



DOING BUSINESS IN INDIA

A. INDIA – World’s most attractive investment destination

India is the second largest country in the world by population - home to about a sixth of the human population - and the seventh largest country by sheer land mass. India is among the fastest growing economies in the world. It is the third largest economy in terms of gross domestic product (GDP) based on purchasing power parity (PPP) and the sixth largest by nominal GDP.

Having emerged as a global center for services and outsourcing, India is also becoming an attractive destination for outsourcing industrial production. In addition, the expanding Indian middle class is about the same size as the population of the US. It has seen a significant rise in its ability to pay for and desire to buy high-quality consumer products, thereby providing a large domestic market for companies that choose to set up consumer manufacturing operations and sales centers in India. Further, it is expected that as India continues to grow, its need for development of its physical and human infrastructure will correspondingly increase.

All in all, there is no doubt that India is one of the world's most attractive investment destinations and will continue to be so in the future.

The Indian economy is on a robust growth trajectory and boasts of a stable annual growth rate, rising foreign exchange reserves and booming capital markets among others. With Government efforts like 'Make in India' and policies for promoting investments in the country, India is poised to become a top global destination for Foreign Direct Investment (FDI).

B. EASE OF DOING BUSINESS IN INDIA

Many new initiatives have been taken up by the Government to facilitate investment and ease of doing business in the country. Noteworthy among them are initiatives such as Make-in-India, Invest India, StartUp India and e-biz Mission Mode Project.

The current business-friendly Government's policies are expected to boost foreign investments further as it aims to:

- Revive growth by fueling investments in infrastructure and manufacturing
- Promote FDI selectively in sectors
- Introduce administrative reforms to expedite project implementation
- Have a stable, predictable, and investor-friendly taxation regime
- Strengthen and expand India's trade network with regional, bilateral, and multilateral trade agreements

C. FOREIGN DIRECT INVESTMENT (FDI) - ENTRY ROUTES

A foreign company can invest in India and establish its business, either under the Automatic Route or the Government (approval) Route.



ENTRY ROUTE I - Automatic Route of FDI

FDI is allowed under the Automatic Route without prior approval either of the Government or of the Reserve Bank of India (RBI) in certain activities/sectors.

Under this route, the company can be established in India and start its operations without any permission. The company is only required to report to the Authorities in intimation form after the incorporation.

Due to India's initiative of Ease of Doing Business, now more than ninety (90%) of business activities fall under this Automatic Route of investment.

ENTRY ROUTE II - Approval Route of FDI

FDI in activities not covered under the Automatic Route requires prior approval of the Government.

Effective June 2017, the Foreign Investment Promotion Board (FIPB), which was responsible for processing FDI proposals, has been abolished. The Foreign Investment Facilitation Portal (FIFP) is the new online single point interface of the Government of India for investors to facilitate FDI. This portal is being administered by the DIPP (Department of Industrial Policy and Promotion), Ministry of Commerce and Industry. This portal will continue to facilitate the single-window clearance of applications, which are through Approval Route.

Only few activities like Air transport, Telecom, Defense, Biotechnology, Private Security Agencies, Multi brand retail, Print Media, Pharmaceuticals (Brown Field) fall under Approval Route.

D. SUITABLE BUSINESS STRUCTURE

Every foreign investor planning to enter India should select an appropriate form of business presence, keeping in mind the business objective of the foreign company in India. The right selection is likely to go a long way to ensure efficiency (from an operational/ legal/ regulatory/ tax perspective) and ensure that the business can be financed and run efficiently.

Foreign entities can set up their business operations in India either as **Incorporated** or **Unincorporated** entities.

INCORPORATED ENTITIES – REGISTERED AS INDIAN ENTITY

- (1) Private Limited Company
(As Wholly Owned Indian Subsidiary (WOS) of Foreign Company OR As Joint Venture (JV) Entity of a Foreign Company and its Indian Joint Venture Partner)
- (2) Limited Liability Partnership (LLP)

UNINCORPORATED ENTITIES – REGISTERED AS FOREIGN ENTITY

- (1) Liaison Office (LO),
- (2) Branch Office (BO)



(3) Project Office (PO)

INCORPORATED ENTITIES

Private Limited Company

- A foreign company may set up a WOS in sectors where 100% FDI is permitted under the FDI policy. Alternatively, it could enter into a joint venture with an Indian partner, which may entail the following advantages for a foreign investor:
 - Established distribution/marketing set-up of the Indian partner
 - Available financial resources of the Indian partner
 - Established contacts of the Indian partner, which help smoothen the process of setting up operations
- A foreign company incorporated as either of these two entities under the Companies Act is treated at par with any domestic Indian company within the scope of approval and subject to all Indian laws and regulations as applicable to other domestic Indian companies

Limited Liability partnership

- A Limited Liability Partnership (LLP) is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership. It is governed by the provisions of the Limited Liability Partnership Act, 2008.
- An LLP can continue its existence irrespective of changes in partners. It is capable of entering into contracts and holding property in its own name. It is a separate legal entity and is liable to the full extent of its assets but the liability of the partners is limited to their agreed contribution in the LLP.
- Furthermore, no partner is liable on account of the independent or unauthorized actions of other partners.
- Mutual rights and duties of the partners within an LLP are governed by an agreement between the partners or between the partners and the LLP, as the case may be.

UNINCORPORATED ENTITIES

Liaison Office ("LO")

- To represent the parent company in India
- LO can not undertake any commercial activity and can not earn any income in India
- LO can act as a channel of communication between the principal place of business or head office and entities in India.
- It can promote export/import from/to India and also facilitate technical/financial collaboration between the parent company and companies in India.

Branch Office ("BO")

- BOs are permitted to represent the parent and undertake activities in India such as export/import of goods, rendering professional services, carrying out research work

Project Office ("PO")

- Activities as per contract to execute project
- PO can be set up to execute specific projects in India and cannot undertake or carry on any activity other than the activity relating and incidental to the execution of the project



E. COMPARABLE LOOK OF DIFFERENT FORM OF BUSINESS STRUCTURES

	Un-incorporated Entities		Incorporated Entities	
Particulars	Liaison Office (LO)	Project Office (PO)/ Branch Office (BO)	Private Limited Company	Limited Liability Partnership (LLP)
Legal status	Represents the parent company and acts only as a communication channel of the foreign parent company	Extended arm of the parent, PO is generally set-up for specific projects, whereas a BO is set-up for carrying activities in the course of business	Independent status	Independent status
Approval for commencement	<ul style="list-style-type: none"> • Approval required from Authorized Dealer Bank (AD Bank) or RBI which is subject to fulfillment of prescribed conditions • Approval from RBI required in prescribed scenarios 	<ul style="list-style-type: none"> • Approval required from AD Bank, which is subject to fulfillment of prescribed conditions² • Approval from RBI required in prescribed scenarios 	Company can be set up subject to FDI guidelines	LLP can be set up subject to FDI guidelines
Permitted activities	Liaison activities No commercial/ business activities are permitted	Restricted scope Activities listed by the RBI are only allowed to be undertaken	Activities specified in memorandum of association of the company, subject to FDI guidelines	LLP has to be engaged in sectors in which 100% FDI is allowed under automatic route and no FDI-linked



				conditions are applicable
Income-tax rate	LO is not subject to tax in India, since it is not permitted to undertake any business activity	Liable to tax on income earned in India @ 43.68%	<ul style="list-style-type: none"> • Liable to tax on global income @ 34.94% • Company is liable to Minimum Alternate Tax @ 21.55% on its book profits 	<ul style="list-style-type: none"> • Liable to tax on global income @ 34.94% • LLP is liable to Alternate Minimum Tax @ 21.55% on its book profits
Repatriation	LO is not permitted to undertake any business activity; as such, may not be any repatriations from LO	BO/PO is permitted to remit post-tax profits outside India on satisfaction of the AD bank, filing of prescribed documents with AD Bank required	<ul style="list-style-type: none"> • Does not require any approval for remittance of post-tax profits. • Dividend declared will be subject to DDT @ 20.56% in India 	<ul style="list-style-type: none"> • Does not require any approval for remittance of post-tax profits • Unlike a company, LLP is not required to pay tax on withdrawal of profits from partners' capital
Ease of exit	Prior approval of AD Bank and ROC authorities required	Prior approval of AD Bank and ROC authorities required	<ul style="list-style-type: none"> • Complex depending on the strategy adopted • Exit can be through sale of shares or liquidation 	<ul style="list-style-type: none"> • Complex depending on the strategy adopted • Exit can be through sale of interest or dissolution

F. FORMATION OF BUSINESS STRUCTURE IN INDIA

INCORPORATION OF A PRIVATE LIMITED COMPANY / LLP (INCORPORATED ENTITIES)

The process of incorporating a company in India can be broadly divided into the following four steps:

STEP I: Director Identification Number (DIN) and Digital Signature Certificate (DSC)- Obtaining a DIN and DSC for all directors of the company is a prerequisite for checking the availability of the



company name and making an application to register the company.

STEP II. Application for name availability - Select a few suitable names, up to a maximum of six names, indicative of the main objectives of the company. The Application for Reservation of Name must be submitted online with the concerned Registrar of Companies (ROC) for their approval

STEP III. Drafting the Memorandum and Articles of Association- The Memorandum of Association and Articles of Association (the governing charter) of the proposed company need to be drafted in accordance with the applicable provisions of the Companies Act, 2013 and are subject to the Foreign Direct Investment (FDI) policy of the Indian government, as amended from time to time.

STEP IV: Application for company incorporation - The fourth step is to apply for the registration of the company. After the name is approved, prescribed forms along with the prescribed filing fees and stamp duty are to be submitted through the MCA portal, along with the Memorandum and Articles of Association and other supporting documents duly signed and certified. The ROC, after scrutiny of documents submitted online, approves the company incorporation application and issues the digitally signed Certificate of Incorporation.

Once the company is incorporated and the Certificate of Incorporation is obtained, the company can commence its business after obtaining the necessary local registrations.

Simplified Proforma for Incorporating a Company Electronically (SPICE) FORM 32

In order to simplify the incorporation process, effective 2 October 2016, the MCA introduced the Simplified Proforma for Incorporating Company Electronically (SPICE), i.e. Form No. INC-32 along with e-Memorandum of Association (eMOA) in Form No. INC-33 and e-Articles of Association (eAOA) in Form No. INC-342.

The integrated form can be used to apply for the following registrations at once:

1. Application for DIN
2. Name reservation
3. Incorporation of a company
4. PAN and TAN:

The greatest advantage of this form is that the process of incorporation is now easier, more convenient and expedited.

Timeline: The entire process of incorporation can be completed in three to four weeks.

Incorporation proceeding of LLP is similar to incorporation of the Company.

ESTABLISHMENT OF PLACE OF BUSINESS AS LIAISON OFFICE (LO) / BRANCH OFFICE (BO) / PROJECT OFFICE (PO) (UNINCORPORATED ENTITIES)

The process of establishing place of business in India (LO/BO/PO) can be broadly divided into the following two important steps



Foreign company can proceed for its establishment in India under Automatic Route. In order to register a LO/BO/PO, the Foreign company will have to follow below two major steps:-

STEP I. Take approval from Authorized Dealer ("AD") Bank / Reserve Bank of India ("RBI") – The foreign company shall submit Form FNC-1 along with charter documents, details of the management of the foreign company and other supporting documents with RBI through AD Bank. The RBI after scrutiny of documents and after getting satisfied with the information issues permission to establish LO/BO/PO.

STEP II. After taking approval/Permission from AD Bank / RBI, the Foreign Company will have to get registered with Registrar of Companies, Ministry of Corporate Affairs – The foreign company shall submit E-Form FC-1 with Ministry of Corporate Affairs along with RBI permission letter and other specified documents. The Ministry shall approve the registration of LO/BO/PO and issues Certificate of establishment of Business in India.

Timeline: The entire process of establishment of LO/BO/PO can be completed in eight to twelve weeks.

G. CORPORATE TAXATION

In India, all domestic companies are liable to tax on their global income, while foreign companies are liable to tax in India with respect to income received or deemed to be received in India or income accruing or deemed to be accruing in India. The effective corporate tax rate (base rate + surcharge + cess) depends on the type of the company (i.e. domestic or foreign) and the quantum of its taxable income in the previous year. The year refers to the Financial Year (FY), beginning on 1 April and ending on 31 March; and previous year means the previous financial year. The Finance Act passed by the Indian government every year could change the rate of tax, surcharge and cess.

Particulars	Taxable income > INR 100 million	INR 10 million < taxable income < INR 100 million	Other cases
Incorporated Entity (Private Limited Company/ LLP)	34.944% (30% base rate + 12% surcharge + 4% cess)	33.384% (30% base rate + 7% surcharge + 4% cess)	31.20% (30% base rate + 4% cess)
Unincorporated Entity (Branch office / Project Office)	43.68% (40% base rate + 5% surcharge + 4% cess)	42.432% (40% base rate + 2% surcharge + 4% cess)	41.60% (40% base rate + 4% cess)



H. REPATRIATION FROM AN INDIAN COMPANY

Foreign capital invested in India is generally allowed to be repatriated along with capital appreciation, if any, after payment of taxes due. The repatriation is allowed provided the investment was made on a repatriation basis in terms of FDI/ FEMA regulations and is subject to any lock-in conditions that may be applicable under FDI/ FEMA regulations.

REPATRIATION BY PRIVATE LIMITED COMPANY

Typical modes of repatriation by an Indian company		
Dividend	Buy back	Capital reduction
<ul style="list-style-type: none"> Profits earned by an Indian company can be repatriated as dividend subject to availability of sufficient free reserves after payment of Dividend Distribution Tax (DDT) @ 20.56%¹ without the RBI's permission. The repatriation is also subject to compliance with other specified conditions No further tax to be levied on corporate shareholders Repatriation can be completed within a week 	<ul style="list-style-type: none"> Buy back restricted up to 25% of share capital and free reserves in a financial year subject to satisfaction of prescribed conditions Company buying back shares liable to pay tax @ 23.30% (on consideration paid less amount received on issue of shares) No tax on shareholders in case of buy back of unlisted shares In case of buy back of listed shares, tax payable by shareholders is dependent on factors like payment of STT, period of holding, residency, etc. Buy back price to be subject to pricing conditions prescribed under FDI regulations in case of non-resident shareholders Generally, buy back of unlisted shares can be completed within six weeks 	<ul style="list-style-type: none"> National Company Law Tribunal (NCLT) driven process, subject to conditions prescribed under FDI regulations Subject to DDT @ 20.56%¹ in the hands of Indian company to the extent of accumulated profits Consideration in excess of accumulated profits subject to capital gains tax in the hands of shareholders Capital reduction can be completed within four to six months (subject to any NCLT vacations and protracted litigation) Capital reduction should be in compliance with the FEMA guidelines



REPATRIATION BY BRANCH OFFICE (BO) / PROJECT OFFICE (PO)

Profits earned by Indian branches of foreign companies (other than banks) can be repatriated to their head offices subject to payment of applicable taxes. Proceeds from the winding-up of a branch of a foreign company in India can also be repatriated.

REPATRIATION BY LIMITED LIABILITY PARTNERSHIP (LLP)

Profit earned by LLPs can be repatriated by way of distribution of profits to partners/ withdrawal of capital.

REPATRIATION IN FORM ROYALTIES AND FEE FOR TECHNICAL SERVICES

Indian entities are permitted to make payments to foreign entities under foreign collaboration agreements, subject to certain prescribed conditions. The payment can be for:

Royalties and technical know-how
Fees for technical and management services

The entities need to substantiate genuineness of such payments.

Remittances to foreign companies in the nature of royalties, fees for technical services and consultancy services are subject to tax withholding at 10% (plus applicable surcharge and cess) as per section 115A of the IT Act subject to beneficial tax rates provided in the applicable treaty. Furthermore, the said payments will be subject to arm's length test in case the transaction is between associated enterprises.

Thanks

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