers discussed in Chapter 7 of this report). This adds an additional element of complication in cross-border M&A with underlying assets or subsidiaries in India. Transfer pricing rules also have to be considered in relation of share transfers as part of a group re-structuring exercise.

Persons acquiring shares of unlisted companies in India may be subject to tax if the consideration paid for the shares is lower than the fair market value of the shares computed using a prescribed formula. Additional tax considerations arise when the deal consideration is structured as earn-outs. Further, withholding tax obligations also create challenges especially in a cross-border context.

As an alternative to a share transfer, acquisitions may be structured in the form of an asset sale or slump sale.

A slump sale is a transaction where the seller transfers one or more of its undertakings on a going concern basis for a lump sum consideration, without assigning values to the individual assets and liabilities of the undertaking. The advantage of undertaking a slump sale is that the business as a whole (and not individual assets) qualifies as a long term capital asset so long as the undertaking as a whole is held for more than 3 years. The consideration received for slump sale of a business is characterized as a capital receipt chargeable to tax as capital gains.

In an asset sale, the acquirer only purchases specific assets or liabilities of the seller. It does not involve a transfer of the business as a whole. The capital gains tax payable by the seller will depend on the period that the seller has held each of the assets that are transferred.

In light of the uncertainties in the tax environment, negotiation of tax indemnities has become a vital component in most M&A deals. Cross-border movement of intangibles may also give rise to potential tax exposures which have to be carefully considered and structured.

B. Indirect Tax

Prior to July 1, 2017, a series of central and state taxes were levied at various stages of the production and distribution process. These included central excise duty on manufacture, central sales tax on inter-state sale, sales tax/value added tax on intra-state sale, and service tax on the rendering of services. Moreover, credit for input taxes paid was not uniformly available across central and state levies thereby leading to a cascading of taxes. With the introduction of the Goods and Services Tax ("GST"), India now has unified indirect tax system.

C. Stamp Duty

Stamp duty is a duty payable on certain specified instruments/documents. The amount of the stamp duty payable would depend on the state specific stamp laws. An insufficiently stamped document is not admissible as evidence in a Court of law of India. When there is a conveyance or transfer of any movable or immovable property, the instrument or document effecting the transfer is liable to payment of stamp duty. Stamp duty is also required to be paid on the order of the Tribunal approving a merger/demerger of two or more companies. The stamp laws of most states require the stamping of such orders. Stamp duty may be payable on an agreement that records the purchase of shares/debentures of a company and on the transfer deeds executed in this regard.

D. Other Taxes

Other taxes that may have to be considered in structuring M&A include potential service tax obligations. For instance, this could be an issue in cases where the seller procures that its employees accept offers of employment with the acquirer. A question may arise as to whether this may be viewed as manpower recruitment services which could be subject to service tax. While structuring any investment it is necessary to adopt a holistic approach and integrate all possible legal and tax considerations in a manner that best achieves the strategic and business objectives.

Capital Markets in India

Indian companies are allowed to raise capital and access financial markets through public issues of shares and other instruments within the regulatory confines of SEBI. The most active stock exchanges in India are the BSE Limited ("BSE") and the National Stock Exchange of India Limited ("NSE"). BSE is the 10th largest stock exchange with an overall market capitalization of more than $4.9 trillion$2.3 trillion on as of April, 2018

I. Public Issues

Public issues in India can be classified into two types: an IPO or a further public offer ("FPO").

An IPO is the process through which an issuer company allots fresh securities ("Fresh Issue") or offers for sale securities ("OFS") held by its existing shareholders or a combination of both Fresh Issue and OFS to the public for the first time. This paves the way for the listing and trading of the issuer company's securities on SEBI-approved stock exchanges in India. In the case of an FPO, an existing publicly listed company makes an additional issuance of its securities to the public or OFS of its existing securities to the public, through an offer document.

The ICDR Regulations govern the process of an IPO or an FPO by an Indian company, besides other offerings such as qualified institutional placement, preferential allotment, and Indian depository receipts.

In addition to ICDR Regulations, IPOs or FPOs are governed by the Companies Act, the Securities Contracts (Regulation) Rules, 1957 ("SCRR") and the Listing Regulations. The ancillary legislations that may be applicable to an IPO are the FEMA and the various regulations, press releases and circulars issued thereunder from time to time by the RBI and the FDI Regulations.

II. Eligibility Requirements for IPO

An unlisted company may undertake an IPO of its equity shares and any convertible securities if it satisfies the following eligibility requirements:

- The issuer company has net tangible assets of at least INR 30 million in each of the 3 preceding years, of which not more than 50% is held in monetary assets. However, the limit of 50% on monetary assets shall not be applicable in case the public offer is made entirely through offer for sale;
- The issuer company has minimum average pre-tax operating profit of INR 150 million, calculated on a restated and consolidated basis, during the 3 most profitable years out of the immediately preceding 5 years;
- The issuer company has a net worth of at least INR 10 million in each of the 3 preceding full years;
- The proposed issue size and all previous issues in the same financial year does not exceed 5 times its pre-issue net worth as per the audited balance sheet of last financial year; and
- If the issuer company has changed its name within the last 1 year, at least 50% of the revenue for the preceding 1 year is earned from the activity indicated by the new name.

An issuer not satisfying the above conditions may undertake an IPO, if the issue is made through the book-building process and the issuer undertakes to allot, at least 75% of the net offer to public, to qualified institutional buyers ("QIB") and to refund full subscription money if it fails to make the said minimum allotment to QIBs. An unlisted public company cannot undertake an IPO, if the company has less than 1,000 prospective allottees and there are outstanding convertible securities of the company or any other right which would entitle any person to an option to receive equity shares after the IPO.

III. Minimum Offer Requirements

The issuer company is required to offer:

i. at least 10% of each class or kind of securities to the public, in an IPO, provided:

- the post issue capital of the company calculated at offer price is more than INR 40,000 million; and
- the company shall increase its public shareholding to at least 25%, within a period of 3 years from the date of listing of the securities, in the manner specified by SEBI.

ii. at least 25% of each class or kind of securities to the public, in an IPO.

IV. Promoters' Contribution

A promoter, under the ICDR Regulations, is defined as a person or persons who are in control of the issuer company and who are instrumental in the formulation of a plan or program pursuant to which securities of the issuer company are offered to the public and those whose names are mentioned in the prospectus for the offering as a promoter of the issuer company.

As per the ICDR Regulations, the promoters are required to contribute in the IPO, not less than 20% of the post-IPO share capital of an issuer company. The promoters have to bring the full amount of the promoters' contribution including premium at least 1 day prior to the issue opening date and such amount is to be kept in an escrow account specially opened for this purpose.

There are certain securities which by the nature of their existence are ineligible for the computation of the promoter contribution, including certain bonus shares, pledged securities and shares acquired for consideration other than cash.

V. Lock-in Restrictions

A "lock-in" means a freeze on dealing in the securities. The ICDR Regulations specify certain lock-in restrictions with respect to the holdings of the promoters as well as other shareholders in the issuer company. The lock-in applicable to securities held by promoters is necessary to ensure that the promoters retain some interest in the issuer company post-IPO and to avoid flyby-night operators. The entire pre-issue capital of the issuer company (other than the securities locked-in for 3 years as minimum promoters' contribution) remains locked-in for a period of 1 year from the date of allotment. Certain exceptions include shares held by domestic and foreign venture capital investors (who have obtained the necessary registrations and have held shares atleast for a period of 1 year prior to filing of the prospectus) and shares issued to employees prior to IPO under an employee stock option plan.

VI. Offer for Sale

Strategic investors, in order to participate in an offer for sale of the securities of an investee company, should have held the equity shares in the investee company for a period of at least 1 year prior to the date of filing of the draft prospectus with SEBI. In case of equity shares issued upon conversion of convertible instruments, the period of holding of such convertible instruments should also be counted towards the 1 year holding period.

The strategic investors are exempt from this pre-requisite 1 year holding period, if either one of the following conditions is met:

- The IPO is of securities of a government company or statutory authority or corporation or any special purpose vehicle set up and controlled by any one or more of them, which is engaged in infrastructure sector;
- The investors had acquired shares pursuant to any scheme approved by the NCLT under Sections 230 to 234 of the Companies Act, 2013in lieu of business and invested capital which had been in existence for a period of more than 1 year prior to such approval.

VII. Credit Rating

The issuer company should have obtained a grading from at least one credit rating agency registered with SEBI prior to the date of registering prospectus or red herring prospectus with the RoC.

VIII. Pricing

The issuer company may freely price its equity shares or any securities convertible into equity shares at a later date in consultation with the lead managers (i.e. the merchant bankers) or through book building process.

IX. Disclosure Requirements

The ICDR Regulations stipulate the disclosure requirements in relation to promoters and members of the promoter group which has to be made in the offer documents that is to be filed with SEBI. The offer documents include sections such as issue details, risk factors (internal and external), capital structure of the issuer company, objects of the offering, terms of the issue, interest of the directors, financial information of the issuer company, charter documents of the company, business of the issuer company, regulatory approvals, outstanding litigations, the issue procedure, etc.

X. Filing of the Offer Document

The issuer company has to file a draft red herring prospectus with SEBI and stock exchanges (where securities are proposed to be listed) prior to the filing of the prospectus with RoC. SEBI and the recognized stock exchanges can specify changes / observations on the draft red herring prospectus. At this stage, the issuer company also has to obtain in-principle approval from all the stock exchanges on which the issuer company intends to list the securities through the prospectus. Thereafter, the issuer company has to carry out such changes or comply with such observations in the draft red herring prospectus before filing the prospectus with the ROC. Overall, doing an IPO is not only a plausible but also a preferred option for exit for strategic investors in Indian companies. However, as mentioned above, they have to be mindful of certain regulatory requirements, compliances and disclosures. In addition to the key pre-issue obligations discussed herein, issuer companies have to comply with a comprehensive list of post-issue obligations as well.

XI. Listing on Exchanges

Outside India Indian Companies are permitted to list instruments linked to their securities on stock exchanges outside India. This may be achieved through the issue of depository receipts – known commonly as ‘American Depository Receipts’ (“ADR”) or ‘Global Depository Receipts’ (“GDR”) depending on the location where the Company chooses to list.

An ADR is a stock that trades in the United States but represents a specified number of shares in a foreign corporation. ADRs are bought and sold on American markets just like regular stocks, and are issued / sponsored in the U.S. by a bank or brokerage. A GDR is similar to an ADR but is issued and traded on stock exchanges in countries other than the United States.

The 'Depository Receipts Scheme, 2014' ("DR Scheme 2014") effective December 15, 2014 was notified by the Central Government for investments under ADR/ GDR.

The salient features of the DR Scheme 2014 are:

- The securities in which a person resident outside India is allowed to invest under Regulation 5 of FEMA shall be eligible securities for issue of Depository Receipts in terms of DR Scheme 2014;
- A person will be eligible to issue or transfer eligible securities to a foreign depository for the purpose of issuance of depository receipts as provided in DR Scheme 2014;
- The aggregate of eligible securities which may be issued or transferred to foreign depositories, along with eligible securities already held by persons resident outside India, shall not exceed the limit on foreign holding of such eligible securities under the extant FEMA regulations, as amended from time to time;
- The eligible securities shall not be issued to a foreign depository for the purpose of issuing depository receipts at a price less than the price applicable to a corresponding mode of issue of such securities to domestic investors under FEMA;
- It is to be noted that if the issuance of the depository receipts adds to the capital of a company, the issue of shares and utilization of the proceeds shall have to comply with the relevant conditions laid down in the regulations framed and directions issued under FEMA;
- The domestic custodian shall report the issue/transfer of sponsored/unsponsored depository receipts as per DR Scheme 2014 in 'Form DRR' as given in annex within 30 days of close of the issue/program.

Earlier, the law allowed issue of GDR only against underlying asset being equity shares. Now, GDRs can be issued against all types of securities whether listed or unlisted. The conversion of GDR to shares and the transfer of GDR outside India between two non-residents are specifically exempted from tax. Apart from these, all other transactions pertaining to GDRs are taxed. Although a special tax regime has been framed, there is disparity as compared to certain concessional tax treatment that is available under normal provisions of the ITA.

However, through the Finance Act, 2015, the Government clarified that a new depository regime has been put in place, but that the tax benefits would only apply to cases valid under the old regime. This means that non-residents trading in certain DRs could be subject to the same taxes as those imposed on people trading in shares of unlisted companies here, besides creating tax ambiguities when such DRs are converted to shares. This was done as the Government intended that tax benefits under the domestic law should be provided only in respect of sponsored issuances of GDRs by Indian listed companies.

XII. Foreign Companies Listing in India

Similar to the ability of Indian Companies to raise capital abroad, foreign Companies are permitted to raise money on Indian capital markets by issuing 'Indian Depository Receipts' ("IDRs"). However, a foreign company intending to issue IDRs must meet the following eligibility requirements to list in India:

1. **Mandatory Listing in Home Country:** The Company must be listed in its home country;
2. **No Prohibition:** The Company must not be prohibited from issuing securities by any regulatory body;
3. **Net-worth and Capitalization Ceilings:** The Company should have a pre-issue paid up capital and free reserves of at least USD 50 million with a minimum capitalization of

USD 100 million in its home country, during the last 3 years immediately preceding the issue;

4. **Compliance Track Record:** The Company must have a good track record of compliance with securities market regulations in its home country;
5. **Trading Track Record:** The Company is required to have a continuous trading record or history on a stock exchange in its home country for at least 3 years immediately preceding the issue; and
6. **Profit Track Record:** The Company should have a track record of distributable profits for at least three out of immediately preceding five years.

A foreign Company must then comply with the provisions of the following statutes, rules and regulations after listing:

- The Companies Act;
- The ICDR Regulations; and
- The Companies (Issue of Indian Depository Receipts) Rules, 2004.

XIII. Small and Medium Listing Enterprises (SME)

In order to facilitate capital raising by SME's and to provide an exit option for angel investors, Venture Capital ("VC") and Private Equity ("PE") funds, SEBI has allowed SME's to list their securities without an IPO and permit trading of specified securities on Institutional Trading Platform ("ITP") in SME Exchanges. SEBI (Listing of Specified Securities on Institutional Trading Platform) Regulations, 2013 govern the process of listing of SMEs without undertaking an IPO.

A SME being a public company should satisfy the following requirements to be eligible to list on the ITP:

- whose promoter, group company or director does not appear in the wilful defaulters list of RBI as maintained by Credit Information Bureau (India) Limited ("CIBIL");
- there is no winding up petition admitted against the company in a competent court;
- neither the company nor its group companies and subsidiaries have been referred to the Board for Industrial and Financial Reconstruction ("BIFR") within a period of 5 years prior to the date of application for listing;
- no regulatory action has been taken against it, its promoter or director, by SEBI, RBI, IRDA or MCA within a period of 5 years prior to the date of application for listing;
- company has at least 1 full year's audited financial statements, for the immediately preceding financial year at the time of making listing application;
- company has been in existence for not more than 10 years and its revenues have not exceeded INR 1 billion in any of the previous financial years;
- whose paid up capital has not exceeded INR 250 million in any of the previous financial years;

The following additional conditions should be satisfied by the company:

- at least 1 AIF, venture capital fund ("VCF") or other category of investors / lenders approved by SEBI has invested a minimum amount of INR 5 million in equity shares of the company, or
- at least 1 angel investor/group which fulfills specified criteria has invested a minimum amount of INR 5 million in the equity shares of the company, or

- company has received finance from a scheduled bank for its project financing or working capital requirements and a period of 3 years has elapsed from the date of such financing and the funds so received have been fully utilized, or
- a registered merchant banker has exercised due diligence and has invested not less than INR 5 million in equity shares of the company which shall be locked in for a period of 3 years from the date of listing, or
- a QIB has invested not less than INR 5 million in the equity shares of the company which shall be locked in for a period of 3 years from the date of listing, or
- a specialized international multilateral agency or domestic agency or a public financial institution as defined under Section 2(72) of the Companies Act, 2013 has invested in the equity capital of the company.

XIV. Capital Raising

The company may raise capital only through private placements and rights issue. Such companies shall not make an IPO while being listed on the ITP.

XV. Promoter's Contribution and Lock-in

The promoters are required to contribute for listing not less than 20% of the post-listing share capital of the company for listing on ITP. Such shares shall be subject to a lock-in for a period of 3 years from date of listing.

Corporate Tax

The OECD's Base Erosion and Profit Shifting (BEPS) recommendations have disrupted the way taxes are administered globally. 'Transparency' and 'lower rates' are the buzzwords that are resonating in the international tax environment. India has kept up with global trends by introducing sunset clauses in its complex exemption-related rules and deductions in its domestic tax laws. In line with these changes, it has reduced its Corporate Tax rate to 25%. The country's tax administration is fast moving to the electronic platform and initiatives are being taken to simplify the compliance process for taxpayers to help them resolve the issues they face with minimum human interaction.

India's endeavor is to become one of the most attractive investment destinations in the world, and it understands very well that the need of the hour is to simplify its tax regime and reduce Corporate Tax rates in the country.

Income Tax is levied in India under the Income Tax Act, 1961 (the IT Act), enacted by the Central Government. Income Tax Rules, 1962 (IT Rules), which lay down the procedures to be followed in compliance with the provisions of the IT Act. These rules are administered by the Central Board of Direct Taxes (CBDT), which operates under the aegis of the Central Finance Ministry. Tax year and tax return filing The Indian tax year starts from 1 April of a year and ends on 31 March of the subsequent one. The due dates for companies to file their return of income in India are set out below:

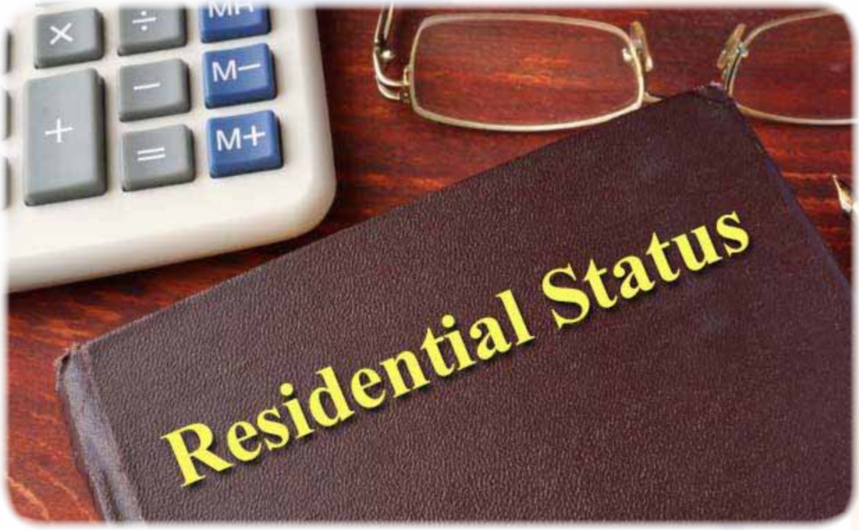
Nature of company	Deadline to file return of income
Companies that are required to submit an accountant's report with respect to their international or specified domestic transactions	30 November of the subsequent tax year
Other companies	30 November of the subsequent tax year 30 September of the subsequent tax year

Non-resident taxpayers are required to file their tax returns in India, even in cases where taxes are withheld in it. However, in certain cases, exemptions are made for non-resident taxpayers regarding their compliance with this rule. Filing of a return of income in India is compulsory for all companies. Failure to do so may attract monetary fines of up to INR 10,000, in addition to imprisonment, which may extend up to seven years.

All resident companies are mandatorily required to obtain a Permanent Account Number (PAN) in India. Non-resident taxpayers need to obtain a PAN if their income is taxable in the country. This rule also applies to directors, partners, founders, office bearers or any other person competent to act on their behalf.

Residential status of a company

A company is considered to be a resident of India if it is incorporated in the country or if its place of effective management (PoEM) is in it. The term PoEM denotes a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are taken in substance. If the PoEM of a company is in India, its global income will be subject to tax in the country. The CBDT has issued guidelines on determination of a foreign company's PoEM and its taxation.



Residential status of other forms of corporate entities

Various forms of corporate entities are permitted and operate in India. These include partnership firms and limited liability partnerships (LLPs), which comprise alternative entities that can avail of the benefits of limited liability. A corporate entity, other than a company, is considered to be resident in India if any portion of its control and management of affairs is located in the country during the tax year.

Scope of taxable income for a company

A company that is resident in India is taxed on its global income. One that is resident outside India is taxed in it in respect of any income that:

- Accrues or arises in India
- Is received or deemed to have been received in the country
- Accrues to the non-resident company from an asset or source of income in India (salary, interest, royalties or fees for technical services), a 'business connection' in the country or transfer of a capital asset in it

The term 'business connection' is used in the IT Act instead of the word 'permanent establishment' (PE), used in tax treaties, to tax profits from business. The term is considered wider in its scope than PE. It has been recently amended to include business activity conducted by agents on behalf of non-residents who habitually conclude or have a principal role in conclusion of contracts in India. Accordingly, the income reasonably attributable to such activity is to be taxed in India.

The concept of a significant economic presence (SEP) has also been recently introduced under the term 'business connection'. SEP has been defined to include a transaction involving goods, services or property, and includes provision for downloading of data or software that is conducted via digital means by non-residents in India, subject to monetary limits yet to be prescribed. It also includes systematic and continuous soliciting of business-related activities or interaction with the number of users prescribed in India through digital means.

Corporate Tax rates

Broadly, the Corporate Tax rate for entities ranges from 25% to 40%.

Status of entity	Rates in force	Conditions
Domestic company	25%	Total turnover/Gross receipts in financial year (2019-20) not exceeding INR 400 crore.
	30%	All other companies
Foreign company	40%	All foreign companies
Partnership firm/LLP	30%	All firms and LLPs

The rates mentioned above are exclusive of surcharge, which is levied on the basis of the quantum of taxable income and cess levied on the tax amount (inclusive of the surcharge). Surcharge rates range from 0% to 12% for domestic companies, partnership firms and LLPs and 0% to 5% for foreign enterprises. The cess rate is 4% for all entities.

Minimum Alternate Tax (MAT)

MAT is levied at 18.5% (plus applicable surcharge and cess) on the adjusted book profits of companies if the tax payable by these under normal tax provisions is less than 18.5% of their adjusted book profits. Credit for MAT is allowed against a tax liability that may arise in the subsequent 15 years computed under the provisions of the IT Act. MAT provisions are not applicable on the Indian PEs of foreign companies.

Alternate Minimum Tax (AMT)

AMT is levied on entities (other than companies) at 18.5% on their adjusted total income (computed according to Income Tax provisions) if the AMT liability exceeds the tax payable under normal Income Tax provisions. Credit for AMT is allowed against a tax liability that may arise in the subsequent 15 years under the provisions of the IT Act. AMT is applicable in cases where taxpayers are obtaining certain specified deductions under IT Act.

Dividend Distribution Tax (DDT)

Indian companies that distribute or declare dividends are required to pay DDT at the rate of 15% (effective rate 20.56%). This tax is payable on declaration, distribution or payment, whichever is earlier, and is in addition to the Corporate Tax payable on business profits.

DDT provisions are not applicable for an LLP. An Indian company has the option to pay tax at the rate of 20% for a dividend payable by its foreign associate enterprise if the former holds more than 26% the shares of the latter.

Buyback of shares

An additional tax of 20% is payable by an unlisted company for buying back shares from its shareholders. This tax is payable by the company on the difference between the amount paid for the buyback and the issue price of the shares. The buyback amount received is exempt from tax in the hands of the recipient.

Patent Box regime

In order to encourage indigenous Research & Development (R&D) and make India a global R&D hub, a 10% tax is applicable on resident patentees' income from royalty for patents they have developed and registered in India. Under this regime, no expenditure or allowance is allowed for computation of taxable income.

Key Corporate Tax-related considerations

Computation of income

A company's taxable income is divided into the following categories or heads of income:

- Income from profits and gains of business or profession
- Income from house property
- Income from capital gains
- Income from other sources

Income from profits and gains of business or profession

Tax audit of books of account Taxpayers conducting a business or profession are required to have their books of account audited for Income Tax-related purposes if the total sales, turnover or gross receipts from their business exceed INR 10 million.

Income Computation and Disclosure Standards (ICDS)

Taxpayers that use the mercantile system of accounting are required to follow the ICDS for computation of income chargeable under the head ‘profits and gains of business or profession’ and ‘income from other sources’.

Depreciation

Taxpayers are allowed depreciation on the written down value (WDV) of assets. Rates of depreciation generally range from 10% to 40%. In the case of a taxpayer engaged in manufacturing or production, incentive by way of additional depreciation at the rate of 20% is provided on the value of the new plant and machinery in the year of their installation. This rate may increase to 35% if certain additional conditions are satisfied.

Presumptive taxation regime for non-residents

The provisions of the IT Act provides for presumptive taxation in the case of certain non-resident taxpayers. In such cases, taxable income is determined on the basis of a certain percentage of their total gross receipts. This is expected to reduce areas of uncertainty and compliance-related requirements.

The provisions of Minimum Alternate Tax (discussed above) are not applicable in computation of taxable income on a presumptive basis of such taxpayers.

Losses incurred from business

Losses from business are classified into business losses and unabsorbed depreciation. Business losses for a particular tax year can be set off against income taxable under other heads of income (except salary) earned during the same tax year and can be carried forward for eight subsequent tax years, to be set off against the business income earned in those years. Unabsorbed depreciation can be carried forward indefinitely and can be set off against taxable income of the subsequent years. In the case of reconstitution of business of closely held entities, 51% of the beneficial shareholding has to be maintained in order to carry forward losses. There are no provisions underthe IT Act for carrying losses back to earlier years.

Income from house property

Rental income earned from the use of buildings for residential or business purposes is taxable in India under this head. However, there is no deduction of expenses from rental income except for the following:

- Standard deduction of 30% of rental income
- Deduction of interest paid on loan taken for such property (as specified in the IT Act)

Income from capital gains

Income earned from transfer of capital assets is taxed under the head 'capital gains'. Capital assets are defined as any property, whether connected to a business or a profession as well as securities held by Foreign Institutional Investors (FIIs), according to the securities regulations applicable in India. However, a capital asset does not include certain personal effects held by taxpayers for their personal use.

There is a variation in the tax rates applicable on short-term and long-term capital gains. Long-term capital gains are generally taxed at lower rates.

The IT Act provides for certain situations where tax on capital gains is not levied if the consideration amount or capital gains is reinvested in specified assets. Furthermore, certain transactions are not considered as 'transfers', and accordingly, do not give rise to capital gains (subject to satisfaction of prescribed conditions).

Indirect transfer of shares

Under the IT Act, the shares of non-resident entities are deemed to be situated in India if they substantially derive their value, whether directly or indirectly, from assets located in India. Accordingly, transfer of such shares (i.e., of a non-resident entity) is considered as transfer of a capital asset situated in India. The provisions of indirect transfers are subject to certain prescribed conditions. There are some jurisdictions that provide exemption from taxability of indirect transfer of shares by virtue of tax treaty provisions. A recent trend noticed in the Indian judiciary is that it gauges substance and ownership requirements for meeting the eligible criteria given in the tax treaties mentioned above.

Income from other sources

Income not covered under any of the specific heads of income is liable to tax as under the head of 'income from other sources'. While computing taxable income from other sources, expenditure incurred wholly and exclusively for earning such income is allowed as a deduction.

Gift Tax

There is no Gift Tax liability in India. However, there are provisions for taxability of gifts in the hands of recipients under the provisions of Income-tax laws. The applicable law provides that receipt of money or property, including shares, by taxpayers without consideration or for inadequate consideration in excess of INR 50,000 will be chargeable to tax in the hands of the recipients under the head 'Other sources'.

Premium on allotment of shares

Privately held companies are required to pay tax at normal rates on amounts received for issue of shares if these amounts are received from Indian residents and are in excess of the fair market value (FMV) of the shares.

Dividends paid by Indian companies

Dividends received from Indian companies that are subject to DDT are not taxable in the hands of recipients. However, in the case of individuals, Hindu Undivided Families (HUFs) or firms' residents in India, tax is levied at the rate of 10% on dividends received in excess of INR 1 million during a tax year.

Other Corporate Tax-related considerations

Withholding Tax (WT) provisions

Both resident and non-resident taxpayers making specified payments are obliged to withhold taxes according to the relevant provisions of the IT Act. Withholding Tax rates range from 0% to 40%, and in the case of payments made to non-residents, are increased by an additional surcharge, cess, etc., subject to benefits available under various tax treaties.

General Anti-Avoidance Rule (GAAR)

GAAR provisions empower the Tax Department to declare an 'arrangement' entered by a taxpayer to be an Impermissible Avoidance Arrangement (IAA). The consequences include denial of the tax benefit either under the provisions of the IT Act or the applicabletax treaty. The provisions can be invoked for any step in or part of an arrangement entered, and the arrangement or step may be declared an IAA. However, these provisions only apply if the main purpose of the arrangement or step is to obtain a tax benefit. The provisions of GAAR will not apply if the tax benefit from an arrangement in a relevant tax year does not exceed INR 30 million. Furthermore, GAAR does not apply on investments made up to 31 March 2017.

Other considerations for taxation of non-residents

Multilateral Instrument (MLI)

The MLI seeks to help governments close the gaps in their existing bilateral tax treaties with a view to eliminate double taxation and counter treaty abuse, and improve dispute resolution mechanisms. India is among the 68 countries that signed the MLI on 7 June 2017. It has published a provisional list of notifications and listed 93 tax treaties, which it intends should be covered by the MLI.

Equalization Levy – digital economy (e-Commerce transactions)

An Equalization Levy of 6% is applicable in India in line with BEPS Action Plan 1 (Digital Economy). As of now, the levy is applicable on payment made by a resident or the Indian PE of a resident to a non-resident providing specified services. A ‘specified service’ has been defined as an online advertisement, or provision for digital advertising space or any other facility or service, for the purpose of online advertisement and also includes any other service notified by the Central Government.

Tax Residency Certificate (TRC)

To avail of the benefits of the applicable tax treaty, non-residents need to provide a copy of the TRC issued by the revenue authorities of their countries of residence as well as other prescribed documents. Concessional tax rates applicable under certain DTAAs India has signed with various countries are provided in Annexure 1.

Foreign Tax Credit (FTC)

The Indian Government has entered a DTAA with several countries to avoid the hardship of double taxation on taxpayers earning income that is taxable in multiple countries. The CBDT has specified rules and procedures by which an Indian resident can obtain the benefit of the taxes paid by it a foreign country.

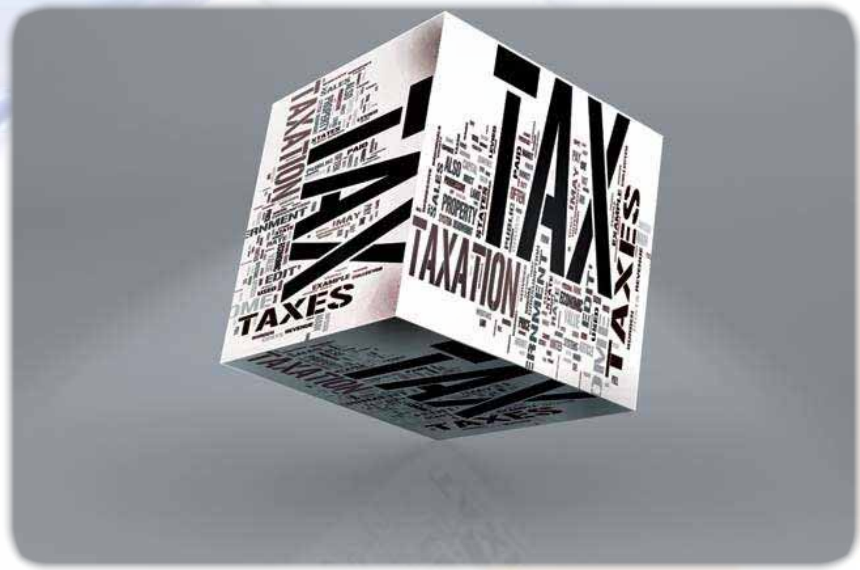
Recent renegotiation of DTAA

India has recently entered a DTAA with Hong Kong to improve transparency in tax-related matters and to curb tax evasion or avoidance. The DTAA is yet to be notified and will come into force after the completion of the procedures prescribed under the respective laws of both the countries.

Thin capitalization

Deduction for interest payments by the Indian PEs or Associated Enterprises of foreign companies are, under certain cases, restricted to 30% of their earnings before Interest, Taxes, Depreciation and Amortization (EBITDA). Excess interest that is disallowed in a year is eligible for being carried forward up to eight consecutive years.

Tax litigation in India



Contentious tax issues

Determination of PE

The Supreme Court of India, the country's highest judicial forum, has recently pronounced some rulings that have enunciated various key principles for determination of PE in India. In one of the rulings, the Supreme Court held that a fixed place PE can be constituted in India even when the duration of its presence is less than six months. This would, of course, depend on the nature of the business it conducts in India.

Royalty from software

There is considerable litigation in India regarding characterisation of amounts received for supply of software (including off-the-shelf software). Indian High have taken divergent views on the issue of whether such consideration should be construed as royalty, and consequently, be taxable in India. The matter is now pending before the Supreme Court for final adjudication.

Offshore supply

Taxability of offshore supply is a vexing tax issue in India and assumes greater proportions when some onshore activities are also carried out in the country consequent to offshore supplies. Indian revenue authorities generally endeavour to attribute some portion of offshore supplies to India, and therefore, seek to bring consequent profits within India's tax net.

Virtual presence/Digital economy

Today, multinational organisations are not confined by geographical boundaries to conduct their business operations. Sale of goods and services and payments are made digitally through servers based in foreign countries. Indian revenue authorities have taken an aggressive stand in capturing online transactions within the ambit of tax.

Alternate Dispute Resolution Mechanisms

Authority of Advance Rulings (AAR)

The AAR is an alternate dispute resolution forum that provides an opportunity to non-residents and certain residents to obtain upfront certainty with respect to tax liabilities arising from transactions undertaken by them. An order of the AAR is binding on both, the applicant and the Revenue, and can only be challenged under a writ jurisdiction before the jurisdictional High Court.

Income-tax Settlement Commission (ITSC)

The ITSC is another alternate dispute resolution forum that is available to both residents and non-residents for resolution of their tax-related disputes only once. In order to file an application before the ITSC, taxpayers need to provide a full and true disclosure of income they have not disclosed earlier and pay tax amounting to INR 1 million in advance. The ITSC has to dispose of proceedings within 18 months of an application and has the power to grant immunity from penalty and prosecution. An order of the ITSC is binding on both the applicant and the Revenue and can only be challenged under writ jurisdiction before a jurisdictional High Court.

Indirect Taxes

The Goods and Services Tax (GST), considered the biggest ever tax reform in Independent India, was implemented on 1 July 2017 and received overwhelming support from industry. The GST has brought in many changes in tax- and compliance-related implications for various businesses because of which the acclimatization phase during the rollover to the new regime was relatively long. However, the GST also afforded India Inc. a real opportunity to simplify and create value for key business processes, including procurement, manufacturing, distribution, logistics, and so on.

The year 2017 will forever be etched in Indian history as one that saw the implementation of the most important and far-reaching economic reform since Independence—the GST. The reform that took more than a decade of intense debate before it was finally implemented with effect from 1 July 2017, subsumed almost all Indirect Taxes at the Central and state levels.

India has a federal structure under which the authority to impose taxes has been distributed between the Central and state governments. This has made the Indian taxation system one of the most complex in the world.

The erstwhile Indirect Tax regime, which was applicable till 30 June 2017, had several shortcomings including the following, which resulted in an inefficient production and consumption structure, and thereby hindered economic growth:

- Tax cascading
- Divergent state-specific compliance-related requirements
- The need for interaction with multiple tax authorities at the Central and state levels
- No cross-utilization of credits, inter se goods and services imposed at the state level and the Central level, respectively

- Input Tax Credit (ITC) of certain taxes or duties such as CST, Octroi or Local Body Tax not being creditable.

The Government has implemented the GST with effect from 1 July 2017 to address and eliminate the shortcomings mentioned above. It has opted for a dual GST model that is in line with the Canadian GST. By adopting this model, the Central and state governments have been empowered to levy the GST on supply of goods and services. The GST is a consumption-based tax. Consequently, revenue for a transaction accrues, based on rules in the consumption or destination state, unlike under the past Indirect Tax regime, wherein revenue only accrued to the supplying state.

The following are some of the key concepts of the GST, which companies looking at investing in India should take into consideration:

A. Taxes applicable under the GST include the following:

Tax type	Levied on	Levied by
Central Goods and Services Tax (CGST)	Intra-state (within the state) supply of goods and services	Central Government
State Goods and Services Tax (SGST	Intra-state (within the state) supply of goods and services	State Government
Union Territory Goods and Services Tax (UTGST	Supply of goods and services in a Union Territory	Central Government
Integrated Goods and Services Tax (IGST)	• Inter-state supply of goods and services • Import of goods and services • Supplies to units and developers of Special Economic Zones (SEZs)	Central Government

B. Registration under the GST

A supplier of goods and/or services is required to obtain GST registration in every state from which it supplies goods and/or services.GST registration is not required if the turnover of a supplier on a pan-India basis is less than the mandated threshold limit of INR 40 lakh in a financial year (in the case of the North Eastern states, the lower threshold of INR 10 lakhs). Furthermore, a supplier that only supplies GST-exempt goods and/or services is not required to obtain GST registration.

C. Rates under the GST schedule

The following are the GST rate slabs for goods and services:

- 0% - 5% - 12% - 18% - 28%

Essential items have been included in the 0% tax slab, most goods and services in the 18% bracket, and specified luxury goods or services and 'sin' goods in the 28% slab. In addition, identified luxury goods and services are also liable to Compensation Cess. The rate of Compensation Cess varies from 1% to 15%. It is even higher for tobacco and tobacco products. However, while this Cess has been called a 'cess' (which should apply to the tax element), in reality it is levied on the base value of goods and services.

D. Liability to pay GST

Generally, a supplier of goods or services bears the liability to pay GST. However, the recipient is liable to pay tax for certain types of transactions (such as sponsorship services or import of services). This method of collecting GST is commonly referred to as a 'reverse charge mechanism'

E. Compliance-related requirements

The GST law prescribes stringent compliance-related requirements. A supplier of goods and services is required to file multiple returns for each registration within a month on a state-wise basis. Deliberations on substantial simplification of the return filing process under GST laws are currently ongoing.

F. Composition Scheme for small taxpayers

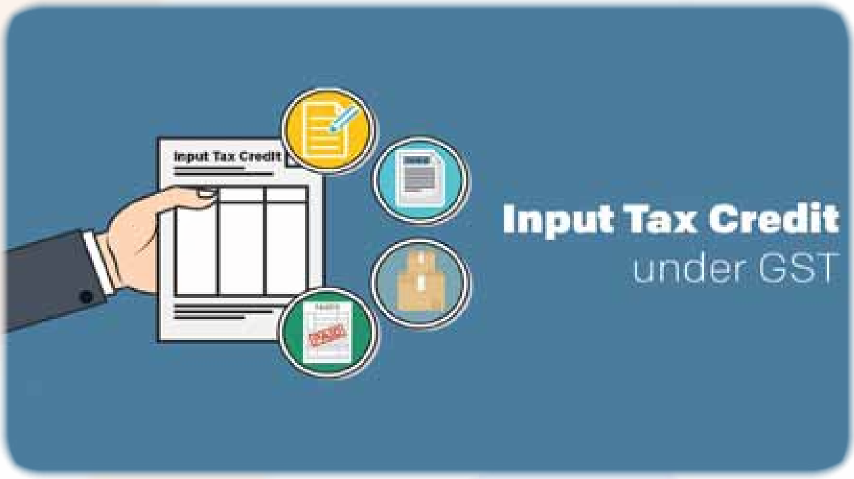
To ease the compliance burden, small taxpayers with an aggregate turnover of up to INR 150 lakhs have been given the option to opt for the Composition Scheme.

Under this scheme, suppliers can pay tax at a specified percentage of their turnover during the year without claiming benefit of ITC on their procurement. Such suppliers cannot recover taxes separately from buyers on their invoices. Consequently, buyers are not eligible for claiming ITC on the tax paid by suppliers under the Composition Scheme.

A supplier with interstate supplies of goods or a service provider is not eligible for the Composition Scheme and cannot opt for it. And while a regular taxpayer has to pay taxes on a monthly basis, a Composition supplier is required to file returns and pay taxes on a quarterly basis. Moreover, it does not need to maintain detailed transaction-wise accounts and records, unlike a regular taxpayer.

G. Input Tax Credit (ITC)

The GST seeks to provide a seamless flow of credit across goods and services as against the erstwhile Indirect Tax regime wherein cross utilization of VAT paid on goods was not allowed against the Output Service Tax or Excise Duty liability, or vice-versa. Taxpayers are



permitted to avail ITC of the GST if have made payment on their procurement during the course of or in furtherance of their business to provide taxable supplies.

ITC can also be utilized to pay for output GST liability. ITC is currently not allowed for certain procurements such as rent-a-cab services, outdoor catering services and expenses for personal consumption. However, under imminent amendments in the ITC provisions, these restrictions are expected to be significantly relaxed. Moreover, a noteworthy departure from the erstwhile Excise and Service Lax laws is that under the GST a supplier's eligibility to claim ITC is subject to the vendor's compliance.

H. Import of goods into India

Import of goods into India continues to be governed by Customs law. Such imports attract Basic Customs Duty (BCD), Customs Cess, IGST and Compensation Cess (if applicable). BCD and Customs Cess paid at the time of import of goods is non-creditable and is therefore a cost. However, ITC of IGST will be available for adjustment against output GST liability. ITC of Compensation Cess is only available for utilization against an output Compensation Cess liability.

I. Exports and supplies to Special Economic Zones (SEZs)

Export of goods or services and supplies to SEZs have been categorized as zero-rated supplies. A supplier providing such supplies is eligible for either:

- Supply goods or services under a bond or Letter of Undertaking without payment of tax
- Supply of goods or services by paying tax and thereafter claiming a rebate for it

J. Transactions between related persons

Generally, only supplies made for a consideration are liable to the GST. However, in the case of transactions between related parties and their locations in different states, even supplies made without consideration attract this tax.

The Government and industry had great hopes that the GST will be instrumental in reducing economic distortion and give the necessary boost to India's economic growth.

According to the latest numbers, growth picked up significantly in the last quarter (January-March 2018). Recent statistics indicate that our GDP growth rate increased by 0.7 percentage points during each successive quarter of 2017-18. Manufacturing, a sector that was expected to be adversely affected by the GST, grew by close to double-digits at 9.9%, while investment, as reflected in the formation of gross fixed capital, grew at 14.4% in the last quarter. Reports from financial institutions indicate that India's GDP is likely to grow to around 7-7.5% in 2018-19.

The Government's revenue collection for March 2018 crossed the INR 1 lakh crore mark for the first time in April 2018. This made Budget-related estimates for FY 2018-19 even more ambitious.

A favorable policy framework, including liberalization of FDI in various sectors and launch of major national development programs, including 'Make in India' and 'Digital India', has ensured significant inflow of foreign capital into India.

Improved governance, favourable conditions for conducting business, transparency in government procedures and responsive policy-making, with an immediate focus on effective implementation of the Government's reforms, are expected to make India a preferred destination for foreign investment and set it on a growth trajectory that promises all-round development, economic welfare and strong macroeconomic indicators. The GST as a radical reform is acting as an enabler to vitalize the business environment in India and greatly enhance its stature around the world.

Transfer Pricing

Accordingly, the Finance Act, 2001 introduced law of transfer pricing in India through sections 92A to 92F of the Indian Incometax Act, 1961 which guides computation of the transfer price and suggests detailed documentation procedures. This article aims to provide a brief overview on the applicability of transfer pricing regulations in India, methods of determining the transfer price and the documentation procedures.

Transfer Pricing Regulations ("TPR") are applicable to the all enterprises that enter into an 'International Transaction' with an 'Associated Enterprise'. Therefore, generally it applies to all cross border transactions entered into between associated enterprises. It even applies to transactions involving a mere book entry having no apparent financial impact. The aim is to arrive at the comparable price as available to any unrelated party in open market conditions and is known as the Arm's Length Price ('ALP').

Associated Enterprises ('AEs')- How Identified?

The basic criterion to determine an AE is the participation in management, control or capital (ownership) of one enterprise by another enterprise. The participation may be direct or indirect or through one or more intermediaries.

The concept of control adopted in the legislation extends not only to control through holding shares or voting power or the power to appoint the management of an enterprise, but also through debt, blood relationships, and control over various components of the business activity performed by the taxpayer such as control over raw materials, sales and intangibles.

It appears that one may go to any layer of management, control or ownership in order to find out association

(a) Direct Control

(b) Through Intermediary

What is an International Transaction?

An international transaction is essentially a cross border transaction between AEs in any sort of property, whether tangible or intangible, or in the provision of services, lending of money etc. At least one of the parties to the transaction must be a non-resident entering into one or more of the following transactions

(a) Purchase, sale or lease of Tangible or Intangible Property

(b) Provision of services

(c) Lending or borrowing of money

(d) Any transaction having a bearing on profits, income, losses or assets

(e) Mutual agreement between AEs for allocation/apportionment of any cost, contribution or expense.

Methods of Determining The ALP

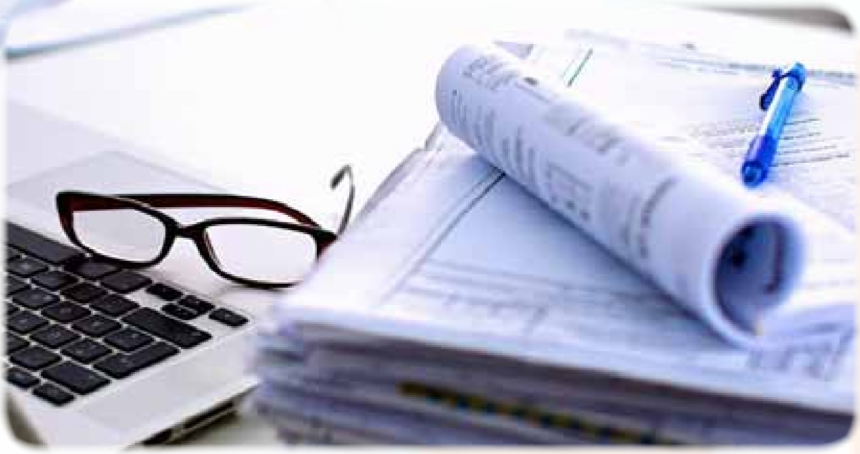
In accordance with internationally accepted principles, the TPR have provided that any income arising from an international transaction between AEs shall be computed having regard to the ALP, which is the price that would be charged in the transaction if it had been entered into by unrelated parties in similar conditions.

The ALP is to be determined by any one or more of the prescribed methods. The taxpayer can select the most appropriate method to be applied to any given transaction, but such selection has to be made taking into account the factors prescribed in the TPR. With a view to allow a degree of flexibility in adopting the ALP, a variance allowance of 5 percent has been provided under the TPR. The prescribed methods have been listed below (a) Comparable Uncontrolled Price Method ('CUPM') (b) Resale Price Method ("RPM') (c) Cost plus method ('CPM') (d) Profit Split Method ('PSM') (e) Transactional Net Margin Method ('TNMM')

Documentation

The provisions contained in the TPR are exhaustive as far as the maintenance of documentation is concerned. This includes background information on the commercial environment in which the transaction has been entered into, information regarding the international transaction entered into, the analysis carried out to select the most appropriate method and to identify comparable transactions, and the actual working out of the ALP of the transaction. This also includes report of an accountant certifying that the ALP has been determined in accordance with the TPR and that prescribed documentation has been maintained. This documentation should be retained for a minimum period of 8 years.

However, it may be noted that in case the value of the international transaction is below INR 10 million, it would be sufficient for the taxpayer to maintain documentation and information which substantiates his claim for the ALP adopted by him. In effect, they need not maintain the prescribed documentation.



Burden of Proof - Taxpayer or Tax Officer?

The primary onus is on the taxpayer to determine an ALP in accordance with the TPR and to substantiate the same with the prescribed documentation. Where such onus is discharged by the taxpayer and the data used for determining the ALP is reliable and correct there can be no intervention by the tax officer.

In other cases, where the tax officer is of the view that the

(a) price charged in the international transaction has not been determined in accordance with the methods prescribed,

(b) or information and documents relating to the international transaction have not been kept and maintained by the assesse in accordance with the TPR,

(c) or the information or data used in computation of the ALP is not reliable or correct,

(d) or the assesse has failed to furnish any information or document which he was required to furnish under the TPR

the tax officer may reject the ALP adopted by the assesse and determine the ALP in accordance with the TPR. For this purpose, he would then refer the matter to a Transfer Pricing Officer ('TPO') (a special post created for valuation of ALP) who would determine the ALP after hearing the arguments of the taxpayer.

Effects of Adjustment to The ALP

In case the ALP determined by the TPO indicates understatement of income by the taxpayer, it could result into the following

(a) Adjustment to reported income of the taxpayer

(b) Levy of penalty

Adjustment to the Reported Income

The tax officer is bound to adjust the reported income of the taxpayer with the amount of adjustment proposed by the TPO. This would have an effect of increasing the assessed income or alternatively decreasing the assessed loss. Furthermore, the eligible deductions available to the taxpayer under section 80 could not be availed on the enhanced income. However, those taxpayers who are eligible for deductions under section 10A and 10B remain unaffected as these deductions remain available on the enhanced income.

Penalties

Penalties have been provided as a disincentive for non-compliance with procedural requirements are as follows.

(a) Penalty for Concealment of Income - 100 to 300 percent on tax evaded

(b) Failure to Maintain/Furnish Prescribed Documentation - 2 percent of the value of the international transaction

(c) Penalty for non-furnishing of accountants report - INR 100,000 (fixed)

The above penalties can be avoided if the taxpayer proves that there was reasonable cause for such failures.

Conclusion

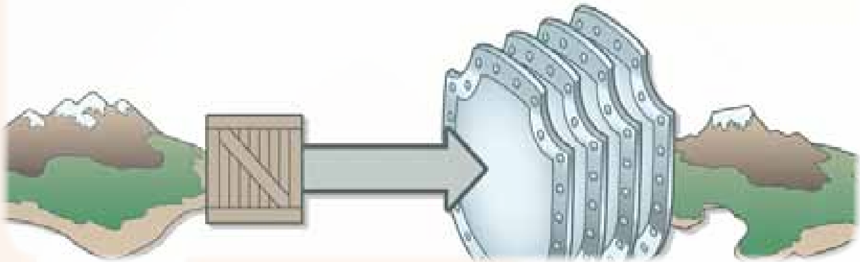
Historically, India has had a poor track record with its rate of growth subsisting through much of the period from independence until 1991. For decades, India was a semi-socialist state. The system of securing licenses and permits to produce goods placed restrictions on internal production. Many industrial sectors were housed in unwieldy and unproductive public sector undertakings, which effectively had a monopoly in their respective sectors. Bureaucracy was rampant and the polity highly corrupt; even the private sector was largely subject to their whims and vagaries causing huge inefficiencies in business operations.

Furthermore, some aspects of the legal system in India continue to be archaic. For example, the labor laws find their origin in the British laws of the early 20th century and have since undergone only minor amendments, even though the same laws in Britain have changed significantly. As a result, sectors such as manufacturing have been dogged by strikes and lock-outs. Additionally, it is very difficult to terminate the services of blue-collared employees in India due to extensive protections under various laws.

India's import policies, despite the recent relaxations, continue to remain unfriendly with very high import duties charged on many imported goods. India's tax and corporate laws are complex. However, the notification of Companies Act, 2013, the introduction of a unified indirect tax system - GST and relaxations in the FDI regime in India are indeed positives step in the right direction.

Following the liberalization of India's economy in 1991, a broad sweep of reforms were introduced to its financial and trade policies. These changes have made positive impact on its sizable Indian populace.

TRADE LIBERALIZATION



India's growth need investment in core sector like Infrastructure. Government push for innovative rollout models in road sector like hybrid annuity model (HAM) and new model like TOT (Toll-Operate-Transfer) & modified BOT and similar schemes for urban transportation projects & Railways.

India's middle class, its prime consumer market and responsible for over half of Indian economy's GDP in the form of private spending, is estimated to cross 250 million in number. Furthermore, India's population remains largely of working age and relatively young, unlike China, which with its 'one-child' policy has resulted in a smaller working population supporting a growing number of retirees.

Liberalization provided the much needed proverbial shot in the arm for the entrepreneurial spirit of India's people and it found a new lease of life after years of being stifled. For instance, the IT/ ITES sector is one of the few that has seen the introduction of a large number of friendly policies which have enabled the sector to grow by leaps and bounds in the last two decades and give rise to various Indian ITES to achieve globally recognition.

While corruption still exists, the computerization of numerous public bodies has led to an increased level of efficiency and institutions such as the RBI and SEBI have become increasingly proactive and professional in dealing with foreign investment into India. Furthermore, some state governments have taken proactive steps to improve efficiency in public offices such as the RoC. While caution exercised by them may seem draconian; it has helped India tremendously in avoiding any major internal impact of the ongoing financial crisis. Modi government's policies of smart cities, Digital India, single window policy has given the correct signals to all. Also the government's mantra of "ease of doing business" has brought about many reforms which will work towards changing the perception about doing business in India. More and more ministries are moving towards online access for seeking licenses/ approvals/ registrations/ reporting etc. and single window clearance.

One of the big steps taken by the government is the promulgation of the Right to Information Act, 2005 ("RTI Act"), which grants a right to every citizen of India to seek information from a "public authority", which information is required to be supplied expeditiously or within 30 days. The RTI Act not only empowers the citizen, but also puts an obligation on every public authority to computerize their records for wide dissemination and to also to ensure that the citizens have minimum recourse to request for information formally.

To conclude, whilst it is apparent that India still has a long way to go, it is and will continue to be an attractive destination for investment and trade. Whilst its expanding levels of intellectual capital and large English-speaking population are likely to make it a global hub for services, high levels of domestic consumption coupled with significant cost competitiveness will also make it an attractive destination for investments in services and manufacturing.

KRS Marketing - *Partnership Proposal*

Marketing Requirements

Handling business opportunities in India require various steps and Marketing Partnership will help you to understand the practice and management to work in India. Considering the promotion before official participation in business, few steps like promotion, introducing own product range to manage the requirement development accept our standard products or services, advance preparation of participation in Indian Opportunities, management of local vendor team, if required for joint participation, handling tenders, offers, negotiations, contract management support etc., the list is ongoing and KRS Infra Ventures Pvt. Limited ensure that our experience being in this trade from last two decades offer you wider experience base in INDIA.

Marketing Proposal

The KRS Group herewith introduce KRS Infra Ventures Pvt. Limited herewith offers the marketing partnership to your organization to promote you and yours associates interest in Indian Infrastructure Sector with following ways:

- Informing Business Opportunities in India for business scope of your organization.

- Promoting your organization with introducing and presenting details to various clients in Government and Private Sector and follow-up for acquisition formalities (tendering process, finalization of business, all assistance during implementation & after sales etc.)
- Informing the current scenario of market in view of Government Policies, Procurements plans etc.
- Advising the strategies required during promotion for successful business opportunities

The partnership terms will require discussions to finalize, which will be second step after receiving your principal approval and suggest you to work on following options for understanding:

Marketing Partnership Joint Venture – which means "KRS Infra Ventures" will offer all Marketing support in India and your organization handle the technical & commercial need of the projects targeted and rest terms conditions of arrangement will decided after in principal approval of partnership.

Exclusive Agent in INDIA- KRS will be offered exclusive Agency Agreement for 3 years minimum to develop and managing business opportunities for your organization and terms & conditions of this agreement will be discuss after principal approval of working.

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