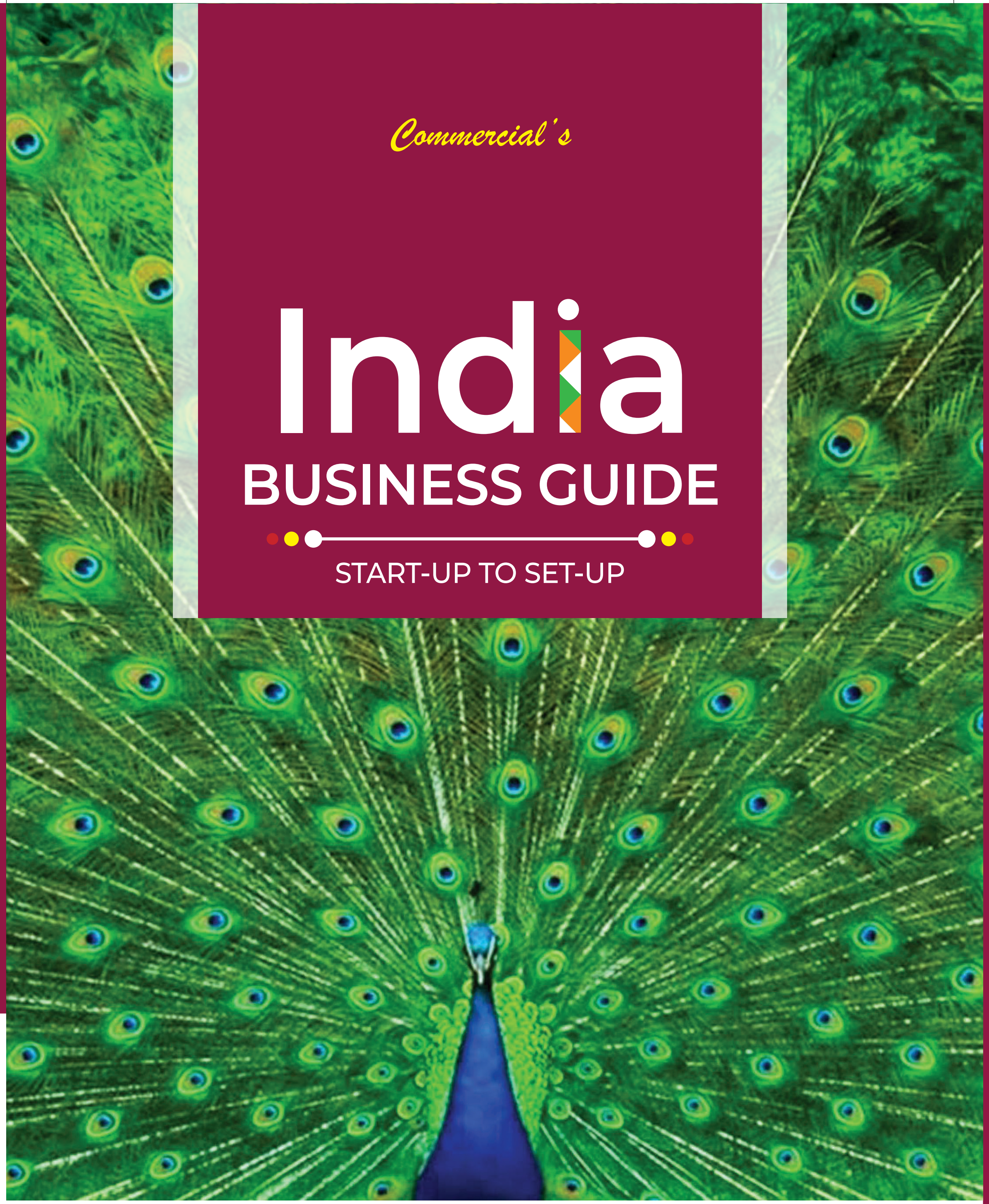
Commercial's

India
BUSINESS GUIDE

START-UP TO SET-UP



2021

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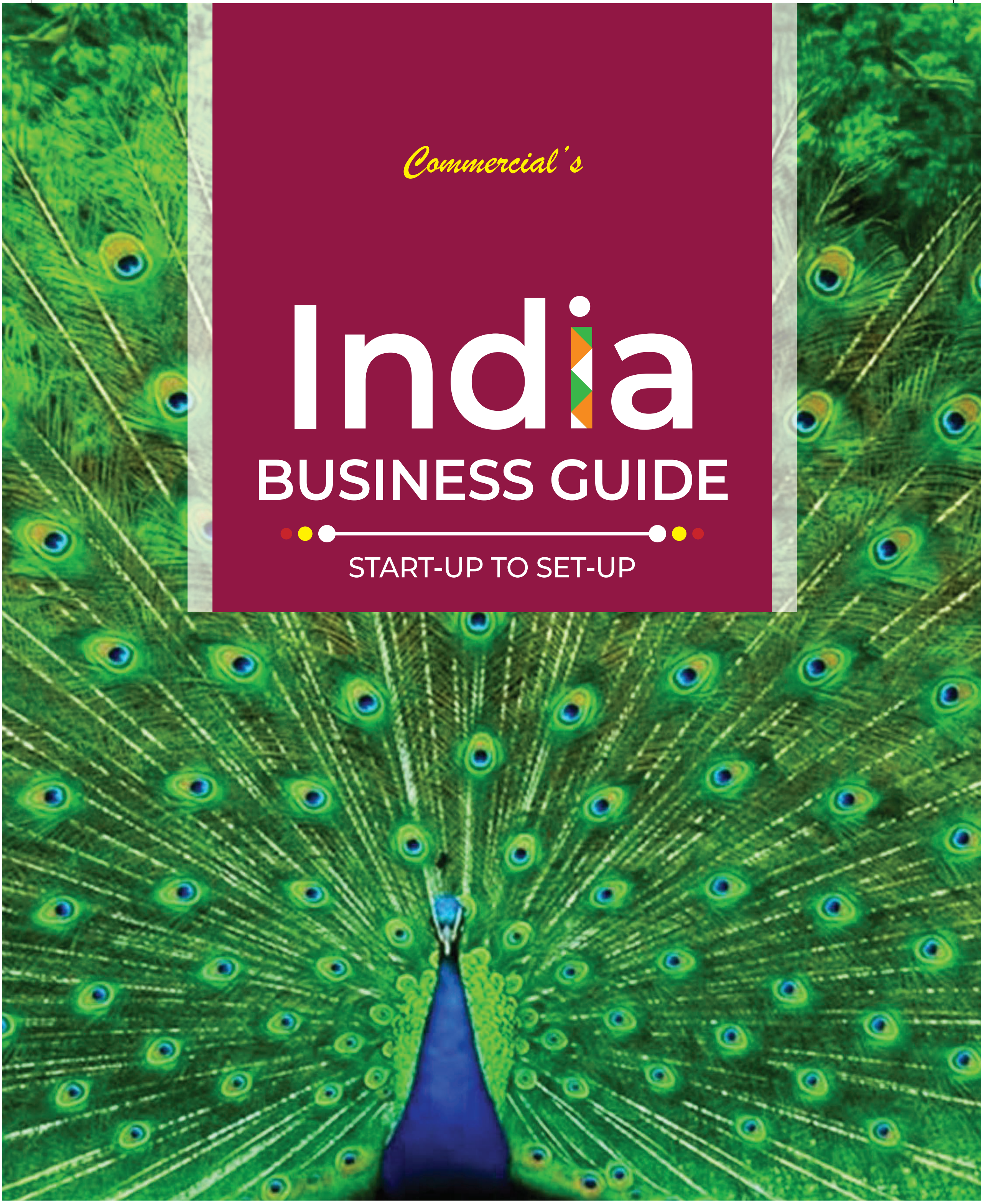

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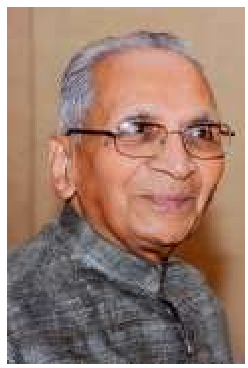

Dedicated to Mr. O. P. Vaish
Senior Advocate
&
Founder
Vaish Associates Advocates
(1931-2013)

Foreword

The year 2020 has seen an unprecedented pandemic that has impacted the global economy. The virus has been a leveler impacting both developed and developing and emerging economies. While it has thrown up a lot of uncertainties, it has also thrown up opportunities. The International Monetary Fund has projected a 9% growth for India in year 2021. This will make India one of the fastest growing economies. India's growth story would not just continue but will be strengthened once we come out of this crisis. With a young and innovative population and the scale of digital transformation that the county is witnessing, we are well poised to achieve high growth rates. As a country, we aspire to become a US$ 5 Trillion economy in the next few years, and it is quite possible that the projected growth rates in year 2021, if achieved, could propel the economy to moving towards this aspirational target.

Businesses in India, from start-ups to big, businesses need to be supported through a legislative and regulatory regime which is enabling and compliments the business growth, in the last few years, the Government has taken several steps that address all business forms. This has to be an ongoing process with stakeholder consultation being an important element of this process.

The India Business Guide compiled by Vaish Associates, Advocates is a useful compendium of relevant rules and regulations that apply across sectors and will be immensely helpful to entrepreneurs, start-ups, foreign investors wanting to invest in India professionals who advise businesses as also the Government officials tasked with their enforcement. It is a single source of legislative and regulatory guidance explained in a simple language that will be of considerable help to new age entrepreneurs and business leaders. As a student of law, I fully appreciate the tremendous use that this compilation has for professionals in advising businesses. In fact, the Guide makes the job of both, those who want investors to invest in India and those who have already made the decision to invest in India, easier. The background information and insights provided in the Guide are immensely useful.

I want to thank and compliment Vaish Associates for coming out with this compilation at periodic intervals, sharply capturing the ever-evolving legislative space in our county for the benefit of hundreds and thousands of stakeholders and readers. This is an example of commendable service that Vaish Associates are rendering, not just to their stakeholders, but to students, professionals, policy makers and businesses as a whole.

I wish every success to this publication, which it fully deserves.

Dev Bajpai
Executive Director, Legal & Corporate Affairs,
Hindustan Unilever Limited

About Vaish Associates Advocates

Founded by Late Shri. O. P. Vaish, Senior Advocate in 1971, Vaish Associates Advocates is a full service law firm in India having offices in Delhi, Mumbai and Bengaluru. The Firm has been providing legal services and advisory to domestic and international clients for over four decades.

Vaish Associates practice areas extends across Direct Tax (Income Tax, Transfer pricing, International Taxation), Indirect Tax (Customs, Central Excise, Service Tax, Central Sales Tax and Value Added Tax), Corporate Practice, Mergers and Acquisitions, Business Reorganization, Foreign Investment, Strategic Alliance/Joint Ventures, Capital Markets –Domestic and International Offerings, Legal & Secretarial Due Diligence, Regulatory Compliances, Alternate Dispute Resolution, Real Estate, Special Economic Zones, Banking and Finance, Labour and Employment laws, Competition/ Anti-Trust laws, Intellectual Property Rights and Information Technology, Litigation, Non Profit Organizations, etc.

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Contents at a Glance

Detailed Content

Chapter 1 Introduction

India is the seventh largest country in the world spread over a total area of 32,87,263 sq kms, including the territorial seas. Located in South Asia in the tropical belt just north of the equator, it is separated from mainland Asia by the Himalayas, a mountain range that umbrellas the entire northern region stretching to a distance of 2,400 kms to the east. India is home to some of the world's highest peaks shielding the country's 28[1] States and 8[2] Union Territories. Several important rivers originate from this mountain range.

To the south of the mountain range are the Indo-Gangetic Plains. To the west of this plain and cut off from it by the Aravalli range is the Thar Desert. Further south, geologically, the oldest part of India is the Deccan Plateau flanked on the left and the right by coastal ranges, the Eastern and Western Ghats. Peninsular India is bordered by the Bay of Bengal in the east and the Arabian Sea in the west. The Indian Ocean forms a pedestal to the country.

India is surrounded by Afghanistan and Pakistan in the north-west, China, Bhutan and Nepal in the north, Myanmar in the east, and Bangladesh to the east of West Bengal. Sri Lanka is separated from India by a narrow channel of sea, formed by Palk Strait and the Gulf of Mannar.

India's history dates back to 2500 BC when the first known civilisation settled along the Indus River. India is a secular country where Hinduism co-exists with Islam, Christianity, Buddhism, Jainism, Sikhism, Judaism and Zoroastrianism. India has 22 official languages and great ethnic diversity. As a consequence of India's continental size, the history of the country has seldom been the same for two adjoining territories. The picturesque land is dotted with palaces, temples and monuments. One of the fascinations of India is a creative fusion of old and new, centuries of history rubbing shoulders with the computer age, Bengaluru's (formerly Bangalore) "Silicon Valley" is as much a part of the world's largest democracy as its remotest villages.

Exciting topographical variations, cultural diversity, and the colourful local traditions lend India harmony in variety. The second most populous country in

1 https://knowindia.gov.in/states-uts/
2 https://knowindia.gov.in/states-uts/

the world after China, India has over one billion people, accounting for one-sixth of the world's population.

The Constitution of India came into force on January 26, 1950. The preamble to the Constitution defines India as a Sovereign Socialist Secular Democratic Republic with a parliamentary form of Government. India has a bicameral Parliament operating under a Westminster-style Parliamentary system which consists of the Upper House, called the Rajya Sabha (Council of States) and the Lower House, called the Lok Sabha (House of People). India's governance is based on a federal structure consisting of the Central Government or the Union Government and federal units known as the States. The power to govern issues relating to national security, defence, national waterways and airways, international treaties, foreign trade, foreign exchange, customs duties, income tax, etc (matters referred to in the **"Union List"** of the Constitution) vests within the Union Government. The State Governments have a mandate over law and order, land revenue, tolls, agriculture, mines and minerals, etc, in the respective States (matters referred to in the **"State List"** of the Constitution). Certain areas (matters referred to in the **"Concurrent List"** of the Constitution) may be governed or legislated upon by both the Union Government and the State Governments. In case of any conflict of laws, the Union/Federal law prevails. India has a unitary three-tier judiciary consisting of the Supreme Court, High Courts and Trial Courts.

The President of India is the Head of State, while the Prime Minister is the Head of the Government. The Prime Minister runs the Government with the support of the Council of Ministers, who form the Union Cabinet.

Ever since India emerged from the shackles of a closed economy in the early 1990s, its economy has steadily grown and today it is one of the fastest-growing economies in the world, with a growth rate higher than that of many developed countries. Over the last decade, India has undergone a transformation and climbed to a high-growth path as macroeconomic and structural reforms has reduced regulations significantly, improved the business environment, and opened the economy to greater competition.

In the recent data published by the World Bank, India is the world's sixth largest economy at an astounding GDP (2018) of US$ 2,718,732 million (US$ 2.719 trillion)[1]. India is fast becoming a leading international business and financial hub. India offers a cost-effective environment for establishing and doing business for the burgeoning domestic and export markets.

India stands at the 120th position out of 186 countries with an economic freedom score of 56.5 as per the Index of Economic Freedom.[2] In the South Pacific region it is ranked 28th among 42 countries.

Foreign investors are looking at India as an attractive investment destination owing to the prospect of high returns. A number of corporate and multinational

1 https://data.worldbank.org/country/india

2 https://www.heritage.org/index/country/india

companies from all over the world have established businesses in India and have expanded over the years.

¶1-010 Start-ups Revolution in India

India's phase of revolution has gained a pace which has had no parallel in the past. This revolution is driven by Start-ups across segments, with the potential to touch lives of over *One Billion Indians*, thereby attracting the attention of global investors and competitors, all of them wanting to tap and be a part of this growth story.

Foreign investors view India as a country with excellent potential and have funded many such start-ups.

In India, everyday there are news of start-ups being launched, start-ups getting funded, or existing start-ups expanding their portfolios to fuel their hyper growth. The "Start-up" movement is growing vigorously across India and along with major cities, it is spreading in tier-2 towns as well.

Prime Minister of India, Mr. Narendra Modi gave a momentum to the **"Start-up India, Stand-up India"** initiative on India's Independence Day on August 15, 2015.

In the words of Prime Minister, Narendra Modi: *Start-up India is a revolutionary scheme that has been started to help the people who wish to start their own business. These people have ideas and capability, so the government will give them support to make sure they can implement their ideas and grow. Success of this scheme will eventually make India, a better economy and a strong nation*.

In India, for an entity to be recognised as a 'start-up', it must be either incorporated as a Private Limited company as per the provisions of Companies Act 2013, it must be registered as a Partnership Firm as per the provisions of the Partnership Act, 1932, or it can be a Limited Liability partnership as per the provisions of the Limited Liability Partnership Act, 2008.

Start-ups in India are making the lives better, providing customers unlimited options to choose from, at the comfort of our homes and computers or mobiles. Government, through its ease of doing business initiatives and business friendly policies, is creating a conducive regulatory framework for Start-ups. In October 2018, Indian made a staggering record 53 rank jump in just two years to reach the 77th position in the doing business ranking from World Bank. As per a study by National Association of Software and Services Companies (NASSCOM) in 2017, 40% (forty percent) of all incubators and accelerators are concentrated in Bengaluru, Mumbai and Delhi-NCR. India also boasts of being home to the 3rd largest unicorn community, with over 16 high valued Start-ups having raised over $17.27 billion funding, with overall valuation of over $58 billion [1].

1 https://www.startupindia.gov.in/content/dam/invest-india/compendium/Startup% 20India%20-%20National%20report_Final%20Version_web.pdf

Start-ups in India –At a glance

Sr. No.	Industry/Sector	Name
1.	Food	Faasos, Zomato, Box8, Swiggy, Chayoos, Freshmenu, , Twigly, Wow! Momo, Chai Point, Daalchini Technologies Pvt. Ltd., Dunzo, Coolberg
2.	Travel	OLA, , Uber, Jugnoo, Savaari, EaseMY Trip, goStops, Revv
3.	Retail & Fashion	Flipkart, Myntra, Snapdeal, , , YEPME and ShopClues, Bewakoof, Nykaa, POPxo
4.	Real Estate	Housing, Homeshikari, Nobroker
5.	Hospitality	OYO Rooms, ZO Rooms, , Treebo Hotels
6.	Health & Wellness	Practo, , Address Health, 1.1mg, Azah, BeatO, BeYouPlus, Cure.Fit, PharmEasy, &Me
7.	Groceries	Big Basket, Grofers, FreshTOHome, DailyNinja, Milkbasket
8.	Education	uFaber, Toppr, Purple Squirrel, Gradeup
9.	Personal Finance	Policy Bazar, Avail Finance, Bon Credit, Cashflo, Razorpay, smallcase
10.	Digital Classifieds	Quikr, Olx
11.	Home Services	LocalOye, Urban Clap, Zimmber, near.in, UrbanPro,
12.	Jewelry	Bluestone, Carat Lane
13.	Cars	CarDekho, CarTrade, ZoomCar
14.	Payment	Paytm, Mobikwik, Freecharge, PayPal
15.	Home Decor & Furniture	Urban Ladder, Pepperfry, Fab Furnish, Furlenco, Homelane
16.	Weddings	Marryinaweek, Wedmegood, Weddingplz
17.	Office space	91springboard
18.	Technology	Hashtaag, Goodera
19.	Legal	Vakilsearch, LawRato, Lawyered, Legalkart

As competition heats up, both with the entry of global players such as *Amazon, Uber, Airbnb, Coursera, OLX, PayU,* and of the emergence of new local players, these start-ups will continue to evolve so as to keep themselves in business. We have already seen several acquisitions within the Indian start-up ecosystem *(i.e., Flipkart's acquisition of Myntra, Snapdeal's acquisition of Freecharge and OLA's acquisition of Taxi For Sure).* Then, there are start-ups which are redefining the way business is conducted (*for example Myntra's decision to adopt a mobile only model).* Also, there are start-ups which are constantly evolving and upgrading their business models (*such as OLA expanding its portfolio to deliver food via its Ola café service, Flipkart expanding its portfolio to sell Home Decor & Furniture and Snapdeal expanding its portfolio to sell houses online*). Furthermore, there are ideas that are changing lives, making it easier for people and redefining the way business is conducted (*an eminent example for this is the partnership between Healthcare booking platform "Practo" and taxi service provider "Uber", helping people reach doctors easily*).

The list is endless. India is a country of innovation and entrepreneurial skills and has a lot to offer. In 2019, with the addition of 1300 start-ups, India became the third largest start-up ecosystem in the world.[1] The year over year growth is projected around 12% (twelve percent) -15% (fifteen percent).[2]

The Government has around 125 different schemes to attract investments in start-ups that are operating in varied fields.[3] Also, to boost the Start-up India Programme, many tax exemptions are being provided to start-ups, and they have the provision of self-certification under various labor and environment laws. An allowance to fast track the patent application process has been made ,and up to 80% (eighty percent) rebate on filing of patents is also being given; further, there is a provision of easy winding up of the entity under the Insolvency and Bankruptcy Code 2016.[4]

These leverages and exemptions have been successful in attracting people to invest in Start-ups, as a result of which India is in the midst of reaping a demographic dividend. The ambitious, skilful, and hardworking nature of the Indian youth is also a factor for the growth of start-up ecosystem in India.

There are around 7 million college graduates per year out of which around 55% (fifty percent) of them have preferred to work in start-ups.[5] The constraint on creativity in corporate houses is one of the major reasons for such an attractive attitude towards the start-up ecosystem. Moreover, one of the reasons for this magnetism is the internet market in India. In India, there are around 462 million internet users which makes India the second largest consumer of internet market around the globe, right behind China.[6]

1 https://www.nasscom.in/knowledge-centre/facts-figures
2 https://www.startupindia.gov.in/content/sih/en/international/go-to-market-guide/indian-startup-ecosystem.html
3 https://www.startupindia.gov.in/content/sih/en/government-schemes.html
4 https://www.startupindia.gov.in/
5 https://www.neusourcestartup.com/blog/indian-startup-ecosystem
6 https://www.startupindia.gov.in/content/sih/en/startup-scheme/International/indian-startup-ecosystem.html

With the help of digitisation, the start-up industry has also reached tier 3-4 cities; the *Blackboard Radio, Bakbuck, Pratilipi, Purpule and Dealshare* are few examples of the same.

Due to competition for rapid innovation in the prevailing business environment, a large number of companies are reaching out to start-ups to seek innovativeness in their operations. This mutual engagement between the company providing corporate specific resources and start-ups providing innovation can prove to be beneficial.

¶1-020 The Effect of COVID-19 on Start-ups

The world economy is in a worse shape. According to IMF[1], global growth is projected at (negative) 4.9% in 2020, 1.9 percentage points below the April 2020 World Economic Outlook (WEO) forecast. In IMF's June 2020 World Economic Outlook Update, India's economy is projected to contract by 4.5% following a longer period of lockdown and experience a slower recovery than anticipated.

The pandemic, followed by near complete closure of all non-essential services by all the State governments has severely hit various sectors, including MSMEs, agriculture, hospitality, and civil aviation. Media, quoting the data released by Centre for Monitoring of Indian Economy, has indicated that about 122 million people have lost their jobs in April 2020 alone.[2]

While announcing various relief measures, the Finance Ministry along with RBI has permitted all the lending institutions to allow a moratorium on payment of instalments of all the term loans which became outstanding as on 1st March 2020.[3] Due to this measure, start-ups can plan their finances better as the repayment of liabilities has been postponed for three months. Many start-ups have been hit by the lockdown, which is why this moratorium is necessarily needed to act as a shield to save their businesses. But this moratorium might backstab the start-ups at the time of repayment after three months, owing to a lack of revenue during the subsequent three months along with the interest rate, which will accumulate in the foregoing months.

The government has also made an effort to save businesses from becoming insolvent by providing them some time to self-heal, by suspending the operation of Section 7 of Insolvency and Bankruptcy Code (IBC), 2016, i.e. initiation of corporate insolvency resolution process by financial creditor, Section 9 of IBC i.e. application for initiation of corporate insolvency resolution process by operational creditor, and Section 10 of IBC i.e. initiation of corporate insolvency resolution process by corporate applicant by promulgation of an ordinance. Further, the threshold limit for filing an insolvency application against the

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1 https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020

2 https://www.thehindu.com/data/data-over-12-crore-indians-lost-their-jobs-during-the-coronavirus-lockdown-in-april/article31520715.ece

3 https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=49582

corporate debtor has been enhanced from Rs. 1 Lakh to Rs. 1 Crore. This decision might give many start-ups some breathing space to recuperate.

For maintaining liquidity in the market RBI has also reduced the repo rate and CRR.

The Start-up India Portal had launched a challenge called 'Submit Solutions to Combat COVID-19'. As the world is going through a serious healthcare challenge caused by the pandemic Covid-19, Department for Promotion of Industry and Internal Trade (DPIIT) with Startup India has launched this challenge to scout for innovative technologies and solutions for precautionary as well as treatment-related interventions.

The objective of this challenge is to help build a one-stop repository of innovative solutions for ready access by the government and the private sector for further development and deployment.

Entries were invited under 10 different categories ranging from personnel protecting equipment to fake news detection and crowd management.[1]

The following list contains some of the start-ups solutions of which have been shortlisted under the 'Submit Solutions to Combat COVID-19' challenge:

Category	Start-up Name	Solution/Product developed
Personnel Protective Equipment	Bubble Byte India	Dr. Sanitor - equipment to sanitize every possible surface.
Testing Equipment	Ayu Devices Pvt. Ltd.	Digital Stethoscope
Critical-Care Equipment	Briota IVS	Briota Portable Ventilator
Large Area Sanitization and Sterilization	Addverb Technologies Pvt. Ltd.	UV Disinfectant Robot
AI Based Technology for Contactless Entry	Touchless ID Pvt. Ltd.	Touchless ID
Movement Tracking	Tinkerbee Innovations Private Limited	Trackbee
Geofencing	N3XVERSE Private Limited	D.O.T - Disease Outbreak Tracker
Crowd Management	YOBNY TECH	QueueOne - Virtual Queuing Platform
Fake News Detection	Unfound	Artificial Intelligence, Natural Language Processing, Machine Learning

1 https://www.startupindia.gov.in/content/dam/investindia/Templates/public/Listicle%20of%20Covid%20Startup%20Solutions_29.04.20_Demo%20Day_Shortlist.pdf

Category	Start-up Name	Solution/Product developed
Logistics	Peer Robotics	Robots for automated delivery of food, medicines, and disposal of waste

Similar initiative has been taken by The Small Industries Development Bank of India (SIDBI) which has launched the *'Covid-19 Start-up Assistance Scheme ('CSAS')'*, to provide financial stability to start-ups. The scheme is aimed to provide assistance to the start-ups adversely affected by COVID 19[1]by providing them working capital loans.

Apart from the measures taken by the Government, the start-up community has through a mission of Action COVID 19-Team came together and collected a sum of Rs. 100 crore (Rs. 1000 million) which has been earmarked to be used to support innovators working on solutions to combat COVID-19. It is a 25-member team consisting NGOs and Industry veterans.[2]

The Indian Government has even amended its FDI policy to check investment flowing in from China, with the objective of stopping opportunistic takeovers of Indian companies owing to the economic situation following the pandemic.

Hopefully, all these relief measures, will contribute positively in reviving the economy, though it is going to be very challenging.

1 http://sidbivcf.in/files/article/articlefiles/COVID19_Scheme_Details.pdf
2 https://www.newindianexpress.com/business/2020/apr/01/startup-community-launches-rs-100-cr-grant-for-innovators-working-on-covid-19-solutions-2124416.html

Chapter 2 Advantage India

¶2-010 Market Place

India is the world's largest democracy and seventh largest country in the world. In the data published by the World Bank, India is world's fifth largest economy at an astounding GDP (2019) of US$ 2,875,142.31 million (US$ 2.875 trillion)[1]. However, due to Covid-19 Pandemic, the World Bank has given a GDP forecast of (-) 3.2, and for the year 2021, the World Bank has indicated an expected recovery in GDP up to (+) 3.1[2].

India offers high prospects for potential growth and return on investment in all areas of businesses. Other salient features of Indian economy are as follows:

- Large and growing domestic market with a huge middle class
- Large pool of young skilled labour force, which is, by and large, educated and fluent in English
- Competitive wages
- Cost-effective production facilities
- Expanding industrial base and intellectual capital
- Capacity upgradation in infrastructure
- Continuous liberalisation in the foreign investment framework and ease of doing business
- Harmonised tax rates for goods and services
- Acceleration of the privatisation process
- Investor-friendly policies

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1 https://data.worldbank.org/country/india
2 https://www.worldbank.org/en/publication/global-economic-prospects#data

The Indian market is widely diverse, thus, tastes and preferences differ greatly among sections of consumers, creating a largely diverse and vast market for all areas of businesses.

Sectors receiving highest FDI equity inflows are Services Sector (financial and non-financial) followed by Computer Software and Hardware and Telecommunication Sector (radio paging, cellular mobile, basic telephone services). As per statistics from the Department of Industrial Policy & Promotion (DIPP) under the Ministry of Commerce and Industry, the FDI equity inflows during the financial year 2019-20 (from April 2019 to March 2020) stood at US$ 49,977 Million. Cumulative FDI inflows into India (from April 2000 to March 2020) stood at US$ 680,919 million and cumulative FDI equity inflows (from April 2000 to March 2020) stood at US$ 469,998 million.[1]

¶2-020 Manufacturing and Service Sectors

Manufacturing

Manufacturing is the backbone of the Indian economy which has emerged as a premier global manufacturing hub with the entry of a number of transnational corporations. India offers tremendous opportunity for automobiles, textiles, steel, metals, and engineering and petroleum products for the world market. India has become one of the most attractive destinations for investment in the manufacturing sector. Indian manufacturing companies are expected to benefit from global innovation and investments. The cumulative FDI in India's manufacturing sector reached US$ 88.45 billion during April 2000 to March 2020[2]. Prime Minister of India, Mr. Narendra Modi, launched the 'Make in India' program to place India on the world map as a manufacturing hub and give global recognition to the Indian economy. Under the Make in India initiative, the Government of India aims to increase the share of the manufacturing sector to the gross domestic product (GDP) to 25% (twenty five percent) by 2022, from 16% (sixteen percent), and to create 100 million new jobs by 2022.[3]

Services

The service sector continues to be the largest contributor to India's GDP. In fact, more than half of the GDP is contributed by the service sector. India's services sector covers a wide variety of activities such as trade, hotel and restaurants, transport, storage and communication, financing, insurance, real estate, business services, community, social and personal services, and services associated with construction. The service sector growth continues to be broad based. Services sector is the largest recipient of FDI in India (from April 2000 to March 2020) with inflow of US$ 82,003 million. In recent past, Indian government for promoting growth in service sector has introduced initiatives, such as,

1 https://dipp.gov.in/sites/default/files/FDI_Factsheet_March20_28May_2020.pdf
2 https://www.ibef.org/industry/manufacturing-sector-india.aspx
3 https://www.ibef.org/industry/manufacturing-sector-india.aspx

National Broadband Mission to provide broadband access to all villages by 2022, Services Exports from India Scheme (SEIS) to promote export of services from India by providing duty scrip credit for eligible exports, etc.

¶2-030 Communication and Information Technology

India is now well integrated with the rest of the world and is linked to most parts of the world through the Internet. Within India, digital IT and telecommunications have seeped into day-to-day activities of businesses and general public. IT has made it possible for the large population of India to have global access. State-of-the-art IT-enabled voice and data services are readily available for conducting and executing business in the country.

Across the globe, countries have recognised IT as an effective tool in catalysing the economic activity for efficient governance and in developing human resources. In India, there is a growing recognition of the wider possibilities of technology. IT, together with communication technologies, which has brought about unprecedented changes in the way people communicate and conduct business. There is even a greater realisation that instead of a single-track technology, lateral integration of technologies can deliver startling results and the world seems to be moving towards such converged systems.

In India, the new technology trends are evident in the development of electronic communication systems. Emerging digital techniques such as new network alternatives (intelligent networks), high-bandwidth communication technology and state-of-the-art software for network functions and services have come a long way. Telemedicine applications make it possible to deliver healthcare to people in isolated and far-flung locations. Broadcasters and TV manufacturers are enhancing the interactive capabilities of their services and equipment. India is adapting to the cutting-edge inventions in science and technology.

Besides establishing indigenous R&D in digital technology, both the Government and private players in the Information Communication Technology sector have established manufacturing and value-added servicing capabilities. Perhaps, the most important feature of this technological breakthrough is India's capability to build and successfully launch its own multi-purpose communications' satellites under public–private partnership initiative.

With the emergence of IT on the national agenda and the announcement of IT policies by various State Governments, people-centric projects on governance, sustainable development economy and social empowerment is being pushed to the center-stage. As an initiative, the Government of India is running Digital India campaign with programs like Aadhaar, Centre of Excellence for IoT, Common Service Centres Scheme, Cyber Swachhta Kendra, etc.[1]

1 https://digitalindia.gov.in/infrastructure

¶2-040 Low Cost and Skilled Manpower

India has made significant progress in the field of elementary education. India's average literacy rate is pegged at 74.04 as per census 2011; next census will be conducted in the year 2021. Concerted efforts towards Universalisation of Elementary Education (UEE) have resulted in manifold increase in schools, teachers and students. The Government has attached highest priority for completing this unfinished task by 2025 and all State governments are preparing an implementation plan for attaining universal foundational literacy and numeracy in all primary schools, identifying stage-wise targets and goals to be achieved by 2025. The main thrust of the higher education sector has been in the following areas:

- Organic growth of higher education system,
- Academically strengthening universities and colleges,
- Evolving socially relevant programmes,
- Programmes for enhancing accessibility to technical education in an equitable manner,
- Promotion of quality and excellence in every aspect of education,
- Enhancing accuracy of physically challenged persons, and
- Strengthening of R&D.

The technical education system in the country covers courses and programmes in engineering, technology, management, architecture, town planning, pharmacy, applied arts and crafts. A large number of institutes at the Central as well as at the State level are engaged in providing quality technical education and training. Higher education and technical education have usually been the prerogative of the Government, but recently initiatives taken by private players are also being encouraged. They are allowed to make valuable and significant contribution. Many engineering and other technical colleges and institutes have been established by private players after due approval and accreditation by the Government. The focus is on overall development and networking of institutions. Keeping in view the emerging trends, efforts are under way to IT enable the entire engineering and technology education system in the country and to leverage new advances in Information and Communication Technologies to enhance learning effectiveness in the entire technical education system in the country.

All these efforts have ensured that India has, and will continue to have an abundant resource base of well-educated, highly proficient and skilled technical manpower, including IT professionals.

In a historic move, the Union Cabinet has granted its seal of approval to the new National Education Policy, 2020 ("Policy"). The new policy will revolutionize the existing framework of education in India after a period of 34 years.

The main aim of the new policy is to ensure, that by 2040 India has an education system that is second to none, with equitable access to the highest-quality education for all learners, regardless of social or economic background. The Policy envisages reforms for both school as well as higher education. One such key reform is the proposed 'Internationalisation' of the Higher Education in India. The policy not only aims at improving the quality of education in India, but also bring Indian educational institutions at par with the top-ranking foreign institutions.

To attain this ambitious goal of having global quality standard and attract greater numbers of international students, India will be promoted as a global education destination providing premium education at affordable costs. This will also entail providing quality residential facilities to foreign students, on-campus support etc. Further, an International Students Office at each Higher Education Institute hosting foreign students will be set up to coordinate all matters including welcoming and supporting foreign students arriving from abroad.

Under the new policy, Government of India will encourage top-most 100 universities in the world to set up their campuses in India. Going forward, a legislative framework facilitating such entry will soon be put in place. These universities will be given special dispensation regarding regulatory, governance, and content norms at par with other autonomous institutions in India.

Research/teaching collaborations, faculty/student exchanges with top notch foreign institutions will also be facilitated. In this regard, MOUs with foreign countries will be signed. Elite and reputed Indian universities will be encouraged to set up their campuses across abroad.

Technical expertise

As a result of the successful economic liberalisation process and the quality of higher and technical education, India has achieved self-reliance in diverse fields. Indian economic and technical assistance is eagerly sought by a number of developing countries in Asia, Africa and West Asia. India provides expertise in projects ranging from construction of cement plants to airports and railway networks to many countries in these regions. A number of Indian firms have been active in this regard in South-East Asia, Africa and West Asia.

The Indian Technical and Economic Cooperation programmes provide expertise and consultancy services to a number of developing countries for feasibility and detailed technical evaluation studies. The programme supports training of personnel in India in a host of areas like agriculture, animal husbandry and small-scale industries.

The new National Education Policy, 2020 also contemplates providing opportunities to professionals to take lead in cutting-edge areas that are fast gaining prominence, such as Artificial Intelligence (AI), 3-D machining, big data analysis, and machine learning, in addition to genomic studies, biotechnology, nanotechnology, neuroscience, with important applications to health, environment, and sustainable living that will be woven into undergraduate education for enhancing the employability of the youth. With the implementation of the new education policy, India will witness momentous growth and technical expertise in years to come.

¶2-050 Strong Banking and Financial Sector

An extensive financial and banking sector supports the rapidly expanding Indian economy. India boasts of a broad-based and sophisticated banking network. The sector also has several national and State-level financial institutions. These include foreign and institutional investors, investment funds, equipment leasing companies, venture capital funds, etc. All large Indian banks are nationalised. Though the banking industry is currently dominated by public sector banks, numerous private and foreign banks have made inroads in this sector. The finance and banking sector is well regulated under the authority of the Reserve Bank of India (RBI), the central banking institution of the country. Among other things, it supervises and administers exchange control and banking regulations, and administers the monetary policy. The banking sector is also being privatised with several public sector banks being restructured and divestment of Government holdings being carried out.

At present, India has 21 public sector banks[1], 46 private foreign banks[2], 45 regional rural banks[3], 3 local area banks[4], 1,538 urban cooperative banks (53 scheduled cooperative banks[5] and 1,485 non-scheduled cooperative banks[6]), 33 state cooperative banks[7] and 365 district central cooperative banks.[8] Please reconfirm all the figures

Various public financial institutions have been established over the years. Some examples are the Industrial Financial Corporation of India (IFCI), Industrial Development Bank of India (IDBI), Industrial Credit and Investment Corporation of India (ICICI, has now been privatised), etc. These institutions provide finance to various sectors of the economy, where commercial banks do not lend.

Banking in India is fairly mature in terms of supply, product range and reach. In terms of quality of assets and capital adequacy, Indian banks are considered to have clean, strong and transparent balance sheets relative to other banks in comparable economies. RBI is an autonomous body which pushes independent policies directed by its Board of Governors.

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1 http://financialservices.gov.in/banking-divisions/public-sector-banks
2 https://rbidocs.rbi.org.in/rdocs/Content/pdfs/71207.pdf
3 https://rbi.org.in/commonman/english/scripts/banksinindia.aspx
4 https://rbi.org.in/commonman/english/scripts/banksinindia.aspx
5 https://rbidocs.rbi.org.in/rdocs/Content/pdfs/schedulecoop.pdf
6 https://rbidocs.rbi.org.in/rdocs/Content/pdfs/nonschedulecoop.pdf
7 https://rbi.org.in/Scripts/AboutUsDisplay.aspx?pg=StateCooperativeBanks.htm
8 https://rbidocs.rbi.org.in/rdocs/Content/pdfs/DCCB20141702.pdf

Further, the country has a well-established stock market, comprising 9[1] recognised stock exchanges with over 17,935 securities listed in 2020-21.[2] The BSE BSE Limited (BSE) as of date is the biggest bourse in number of listed companies and in terms of equity market capitalisation.[3] The National Stock Exchange of India Limited (NSE) is the largest stock exchange in India in terms of daily turnover and number of trades, for both equities and derivative trading. The average daily turnover at NSE in 2019-2020 increased to Rs. 36432 crore from Rs. 32052 crore in 2018-2019 and Rs. 61074 crore till August 2020[4]. The Indian capital markets are rapidly moving towards a market that is modern in terms of infrastructure as well as application of international best practices such as derivative trading with stock index futures.

¶2-060 Reforms in Infrastructure

Roads

Indian roads have grown rapidly. Ranging from the cross-country link of the national highways to the roads in the deepest interiors, India, by the year 2018 had a road network of more than 5.96 million kms[5] comprising National Highways, Expressways, State Highways, Major District Roads, Other District Roads and Village Roads. National highways that are the prime arterial routes, which spans about 1.32 lakhs (approx.) kms throughout the country as on 01.03.2019[6], catering to about 40% (forty percent) of the total road-transport traffic.[7] Recently, reforms have been initiated to improve and modernise roads.

The Government in the year 2015 launched "Bharatmala Pariyojana" as an umbrella program for the highways sector that focuses on optimising efficiency of freight and passenger movement across the country. The program contemplates construction of 24,800 KM in Phase 1, which is to be implemented over a period of five years, i.e., 2017-18 to 2021-22. According to government reports, this umbrella program will help in bridging critical infrastructure gaps through effective interventions like development of Economic Corridors, Inter Corridors and Feeder Routes, National Corridor Efficiency Improvement, Border and International connectivity roads, Coastal and Port connectivity roads and Green-field expressways. Under Bharatmala Pariyojana.[8], a total 40,870 KM of

1 https://www.sebi.gov.in/stock-exchanges.html
2 http://www.bseindia.com/markets/keystatics/Keystat_Companies.aspx?expandable=1
3 https://bseindia.com/static/about/Company_Overview.html
4 https://www1.nseindia.com/products/content/equities/equities/historical_equity_businessgrowth.htm
5 Economic Survey 2019-20
6 Economic Survey 2019-20
7 http://www.nhai.gov.in/about-nhdp.htm
8 https://morth.nic.in/sites/default/files/Ministry%20Annual%20Report_2019-20.pdf

road network has been constructed out of the targeted road network of 54,478 KM

Railways

Indian Railways, one of the largest rail networks in the world, is in the process of upgrading itself with the latest technology by introducing high-speed bullet trains and converting metre gauge lines in the country with broad gauge. Stainless steel coaches are being installed in premier carriers. Improved ventilation and illumination are part of the new scheme of things, along with the decision to install air brake systems on all coaches. Ambitious Dedicated Freight Corridors projects are being undertaken.

The Indian Railways' quadrilateral linking the four metropolitan cities of Delhi, Mumbai, Chennai and Howrah, commonly known as the Golden Quadrilateral; and its two diagonals (Delhi-Chennai and Mumbai-Howrah), adding up to a total route length of 10,122 km carries 58% (fifty eight percent)[1] of revenue earning freight traffic of Indian Railways. The existing trunk routes of Howrah-Delhi on the Eastern Corridor and Mumbai-Delhi on the Western Corridor are highly saturated, line capacity utilisation varying between 115% (one hundred fifteen percent) and 150% (one hundred fifty percent).[2] The surging surging power needs requiring heavy coal movement, booming infrastructure construction and growing international trade has led to the conception of the Dedicated Freight Corridors along the Eastern and Western Routes.

Dedicated Freight Corridor Corp. of India Ltd (DFCCIL), is already building the first two freight corridors—Eastern Freight Corridor from Ludhiana to Dankuni (1,856km) and Western Freight Corridor from Dadri to Jawaharlal Nehru Port (1,504km)—at a total cost of Rs. 81,000 crore (US$ 11.59 billion).[3] The Dedicated Freight Corridors will adopt world class and state-of-the-art technology. Significant improvement is proposed to be made in the existing carrying capacity by modifying basic design features. The permanent way will be constructed with significantly higher design features that will enable it to withstand heavier loads at higher speeds. Simultaneously, in order to optimise productive use of the right of way, dimensions of the rolling stock are proposed to be enlarged. Both these improvements will allow longer and heavier trains to ply on the Dedicated Freight Corridors.

It is pertinent to note that National High Speed Rail Corporation Limited is implementing the project of high speed train corridor between Ahmedabad and Mumbai the total length of which works out to be 508.17 kms. The proposed corridor lies in Western Railway zone and shall commence from Bandra Kurla Complex in Mumbai and terminate near Sabarmati Railway Station in Ahmedabad.[4]

1 https://dfccil.com/Home/DynemicPages?MenuId=3
2 https://dfccil.com/Home/DynemicPages?MenuId=3
3 https://www.ibef.org/industry/indian-railways.aspx
4 https://www.nhsrcl.in/en/about-us/about-nhsrcls

Ports

Ports are the main gateways for trade. Presently, in India, about 95% (ninety-five percent) of the trade by quantity and 70% (seventy percent) by value takes place through ports.[1] There are 12 major ports and about 205 minor and intermediate ports in India.[2] The major ports are managed by port trusts that are regulated by the Central Government. They come under the purview of the *Major Port Trusts Act, 1963*. The minor ports are regulated by the respective State Governments and many of these ports are private or captive ports. India is also among the few countries that offer fair and free competition to all shipping companies for obtaining cargo.

Inland Waterways

India has an extensive network of inland waterways in the form of rivers, canals, backwaters and streams. The total navigable length of important rivers as on date, is about 14,500 kms.[3] The Inland Waterways Authority of India (IWAI) is the statutory authority in charge of the waterways in India, which provides for the necessary infrastructure in these waterways, surveys the economic feasibility of new projects and also administers and regulates projects. The natural advantage of a vast coastline requires India to use sea transport for the bulk movement of cargo.

The Indian shipping industry, major ports, national highways and water transport are increasingly being thrown open to the private sector.

Indian Airways

India's booming economy has created a large middle-class population. Rapid economic growth has made air travel much more affordable. India's air transport network has attracted heavy investments in the past few years. In the recent years, more than half a dozen low-cost carriers have entered the Indian air landscape to meet the rapidly, increasing demand for air travel. In all, there are more than 20 international airports located within the country.

Electricity Sector

The electricity sector in India is predominantly controlled by the Government of India's Public Sector Undertakings (PSUs). Major PSUs are involved in the generation of electricity; however, transmission and distribution is managed by the State Electricity Boards (SEBs) and private companies. At present, 62.2% of the electricity consumed in India is generated by thermal power, 12.3% by hydro- electricity and 1.8% by nuclear power.[4] India's high economic development has created a surge in the demand for electricity. The figures under each heading need to be updated.

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1 https://www.ibef.org/industry/ports-india-shipping.aspx

2 https://www.ibef.org/industry/ports-india-shipping.aspx

3 http://www.iwai.nic.in

4 https://powermin.nic.in/en/content/power-sector-glance-all-india

Telecom Services

Telecom services have been recognised the world over as an important tool for the socio-economic development of a nation. Hence, telecom infrastructure is treated as a crucial factor to realise the socio-economic objectives in India. A large population, and rise in consumer income and spending owing to strong economic growth have contributed to making India the fastest-growing telecom market in the world. India is currently the world's second-largest telecommunications market with a subscriber base of 1189.28 million (of which mobile telephone connections are 1168.32 million and landline telephone connections are 20.96 million). The overall tele density in the country is 90.23%. While the rural tele density is currently 57.01%, the urban tele density stands at 160.87% at the end of July, 2019[1].

As on May 31, 2020[2] India has total of 1163.67 million subscribers. TRAI (Telecom Regulatory Authority of India) is in the process of formulating the New Telecom Policy which is presently being contemplated to be released this year.

Through the new Telecom Policy, Government of India will address many issued relating to regulatory & licensing frameworks, connectivity for all, quality of services, ease of doing business and introduction of New Technologies including 5G, etc.

¶2-070 Liberalisation of Foreign Investment and Foreign Trade Regulations

India presents vast potential for overseas investment and is actively encouraging the entrance of foreign players into its domestic market. There are various forms in which business can be conducted by a foreign company in India, such as:

Incorporated entity:

By incorporating a company under the *Companies Act, 2013*[3] through

- joint venture, or
- wholly owned subsidiary.

By incorporating a Limited Liability Partnership under the *Limited Liability Partnerships Act, 2008* through

- joint venture, or
- wholly owned LLP

1 https://dot.gov.in/sites/default/files/Telecom%20at%20a%20Glance2019.pdf download=1

2 https://www.trai.gov.in/sites/default/files/PR_No.62of2020.pdf

3 The *Companies Act, 1956* has now been replaced with the *Companies Act, 2013* and has come into effect from April 01, 2014

Unincorporated entity:

As an office of a foreign entity through

- liaison office/representative office,
- project office, and
- branch office.

FDI in India can be made through two routes, namely Automatic and Approval Routes.

¶2-080 International and Regional Trade Agreements

Free Trade Agreements

Free Trade Agreements (FTAs) are generally made between two countries. Many countries, including India, have either signed FTAs or are negotiating or contemplating new bilateral free-trade and investment agreements. These agreements lead to integration of Indian economy with the global free market. It is assumed that free trade and removal of regulations on investments will lead to economic growth, reducing poverty in the FTA signatory countries, increasing standards of living and generating employment opportunities. In simple terms, FTAs seek to remove restrictions on businesses.

India has concluded FTAs/Framework Agreements with a number of countries, including Thailand, Association of South-East Asian Nations (ASEAN) and GCC states (Charter of the Cooperation Council for the Arab States of the Gulf), Korea, Japan, Chile, Sri Lanka and Malaysia.

FTAs improve living standards, deepen economic linkages, promote economic growth and investment opportunities, minimise barriers and create a larger and more integrated market with greater opportunities.

FTAs strengthen the special bonds of friendship, economic relationship and cooperation that exist between the parties. They generate more business and investment growth opportunities for businesses based in India and in the economies of the FTA partners.

Bilateral Investment Promotion and Protection Agreement (Bilateral Investment Treaty)

The Bilateral Investment Promotion and Protection Agreement (BIPA) is a bilateral treaty, or an agreement, between two countries (or states) for reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country (or State). The purpose of these agreements is to create conditions that are favourable for fostering greater investments by the investors of one country in the territory of the other country. Such agreements are beneficial for both the countries because they stimulate their business initiatives and, thus, enhance their prosperity.

Many countries have entered into bilateral investment treaties or agreements that encourage capital flows into their own countries, but also provide safe business environment for their own investors abroad.

Generally, these bilateral agreements have, by and large, standard elements and provide a legal basis for enforcing the rights of the investors in the countries involved. They give assurance to the investors that their foreign investments will be guaranteed fair and equitable treatment, full and constant legal security and dispute resolution through international mechanisms.

The Indian Government undertook negotiations with a number of countries and entered into BIPAs with them. This was done with a view to providing more conducive and predictable investment climate to foreign investments in India as well as to protect Indian investments abroad. The Government as of date has signed BIPAs with about 89 countries.[1] In addition, agreements have also been finalised and/or being negotiated with a number of other countries.

¶2-090 Impact of Covid-19

In December 2019, a novel strain of COVID-19 was first reported in Wuhan, China. In March, 2020, the World Health Organization categorized it as a pandemic. COVID-19 outbreak caused an upheaval all around the world, resulting in frequent lockdowns, travel restrictions and closure of business activities all over the world including in India, however, the Indian government has gradually permitted re-opening of the economy in a phased manner. Multinational companies all over the world are now looking to diversify their supply chains away from China due to trade protectionist measures and rising risks because of such pandemics. A UBS report specially examining the factory relocation theme analysed that India's competitive advantage in terms of land and labour availability makes India a top destination for companies moving out of China.2 In a post-COVID-19 world, healthcare will emerge as a major focal point of attention for many nations across the world. India has the potential to do tremendously well in this area given its comparative advantages in pharma-based exports and in the area of medical tourism.

1 https://dea.gov.in/bipa and http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411

2 https://www.ubs.com/global/en/investment-bank/in-focus/2019/india-market-strategy.html

Chapter 3 Constitutional Framework

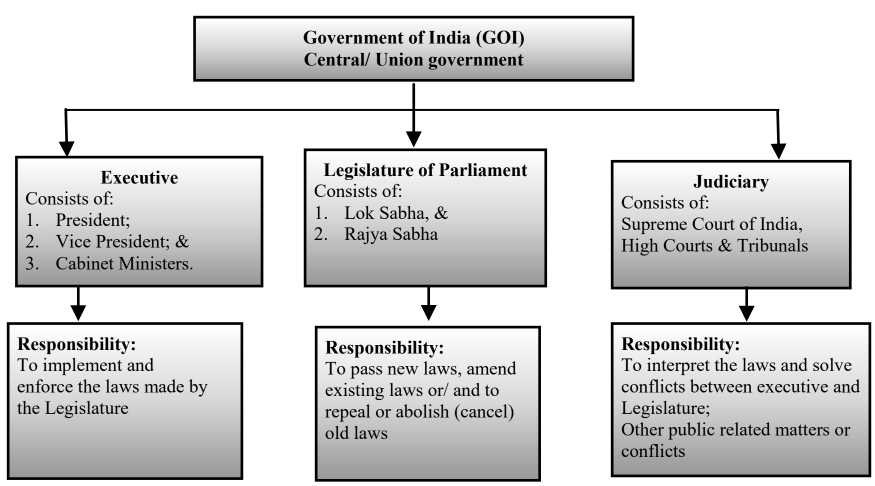
¶3-010 Governance Framework

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC, and to secure to all its citizens…"

The Republic of India is governed by the Constitution of India, which was adopted by the Constituent Assembly on November 26, 1949 and came into force on January 26, 1950. The Constitution of India is the supreme law of the country and is foundation of all other laws. The Constitution of India is the longest written constitution in the world with 449 articles, 12 schedules, 25 parts, 5 appendices and 101 amendments. The Constitution of India seeks to protect the fundamental, political and civil rights of the people. It also embodies the basic governance structure of the country.

The Constitution of India provides for a Parliamentary form of Government, which is federal in structure with certain unitary features.

Broadly, the governance structure in India can be depicted as follows:



Transparency, accountability and adherence to the rule of law depends on a systemic arrangement and coherency between the three arms of the state, viz, the Executive, the Legislature and the Judiciary. The Constitution of India provides for a system of governance based on the above-mentioned three arms within a federal framework with greater powers in the hands of the Union Government or Government of India or the Central Government (also referred to as the "Centre"), which governs the Union of India as a whole.

Legislature

In India, the Parliament is the supreme legislative body. As per Article 79 of the Constitution of India, the Parliament of the Union consists of the President and two Houses, which are known as the Council of States (Rajya Sabha) and the House of People (Lok Sabha). The President has the power to summon either House of the Parliament or to dissolve the Lok Sabha. Each House has to meet within 6 months of its previous sitting. A joint sitting of two Houses can be held in certain cases.

The cardinal functions of the Legislature include making of laws, overseeing of administration, passing of budget, ventilation of public grievances and discussing various subjects like development plans, international relations and national policies. The Parliament is also vested with powers to impeach the President, remove judges of the Supreme Court and High Courts, the Chief Election Commissioner, and the Comptroller and Auditor General in accordance with the procedure laid down in the Constitution of India. All legislations require the consent of both the Houses of Parliament. The Parliament is also vested with the power to initiate amendments in the Constitution of India.

Executive

The President serves as the Executive Head of the State and the Supreme Commander-in-Chief of the armed forces. Article 74(1) of the Constitution of India provides that there shall be a Council of Ministers, with the Prime Minister as its head to aid and advise the President.

The President appoints the Prime Minister, Cabinet Ministers, Governors of States and Union Territories, Judges of the Supreme Court and High Courts, Ambassadors and other diplomatic representatives. The President is also authorised to issue Ordinances with the force of the Act of Parliament, when Parliament is not in session.

The President must consult the Council of Ministers and the Prime Minister before taking any executive decision. It is important to note that the Council of Ministers (usually known as the "Cabinet" and constituted of the members of the ruling political party/alliance) and the Prime Minister (usually the leader of the political party/consensus candidate of the alliance; also heads the Cabinet) are members of Parliament and, therefore, by convention, in their hands rest the legislative and executive powers of the Centre.

The federal units, ie, the States, have their own set-up in terms of legislatures (normally referred to as the "State Legislature") and state administrative wings similar to that of the Centre. Here, the Governor is the head of the Executive, though the real power rests with the Chief Minister and his/her Council of Ministers. There are certain territories in India that are not States, but are known as Union Territories and these are governed directly by the Centre.

The Constitution of India prescribes the separation of legislative and administrative powers between the Union and the States. Areas such as, defence, railways, maritime, interstate trade, airways, banking, etc, are under the jurisdiction of the Centre (Union List) and areas such as public order, police, agriculture, etc, fall under the jurisdiction of the States (State list). There is a third category of list also which is termed as the Concurrent List. It covers areas such as criminal law and procedure, economic and social planning, trusts, bankruptcy, etc, over which both the Centre and the States have legislative and executive powers, though in case of conflict between the two, the Centre's position prevails. Additionally, the Constitution also provides for delegated legislation in certain scenarios, allowing the Executive to exercise certain legislative power in the form of ordinances, rules and regulations.

Judiciary

The Indian Judiciary as of today is a continuation of the British legal system established by the English in the mid-19th century. Before the arrival of the Europeans in India, it was governed by laws based on the Arthashastra, dating from 400BC, and the Manusmriti from 100AD. These were the influential treatises in India, texts that were considered authoritative legal guidance, however, till today the legacy of the British system is manifested from the fact that India falls into the genre of common law system. The procedure and substantive laws of the country, the structure and organisation of courts, etc, emanate from the common law system.

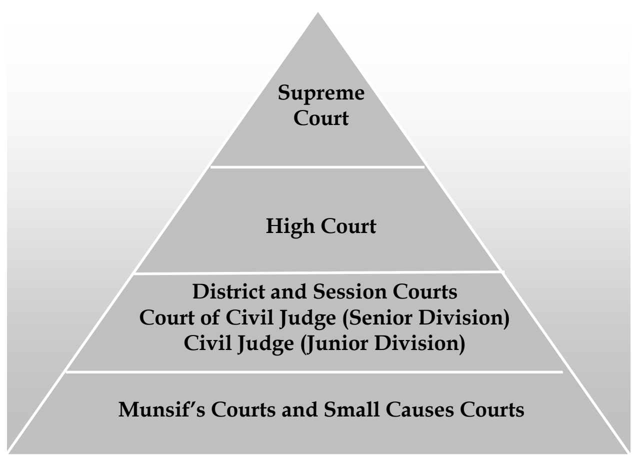
The Judiciary of India is an independent body and is separate from the Executive and Legislative organs of the Indian Government. The framework of Indian Judiciary has been laid down under the Constitution of India and the judicial system derives its powers from it. The Judiciary in India provides the people of the nation the necessary "auxiliary precaution" required to ensure that the Government functions in favour of the people, for their amelioration and for the betterment of society.

The judicial system of India is divided into four basic levels. At the apex level is the Supreme Court, situated in New Delhi, which, under the scheme of the Constitution of India is the guardian and interpreter of the Constitution of India, which is followed by High Courts at the State level, District Courts at the district level and Lok Adalats at the village and panchayat level. Apart from these judicial bodies, there are numerous quasi-judicial bodies who are involved in dispute resolutions. These quasi-judicial bodies are the Administrative Tribunals and play an important role in the adjudication of disputes and supplement the traditional judicial system. The Supreme Court and High Courts have the special constitutional responsibility of enforcing the "Fundamental Rights" of the citizen, as enshrined in Part III of the Constitution.

While the judicial process is largely considered fair, a large backlog of cases to be heard and frequent adjournments result in considerable delays before a case is decided. The present pendency scenario of Indian courts can be understood from the data derived from the website of the Supreme Court of India[1] and E-court services[2], pertaining to the pendency of cases in various Indian Courts. A glimpse at the data given hereinafter of the pending cases in the Indian courts is grave enough to pose caution. As of May 2018, 54,013 cases are pending with the Supreme Court of India, over 4.3 million cases are pending in the 24 High Courts and over 27 million civil and criminal cases are pending in the District Courts. However, matters of priority and public interest are often dealt with expeditiously and interim relief is usually allowed in cases, on merits.

¶3-020 Hierarchy of Courts for Civil Matters

Below is a schematic representation of the hierarchy of courts in India:



Supreme Court

The Supreme Court has original, appellate and advisory jurisdiction. Its exclusive original jurisdiction includes any dispute between the Centre and State(s) or between States as well as matters concerning enforcement of fundamental rights of individuals. The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court concerned in respect of any judgment, decree, or final order of a High Court, in both civil and

1 http://supremecourtofindia.nic.in/statistics
2 http://www.ecourts.gov.in/ecourts_home/index1.php

criminal cases, involving substantial questions of law as to the interpretation of the Constitution or any law. The appellate jurisdiction of the Supreme Court can also be invoked through the residuary power of Special Leave Petition, which is to be exercised only in cases when any substantial question of law is involved, or gross injustice has been done. Supreme Court decisions are binding on all Courts/Tribunals in the country and act as precedence for lower courts. Under Article 141 of the Constitution, all courts in India are bound to follow the decision of the Supreme Court as the rule of law. Further, Article 142 of the Constitution empowers the Supreme Court to pass any order as may be necessary for doing complete justice between the parties. The Supreme Court, has over the years, frequently relied upon Article 142 to meet the ends of justice, and introduced the concepts of absolute liability, prospective application of a particular judgment, etc.

High Courts

High Courts have jurisdiction over the States in which they are located. There are at present, 24 High Courts in India.[1] However, few of the High Courts have jurisdiction over more than one State or Union Territories: Bombay (Mumbai) High Court, Calcutta High Court (Kolkata), Guwahati High Court, High Court of Judicature at Hyderabad, Madras (Chennai) High Court and Punjab and Haryana High Courts. For instance, the Bombay High Court is located at Mumbai, the capital city of the State of Maharashtra. However, its jurisdiction covers the States of Maharashtra and Goa, and the Union Territories of Dadra and Nagar Haveli as well as Daman and Diu. Predominantly, High Courts can exercise only writ and appellate jurisdiction, but a few High Courts have original jurisdiction and can try suits. High Court decisions are binding on all the lower courts of the State over which it has jurisdiction.

District Courts

District Courts in India take care of judicial matters at the District level. Headed by a judge, these courts are administratively and judicially controlled by the High Courts of the respective States to which the District belongs. The District Courts are subordinate to their respective High Courts. All appeals in civil matters from the District Courts lie to the High Court of the State. There are many secondary courts also at this level, which work under the District Courts. There is a court of the Civil Judge as well as a court of the Chief Judicial Magistrate. While the former takes care of the civil cases, the latter looks into criminal cases and offences.

Lower Courts

In some States, there are some lower courts (below the District Courts) called Munsif's Courts and Small Causes Courts. These courts only have original

1 http://www.ecourts.gov.in/ecourts_home/static/highcourts.php

jurisdiction and can try suits up to a small amount. Thus, Presidency Small Causes Courts cannot entertain a suit in which the amount claimed exceeds Rs. 2,000.[1] However, in some States, civil courts have unlimited pecuniary jurisdiction. Judicial officers in these courts are appointed on the basis of their performance in competitive examinations held by the various States' Public Service Commissions.

Commercial Courts

Commercial Courts, Commercial Appellate Divisions as well as Commercial Divisions in High Courts were constituted under Commercial Courts Act, 2015 throughout India to specifically deal with matters pertaining to "commercial disputes" of a value more than Rs. 3,00,000, arising out of a wide range of transactions, including export/import, maritime, franchising, distribution & licensing, consultancy, joint venture, intellectual property, insurance, investment agreements etc. as specified in the Commercial Courts Act, 2015. The procedure followed by Commercial Courts is different and stricter in some aspects than the procedure as applicable to adjudication process of other civil disputes in general.

Tribunals

Special courts or Tribunals also exist for the sake of providing effective and speedy justice (especially in administrative matters) as well as for specialised expertise relating to specific kind of disputes. These Tribunals have been set up in India to look into various matters of grave concern. The Tribunals do not have to follow any uniform procedure as laid down under the Civil Procedure Code or the Indian Evidence Act but they have to follow the principles of Natural Justice. The Tribunals that need a special mention are as follows:

- Income Tax Appellate Tribunal
- Central Administrative Tribunal
- Intellectual Property Appellate Tribunal, Chennai
- Railways Claims Tribunal
- Appellate Tribunal for Electricity
- Debts Recovery Tribunal
- Central Excise and Service Tax Appellate Tribunal
- National Company Law Tribunal
- Telecom Disputes Settlement Appellate Tribunal
- Competition Appellate Tribunal

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1 Section 18 of *The Presidency Small Cause Courts Act, 1882* http://indiankanoon.org/doc/997218/ and http://www.manupatrafast.in/ba/fulldisp.aspx?iactid=1496

For instance, the Rent Controller decides rent cases, Family Courts try matrimonial and child custody cases, Consumer Tribunals try consumer issues, Industrial Tribunals and/or Courts decide labour disputes, Tax Tribunals try tax issues, etc. The National Company Law Tribunal (NCLT) has been established to streamline and effectuate the liquidation proceedings of companies, dispute resolution and compliance with certain provisions of the *Companies Act, 2013*[1].

¶3-030 Alternate Dispute Resolution (ADR)

An interesting feature of the Indian legal system is the existence of voluntary agencies called Lok Adalats (Peoples' Courts). These forums resolve disputes through methods like Conciliation and Negotiations and are governed by the *Legal Services Authorities Act, 1987*. Every award of Lok Adalats shall be deemed to be a decree of a civil court and shall be binding on the parties to the dispute. The ADR mechanism has also proven to be one of the most efficacious mechanisms to resolve commercial disputes of an international nature. In India, laws relating to resolution of disputes have been amended from time to time to facilitate speedy dispute resolution in sync with the changing times. The Judiciary has also encouraged out-of-court settlements to alleviate the increasing backlog of cases pending in the courts. To effectively implement the ADR mechanism, organisations like the Indian Council of Arbitration (ICA) and the International Centre for Alternate Dispute Resolution (ICADR) were established. The ICADR is an autonomous organisation, working under the aegis of the Ministry of Law & Justice, Government of India, with its headquarters at New Delhi, to promote and develop ADR facilities and techniques in India. ICA was established in 1965 and is the apex arbitral organisation at the national level. The main objective of the ICA is to promote amicable and quick settlement of industrial and trade disputes by arbitration. Moreover, the Arbitration Act, 1940 was also repealed and a new and effective arbitration system was introduced by the enactment of the Arbitration and Conciliation *Act, 1996*. This law is based on the United Nations Commission on International Trade Law (UNCITRAL) model of the International Commercial Arbitration Council.

In 2015, the *Arbitration and Conciliation Act, 1996* was amended to bring robust changes more particularly, structuring a model fee schedule of arbitrators, restricting intereference by Courts in arbitration cases, restricting time schedule for completion of arbitral proceedings, provision for "Fast Track" proceedings for completion of proceedings within 6 months. In 2019, few more amendments were introduced in the *Arbitration and Conciliation Act, 1996,* most significantly, introduction of Arbitration Council of India for framing policies for governing the grading of arbitrators, accreditation of arbitrators, making recommendations to the Government of India on various aspects.

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1 The *Companies Act, 1956* has now been replaced with the *Companies Act, 2013* which has come into effect from April 1, 2014

Likewise, to make the ADR mechanism more effective and in coherence with the demanding social scenario, the *Legal Services Authorities Act, 1987* has also been amended from time to time to endorse the use of ADR methods. Section 89 of the Code of Civil Procedure, as amended in 2002, has introduced conciliation, mediation and pre-trial settlement methodologies for effective resolution of disputes. Mediation, conciliation, negotiation, mini trial, Lok Adalats and Banking Ombudsman have already been accepted and recognised as effective alternative dispute-resolution methodologies.

A brief description of few widely used ADR procedures is as follows:

***1. Negotiation*:** A non-binding procedure in which discussions between the parties are initiated without the intervention of any third party, with the object of arriving at a negotiated settlement of the dispute.

***2. Conciliation*:** In this case, parties submit to the advice of a conciliator, who talks to the each of them separately and tries to resolve their disputes. Conciliation is a non-binding procedure in which the conciliator assists the parties to a dispute to arrive at a mutually satisfactory and agreed settlement of the dispute.

***3. Mediation*:** A non-binding procedure in which an impartial third party known as a mediator tries to facilitate the resolution process but he cannot impose the resolution, and the parties are free to decide according to their convenience and terms.

***4. Arbitration*:** It is a method of resolution of disputes outside the court, wherein the parties refer the dispute to one or more persons appointed as an arbitrator(s) who reviews the case and imposes a decision that is legally binding on both parties. Usually, the arbitration clauses are mentioned in commercial agreements wherein the parties agree to resort to an arbitration process in case of disputes that may arise in future regarding the contract terms and conditions.

Chapter 4 Establishing Presence in India

¶4-010 Entry Option for Foreign Investors

A foreign company planning to set up business operations in India has the following options:

As an Incorporated Entity

By incorporating a company under the *Companies Act, 2013* (Companies Act) through:

- Joint Ventures, or
- Wholly Owned Subsidiaries.

Foreign equity in such Indian companies can be up to 100% (one hundred percent), depending on the requirements of the investor, subject to any equity caps prescribed in respect of the area of activities under the Consolidated FDI policy as amended from time to time, issued by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India (Consolidated FDI Policy).

As an Unincorporated Entity

As a foreign company through:

- Liaison Office (LO)/Representative Office (RO)
- Project Office (PO)
- Branch Office (BO)

Such offices can undertake activities permitted under the *Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016* ("**Regulations**"), as amended from time to time, along with other specific rules, regulations and circulars notified in this context, consolidated in Master Circular on "Establishment of Liaison/Branch/Project Offices in India by Foreign Entities issued by the Reserve Bank of India ("**RBI**")".

Applications from foreign companies (a body corporate incorporated outside India, including a firm or other association of individuals) for establishing BO/LO/PO in India shall be considered by the AD Category-I bank **("AD Bank")** as per the guidelines given by RBI. If the principal business of the entity resident outside India falls under sectors where 100% (one hundred percent) Foreign Direct Investment (**FDI**) is allowed in terms of Foreign Exchange Management (Non-debt Instruments) Rules, 2019, as amended from time to time, and the entity seeks to open a BO/LO/PO, the AD Bank may consider such applications under the delegated powers.

The applications will have to be made by such entities in Form FNC and will be considered under either of the following 2 (two) routes:

(1) ***AD Bank***: In all cases, except where RBI approval is mandated.

(2) ***RBI Route***: Any application from a person resident outside for opening of a BO or a LO or a PO or any other place of business in India shall require prior approval of RBI in the following cases where:

(a) The applicant is a citizen of or is registered/incorporated in Pakistan;

(b) The applicant is a citizen of or is registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau and the application is for opening a LO, BO or PO in Jammu and Kashmir, North East region and Andaman and Nicobar Islands;

(c) The principal business of the applicant falls in the 4 (four) sectors namely Defence, Telecom, Private Security and Information and Broadcasting;

Provided that prior approval of the RBI shall not be required in case where Government approval or license/permission by the concerned Ministry/ Regulator has already been granted. Further, in the case of proposal for opening a PO relating to defence sector, no separate reference or approval of Government of India shall be required, if the said non-resident applicant has been awarded a contract by/entered into an agreement with the Ministry of Defence or Service Headquarters or Defence Public Sector Undertakings. The term "permission" does not include general permission, if any, available under FDI in the automatic route, in respect of the above 4 (four) sectors.

(d) The applicant is a Non-Government Organisation, Non-Profit Organisation, Body/Agency/Department of a foreign government. However, if such entity is engaged, partly or wholly, in any of the activities covered under Foreign Contribution (Regulation) Act, 2010

(FCRA), they shall obtain a certificate of registration under the said Act and shall not seek permission under the Regulation.

Such applications shall be forwarded to the RBI, Foreign Exchange Department, Central Office Cell, New Delhi by the AD Bank and be considered in consultation with the Government of India. The following additional criteria are also considered by the RBI while sanctioning LOs/BOs of foreign entities:

(1) Track Record

(i) ***For BO***: A profit-making track record during the immediately-preceding 5 (five) financial years in the home country.

(ii) ***For LO:*** A profit-making track record during the immediately-preceding 3 (three) financial years in the home country.

(2) Net Worth (total of paid-up capital and free reserves, *less* intangible assets, as per the latest Audited Balance Sheet or Account Statement, certified by a Certified Public Accountant or any Registered Accounts Practitioner by whatever name).

(i) For BO: not less than US$100,000 or its equivalent.

(ii) For LO: not less than US$50,000 or its equivalent.

The application in Form FNC for establishing BOs/LOs in India should be forwarded by the foreign entity to a designated AD Bank along with the prescribed documents including:

1. Certificate of Incorporation/Registration or Memorandum and Articles of Association attested by Indian Embassy/Notary Public in the Country of Registration.
2. Latest Audited Balance Sheet of the applicant entity for the last 3 (three)/ 5 (five) years in case of BO/LO respectively.
3. Bankers' Report from the applicant's banker in the host country/ country of registration showing the number of years the applicant has had banking relations with that bank.
4. Power of Attorney in favour of signatory of Form FNC in case the Head of the overseas entity is not signing the Form FNC.

The AD Bank may grant approval as per the directions and/or guidelines issued by RBI in this regard.

Applicants who do not satisfy the eligibility criteria and are subsidiaries of other companies can submit a Letter of Comfort from their parent company, subject to the condition that the parent company satisfies the eligibility criteria as prescribed above. The designated AD Bank should exercise due diligence in respect of the applicant's background, antecedents of the promoter, nature and location of activity, sources of funds, etc., and also ensure compliance with the

Know Your Customer (KYC) norms before forwarding the application together with their comments/recommendations to the RBI.

Prior to issuance of the approval letter to the applicant, the AD Bank shall forward a copy of the Form FNC along with the details of the approval proposed to be granted by it to the RBI, for allotment of Unique Identification Number (UIN) to each BO/LO. After receipt of the UIN from the RBI, the AD Bank shall issue the approval letter to the non-resident entity for establishing BO/LO in India.

The BO/LO/PO for which permission is granted shall open within 6 (six) months from the date of grant of approval letter failing which the approval shall lapse. In cases where the person resident outside India is not able to open the office within the stipulated time frame due to reasons beyond their control, the AD Bank may consider granting extension of time for setting up the office by a further period of 6 (six) months. Any further extension of time shall require the prior approval of the RBI in this regard.

After the AD Bank/RBI's approval, the BO/LOs are also required to obtain a Certificate of Establishment of Place of Business in India from the Registrar of Companies (ROC).

The BOs/LOs shall also obtain Permanent Account Number (PAN) from the Income Tax Authorities on setting up the offices in India.

Liaison Office

An LO is suitable for a foreign company, which wishes to set up a representative office as a first step to explore and understand the business and investment climate in the country. The LO generally acts as a channel of communication between the overseas parent company and its present/ prospective customers in India. The LO can also be set up to establish business contacts or gather market intelligence to promote the products or services of the overseas parent company or to promote export/import from/to India. Permission to set up LOs is initially granted for a period of 3 (three) years which may be extended from time to time by an AD Bank. Also, LOs have to submit Annual Activity Certificates from chartered accountants to designated AD Bank. The LO cannot undertake any business activity in India nor earn any income in India. Expenses of such offices are met entirely through inward remittances of foreign exchange from the head office outside India.

Project Office

Foreign companies planning to execute specific projects in India can set up temporary Project/Site Offices in India. RBI has now granted general permission to foreign entities to establish PO provided:

(i) They have secured a contract from an Indian company to execute a project in India and the project is funded directly by inward remittance from abroad;

(ii) The project is funded by a bilateral or multilateral International Financing Agency;

(iii) The project has been cleared by an appropriate authority; or

(iv) A company or entity in India awarding the contract has been granted term loan by a public financial institution or a bank in India for the project.

A person from any country other than Pakistan who has been awarded a contract for a project by a Government authority/Public Sector Undertaking may open a bank account with an AD Bank without any prior approval from the RBI.

The validity of the PO is for the tenure of the project.

In all other cases, an approval from RBI has to be taken for setting up PO in India. Such offices cannot undertake or carry on any activity other than the activity relating and incidental to execution of the project. POs may remit the surplus of the project outside India, after meeting the tax liabilities, on its completion. However, AD Bank can permit intermittent remittances by PO pending winding up/completion of the project provided they are satisfied with the bona fides of the transaction, subject to the submission of the following:

(a) Certified copy of the final audited project accounts.

(b) Statutory auditors' certificate showing the manner of arriving at the remittable surplus and confirming that sufficient provisions have been made to meet the liabilities in India including Income Tax, etc.

(c) An undertaking from the PO that the remittance will not, in any way, affect the completion of the project in India and that any shortfall of funds for meeting any liability in India will be met by inward remittance from abroad.

Branch Office

Companies incorporated outside India and engaged in manufacturing or trading activities are allowed to set up BOs with specific approval of the RBI. Normally, the BO should be engaged in the activity in which the parent company is engaged.

The AD Bank/RBI does not permit a BO to undertake any manufacturing or processing activities in India, directly or indirectly. The range of activities to be undertaken by a BO is also very restricted and permission has to be obtained from the AD Bank/RBI, each time any new activity is to be undertaken. The BO will not expand its activities or undertake any new trading, commercial or industrial activity other than that expressly approved by the AD Bank/RBI. BO is permitted to represent the parent/group companies and undertake the following activities in India:

(i) Export/Import of goods.

(ii) Rendering professional or consultancy services.

(iii) Carrying out research work in which the parent company is engaged.

(iv) Promoting technical or financial collaborations between Indian companies and parent or overseas group company.

(v) Representing the parent company in India and acting as a buying/selling agent in India.

(vi) Rendering services in Information Technology and development of software in India.

(vii) Rendering technical support to the products supplied by parent/group companies.

(viii) Representing a foreign airline/shipping company.

Note: *Normally, the BO should be engaged in the activity in which the parent company is engaged. Retail trading activities of any nature is not allowed for a BO in India. A BO is not allowed to carry out manufacturing (except in Special Economic Zones (SEZ)) or processing activities in India, directly or indirectly. A BO is allowed to be to set up in SEZ to carry out manufacturing or processing activities in India without specific approval of RBI subject to prescribed conditions.*

Profits earned by the BOs are freely remittable from India, subject to payment of applicable taxes. BOs have to submit Annual Activity Certificates from chartered accountants to designated AD Bank. A BO is not a separate legal entity unlike a company and any liability of the BO would be the liability of the foreign entity. BOs may remit their profits, net of applicable Indian taxes, outside India, subject to production of prescribed documents to the satisfaction of the AD Bank through whom the remittance is affected.

Registration with Police authorities

Applicants from Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong, Macau or Pakistan desirous of opening BO/LO/PO in India shall have to register with the State Police authorities. Copy of approval letter for "persons" from these countries shall be marked by the AD Bank to the Ministry of Home Affairs, Internal Security Division-I, Government of India, New Delhi for necessary action and record.

Application for undertaking additional Activities or Additional BOs/LOs

Requests for establishing additional BOs/LOs may be submitted to the AD Bank in a fresh FNC form. However, the documents mentioned in form FNC need not be resubmitted, if there are no changes to the documents already submitted earlier.

Requests for undertaking activities in addition to what has been permitted initially by RBI/AD Bank may be submitted by the applicant to the RBI through the designated AD Bank justifying the need.

In the event of winding up of business and for remittance of winding up proceeds, the BO/LO/PO shall approach an AD Bank with the following documents:

(i) Copy of AD Bank/RBI's permission/approval for establishing the BO/LO/PO.

(ii) Auditor's certificate:

  1. Indicating the manner in which the remittable amount has been arrived and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets;

  2. Confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc, of the BO/LO/PO have been either fully met or adequately provided for; and

  3. Confirming that no income accruing from sources outside India (including proceeds of exports) has remained un-repatriated to India.

(iii) No objection or tax-clearance certificate from Income tax authority for the remittance/s.

(iv) Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending and there is no legal impediment to the remittance.

(v) A report from the ROC regarding compliance with the provisions of the Companies Act, in case of winding up of the BO/LO in India.

(vi) Designated AD Bank has to ensure that the BO/LO/PO had filed the respective AACs.

(vii) Any other document/s, specified by the AD Bank/RBI while granting approval.

Designated AD Bank may allow remittance of winding up proceeds in respect of offices of banks and insurance companies, after obtaining copies of permission of closure from the sectoral regulators along with the documents mentioned above.

¶4-020 Incorporation of Company

Incorporation of a company in India is governed by the Companies Act. For registration and incorporation, an application has to be filed with the ROC. Once a company has been duly registered and incorporated as an Indian company, it is subject to Indian laws and regulations as applicable to other domestic Indian companies.

Private Company

A private company can be formed with minimum 2 (two) shareholders and with a minimum paid-up capital, as may be prescribed, and by its Memorandum and Articles of Association. Further, a private company:

1. Restricts the rights to transfer its shares, if any;
2. Limits the number of its members to 200 (two hundred), not including:
    (a) Persons who are in the employment of the company; and
    (b) Persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be a members after the employment had ceased; and
3. Prohibits any invitation to the public to subscribe for any securities, of the company; and
4. Prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

Formation of a Private Limited Company

A private company can be formed either by:

1. Incorporation of a new company for doing a new business, or
2. Conversion of the existing business of partnership firm, limited liability partnership or society into a company.

Public Company

A public company can be formed with minimum 7 (seven) shareholders and with a minimum paid-up capital, as may be prescribed.

Memorandum of Association

An important step in the formation of a company is to prepare a document called Memorandum of Association (MOA). It is the constitution of the company and it contains the fundamental conditions on which the company is incorporated. The MOA contains the name, the State in which the registered office is to be situated, main objects of the company to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of the main objects, liability of the members and the authorised share capital of the company. The main purpose of the memorandum is to state the scope of activities and powers of the company.

Articles of Association

The Articles of Association (AOA) of a company contain rules, regulation and by-laws for the general management of the company.

The AOA are subordinate to the MOA. Therefore, the AOA should not contain any regulation, which is contrary to the provisions of the MOA or the Companies Act. The AOA are binding on the members in relation to the company as well as on the company in its relation to members.

Procedure for Incorporation of Company in India

A. Preliminary Steps

- Obtain Digital Signature Certificate
  - The proposed directors of the company (to be incorporated) have to apply for Digital Signature Certificate (DSC) for online signing of e-Forms.

B. Incorporation-related Activities

Step I: Approval of Name

The name of a corporation is the symbol of its personal existence. Any suitable name may be selected for registration, subject to the following guidelines:

- Apply to the ROC by using the simplified proforma for incorporating company electronically plus (**SPICe+**) facility provided by the Ministry of Corporate Affairs (MCA).
- The names should include, as far as possible, activity as per the main objects of the proposed company.
- The names should not too closely resemble with the name of any other registered company.
- The official guidelines issued by the Central Government should be followed while selecting the names. Besides, the names so selected should not violate the provisions of the *Emblems and Names (Prevention of Improper Use) Act, 1950*.
- The validity of the name approval is for 20 (twenty) days within which the company should file the MOA and the AOA (Step II).

Step II: Memorandum and Articles of Association (MOA and AOA)

- Drafting of MOA and AOA - Charter documents.

Step III: Filing of additional e-Forms

The company is required to file the following e-forms on the MCA's online portal for filing of forms in order to incorporate a company:

In order to simplify the incorporation process, the MCA has recently introduced SPICe**+** webform INC-32 for incorporation of a company. In addition to company incorporation, the SPICe+ webform INC-32 also consolidates the applications to be filed for obtaining Director Identification Number (**DIN**), permanent account number (**PAN**) and tax deducted at source (**TDS**). Additionally, the MCA has introduced webform AGILE-PRO which consolidates applications for obtaining Employees' Provident Fund Organisation (**EPFO**) registration, Employees' State Insurance Corporation (**ESIC**) registration, Profession Tax registration and Goods and Service Tax Identification Number (**GSTIN**) and opening of bank account for the proposed company. Along with SPICe+ webform INC-32 and webform AGILE-PRO, an applicant is also required to file webforms INC-33 and INC-34 to file MOA and AOA, respectively, of the proposed company.

C. Certificate of Incorporation

- The ROC will give the certificate of incorporation in form INC-11 after the above documents duly stamped and signed are presented along with the requisite registration fee, which is scaled according to the authorised share capital of the company, as stated in the MOA.
- Certificate of incorporation is the birth certificate of the company and is proof of its existence.

D. Issue of Share Capital

After obtaining registration, the company will require funds to carry on its business. The company will at first issue shares to the subscribers to its MOA and then to other members of the company. The issued capital must not exceed the authorised share capital of the company. In case of a private company, the capital is to be raised by way of private arrangement, whereas a public company can raise funds from the public or by way of private arrangement.

¶4-030 Limited Liability Partnerships in India

Introduction

The *Limited Liability Partnership ("**LLP**") Act, 2008* ("LLP Act") has been enacted by the Government to facilitate formation of LLPs in India. The LLP Act came into force with effect from March 31, 2009 and the *LLP Rules, 2009* came into force with effect from April 01, 2009.

The LLP is a separate legal entity, liable to the full extent of its assets, with the liability of the partners being limited to their agreed contribution in the LLP which may be of tangible or intangible nature or both tangible and intangible in nature. In a LLP, no partner would be liable on account of the independent or unauthorised actions of other partners or their misconduct. The liabilities of the LLP and partners who are found to have acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the LLP.

A LLP shall have at least 2 (two) partners and shall also have at least 2 (two) individuals as designated partners, of whom at least 1 (one) shall be resident in India, that is, a LLP can be formed even without Indian citizens. All that the LLP Act requires is that at least 1 (one) designated partner must be resident in India, meaning a person who has stayed in India for a minimum period of 182 (one hundred and eighty two) days during the immediately preceding 1 (one) year.

A LLP has to maintain annual accounts reflecting true and fair view of its state of affairs. A statement of accounts and solvency in Form 8 shall be filed by every LLP with the ROC every year within a period of 30 (thirty) days from the end of 6 (six) months of the financial year to which the statement of account and solvency relates. The accounts of LLPs shall also be audited, subject to any class of LLP being exempted from this requirement by the Central Government. An LLP has to file an annual return in Form 11 with the ROC within 60 (sixty) days of closure of its financial year

The death or insolvency of the partners does not affect the continued existence of the LLP. Any change in the partners does not affect the existence, rights or liabilities of the LLP.

Extent of Liability of Partners of LLP

By far, the most important change that the LLP Act seeks to bring about is the change in the extent of liability of the partners of a LLP.

Under the scheme of the LLP Act, for the purposes of business of the LLP, the agency relationship exists between the LLP and its partners, but this relationship does not travel to other partners, so that every partner of LLP is, for the purposes of its business, an agent of the LLP but not of the other partners.

An obligation of the LLP, whether contractual or otherwise, is solely the obligation of the LLP, and for such an obligation, a partner, other than the wrongdoing partner(s), cannot be made personally liable. Such an obligation would have to be met out of the property of the LLP alone. This agency relationship is, however, subject to the authority of the partner to act for the LLP in doing a particular act such that where there is no such authority, the LLP is not bound by the act of the partner if the person with whom the partner is dealing knows that the partner has no authority or does not believe the person to be a partner of the LLP.

The LLP Act is, however, not in any way intended to operate as a restriction or limitation upon the extent of liability of the partners doing the wrongful act. In other words, the partners doing a wrongful act would, under the normal provisions of civil law, be personally liable. Since the agency relationship does not traverse so as to bind the other partners, there is no "joint and several" liability.

Winding up of an LLP

The grounds for "winding up" are analogous to the winding up of a company and may be either voluntary or by an order of the National Company Law Tribunal (the Tribunal). Besides the obvious grounds of financial insolvency, decision of the LLP to be wound up, continuance for more than 6 (six) months with less than 2 (two) partners, acting against the sovereignty, integrity or security of India or public order, failure to file statement of accounts and solvency or annual returns for any 5 (five) consecutive financial years, the power to wind up an LLP, on the ground that "it is just and equitable" to do so, is vested with the Tribunal.

Conversion into LLP

A significant feature of the LLP Act is that it permits conversion of existing (a) partnership firm, (b) private limited company, and (c) unlisted public company into LLP. The procedure for such conversion is provided for in the Second, Third and Fourth Schedules, respectively, to the LLP Act. "Conversion," for the purposes of the LLP Act, means the transfer of the property, assets, interests, rights, privileges, liabilities, obligations and the undertaking of a firm or an eligible company to LLP. For any conversion to take place, the LLP must be, at that time, the mirror image of the firm or the company sought to be converted. In other words, all the partners (of the firm) or shareholders (of the eligible company), as the case may be, should at the time of conversion, become partners of the LLP. Upon conversion, all the assets and liabilities of the predecessor firm or company would stand transferred to and vested in the LLP. Such conversion shall have the effect of dissolution of the predecessor firm or company, as the case may be.

An LLP, thus, offers an attractive alternative to the existing partnership firms and joint-venture companies that are operating in India since it assures limited liability and yet provides organisational flexibility, less onerous compliances and limited disclosure requirements.

¶4-040 Setting up a Legal Structure for a Non-profit Entity in India

A legal entity proposed to be established in India by an overseas entity may take any 1 (one) of the following forms:

A. A company licensed under Section 8 of the Companies Act;

B. A society registered under the *Societies Registration Act, 1860*;

C. A registered trust.

The aforesaid forms/options have been explained in the succeeding paragraphs:

A. Company licensed under Section 8 of the Companies Act

Section 8 of the Companies Act provides that any association which is engaged in promoting commerce, art, science, religion, charity or any other useful object and which intends to apply its profits (if any) or other income in promoting its objects and prohibits the payment of any dividend to its members may be granted a licence by the Central Government directing that such an association may be registered as a company with limited liability, without the addition to its name of the word "Limited" or the words "Private Limited" (Section 8 Company).

Such companies are eligible for exemptions from Indian Income Tax and from certain regulatory provisions of the Companies Act. Further, all the advantages of incorporation are enjoyed by such companies. The membership rights under Section 8 Company can be transferred and such companies are not affected by changes in membership.

Procedure for Incorporation of Section 8 Company

The procedure for incorporation of Section 8 Company is briefly described as under:

- Application should be made to the ROC online using **SPICe+** facility provided by the MCA for name availability.
- Upon approval of name availability, an application for obtaining licence and incorporation of a Section 8 Company is required to be submitted to the ROC in webform **SPICe+** .
- The aforesaid application is to be accompanied with certain documents such as MOA in Form INC-13, AOA, declaration by an Advocate, Chartered Accountant, Cost Accountant or a Company Secretary in practice that the draft MOA and AOA have been drawn up in conformity with the Companies Act and rules framed thereunder, statement showing details of assets, estimate of future income, etc., in Form INC-14, a declaration by each person making the application in Form INC-15, estimated future annual income and expenditure, for next 3 (three) years specifying the source of income and objects of expenditure; and statement of the grounds on which application is made.
- Once the ROC is satisfied that all the requirements of the Companies Act and regulations made thereunder have been duly complied, the ROC will grant licence and incorporate the Section 8 Company.

A company under Section 8 of the Companies Act is almost the same as a domestic Indian company incorporated under the Companies Act. The compliances are also, more or less, similar to any other company such as filing of a periodic return, holding of board and general meetings, etc.

Procedure for conversion of existing Company into Section 8 Company

- An existing company can also apply for registration under Section 8 of the Companies Act. For this purpose, following additional documents are required to be submitted to ROC:
  (a) Audited financial statements, the board's reports, annual returns and the audit reports for each of the 2 (two) financial years immediately preceding the date of the application or, where the company has functioned only for 1 (one) financial year, for such year;
  (b) Statement of assets and liabilities as on the date of application or within 30 (thirty) days preceding the date; and
  (c) Certified true copy of board meeting/general meeting resolutions passed for conversion.
- Within a week of submission of an application, a notice of intention to form a company is to be given in an English newspaper and a local daily to invite objections from the public and a copy of the notice, as published, shall be sent forthwith to the ROC.

B. Society registered under Societies Registration Act, 1860 as modified in the State in which the Society is proposed to be registered

Any 7 (seven) or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as specified in the Section 20 of *Societies Registration Act, 1860*, may, by subscribing their names to an MOA, and filing the same with the Registrar of Societies, form themselves into a society under the said Act.

The registration of a society under the *Societies Registration Act, 1860*, provides legal recognition to the society which is essential for the opening of bank accounts, filing of legal suits, obtaining income tax approvals, lawful vesting of properties, etc, in the name of the society.

Characteristics of a Society

- It is an artificial legal person created to achieve the objects for which it is formed.
- It has a separate legal entity distinct from its members. It can sue and may also be sued in its own name. No member may, either individually or jointly, claim any ownership rights in the assets of the society during its existence. Upon dissolution, the surplus assets of the society are given to some other society with similar objects.

- A society has perpetual succession and is not affected in a legal sense by changes in membership or employees.
- It also has the advantage of limited liability which means that members of the society are not personally liable to settle society's dues, except in specific circumstances.

Procedure for Incorporation of Society

- In India, societies are governed by a central law as well as State legislations.
- Minimum 7 (seven) persons are required for the purpose of registration of the society.
- The following are some relevant documents to be filed with the Registrar of Societies:
  - (i) MOA, containing the name, object and registered office address of the society and the names, addresses and occupations of the members.
  - (ii) Rules and regulations of the society.
  - (iii) Identity Proof of all members of the society.
  - (iv) No Objection Certificate from the owner of the premises where the registered office is to be situated, stating that he/she has no objection in case society operates from that premises.
  - (v) Consent letter from all the members and affidavit and declaration in the prescribed format.
  - (vi) Payment of applicable fees to the Registrar of Societies.

C. Trust

A trust is created by annexing an obligation to the ownership of property. This obligation, when accepted by the trustee(s), results in the creation of a trust. The trust has primarily 3(three) parties, author/settler, trustees, and beneficiaries. The person who reposes or declares confidence is called the "author of the trust". The author of the trust is also known as the "settler". The person who accepts the confidence is called the "trustee". The subject matter of the trust is called "trust property" or "trust money". The person for whose benefit the confidence is accepted is called the "beneficiary". The instrument, if any, by which the trust is declared is called the "instrument of trust". After creation of the trust, various registrations and exemptions under the Income Tax Act may be sought.

Procedure for registration of a trust is easy as it can be created only by executing an Instrument of Trust (Trust Deed) and getting the same registered.

The registration of Trust Deed normally takes 1 (one) day. There are very few procedural regulations applicable to the trusts.

Characteristics of a Trust

- The obligation (created for forming the trust) must relate exclusively to property, the ownership of which vests with the trustees.
- The obligation must arise out of confidence that is reposed in the trustee(s). Such confidence, in turn, must be accepted for the benefit of the beneficiaries.
- A trust must be created for a lawful purpose.

Trust is, however, subject to certain disabilities such as:

- Inability to modify objects/activities in the event where the original beneficiaries are not consenting.
- Possibility of mismanagement due to non-democratic style of governance.
- No separate existence of its own, that is, it is not an independent legal entity.

During the process of registration of a trust, the Settler's physical presence before the Sub-registrar is mandatory. The Settler's presence can be dispensed with by executing a power of attorney in favour of an authorised person. The said authorised person shall have to be present before the Sub-registrar at the time of registration.

The stamp duty is payable on the amount settled by the settler of trust at the rate prevalent in the State where the trust is going to be registered.

Foreign Funding and Applicability of Foreign Contribution Regulation Act, 2010 (FCRA)

Non-profit organisations whether in the form of a Section 8 Company, a Society or a Trust may draw its funds from within India or from outside India.

The receipt of international funding from a foreign source by any of the aforesaid entities is regulated by the provisions of the *Foreign Contribution Regulation Act, 2010* (FCRA). FCRA is an Act which regulates the acceptance and utilisation of foreign contribution with a view to ensuring that parliamentary institutions, political associations and academic and other voluntary organisations as well as individuals working in the important areas of national life may function in the manner consistent with the values of the Sovereign Democratic Republic.

A person as defined under Section 2(1)(m) of the FCRA can receive foreign contribution (excluding person mentioned in Section 3 of the FCRA). A "person" as defined under Section 2(1)(m) of the FCRA includes an individual, a Hindu undivided family, an association, a company registered under Section 25 of the *Companies Act, 1956* (that is, Section 8 of the Companies Act). The terms "association" and "foreign contribution" have also been defined under Sections 2(1)(a) and 2(1)(h), respectively, of FCRA. Under Section 2(1)(a) of the FCRA, "association" means an association of individuals, whether incorporated or not, having an office in India, and includes a society, whether registered under the *Societies Registration Act, 1860*, or not, any other organization by whatever name called. A company or a society, or a trust can receive foreign contribution under the provisions of the FCRA. Further, any donation, delivery or transfer of any currency, by any foreign source would be regarded as foreign contribution. Section 11 of FCRA deals with certain requirements relating to persons receiving foreign contribution.

Under FCRA, a foreign company or an Indian company in which more than 50% (fifty percent) of the shareholding is with a foreign entity, then it would be construed as a "foreign source". However, after the amendment introduced to the FCRA by the *Finance Act, 2016*, an Indian company which is complying with the sectoral cap limits set by Foreign Exchange Management Act, or rules and regulations made thereunder, then irrespective of foreign shareholding present in the company, it will not be construed as a "foreign source" and such donations will not be considered as donation from foreign entities.

Section 11 of the FCRA provides that any person having definite cultural, economic, educational, religious or social programmes shall not receive foreign contribution unless such person is registered with the Central Government or seeks prior approval of the Central Government in accordance with the rules made in this behalf under FCRA. Further, such foreign contribution should be received only through a single designated bank account, specifically opened for the said purpose, and the person is required to specify the same in its application for registration/prior permission, as the case may be. It also requires that once the registration is granted, the bank or authorised persons should give an intimation regarding receipt of foreign contribution to the Central Government within such time and in such form and manner, as may be prescribed by the rules made under FCRA.

In all the aforesaid forms, payment of dividend/distribution of income to the members by an organisation in any form is prohibited. Any surplus arising out of the venture is to be reinvested for promotion of its objects, within the country.

Tabular Comparison of Main Features of Section-8 Company, Society and Trust

S. No.	Section-8 Company	Society	Trust
1.	**Objects**: Non-profit activities can	Non-profit activities can	Non-profit activities

S. No.	Section-8 Company	Society	Trust
	be the same in case of either of the entities.	be the same in case of either of the entities.	can be the same in case of either of the entities.
2.	**Formation**: The forms/documents for incorporation are required to be filed with the ROC.	Documents for registration to be filed with the Registrar of Societies.	Trust is established by executing a trust deed and registering it with the Sub-Registrar.
3.	**Minimum number of members:** 2 (two) persons in case of private company and 7 (seven) persons in case of public company are required for incorporation.	Minimum 7 (seven) persons are required to form a society.	Minimum 2 (two) persons required to form a trust.
4.	**Management**: Management vests with the Board of Directors.	Management vests with the Governing Body called by whatever name.	Management vests with the Board of Trustees.
5.	**Meetings**: Board meetings to be held as per Companies Act. At least 1 (one) board meeting to be held in every 6 (six) calendar months. Annual General Meeting (AGM) to be held once in a year.	Annual meeting to be held once in a year. Other than the Annual Meeting, society can hold meetings as prescribed in the Rules/By-laws of the Society.	The Board of Trustees can hold meetings as prescribed in the Trust Deed.
6.	**Statutory Filings**: Annual Return to be filed with ROC. Balance Sheet to be filed with ROC within 30 (thirty) days of placing the accounts at AGM. Change of Directors to be intimated to ROC in the prescribed form.	List of Governing Body to be filed with the Registrar of Societies annually.	No filing required to be done.

S. No.	Section-8 Company	Society	Trust
7.	**Liability of Directors/ Members/Trustees:** Directors' liability is limited. Directors' position is fiduciary vis-à-vis the company, and they must exercise their powers for the benefit of the Company. Different sections under the Companies Act, specify the penalty to be paid in case of default.	Limited liability of members of the society, that is, members are not personally liable to settle society's dues except in certain circumstances.	Trustees are liable for any breach of trust.
8.	**Legal Status**: Separate legal entity, distinct from its members.	Separate legal entity, distinct from its members.	No separate existence.
9.	**Alteration of objects:** Complex procedure as prescribed under the Companies Act.	Simple procedure as given under the Societies Registration Act, 1860.	Unable to modify if the beneficiary is unwilling.
10.	**Dissolution**: Companies can be dissolved as per the provisions of the Companies Act. The procedure for dissolution is complex.	Society can be dissolved as per the provisions of the Societies Registration Act.	Trust can be dissolved as per the provisions of the Trust Deed.

Chapter 5 Foreign Investment in India

¶5-010 Policy on Foreign Direct Investment

Any investment made by a person resident outside India on a repatriable basis in the equity instruments of an Indian company or to the capital of a Limited Liability Partnership ("LLP") is considered as foreign investment. When such investment is made in an unlisted Indian company or in 10 (ten) percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company, then it is considered as Foreign Direct Investment ("FDI").

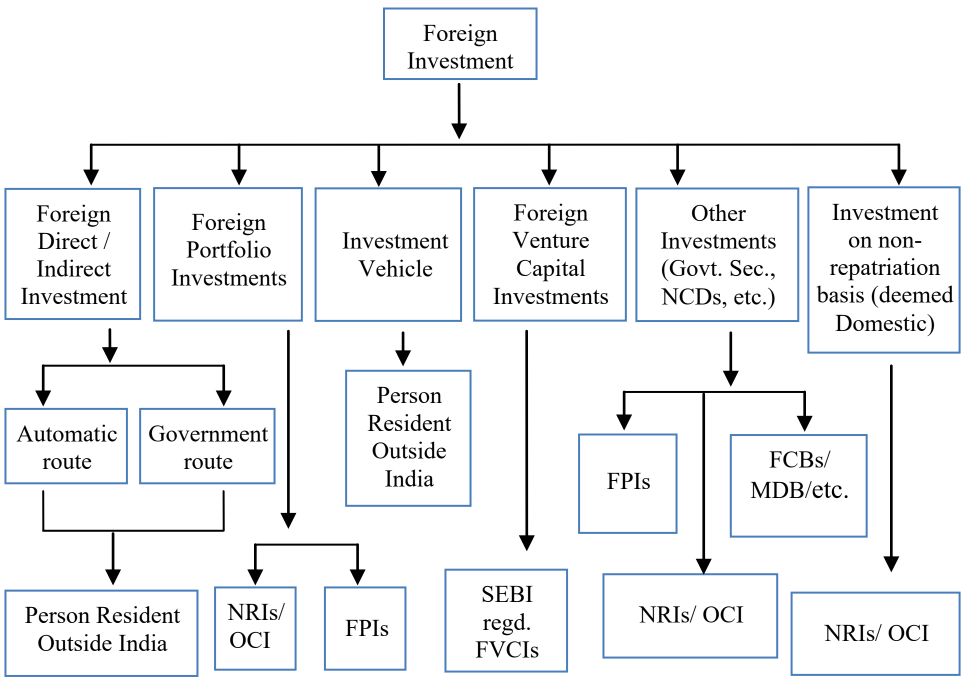
The Government of India recognises the key role of foreign investment in economic development not only as an addition to domestic capital but also as a contributor to industrialisation and socio-economic development.

The foreign investment in India is governed by the policy issued by the Government of India ("FDI Policy") and the provisions of the *Foreign Exchange Management Act, 1999*, the rules and the regulations ("FEMA Rules and Regulations") made and the directions passed thereunder (collectively referred to as "FEMA"). Reserve Bank had issued Notification No. FEMA 20/2000-RB dated May 3, 2000 containing the Regulations in this regard, which were subsequently replaced by the *Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017* ("*FEMA (TISPRO) Regulations, 2017*") issued by the Reserve Bank vide Notification No. FEMA 20(R)/2017-RB. Towards the end of 2019, India witnessed the revamping of law on the position of foreign investment in India. The Ministry of Finance vide Notification No. S.O. 3715(E) dated October 15, 2019, brought into effect certain provisions of the *Foreign Exchange Management Act, 1999* which were originally introduced by the *Finance Act, 2015*. Prior to this notification, all capital account transactions were substantially regulated by the Reserve Bank. However, the amendments introduced by the *Finance Act, 2015*, which have come into effect on and from October 15, 2019, recognize two categories of capital account transactions, that is, "capital account transactions involving non-debt instruments" and "capital account transactions involving debt instruments". Further, there is a bifurcation of power between the Central Government and the Reserve Bank whereby the Central Government has been empowered to notify rules concerning non-debt instruments whereas the Reserve Bank has to frame regulations for debt instruments. It may however be noted that the Central Government is empowered to determine instruments which would be classified as "debt instruments". Subsequently, the Ministry of Finance vide Notification No. S.O. 3722(E) dated October 16, 2019 notified instruments which shall be considered as "debt instruments" and "non-debt instruments."

In supersession of *FEMA (TISPRO) Regulations, 2017* and *Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018*, on October 17, 2019, the Central Government notified the *Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("FEMA (NDI) Rules, 2019")* by Ministry of Finance Notification No. S.O. 3732(E) and the Reserve Bank notified the *Foreign Exchange Management (Debt Instruments) Regulations, 2019 ("FEMA (DI) Regulations, 2019")* by Notification No. FEMA 396/2019-RB. In addition to the above, the Reserve Bank simultaneously notified the *Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 ("FEMA Reporting Regulations, 2019")* by Notification No. FEMA. 395/2019-RB relating to mode of payment and reporting requirements for investment in India by a non-resident.

Changes in sectoral policy/sectoral equity caps are notified from time to time through the Consolidated FDI Policy, formulated by the Department of Industrial Policy & Promotion (DIPP) now known as the Department for Promotion of Industry and Internal Trade (DPIIT), Ministry of Commerce and Industry, Government of India. The DPIIT also makes policy pronouncements on FDI through Press Notes/Press Releases.

FDI is freely permitted in almost all the sectors. Under the FDI Policy, investments can be made by non-residents in the shares, convertible debentures/preference shares of an Indian company, through two routes – the automatic route and the government route. A schematic representation of various types of foreign investment permitted in India is given below:



¶5-020 Eligibility for Investment in India — Who can Invest?

The following persons are permitted to invest in India, subject to the FDI Policy:

Person resident outside India

A person resident outside India means the person who is not person resident in India. Person resident in India means:

(i) A person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include:

(A) A person who has gone out of India or who stays outside India, in either case:

(a) For or on taking up employment outside India,

(b) For carrying on outside India a business or vocation outside India, or

(c) For any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) A person who has come to or stays in India, in either case, otherwise than:

(a) For or on taking up employment in India;

(b) For carrying on in India a business or vocation in India, or

(c) For any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

(ii) Any person or body corporate registered or incorporated in India;

(iii) An office, branch or agency in India owned or controlled by a person resident outside India;

(iv) An office, branch or agency outside India owned or controlled by a person resident in India.

A person resident outside India can invest in India. A person resident outside India may hold foreign investment either as FDI or as foreign portfolio investment in any particular Indian company. Prior to April 22, 2020, a citizen of Bangladesh or Pakistan or an entity incorporated in Bangladesh or Pakistan could invest in India, only with prior Government approval. However, in order to curb opportunistic takeovers/acquisitions of Indian companies due to the COVID-19 pandemic, the above position was revised with effect from April 22, 2020. Accordingly, any entity of a country, which shares land border with India or the beneficial owner of an investment into India who is situated in or is a citizen of any such country, can invest in India only with the Government approval. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space and atomic energy and sectors/activities prohibited for foreign investment. It is to be noted that, in the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction or purview of the above, then such subsequent change in beneficial ownership shall also require Government approval.

A person resident outside India, permitted for the purpose by the Reserve Bank in consultation with Central Government, can purchase or sell debt instruments in the manner and subject to the terms and conditions specified in Schedule 1 of *FEMA (DI) Regulations, 2019*.

A person resident outside India, other than a citizen of Bangladesh or Pakistan or an entity incorporated in Bangladesh or Pakistan, can invest, either by way of capital contribution or by way of acquisition/transfer of profit shares of a LLP.

A person resident outside India can invest in the Depository Receipts (DRs) issued by foreign depositories against eligible securities in the manner and subject to the *FEMA (NDI) Rules, 2019*, as amended from time to time.

A person resident outside India, other than a citizen of Bangladesh or Pakistan or an entity incorporated in Bangladesh or Pakistan, can invest in units of an investment vehicle.

Purchase on a stock exchange in India

A person resident outside India can purchase equity instruments of a listed Indian company on a stock exchange in India provided that:

1. The person resident outside India making the investment has already acquired control of such company in accordance with the *SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011* and continues to hold such control.
2. The amount of consideration may be paid as per the mode of payment specified by the Reserve Bank or out of the dividend payable by Indian investee company in which the person resident outside India has acquired and continues to hold the control in accordance with the *SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011* provided the right to receive dividend is established and the dividend amount has been credited to a specially designated non-interest bearing rupee account for acquisition of shares on the recognised stock exchange.

Issue by a wholly owned subsidiary

A wholly owned subsidiary set up in India by a non-resident entity, operating in a sector where 100% (one hundred percent) foreign investment is allowed in the automatic route and there are no FDI linked performance conditions, may issue equity instruments to the said non-resident entity against pre-incorporation/preoperative expenses incurred by the said non-resident entity up to a limit of 5% (five percent) of its authorised capital or USD 500,000 (US dollar five hundred thousand) whichever is less, subject to the condition that within 30 (thirty) days from the date of issue of equity instruments but not later than one year from the date of incorporation or such time as the Reserve Bank permits, the Indian company shall report the transaction to the Reserve Bank as per the reporting requirements as specified by the Reserve Bank under *FEMA Reporting Regulations, 2019*.

Other modes of issue

An Indian company may issue equity instruments to a person resident outside India under automatic route if the Indian investee company is engaged in an automatic route sector or with prior Government approval if the Indian investee company is engaged in a sector under requiring Government approval against:

1. Swap of equity instruments;

2. Import of capital goods/machinery/equipment (excluding second-hand machinery) subject to following conditions:

   (a) The import of capital goods, machineries, etc., made by a person resident in India, is in accordance with the Foreign Trade Policy notified by the Directorate General of Foreign Trade (DGFT) and the regulations on imports issued under the *Foreign Exchange Management Act, 1999*;

   (b) There is an independent valuation of the capital goods/ machineries/ equipment by a third party entity, preferably an independent valuer from the country of import along with production of copies of documents/ certificates issued by the customs authorities towards assessment of the fair-value of such imports;

   (c) The application should clearly indicate the beneficial ownership and identity of the importer company as well as the overseas entity;

   (d) The applications should be accompanied by documents evidencing 2(b) above and a special resolution of the company; and

   (e) Applications (complete in all respects) for capitalisation should be submitted within 180 (one hundred and eighty) days from the date of shipment of goods.

3. Pre-operative/pre-incorporation expenses (including payments of rent, etc), subject the following conditions:

   (a) Submission of FIRC for remittance of funds by the overseas promoters for the expenditure incurred;

   (b) Verification and certification of the pre-incorporation/pre-operative expenses by the statutory auditor;

   (c) Payments should be made by the foreign investor to the company directly or through the bank account opened by the foreign investor as provided under FEMA;

   (d) The applications should be accompanied by documents evidencing 3(a), 3(b) and 3(c) above and a special resolution of the company; and

   (e) The application (complete in all respects) for capitalisation being made within a period of 180 (one hundred and eighty) days from the date of incorporation of the company.

Government approval would be subject to pricing guidelines and appropriate tax clearance. For sectors under automatic route, issue of equity shares against import of capital goods/machinery/equipment (excluding second-hand machinery) and pre-operative/pre-incorporation expenses (including payments of rent, etc) is permitted under automatic route subject to compliance with respective conditions mentioned above, and reporting to Reserve Bank in form FC-GPR as per procedure prescribed under the FDI Policy.

An Indian company can issue equity shares against any funds payable by it to a person resident outside India, the remittance of which is permitted under FEMA or does not require prior permission of the Central Government or the Reserve Bank under FEMA or has been permitted by the Reserve Bank under FEMA subject to the following conditions:

(a) Issue of such shares that require Government approval or import dues deemed as external commercial borrowing ("ECB") or trade credit or payables against import of second hand machinery will be dealt in accordance with respective guidelines;

(b) The issue of such shares shall be subject to tax laws as applicable to the funds payable and the conversion to equity should be net of applicable taxes.

In case where permission has been granted by the Reserve Bank for making remittance, the Indian company may issue equity shares against such remittance provided all regulatory actions with respect to the delay or contravention under FEMA have been completed.

Foreign Portfolio Investor

"Foreign portfolio investment" is any investment made by a person resident outside India in equity instruments where such investment is (a) less than 10% (ten percent) of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or (b) less than 10% (ten percent) of the paid up value of each series of equity instruments of a listed Indian company. Foreign portfolio investor ("FPI") is a person registered in accordance with the provisions of the *SEBI (FPI) Regulations, 2019*.

A registered FPI is eligible to purchase or sell equity instruments of an Indian company which is listed or to be listed on a recognised stock exchange in India and/or purchase or sell securities other than equity instruments.

Purchase/sale of equity instruments

FPIs can purchase or sell equity instruments of an Indian company listed or to be listed on a recognised Stock Exchange up to a maximum holding by each FPI or an investor group of less than 10% (ten percent) of the total paid-up equity capital of the company on a fully diluted basis or less than 10% (ten percent) of the paid up value of each series of debentures or preference shares or share warrants issued by an Indian company. The total holdings of all FPIs put together, including any other direct and indirect foreign investments in the Indian company by FPIs permitted under *FEMA (NDI) Rules, 2019*, shall not exceed 24% (twenty-four percent) of the paid up equity capital of the company on a fully diluted basis or paid-up value of each series of debentures or preference shares or share warrants. Prior to April 1, 2020, the aggregate limit of 24% (twenty-four percent) could be increased by the Indian company concerned up to the sectoral cap/ statutory ceiling, as applicable, with the approval of its Board of Directors and its General Body through a resolution and a special resolution, respectively.

However, with effect from April 1, 2020, the aggregate limit is in fact the sectoral caps applicable to the Indian company as laid out in sub-paragraph (b) of paragraph 3 of Schedule I of *FEMA (NDI) Rules, 2019*, with respect to its paid-up equity capital on a fully diluted basis or such same sectoral cap percentage of paid up value of each series of debentures or preference shares or share warrants. This aggregate limit could have been decreased by the Indian company concerned to a lower threshold limit of 24% or 49% or 74% as deemed fit, with the approval of its Board of Directors and its General Body through a resolution and a special resolution, respectively, before March 31, 2020. The Indian company which has decreased its aggregate limit to 24% or 49% or 74%, may increase such aggregate limit to 49% or 74% or the sectoral cap or statutory ceiling respectively, as deemed fit, with the approval of its Board of Directors and its General Body through a resolution and a special resolution, respectively. However, once the aggregate limit has been increased to a higher threshold, the Indian company cannot reduce the same to a lower threshold. In any case, the aggregate limit with respect to an Indian company in a sector where FDI is prohibited shall be 24% (twenty-four percent).

It may be noted that, in case, two or more FPIs including foreign Governments/their related entities are having common ownership, directly or indirectly, of more than 50% (fifty percent) or common control, all such FPIs shall be treated as forming part of an investor group. Control includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

The FPIs investing in breach of the prescribed limit shall have the option of divesting their holdings within 5 (five) trading days from the date of settlement of the trades causing the breach. In case the FPI chooses not to divest, then the entire investment in the company by such FPI and its investor group shall be considered as investment under FDI and the FPI and its investor group shall not make further portfolio investment in the company concerned. The FPI, through its designated custodian, shall bring the same to the notice of the depositories as well as the concerned company for effecting necessary changes in their records, within 7 (seven) trading days from the date of settlement of the trades causing the breach. The divestment of holdings by the FPI and the reclassification of FPI investment as FDI shall be subject to further conditions, if any, specified by the SEBI and the Reserve Bank in this regard. The breach of the said aggregate or sectoral limit on account of such acquisition for the period between the acquisition and sale or conversion to FDI within the prescribed time, shall not be reckoned as a contravention under *FEMA (NDI) Rules, 2019*.

The investment by foreign Government agencies shall be clubbed with the investment by the foreign Government or its related entities for the purpose of calculation of 10% (ten percent) limit for FPI investments in a single company, if they form part of an investor group. However, certain foreign Government agencies and its related entities may be exempt from such clubbing requirements and other investment conditions either by way of an agreement or treaty with other sovereign governments or by an order of the Central Government. However, if an existing investment by a person resident outside India in equity instruments of a listed Indian company falls to a level below 10% (ten percent) of the post issue paid-up equity capital on a fully diluted basis, the investment will continue to be treated as FDI. There are certain sector-specific restrictions and/or ceilings on FPI investment in sectors including, inter-alia Asset Reconstruction Companies ("ARCs"), infrastructure companies in Securities Market, Credit Information Companies, etc.

Aggregate foreign portfolio investment up to 49% (forty-nine percent) of the paid-up capital on a fully diluted basis or the sectoral/statutory cap, whichever is lower, does not require Government approval or compliance of sectoral conditions as the case may be, if such investment does not result in transfer of ownership and control of the resident Indian company from resident Indian citizens or transfer of ownership or control to persons resident outside India. Other investments by a person resident outside India are subject to conditions of Government approval and compliance of sectoral conditions.

For arriving at the ceiling on holdings of FPI, equity instruments acquired both through primary as well as secondary market will be included. However, the ceiling will not include investment made by the FPI through off-shore Funds, Global Depository Receipts and Euro-Convertible Bonds.

SEBI registered FPIs are allowed to trade in all exchange-traded derivative contracts, approved by SEBI subject to the limits prescribed by SEBI from time to time.

SEBI registered FPIs have been permitted to invest in an Indian company through offer/private placement, subject to total FPI investment, namely, PIS/private placement/offer, being within the individual/aggregate FPI investment limits. In case of public offer, the price of the shares to be issued should not be less than the price at which shares are issued to residents. In case of issue by private placement, the price should not be less than (a) the price arrived in terms of guidelines issued by the SEBI, or (b) the fair price worked out as per any internationally accepted pricing methodology for valuation of shares on arm's length basis, duly certified by a Merchant Banker or Chartered Accountant or a practicing Cost Accountant, as applicable registered with the SEBI.

FPIs can undertake short selling as well as lending and borrowing of securities as permitted by the Reserve Bank and the SEBI subject to following conditions:

(a) The short selling of equity shares by FPIs is permitted for equity shares of those companies where there is at least 2% (two percent) headroom available for total foreign investment and/or aggregate FPI limit or is not in the caution list or ban list published by the Reserve Bank or any restrictive list published by any authority designated to do so by the Reserve Bank or SEBI.

(b) Borrowing of equity shares by FPIs will only be for the purpose of delivery into short sale.

(c) The margin/collateral will be maintained by FPIs as applicable in the cash and F&O segment of equity market. No interest shall be paid to the FPI on such margin/collateral.

(d) The designated custodian banks shall separately report all transactions pertaining to short selling of equity shares and lending and borrowing of equity shares by FPIs in their daily reporting with a suitable remark (short sold/lent/borrowed equity shares) for the purpose of monitoring by the Reserve Bank.

Investments will be subject to the limits and margin requirements prescribed by the Reserve Bank/SEBI.

FPIs can purchase, hold or sell Indian Depository Receipts (IDRs) of companies resident outside India and issued in the Indian capital market, subject to the *FEMA (NDI) Rules, 2019*, as amended from time to time.

Purchase/sale of securities other than equity instruments

An FPI may purchase:

(a) Units of domestic mutual funds or Category III Alternative Investment Fund or offshore fund for which no objection is issued in accordance with the *SEBI (Mutual Fund) Regulations, 1996*, which in turn invest more than 50% (fifty percent) in equity instruments on repatriation basis subject to the terms and conditions specified by the SEBI and the Reserve Bank.

(b) Units of Real Estate Investment Trusts ("REITs") and Infrastructure Investment Trusts ("InvIts") on repatriation basis subject to the terms and conditions specified by the SEBI.

Purchase/sale of debt instruments

FPI may purchase the following debt instruments on repatriation basis subject to the terms and conditions specified by the SEBI and the Reserve Bank:

(a) Dated Government securities/treasury bills: FPIs are permitted to invest in Central Government securities (G-secs), including in Treasury Bills, and State Development Loans (SDLs) without any minimum residual maturity requirement, subject to the condition that short-term investments, that is, investments with residual maturity up to one year, by an FPI under either category shall not exceed 30% (thirty percent) of the total investment of that FPI in that category. There is, however, no lock-in period to sell the securities to the domestic investors. Further, FPIs can also invest the coupons received on their existing investments in G-secs. These investments will be reckoned within the applicable limit for investments by FPIs in G-secs. Similarly, the coupon reinvestment arrangement for G-secs has also been extended to SDLs.

(b) Non-convertible debentures/bonds issued by an Indian company, provided that:

- FPIs are permitted to invest in corporate bonds with minimum residual maturity of above one year, subject to the condition that short-term investments in corporate bonds by an FPI shall not exceed 30% (thirty percent) of the total investment of that FPI in corporate bonds. These stipulations would not apply to investments in "Exempted Securities" by FPIs. "Exempted Securities" shall include the following instruments:

  1. Security Receipts and debt instruments issued by Asset Reconstruction Companies; and
  2. Debt instruments issued by an entity under the Corporate Insolvency Resolution Process as per the resolution plan approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016.

  There will, however, be no lock-in period and FPIs can sell the securities (including those that are presently held with less than 3 (three) years' residual maturity) to domestic investors.

- FPIs can invest in primary issues of non-convertible debentures ("NCDs")/bonds only if listing of such bonds/NCDs is committed to be done within 15 (fifteen) days of such investment. In case the NCDs/ bonds issued to the FPIs are not listed within 15 (fifteen) days of issuance to the FPIs, for any reason, then the FPIs shall immediately dispose of these bonds/NCDs either by way of sale to a third party or to the issuer. The terms of offer to FPIs should contain a clause that the issuer of such debt securities shall immediately redeem/buyback the said securities from the FPIs in such an eventuality.

- FPIs are permitted to invest in unlisted NCDs/bonds issued by an Indian company subject to a minimum residual maturity of 3 (three) years and end-use restriction on investment in real estate business, capital market and purchase of land. The custodian banks shall ensure compliance with this condition.

It may be noted that the requirement that short-term investments shall not exceed 30% (thirty percent) of total investment by an FPI in any category applies on an end-of-day basis. At the end of any day, all investments with residual maturity of up to one year will be reckoned for the 30% (thirty percent) limit.

Further, short-term investments by an FPI may exceed 30% (thirty percent) of total investments, only if the short-term investments consist entirely of investments made on or before April 27, 2018; that is, short-term investments do not include any investment made after April 27, 2018.

(c) Commercial papers issued by an Indian company;

(d) Units of domestic mutual funds or Exchange-Traded Funds (ETFs) which invest less than or equal to 50 percent in equity;

(e) Debt instruments issued by banks, eligible for inclusion in regulatory capital;

(f) Rupee-denominated bonds/units issued by infrastructure debt funds including instruments issued on or after November 22, 2011 and held by deemed FPIs;

(g) Credit enhanced bonds;

(h) Listed non-convertible/redeemable preference shares or debentures issued in terms of Regulation 6 of the *FEMA (DI) Regulations, 2019*;

(i) Security receipts (SRs) issued by Asset Reconstruction Companies (ARCs) subject to following conditions:

- FPIs can invest up to 100% (one hundred percent) of each tranche in SRs issued by ARCs, subject to provisions of the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002*.
- The restriction on investments with less than 3 (three) years residual maturity is not applicable to investment by FPIs in SRs issued by ARCs.
- Such investment should be within the FPI limits on corporate bonds prescribed by the Reserve Bank.
- Investment by FPIs in the unlisted corporate debt securities and securitised debt instruments shall not exceed investment limits prescribed for corporate bonds from time to time.

(j) Securitised debt instruments, including (a) any certificate or instrument issued by a special purpose vehicle (SPV) set up for securitisation of asset/s with banks, Financial Institutions or NBFCs as originators;

(k) Municipal Bonds; and

(l) FPI can acquire NCDs/bonds, which are under default, either fully or partly, in the repayment of principal on maturity or principal instalment in the case of amortising bond. The revised maturity period of such NCDs/bonds, restructured based on negotiations with the issuing Indian company, should be as per norms prescribed by the Reserve Bank from time to time. The FPI should disclose to the Debenture Trustees the terms of the offer made to the existing debenture holders/beneficial owners from whom the bonds are being acquired. Such investment should be within the overall limit prescribed for corporate debt from time to time.

FPIs can offer the following instruments as collateral to the recognised stock exchanges in India for their transactions in exchange traded derivative contracts:

(a) Domestic Government Securities (acquired in accordance with the provisions of Schedule I to the *FEMA (DI) Regulations, 2019* and subject to the overall limits specified by the SEBI from time to time).

(b) Foreign sovereign securities with AAA rating.

(c) Corporate bonds acquired by FPIs in accordance with provisions of Schedule I to the *FEMA (DI) Regulations, 2019*.

(d) Cash.

Cross-margining of government securities (placed as margins by the FPIs for their transactions in the cash segment of the market) is not allowed between the cash and the derivative segments of the market.

"Investment on repatriation basis" is an investment, the sale/maturity proceeds of which are, net of taxes, eligible to be repatriated and the expression "Investment on non-repatriation basis", to be construed accordingly.

Instruments in which FPIs cannot invest

FPIs are not allowed to invest in the following:

(a) Liquid and money market mutual fund schemes; and

(b) Partly paid debt instruments.

Non-resident Indians or Overseas Citizens of India

"Non-Resident Indian" ("NRI") means an individual resident outside India who is a citizen of India. "Overseas Citizen of India" ("OCI") means an individual resident outside India who is registered as an Overseas Citizen of India cardholder within the meaning of Section 7(A) of the *Citizenship Act, 1955*. "Persons of Indian Origin" cardholders registered as such under Notification No. 26011/4/98 F.I. dated August 19, 2002 issued by the Central Government are deemed to be "Overseas Citizen of India" cardholders.

Purchase/sale of equity instruments on repatriation basis

NRIs or OCI on repatriation basis can purchase or sell equity instruments of listed Indian companies on a recognised stock exchange in India under the FDI route.

NRIs can invest through designated ADs, on repatriation basis up to 5% (five percent) of the total paid- up equity capital on a fully diluted basis/paid-up value of each series of debentures or preference shares or share warrants of Indian companies. The total holdings of all NRIs and OCIs put together cannot exceed 10% (ten percent) of the total paid-up equity capital on a fully diluted basis/ paid-up value of each series of debentures or preference shares or share warrants (or 24% in case a special resolution of the shareholders to this effect is passed).

NRI or OCI may, without limit purchase or sell shares in public sector enterprises being disinvested by the Central Government, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids.

Purchase or sale of units of domestic mutual funds

NRI or OCI may without limit purchase or sell units of domestic mutual funds which invest more than 50% (fifty percent) in equity.

Subscription to National Pension System

NRI or an OCI may subscribe to the National Pension System governed and administered by Pension Fund Regulatory and Development Authority (PFRDA), provided such person is eligible to invest as per the provisions of the Pension Fund Regulatory and Development Authority Act. The annuity/ accumulated saving will be repatriable.

NRIs or OCIs may offer such instruments as permitted by the Reserve Bank from time to time as collateral to the recognised Stock Exchanges in India for their transactions in exchange traded derivative contracts as prescribed in sub-clause (2) of clause 12 of the *FEMA (NDI) Rules, 2019*.

Purchase/sale of debt instruments

NRIs or OCIs can, without limit, purchase the following instruments on repatriation basis:

(a) Government dated securities (other than bearer securities) or treasury bills or units of domestic mutual funds or Exchange-Traded Funds (ETFs) which invest less than or equal to 50% (fifty percent) in equity;

(b) Bonds issued by a public sector undertaking in India;

(c) Bonds issued by Infrastructure Debt Funds; and

(d) Listed non-convertible/redeemable preference shares or debentures.

NRI or an OCI may purchase on repatriation basis debt instruments issued by banks, eligible for inclusion in regulatory capital.

NRI can subscribe to National Pension System governed and administered by Pension Fund Regulatory and Development Authority (PFRDA), provided such person is eligible to invest as per the provisions of the PFRDA Act. The annuity/accumulated saving will be repatriable.

NRIs or OCIs can offer such instruments as permitted by the Reserve Bank as collateral to the recognised Stock Exchanges in India for their transactions in exchange traded derivative contracts.

Purchase/sale of equity instruments or convertible notes or units or contribution to the capital of LLP on Non-repatriation basis

NRIs or OCI, including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, can purchase/contribute, as the case may be, on non-repatriation basis the following:

(a) An equity instrument issued by a company without any limit either on the stock exchange or outside it.

(b) Units issued by an investment vehicle without any limit, either on the stock exchange or outside it.

(c) The capital of a Limited Liability Partnership without any limit.

(d) Convertible notes issued by a start-up company in accordance with the *FEMA (NDI) Rules, 2019*.

All investments by NRIs or OCIs as detailed above will deemed to be domestic investment at par with the investments made by residents.

Purchase or sale of units of domestic mutual funds

NRI or OCI may without limit purchase or sell units of domestic mutual funds on non-repatriation basis which invest more than 50% (fifty percent) in equity.

NRIs or OCIs including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, cannot make any investment, in equity instruments or units of a Nidhi company or a company engaged in agricultural/plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights.

NRIs or OCIs can trade or invest in all exchange traded derivative contracts approved by SEBI from time to time subject to the limits prescribed by SEBI and conditions specified in the *FEMA (NDI) Rules, 2019.*.

NRI or anOCI may purchase, hold, or sell Indian Depository Receipts (IDRs) of companies resident outside India and issued in the Indian capital market, in the manner and subject to the terms and conditions specified in *FEMA (NDI) Rules, 2019*.

Investment in a firm or a proprietary concern

NRI or an OCI can invest, on a non-repatriation basis, by way of contribution to the capital of a firm or a proprietary concern in India provided such firm or proprietary concern is not engaged in any agricultural/plantation activity or print media or real estate business.

Purchase/sale of debt instruments

NRIs or OCIs can, without limit, purchase the following instruments on non-repatriation basis:

(a) Dated Government securities (other than bearer securities), treasury bills, units of domestic mutual funds or Exchange-Traded Funds (ETFs) which invest less than or equal to 50% (fifty percent) in equity, or National Plan/Savings Certificates;

(b) Listed non-convertible/redeemable preference shares or debentures;

(c) NRI or an OCI may, without limit, on non-repatriation basis subscribe to the chit funds authorised by the Registrar of Chits or an officer authorised by the State Government in this behalf.

Foreign Venture Capital Investor

A SEBI-registered Foreign Venture Capital Investor (FVCI) subject to the terms and conditions laid down by the Central Government can purchase (a) securities, issued by an Indian company engaged in certain sectors and whose securities are not listed on a recognised stock exchange at the time of issue of the said securities; (b) units of a Venture Capital Fund (VCF) or of a Category I Alternative Investment Fund (Cat-I AIF) or units of a scheme or of a fund set up by a VCF or by a Cat-I AIF; and (c) equity or equity linked instrument or debt instrument issued by an Indian start-up irrespective of the sector in which the start-up is engaged. If the investment is in equity instruments, then the sectoral caps, entry routes, reporting requirement and attendant conditions will apply. The FVCI can also receive the proceeds of the liquidation of VCFs or of Cat-I AIFs or of schemes/ funds set up by the VCFs or Cat-I AIFs.

FVCIs can purchase the securities/instruments mentioned above either from the issuer of these securities/instruments or from any person holding these securities/instruments. FVCIs can also invest in securities on a recognised stock exchange subject to the provisions of the *SEBI (FVCI) Regulations, 2000*, as amended from time to time. Further, FVCI can acquire/transfer securities/ instruments permitted for it at a price that is mutually acceptable to the buyer and the seller/issuer. In case of sale to a person resident outside India, the buyer should be an eligible acquirer.

FVCI is allowed to invest in the following sectors: Biotechnology, IT related to hardware and software development, nanotechnology, seed research and development, research and development of new chemical entities in pharmaceutical sector, dairy industry, poultry industry, production of bio-fuels, hotel-cum-convention centres with seating capacity of more than 3,000 (three thousand) and infrastructure sector.

A VCF established in the form of a trust or a company or a body corporate and registered under the *SEBI (Venture Capital Fund) Regulations, 1996* cannot be considered as an investment vehicle for the purpose of the *FEMA (NDI) Rules, 2019*.

Foreign Central Banks or Multilateral Development Banks

Foreign Central Banks, Multilateral Development Banks or any other entity permitted by the Reserve Bank, may purchase or sell dated Government Securities/treasury bills, as per terms and conditions specified by the Reserve Bank.

Other non-resident investors

Long-term investors like Sovereign Wealth Funds (SWFs), Multilateral Agencies, Endowment Funds, Insurance Funds, Pension Funds and Foreign Central Banks may purchase securities subject to such terms and conditions as may be specified by the Reserve Bank and the SEBI.

"Eligible Foreign Entity" (EFE) as defined in SEBI circular dated the 9th October 2018 and having actual exposure to Indian physical commodity market may participate in domestic commodity derivative markets in accordance with framework specified by the SEBI. EFEs have been defined to mean any person resident outside India as defined in Foreign Exchange Management Act, 1999, and are having actual exposure to Indian physical commodity markets.

¶5-030 Entry Routes

FDI is freely permitted in almost all sectors. Under the FDI Policy, investments can be made by non-residents in the equity shares; fully, compulsorily and mandatorily convertible debentures; or fully, compulsorily and mandatorily convertible preference shares, partly paid equity shares and warrants of an Indian company, through two routes:

(i) the Automatic Route; and

(ii) the Government Route.

Procedure under automatic route

Under the automatic route, the non-resident investor or the Indian company does not require any approval from the Reserve Bank or Government of India for the investment. An Indian company, not engaged in any activity/sectors where FDI is prohibited, can issue shares or convertible debentures to a person resident outside India, subject to entry routes and sectoral caps prescribed in the FDI Policy.

Procedure under government route

FDI in activities not covered under the automatic route requires prior approval of the Government which are considered by respective ministry/ department of the Government of India, as the case may be.

Foreign investment in sectors/activities under government approval route is subject to government approval where:

(i) An Indian company is being established with foreign investment and is not owned by a resident entity.

(ii) An Indian company is being established with foreign investment and is not controlled by a resident entity.

(iii) The control of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non-resident entities through amalgamation, merger/demerger, acquisition, etc.

(iv) The ownership of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non-resident entities through amalgamation, merger/demerger, acquisition, etc.

(v) Foreign Currency Convertible Debentures ("FCCBs") and DRs having underlying of instruments, being in the nature of debt, shall not be treated as foreign investment. Further, any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned as foreign investment and shall be under the sectoral cap.

(vi) Investment by NRIs and OCIs under Schedule 4 of the *FEMA (NDI) Rules, 2019* will be deemed to be domestic investment at par with the investment made by residents.

(vii) A company, trust and partnership firm incorporated outside India and owned and controlled by NRIs or OCIs will be eligible for investments under Schedule 4 of the *FEMA (NDI) Rules, 2019* and such investment will also be deemed domestic investment at par with the investment made by residents.

Competent authorities for grant of approval

Following are the competent authorities for grant of approval for foreign investment for sectors/activities requiring Government approval:

Sr. No.	**Activity/sector**	**Administrative Ministry/Department**
(i)	Mining	Ministry of Mines
(ii)	Defence	
	Items requiring Industrial Licence under the *Industries (Development & Regulation) Act, 1951*, and/or *Arms Act, 1959* for which the powers have been delegated by Ministry of Home Affairs to DIPP	Department of Defence Production, Ministry of Defence
	Manufacturing of Small Arms and Ammunitions covered under the *Arms Act, 1959*	Ministry of Home Affairs
(iii)	Broadcasting	Ministry of Information & Broadcasting
(iv)	Print Media	

Sr. No.	Activity/sector	Administrative Ministry/Department
(v)	Civil Aviation	Ministry of Civil Aviation
(vi)	Satellites	Department of Space
(vii)	Telecommunication	Department of Telecommunications
(viii)	Private Security Agencies	Ministry of Home Affairs
(ix)	Applications involving investments from Countries of Concern falling under automatic route sectors/activities, requiring security clearance as per the extant *FEMA (NDI) Rules, 2019*, FDI Policy and security guidelines, as amended from time to time	DPIIT
	Cases pertaining to Government approval route sectors/ activities requiring security clearance as per the extant *FEMA (NDI) Rules, 2019*, FDI Policy and security guidelines, as amended from time to time	Nodal Administrative Ministries/Departments
(x)	Trading (Single brand, Multi brand and Food Product retail trading)	DPIIT
(xi)	FDI proposals by Non-Resident Indians (NRIs)/Export Oriented Units requiring approval of the Government	
(xii)	Applications relating to issue of equity shares under the FDI policy under the Government route for import of capital goods/machinery/equipment (excluding second-hand machinery)	
(xiii)	Applications relating to issue of equity shares for pre-operative/pre-incorporation expenses (including payments of rent, etc.)	
(xiv)	Financial services activity which are not regulated by any Financial Sector Regulator or where only part of the financial services activity is regulated or where there is doubt regarding the regulatory oversight	Department of Economic Affairs
(xv)	Applications for foreign investment into a Core Investment Company or an Indian company engaged only in the activity of investing in the capital of other India Company/ies	
(xvi)	Banking (Public and Private)	Department of Financial Services

Sr. No.	Activity/sector	Administrative Ministry/Department
(xvii)	Pharmaceuticals	Department of Pharmaceuticals

In respect of sectors/activities which are presently under automatic route but required Government approval earlier as per the extant policy during the relevant period, concerned administrative Ministry/Department would be the competent authorities for the grant of post-facto approval for foreign investment.

A standard operating procedure ("SOP") for facilitating the processing of applications for FDI in sectors/transactions that require government approval was issued by the DIPP on June 29, 2017. The said SOP sets out the process and procedure for filing and processing of FDI proposals, time limits and internal mechanisms for monitoring the processing of FDI proposals and is available on the website of DIPP and on fifp.gov.in.

The competent authority would consider proposals with total foreign equity inflow of and below Rs. 5000,00,00,000 (Indian rupees five thousand crore).

The proposals with total foreign equity inflow of more than Rs. 5000,00,00,000 (Indian rupees five thousand crore) would be placed for consideration of Cabinet Committee on Economic Affairs ("CCEA").

The CCEA would also consider the proposals which can be referred to it by the Minister-in-charge of the concerned competent authority.

Conditions on investment besides entry conditions

Besides the entry conditions on foreign investment, the investment/ investors are required to comply with all relevant sectoral laws, regulations, rules, security conditions, and state/local laws/regulations.

For establishment of branch office, liaison office or project office or any other place of business in India if the principal business of the applicant is Defence, Telecom, Private Security or Information and Broadcasting, approval of Reserve Bank is not required in cases where Government approval or license/permission by the concerned Ministry/Regulator has already been granted.

Cases which do not require fresh approval

Companies may not require fresh approval of the Government for bringing in additional foreign investment into the same entity, in the following cases:

(a) Entities the activities of which had earlier required prior approval of Government and which had, accordingly, earlier obtained prior approval of Government for their initial foreign investment but subsequently such activities/sectors have been placed under automatic route.

(b) Entities, the activities of which had sectoral caps earlier and which had, accordingly, earlier obtained prior approval of Government for their initial foreign investment but subsequently such caps were removed/increased and the activities placed under the automatic route; provided that such additional investment along with the initial/original investment does not exceed the sectoral caps.

(c) Additional foreign investment into the same entity where prior approval of Government had been obtained earlier for the initial/original foreign investment due to requirements of Press Note 18/1998 or Press Note 1 of 2005 and prior approval of the Government under the FDI policy is not required for any other reason/purpose.

(d) Additional foreign investment up to cumulative amount of Rs. 5000,00,00,000 (Indian rupees five thousand crore) into the same entity within an approved foreign equity percentage/or into a wholly owned subsidiary.

Online filing of applications for Government approval

Guidelines for e-filing of applications, filing of amendment applications and instructions to applicants are available at the Foreign Investment Facilitation Portal (www.fifp.gov.in).

¶5-040 Prohibition on Investment in India

FDI, in any form, is prohibited where the entity is engaged or proposes to engage in any of the following activities:

(i) Lottery Business including Government/private lottery, online lotteries, etc.

(ii) Gambling and Betting including casinos, etc.

(iii) Chit funds.

(iv) Nidhi company.

(v) Trading in Transferable Development Rights (TDRs).

(vi) Real Estate Business or Construction of Farmhouses. "Real estate business" is dealing in land and immoveable property with a view to earning profit there from and does not include development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent/income on lease of the property, not amounting to transfer, will not amount to real estate business.

(vii) Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes. The prohibition is on manufacturing of the products mentioned and foreign investment in other activities relating to these products including wholesale cash and carry, retail trading, etc., will be governed by sectoral restrictions under the *FEMA (NDI) Rules, 2019.*

(viii) Activities/sectors not open to private sector investment, example, (I) Atomic energy and (II) Railway operations (other than permitted activities mentioned in paragraph (3) of Schedule I of *FEMA (NDI) Rules, 2019*).

(ix) Foreign technology collaborations in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for lottery business and gambling and betting activities.

¶5-050 Types of Instruments Eligible for Foreign Investment

Indian companies can issue equity shares; convertible debentures; preference shares and share warrants issued in accordance with regulations framed by SEBI ("SEBI Regulations") by an Indian company (collectively "equity instruments"), subject to pricing guidelines/valuation norms prescribed under FEMA Rules and Regulations.

<u>Equity shares:</u> Equity shares are those issued in accordance with the provisions of the *Companies Act, 2013* and will include equity shares that have been partly paid.

Partly paid shares issued in accordance with the provisions of the *Companies Act, 2013* on or after July 8, 2014 will be considered as equity instruments. Partly paid shares that have been issued to a person resident outside India shall be fully called-up within 12 (twelve) months of such issue or as may be specified by Reserve Bank from time to time. 25% (twenty-five percent) of the total consideration amount (including share premium, if any), shall be received upfront and the balance consideration towards fully- paid equity shares should be received within a period of 12 (twelve) months from the date of issue of partly- paid shares. The time period of 12 (twelve) months for receipt of the balance consideration need not be insisted upon where the issue size exceeds Rs. 500,00,00,000 (Indian rupees five hundred crore) and the issuer complies with Regulation 17 of the *SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009* regarding monitoring agency.

In case of an unlisted Indian company, the balance consideration amount can be received after 12 (twelve) months where the issue size exceeds Rs. 500,00,00,000 (Indian rupees five hundred crore). However, the investee company should appoint a monitoring agency on the same lines as required in case of a listed Indian company under the SEBI (Issue of Capital and Disclosure Requirements) Regulations. Such monitoring agency (AD Category -1 bank) should report to the investee company as prescribed by the SEBI Regulations, for the listed companies. In case of non-payment of call money, the forfeiture of the amount paid upfront will be in accordance with the provisions of the *Companies Act, 2013* and the provisions of the *Income-tax Act, 1961*, as applicable.

<u>Share warrants:</u> Share Warrants are those issued by an Indian Company in accordance with the SEBI Regulations. In case of share warrants, at least 25% (twenty-five percent) of the consideration shall be received upfront and the

balance amount within 18 (eighteen) months of issuance of share warrants. In case of non-payment of balance consideration, the forfeiture of the amount paid upfront will be in accordance with the provisions of the *Companies Act, 2013* and the provisions of the *Income-tax Act, 1961*, as applicable. The deferment of payment of consideration amount by the foreign investors or shortfall in receipt of consideration amount as per applicable pricing guidelines will not be treated as subscription to partly paid shares and warrants.

Convertible debentures: Convertible debentures are fully, compulsorily and mandatorily convertible debentures. Amendment of the tenure of compulsorily and mandatorily convertible debentures shall be in compliance with the *Companies Act, 2013*.

Preference shares: Preference shares are fully, compulsorily and mandatorily convertible preference shares. Amendment of the tenure of fully, compulsorily and mandatorily convertible preference shares shall be in compliance with the *Companies Act, 2013*.

The inward remittance received by the Indian company by issuance of DRs and FCCBs are treated as FDI and counted towards FDI.

Prior to December 30, 2013, issue of other types of preference shares such as non-convertible, optionally convertible or partially convertible, were to be in accordance with the guidelines applicable for ECBs. On and from December 30, 2013, it has been decided that optionality clauses can henceforth be allowed in equity instruments to be issued to a person resident outside India. The optionality clause will oblige the buy-back of securities from the investor at the price prevailing/value determined at the time of exercise of the optionality so as to enable the investor to exit without any assured return.

The provision of optionality clause is allowed in equity instruments subject to the following conditions:

(a) There is a minimum lock-in period of 1 (one) year or a minimum lock-in period as prescribed under FEMA Rules and Regulations, whichever is higher (example, defence sector where the lock-in period of 3 (three) years has been prescribed) but without any option or right to exit at an assured price.

(b) After the lock-in period, as applicable above, the non-resident investor exercising option/right shall be eligible to exit without any assured return, as as per pricing/valuation guidelines issued by Reserve Bank from time to time.

The guiding principle would be that the non-resident investor is not guaranteed any assured exit price at the time of making such investment/ agreements and shall exit at the fair price computed as above at the time of exit, subject to lock-in period requirement, as applicable.

¶5-060 Entities into which Foreign Investment can be Made

I. Foreign investment in an Indian company

Indian companies can issue capital against FDI.

II. Foreign investment in a partnership firm or a proprietary concern

NRI or an OCI can invest by way of contribution to the capital of a firm or a proprietary concern in India on non-repatriation basis provided that the firm or proprietary concern is not engaged in any agricultural/plantation or real estate business (ie, dealing in land and immovable property with a view to earning profit or earning income there from) or print media sector. The mode of payment and attendant conditions for remittance of sale or maturity proceeds will be specified by the Reserve Bank.

Investments with repatriation option

NRIs/OCIs can seek prior permission of Reserve Bank for investment in sole proprietorship concerns/partnership firms with repatriation option. The application will be decided in consultation with the Government of India.

Investments by non-residents other than NRIs/OCI

A person resident outside India other than NRIs/OCI can make an application and seek prior approval of Reserve Bank for making investment by way of contribution to the capital of a firm or a proprietorship concern or any association of persons in India. The application will be decided in consultation with the Government of India.

III. FDI in trusts

FDI in Trusts (other than by SEBI-registered FVCIs in domestic VCF) is not permitted.

IV. Foreign investment in LLP

FDI in LLP is permitted and is subject to the compliance of the conditions of the *LLP Act, 2008*.

Person resident outside India (other than a citizen of Pakistan or Bangladesh) or an entity incorporated outside India (other than an entity incorporated in Pakistan or Bangladesh), not being an FPI or an FVCI are permitted to contribute in the capital of a LLP under the automatic route for LLPs operating in sectors/ activities where 100% (one hundred percent) FDI is allowed, through the automatic route and there are no FDI linked performance conditions.

Investment by way of "profit share" falls under the category of reinvestment of earnings.

An Indian company or a LLP, having foreign investment, is permitted to make downstream investment in another company or LLP in sectors in which

100% (one hundred percent) FDI is allowed under the automatic route and there are no FDI linked performance conditions.

Conversion of a LLP having foreign investment and operating in sectors/activities where 100% (one hundred pe rcent) FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into a company is permitted under automatic route. Similarly, conversion of a company having foreign investment and operating in sectors/activities where 100% (one hundred percent) FDI is allowed through the automatic route and there are no FDI-linked performance conditions, into a LLP is permitted under automatic route.

Investment in a LLP either by way of capital contribution or by way of acquisition/transfer of profit shares, should not be less than the fair price worked out as per any valuation norm which is internationally accepted/adopted as per market practice (hereinafter referred to as "fair price of capital contribution/ profit share of a LLP") and a valuation certificate to that effect shall be issued by the Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.

In case of transfer of capital contribution/profit share from a person resident in India to a person resident outside India, the transfer shall be for a consideration not less than the fair price of capital contribution/profit share of a LLP. Further, in case of transfer of capital contribution/profit share from a person resident outside India to a person resident in India, the transfer shall be for a consideration which is not more than the fair price of the capital contribution/profit share of a LLP.

V. Foreign investment in units of an investment vehicle

"Investment vehicle" is an entity registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose and will be Real Estate Investment Trusts (REITs) governed by the *SEBI (REITs) Regulations, 2014*, Infrastructure Investment Trusts ("InvIts") governed by the *SEBI (InvIts) Regulations, 2014*, Alternative Investment Funds ("AIFs") governed by the *SEBI (AIFs) Regulations, 2012*.

A person resident outside India (other than a citizen of Pakistan or Bangladesh) or an entity incorporated outside India (other than an entity incorporated in Pakistan or Bangladesh) can invest in units of investment vehicles.

A person resident outside India who has acquired or purchased units can sell or transfer in any manner or redeem the units as per SEBI Regulations or directions issued by the Reserve Bank.

An investment vehicle can issue its units to a person resident outside India against swap of equity instruments of a Special Purpose Vehicle (SPV) proposed to be acquired by such investment vehicle.

Investment made by an investment vehicle into an Indian entity shall be reckoned as indirect foreign investment for the investee Indian entity if the sponsor or the manager or the investment manager (i) is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India. For sponsors or managers or investment managers organised in a form other than companies or LLPs, SEBI shall determine whether the sponsor or manager or investment manager is foreign owned and controlled.

"Control" of the AIF should be in the hands of "sponsors" and "managers/investment managers", with the general exclusion to others. In case the "sponsors" and "managers/investment managers" of the AIF are individuals, for the treatment of downstream investment by such AIF as domestic, "sponsors" and "managers/investment managers" should be resident Indian citizens.

An Alternative Investment Fund Category III which has received any foreign investment shall make portfolio investment in only those securities or instruments in which an FPI is allowed to invest under FEMA.

VI. Foreign investment in start-up companies

A "start-up company" means a private company incorporated under the *Companies Act, 2013* and identified under number G.S.R. 180(E) dated February 17, 2016 issued by the DIPP and as amended from time to time.

Start-ups can issue equity or equity linked instruments or debt instruments to FVCI against receipt of foreign remittance, as per the FEMA regulation. In addition, with effect from January 10, 2017, start-ups can issue convertible notes to person resident outside India.

"Convertible note" is an instrument issued by a start-up company acknowledging receipt of money initially as debt, repayable at the option of the holder, or which is convertible into such number of equity shares of that company, within a period not exceeding 5 (five) years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument.

¶5-070 Issue of Instruments

I. Conditions for issue of shares to non-resident investor

The equity instruments should be issued within 60 (sixty) days from the date of receipt of the inward remittance from abroad through banking channels or by debit to the NRE/FCNR(B) (Foreign Currency Non-resident Bank) account of the non-resident investor/escrow account, failing which the amount of consideration should be refunded immediately to the non-resident investor by outward remittance through banking channels or by credit to his NRE/FCNR(B) accounts, as the case may be within 15 (fifteen) days from the date of completion of 60 (sixty) days. In case of partly paid equity shares, the period of 60 (sixty) days shall be reckoned from the date of receipt of each call payment. Non-compliance with the above provision would be reckoned as a contravention under FEMA and could attract penal provisions.

II. Issue of rights shares/bonus shares

A person resident outside India and having investment in an Indian company may make investment in equity instruments (other than share warrants) issued by such company as a rights issue or a bonus issue provided that:

(1) The offer made by the Indian company is in compliance with the provisions of the *Companies Act, 2013*;

(2) Such issue shall not result in a breach of the sectoral cap applicable to the company;

(3) The shareholding on the basis of which the rights issue or the bonus issue has been made must have been acquired and held as per the provisions of the *FEMA (NDI) Rules, 2019*;

(4) The equity instruments (other than share warrants) acquired by the person resident outside India as bonus or rights issue will be subject to the same conditions including restrictions in regard to repatriability as applicable to the original holding against which rights or bonus issue has been made;

(5) In case of a listed Indian company, the rights issue to persons resident outside India shall be at a price determined by the company;

(6) In case of an unlisted Indian company, the rights issue to persons resident outside India shall not be at a price less than the price offered to persons resident in India.

(7) Such investment made through rights issue or bonus issue shall be subject to the conditions as are applicable at the time of such issue.

(8) the mode of payment and attendant conditions for such transactions shall be specified by the Reserve Bank.

(9) An individual who is a person resident outside India exercising a right which was issued when he/she was a person resident in India shall hold the equity instruments (other than share warrants) so acquired on exercising the option on a non-repatriation basis.

With effect from November 12, 2002, the Indian investee company (other than investors who have been allotted such shares as overseas corporate bodies) could, on an application made to it, allot to existing shareholders who are persons resident outside India additional equity instruments (other than share warrants) as a rights issue over and above their rights entitlement subject to individual or sectoral caps, as the case may be.

Renunciation of rights

(1) A person resident in India and a person resident outside India may subscribe for additional shares over and above the shares offered on

rights basis by the company and also renounce the shares offered either in full or part thereof in favour of a person named by them.

(2) The said facility would not be available to investors who have been allotted such shares as overseas corporate bodies.

(3) A person resident outside India who has acquired a right from a person who has renounced it may acquire equity instruments (other than share warrants) against the said rights at the price laid down in the *FEMA (NDI) Rules, 2019*.

(4) The equity instruments to be acquired on renunciation of rights shall be subject to the same conditions including restrictions in regard to repatriability as applicable to the original holding against which rights issue has been made.

Acquisition after renunciation of rights:

A person resident outside India who has acquired a right from a person resident in India who has renounced it may acquire equity instruments (other than share warrants) against the said rights as per pricing guidelines specified under *FEMA (NDI) Rules, 2019.*

III. Acquisition of shares under scheme of merger/demerger/amalgamation

Where a scheme of merger or amalgamation of two or more Indian companies or a reconstruction by way of demerger or otherwise of an Indian company, has been approved by National Company Law Tribunal ("NCLT")/competent authority, the transferee company or the new company, as the case may be, may issue equity instruments to the existing holders of the transferor company resident outside India, subject to the following conditions, namely:

(a) The transfer or issue is in compliance with the entry routes, sectoral caps or investment limits, as the case may be, and the attendant conditionalities of investment by a person resident outside India;

(b) In case the foreign investment is likely to breach the sectoral caps or the attendant conditionalities, the transferor company or the transferee or new company may obtain necessary approvals from the Central Government.

(c) The transferor company or the transferee company or the new company shall not engage in any sector prohibited for foreign investment.

Where a scheme of merger or amalgamation of two or more Indian companies or a reconstruction by way of demerger or otherwise of an Indian company where any of the companies involved is listed on a recognised stock exchange in India, then the scheme of arrangement shall be in compliance with the SEBI (Listing Obligation and Disclosure Requirement) Regulations, 2015.

IV. Issue of shares under Employee Stock Option Scheme (ESOPs)

An Indian company may issue "ESOPs" and/or "sweat equity shares" to its employees/directors or employees/directors of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries who are resident outside India, provided that:

(i) The ESOP has been drawn either in terms of the *SEBI Act, 1992* or the *Companies (Share Capital and Debentures) Rules, 2014*, as the case may be.

(ii) The "ESOPs"/"sweat equity shares" issued to non-resident employees/directors under the applicable rules/regulations are in compliance with the sectoral cap applicable to the said company.

(iii) Issue of "ESOPs"/"sweat equity shares" in a company where investment by a person resident outside India is under the approval route shall require prior approval of the Government.

(iv) Issue of "employee's stock option"/"sweat equity shares" to a citizen of Bangladesh/Pakistan requires prior Government approval.

Provided an individual who is a person resident outside India exercising an option which was issued when he/she was a person resident in India shall hold the equity instruments so acquired on exercising the option on a non-repatriation basis.

V. Issue of convertible notes by an Indian start-up company

Issue of convertible notes by start-ups shall be subject to the following conditions:

(i) A person resident outside India (other than an individual who is citizen of Pakistan or Bangladesh or an entity which is registered/incorporated in Pakistan or Bangladesh), can purchase convertible notes issued by an Indian start-up company for an amount of Rs.25,00,000 (Indian rupees twenty-five lakh) or more in a single tranche.

(ii) A start-up company engaged in a sector where foreign investment requires Government approval may issue convertible notes to a non-resident only with approval of the Government.

(iii) Issue of equity shares against such convertible notes should be in compliance with the entry route, sectoral caps, pricing guidelines and other attendant conditions for foreign investment.

(iv) The mode of payment and other attendant conditions for remittance of sale or maturity proceeds shall be specified by the Reserve Bank.

(v) NRIs or an OCI can acquire convertible notes on non-repatriation basis in accordance with Schedule 4 of the *FEMA (NDI) Rules, 2019*.

(vi) A person resident outside India can acquire or transfer, by way of sale, convertible notes, from or to, a person resident in or outside India, provided the transfer takes place in accordance with entry routes and pricing guidelines as prescribed for equity instruments.

VI. Issue of Depository Receipts (DRs)

Any security or unit in which a person resident outside India is allowed to invest under the *FEMA (NDI) Rules, 2019* shall be eligible instruments for issue of Depository Receipts in terms of the *Depository Receipts Scheme, 2014* ("*DR Scheme, 2014*").

A person will be eligible to issue or transfer eligible instruments to a foreign depository for the purpose of issuance of depository receipts in accordance with the *DR Scheme, 2014* and guidelines issued by the Central Government in this regard.

A domestic custodian may purchase eligible instruments on behalf of a person resident outside India, for the purpose of converting the instruments so purchased into depository receipts in terms of the *DR Scheme, 2014*.

The aggregate of eligible instruments which may be issued or transferred to foreign depositories, along with eligible instruments already held by persons resident outside India, shall not exceed the limit on foreign holding of such eligible instruments under FEMA.

The eligible instruments shall not be issued or transferred 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 or transfer of such instruments to domestic investors under the applicable laws.

Depository Receipts issued under the *Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993* shall be deemed to have been issued under the corresponding provisions of the *DR Scheme, 2014*.

Two-way Fungibility Scheme

A limited two-way Fungibility scheme has been put in place by the Government of India for ADRs/GDRs. Under this Scheme, a stockbroker in India, registered with SEBI, can purchase shares of an Indian company from the market for conversion into ADRs/GDRs based on instructions received from overseas investors. Re-issuance of ADRs/GDRs would be permitted to the extent of ADRs/GDRs which have been redeemed into underlying shares and sold in the Indian market.

Sponsored ADR/GDR issue

An Indian company can also sponsor an issue of ADR/GDR. Under this mechanism, the company offers its resident shareholders a choice to submit their shares back to the company so that on the basis of such shares, ADRs/GDRs can be issued abroad. The proceeds of the ADR/GDR issue are remitted to India and distributed among the resident investors who had offered their Rupee denominated shares for conversion. These proceeds can be kept in Resident

Foreign Currency (Domestic) accounts in India by the resident shareholders who have tendered such shares for conversion into ADRs/GDRs.

VII. Issue of Indian Depository Receipts (IDRs)

Companies incorporated outside India may issue IDRs through a domestic depository, to persons resident in India and outside India, subject to the following conditions:

(i) the issue of IDRs is in compliance with the *Companies (Registration of Foreign Companies) Rules, 2014* and the *SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009*;

(ii) any issue of IDRs by financial/banking companies having presence in India, either through a branch or subsidiary, shall require prior approval of the sectoral regulator(s);

(iii) IDRs shall be denominated in Indian Rupees only;

(iv) the proceeds of the issue of IDRs shall be immediately repatriated outside India by the companies issuing such IDRs.

Purchase/sale of IDRs

FPI or an NRI or an OCI may purchase, hold or sell IDRs. The mode of payment and attendant conditions for remittance of sale or maturity proceeds shall be as specified by the Reserve Bank.

There is an overall cap of USD 5,000,000,000 (US dollar five billion) for raising of capital by issuance of IDRs by eligible foreign companies in Indian markets. This limit is monitored by SEBI.

Transfer, redemption and Two-way Fungibility of IDRs

Redemption/conversion of IDRs into underlying equity shares of the issuing company shall comply with the *FEMA (Transfer or Issue of any Foreign Security) Regulations, 2004*. IDRs shall not be redeemable into underlying equity shares before the expiry of 1 (one) year from the date of issue.

Limited two way fungibility of IDRs is permissible subject to following guidelines:

(i) Listed Indian companies may either sell or continue to hold the underlying shares subject to compliance with the *FEMA (Transfer or Issue of any Foreign Security) Regulations, 2004*.

(ii) Indian mutual funds, registered with SEBI may either sell or continue to hold the underlying shares subject to compliance with the *FEMA (Transfer or Issue of any Foreign Security) Regulations, 2004*.

(iii) Other persons resident in India including resident individuals are allowed to hold the underlying shares only for the purpose of sale within a period of 30 (thirty) days from the date of conversion of the IDRs into underlying shares.

The FEMA provisions shall not apply to the holding of the underlying shares, on redemption of IDRs by the FPIs.

VIII. Foreign Currency Account

Indian companies which are eligible to issue shares to persons resident outside India under the FDI Policy can retain the share subscription amount in a foreign currency account, with the prior approval of Reserve Bank.

¶5-080 Transfer of Instruments

A person resident outside India holding equity instruments of an Indian company or units in accordance with the *FEMA (NDI) Rules, 2019* or a person resident in India, may transfer such equity instruments or units so held by him in compliance with the conditions, if any, specified in the respective schedules of the *FEMA (NDI) Rules, 2019* and subject to the terms and conditions specified hereunder:

I. Transfer from a person resident outside India by way of sale or gift to any person resident outside India

A person resident outside India, not being a non-resident Indian or an overseas citizen of India or an erstwhile overseas corporate body may transfer by way of sale or gift the equity instruments of an Indian company or units held by him to any person resident outside India. It shall also include transfer of equity instruments of an Indian company pursuant to liquidation, merger, de-merger and amalgamation of entities/companies incorporated or registered outside India. Prior Government approval shall be obtained for any transfer in case the company is engaged in a sector which requires Government approval. In case the equity instruments are held by the person resident outside India on a non-repatriable basis, the transfer by way of sale where the transferee intends to hold the equity instruments on a repatriable basis, shall be in compliance with and subject to the adherence to entry routes, sectoral caps or investment limits, as specified in *FEMA (NDI) Rules, 2019* and attendant conditionalities for such investment, pricing guidelines, documentation and reporting requirements for such transfers, as may be specified by the Reserve Bank from time to time.

II. Transfer by an Overseas Corporate Body (OCB)

"Overseas Corporate Body" ("OCB") means an entity derecognised through the *FEMA (Withdrawal of General Permission to OCBs) Regulations, 2003*.

An OCB may transfer equity instruments in accordance with the instructions given in the frequently asked questions (FAQs) on de-recognition of OCBs issued vide AP (DIR Series) Circular No. 14 dated September 16, 2003.

III. Transfer by NRI/OCI by way of gift or sale to any person resident outside India

NRI or OCI holding equity instruments of an Indian company or units on repatriation basis may transfer the same by way of sale or gift to any person resident outside India. Prior Government approval shall be obtained for any transfer in case the company is engaged in a sector which requires Government approval.

Where the acquisition of equity instruments by NRI or an OCI under the provisions of Schedule 3 of the *FEMA (NDI) Rules, 2019* has resulted in a breach of the applicable aggregate NRI/OCI limit or sectoral limits, the NRI or the OCI shall sell such equity instruments to a person resident in India eligible to hold such instruments within the time stipulated by Reserve Bank in consultation with the Central Government. The breach of the said aggregate or sectoral limit on account of such acquisition for the period between the acquisition and sale, provided the sale is within the prescribed time, shall not be reckoned as a contravention under the *FEMA (NDI) Rules, 2019*.

IV. Transfer by NRI/OCI holding equity instruments on a non-repatriable basis or a person resident in India by way of sale to any person resident outside India

A person resident in India holding equity instruments of an Indian company or units, or NRI or an OCI or an eligible investor under Schedule 4 of the *FEMA (NDI) Rules, 2019*, holding equity instruments of an Indian company or units on a non-repatriation basis, may transfer the same to a person resident outside India by way of sale, subject to the adherence to entry routes, sectoral caps/investment limits, pricing guidelines and other attendant conditions as applicable for investment by a person resident outside India and documentation and reporting requirements for such transfers as may be specified by Reserve Bank from time to time.

Provided the entry routes, sectoral caps/investment limits, pricing guidelines and other attendant conditions shall not apply in case the transfer is to NRI or an OCI or an eligible investor under Schedule 4 of the *FEMA (NDI) Rules, 2019* acquiring such investment.

V. Transfer by NRI/OCI holding equity instruments on a non-repatriable basis by way of gift to another NRI/OCI who will hold such equity instruments on a non-repatriable basis

NRI or an OCI or a company/trust/partnership firm incorporated outside India and owned and controlled by NRIs or OCIs holding equity instruments of an Indian company or units on a non-repatriation basis, may transfer the same to a person resident in India by way of gift to NRI or an OCI or a company/trust/partnership firm incorporated outside India and owned and controlled by NRIs or OCIs and the transferee shall hold them on a non-repatriation basis.

VI. Sale by a person resident outside India on a recognised stock exchange in India

A person resident outside India, holding equity instruments of an Indian company or units in accordance with the *FEMA (NDI) Rules, 2019* is permitted to transfer the same to a person resident in India by way of sale/gift or may sell the same on a recognised stock exchange in India in the manner prescribed by SEBI.

The transfer by way of sale is required to be in compliance with and is subject to the adherence to pricing guidelines, documentation and reporting requirements prescribed for such transfers as may be specified by the Reserve Bank in consultation with the Central Government from time to time. Where the equity instruments are held by the person resident outside India on a non-repatriable basis, conditions given in this paragraph will not apply.

VII. Transfer by way of gift by NRI/OCI holding securities on a non-repatriable basis or a resident to a person resident outside India

A person resident in India holding equity instruments or units of an Indian company or NRI or an OCI or an eligible investor under Schedule 4 of the *FEMA (NDI) Rules, 2019* holding equity instruments or units of an Indian company on a non-repatriation basis may transfer the same to a person resident outside India by way of gift with the prior approval of the Reserve Bank, in the manner prescribed, and subject to the following conditions:

(a) The donee is eligible to hold such a security under relevant schedules of the *FEMA (NDI) Rules, 2019*.

(b) The gift does not exceed 5% (five percent) of the paid up capital of the Indian company/each series of debentures/each mutual fund scheme. The 5% (five percent) will be on cumulative basis by a single person to another single person.

(c) The applicable sectoral cap in the Indian company is not breached.

(d) The donor and the donee shall be "relatives" within the meaning in Section 2(77) of the *Companies Act, 2013*.

(e) The value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift during the financial year does not exceed the rupee equivalent of USD 50,000 (US dollar fifty thousand).

(f) Such other conditions as considered necessary in public interest by the Central Government.

(g) The application to the Reserve Bank shall be made through the Authorised Dealer ("**AD**") bank.

VIII. Transfer by a person resident outside India of equity instruments containing an optionality clause

A person resident outside India holding equity instruments of an Indian company containing an optionality clause in accordance with FEMA (NDI) Rules and exercising the option/right, may exit without any assured return, subject to the pricing guidelines prescribed in the *FEMA (NDI) Rules, 2019* and a minimum lock in period of 1 (one) year or minimum lock-in period as prescribed in the *FEMA (NDI) Rules, 2019*, whichever is higher.

IX. Deferred payment consideration

In case of transfer of equity instruments between a person resident in India and a person resident outside India, an amount not exceeding 25% (twenty-five percent) of the total consideration:

(a) Can be paid by the buyer on a deferred basis within a period not exceeding 18 (eighteen) months from the date of the transfer agreement;

(b) Can be settled through an escrow arrangement between the buyer and the seller for a period not exceeding 18 (eighteen) months from the date of the transfer agreement; or

(c) Can be indemnified by the seller for a period not exceeding 18 (eighteen) months from the date of the payment of the full consideration, if the total consideration has been paid by the buyer to the seller.

The total consideration finally paid for the shares shall be compliant with the applicable pricing guidelines.

X. Opening of escrow account

In case of transfer of equity instruments between a person resident in India and a person resident outside India, a person resident outside India may open an Escrow account in accordance with the *FEMA (Deposit) Regulations, 2016*. Such Escrow account may be funded by way of inward remittance through banking channels and/or by way of guarantee issued by an AD bank, subject to terms and conditions as specified in the *FEMA (Guarantees) Regulations, 2000*.

Where the transaction is governed by SEBI Regulations/guidelines, operation of the Escrow accounts for securities shall be in accordance with the relevant SEBI Regulations, if any.

XI. Transfer by way of pledge

The transfer of equity instruments of an Indian company or units of an investment vehicle by way of pledge is subject to the following terms and conditions:

(a) Any person being a promoter of a company registered in India (borrowing company), which has raised ECB in compliance with the *FEMA (Borrowing and Lending in Foreign Exchange) Regulations, 2000*, may pledge the shares of the borrowing company or that of its associate resident companies for the purpose of securing the ECB raised by the borrowing company, subject to the following conditions:

  (i) The period of such pledge shall be co-terminus with the maturity of the underlying ECB.

  (ii) In case of invocation of pledge, transfer shall be in accordance with the *FEMA (NDI) Rules, 2019* and directions issued by the Reserve Bank.

(iii) The Statutory Auditor has certified that the borrowing company will utilise/has utilised the proceeds of ECB for the permitted end use/s only.

(iv) No person shall pledge any such share unless a no-objection has been obtained from an AD bank that the above conditions have been complied with.

(b) Any person resident outside India holding equity instruments in an Indian company or units of an investment vehicle may pledge the equity instruments or units, as the case may be:

(i) In favour of a bank in India to secure the credit facilities being extended to such Indian company for bona fide purposes, subject to the following conditions:

- In case of invocation of pledge, transfer should be in accordance with instructions in vogue at the time of creation of pledge.
- Submission of a declaration/annual certificate from the statutory auditor of the investee company that the loan proceeds will be/have been utilised for the declared purpose.
- The Indian company has to follow the relevant SEBI disclosure norms, if any.
- Pledge in favour of the lender (bank) would be subject to compliance with the Section 19 of the *Banking Regulation Act, 1949*.
- The conditions hereinabove will apply suitably for units.

(ii) In favour of an overseas bank to secure the credit facilities being extended to such person or a person resident outside India who is the promoter of such Indian company or the overseas group company of such Indian company, subject to the following conditions:

- Loan is availed only from an overseas bank.
- Loan is utilised for genuine business purposes overseas and not for any investments either directly or indirectly in India.
- Overseas investment should not result in any capital inflow into India.
- In case of invocation of pledge, transfer should be in accordance with the policy in vogue at the time of creation of pledge.
- Submission of a declaration/annual certificate from a Chartered Accountant/Certified Public Accountant of the non-resident borrower that the loan proceeds will be/have been utilised for the declared purpose.
- The conditions hereinabove will apply suitably for units.

(iii) In favour of an NBFC registered with the Reserve Bank to secure the credit facilities being extended to such Indian company for bona fide purposes, subject to the following conditions:

- In case of invocation of pledge, transfer of equity instruments should be in accordance with the credit concentration norm as stated in the *Master Direction – NBFC – Non-Systemically Important Non-Deposit taking Company (Reserve Bank) Directions, 2016* (Para 22) and *Master Direction – NBFC – Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016* (Para 22).
- The AD bank may obtain a board resolution "ex ante", passed by the Board of Directors of the investee company, that the loan proceeds received consequent to pledge of equity instruments will be utilised by the investee company for the declared purpose.
- The AD bank may also obtain a certificate "ex post", from the statutory auditor of investee company, that the loan proceeds received consequent to pledge of shares, have been utilised by the investee company for the declared purpose.
- The Indian company has to follow the relevant SEBI disclosure norms, as applicable.
- Under no circumstances, the credit concentration norms should be breached by the NBFC. If there is a breach on invocation of pledge, the equity instruments should be sold and the breach shall be rectified within a period of 30 (thirty) days from the date of invocation of pledge.

(iv) The AD bank should satisfy itself of the compliance of the stipulated conditions.

(c) Equity instruments of an Indian company or units transferred by way of pledge should be unencumbered.

(d) The company shall obtain no-objection certificate from the existing lenders, if any.

(e) In case of invocation of pledge, transfer of equity instruments of an Indian company or units shall be in accordance with entry routes, sectoral caps/investment limits, pricing guidelines and other attendant conditions at the time of creation of pledge.

(f) Any other transfer by way of pledge would require the prior approval of the Reserve Bank. Cases may be forwarded to the Reserve Bank with the following documents:

(i) A copy of the board resolution passed by the non-resident company/ies approving the pledge of security acquired (number/percentage of securities to be pledged) of investee company held by them for securing the loan facility in favour of the lender/s.

(ii) A copy of the board resolution passed by the investee company approving pledge of securities acquired in favour of the lender for the loan facility availed by the investee company.

(iii) A copy of the loan agreement/pledge agreement containing security clause duly certified by the company secretary, requiring the pledge of shares of investee company.

(iv) The details of the facility availed/proposed to be availed.

(v) The details of reporting of the acquisition of the security as prescribed in terms of the *FEMA (NDI) Rules, 2019*, if any.

XII. Transfer from a resident to a person resident outside India where the investee company is in the financial sector

In case of transfer of equity instruments of a company in the financial sector from a resident to a person resident outside India, "fit and proper/due diligence" requirement as regards the non-resident investor as stipulated by the respective financial sector regulator shall have to be complied with by the AD bank.

XIII. Mode of payment

The amount of consideration for transfer of equity instruments between a person resident in India and a person resident outside India should be received from abroad or remitted from India, as the case may be, through banking channels in India or paid out from or received in, as the case may be, NRE/FCNR(B)/Escrow accounts maintained in accordance with the *FEMA (Deposit) Regulations, 2016*.

In case an investment is held on a non-repatriation basis, the amount of consideration for transfer may be paid out from or received in, as the case may be, NRO account maintained in accordance with the *FEMA (Deposit) Regulations, 2016*.

¶5-090 Pricing Guidelines

Issue of equity instruments: Price of equity instruments of an Indian company issued by such company to a person resident outside India shall not be less than:

(i) The price worked out on the basis of SEBI guidelines in case of listed companies or on the basis of the *SEBI (Delisting of Equity Shares) Regulations, 2009* in case of a company going through a delisting process.

(ii) The valuation of equity instruments done as per any internationally accepted pricing methodology on arm's length basis duly certified by a SEBI registered Merchant Banker or a Chartered Accountant or a practicing Cost Accountant, in case of an unlisted Indian Company.

In case of convertible equity instruments, the price/conversion formula of the instrument should be determined upfront at the time of issue of the instrument. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such instruments, in accordance with the extant FEMA Rules & Regulations.

Transfer of equity instruments from a person resident in India to a person resident outside India: Price of equity instruments transferred shall not be less than:

(i) The price worked out in accordance with the relevant SEBI guidelines in case of a listed Indian company;

(ii) The price at which a preferential allotment of shares can be made under the SEBI guidelines, as applicable, in case of a listed Indian company or in case of a company going through a delisting process as per the *SEBI (Delisting of Equity Shares) Regulations, 2009*. The price should be determined for such duration as specified in the SEBI Guidelines, preceding the relevant date, which shall be the date of purchase or sale of shares. In case of a company which has completed a delisting process, the price as determined for such duration as specified in the SEBI Guidelines will apply for those shares which have not been tendered to the company during the delisting process;

(iii) The valuation of equity instruments is done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a SEBI registered Merchant Banker or a practicing Cost Accountant, in case of an unlisted Indian Company.

Transfer of equity instruments by a person resident outside India to a person resident in India: Price of equity instruments transferred shall not exceed:

(i) The price worked out in accordance with the relevant SEBI guidelines in case of a listed Indian company;

(ii) The price at which a preferential allotment of shares can be made under the SEBI guidelines, as applicable, in case of a listed Indian company or in case of a company going through a delisting process as per the *SEBI (Delisting of Equity Shares) Regulations, 2009*. The price is determined for such duration as specified in the SEBI guidelines, preceding the relevant date, which shall be the date of purchase or sale of shares.

(iii) The valuation of equity instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Securities and Exchange Board of India registered Merchant Banker or a practicing Cost Accountant, in case of an unlisted Indian Company.

The guiding principle would be that the person resident outside India is not guaranteed any assured exit price at the time of making such investment/ agreement and shall exit at the price prevailing at the time of exit.

Subscription to Memorandum of Association: Where non-residents (including NRIs) are making investments in an Indian company in compliance with the provisions of the *Companies Act, 2013*, by way of subscription to its

Memorandum of Association, such investments may be made at face value subject to entry route and sectoral caps.

Swap of equity instruments: In case of swap of equity instruments, subject to the condition that irrespective of the amount, valuation involved in the swap arrangement will have to be made by a Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country.

Share warrants: In case of share warrants, their pricing and the price/conversion formula shall be determined upfront. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such warrants.

Partly paid shares: In case of partly paid equity shares, the pricing shall be determined upfront.

Investment in a LLP: Investment in a LLP either by way of capital contribution or by way of acquisition/transfer of profit shares, should not be less than the fair price worked out as per any valuation norm which is internationally accepted/adopted as per market practice (hereinafter referred to as "fair price of capital contribution/profit share of a LLP") and a valuation certificate to that effect should be issued by a Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.

Transfer of capital contribution/profit share of a LLP: In case of transfer of capital contribution/profit share of a LLP from a person resident in India to a person resident outside India, the transfer should be for a consideration not less than the fair price of capital contribution/profit share of a LLP. In case of transfer of capital contribution/profit share of a LLP from a person resident outside India to a person resident in India, the transfer should be for a consideration which is not more than the fair price of the capital contribution/profit share of a LLP.

Non-applicability of pricing guidelines: The pricing guidelines are not applicable for investment in equity instruments by a person resident outside India on non-repatriation basis. The pricing guidelines will not be applicable for any transfer by way of sale done in accordance with SEBI Regulations where the pricing is prescribed by SEBI. A chartered accountant's certificate to the effect that relevant SEBI Regulations/guidelines have been complied with has to be attached to the form FC-TRS filed with the AD bank.

¶5-100 Reporting Obligations for Transfer of Shares

The Reserve Bank has issued A.P (DIR Series) Circular No. 30 dated June 07, 2018 to integrate the extant reporting structures of various types of foreign investment in India in a Single Master Form ("SMF") which is required to be filed online. Indian entities not complying with the reporting requirement will not be able to receive foreign investment and will be considered to be non-compliant under FEMA.

As per the above-mentioned circular, the reporting requirement for an Investment in India by a person resident outside India in SMF shall be as follows:

(1) **Form Foreign Currency-Gross Provisional Return (FC-GPR):** An Indian company issuing equity instruments to a person resident outside India and where such issue is reckoned as FDI, for the purpose of the *FEMA (NDI) Rules, 2019*, shall report such issue in Form FC-GPR to the Regional Office concerned of the Reserve Bank under whose jurisdiction the Registered office of the company operates, not later than 30 (thirty) days from the date of issue of equity instruments. Issue of "participating interest/rights" in oil fields by Indian companies to a person resident outside India would be treated as foreign investment and shall be reported in Form FC-GPR.

(2) **Form Foreign Currency-Transfer of Shares (FC-TRS):**

(a) Form FCTRS shall be filed for transfer of equity instruments in accordance with the *FEMA (NDI) Rules, 2019* between:

(i) A person resident outside India holding equity instruments in an Indian company on a repatriable basis and person resident outside India holding equity instruments on a non-repatriable basis; and

(ii) A person resident outside India holding equity instruments in an Indian company on a repatriable basis and a person resident in India,

The onus of reporting shall be on the resident transferor/transferee or the person resident outside India holding equity instruments on a non-repatriable basis, as the case may be.

Transfer of equity instruments in accordance with the *FEMA (NDI) Rules, 2019*, by way of sale between a person resident outside India holding equity instruments on a non-repatriable basis and person resident in India is not required to be reported in Form FC-TRS.

(b) Transfer of equity instruments on a recognised stock exchange by a person resident outside India shall be reported by such person in Form FC-TRS to the AD bank.

(c) Transfer of equity instruments on deferred basis, through an escrow arrangement or for an indemnity as per the *FEMA (NDI) Rules, 2019*, shall be reported in Form FC-TRS to the AD bank on receipt of every tranche of payment. The onus of reporting shall be on the resident transferor/transferee.

(d) Transfer of "participating interest/rights" in oil fields shall be reported in Form FC-TRS.

The form FC-TRS shall be filed with the AD bank within 60 (sixty) days of transfer of equity instruments or receipt/remittance of funds, whichever is earlier.

(3) **Form Employees' Stock Option (ESOP):** An Indian company issuing employees' stock option to persons resident outside India who are its employees/directors or employees/directors of its holding company /joint venture/wholly owned overseas subsidiary/subsidiaries shall file Form-ESOP, within 30 (thirty) days from the date of issue of employees' stock option.

(4) **Form Depository Receipt Return (DRR):** The domestic custodian shall report in Form DRR, to the Reserve Bank, the issue/transfer of depository receipts issued in accordance with the *Depository Receipt Scheme, 2014* within 30 (thirty) days of close of the issue.

(5) **Form LLP (I):** A Limited Liability Partnership (LLP) receiving amount of consideration for capital contribution and acquisition of profit shares shall file Form LLP (I), within 30 (thirty) days from the date of receipt of the amount of consideration.

(6) **Form LLP (II):** The disinvestment/transfer of capital contribution or profit share between a resident to a non-resident (or vice versa) shall be reported in Form LLP (II) to the AD bank within 60 (sixty) days from the date of receipt of funds. The onus of reporting shall be on the resident transferor/transferee.

(7) **Downstream Investment (DI):** An Indian company making downstream investment in another Indian company which is considered as indirect foreign investment for the investee company in terms of the *FEMA (NDI) Rules, 2019*, shall notify the Secretariat for Industrial Assistance, DPIIT and file Form DI within 30 (thirty) days of such investment and, even if equity instruments have not been allotted along with the modality of investment in new/existing ventures (with/without expansion program);

(8) **Form Convertible Notes (CN):**

(a) The Indian start-up company issuing Convertible Notes to a person resident outside India shall report such inflows to the AD bank in Form CN within 30 (thirty) days of such issue.

(b) A person resident in India, who may be a transferor or transferee of Convertible Notes issued by an Indian start-up company shall report such transfers to or from a person resident outside India, as the case may be, in Form CN to the AD bank within 30 (thirty) days of such transfer.

(9) **Form InVi:** Investment Vehicle receiving investment by a person resident outside India shall file the form within 30 (thirty) days of the date of issue of units.

In addition to the SMF, following forms are required to be separately filled in case of foreign investment under FEMA:

(1) **Advance Remittance Form (ARF):** An Indian company which has received amount of consideration for issue of equity instruments and

where such issue is reckoned as FDI for the purpose of the *FEMA (NDI) Rules, 2019*, shall report such receipt (including each upfront/call payment) in Form ARF to the regional office concerned of the Reserve Bank, not later than 30 (thirty) days from the date of receipt.

(2) **Annual Return on Foreign Liabilities and Assets (FLA):** An Indian Company which has received FDI or a LLP which has received investment by way of capital contribution in the previous year including the current year, should submit form FLA to the Reserve Bank on or before the 15th day of July of each year. Year for this purpose shall be reckoned as April to March.

(3) **LEC (FII):** The AD category I banks shall report to the Reserve Bank in Form LEC (FII) the purchase/transfer of equity instruments by FPIs on the stock exchanges in India.

(4) **LEC (NRI):** The AD category I banks shall report to the Reserve Bank in Form LEC (NRI) the purchase/transfer of equity instruments by Non-Resident Indians or Overseas Citizens of India stock exchanges in India.

The format, periodicity and manner of submission of such reporting are prescribed by Reserve Bank in this regard. Further, unless otherwise specifically stated in the *FEMA (NDI) Rules, 2019*, all reporting shall be made through or by an AD bank, as the case may be.

Delays in reporting

As per the *FEMA (NDI) Rules, 2019*, the person/entity responsible for filing the reports/forms shall be liable for payment of late submission fee, as may be decided by the Reserve Bank, in consultation with the Central Government, for any delays in reporting. Reserve Bank has come out with the Master Direction No. 4/2015-16 dated January 01, 2016 (as amended from time to time) for compounding of contraventions under the *Foreign Exchange Management Act, 1999*, which provides that compounding powers are delegated to the regional offices of the Reserve Bank to compound the delay in filing forms/reports.

Persons/entities responsible for filing the reports are liable for payment of late submission fee for any delays in reporting. The payment of late submission fee is an option for regularising reporting delays without undergoing the compounding procedure. Payment of late submission fee without undergoing the compounding procedure is applicable only for the transactions undertaken on or after November 07, 2017. The detailed procedure for calculation and payment of late submission fee is prescribed by Reserve Bank under Master Direction No. 18/2015-16 dated January 01, 2016 (as amended from time to time).

¶5-110 Downstream Investment

"Downstream investment" shall mean investment made by an Indian entity which has total foreign investment in it, or an Investment Vehicle in the equity instruments or the capital, as the case may be, of another Indian entity. For the purpose of downstream investment under the *FEMA (NDI) Rules, 2019*:

(a) "Ownership of an Indian company" is the beneficial holding of more than 50% (fifty percent) of the equity instruments of such company.

(b) "Ownership of a LLP" is the contribution of more than 50% (fifty percent) in its capital and having majority profit share.

(c) "Company owned by resident Indian citizens" is an Indian company where ownership is vested in resident Indian citizens and/or Indian companies, which are ultimately owned and controlled by resident Indian citizens.

(d) A "LLP owned by resident Indian citizens" is a LLP where ownership is vested in resident Indian citizens and/or Indian entities, which are ultimately owned and controlled by resident Indian citizens.

(e) "Company owned by persons resident outside India" is an Indian company that is owned by persons resident outside India.

(f) A "LLP owned by persons resident outside India" is a LLP that is owned by persons resident outside India.

(g) "Control" is the right to appoint majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreement.

(h) For the purpose of LLP, "control" is the right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of a LLP.

(i) "Company controlled by resident Indian citizens" means an Indian company, the control of which is vested in resident Indian citizens and/or Indian companies which are ultimately owned and controlled by resident Indian citizens.

(j) A "LLP controlled by resident Indian citizens" is a LLP, the control of which is vested in resident Indian citizens and/or Indian entities, which are ultimately owned and controlled by resident Indian citizens.

(k) "Company controlled by persons resident outside India" is an Indian company that is controlled by persons resident outside India.

(l) A "LLP controlled by persons resident outside India" is a LLP that is controlled by persons resident outside India.

(m) "Holding company" will have the same meaning as assigned to it under the *Companies Act, 2013*.

(n) "Indirect foreign investment" is downstream investment received by an Indian entity from:

(i) Another Indian entity which has received foreign investment and which is not owned and not controlled by resident Indian citizens, or is owned or controlled by persons resident outside India; or

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

(o) "Total foreign investment" is the sum of foreign investment and indirect foreign investment and the same will be reckoned on a fully diluted basis.

(p) "Strategic downstream investment" means downstream investment by banking companies incorporated in India in their subsidiaries, joint ventures and associates.

Prohibition

No person resident in India other than an Indian entity can receive indirect foreign investment.

Conditions for downstream investment that is treated as indirect foreign investment for the investee Indian entity

An Indian entity which has received indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other FDI linked performance conditions as applicable for foreign investment.

Downstream investment by a LLP not owned and not controlled by resident Indian citizens or owned or controlled by person resident outside India is allowed in an Indian company operating in sectors where foreign investment up to 100% (one hundred percent) is permitted under automatic route and there are no FDI linked performance conditions.

Indirect foreign Investment is permitted in a LLP in sectors where foreign investment is allowed 100% (one hundred percent) under automatic route and there are no FDI linked performance conditions.

If the sponsors/managers/investment managers of an investment vehicle are individuals, for the downstream investment made by such investment vehicle not to be considered as indirect foreign investment for the investee, the sponsors/managers/investment managers of the investment vehicle should be resident Indian citizens. In case the sponsor/manager/investment manager is organised in any other form, SEBI will determine whether it is foreign owned and/or controlled or not.

The downstream investment that is treated as indirect foreign investment for the investee Indian entity should have the approval of the Board of Directors as also a shareholders' agreement, if any, of the investing Indian entity.

The Indian entity making the downstream investment that is treated as indirect foreign investment for the investee Indian entity is required to bring in requisite funds from abroad and not use funds borrowed in the domestic markets. Subscription by persons resident outside India to non-convertible debentures issued by an Indian company will not be construed as funds borrowed/leveraged in the domestic market. However, raising of debt and its utilisation will have to comply with FEMA.

Downstream investment which is treated as indirect foreign investment for the investee Indian entity can be made through internal accruals. For this purpose, internal accruals will mean profits transferred to reserve account after payment of taxes.

When a company which does not have any operations makes downstream investment which is treated as indirect foreign investment for the investee Indian entity or commences business(s), it will have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.

Downstream investment/s under Corporate Debt Restructuring (CDR), mechanism

With effect from July 31, 2012, downstream investment/s made under Corporate Debt Restructuring (CDR), or other loan restructuring mechanism, or in trading book, or for acquisition of shares due to defaults in loans, by a banking company, as defined in clause (c) of Section 5 of the *Banking Regulation Act, 1949*, incorporated in India, which is not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India, will not count towards indirect foreign investment. However, their strategic downstream investment will be counted towards indirect foreign investment for the company in which such investment is being made.

Conditions for exit

Equity instrument of an Indian company held by another Indian company which has received foreign investment and is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India may be transferred to:

(a) A person resident outside India, subject to reporting requirements as specified by the Reserve Bank. However, pricing guidelines will not apply for such a transfer.

(b) A person resident in India subject to adherence to pricing guidelines.

(c) An Indian company which has received foreign investment and is not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India. Pricing and reporting guidelines will not apply.

The conditions mentioned herein shall be construed accordingly for a LLP.

Responsibility for compliance

The first level Indian company making downstream investment shall be responsible for ensuring compliance 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 Reserve Bank in whose jurisdiction the Registered Office of the company is located and shall also obtain acknowledgement from the Regional Office.

The conditions mentioned herein shall be construed accordingly for a LLP.

Foreign investment into an Indian company engaged only in the activity of investing in the capital of other Indian company/ies

Foreign Investment in investing companies registered as NBFC with the Reserve Bank, being overall regulated, would be under 100% (one hundred perc ent) automatic route. 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 Reserve Banks regulatory framework for CICs.

For undertaking activities which are under automatic route and without FDI linked performance conditions, Indian company which does not have any operations and also does not have any downstream investments, will be permitted to have infusion of foreign investment under automatic route. However, approval of the Government will be required for such companies for infusion of foreign investment for undertaking activities which are under Government route, regardless of the amount or extent of foreign investment. Further, as and when such a company commences business(s) or makes downstream investment, it will have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.

The onus of compliance with the sectoral/statutory caps on foreign investment and attendant conditions if any, will be on the company receiving foreign investment.

Guidelines for calculating total foreign investment in Indian companies

(a) Any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned for total foreign investment.

(b) FCCBs and DRs having underlying of instruments in the nature of debt, shall not be reckoned for total foreign investment.

(c) The methodology for calculating total foreign investment would apply at every stage of investment in Indian companies and thus in each and every Indian company;

(d) For the purpose of downstream investment, the portfolio investment held as on March 31 of the previous financial year in the Indian company making the downstream investment shall be considered for computing its total foreign investment.

(e) The indirect foreign investment received by a wholly owned subsidiary of an Indian company will be limited to the total foreign investment received by the company making the downstream investment.

¶5-120 Calculation of Total Foreign Investment

Investment in an eligible Indian entity can be made both by non-resident as well as resident Indian entities. Any non-resident investment in an Indian company is direct foreign investment. Investment in resident Indian entities could again comprise of both resident and non-resident investment. Thus, such an Indian company would have indirect foreign investment, if the Indian investing company has foreign investment in it. The indirect investment can also be a cascading investment, that is, through multi-layered structure.

For the purpose of computation of indirect foreign investment in an Indian company, foreign investment in an Indian company shall include all types of foreign investments that is FDI; investment by FIIs (holding as on March 31), FPIs (holding as on March 31); NRIs; ADRs; GDRs; FCCBs; investment vehicles fully, compulsorily and mandatorily convertible preference shares and fully, compulsorily and mandatorily convertible Debentures or units of an investment vehicle.

Counting the direct foreign investment

All investment directly by a non-resident entity into the Indian company would be counted towards foreign investment.

Counting of indirect foreign investment

(a) The foreign investment through the investing Indian company/LLP would not be considered for calculation of the indirect foreign investment in case of Indian companies/LLPs which are "owned and controlled" by resident Indian citizens and/or Indian Companies/LLPs which are owned and controlled by resident Indian citizens.

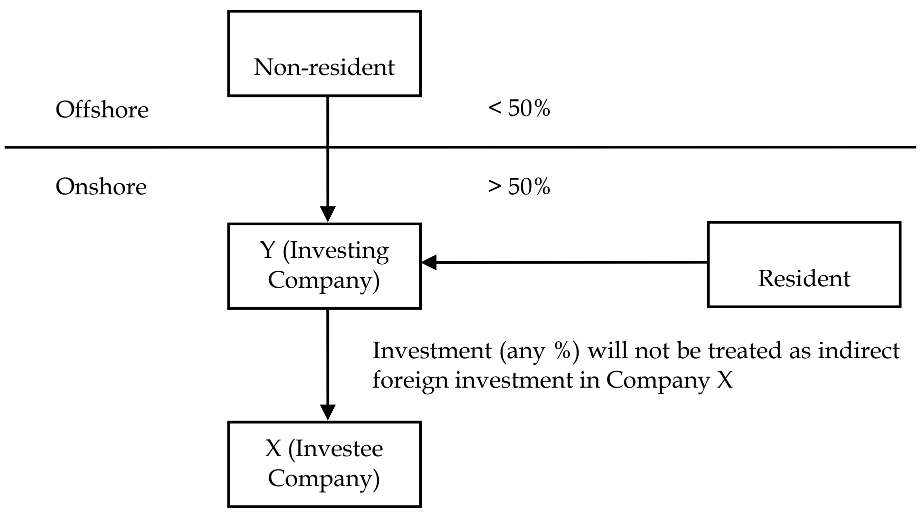
(b) Downstream investment by an investment vehicle shall be regarded as foreign investment if either the sponsor or the manager or the investment manager is not Indian "owned and controlled" as defined in the *FEMA (NDI) Rules, 2019*. Provided that for sponsors or managers or investment managers organised in a form other than companies or LLPs, SEBI shall determine whether the sponsor or manager or investment manager is foreign owned and controlled.

(c) For cases where condition (a) above is not satisfied or if the investing company is owned or controlled by "non-resident entities", the entire investment by the investing company/LLP into the subject Indian Company would be considered as indirect foreign investment, provided that, as an exception, the indirect foreign investment in only the 100% (one hundred percent) owned subsidiaries of operating-cum-investing/investing companies, will be limited to the foreign investment in the operating-cum-investing/investing company. This exception is made since the downstream investment of a 100% (one hundred percent) owned subsidiary of the holding company is akin to investment made by the holding company and the downstream investment should be a mirror image of the holding company. This exception, however, is strictly for those cases where the entire capital of the downstream subsidiary is owned by the holding company.

Illustrations

To illustrate, if the indirect foreign investment is being calculated for Company X which has investment through an investing Company Y having foreign investment, the following would be the method of calculation:

(A) where Company Y has foreign investment less than 50% (fifty perc ent) - Company X would not be taken as having any indirect foreign investment through Company Y.

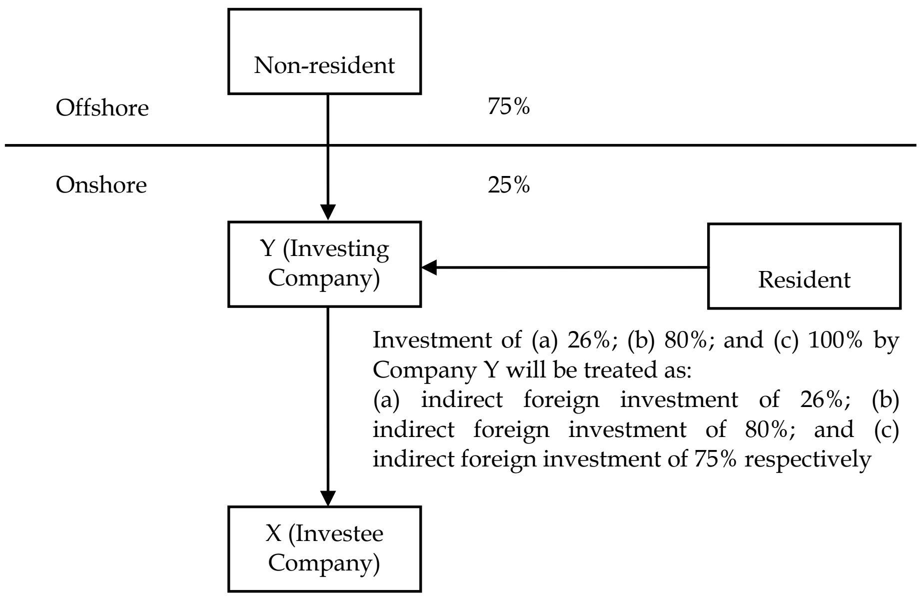


(B) where Company Y has foreign investment of say 75% (seventy-five percent) and:

(i) invests 26% (twenty-six percent) in Company X, the entire 26% (twenty-six percent) investment by Company Y would be treated as indirect foreign investment in Company X;

(ii) invests 80% (eighty percent) in Company X, the indirect foreign investment in Company X would be taken as 80% (eighty percent);

(iii) where Company X is a wholly owned subsidiary of Company Y (that is Company Y owns 100% (one hundred percent) shares of Company X), then only 75% (seventy-five percent) would be treated as indirect foreign equity and the balance 25% (twenty-five percent) would be treated as resident held equity. The indirect foreign equity in Company X would be computed in the ratio of 75:25 (seventy-five: twenty-five) in the total investment of Company Y in Company X.



The total foreign investment would be the sum total of direct and indirect foreign investment.

The methodology for calculation of total foreign investment would apply at every stage of investment in Indian companies and thus in each and every Indian company.

Additional conditions

The full details about the foreign investment including ownership details, etc, in Indian company/ies and information about the control of the company/ies would be furnished by the Company/ies to the Government of India at the time of seeking approval.

In any sector/activity, where Government approval is required for foreign investment and in cases where there are any inter-se agreements between/amongst share-holders which have an effect on the appointment of the Board of Directors or on the exercise of voting rights or of creating voting rights disproportionate to shareholding or any incidental matter thereof, such agreements will have to be informed to the approving authority. The approving authority will consider such inter-se agreements for determining ownership and control when considering the case for approval of foreign investment.

In all sectors attracting sectoral caps, the balance equity, that is beyond the sectoral foreign investment cap, would specifically be beneficially owned by/held with/in the hands of resident Indian citizens and Indian companies, owned and controlled by resident Indian citizens.

In the Information & Broadcasting sector, where the sectoral cap is up to 49% (forty-nine percent), the company would need to be "owned and controlled" by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens.

(A) For this purpose, the equity held by the largest Indian shareholder would have to be at least 51% (fifty-one percent) of the total equity, excluding the equity held by Public Sector Banks and Public Financial Institutions, as defined in Section 4A of the *Companies Act, 1956* or Section 2(72) of the *Companies Act, 2013*, as the case may be. The term "largest Indian shareholder", will include any or a combination of the following:

    (I) In the case of an individual shareholder,

        (a) The individual shareholder,

        (b) A relative of the shareholder within the meaning of Section 2(77) of the *Companies Act, 2013*.

        (c) A company/group of companies in which the individual shareholder/HUF to which he belongs has management and controlling interest.

    (II) In the case of an Indian company,

        (a) The Indian company

        (b) A group of Indian companies under the same management and ownership control.

(B) "Indian company" shall be a company which must have a resident Indian or a relative as defined under Section 2(77) of the *Companies Act, 2013*/HUF, either singly or in combination holding at least 51% (fifty-one percent) of the shares.

(C) Provided that, in case of a combination of all or any of the entities mentioned in sub-clauses (I) and (II) above, each of the parties shall have entered into a legally binding agreement to act as a single unit in managing the matters of the applicant company.

If a declaration is made by persons as per Section 187C of the *Indian Companies Act, 1956* or Section 89 of the *Companies Act, 2013* as the case may be about a beneficial interest being held by a non-resident entity, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.

The above-mentioned policy and methodology would be applicable for determining the total foreign investment in all sectors, except in sectors where it is specified in a statute or a rule thereunder. The above methodology of determining direct and indirect foreign investment therefore does not apply to the insurance sector which will continue to be governed by the relevant regulation. Similarly, above methodology will also not apply to downstream investments by an investment vehicle.

¶5-130 Taxes, Remittance and Repatriation

Taxes

All transactions relating to foreign investment in India are required to be undertaken through banking channels in India and are subject to payment of applicable taxes and other duties/levies in India.

Remittance on sale proceeds

Remittance of sale proceeds of an Indian security held by a person resident outside India will have to be made only in accordance with the *FEMA (NDI) Rules, 2019*.

Sale proceeds of shares and securities and their remittance is "remittance of asset" and is governed by the *FEMA (Remittance of Assets) Regulations, 2000*.

AD bank can allow the remittance of sale proceeds of a security (net of applicable taxes) to the seller of shares resident outside India, provided the security has been held on repatriation basis, and either the security has been sold in compliance with the pricing guidelines or the Reserve Bank's approval has been obtained in other cases for sale of the security and remittance of the sale proceeds thereof.

Remittance on winding-up/liquidation of companies

AD category – I banks have been allowed to remit winding up proceeds of companies in India, which are under liquidation, subject to payment of applicable taxes. Liquidation may be subject to any order issued by the court winding up the company or the official liquidator in case of voluntary winding up under the provisions of the *Companies Act, 2013*. AD category – I banks shall allow the remittance provided the applicant submits:

(a) No objection or tax clearance certificate from Income Tax Department for the remittance.

(b) Auditor's certificate confirming that all liabilities in India have been either fully paid or adequately provided for.

(c) Auditor's certificate to the effect that the winding up is in accordance with the provisions of the *Companies Act, 2013*.

(d) In case of winding up otherwise than by a court, an auditor's certificate to the effect that there are no legal proceedings pending in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

Repatriation of dividend

Dividends are freely repatriable without any restrictions (net after Tax deduction at source or Dividend Distribution Tax, if any, as the case may be). The repatriation is governed by the provisions of the *FEMA (Current Account Transactions) Rules, 2000*, as amended from time to time.

Repatriation of interest

Interest on fully, mandatorily and compulsorily convertible debentures is also freely repatriable without any restrictions (net of applicable taxes). The repatriation is governed by the provisions of the *FEMA (Current Account Transactions) Rules, 2000*, as amended from time to time.

¶5-140 Violations and Consequences

FDI is a capital account transaction and thus any violations are covered by the penal provisions of FEMA. Reserve Bank administers the FEMA and Directorate of Enforcement under the Ministry of Finance is the authority for the enforcement of FEMA. The Directorate takes up investigation in any contravention of FEMA.

Penalties

(a) If a person violates/contravenes any FDI regulations, by way of breach/non-adherence/non-compliance/contravention of any rule, regulation, notification, press note, press release, circular, direction or order issued in exercise of the powers under FEMA or contravenes any conditions subject to which an authorisation is issued by the Government of India/Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contraventions where such amount is quantifiable, or up to Rs.2,00,000 (Indian rupees two lakh) where the amount is not quantifiable, and where such contraventions is a continuing one, further penalty which may extend to Rs.5,000 (Indian rupees five thousand) for every day after the first day during which the contraventions continues.

(b) Where a person committing a contravention of any provisions of FEMA or of any rule, direction or order made there under is a company (company means anybody corporate and includes a firm or other association of individuals as defined in the *Companies Act, 2013*), every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

(c) Any Adjudicating Authority adjudging any contraventions under (a), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government.

Adjudication and appeals

For the purpose of adjudication of any contravention of FEMA, the Ministry of Finance as per the provisions contained in the *FEMA (Adjudication Proceedings and Appeal) Rules, 2000* appoints officers of the Central Government as the Adjudicating Authorities for holding an enquiry in the manner prescribed. A reasonable opportunity has to be given to the person alleged to have committed contraventions against whom a complaint has been made for being heard before imposing any penalty.

The Central Government may appoint as per the provisions contained in the *FEMA (Adjudication Proceedings and Appeal) Rules, 2000*, an Appellate Authority/Appellate Tribunal to hear appeals against the orders of the adjudicating authority.

Compounding proceedings

Under the *Foreign Exchange (Compounding Proceedings) Rules, 2000*, the Central Government may appoint "Compounding Authority" an officer either from Enforcement Directorate or Reserve Bank for any person contravening any provisions of the FEMA. The Compounding Authorities are authorised to compound the amount involved in the contravention to FEMA made by the person. No contravention shall be compounded unless the amount involved in such contravention is quantifiable. Any second or subsequent contravention committed after the expiry of a period of 3 (three) years from the date on which the contravention was previously compounded shall be deemed to be a first contravention. The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings. The Compounding Authority shall pass an order of compounding after affording an opportunity of being heard to all the concerns expeditiously and not later than 180 (one hundred eighty) days from the date of application made to the Compounding Authority. Compounding Authority shall issue order specifying the provisions of FEMA or orders made there under in respect of which contravention has taken place along with details of the alleged contraventions.

¶5-150 Sector-Specific Policy

Sectoral cap is the maximum investment including both foreign investment on a repatriation basis by persons resident outside India in equity instruments of a company or the capital of a LLP, as the case may be, and indirect foreign investment, subject to applicable laws/regulations, security and other conditionalities.

Sectoral cap, unless provided otherwise, is composite and includes all types of foreign investments, direct and indirect. This is the composite limit for the investee Indian entity. The total foreign investment shall not exceed the sectoral/statutory cap. However, any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned as foreign investment under the composite cap.

Foreign investment in sectors under Government approval route resulting in transfer of ownership and/or control of Indian entities from resident Indian citizens to non-resident entities is subject to Government approval. Foreign investment in sectors under automatic route but with conditionalities, resulting in transfer of ownership and/or control of Indian entities from resident Indian citizens to non-resident entities, is subject to compliance of such conditionalities.

In sectors/activities not listed herein, FDI is permitted up to 100% (one hundred percent) on the automatic route, subject to applicable laws/regulations; security and other conditionalities. This condition is not applicable for activities in financial services. Wherever there is a requirement of minimum capitalisation, it will include premium received along with the face value of the equity instrument, only when it is received by the company upon issue of such instruments to a person resident outside India. Amount paid by the transferee during post-issue transfer beyond the issue price of the equity instrument, cannot be taken into account while calculating minimum capitalisation requirement.

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.

The onus of above-mentioned compliances lies on the investee company.

The sectoral policies and caps in respect of some of the important sectors as updated up to April, 2020 are set out below. For the current law on sector specific policy and sectoral caps in these sectors as well as other sectors, please refer to the latest consolidated FDI Policy as amended from time to time, available on the website of DPIIT.

Sr. No.	**Sector/Activity**	**% of FDI Cap/Equity**	**Entry Route**
AGRICULTURE			
1.	**Agriculture & Animal Husbandry**		
1.1	(a) Floriculture, Horticulture, and Cultivation of	100%	Automatic

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	Vegetables & Mushrooms under controlled conditions; (b) Development and Production of seeds and planting material; (c) Animal husbandry (including of breeding of dogs), Pisciculture, Aquaculture, Apiculture; and (d) Services related to agro and allied sectors. ***Note*****:** Besides the above, FDI is not allowed in any other agricultural sector/activity.		
1.2	**Other conditions**:		
1.2.1	The term "under controlled conditions" covers the following: (i) "Cultivation under controlled conditions" for the categories of floriculture, horticulture, cultivation of vegetables and mushrooms is the practice of cultivation wherein rainfall, temperature, solar radiation, air humidity and culture medium are controlled artificially. Control in these parameters may be effected through protected cultivation under green houses, net houses, poly houses or any other improved infrastructure facilities where micro-climatic conditions are regulated anthropogenically.		
2.	**Plantation**		
2.1	i. Tea sector including tea plantations ii. Coffee plantations iii. Rubber plantations iv. Cardamom plantations v. Palm oil tree plantations	100%	Automatic

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	vi. Olive oil tree plantations **Note:** Besides the above, FDI is not allowed in any other plantation sector/activity.		
2.2	**Other conditions**:		
2.2.1	Prior approval of the State Government concerned in case of any future land use change.		
MINING AND PETROLEUM AND NATURAL GAS			
3	**Mining**		
3.1	Mining and Exploration of metal and non-metal ores including diamond, gold, silver and precious ores but excluding titanium bearing minerals and its ores; subject to the *Mines and Minerals (Development & Regulation) Act, 1957*.	100%	Automatic
3.2	**Coal and Lignite**		
3.2.1	Coal and Lignite mining for captive consumption by power projects, iron and steel and cement units and other eligible activities permitted under and subject to the provisions of the *Mines and Minerals (Development and Regulation) Act, 1957 and the Coal Mines (Special Provisions) Act, 2015*.	100%	Automatic
3.2.2	Setting up coal processing plants like washeries subject to the condition that the company shall not do coal mining and shall not sell washed coal or	100%	Automatic

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing.		
3.2.3	For sale of coal, coal mining activities including associated processing infrastructure subject to the provisions of the *Mines and Minerals (Development and Regulation) Act, 1957* and the *Coal Mines (Special Provisions) Act, 2015* and as amended from time to time and other relevant Acts on the subject.	100%	Automatic
3.3	**Mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities**		
3.3.1	Mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities subject to sectoral regulations and the *Mines and Minerals (Development and Regulation) Act, 1957*.	100%	Government
3.4	**Other conditions**:		
3.4.1	"Associated Processing Infrastructure" as contained in 3.2.3 includes coal washery, crushing, coal handling, and separation (magnetic and non-magnetic.)		
3.4.2	FDI for separation of titanium bearing minerals & ores will be subject to the following conditions, namely: (A) value addition facilities are set up within India along with transfer of technology; (B) disposal of tailings during the mineral separation shall be carried out in accordance with regulations framed by the		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	Atomic Energy Regulatory Board such as *Atomic Energy (Radiation Protection) Rules, 2004* and the *Atomic Energy (Safe Disposal of Radioactive Wastes) Rules, 1987*.		
3.4.3	FDI will not be allowed in mining of "prescribed substances" listed in the Notification No. S.O. 61(E), dated January 18, 2006, issued by the Department of Atomic Energy.		
3.4.4	**Clarification:** (1) For titanium bearing ores such as Ilmenite, Leucoxene and Rutile, manufacture of titanium dioxide pigment and titanium sponge constitutes value addition. Ilmenite can be processed to produce "Synthetic Rutile or Titanium Slag" as an intermediate value-added product. (2) The objective is to ensure that the raw material available in the country is utilised for setting up downstream industries and the technology available internationally is also made available for setting up such industries within the country. Thus, if with the technology transfer, the objective of this Rules/the FDI Policy can be achieved, the conditions prescribed at (3.4.1) (A) above shall be deemed to be fulfilled.		
4	**Petroleum & Natural Gas**		
4.1	Exploration activities of oil and natural gas fields, infrastructure related to marketing of petroleum products and natural gas, marketing of natural gas and petroleum products, petroleum product pipelines, natural gas/pipelines, LNG Regasification infrastructure, market study and formulation and Petroleum refining in the private sector, subject to the existing sectoral policy and regulatory framework in the oil marketing sector and the policy of the Government on private participation in	100 %	Automatic

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	exploration of oil and the discovered fields of national oil companies.		
4.2	Petroleum refining by the Public Sector Undertakings (PSUs), without any disinvestment or dilution of domestic equity in the existing PSUs.	49%	Automatic
5.	**Manufacturing**	100%	Automatic
5.1	Manufacturing activities may be either self-manufacturing by the investee entity or contract manufacturing in India through a legally tenable contract, whether on principal to principal or principal to agent basis. Further, a manufacturer is permitted to sell his products manufactured in India through wholesale and/or retail, including through e-commerce, without Government approval.		
5.2	Notwithstanding the provisions of the *FEMA (NDI) Rules, 2019*, on trading sector, 100% foreign investment under Government approval route is allowed for trading, including through e-commerce, in respect of food products manufactured and/or produced in India. Applications for foreign investment in food products retail trading would be processed in the Department of Industrial Policy & Promotion before being considered by the Government for approval.		
6	**Defence**		
6.1	Defence Industry subject to Industrial license under the *Industries (Development & Regulation) Act, 1951* and Manufacturing of small arms and ammunition under the *Arms Act, 1959*.	100%	Automatic up to 49%. Government route beyond 49% wherever it is likely to result in access to modern technology or for other reasons to be recorded.
6.2	**Other Conditions**: (i) Infusion of fresh foreign investment within the permitted automatic route level, in a company not seeking industrial license, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor,		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	will require Government approval. (ii) Licence applications will be considered and licences shall be given by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, in consultation with Ministry of Defence and Ministry of External Affairs. (iii) Foreign investment in the sector is subject to security clearance and guidelines of the Ministry of Defence. (iv) Investee company should be structured to be self-sufficient in areas of product design and development. The investee/joint venture company along with manufacturing facility, should also have maintenance and life cycle support facility of the product being manufactured in India.		
SERVICES SECTOR			
7.	**Broadcasting**		
7.1	**Broadcasting Carriage Services**		
7.1.1	(1) Teleports (setting up of up-linking HUBs/Teleports); (2) Direct to Home (DTH); (3) Cable Networks (Multi System operators (MSOs) operating at National or State or District level and undertaking upgradation of networks towards digitalisation and addressability); (4) Mobile TV; (5) Headend-in-the Sky Broadcasting Service (HITS).	100%	Automatic
7.1.2	Cable Networks (Other MSOs not undertaking upgradation of networks towards digitalisation and addressability and Local Cable Operators (LCOs)).	100%	Automatic

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
7.1.3	Note**:** Infusion of fresh foreign investment, beyond 49% in a company not seeking license/permission from the sectoral Ministry, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, will require Government approval.		
7.2	**Broadcasting Content Services**		
7.2.1	Terrestrial Broadcasting FM (FM Radio) subject to such terms and conditions, as specified from time to time, by Ministry of Information and Broadcasting, for grant of permission for setting up of FM Radio stations	49%	Government
7.2.2	Up-linking of "News & Current Affairs" TV Channels	49%	Government
7.2.3	Uploading/Streaming of News and Current Affairs through Digital Media	26%	Government
7.2.4	Up-linking of Non-"News & Current Affairs" TV Channels/Down-linking of TV Channels	100%	Automatic
7.3	Other Conditions		
7.3.1	(a) Foreign investment in companies engaged in all the afore-stated services will be subject to relevant regulations and such terms and conditions, as may be specified from time to time, by the Ministry of Information and Broadcasting. (b) Foreign investment in the afore-stated broadcasting carriage services will be subject to the terms and conditions as may be specified by the Ministry of Information and Broadcasting, from time to time, in this regard. (c) Licensee shall ensure that broadcasting service installation carried out by it should not become a safety hazard and is not in contravention of any statute, rule or regulations and public policy.		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	(d) In the Information and Broadcasting sector where the sectoral cap is up to 49%, the company should be owned and controlled by resident Indian citizens or Indian companies which are owned and controlled by resident Indian citizens. I. For this purpose, the equity held by the largest Indian shareholder shall be at least 51% of the total equity, excluding the equity held by Public Sector Banks and Public Financial Institutions, as defined in Section 4A of the *Companies Act, 1956* or Section 2(72) of the *Companies Act, 2013*, as the case maybe. The term "largest Indian shareholder" used in this clause, will include any or a combination of the following: (1) In the case of an individual shareholder, (i) The individual shareholder, (ii) A relative of the shareholder within the meaning of Section 2(77) of the *Companies Act, 2013*. (iii) A company/group of companies in which the individual shareholder/HUF to which he belongs has management and controlling interest. (2) In the case of an Indian company, (i) The Indian company (ii) A group of Indian companies under the same management and ownership control. (3) For this purpose, "Indian company" shall be a company which must have a resident Indian or a relative as defined under Section 2(77) of the *Companies Act, 2013*/HUF, either singly or in combination holding at least 51% of the shares. (4) Provided that, in case of a combination of all or any of the entities mentioned in sub-clauses (d)(I) above, each of the parties shall have entered into a legally binding agreement to act as a single unit in managing the matters of the applicant company.		
8.	**Print Media**		
8.1	Publishing of newspaper and periodicals dealing with news and current affairs	26%	Government
8.2	Publication of Indian editions of foreign magazines dealing with news and current affairs	26%	Government

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
8.2.1	Other Conditions		
8.2.1.1	(i) "Magazine", for the purpose of these guidelines, will be defined as a periodical publication, brought out on non-daily basis, containing public news or comments on public news. (ii) Foreign investment would also be subject to the Guidelines for Publication of Indian editions of foreign magazines dealing with news and current affairs issued by the Ministry of Information & Broadcasting on December 04, 2008.		
8.3	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.	100%	Government
8.4	Publication of facsimile edition of foreign newspapers.	100%	Government
8.4.1	Other Conditions		
8.4.1.1	(i) FDI should be made by the owner of the original foreign newspapers whose facsimile edition is proposed to be brought out in India. (ii) Publication of facsimile edition of foreign newspapers can be undertaken only by an entity incorporated or registered in India under the provisions of the Companies Act, as applicable. (iii) Publication of facsimile edition of foreign newspaper would also be subject to the Guidelines for publication of newspapers and periodicals dealing with news and current affairs and publication of facsimile edition of foreign newspapers issued by Ministry of Information & Broadcasting on March 31, 2006.		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
9.	**Civil Aviation**		
9.1	The Civil Aviation sector includes Airports, Scheduled and Non-scheduled domestic passenger airlines, Helicopter services/Seaplane services, Ground-handling Services, Maintenance and Repair organisations; Flying training institutes; and Technical training institutions. For the purposes of the Civil Aviation sector: (i) "Airport" means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome as defined in clause (2) of Section 2 of the *Aircraft Act, 1934*; (ii) "Aerodrome" means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers and other structures thereon or pertaining thereto; (iii) "Air transport service" means a service for the transport by air of persons, mails or any other thing, animate or inanimate, for any kind of remuneration whatsoever, whether such service consists of a single flight or series of flights. (iv) "Air Transport Undertaking" means an undertaking whose business includes the carriage by air of passengers or cargo for hire or reward. (v) "Aircraft component" means any part, the soundness and correct functioning of which, when fitted to an aircraft, is essential to the continued airworthiness or safety of the aircraft and includes any item of equipment; (vi) "Helicopter" means a heavier-than-air aircraft, supported in flight by the reactions of the air on one or more power-driven rotors on substantially vertical axis; (vii) "Scheduled air transport service", means an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognisably systematic series, each flight being open to use by members of the public. (viii) "Non-scheduled Air Transport service" means any service which is not a scheduled air transport service and will include Cargo airlines. (ix) "Cargo airlines" would mean such airlines which meet the conditions as given in the Civil Aviation Requirements issued by the Ministry of Civil Aviation. (x) "Seaplane" means an aeroplane capable normally of taking		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	off from and alighting solely on water; (xi) "Ground Handling" means (i) ramp handling, (ii) traffic handling both of which shall include the activities as specified by the Ministry of Civil Aviation through the Aeronautical Information Circulars from time to time, and (iii) any other activity specified by the Central Government to be a part of either ramp handling or traffic handling.		
9.2	**Airports**		
9.2.1	(a) Greenfield projects	100%	Automatic
9.2.2	(b) Existing projects	100%	Automatic
9.3	**Air Transport Services**		
9.3.1	(1) (A) Scheduled Air Transport Service/ Domestic Scheduled Passenger Airline (B) Regional Air Transport Service	100%	Automatic up to 49% Government route beyond 49% (Automatic up to 100% for NRIs and OCIs)
9.3.2	(2) Non-scheduled Air Transport Service	100%	Automatic
9.3.3	(3) Helicopter services/seaplane services requiring DGCA approval.	100%	Automatic
9.4	**Other Services under Civil Aviation sector**		
9.4.1	(a) Ground Handling Services subject to sectoral regulations and security clearance	100%	Automatic
9.4.2	(b) Maintenance and Repair organisations; flying training institutes and technical training institutions	100%	Automatic
9.5	Other Conditions: (a) Air Transport Services would include Domestic Scheduled Passenger Airlines; Non-Scheduled Air Transport Services, helicopter and seaplane services. (b) Foreign airlines are allowed to participate in the equity of companies operating Cargo airlines, helicopter and seaplane services, as per the limits and entry routes mentioned above.		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	(c) Foreign airlines are also allowed to invest in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital. Such investment would be subject to the following conditions: (i) It shall be under the Government approval route. (ii) The foreign investment shall comply with the relevant regulations of SEBI as well as other applicable rules and regulations. (iii) A Scheduled Operator's Permit may be granted only to a company: a) that is registered and has its principal place of business within India; b) the Chairman and at least two-thirds of the Directors of which are citizens of India; and c) the substantial ownership and effective control of which is vested in Indian citizens. (iv) All foreign nationals likely to be associated with Indian scheduled and non-scheduled air transport services, as a result of such investment shall be cleared from security view point before deployment; and (v) All technical equipment that might be imported into India as a result of such investment shall require clearance from the relevant authority in the Ministry of Civil Aviation. (d) In addition to the above conditions, foreign investment in M/s Air India Ltd. shall be subject to the following conditions: (i) Foreign investment(s) in M/s Air India Ltd., including that of foreign airline(s), shall not exceed 49% either directly or indirectly. (ii) Substantial ownership and effective control of M/s Air India Ltd. shall continue to be vested in Indian Nationals. Note: (i) The FDI limits/entry routes, mentioned at paragraph 9.3(1) and 9.3(2) above, are applicable in the situation where there is no investment by foreign airlines. (ii) The dispensation for NRIs and OCIs regarding FDI up to 100% will also continue in respect of the investment regime specified at para 9.5(c) above. (iii) The investee company additionally shall have to follow guidelines issued by the concerned ministry of the Central Government.		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
10.	**Construction Development: Townships, Housing, Built-up Infrastructure**		
10.1	Construction-development projects (which would include development of townships, construction of residential/ commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships)	100%	Automatic
10.2	Other Conditions		
	(A) Each phase of the construction development project would be considered as a separate project. (B) The investor will be permitted to exit on completion of the project or after development of trunk infrastructure, ie, roads, water supply, street lighting, drainage and sewerage. (C) Notwithstanding anything contained at (B) above, a foreign investor will be permitted to exit and repatriate foreign investment before the completion of project under automatic route, provided that a lock-in-period of three years, calculated with reference to each tranche of foreign investment has been completed. Further, transfer of stake from one non-resident to another nonresident, without repatriation of investment will neither be subject to any lock-in period nor to any government approval. (D) The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid in the building control regulations, bye laws, rules and other regulation of the State Government/Municipal/Local Body concerned. (E) The Indian investee company will be permitted to sell only developed plots. "Developed plots" will mean plots where trunk infrastructure, ie, roads, water supply, street lighting, drainage and sewerage, have been made available. (F) The Indian investee company shall be responsible for obtaining all necessary approvals, including those of the		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	building/layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/bye-laws/regulations of the State Government/Municipal/Local Body concerned. (G) The State Government/Municipal/Local Body concerned, which approves the building/development plans, will monitor compliance of the above conditions by the developer. **Notes:** (i) Foreign investment is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farmhouses and trading in transferable development rights (TDRs). (ii) Condition of lock-in period at (A) above will not apply to Hotels &Tourist Resorts, Hospitals, Special Economic Zones (SEZs), Educational Institutions, Old Age Homes and investment by NRIs/OCIs. (iii) Completion of the project will be determined as per the local bye-laws/rules and other regulations of State Governments. (iv) It is clarified that 100% Foreign investment under automatic route is permitted in completed projects for operation and management of townships, malls/ shopping complexes and business centres. Consequent to foreign investment, transfer of ownership and/or control of the investee company from residents to non-residents is also permitted. However, there would be a lock-in-period of three years, calculated with reference to each tranche of FDI, and transfer of immovable property or part thereof is not permitted during this period. (v) "Transfer", in relation to FDI policy on the sector, includes,— (a) the sale, exchange or relinquishment of the asset; or (b) the extinguishment of any rights therein; or (c) the compulsory acquisition thereof under any law; or (d) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the *Transfer of Property Act, 1882* (4 of 1882); or (e) any transaction, by acquiring equity instruments in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	has the effect of transferring, or enabling the enjoyment of, any immovable property. (vi) Real estate business' means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships; *Explanation:* a. Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the *Securities and Exchange Board of India (REITs) Regulations, 2014* shall also be excluded from the definition of "real estate business". b. Earning of rent income on lease of the property, not amounting to transfer, will not amount to real estate business. c. Transfer in relation to real estate includes, i. the sale, exchange or relinquishment of the asset; or ii. the extinguishment of any rights therein; or iii. the compulsory acquisition thereof under any law; or iv. any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the *Transfer of Property Act, 1882* (4 of 1882); or v. any transaction, by acquiring equity instruments in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property. (vii) Notwithstanding anything contained herein, it is clarified that real estate broking service does not amount to real estate business and 100% foreign investment is allowed in the activity under automatic route.		
11.	**Industrial Parks**	100%	Automatic
11.1	(i) "Industrial Park" is a project in which quality infrastructure in the form of plots of developed land or built up space or a combination with common facilities, is developed and made available to all the allottee units for the purposes of industrial activity. (ii) "Infrastructure" refers to facilities required for functioning of units located in the Industrial Park and includes roads		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	(including approach roads), railway line/ sidings including electrified railway lines and connectivities to the main railway line, water supply and sewerage, common effluent treatment facility, telecom network, generation and distribution of power, air conditioning. (iii) "Common Facilities" refer to the facilities available for all the units located in the industrial park, and include facilities of power, roads (including approach roads), railway line/sidings including electrified railway lines and connectivities to the main railway line, water supply and sewerage, common effluent treatment, common testing, telecom services, air conditioning, common facility buildings, industrial canteens, convention/ conference halls, parking, travel desks, security service, first aid center, ambulance and other safety services, training facilities and such other facilities meant for common use of the units located in the Industrial Park. (iv) "Allocable area" in the Industrial Park means- (a) in the case of plots of developed land- the net site area available for allocation to the units, excluding the area for common facilities. (b) in the case of built up space- the floor area and built up space utilised for providing common facilities. (c) in the case of a combination of developed land and built-up space the net site and floor area available for allocation to the units excluding the site area and built up space utilised for providing common facilities (v) "Industrial Activity" means manufacturing; electricity; gas and water supply; post and telecommunications; software publishing, consultancy and supply; data processing, database activities and distribution of electronic content; other computer related activities; basic and applied R&D on bio-technology, pharmaceutical sciences/life sciences, natural sciences and engineering; business and management consultancy activities; and architectural, engineering and other technical activities.		
11.2	Foreign investment in Industrial Parks would not be subject to the conditionalities applicable for construction development projects, etc, spelt out in para 10 above, provided the Industrial Parks meet with the under-mentioned conditions: (i) it would comprise of a minimum of 10 units and no single unit shall occupy more than 50% of the allocable area; (ii) the minimum percentage of the area to be allocated for industrial activity shall not be less than 66% of the total allocable area.		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
12.	**Satellites – Establishment and operation**		
12.1	Satellites Establishment and operation, subject to the sectoral guidelines of Department of Space/ISRO.	100%	Government
13.	**Private Security Agencies**		
13.1	Private Security Agencies	49%	Government
14.	**Telecom Services (including Telecom Infrastructure Providers Category-I)**	100%	Automatic, up to 49%; Government route, beyond 49%
14.1	All telecom services including Telecom Infrastructure Providers Category-I, namely, Basic, Cellular, United Access Services, Unified License (Access Services), Unified License, National/International Long Distance, Commercial V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS), All types of ISP licenses, Voice Mail/Audiotex/UMS, Resale of IPLC, Mobile Number Portability Services, Infrastructure Provider Category-I (providing dark fibre, right of way, duct space, tower) except Other Service Providers.		
14.2	Other conditions		
	The licencing and security conditions as notified by the Department of Telecommunications (DoT) from time to time, shall be observed by licensee as well as investors except for foreign investment in “Other Service Providers”, which are allowed 100% under the automatic route.		
15.	**Trading**		
15.1	Cash & Carry Wholesale Trading/Wholesale Trading (including sourcing from MSEs)	100%	Automatic
15.1.1	Definition: (i) Cash & Carry Wholesale trading/Wholesale trading, would mean sale of goods/merchandise to retailers, industrial, commercial, institutional or other professional business users or to other wholesalers and related subordinated service providers. (ii) Wholesale trading would, accordingly, imply sales for the purpose of trade, business and profession, as opposed to sales		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	for the purpose of personal consumption. The yardstick to determine whether the sale is wholesale or not would be the type of customers to whom the sale is made and not the size and volume of sales. Wholesale trading would include resale, processing and thereafter sale, bulk imports with ex-port/ex-bonded warehouse business sales and B2B e-Commerce.		
15.1.2	Other conditions		
15.1.2.1	(a) For undertaking "WT", requisite licenses/registration/ permits, as specified under the relevant Acts/ Regulations/Rules/Orders of the State Government/ Government Body/Government Authority/Local Self-Government Body under that State Government should be obtained. (b) Except in case of sales to Government, sales made by the wholesaler would be considered as "cash & carry wholesale trading/wholesale trading" with valid business customers, only when WT are made to the following entities: (i) Entities holding sales tax/VAT registration/service tax/excise duty registration; or (ii) Entities holding trade licenses, ie, a license/ registration certificate/membership certificate/ registration under Shops and Establishment Act, issued by a Government Authority/Government Body/Local Self-Government Authority, reflecting that the entity/person holding the license/registration certificate/membership certificate, as the case may be, is itself/himself/herself engaged in a business involving commercial activity; or (iii) Entities holding permits/license, etc, for undertaking retail trade (like tehbazari and similar license for hawkers) from Government Authorities/Local Self Government Bodies; or (iv) Institutions having certificate of incorporation or registration as a society or registration as public trust for their self-consumption. **Note: An entity, to whom WT is made, may fulfil any one of the 4 conditions.** (c) Full records indicating all the details of such sales like name of entity, kind of entity, registration/license/ permit, etc, number, amount of sale, etc, should be maintained on a day-to-day basis. (d) WT of goods would be permitted among companies of the same group. However, such WT to group companies taken together should not exceed 25% of the total turnover of the wholesale venture.		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	(e) WT can be undertaken as per normal business practice, including extending credit facilities subject to applicable regulations. (f) A wholesale/cash and carry trader can undertake single brand retail trading, subject to the conditions as applicable. An entity undertaking wholesale/cash and carry as well as retail business will be mandated to maintain separate books of accounts for these two arms of the business and duly audited by the statutory auditors. Conditions of the FDI policy for wholesale/cash and carry business and for retail business have to be separately complied with by the respective business arms.		
15.2	**E-commerce**		
15.2.1	B2B E-commerce activities	100%	Automatic
15.2.1.1	Such companies would engage only in Business to Business (B2B) e-commerce and not in retail trading, inter alia implying that existing restrictions on FDI in domestic trading would be applicable to e-commerce as well.		
15.2.2	Market place model of e-commerce	100%	Automatic
15.2.3	Other conditions		
15.2.3.1	i) "E-commerce" means buying and selling of goods and services including digital products over digital & electronic network. ii) "E-commerce entity" means a company incorporated under the *Companies Act, 1956* or the *Companies Act, 2013* or a foreign company covered under Section 2(42) of the *Companies Act, 2013* or an office, branch or agency in India as provided in Section 2(v)(iii) of *FEMA, 1999*, owned or controlled by a person resident outside India and conducting the e-commerce business. iii) "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. Foreign investment is not permitted in Inventory based model of e-commerce. iv) "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. v) Digital & electronic network will include network of computers, television channels and any other internet		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	application used in automated manner such as web pages, extranets, mobiles, etc. vi) Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis. vii) E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre, payment collection and other services. viii) E-commerce entity providing a marketplace will not exercise ownership over the inventory, ie, goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model. ix) An e-commerce entity will not permit more than 25% of the sales value on financial year basis affected through its market place from one vendor or their group companies. x) An entity having equity participation by e-commerce marketplace entity or its group companies or having control on its inventory by e-commerce marketplace entity or its group companies, shall not be permitted to sell its products on the platform run by such marketplace entity. xi) Goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller. xii) Payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines issued by the Reserve Bank in this regard. xiii) Any warranty/guarantee of goods and services sold will be the responsibility of the seller. xiv) E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. xv) No e-commerce marketplace entity shall mandate any seller to sell any of their product exclusively on its platform. xvi) e-commerce marketplace entity with FDI shall have to obtain and maintain a report of statutory auditor by 30th of September every year for the preceding financial year confirming compliance of the e-commerce guidelines. xvii) Guidelines on cash and carry wholesale trading as given in Sl No. 15.1.2 above shall apply to B2B ecommerce activities. Note: Foreign investment is not permitted in inventory based model of e-commerce.		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
15.2.4	Sale of services through e-commerce shall be under automatic route subject to the sector specific conditions, applicable laws/ regulations, security and other conditionalities.		
15.3	**Single Brand Product Retail Trading (SBRT)** Foreign Investment in Single Brand product retail trading is aimed at attracting investments in production and marketing, improving the availability of such goods for the consumer, encouraging increased sourcing of goods from India, and enhancing competitiveness of Indian enterprises through access to global designs, technologies and management practices.	100%	Automatic
15.3.1	Other conditions		
15.3.1.1	(a) Products to be sold should be of a "Single Brand" only. (b) Products should be sold under the same brand internationally, ie, products should be sold under the same brand in one or more countries other than India. (c) "Single Brand" product-retail trading would cover only products which are branded during manufacturing. (d) A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake "single brand" product retail trading in the country for the specific brand, either directly by the brand owner or through a legally tenable agreement executed between the Indian entity undertaking single brand retail trading and the brand owner. (e) In respect of proposals involving foreign investment beyond 51%, sourcing of 30 percent of the value of goods procured, shall be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing shall be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company shall be required to maintain. The procurement requirement		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	is to be met in the first instance as an average of five years total value of procured beginning 1st April of the year of the commencement of SBRT business (i.e. opening of first store or start of online retail, whichever is earlier). Thereafter, SBRT entity shall be required to meet the 30% local sourcing norms on an annual basis. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company incorporated in India, which is the recipient of foreign investment for the purpose of carrying out single brand product retail trading. (f) For the purpose of meeting local sourcing requirement laid down at entry (e), all procurements made from India by the SBRT entity for that single brand shall be counted towards local sourcing, irrespective of whether the goods procured are sold in India or exported. SBRT entity is also permitted to set off sourcing of goods from India for global operations against the mandatory sourcing requirement of 30%. For this, purpose, 'sourcing of goods from India for global operations' shall mean value of goods sourced from India for global operations for that single brand (in INR terms) in a particular financial year directly by the entity undertaking SBRT or its group companies (resident or non-resident), or indirectly by them through a third party under a legally tenable agreement. A SBRT entity operating through brick and mortar stores, can also undertake retail trading through e-commerce. However, retail trading through e-commerce can also be undertaken prior to opening of brick and mortar stores, subject to the condition that the entity opens brick and mortar stores within two years from date of start of online retail. **Notes:** (i) Conditions mentioned at Para 15.3.1.1(b) and 15.3.1.1(d) hereinabove will not be applicable for undertaking Single Brand Product Retail Trading of Indian brands. (ii) Indian brands should be owned and controlled by resident Indian citizens and/or companies which are owned and controlled by resident Indian citizens. (iii) Sourcing norms will not be applicable up to three years from commencement of the business, i.e., opening of the first store or start of online retail, whichever is earlier for entities undertaking single brand retail trading of products having "state-of-art" and "cutting-edge" technology and where local sourcing is not possible. Thereafter, provisions of Para 15.3.1.1 (e) will be applicable. A Committee under the Chairmanship of Secretary, DIPP, with representatives from NITI Aayog,		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	concerned Administrative Ministry and independent technical expert(s) on the subject will examine the claim of applicants on the issue of the products being in the nature of "state-of-art" and "cutting-edge" technology where local sourcing is not possible and give recommendations for such relaxation.		
15.4.1	Multi Brand Retail Trading (MBRT)	51%	Government
15.4.1.1	Other conditions		
15.4.1.1.1	(a) Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery and meat products, may be unbranded. (b) Minimum amount to be brought in, as FDI, by the foreign investor, would be US $ 100 million. (c) At least 50% of total FDI brought in the first tranche of US $ 100 million, shall be invested in "back-end infrastructure" within three years, where "back-end infrastructure" will include capital expenditure on all activities, excluding that on front-end units; for instance, back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, warehouse, agriculture market produce infrastructure, etc. Expenditure on land cost and rentals, if any, will not be counted for purposes of backend infrastructure. Subsequent investment in backend infrastructure would be made by the MBRT retailer as needed, depending upon its business requirements. (d) At least 30% of the value of procurement of manufactured/ processed products purchased shall be sourced from Indian micro, small and medium industries, which have a total investment in plant & machinery not exceeding US $ 2.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. The "small industry" status would be reckoned only at the time of first engagement with the retailer, and such industry shall continue to qualify as a "small industry" for this purpose, even if it outgrows the said investment of US $ 2.00 million during the course of its relationship with the said retailer. Sourcing from agricultural co-operatives and farmers co-operatives would also be considered in this category. The procurement requirement would have to be met, in the first instance, as an average of five years' total value of the manufactured/ processed products purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	would have to be met on an annual basis. (e) Self-certification by the company, to ensure compliance of the conditions at serial nos. (ii), (iii) and (iv) above, which could be cross-checked, as and when required. Accordingly, the investors shall maintain accounts, duly certified by statutory auditors. (f) Retail sales outlets may be set up only in cities with a population of more than 10 lakh as per 2011 Census or any other cities as per the decision of the respective State Governments, and may also cover an area of 10 kms. around the municipal/urban agglomeration limits of such cities; retail locations will be restricted to conforming areas as per the Master/Zonal Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking. (g) Government will have the first right to procurement of agricultural products. (h) The above policy is an enabling policy only and the State Governments/Union Territories would be free to take their own decisions in regard to implementation of the policy. Therefore, retail sales outlets may be set up in those States/Union Territories which have agreed, or agree in future, to allow FDI in MBRT. The list of States/Union Territories which have conveyed their agreement is at (2) below. Such agreement, in future, to permit establishment of retail outlets under the FDI Policy, would be conveyed to the Government of India through the Department of Industrial Policy & Promotion and additions would be made to the list at (2) below accordingly. The establishment of the retail sales outlets will be in compliance of applicable State/Union Territory laws/regulations, such as the Shops and Establishments Act, etc. (i) Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of multi-brand retail trading. (j) Applications would be processed in the Department of Industrial Policy & Promotion, to determine whether the proposed investment satisfies the notified guidelines, before being considered for Government approval.		
15.4.2	States/Union Territories are: Andhra Pradesh, Assam, Delhi, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Maharashtra, Manipur, Rajasthan, Uttarakhand, Daman & Diu and Dadra and Nagar Haveli (Union Territories)		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
15.5	**Duty Free Shops**	100%	Automatic
15.5.1	Other conditions		
15.5.1.1	(1) Duty Free Shops would mean shops set up in custom bonded area at International Airports/International Seaports and Land Custom Stations where there is transit of international passengers. (2) Foreign investment in Duty Free Shops is subject to compliance of conditions stipulated under the *Customs Act, 1962* and other laws, rules and regulations. (3) Duty Free Shop entity shall not engage into any retail trading activity in the Domestic Tariff Area of the country.		
16.	**Pharmaceuticals**		
16.1	Greenfield	100%	Automatic
16.2	Brownfield	100%	Automatic up to 74%; Government route beyond 74%
16.3	Other conditions		
	(a) "Non-compete" clause would not be allowed except in special circumstances with the Government approval. (b) The prospective investor and the prospective investee are required to provide a certificate given at 16.4 along with the application submitted for Government approval. (c) Government approval may incorporate appropriate conditions for foreign investment in brownfield cases. (d) Foreign investment in brownfield pharmaceuticals, irrespective of entry route, is further subject to the following conditions: (i) The production level of National List of Essential Medicines (NLEM) drugs and/or consumables and their supply to the domestic market at the time of induction of foreign investment, being maintained over the next five years at an absolute quantitative level. The benchmark for this level would be decided with reference to the level of production of NLEM drugs and/or consumables in the three financial years, immediately preceding the year of induction of foreign investment. Of these, the highest level of production in any of these three years would be taken as the level. (ii) Research and Development (R&D) expenses being maintained in value terms for 5 years at an absolute quantitative level at the time of induction of foreign		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	investment. The benchmark for this level would be decided with reference to the highest level of R&D expenses which has been incurred in any of the three financial years immediately preceding the year of induction of foreign investment. (iii) The administrative Ministry will be provided complete information pertaining to the transfer of technology, if any, along with induction of foreign investment into the investee company. (iv) The administrative Ministry(s), ie, Ministry of Health and Family Welfare, Department of Pharmaceuticals or any other regulatory Agency/Development as notified by Central Government from time to time, will monitor the compliance of conditionalities. **Notes:** (1) Foreign investment up to 100% under the automatic route is permitted for manufacturing of medical devices. The abovementioned conditions will, therefore, not be applicable to greenfield as well as brownfield projects of this industry. (2) Medical device means:- (a) Any instrument, apparatus, appliance, implant, material or other article, whether used alone or in combination, including the software, intended by its manufacturer to be used specially for human beings or animals for one or more of the specific purposes of:- ▪ Diagnosis, prevention, monitoring, treatment or alleviation of any disease or disorder; ▪ diagnosis, monitoring, treatment, alleviation or assistance for, any injury or disability; ▪ investigation, replacement or modification or support of the anatomy or of a physiological process; ▪ supporting or sustaining life; ▪ disinfection of medical devices; ▪ control of conception; and which does not achieve its primary intended action in or on the human body or animals by any pharmacological or immunological or metabolic means, but which may be assisted in its intended function by such means; (b) an accessory to such an instrument, apparatus, appliance, material or other article; (c) in-vitro diagnostic device which is reagent, reagent product, calibrator, control material, kit, instrument,		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	apparatus, equipment or system whether used alone or in combination thereof intended to be used for examination and providing information for medical or diagnostic purposes by means of in vitro examination of specimens derived from the human bodies or animals.		
16.4	Certificate to be Furnished by the Prospective Investor as well as the Prospective Recipient Entity It is certified that the following is the complete list of all inter-se agreements, including the shareholders agreement, entered into between foreign investor(s) and investee brownfield pharmaceutical entity. 1. ……………… 2. ………………. 3. ………………. (copies of all agreements to be enclosed) It is also certified that none of the inter-se agreements, including the shareholders agreement, entered into between foreign investor(s) and investee brownfield pharmaceutical entity contain any non-compete clause in any form whatsoever. It is further certified that there are no other contracts/ agreements between the foreign investor(s) and investee brownfield pharma entity other than those listed above. The foreign investor(s) and investee brownfield pharma entity undertake to submit to the FIPB any inter-se agreements that may be entered into between them subsequent to the submission and consideration of this application.		
17.	**Railway Infrastructure**		
17.1	Construction, operation and maintenance of the following: (i) Suburban corridor projects through PPP, (ii) High speed train projects, (iii) Dedicated freight lines, (iv) Rolling stock including train sets, and locomotives/coaches manufacturing and maintenance facilities, (v) Railway Electrification, (vi) Signaling systems,	100%	Automatic

Sr. No.	**Sector/Activity**	**% of FDI Cap/Equity**	**Entry Route**
	(vii) Freight terminals, (viii) Passenger terminals, (ix) Infrastructure in industrial park pertaining to railway line/sidings including electrified railway lines and connectivity to main railway line and (x) Mass Rapid Transport Systems.		
17.2	Other conditions		
	(i) Foreign Direct Investment in this sector open to private sector participation including FDI is subject to sectoral guidelines of Ministry of Railways. (ii) Proposals involving foreign investment beyond 49% in sensitive areas from security point of view, will be brought by the Ministry of Railways before the Cabinet Committee on Security (CCS) for consideration on a case to case basis.		
F.	**Financial Services** Foreign investment in financial services, other than those indicated below, would require prior approval of the Government.		
F.1	**Asset Reconstruction Companies**	100%	Automatic
F.1.1	Other conditions:		
	(a) Investment limit of a sponsor in the shareholding of an ARC will be governed by the provisions of the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002*, as amended from time to time. Similarly, investment by institutional/non-institutional investors will also be governed by the said Act. (b) FPIs can invest in the Security Receipts (SRs) issued by ARCs. FPIs may be allowed to invest up to 100% of each tranche in SRs issued by ARCs, subject to directions/guidelines of Reserve Bank. Such investment should be within the relevant regulatory cap as applicable. (c) All investments would be subject to provisions of the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002*.		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
F.2	**Banking – Private sector**	74%	Automatic up to 49%; Government route beyond 49% and up to 74%.
F.2.1	Other conditions		
	(1) At all times, at least 26% of the paid up capital will have to be held by residents, except in regard to a wholly-owned subsidiary of a foreign bank. (2) In the case of NRIs, individual holding is restricted to 5% of the total paid-up capital both on repatriation and non-repatriation basis and aggregate limit cannot exceed 10% of the total paid-up capital both on repatriation and non-repatriation basis. However, NRI holding can be allowed up to 24% of the total paid-up capital both on repatriation and non-repatriation basis provided the banking company passes a special resolution to that effect in the general body. (3) Applications for foreign direct investment in private banks having joint venture/subsidiary in insurance sector may be addressed to the Reserve Bank for consideration in consultation with the Insurance Regulatory and Development Authority of India (IRDAI) in order to ensure that the 49% limit of foreign shareholding applicable for the insurance sector is not being breached. (4) Transfer of shares under FDI from residents to non-residents will continue to require approval of Reserve Bank and Government whenever applicable. (5) The policies and procedures prescribed from time to time by Reserve Bank and other institutions such as SEBI, Ministry of Corporate Affairs and IRDAI on these matters will continue to apply. (6) Reserve Bank guidelines relating to acquisition by purchase or otherwise of shares of a private bank, if such acquisition results in any person owning or controlling 5% or more of the paid up capital of the private bank will apply to foreign investors as well. (7) Setting up of a subsidiary by foreign banks: (a) Foreign banks will be permitted to either have branches or subsidiaries but not both. (b) Foreign banks regulated by banking supervisory authority in the home country and meeting Reserve Bank's licensing criteria will be allowed to hold 100% paid-up capital to enable them to set up a wholly owned subsidiary in India.		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	(c) A foreign bank may operate in India through only one of the three channels, namely, (i) branches (ii) a wholly owned subsidiary and (iii) a subsidiary with aggregate foreign investment up to a maximum of 74% in a private bank. (d) A foreign bank will be permitted to establish a wholly-owned subsidiary either through conversion of existing branches into a subsidiary or through a fresh banking license. A foreign bank will be permitted to establish a subsidiary through acquisition of shares of an existing private sector bank provided at least 26% of the paid capital of the private sector bank is held by residents at all times consistent with para (3) above. (e) A subsidiary of a foreign bank will be subject to the licensing requirements and conditions broadly consistent with those for new private sector banks. (f) Guidelines for setting up a wholly owned subsidiary of a foreign bank will be issued separately by Reserve Bank. (g) All applications by a foreign bank for setting up a subsidiary or for conversion of their existing branches to subsidiary in India will have to be made to the Reserve Bank. (8) The present limit of 10% on voting rights in respect of banking companies may be noted by potential investor. (9) All investments shall be subject to the guidelines prescribed for the banking sector under the *Banking Regulation Act, 1949* and the *Reserve Bank of India Act, 1934*.		
F.3	**Banking – Public Sector**		
F.3.1	Banking – Public Sector, subject to *Banking Companies (Acquisition & Transfer of Undertakings) Acts, 1970/80*. This ceiling is also applicable to the State Bank of India.	20%	Government
F.4	**Infrastructure Company in the Securities Market**		
F.4.1	Infrastructure companies in Securities Markets, namely, stock exchanges, commodity exchanges, depositories and clearing corporations, in	49%	Automatic

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	compliance with SEBI Regulations.		
F.4.2	Other conditions		
	(i) Foreign investment, including investment by FPIs, will be subject to the Guidelines/Regulations issued by the Central Government, SEBI and the Reserve Bank from time to time. (ii) Words and expressions used herein and not defined in the *FEMA (NDI) Rules, 2019* but defined in the *Companies Act, 2013* (18 of 2013) or the *Securities Contracts (Regulation) Act, 1956* (42 of 1956) or the *Securities and Exchange Board of India Act, 1992* (15 of 1992) or the *Depositories Act, 1996* (22 of 1996) or in the concerned Regulations issued by SEBI shall have the same meanings respectively assigned to them in those Acts/Regulations.		
F.5	**Commodities Spot Exchange**	49%	Automatic
F.5.1	Investment shall be subject to guidelines prescribed by the Central/State Government		
F.6	**Power Exchanges**		
F.6.1	Power Exchanges under the *Central Electricity Regulatory Commission (Power Market) Regulations, 2010*	49%	Automatic
F.6.2	Other conditions		
	(a) A person resident outside India including persons acting in concert should not hold more than 5%. (b) The investment would be in compliance with SEBI Regulations, other applicable laws/regulations, security and other conditionalities.		
F.7	**Credit Information Companies**	100%	Automatic
F.7.1	Other conditions		
	(a) Foreign investment in Credit Information Companies is subject to the *Credit Information Companies (Regulation) Act, 2005* and regulatory clearance from the Reserve Bank. (b) FPI investment would be permitted subject to the following conditions: (i) A single entity shall directly or indirectly hold below 10% equity;		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	(ii) Any acquisition in excess of 1% will have to be reported to Reserve Bank as a mandatory requirement; and (iii) FPIs investing in Credit Information Companies shall not seek a representation on the Board of Directors based upon their shareholding.		
F.8	**Insurance**		
F.8.1	(i) Insurance Company (ii) Insurance Brokers (iii) Third Party Administrators (iv) Surveyors and Loss Assessors (v) Other Insurance Intermediaries appointed under the provisions of *Insurance Regulatory and Development Authority Act, 1999* (41 of 1999)	49%	Automatic
F.8.2	Other Conditions		
F.8.2.1	(a) Foreign investment in the sector shall be subject to compliance of the provisions of the *Insurance Act, 1938* and subject to necessary license/approval from the Insurance Regulatory & Development Authority of India for undertaking insurance and related activities. (b) An Indian insurance company shall ensure that its ownership and control remains at all times with resident Indian entities as determined by Central Government/ Insurance Regulatory and Development Authority of India as per the rules/regulation issued by them from time to time. (c) Where an entity like a bank, whose primary business is outside the insurance area, is allowed by the Insurance Regulatory and Development Authority of India to function as an insurance intermediary, the foreign equity investment caps applicable in that sector shall continue to apply, subject to the condition that the revenues of such entities from their primary (ie, non-insurance related) business must remain above 50% of their total revenues in any financial year.		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	(d) The provisions of paragraphs F.2.1 relating to "Banking-Private Sector", shall be applicable in respect of bank promoted insurance companies. (e) Terms "Control", "Equity Share Capital", "Foreign Direct Investment" (FDI), "Foreign Investors", "Foreign Portfolio Investment", "Indian Insurance Company", "Indian Company", "Indian Control of an Indian Insurance Company", "Indian Ownership", "Non-resident Entity", "Public Financial Institution", "Resident Indian Citizen", "Total Foreign Investment" will have the same meaning as provided in Notification No. G.S.R 115(E), dated February 19, 2015 issued by Department of Financial Services and regulations issued by Insurance Regulatory and Development Authority of India from time to time.		
F.9	**Pension Sector**	49%	Automatic
F.9.1	Other Conditions		
F.9.1.1	(i) Foreign investment in this sector shall be in accordance with the *Pension Fund Regulatory and Development Authority (PFRDA) Act, 2013*. (ii) Foreign investment in Pension Funds will be subject to the condition that entities investing in equity instruments issued by an Indian Pension Fund as per Section 24 of the *PFRDA Act, 2013* shall obtain necessary registration from the PFRDA and comply with other requirements as per the *PFRDA Act, 2013* and Rules and Regulations framed under it for so participating in Pension Fund Management activities in India. (iii) An Indian pension fund shall ensure that its ownership and control remains at all times with resident Indian entities as determined by the Government of India/ PFRDA as per the rules/regulation issued by them.		
F.10	**Other Financial Services**	100%	Automatic
F.10.1	Other Conditions		
F.10.1.1	(i) Other Financial Services will mean financial services activities regulated by financial sector regulators, namely, Reserve Bank, SEBI, Insurance Regulatory and Development Authority, Pension Fund Regulatory and Development Authority, National Housing Bank or any other financial sector regulator as may be notified by the Government of India. (ii) Foreign investment in "Other Financial Services" activities		

Sr. No.	Sector/Activity	% of FDI Cap/Equity	Entry Route
	shall be subject to conditionalities, including minimum capitalisation norms, as specified by the concerned Regulator/Government Agency. (iii) "Other Financial Services" activities need to be regulated by one of the Financial Sector Regulators. In all such financial services activity which are not regulated by any Financial Sector Regulator or where only part of the financial services activity is regulated or where there is doubt regarding the regulatory oversight, foreign investment up to 100% will be allowed under Government approval route subject to conditions including minimum capitalisation requirement, as may be decided by the Government. (iv) Any activity which is specifically regulated by an Act, the foreign investment limits will be restricted to those levels/limit that may be specified in that Act, if so mentioned. (v) Downstream investments by any of these entities engaged in "Other Financial Services" will be subject to the *FEMA (NDI) Rules, 2019*.		

Chapter 6 Tax Laws

Income Tax

Goods and Services Tax ("GST")

Customs Duty

Income Tax

¶6-010 Chargeability of Income Tax

Article 265 of the Constitution of India provides that "no tax shall be levied or collected except by the authority of law". Therefore, no tax can be levied or collected in India, unless it is explicitly and clearly authorised by way of legislation. The *Income-tax Act, 1961* (ITA) was enacted to provide for levy and collection of tax on income earned by a person.

According to the ITA, every person whose total income exceeds the maximum amount not chargeable to tax shall be chargeable to income tax at the rate or rates prescribed in the Finance Act. The ITA defines the term "person" to include an individual, an HUF, a company, a firm (including LLP), an AOP or a BOI; a local authority and every other artificial juridical person.

The ITA provides an inclusive definition of the expression "income". Therefore, income includes not only those things which this definition explicitly declares, but also all such things as the word signifies according to its natural import.[1] Therefore, before arriving at a conclusion as to the tax implications of a receipt of money, it is imperative to determine whether or not such a receipt amounts to income under the ITA. There will be no incidence of income tax if a receipt of money does not amount to income. For instance, it is important to distinguish a capital receipt from a revenue receipt because, while all revenue receipts are taxable under the ITA, unless specifically exempted, a capital receipt cannot be taxed as income[2], unless otherwise provided for by the statute.[3]

1 Kanga Palkhivala and Vyas, The Law and Practice of Income Tax, Ninth Edition at p. 142
2 *Padmaraje R. Kadambande v CIT* [1992] 195 ITR 877
3 For example, capital gains under Section 45 of the ITA

¶6-020 Residential Status

Section 6 of the ITA defines the term "resident" and contains different criteria to determine the residence of various entities such as a company, a firm and an individual, etc. A company is regarded as resident in India if it is an Indian company; or the place of its effective management[1] is in India in the relevant financial year.[2] The expression "place of effective management" has been defined to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.[3] An AOP, a firm or HUF is considered resident in India, except where during that financial year, the control and management of its affairs is situated wholly outside India. An individual's residential status is dependent on the duration of stay in India.

A person resident in India is liable to tax on his global income. A non-resident is liable to tax on income which is received or is deemed to be received in India or which accrues or arises or is deemed to accrue or arise to him in India.

¶6-030 Scope of Income

The total income of an assessee is determined on the basis of his residential status in India. According to Section 5 of the ITA, Indian residents[4] are liable to be taxed on their global income, whereas non-residents are taxed only on income that has its source in India.[5]

The scope of Section 5 is expanded by the legal fiction contained in Section 9, which deems certain incomes to be of Indian source. Section 9 provides for circumstances when various types of incomes are deemed to be Indian sourced and hence are liable to tax in India. It specifically provides that all incomes accruing or arising, whether directly or indirectly, through or from any business connection[6] in India, or through or from any property in India, or through or

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1 As substituted by the *Finance Act, 2015*, w.e.f. April 01, 2016

2 A period of 12 months commencing on the 1st day of April

3 As defined in Explanation to Section 6(3) of the ITA

4 Defined in Section 6 of the ITA

5 Income is said to have its source in India if it is "income which accrues or arises in India, is deemed to accrue or arise in India or is received in India"

6 The expression "business connection" as used in this provision was not originally defined in the ITA. The Supreme Court in the case of *R.D. Aggarwal* 56 ITR 20 laid down the definition of the term as:
"Business connection means something more than business. It presupposes an element of continuity between the business of the non-resident and his activity in the taxable territory, rather than a stray or isolated transaction".
The ITA was amended by the *Finance Act, 2003*, and an inclusive definition of the expression was inserted with effect from April 01, 2004. As per this definition, a business connection includes "any business activity carried out through a person who, acting on behalf of the non-resident, (a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are

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from any asset or source of income in India, or through the transfer of a capital asset situated in India, are deemed to be taxable in India to the extent attributable to Indian operations. It has been clarified in the ITA that an asset or capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from assets located in India. Such asset can be said to be deriving its value substantially from assets located in India, where the value of such asset exceeds Rs. 10 crore (INR ten million) and the same represents at least 51% (fifty-one percent) of the value of all the assets owned by the company/entity[1].

¶6-040 Tax Year

The financial year in which the income is earned is called the "Previous Year" and is the year ending on the 31st day of March each year. The year immediately succeeding the previous year is referred to as the "Assessment Year". The income of the previous year is taxed in the assessment year. The term "Assessment Year" refers to a period of 12 months commencing on the 1st day of April every year and ending on 31st day of March of the following year.

¶6-050 Rates of Income Tax

Applicable tax rates vary depending on the type of entity and the residential status of the taxpayer. For example, income of a resident company is taxed at the rate of 25% to 30%[2], whereas a non-resident company is taxed at the rate of 40% (forty percent)[3]. However, the applicable rates of income tax are amended every financial year by the corresponding Finance Act. For the tax rates applicable to the assessment year 2019-20, please refer to **Annexure 1.**

In computation of the income of a non-resident, the provisions of the Double Taxation Avoidance Agreement **(DTAA)** between India and the country of residence of the non-resident are required to be examined, since the ITA provides that its provisions shall be applicable only insofar as they are more beneficial to the taxpayer.[4] Thus, if the provisions of the DTAA are more beneficial as compared to the provisions of the ITA, the non-resident can opt to be taxed with

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limited to the purchase of goods or merchandise for the non-resident; or (b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or (c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident"

1 Refer Explanations 5, 6 and 7 in clause (i) of Section 9(1) of the ITA
2 Exclusive of applicable surcharge and education cess
3 Exclusive of applicable surcharge and health and education cess
4 Section 90(2) of the ITA

reference to the provisions of the DTAA. Please refer **Annexure 2** for a list of countries with whom India has signed DTAA.

The only exception where beneficial provisions of DTAA are not available to a non-resident is in case of applicability of General Anti Avoidance Rules[1] or non-furnishing of Tax Residency Certificate by the non-resident.[2]

¶6-060 Aligning Scope of "Business Connection" under the Indian Domestic Tax Laws with Modified PE Rule as per Multilateral Instrument (MLI)

The Indian domestic tax laws provide that all income accruing or arising, whether directly or indirectly, through or from any "business connection" in India shall be deemed to accrue or arise in India. In other words, business income of non-residents is taxable in India if they have a business connection in India.

Prior to April 01, 2018, the scope of "business connection" under the Indian domestic tax laws was similar to the provisions of Dependent Agent Permanent Establishment (DAPE) in Article 5(5) of the DTAAs entered into by India with other countries. In terms of the DAPE Rules in DTAAs, if any person acting on behalf of the non-resident is habitually authorised to conclude contracts for the non-resident, then such agent would constitute a PE in the source country. However, in many cases, with a view to avoid establishing a PE under Article 5(5) of the DTAA, the person acting on the behalf of the non-resident negotiates the contract but does not conclude the contract.

The OECD under BEPS Action Plan 7 reviewed the definition of "PE" with a view to prevent avoidance of payment of tax by circumventing existing PE definition by way of commissionaire arrangements or fragmentation of business activities. In order to tackle such tax avoidance scheme, the BEPS Action Plan 7 recommended modifications to Article 5(5) to provide that an agent would include not only a person who habitually concludes contracts on behalf of the non-resident but also a person who habitually plays a principal role leading to the conclusion of contracts.

Further, with a view to prevent base erosion and profit shifting, the recommendations under BEPS Action Plan 7 have now been included in Article 12 of Multilateral Convention to Implement Tax Treaty Related Measures (MLI), to which India is also a signatory. Consequently, these provisions will automatically modify India's bilateral DTAAs covered by MLI, where treaty partner has also opted for Article 12 of the MLI. As a result, the DAPE provisions in Article 5(5) of India's DTAAs, as modified by MLI, would become wider in scope than the provisions of the Indian domestic tax laws.

Accordingly, the Indian government has, with effect from April 01, 2018, expanded the scope of "business connection" as defined under the Indian

1 Section 90(2A) of the ITA
2 Section 90(4) of the ITA

domestic tax laws consistent with PE Rule as modified by BEPS Action Plan 7 and MLI by introducing the concept of *"agent habitually playing principal role leading to conclusion of contract"*, where the contracts are:

- in the name of the non-resident;
- for the transfer of the ownership of, or for the granting of the right to use, property owned by the non-resident or for which the non-resident has a right to use; or
- for provision of services by that non-resident.

Accordingly, the amendment in the Indian tax laws will align it with provisions of DTAA as modified by MLI so as to make the provisions of the DTAA effective.

However, it is pertinent to note that since the existing definition of agency PE under the DTAAs is narrower than the aforesaid amended definition under the Indian tax laws, therefore, the provisions of DTAAs being more beneficial than the Indian domestic tax laws would continue to apply to the non-resident till the time MLI comes into force.

¶6-070 "Business Connection" to Include "Significant Economic presence"

BEPS Action Plan 1 on "Addressing the tax challenges of the digital economy" recommended modifying existing definition of Permanent Establishment to provide that:

- An enterprise engaged in fully de-materialised digital activities would constitute a PE if it maintained a significant digital presence in another country's economy;
- Virtual PE would be constituted when an enterprise maintains its website on a server of another enterprise located in a jurisdiction and carries on business through that website.

BEPS Action Plan 1 also recommended that countries may introduce the following safeguards in their domestic laws to prevent BEPS:

i. A new nexus rule based on the concept of "significant economic presence"
ii. Withholding tax on certain types of digital transactions
iii. An equalisation levy

Prior to April 01, 2018, the Indian domestic tax laws provided for physical presence-based nexus rule for taxation of business income of the non-resident in India - territorial nexus. Emerging business models such as digitised businesses, which do not require physical presence of itself or any agent in India, were not covered by the domestic tax laws.

In view of the above, with effect from April 01, 2018, the Indian Government has expanded the scope of "business connection" to include "significant economic presence".

Significant economic presence for this purpose shall mean:

- Any transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India if the aggregate of payments arising from such transaction or transactions during the previous year exceeds the amount as may be prescribed; or
- Systematic and continuous soliciting of its business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means.

The aforesaid amendment will apply to all online advertisements, online searches, cloud services and other digital products, and ensure that profits of these firms attributable to Indian users are taxed in India. This could bring firms like Google, Facebook, Netflix and Amazon USA, besides app developers such as Uber Inc. with huge consumer bases in India into the tax net.

The aforesaid amendment comes at the back of equalisation levy at the rate of 6% (six percent) imposed from June 01, 2016, on online advertising payments to foreign entities not having a PE in India. Accordingly, companies digitally selling goods or services in India and whether or not having a taxable presence in India may fall within the garb of this amendment.

The revenue-based factor and user-based factor approach proposed by the Finance Bill to determine nexus based on the concept of significant economic presence is in line with Action Plan 1. However, guidelines in this regard prescribing the conditions and the threshold limits are yet to be issued.

¶6-080 Place of Effective Management

In India, prior to the amendment by the *Finance Act, 2015*, Section 6 of the Act provided that a company can be said to be resident in India in any previous year, if:

(i) it is an Indian company; or

(ii) during that year, the control and management of its affairs is situated wholly in India.

In other words, under the Indian Income tax prior to the amendment, a foreign company could be considered as a tax resident of India if during the relevant year, the "control and management" of its affairs is wholly situated in India. Therefore, for constituting a tax resident of India, "control and management" of a foreign company was required to be wholly situated in India.

Accordingly, unless the whole of control and management is situated in India, a company could not be treated as a resident for the purposes of the Act.

The said condition was being circumvented by companies by holding a board meeting outside India which facilitates creation of shell companies which are incorporated outside but controlled from India.

In order to discourage creation of shell companies outside India, which are controlled and managed from India, Section 6 of the Act had been amended by the *Finance Act, 2015* to provide that a person being a company shall be said to be resident in India in any previous year, if:

(i) it is an Indian company; or

(ii) its place of effective management, in that year, is in India.

Section 6(3) of the *Income Tax Act, 1961* (the Act) deems a foreign company to be resident in India if its "place of effective management" ("POEM") during that year is in India. The term "place of effective management (PoEM)" has been defined to mean a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are in substance made. Circular 8/2017 dated February 23, 2017 issued by CBDT has clarified that the provisions of PoEM will not be applicable to a company having turnover of Rs. 50 crore or less in a financial year.

The guiding principles to be followed in the determination of POEM provide that PoEM of a company would not be said to be in India if it is engaged in active business outside India and majority of the board meetings are held outside India, provided that the Board has actual decision making authority. A company is said to be in active business outside India if its passive income (income in relation to transactions of purchase and sale with associated enterprises or income generated from royalty, dividend, interest, rental or capital gains) is not more than 50% (fifty percent) of the total income.

For companies failing in active business outside India test, determination of POEM is a two-stage process namely;

(i) Identifying or ascertaining person or persons who actually makes key management and commercial decisions for conduct of company's business as a whole; and

(ii) Determination of place where these decisions are, in fact, made.

Further, the following factors are considered irrelevant for determining POEM of a company:

- Foreign company is wholly owned by an Indian company;
- Foreign company has a PE in India;
- One or more directors reside in India;
- Local management in India in respect of activities carried out by a foreign company in India;
- Support functions that are preparatory and auxiliary in character are in India;

- Place where routine operational decisions taken by junior/middle management;
- Place of meeting of shareholders for matters reserved for them;
- Place of implementation or execution of decisions.

Prior approval of Commissioner is necessary to initiate proceedings and the order of the assessing officer ought to be issued after approval of collegium of three Commissioners. The opportunity of hearing shall be provided by collegium to tax payer. However, if during the relevant year, PoEM exists both in and out of India, PoEM is presumed to be in India if it is predominantly in India.

Where a foreign company as per the aforesaid provisions of Section 6(3) is deemed to be a "resident" in India in a previous year, the issue arises as to the applicability of certain deductions/exemptions to foreign company while computing business income, such as calculation of unabsorbed depreciation, brought forward losses, opening Written Down Value (WDV) of depreciable assets, etc. In order to address the same, Section 115JH provides that certain provisions of the Act relating to mode of computation of total income, unabsorbed depreciation, brought forward loss, collection and recovery of tax shall be applicable to such foreign company (deemed to be resident in India) with certain exceptions/modifications/adaptations as may be notified by the Central Government.

In exercise of aforesaid powers conferred under Section 115JH, a draft notification dated June 15, 2017 was issued by the Central Board of Direct Taxes (CBDT) for public comments. The CBDT has now issued final notification, viz, Notification No. S.O. 3039 (E) dated June 22, 2018.

As per the provisions of Section 115JH(3) of the Act, the notification is required to be laid before each House of Parliament.

Salient features of the Final Notification

(a) Method for determination of the opening WrittDown Value (WDV) of depreciable assets for the purpose of computation of depreciation

- ✓ *Where the foreign company is assessed to tax in a foreign jurisdiction and depreciation is required to be taken into consideration while computing taxable income*

The WDV of the depreciable assets as per the taxpayer's tax record in the foreign jurisdiction as on the 1st day of the previous year shall be deemed to be the opening WDV of the depreciable assets.

- ✓ *Where the foreign company is not assessed to tax in a foreign jurisdiction or where depreciation is not allowed as deduction while computing taxable income*

WDV of the depreciable asset as appearing in taxpayer's books of accounts (maintained in accordance with the laws of the foreign jurisdiction) as on the 1st day of the previous year shall be adopted as opening WDV.

(b) Method of determination of unabsorbed depreciation and brought forward losses

✓ *Where the foreign company is assessed to tax in a foreign jurisdiction*

To be determined year wise on the basis of the *taxpayer's tax record* in foreign jurisdiction on the 1st day of the previous year.

✓ *Where the foreign company is not assessed to tax in a foreign jurisdiction*

To be determined year wise on the basis of the *taxpayer's books of account* prepared in accordance with the laws of foreign jurisdiction on the 1st day of the previous year.

✓ *Other points in relation to method of determination*

The brought forward loss/unabsorbed depreciation shall be allowed to be carried forward and set off in accordance with the provisions of the Act for the remaining period calculated from the year in which they first occurred by considering such year as the first year.

For example: If unabsorbed business loss occurred in the hands of the foreign company in AY 2015-16 whose POEM was found to be in India in assessment year 2018-19, which could not be set-off even in that year, then such business loss shall be available for carry forward only for the remaining period of 5 assessment years out of 8 assessment years commencing from AY 2016-17 in terms of Section 72 of the Act.

The brought forward loss/unabsorbed depreciation would not be allowed to be set off against income of the foreign company which would have been subject to tax in India even in its capacity as a non-resident. Accordingly, the brought forward loss/unabsorbed depreciation can be set off only against such income of the foreign company which became chargeable to tax in India only by virtue of the foreign company becoming resident in India on account of PoEM in India.

For example: Where "royalty" income earned by a foreign company is subject to tax in India in its capacity as a non-resident and the foreign company is also treated as resident in India on account of its POEM in India, then the brought forward loss/unabsorbed depreciation would not be permitted to be set off against such "royalty" income.

Where the brought forward loss or unabsorbed depreciation is revised in the foreign jurisdiction, the amount of losses or depreciation will stand revised in India as well.

In the event of different "previous year" being followed in the foreign jurisdiction, separate guidelines have been issued, which are discussed infra.

Where a foreign company is deemed to be resident of India on account of POEM in subsequent years, then the modifications prescribed by the notification shall continue to apply in those years as well. In such subsequent year(s), the WDV and brought forward loss/unabsorbed depreciation shall be as per the provisions of this final Notification.

(d) Preparation of profit and loss account and balance sheet

Where the accounting year followed by the foreign company does not end on 31st March (eg, where it ends on 31st December), then such foreign company would be required to prepare its profit and loss account and balance sheet for the period starting from the 1st day of the immediately succeeding accounting year followed by the foreign company (ie, 1st January) and ending with 31st March of the immediately preceding financial year during which the foreign company became resident in India on account of POEM.

The foreign company shall also be required to prepare the profit and loss account and balance sheet for the succeeding periods of twelve months, beginning from 1st April and ending on 31st March, till the year the foreign company remains resident in India on account of its POEM.

(e) Applicability of other provisions to a "foreign company" resident in India

It is provided that where there is a conflict between the provisions applicable to resident as well as foreign company, the provision applicable to the foreign company alone shall prevail.

Illustration 1

The withholding tax obligation on payment for "works contract" by a resident in India to such foreign company deemed to be resident in India on account of POEM shall be governed by the provisions of Section 195 as against Section 194C; the former being specific to foreign company shall prevail over the latter.

The rate of income tax as applicable to a foreign company (currently 40%) shall continue to apply, even though the tax status of the foreign company changes from non-resident to resident on account of POEM.

Transaction of a foreign company with any other person or entity under the Act shall not be altered only on the ground that the foreign company is resident in India on account of POEM.

Illustration 2

Where the shares of a foreign company deemed to be resident in India on account of POEM held by a non-resident entity are transferred, then such sale will not be taxable in the hands of non-resident seller in India, merely because such company is deemed to be resident in India, unless it meets the test of substantial assets being located in India in terms of Explanation 5 to Section 9(1)(i) of the Act.

The exceptions/modifications prescribed in the final Notification shall not apply in respect of such income of the foreign company (becoming tax resident in India on account of POEM) which would have been chargeable to tax even if it was not resident in India.

Illustration 3

"Royalty" income is earned by the foreign company and such royalty income is chargeable to tax in India under Section 115A in its capacity as a

non-resident in India. The foreign company is treated as resident on account of it POEM in India. In such a case, its global income will be subject to tax in India and normally it should be eligible to claim credit for foreign taxes paid. However, the notification expressly mentions that its provisions will not be applicable to the above-mentioned "royalty" income. Consequently, there is a possibility that the relief of foreign tax credit as specifically provided for in the final Notification may not be available against tax paid in foreign jurisdiction on such "royalty" income.

(f) Relief from double taxation

The foreign company deemed to be resident in India on account of POEM shall be entitled to credit of foreign tax paid outside India in accordance with the provisions of Section 90/91 of the Act. The relief in the form of foreign tax credit shall be provided in the same proportion in which income is offered to tax in India in accordance with the Foreign Tax Credit rules contained under Rule 128 of the *Income Tax Rules, 1962*.

Other miscellaneous features

The rate of exchange for conversion of a value expressed in foreign currency shall be in accordance with Rule 115 of the *Income Tax Rules, 1962*.

The final Notification shall be deemed to have come into force from April 01, 2017.

The Notification seeks to bring clarity on application of various provisions of the Act on such foreign companies more specifically relating to allowance of set-off of brought forward losses, unabsorbed depreciation and credit of foreign taxes paid, which were ambiguous prior to the issuance of the Notification.

However, there are still several additional questions that would need clarity as to taxation of such foreign companies deemed to be resident in India like:

- Applicability of Section 115JB relating to "Minimum Alternate tax" on book profit;
- Applicability of advance tax provisions qua such foreign companies;
- Requirement to obtain tax audit report under Section 44AB of the Act;
- The transfer pricing provisions apply in relation to international transaction between a person resident in India and its non-resident associated enterprise. Hence, greater clarity is required on whether the transfer pricing provisions shall apply on transaction between such foreign company, deemed to be resident in India, and another associated/related Indian company resident.

The Act provides certain incentives/deductions to an Indian company (like deduction under Section 80IA/80IB, etc). Pending further clarification, while the foreign company deemed to be resident in India will be subject to tax like an Indian company, however, it shall stand discriminated and not be allowed incentive/deduction available to similarly placed Indian companies. Where non-discrimination provisions exist in the applicable Tax Treaty, it may be possible for the resident foreign company to invoke the said Article and defend against such discrimination.

The Notification, while seeking to clarify and extend benefits to foreign companies deemed to be resident in India simultaneously takes away certain benefits, such as not extending some exemptions/deductions under the notification to that income of the foreign company which would have in any event been taxable in India in its capacity as a non-resident. The issue would arise whether such notification to the extent it goes beyond the scheme of the Act and is not favorable to the taxpayer would be binding on such taxpayers and a view different than the notification could be taken.

¶6-090 Heads of Income

Income liable to tax in the hands of a person under the ITA has been classified into five mutually exclusive heads of income, namely:

- Salaries,
- Income from house property,
- Profits and gains from business or profession,
- Capital gains, and
- Income from other sources.

The ITA details the manner of computation for each head of income. Various exemptions and deductions are provided under each head of income and the net amount (net of exemptions and deductions) is included in computing a person's total taxable income. Ad hoc deductions and exemptions are provided for insofar as salaries and income from house property are concerned. No expenditure other than as prescribed can be deducted while computing income under the heads "salaries" and "income from house property".

¶6-100 Computation of Profits and Gains from Business or Profession

All expenditure, other than capital or personal expenditure, incurred wholly and exclusively for the purpose of business is allowed as a deduction while computing the business income of an assessee. While this is the general rule, specific deductions are prescribed for certain expenditures like rent, rates, taxes, repairs and insurance for premises, used for the purposes of the business, repair and insurance of machinery, plant and furniture, depreciation of various capital assets, etc. The thrust is on taxing net current income and, therefore, receipts or expenditure of a capital nature are usually not taken into consideration while computing the taxable income of business or profession. However, depreciation is allowed in relation to capital expenditure incurred for obtaining a tangible or intangible asset.

Certain additional exemptions, concessions and deductions have been provided to promote certain important industries, services or as the case may be, for the economic development of a particular geographical area. For instance, profits and gains derived by an assessee from a newly established undertaking set up in Special Economic Zone (SEZs) will not be included in the total income of the taxpayer for ten consecutive financial years from the date of commencement of operations by such an undertaking. A few such provisions have been discussed in detail below:

Deduction in respect of newly established units in Special Economic Zones

Section 10AA of the ITA makes special provisions in respect of newly established units in Special Economic Zones. A taxpayer setting up such a unit is entitled to exemption from income tax for a period of 15 years from the year of commencement of operations by such a unit, in the following manner:

- 100% (one hundred percent) of profits earned from the export of goods or services for a period of first five years;
- 50% (fifty percent) of such profits for next five years; and
- 50% (fifty percent) of such profits for further five years subject to re-investment of profits in the business of the taxpayer in prescribed manner;

However, certain general conditions must be satisfied before a taxpayer becomes entitled to this deduction, viz,

- The unit should be set up in a notified Special Economic Zone;
- The unit should not be formed by splitting up or by reconstruction of a business already in existence; and
- The unit should not have been formed by the transfer of a new business of machinery or plant previously used for any purpose.

Deductions in respect of profits from industrial undertakings or enterprises engaged in infrastructure development, etc

Special deduction of 100% (one hundred percent) of profits earned by a taxpayer derived from certain industrial undertakings or enterprises engaged in certain activities are allowed for 10 consecutive financial years under Section 80-IA of the ITA. Such deductions are available for undertakings engaged in the following activities:

- Provision of infrastructure facilities;
- Power generation, transmission and distribution or substantial renovation and modernisation of existing distribution lines; and
- Undertaking set up for a new power unit.

Deductions in respect of profits from industrial undertakings other than infrastructure development undertakings

Section 80-IB of the ITA provides for deductions of varying magnitude in respect of profits earned by a taxpayer derived from certain industrial undertakings other than infrastructural undertakings set up in specified backward areas/districts. The deductions are available for 10 consecutive financial years from the date of commencement of its operations. The deduction under the above section is also available to an enterprise engaged in the following activities:

- Operation of a ship;
- Hotels;
- Industrial research;
- Production of mineral oil;
- Developing and building housing projects;
- Business of processing, preservation and packaging of fruits or vegetables or integrated handling, storage and transportation of food grains units;
- Multiplex theatres;
- Convention centres; and
- Operating and maintaining a hospital in rural areas.

However, the undertakings must satisfy the following conditions in order to claim deduction under Section 80-IB:

- It should be a new undertaking;
- It should not be formed by the transfer of old plant and machinery;
- It should not manufacture or produce non-priority sector items, as listed in the Eleventh Schedule to the ITA;
- Manufacture or production should commence within the prescribed time limit for various activities;
- It should employ at least 10 (for power-assisted undertakings) or twenty (for undertakings operating without the aid of power) workers;
- It must file its return of income on or before the prescribed due date; and
- Tax holiday is also provided in respect of profits of units set up in certain specified States (Section 80-IC) and business of hotels and convention centres in specified areas.

Deduction in respect of profits and gains by an undertaking or enterprise engaged in development of Special Economic Zone

Under Section 80-IAB of ITA, deduction of 100% (one hundred percent) of profits derived by a taxpayer from the business of developing or developing, operating and maintaining a notified special economic zone is available for a period of ten consecutive years out of a period of 15 years commencing from the year of notification of the Special Economic Zone.

¶6-110 Computation of Capital Gains

Any profit or gain arising from the transfer of a capital asset during a financial year is chargeable to tax under the head "capital gains". Capital assets may either be in the nature of long-term capital assets or be in the nature of short-term capital assets. A capital asset held by the taxpayer for not more than thirty six months is a short-term capital asset, while other capital assets are long-term capital assets. However, the above-mentioned period of 36 months stands reduced to 12 months in the case of security of a company listed on a recognised stock exchange and unit of equity-oriented mutual funds. Therefore, equity or preference shares which are listed on a recognised stock exchange held by a taxpayer will be a long-term capital asset should it be held for a period of twelve months or more.

Long-term capital gains are taxed at a lower rate as compared to the normal rate of tax. Capital gains are generally computed by deducting the following amounts from the value of consideration for which the capital asset has been transferred:

- All expenditure incurred wholly and exclusively in connection with the transfer of the capital asset;
- Cost of acquisition of the capital asset; and
- Any cost of improvement that may have been incurred by the taxpayer towards the capital asset.

These costs of acquisition and improvement are taken at their absolute values for computing capital gains arising from the transfer of short-term capital assets. However, indexation benefit is allowed in case of capital gains arising from the transfer of long-term capital assets to neutralise the impact of inflation since the date of acquisition of the asset or April 01, 1981, whichever is later.

¶6-120 Transfer Pricing

Section 92 of the ITA provides that income arising from an "international transaction" shall be computed having regard to the arm's length price. The expression "international transaction" has been defined to mean a transaction between two or more "associated enterprises", either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises. Further, two enterprises are considered to be "associated enterprises" if one enterprise holds, directly or indirectly, shares carrying not less than 26% (twenty-six percent) of the voting power in the other enterprise. Further, there are certain other circumstances in which two enterprises are deemed to be "associated enterprises". The Indian Transfer Pricing guidelines are to a large extent modeled on the OECD's transfer pricing guidelines and follows transfer pricing policy prevalent in the developed countries. However, transfer pricing regulations are not applicable to transactions where no tax liability arises in India under the provisions of DTAA.[1]

The *Finance Act, 2012* has extended the scope of transfer pricing provisions to specified domestic transactions. In terms of the newly inserted Section 92BA of the ITA, the following transactions between two domestic enterprises shall be subject to transfer pricing provisions:

(i) Any transaction referred to in Section 80A;

(ii) Any transfer of goods or services referred to in sub-section (8) of Section 80-IA;

(iii) Any business transacted between the assessee and other person as referred to in sub-section (10) of Section 80-IA;

(iv) Any transaction, referred to in any other section under Chapter VI-A or Section 10AA, to which provisions of sub-section (8) or (10) of Section 80-IA are applicable; or

(v) Any other transaction as may be prescribed.

The provisions of domestic transfer pricing have been made applicable if aggregate amount of all such domestic transactions exceeds Rs. 200 million in a year.

Existing transfer pricing provisions provided arm's length range of $\pm$ 3% (three percent) for determining the arm's length price.

Anti-Avoidance Rules

Section 94A has been inserted by the *Finance Act, 2011* to deal with transactions undertaken with persons located in the notified countries or jurisdictions[2], which do not effectively exchange information with India.

According to this provision, if a taxpayer enters into a transaction, where one of the parties to the transaction is located in a notified area, transfer pricing regulations will apply to such transaction. No deduction in respect of any payment made to any financial institution located in a notified area will be

1 *Vanenburg Group B.V. v CIT*, 289 ITR 464; *DDIT v Sun Chemicals BV*, 24 SOT 199

2 Central Government may notify any country or territory outside India as a notified jurisdictional area (notified area)

allowed unless the taxpayer furnishes an authorisation authorising CBDT or any other income tax authority acting on its behalf, to seek relevant information from the financial institution.

No deduction in respect of any other expenditure or allowance (including depreciation) arising from the transaction with a person located in a notified area will be allowed under any provision of the ITA unless the taxpayer maintains such other documents and furnishes the information as may be prescribed.

If any sum is received by a taxpayer from a person located in a notified area, the onus will be on the taxpayer to satisfactorily explain the source of such money in the hands of such person or in the hands of the beneficial owner and in case of his failure to do so, the amount will be deemed to be the income of the taxpayer.

Sub-section (5) of Section 94A of the ITA provides that where any person located in a notified area is entitled to receive any sum or income on which tax is deductible under Chapter XVII-B, tax shall be deducted at the highest of the following rates, namely,

- rates in force;
- rates specified in the relevant provisions of the ITA; or
- rate of 30% (thirty percent).

Vide Notification No. 86/2013 dated November 01, 2013, Cyprus has been notified as a notified jurisdictional area, for the purpose of the aforesaid section. Thus, in terms of the said provision, transactions entered with resident(s) of Cyprus are subject to the provisions of said section.

Advance Pricing Agreements (APA)

Sections 92CC and 92CD providing for the APA programme were inserted by the *Finance Act, 2012*. An APA is an agreement entered between the taxpayer and the tax administration (in India, with the Central Board of Direct Taxes "CBDT") determining in advance the price of an international transaction, thereby providing for a dispute prevention mechanism.

APA could be unilateral, involving a taxpayer and Indian tax administration or bilateral/multilateral, involving tax administrations of two or more countries.

In bilateral APA the agreement is between (i) the taxpayer and the Government of the concerned country, (ii) the non-resident taxpayer and the Government of the non-resident's country and (iii) between the two Governments (not shared with the taxpayer).

The APA Scheme was introduced by the *Finance Act, 2012* and is provided in Sections 92CC and 92CD of the Act.

At present APA can be obtained for a period not exceeding five years for future transactions.

By the *Finance Act, 2014*, with effect from October 01, 2014, “roll back” provision in the APA scheme is brought in the statute so that an APA entered into for future transactions may also be applied to international transaction undertaken in previous four years in specific circumstances.

Safe Harbour

The *Finance (No.2) Bill, 2009* empowered the CBDT to formulate Safe Harbour Rules providing for the circumstances in which the Income-tax authorities shall accept the transfer price declared by the assessee.

The CBDT, accordingly issued Safe Harbour Rules in 2013 prescribing Rules for implementation of Safe Harbour provisions. However, the Revenue received tepid response to the safe harbour scheme due to high rate prescribed under Rules.

The CBDT, thereafter vide notification number 46/2017 revised the Safe Harbour Rules, which are applicable for assessment year 2017-18 and two following assessment year, ie, up to assessment year 2019-20. The revised safe harbour rates are as under:

i) For IT/IT-enabled services the rates have been reduced to 17%-18% from the rate of 20%-22% prescribed earlier;

ii) The rates for KPO services have been reduced to 16%-24% (depending upon ratio of employee cost to operating expenses) from the earlier rate of 25% (twenty-five percent);

iii) The safe harbour provisions have been extended to receipt of low value added intra group services. In order to qualify for safe harbour provisions, the value of low value added intra group services, including a maximum mark up of 5% (five percent), shall not exceed Rs. 10 crore;

iv) The interest rates on loans granted to wholly owned subsidiaries is to be computed with reference currency in which the loan is denominated and the credit rating of the borrower;

v) The commission rate for provision of corporate guarantee has been reduced to 1% (one percent) from the earlier prescribed rate of 1.75%-2%;

vi) The rates for provision of contract R&D services have been reduced to 24% (twenty-four percent) (where the value of international transaction is not greater than Rs. 200 crore) from the earlier rate of 29%-30%; and

vii) The operating profit margin for manufacture and export of core auto components has been retained at 12% (twelve percent) and for non-core auto components the rate has been fixed at 8.50%.

¶6-130 Master File and Country-by-Country (CbC) Reporting – BEPS Action Plan

India has been an active member of the Base Erosion and Profit Shifting (BEPS) initiative of the Organisation for Economic Cooperation and Development (OECD) and is part of the consensus. The *Finance Act, 2016* inserted second proviso to Section 92D of the Act providing for enhanced reporting requirements in line with Base Erosion and Profit Shifting (BEPS) Action 13, which applies to members of an MNE group, viz,

(i) CbC by the Parent (or the alternate reporting member) resident in India; and

(ii) Master file by each member of the MNE group who is resident in India.

The Central Board of Direct Taxes (CBDT) has issued rules relating to Master File and Country by Country (CbC) reporting. The Rules in connection with furnishing of Master file and CbC report are as under:

a) <u>Master File</u>

As per the Rule 10DA, the Master File has to be furnished in Form 3CEAA (comprising Part - A and Part - B) on or before the prescribed date of March 31, 2018 for financial year 2016-17. The threshold for furnishing the master file are as under:

(i) The consolidated revenue of the multinational group is more than Rs. 500 crore in the accounting year; **and**

(ii) The value of international transactions for that entity during the relevant year exceeds Rs. 50 crore in aggregate or the aggregate value of international transactions involving sale, purchase, transfer, lease or use of intangible property exceeds Rs. 10 crore (USD 1.50 million approx).

An entity which meets the above criteria will be required to furnish information in both **Part-A** and **Part-B** of Form 3CEAA and all Indian entities that are part of a multinational group irrespective of the above criteria would be required to furnish information mentioned in Part-A of Form 3CEAA.

Further, where there are more than one constituent entities resident in India of an international group, the aforesaid report may be furnished by the entity designated by the international group for this purpose. The intimation as to which entity has been designated for making the aforesaid filings shall be made in Form 3CEAB at least thirty days before the due date of filing the master file.

b) <u>CbC Report</u>

Rule 10DB provides the requirements with regard to furnishing of CbC report. The threshold for filing the CbC report is proposed to be fixed at Rs. 5,500 crore of consolidated turnover of the multinational group. The filing requirements under the proposed Rule 10DB are as under:

(i) **Form 3CEAC** is required to be filed by an Indian subsidiary of a foreign multinational group for notifying the Indian Tax Authorities about its parent company or the alternate reporting entity and their tax jurisdiction. The form is required to be submitted 60 days prior to the due date for filing the CbC report in Form 3CEAD.

(ii) **Form 3CEAD is required to be furnished by** the parent company or the alternate reporting entity of the multinational group resident in India.

The format and information requirement prescribed under the Rules are largely consistent with the guidance provided by the OECD under BEPS Action 13.

¶6-140 Rationalisation of Provisions Relating to CbC Reporting

Prior to April 01, 2018, the parent company or the alternate reporting entity of an international group resident in India was required to furnish CbC report in prescribed Form on or before the due date for filing of the Income Tax Return.

The Indian Government, has with retrospective effect from April 01, 2017, extended the time allowed for furnishing CBC report to twelve months from the end of the reporting accounting year. OECD BEPS Action Plan 13 recommends that the CbCR may be furnished within one year from the end of the fiscal year of the ultimate parent of the MNE group. However, the US prescribes filing of CbCR by the date of filing the tax return, ie, 15th April and China requires filing of CbCR by 31st May. Other countries generally prescribe filing of CbCR within one year from the end of the fiscal year. The proposed change in the due date for furnishing CbCR is in line with the recommendation of the OECD.

Under the Indian tax laws, following Indian entities having non-resident parent company are required to furnish the CbC report:

- The parent company is a resident of country with which India does not have an agreement for exchange of CbC report; or
- There has been a systematic failure of the country of resident of the parent company in exchanging CbC report with India and such failure has been communicated to the Indian entity.

The Indian company having non-resident parent as described above will not be required to furnish CbC report if the alternate reporting entity of the group has furnished the CbC report in accordance with the regulation of the Country in which such alternate reporting entity is the resident.

¶6-150 Withholding Tax

A person (except individuals in certain cases) is required to withhold tax from certain specified payments. Separate provisions exist in respect of tax to be deducted on specific transactions with residents and non-residents.

The ITA provides for withholding of taxes from payments made to non-residents, which are chargeable to tax under the ITA. Any person, whether resident or non-resident, making payment to a non-resident would be liable to withhold tax from such payment and deposit the same with the Government within the prescribed time. Moreover, prescribed returns are also required to be filed periodically with the tax authorities. The payee is entitled to adjust the taxes so withheld against his tax liability in India on production of a (tax credit) certificate to be issued by the person withholding the tax.

Rates of withholding tax

The current rates[1] for withholding tax for payment to non-residents are as follows:

Interest	20%
Interest (from a notified Infrastructure Debt Fund)	5%
Dividends (Domestic Companies)	Nil
Royalties	10%
Technical Services	10%
Any other income	Individuals: 30% Companies: 40%

The above rates are general and applicable in respect of countries with which India does not have a DTAA. If the tax rates, as per the DTAA, are more favourable, the same would apply.

However, if the non-resident payee does not have a Permanent Account Number (PAN), the rate of tax withholding shall be 20% (twenty percent) or the rates as per the aforesaid table, whichever is higher.

¶6-160 Minimum Alternative Tax (MAT)

In India, a company, alike other assessees, is liable to pay tax on the income computed in accordance with the provisions of the ITA. However, the profit and loss account of the company is prepared as per the provisions of the *Indian Companies Act, 1956*. The Government has experienced a large number of cases where the companies, though had profits as per their profit and loss account, were not paying any tax because income computed as per the provisions of the ITA was either nil or was a loss. In such cases, though the companies were showing profits in books and declaring dividends to its shareholders, yet they were not paying any income tax. To bring such companies within the income tax ambit, "Minimum Alternate Tax" was introduced on regular basis, w.e.f. the assessment year 1997-1998.

1 Rates mentioned are exclusive of surcharge and education cess

Thus, in terms of Section 115JB of the ITA, a company is required to pay tax at the rate of 18.5%[1] plus applicable surcharge and education cess on its book profits (as declared in the profit and loss account), if the tax on income computed as per the normal provisions of the ITA is less than the aforesaid tax on book profits.

A new tax credit scheme was introduced by which the MAT paid could be carried forward and set off against regular tax payable during the subsequent ten-year period[2], subject to certain conditions, viz:

- When a company pays tax under the MAT, the tax credit earned by it shall be an amount, which is the difference between the amount payable under the MAT and the regular tax. Regular tax in this case means the tax payable on the basis of normal computation of total income of the company.
- MAT credit will be allowed to be carried forward for a period of 10 assessment years immediately succeeding the assessment year in which MAT is paid. Unabsorbed MAT credit will be allowed to be accumulated, subject to the 10-year carry-forward limit.
- In the assessment year when regular tax becomes payable, the difference between the regular tax and the tax computed under the MAT for that year may be set off against the MAT credit available.
- It may be noted that the credit allowed will not bear any interest.

The *Finance Act, 2015*, w.e.f. April 01, 2016 has specifically excluded from the purview of MAT, any income accruing and/or arising to a foreign company under the heads capital gains arising from transactions in securities or interest, royalty or fees for technical services.

¶6-170 Alternate Minimum Tax

A concept similar to minimum alternate tax for companies has also been introduced with effect from April 01, 2011 for all assessee, including limited liability partnerships but excluding companies, as companies are governed by MAT provisions. All assessees, other than a company, are required to compute alternate minimum tax (AMT) on their adjusted total income and pay AMT if it exceeds the tax arrived at as per the other provisions of ITA. Provisions for credit and set off (similar to those applicable to companies in case of MAT) have also been enacted.

¶6-180 Securities Transaction Tax

Securities transaction tax (STT) or turnover tax, as is generally known, is a tax that is leviable on securities transaction carried through a recognised stock

1 With effect from assessment year 2012-2013 (as per the *Finance Act, 2011*)
2 Where the tax has been paid under Section 115JB(1) of the ITA

exchange in India. STT is leviable on the taxable securities transactions, w.e.f. October 01, 2004. Surcharge is not leviable on the STT.

Long-term capital gains arising on the sale of shares/securities, which is carried out through the stock exchange and on which STT has been paid, are exempted from tax.

¶6-190 Dividend Distribution Tax

Section 115-O of the ITA provides that any amount declared, distributed or paid by a domestic company by way of dividend shall be chargeable to dividend distribution tax (DDT). Only a domestic company (not a foreign company) is liable for DDT. Such tax on distributed profit is in addition to income tax chargeable in respect of total income. It is applicable whether the dividend is interim or otherwise and whether such dividend is paid out of the current profits or accumulated profits.

Rate of DDT is 15% (fifteen percent) plus surcharge and education cess on dividends distributed by companies and 30% (thirty percent) on deemed dividend referred to in Section 2(22)(e), on account of any payment by a closely held company by way of loan or advance to a shareholder holding not less than 10% (ten percent) of the voting power.

With a view to remove the cascading effect of DDT in multi-tier corporate structure, dividend received by any company from its domestic subsidiary which has been subjected to DDT or a foreign subsidiary, in respect of which tax has been paid by the domestic company under Section 115BBD shall be liable to be reduced from the amount of dividend distributed by such recipient shareholder company, subject to DDT.

¶6-200 Taxation of Dividends Received from Foreign Subsidiaries

Dividend received (gross) by an Indian company from its foreign subsidiary(ies) (in which the recipient Indian company holds a minimum threshold shareholding of 26%(twenty-six percent) has now been taxable at a concessional rate of 15% (fifteen percent)[1]. Until March 31, 2011, any dividend received from foreign subsidiary(ies) was taxable at the normal rates. This amendment, brought by the *Finance Act, 2011*, by inserting Section 115BBD, is intended to encourage inflow of passive income lying abroad to boost the economy.

Buyback of shares by the Indian company

The *Finance Act, 2013* inserted new Chapter XII-DA consisting of Sections 115-QA to 115-QC, w.e.f. June 01, 2013, to provide that tax shall be payable by the company (whose shares are not listed on a recognised stock exchange) on buy back of its own shares at the rate 20% (twenty percent) of the "distributed income".

1 Section 115BBD of the ITA

For the aforesaid purpose, "distributed income" is to be computed by reducing the amount received by the company on issuance of shares from the consideration paid on buyback. The said additional income tax paid by the company shall be the final tax liability and consequently, the amount/ consideration received by the shareholder(s) would be exempt from tax in their respective hands.

¶6-210 Return of Income

A person having income liable to tax in India is required to file a return of income with the income tax authorities (also referred to as the "Revenue"). The return of income must be filed before specific due dates prescribed for various kinds of entities for each financial year. Every company, including a foreign company, deriving income from India, is required to file such a return in India.

Effective from June 01, 2011, the liaison offices of foreign companies are required to furnish a statement of its activities in prescribed form to the income-tax authorities within 60 days from the close of the financial year.

¶6-220 Books/Records to be Maintained and Audited

The ITA requires an assessee carrying on business or profession to maintain books of accounts if the gross receipts exceed the specified threshold. Every assessee carrying on business with gross receipts exceeding Rs. 1,00,00,000 (INR ten million), or profession with gross receipts exceeding Rs. 50,00,000 (INR five million) in a financial year is statutorily required to get the books of account audited by a Chartered Accountant and furnish Tax Audit Report.

¶6-230 Assessment and Dispute Resolution

Detailed provisions exist in the ITA for assessing the income of a taxpayer for any previous financial year. Normally, the assessment of income is made on the basis of the return of income filed by the assessee. However, there may be cases where the Revenue may call for certain details in order to make a correct assessment of the taxpayer's income. The income tax law in India also provides for reopening of assessments in cases where income chargeable to tax had escaped assessment. The Commissioner of Income Tax (CIT) has wide powers to revise an assessment if the order is erroneous or prejudicial to the interest of Revenue.

¶6-240 Dispute Resolution Panel

In order to facilitate expeditious disposal of disputes, a new dispute resolution mechanism has been introduced. In case of specified assessee (an Indian company, in whose case, a Transfer Pricing adjustment is proposed, and a foreign company), it has been provided that prior to passing of final assessment order, the assessing officer should serve a copy of draft order to the assessee, to enable the assessee to record his objections to the draft order before the Dispute Resolution Panel (DRP). The DRP is a panel consisting of three senior Revenue officers, who have been given the powers to review the objections of the assessee and issue necessary directions to the Revenue officer to pass the assessment order in accordance with such directions. An appeal against the order passed by the Revenue officer in accordance with the directions of the DRP can be preferred directly before the second appellate authority, the Income Tax Appellate Tribunal (ITAT). This mechanism is optional and the assessee may decide not to avail of this resolution mechanism and take the traditional approach and prefer an appeal before the first appellate authority, the CIT(A) against the assessment order passed by the Revenue officer. The advantage of opting for the DRP route is that there is no demand raised until the final order is passed by the assessing officer after considering the directions of DRP. Also, the assessee can approach the ITAT for stay of demand raised by the assessing officer as per the final order, after filing appeal to the ITAT against such order.

¶6-250 Appeals: Administrative, Quasi-Judicial and Judicial Hierarchy

The ITA makes detailed provisions for appeals and revisions. Any assessee aggrieved by an assessment order made by the Revenue may prefer an appeal against the order to a Commissioner of Income Tax (Appeals) (CIT(A)), who is a senior revenue officer and a quasi-judicial authority. The assessee can only approach the CIT to seek revision of the order, if it is prejudicial to him.

The taxpayer as well as the Revenue has a right to prefer an appeal against the order of the CIT(A) before the ITAT. The order of the ITAT may further be appealed against before the appropriate High Court, if a substantial question of law is involved. The order of the High Court is appealable before the Supreme Court.

¶6-260 Advance Ruling

With as many as **four statutory appellate forums**, assessees often find themselves caught in long-drawn and expensive litigations against the Revenue and, in the process, face a great deal of uncertainty regarding their tax liability. To address this situation, the ITA provides for advance rulings for certain eligible applicants. The Authority for Advance Rulings (AAR) is required by statute to issue its ruling within six months of receiving an application from an eligible applicant. These rulings are binding on taxpayers as well as the Revenue.

¶6-270 Closure of Business

When any business or profession is discontinued in a year, the Revenue has the power to tax the income for the period starting from the 1st day of April of that year up to the date of discontinuance as if such income was that of the immediately preceding financial year. The intimation should be given to the

Revenue in the event that a business or profession in India is discontinued. Such intimation is required to be given within a period of fifteen days from the date of discontinuance of the business.

Discontinuation of an entity carrying on business has tax consequences. The winding up of the business and distribution of the assets to the constituent members may entail tax liabilities arising from transfer of the assets to the constituent members. In the case of a company, money or assets received by a shareholder on liquidation in lieu of the share capital contributed by him would result in capital gains in his hands depending upon the amount/value of assets received vis-à-vis the cost of acquisition of the shares. Further, to the extent the company in liquidation has accumulated profits the amount distributed is liable to dividend distribution tax. In the case of dissolution of a partnership firm or AOP, the firm would be liable to tax on capital gains on the assets distributed to its partners on the basis of the market value of the asset on the date of distribution. The partners are not, however, liable to tax on the assets so received.

In the case of a partnership firm or an AOP where the business is discontinued or the firm/AOP is dissolved, the members of such AOP at the time of discontinuance/dissolution and their legal representatives shall be jointly and severally liable for the tax liabilities of such dissolved firm/AOP.

In the case of a company, which goes into liquidation, the liquidator is required to give a notice to the tax authorities of his appointment as such liquidator. The tax authorities are empowered to require the liquidator to keep aside a sum, which the authorities consider sufficient to provide for the existing and future tax liabilities of the company in liquidation.

In the case of a private limited company, the undischarged tax liabilities can be recovered from its directors, even after the company is liquidated, unless the director proves that the non-recovery of the taxes from the company cannot be attributed to any gross negligence or misfeasance on its part. It may be difficult to wind up a company if there are tax liabilities outstanding against the company or litigation is pending with the tax department till an arrangement is made to the satisfaction of the tax department as regards security for the estimated amounts which the company may be liable to pay.

¶6-280 Corporate Restructuring: Tax Implications

The growing need for restructuring of business enterprises on account of increasing competition and globalisation, by ensuring preservation of tax benefits and simplifying procedural requirements, has been recognised in the provisions under the ITA.

Amalgamation

Under the ITA, in the case of amalgamation of companies, which is approved by the Court, the benefit of unabsorbed tax allowances of an amalgamating company owning an industrial undertaking or carrying on certain other specified business is available to the amalgamated company without the necessity of obtaining any formal approval, subject only to fulfillment of the conditions prescribed therein. The conditions which are required to be fulfilled are as under:

- The book value of the assets of the amalgamating company as on the date of amalgamation should not be less than 75% (seventy-five percent) of the book value of the assets held two years prior to the date of amalgamation;
- The business in which losses have been incurred by the amalgamating company should have carried on for a period of at least three years prior to the date of amalgamation;
- The amalgamated company should hold continuously for a minimum period of five years from the date of amalgamation, at least 75% (seventy-five percent) of the book value of the fixed assets of the amalgamating company;
- The amalgamated company should continue the business of the amalgamating company for a minimum period of five years from the date of amalgamation;
- The amalgamated company should achieve production of at least 50% (fifty percent) of the installed capacity of the undertaking of the amalgamating company before the end of four years from the date of amalgamation and should continue to maintain such capacity utilisation till the end of five years from the date of amalgamation; and
- The amalgamated company must furnish a certificate in the prescribed form, to be issued from a chartered accountant, to the Revenue.

The transfer of assets of the amalgamating company to the amalgamated company pursuant to the amalgamation does not attract any capital gains tax. Similarly, issue of shares of the amalgamated company to the shareholders of amalgamating company in lieu of their shares in the amalgamating company does not attract any capital gains tax. The amalgamated company is also entitled to claim depreciation on the fixed assets of the amalgamating company to the same extent as the amalgamating company was entitled to as if no amalgamation had taken place.

Demerger

Demerger in the context of the Indian tax laws signifies a transfer of the division/undertaking of a company to another company under a scheme of arrangement approved by the Court. Provisions exist in the current laws to maintain tax neutrality in respect of the assets transferred by the demerged company to the resulting company through a scheme of demerger. The provisions are broadly on the same lines as those in the case of an amalgamation. The losses identifiable to the unit/division to be demerged or in the absence of such identifiability, proportionate losses of the demerged company can be availed of by the resulting company. Under the present provisions, however, the condition regarding the continuation of business, holding of the minimum percentage of assets, etc, as applicable to an amalgamation, do not apply in the case of a demerger.

Conversion of Proprietorship or Partnership Firm into a Company

Tax neutrality exists where a sole proprietorship or partnership firm is converted into a company, subject to fulfillment of some specified conditions.

Conversion of Private or Unlisted Public Company into Limited Liability Partnership

Tax neutrality exists where a private or an unlisted public company (not having gross receipts from business of more than Rs. 6 million in the preceding three years) is converted into a Limited Liability Partnership, subject to fulfillment of specified conditions.

¶6-290 Administration

The Income Tax Act is administered by the Central Board of Direct Taxes (CBDT), Department of Revenue, Ministry of Finance, Government of India. The CBDT, from time to time, comes out with Circulars/Notifications clarifying the provisions of law, framing rules, etc, in connection with effective implementation of the provisions of the ITA.

Goods and Services Tax ("GST")

¶6-300 GST Overview

The Government of India on July 01, 2017, implemented GST regime in India thereby amalgamating a large number of Central and State taxes into a single tax. Going forward, there will be no separate taxes on the transactions involving goods and services and the same would attract the single levy of GST.

GST is being viewed as a very significant step in the field of indirect tax reforms in India. The new tax regime aims to mitigate cascading or double taxation in a major way and pave the way for a common national market to enable free flow of goods and services across the country.

¶6-310 GST - Structure

GST is a destination based tax in the form of value added tax on each stage of business transaction up to the retail stage, ie, supply to end consumer, whereby the GST paid on the purchase of goods and services is available for set-off against the GST to be paid on the supply of goods and services. The final consumer will thus bear only the GST charged by the last dealer in the supply chain, with set-off benefits at all the previous stages.

The GST in India is implemented as a dual tax structure, ie, the Central GST and the State GST would be levied simultaneously on every transaction of supply of goods and services.

GST is applicable on all supplies of goods and services except petroleum crude, high-speed diesel, motor spirit (commonly known known as petrol), natural gas and aviation turbine fuel on which GST shall be levied from a later date on recommendations of the GST Council. Further, in case of tobacco and tobacco products, in addition to GST, the Centre would also continue to levy Central Excise duty on the same.

¶6-320 Taxes Subsumed under GST

GST has subsumed a plethora of indirect taxes that were levied under erstwhile regime across the Country both at Centre and State levels. Following taxes have been subsumed under GST:

Central level taxes

- Excise Duty
- Service Tax
- Central Sales Tax
- Countervailing Duty
- Special Additional Duty
- Surcharges and Cesses (relating to supply of goods and services)

State level taxes

- Value Added Tax
- Entry Taxes/Octroi
- Purchase Tax
- Luxury Tax
- Taxes on advertisements
- Taxes on lotteries, betting and gambling
- State cesses and surcharges (relating to supply of goods and services)

¶6-330 Taxes outside GST

Even after implementation of GST, the following taxes/duties levied under the earlier regime would continue:

- Basic Customs Duty
- Customs Cess
- Stamp duty

- Taxes on electricity (generation)
- Taxes on alcohol for human consumption
- Taxes on petroleum products

¶6-340 Types of Taxes under GST

The various components of GST, as applicable on any transaction, includes the following:

In case of intra-State supply of goods or services

- **Central GST (CGST) -** Levied by the Central Government on supply of goods and/or services within a state, under the *Central GST Act, 2017* (CGST Act) and the *Central GST Rules, 2017* (CGST Rules);
- **State GST (SGST) -** Levied by the State Government on supply of goods and/or services within a state, under the respective State GST Acts (SGST Act) issued in each State; or
- **Union Territory GST (UTGST) -** Levied in place of SGST, by the UT government on supply of goods and/or services within a Union Territory under the respective UT GST Acts (UTGST Act) issued in each Union Territory.

In case of inter-State supply of goods or services as well as in case of import of goods or services

- **Integrated GST (IGST) -** Levied by the Central Government on inter-state supply of goods and/or service, under the *Integrated Goods and Services Tax Act, 2017* (IGST Act).

Further, in addition to the above applicable levies, certain specific goods such as aerated waters, tobacco products, motor vehicles, etc, shall also attract the levy of **GST compensation cess,** at the prescribed rates under the *Goods and Services Tax (Compensation to States) Cess Act, 2017*.

¶6-350 Levy of GST

GST is payable on supply of goods and services by one person to another for a consideration, except for the following:

- Exempted goods or services – common list for CGST & SGST
- Transactions below threshold limits (discussed in detail in the subsequent paras)

Hence, the taxable event under GST is supply of goods and services. This is different from the earlier indirect tax regime where there were different taxable events for different levies, viz, “manufacture” for levy of excise duty, “provision of service” for levy of service tax and “sale” for levy of sales tax.

Ambit of "Supply"

The definition of term "supply" under the GST law is wide and includes the following:

- All forms of supply, in form of sale, transfer, barter, exchange, license, rental, lease or disposal made in the course of business. It is important to note that unlike the earlier regime, under GST the scope of supply has been widened to include any barter transaction also.
- Importation of service, with or without consideration, whether or not in the course or furtherance of business.
- Supplies without consideration to related persons (eg, employees) or to distinct persons (same PAN but another registration in a different state, eg, stock transfers to another registration).
- Other specified transactions such as permanent transfer of business assets, temporary application of business assets to a non-business use, specified transactions between principal and agents.

¶6-360 Place of Supply

One of the most important aspects of GST is determination of place of supply, ie, the place where the goods and/or services would deemed to have been supplied, ie, within India or outside India; if within India, whether inter-state or intra-state. Detailed provisions to determine the place of supply, separately for goods and services, are laid down in the IGST Act.

The general rule for place of supply for goods is the location where movement of goods terminates for delivery to recipient except in case of bill to ship to transaction, where the place of supply shall be location of entity on whom the bill is raised.

Whereas in case of services, the place of supply of services to a registered person is the location of such registered person. For services provided to an unregistered person, it is the address of recipient, and if it is not available, the location of the supplier of services. However, there are various exceptions provided to these principles in case of certain categories of services for which there are specific provisions under law for determining the place of supply.

Under GST, a supply would become an inter-state supply (thereby attracting IGST) when:

(i) Location of supplier, and

(ii) Place of supply are in different states.

Further, a supply would become an intra-state supply (thereby attracting CGST+SGST/UTGST) when:

(i) Location of supplier, and

(ii) Place of supply are in same State.

¶6-370 Valuation under GST

The GST law provides that tax with respect to any supply would be payable on the "transaction value", ie, the price actually paid/payable (excluding on-invoice discount) for the said supply. Further, the value would also include the following:

- Any amount paid by recipient on behalf of supplier, which supplier is liable to pay, which is not included in sale price;
- Incidental expenses such as commission, packaging or any other amount charged for any activity done in relation to supply of goods at the time of or before delivery of goods;
- Taxes, duties, cesses, fees and charges levied under any statute other than CGST, SGST, IGST and GST Compensation Cess;
- Interest, penalty or late fee for delayed payment;
- Subsidies (other than Government subsidies) directly linked to the price.

Please note that any post-sale discount in relation to a supply of goods can be reduced from the value of supply if:

- Discount is established in the terms of agreement (before supply) and linked to relevant invoice;
- Input tax credit attributable to such discount has been reversed by recipient.

¶6-380 Exceptions to Transaction Value

Under GST, the general rule of levying tax on the transaction value shall not be applicable in the following circumstances:

- Where the consideration for the supply is not in money, wholly or partly;
- Where the supplier and recipient are related parties;
- Where there is a reason to doubt the truth or accuracy of declared transaction value.

In these scenarios, the assessable value shall be determined in the manner as discussed below.

Where the consideration for the supply is not in money, wholly or partly

Or

Where there is a reason to doubt the truth or accuracy of declared transaction value

In case where the consideration is not wholly in money, then the assessable value shall be:

- The open market value of the goods or services involved;

- However, if the open market value is not available, the assessable value shall be the consideration in money plus the monetary equivalent of the consideration not in money;
- If the assessable value is not determinable as per above, it shall be the value of goods/services of like kind and quantity;
- If the assessable value is not determinable as per above, it shall be 110% (hundred-ten percent) of the cost of production or manufacture or provision or acquisition;
- If the assessable value is not determinable as per above, then it shall be the value determined as per reasonable means.

Where the supplier and recipient are related parties or distinct parties

The value of supply between different establishments of same persons or between related persons would be the open market value, or the value of supply of goods or services of like kind or quality if the open market value is not available. However, in such cases, where the recipient is eligible for full input tax credit, the value declared in the invoice would be deemed to be open market value of such supply.

Further, there is a specific valuation provision prescribed under law for goods intended for further supply as such by the recipient, in which case the supplier has option to adopt value as 90% (ninety percent) of the price charged by the recipient to his customer not being a related person.

In addition to the above, the GST law also provides specific valuation mechanism to be followed in case of business transactions undertaken by pure agent, money changer, insurer, air travel agent, etc.

¶6-390 Rate of GST

There are five rates prescribed for IGST/CGST+SGST- Nil, 5%, 12%, 18% and 28% (before abatements, if any). The actual rate applicable on a product/service would depend on its nature and its classification under the schedules to the relevant Notifications which prescribe these rates.[1]

¶6-400 Time of Supply

Time of supply refers to the point at which the supply would be deemed to have been provided under law for determining when the liability to pay tax shall arise. There are separate provisions under the CGST Act to determine the time of supply in case of goods and services.

- *Time of supply of goods is the earliest of:*
  - (i) Date of removal/making available goods by the supplier;
  - (ii) Date of issue of invoice;

1 Notification No. 1/2017-Central Tax (Rate) dated June 26, 2017 and Notification No. 1/2017-Integrated Tax, dated June 26, 2017

(iii) Date of receipt of payment by the supplier;[1] or

(iv) Date on which the recipient shows the receipt of goods in his books of accounts.

- *Time of supply of services is the earliest of:*

  (i) Date of issue of invoice or date of receipt of payment, if invoice is issued within prescribed period;

  (ii) Date of completion of service or date of receipt of payment, if invoice not issued within the prescribed period;

  (iii) Date on which recipient shows the receipt of services in his books of accounts, where (i) or (ii) above does not apply.

In addition to the above, there are provisions to determine the time of supply in case of reverse charge and in case of continuous supply of goods/services.

¶6-410 Input Tax Credit

Overview

Under GST, a registered person is entitled to take input tax credit of GST paid at the time of procurement of all goods as well as services used in the course or furtherance of business (except where restricted specifically).

Further, proportionate credit would be allowed in the following cases:

- Where the goods or services are used partly for the purpose of business and partly for other purposes;
- Where the goods are used for both taxable and exempt supplies – taxable supplies here would include zero-rated supplies also.

The credit would be permitted to be utilised in the following manner:

a) Input tax credit of CGST allowed for payment of CGST and IGST in that order;

b) Input tax credit of SGST allowed for payment of SGST and IGST in that order;

c) Input tax credit of UTGST allowed for payment of UTGST and IGST in that order;

d) Input tax credit of IGST allowed for payment of IGST, CGST and SGST/UTGST in that order.

It is important to note that the credit of CGST paid on inputs may be used only for paying CGST on the output and the credit of SGST/UTGST paid on inputs may be used only for paying SGST/UTGST. In other words, the two

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1 It may be noted that vide Notification No. 66/2017-Central Tax dated November 15, 2017, the requirement of payment of GST on advance receipts towards supply of goods has been removed

streams of input tax credit cannot be cross utilised, except in specified circumstances of inter-State supplies for payment of IGST.

Conditions and eligibility for credit availment

The tax payer is required to maintain its credit pool on a State-wise basis. This means that credit availed in one State can be utilised only for the payment of tax of such State and cannot be utilised in another State.

Further, input tax credit can be used towards payment of tax on outward supplies only and not for payment of tax where liability arises under reverse charge basis[1].

Credit will be available only if the payment for the supply has been made to vendor within 180 days, otherwise the credit would be required to be reversed. Interest to be paid from date of availing credit till the date ITC is reversed.

Credit will be available subject to deposit of tax by supplier and proper disclosures in return. Accordingly, the credits claimed need to be matched with the tax liability of the supplier, and in case of any discrepancies, the amount of excess credit claimed will be added in the tax liability of the recipient.

No credit can be availed with respect to goods to be supplied for free, gifts or as sample.

¶6-420 Reverse Charge Mechanism

Usually the liability to pay indirect taxes devolves on the supplier of goods or services. However, in certain cases, the concept of payment of tax by the recipient has been implemented. Under GST, reverse charge is applicable for the following supplies of goods and services:

- Specified categories of domestic supply of goods or services as notified by the Government;
- Import of services from suppliers outside India to recipients located in India (discussed in detail in the subsequent part of the chapter);
- Supply of goods/services by an unregistered person to a registered person[2].

1 Reverse charge means a situation where the liability to pay tax is on the person receiving goods and/or services instead of supplier of such goods and/or services in respect of notified categories of supplies. The same has been discussed in detail in the subsequent part of the chapter

2 The applicability of the said provision has been put on hold till September 2019 vide Notification No. 22/2018- Central Tax (Rate) dated August 06, 2018

¶6-430 Import of Services and Goods

Meaning and treatment under GST

Import of goods - As understood generally, import of goods under GST bringing goods into the territory of India. Import of goods under GST is treated as inter-State supplies and hence, is subject to IGST in addition to the applicable customs duties.

Import of services - Under GST, import of services means where:

- The supplier of services is located outside India;
- The recipient is located within India;
- The place of supply of service is within India.

Import of services also is treated as inter-State supplies under GST and is subject to IGST. However, in such a case, since the service provider is situated outside India, it is the responsibility of the service recipient to deposit GST under reverse charge mechanism and undertake related compliances.

¶6-440 Export of Goods and Services

Meaning of export

There are special provisions under GST with respect to export of goods as well as services to ensure neutralisation of taxes with respect to export transactions. Further, what constitutes export for the purpose of GST is as below:

- Export of goods - As understood generally, export of goods under GST means taking goods out of India to a place outside India.[1]
- Export of services - Because of the intangible nature of services, there are certain essential conditions prescribed under the GST law for any service to qualify as export services which are as follows:
  - The supplier of services is located in India.
  - The recipient is located outside India.
  - The place of supply of service is outside India.
  - Payment for such service has been received by supplier of service in convertible foreign exchange.
  - Supplier of service and recipient of service are not merely establishments of a distinct person, such as Project office, Branch office or Head Office.

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1 This discussion is only regarding the GST provisions with respect to Export of goods. In addition to the same, export of selected goods also attracts the levy of Export duty at the specified rate, the details for which has been included in Customs Section

Treatment of export of goods and services

Exports under GST are treated as zero-rated supplies, ie, there is no tax payable with respect to these supplies while the exporter is allowed to claim credit with respect to the inputs/inputs services used for these supplies, subject to the conditions prescribed. Accordingly, the GST law provides for the following options with respect to export of goods and services:

- **Export without payment of tax** – Under this option, the exporter can choose to export the goods or services, without payment of any tax by submitting a bond or LUT as per the prescribed procedure and conditions. The exporter is also allowed to claim a refund of the taxes paid on inputs and input services used in the supply of exported goods or services, in such cases.[1]
- **Export on payment of tax** – Under this option, the exporter can choose to deposit IGST on export of goods and services and such tax paid can be claimed as refund.

Procedure for grant of refund for export of goods/services

The law prescribes that a tax payer has to file State-wise refunds separately in the ratio of export turnover from each location in the following manner:

(i) Monthly application of refund can be made on filing of return containing shipping bill/invoice;

(ii) 90% (ninety percent) of refund shall be granted provisionally in 7 days from the date of issue of acknowledgement (which is required to be issued within 15 days of filing of the complete application);

(iii) Balance 10% (ten percent) of refund shall be granted after verification of documents;

(iv) Order of refund to be passed by the proper officer within 60 days from receipt of application;

(v) On delayed payment of refund, interest payable to the applicant from the date of expiry of 60 days.

Exemption/concession on procurement of goods for exports

Imports made under the export promotion schemes of Advance Authorisation, Export Promotion Capital Goods (EPCG) as well as by units under 100% (one hundred percent) EOU Scheme would be without payment of

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1 By virtue of Notification 37/2017, the Government has currently allowed all the exporters intending to export goods or services (including supply to SEZ) without payment of IGST to furnish an LUT instead of bond. However, persons who have been prosecuted under GST laws or any existing laws in force, where the amount of tax evaded exceeds Rs. 25 million are not eligible to submit LUT

IGST, cess, etc.[1] Domestic supplies to such persons would be treated as deemed exports and refund of tax paid on such supplies would be given to the supplier.

Merchant exporters are required to pay GST at the rate of 0.1% for procuring goods from domestic suppliers for exports.

¶6-450 Cross-border Services between Related Parties

As mentioned above, for most of the services, the place of supply under GST shall be the location of service recipient. However, there could be a situation where the foreign related party shall be treated to be located in India even if it does not have a registered office in India:

- Where the supply is made from a fixed establishment in India - Having any presence in India which is characterised by a sufficient degree of permanence and suitable structure in terms of human and technical resources to supply services, or to receive and use services for its own needs.
- Where two offices of an entity are involved in a supply out of which one is in India and the said Indian office is more closely connected with the supply.

In these situations, the taxability of the services between related parties shall be as follows:

- For the transactions where the foreign party is the service provider, the foreign party would be required to take registration and pay GST.
- For the transactions where the foreign party is the recipient of services, the transaction between the parties would not qualify as export of services and shall be taxable.

¶6-460 Registration

Persons liable for registration

As per GST law, any person whose aggregate annual turnover for a given financial year exceeds the threshold limit of Rs. 20 lakh or Rs. 10 lakh for special category States[2] shall be liable to obtain registration.

The term "aggregate turnover" in this regard has been defined to include the aggregate value of:

(i) All taxable supplies;

(ii) All exempt supplies;

(iii) Exports of goods and/or service; and

(iv) All inter-state supplies

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1 The said facility may soon be discontinued for IGST and the only exemption under these schemes may be for the Customs duty portion

2 Special Category states include Himachal Pradesh, Uttarakhand, Sikkim, Arunachal Pradesh, Mizoram, Meghalaya, Manipur, Tripura, Nagaland and Assam

Aggregate turnover does not include value of supplies on which tax is levied on reverse charge basis and value of inward supplies.

Furthermore, in certain cases, the GST law imposes a liability to undertake compulsory registration irrespective of their turnover, which includes the following persons:

- Every license holder or a registered person under the erstwhile regime immediately before July 01, 2017
- Persons making inter-state taxable supply except service providers
- Casual taxable person making taxable supply
- Persons liable to pay tax under reverse charge
- Electronic Commerce Operators
- Taxable supplies being made by non-resident taxable persons
- Persons who are liable to deduct tax at source
- An agent or otherwise making taxable supplies on behalf of other taxable persons
- Input service Distributors
- Persons supplying goods and/or services through e-commerce operators who are liable to collect tax at source
- Such other persons as notified by the Government of India

Premises liable to be registered

The GST law provides that the taxpayer is required to obtain registration in each State from where it is undertaking the supplies. Further, the taxpayer also has an option to obtain separate registrations for its different business verticals within one State.

¶6-470 Returns and Payment under GST

Timelines for returns

Timelines of furnishing returns under GST is summarised in the table below[1]:

Returns	Description	Due Date
GSTR – 1	For details pertaining to Outward Supplies	10th day of the succeeding month

1 These are the standard compliances and corresponding timeline provided under GST law. There are certain other returns which are applicable only on certain specific category of assessees

Returns	Description	Due Date
GSTR – 2	For details pertaining to Inward Supplies	Implementation put on hold till a date to be notified
GSTR – 3	Monthly Return based on GSTR-1 and GSTR-2 filed	Implementation put on hold till a date to be notified
GSTR-3B	Temporary summary return in lieu of GSTR-3	20th day of the succeeding month
GSTR– 9	Annual Return	On or before 31st December following the end of such financial year

Payment of GST

A taxpayer can utilise the available credit balance for making payment of output tax and the balance liability can be discharged with cash. However, the reverse charge liabilities are required to be mandatorily discharged in cash.

¶6-480 Documentation under GST

Under GST, an assessee would be required to issue a tax invoice containing the particulars prescribed under the law for each supply of goods as well as services.

- **Tax invoice**: To be issued to the customer for each supply of goods as well as services.
- **Credit note or debit note**: To be issued to the customer, in the event of downward/upward revision of transaction value return/deficiency of supplied goods on or before filing of September return following the end of the financial year in which such supply was made or the date of filing of the relevant annual return, whichever is earlier.
- **Receipt voucher:** To be issued to the customer with respect to any advances received.
- **Payment voucher:** To be issued to the vendor with respect to purchase made, in case of unregistered vendors.
- **Refund voucher**: To be issued to the customer in cases where after issuance of a receipt voucher for advance, subsequently the order is canceled.
- **Bill of supply**: To be issued to the customer with respect to supply of exempted goods or services or both instead of a tax invoice.
- **Delivery challan**: To be issued for transportation of goods for job work or for reasons other than by way of supply, eg, for repair of goods, etc.

- **Input Credit Register:** The Government has not prescribed any format in which various accounts and records are to be maintained. However, GST Law prescribes that every dealer shall maintain details of inward or outward supply of goods and/or services, of stock of goods, of ITC availed, of output tax payable and paid.

¶6-490 Input Service Distributor

The concept of Input Service Distributor (ISD) under GST has been carried over from Service tax law, as per which a taxpayer can appoint one of its offices as an ISD which will allow such office to receive tax invoices pertaining to the input services which would be for common utilisation of all its units across the country and distribute the credit pertaining to such services amongst all the consuming units. For the purposes of distributing the input tax credit, an ISD has to issue an ISD invoice, in the prescribed format, clearly indicating in such invoice that it is issued only for distribution of input tax credit. The law lay down detailed provisions for the manner and amount of credit to be distributed.

¶6-500 Special Economic Zones

Under GST, special tax incentives have been granted to SEZ units and developers similar to the earlier indirect tax regime. The law provides that supplies of goods or services to or by an SEZ unit shall be considered as inter-State supplies which shall attract IGST. Having said that, the supplies to SEZ developer/unit shall be treated at par with physical exports and hence, the same will also be treated as zero-rated supplies. Accordingly, the supplier supplying to SEZ shall have the options to pay tax and claim refund or export against LUT/bond without payment of tax.

It is important to note that under GST law, an SEZ unit of a company shall be treated as a separate business vertical (from a non-SEZ unit). Accordingly, a company shall be required to take separate registrations for its SEZ unit and a non- SEZ unit, which are located within the same State

¶6-510 Job Work Transactions

Job work under GST has been defined to mean undertaking of any treatment or process by a person on goods belonging to another registered taxable person. The ownership of the goods does not transfer to the job-worker but it rests with the principal.

The GST law makes special provisions with regard to removal of goods for job-work and receiving back the goods after processing from the job-worker as per which either of these transactions shall not attract the levy of GST, provided the goods are brought back to the principal's premises within the prescribed period.

The principal also has the option to directly supply final products to end customers on payment of GST or export from the premises of job worker itself, subject to fulfillment of applicable conditions.

Further, the law also allows GST credit for inputs or capital goods received directly by the job-worker, subject to receipt of goods back by the principal within specified period.

¶6-520 Composite Supply and Mixed Supply

Concepts of "composite supply" and "mixed supply" have been introduced under GST to determine the taxability of transactions where more than one good and/or services are being provided. A composite supply, wherein a supply is made comprising multiple supplies of goods or services, out of which one supply is predominant and others are naturally bundled with it, will be treated as supply of such predominant supply. A mixed supply, which involves multiple individual supplies of goods or services for a single price, without any predominant supply, will be treated as supply of goods or services which attracts highest rate of tax.

¶6-530 Composition Scheme

Under GST, a compounding option (ie, to pay tax at a flat rate without credits) is available to small taxpayers (including to manufacturers other than specified category of manufacturers and service providers) having an annual turnover of up to 15 million. The tax rate under composition scheme for manufacturers as well as traders would be at the rate of 1% (one percent) of the turnover. If a dealer is involved in inter-State supplies, then he cannot opt for the scheme. All taxpayers who would opt for the Composition Scheme under GST will be required to file summarised returns on a quarterly basis, instead of three monthly returns (as applicable for normal businesses).

¶6-540 Anti-Profiteering

Another special provision introduced under GST is the provision of "Anti-profiteering" which mandates that any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices. This is to ensure that businesses do not make excessive or unfair profits or charge unwarranted hikes under the guise of the GST.

As per the provisions, if the designated authority identifies registered persons or entities who have not passed on tax benefits, it could order the following:

(i) Order the defaulting person or entity to reduce prices;

(ii) Return excess money to the customer with an interest at the rate of 18% (eighteen percent) on the amount collected; and

(iii) Cancel the business registration of the violating firm under the Act.

The scrutiny under this provision could be initiated on the basis of a complaint or on *suo motu* basis.

¶6-550 Tax Deduction at Source (TDS)

The GST law lays down an obligation on certain persons including government departments, local authorities and Public Sector undertakings, who are recipients of supply, to deduct tax at source at the rate of 2% (1% each under CGST and SGST Acts) from the payment made or credited to the supplier of taxable goods or services or both, where the total value of such supply under a contract exceeds Rs. 0.25 million. Currently, the implementation of the TDS provisions have been put on hold and the operationalisation of said provisions shall be only from a date to be notified.

¶6-560 Compliance Rating

The GST law has introduced a new system of compliance rating whereby every taxable person shall be assigned a GST compliance rating score based on his record of compliance with the GST provisions. The GST compliance rating score shall be determined on the basis of parameters to be prescribed in this behalf. The ratings shall be updated at periodic intervals and intimated to the taxable person and also placed in the public domain in the manner prescribed.

¶6-570 Administrative Control over Assessee

In order to ensure single interface, all administrative control over 90% (ninety percent) of taxpayers having turnover less than Rs. 15 million would vest with State tax administration and over 10% (ten percent) with the Central tax administration. Further all administrative control over taxpayers having turnover above Rs. 15 million shall be divided equally in the ratio of 50% (fifty percent) each for the Central and State tax administrations.

The division of the taxpayers in each State will be done by computer at the State level by stratified random sampling and could also take into account geographical location and the types of the taxpayers. The State level committees would take necessary steps for division of taxpayers in each State.

Customs Duty

¶6-580 Chargeability of Customs Duty

The import and export duty is a Union subject under Entry 83 to List-I of the Seventh Schedule to the Constitution of India under the heading "Duties of Customs including Export duties". Article 246(1) of the Constitution confers exclusive powers upon Parliament to make laws with respect to any of matters enumerated in the Union List. In exercise of its powers, Parliament enacted the *Customs Act, 1962* (the "Customs Act").

Section 12 of the Customs Act, the charging section, provides that duties of customs shall be levied at such rates as may be specified under the *Customs Tariff Act, 1975* (Customs Tariff Act), or any other law for the time being in force, on goods imported into, or exported from India. Customs duties include both import and export duties. However, since export duties contribute only nominal revenue due to emphasis on raising competitiveness of exports, import duties alone constitute major part of the revenue from customs duties.

According to Section 2(18) of the Customs Act, "export" with its grammatical variations and cognate expressions means taking out of India to a place outside India.

According to Section 2(23) of the Customs Act, "import" with its grammatical variations and cognate expressions means bringing into India from a place outside India.

¶6-590 The Levy of Customs

Broadly, the following enactments deal with the matters relating to Customs Duty:

1. *Customs Act*
2. *Customs Tariff Act*
3. *Customs Valuation (Determination of Value of Imported Goods) Rules, 2007*
4. *Customs Valuation (Determination of Value of Export Goods) Rules, 2007*
5. *Customs (Advance Ruling) Rules, 2002*
6. *Customs, Central Excise Duty and Service Tax Drawback Rules, 1995*
7. *Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995*
8. *Customs (Compounding of Offences) Rules, 2005*
9. *Integrated Goods and Services Act, 2017*

Customs duties are levied on the goods at the rates specified in the Schedule(s) to the Customs Tariff Act as amended from time to time. The taxable event is import of goods into or export from India.

¶6-600 Export Duties

Under the Customs Act, only selected goods exported from India are subject to the levy of export duty. Depending on the prevailing circumstances and export sensitivity, export duties are levied on various items from time to time. The items on which export duty is levied and the rate at which the duty is levied are given in the Customs Tariff Act.

¶6-610 Import Duties

Import duties generally consist of the following:

1. Basic Customs duty

Basic Customs Duty (BCD) is levied under Section 12 of the Customs Act. Normally, it is levied as a percentage of value as determined under Section 14(1) of the Customs Act. The rates at which BCD is charged vary from item-to-item. BCD may be fixed on ad valorem basis or specific rate basis. In other words, BCD may be a percentage of the value of the goods or at a specific rate.

2. IGST[1]

Further, as per the GST law, import of goods into the territory of India is treated as a transaction of inter State supply of goods and hence, shall also attract the levy of IGST at the prescribed rate Also, certain specified goods such as aerated waters, tobacco products, motor vehicles, etc, shall also attract the levy of Compensation cess at the prescribed rate. The taxable value of the imported goods for the purpose of levying IGST and GST Compensation cess shall be, assessable value plus BCD levied under the Act, and any other duty chargeable on the said goods under any law for the time being in force as an addition to, and in the same manner as, a duty of customs.

3. National Calamity Contingent Duty

In terms of Section 3 of the Customs Tariff Act read with Section 136 of the *Finance Act, 2001*, certain specific imported goods are charged to National Calamity Contingency Duty (NCCD) in the same manner as the relevant provisions for levy and collection of the duty of excise on such goods applicable in terms of the *Central Excise Act, 1944*.

4. Safeguard duty

Sections 8B, 8C, 9A, 9B and 9C of the Customs Tariff Act read with the *Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997* and the *Customs Tariff (Transitional Products Specific Safeguard Duty) Rules, 2002* form the legal basis for imposition of safeguard duty. The Central Government is empowered to impose safeguard duty on specified imported goods if it is satisfied that imports of a particular product, as a result of tariff concessions or other World Trade Organisation (WTO) obligations undertaken by the importing country, increase unexpectedly to an extent that they cause or threaten to cause serious injury to domestic producers of “like or directly competitive products”. The relevant provisions under the Customs Tariff Act seek to provide relief to the

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1 GST is applicable on all supplies of goods and services except petroleum crude, high speed diesel, motor spirit, natural gas & aviation turbine fuel. Hence, in place of IGST, these goods will continue to attract the earlier levies of Countervailing Duty (CVD) in lieu of Excise duty applicable on manufacture of domestic goods and Special Additional duty of Customs (SAD) in lieu of Value added tax applicable on sale of domestic goods

domestic producers against injury caused by imports in accordance with the WTO Agreements. These provisions are aimed at offsetting the adverse effects of increased imports, subsidised imports or dumped imports and imports from the Peoples' Republic of China.

5. Anti-dumping duty

Sections 9A, 9B and 9C of the Customs Tariff Act read with the *Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995* form the legal basis for anti-dumping investigations and for the levy of anti-dumping duties. These laws are based on the Agreement on Anti-Dumping which is in pursuance of Article VI of the *General Agreement on Trade and Tariffs (GATT), 1994*. The domestic industry can seek necessary relief and protection against dumping of goods and articles by exporting companies and firms of any country from any part of the world in terms of the above legal framework.

6. Countervailing duty on subsidised articles

Sections 9 of the Customs Tariff Act read with the *Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidised Articles and for Determination of Injury) Rules, 1995* form the legal basis for anti-subsidy investigations and levy of countervailing duty. These laws are in consonance with the WTO agreements on anti-subsidy countervailing measures. If a country or territory pays any subsidy (directly or indirectly) to its exporters for exporting goods to India, the Central Government can impose countervailing duty up to the amount of such subsidy under Section 9 of the Customs Tariff Act. The *Customs Tariff (Identification, Assessment and Collection of Countervailing Duty or Subsidized Articles and for Determination of Injury) Rules, 1975* [Customs Notification No. 1/95 (N.T.) dated January 01, 1995] provide detailed procedure for determining the injury to domestic industry in case of subsidised goods.

7. Protective duties

Section 6 of the Customs Tariff Act empowers the Central Government to levy protective duties in certain cases. Accordingly, based on the recommendations of the Tariff Commission, if the Central Government is satisfied that an immediate action is necessary to protect the interests of the Indian industry, it may levy protective customs duty at a rate recommended by the Tariff Commission. Such levy has to be levied by way of a Notification in the official gazette and is valid till the date prescribed in the Notification.

8. Social Welfare Surcharge

In addition to the normal customs duties, import of goods shall also attract a Social Welfare Surcharge to be calculated at the rate of 10% (ten percent) on the aggregate of duties of customs (and not on the IGST component). The purpose of levying Social Welfare Surcharge includes financing of education, housing and social security. The said levy has been introduced in place of the earlier levy of Education Cess and Secondary and Higher Education Cess on imported goods. On certain items, the Social Welfare Surcharge would be calculated at the rate of

3% (three percent) on aggregate duties of customs while certain other items are exempt from applicability of the said levy.

¶6-620 Rate of Duty

Customs duty is leviable based on the ITC (HSN) tariff classification of goods. There are different rates of customs duty prescribed for different tariff classifications. Item-specific rates of duty are given in the relevant Schedule(s) to the Customs Tariff Act. In determining the applicable rate of customs duty for a particular item/class, exemption notification, if any, issued with respect to such item/class should be taken into consideration.

Further, where India has entered into Bilateral/Multilateral Trade Agreement(s) with its trading partner countries wherein preferential rate of duties has been contemplated, the levy of customs duty in such cases shall be governed by the provisions of such Bilateral/Multilateral Trade Agreement(s). Such preferential rates of customs duty under the Bilateral/Multilateral Trade Agreement(s) are implemented through exemption notification(s) issued by the Government.

¶6-630 Input Tax Credit

Under GST law, a registered person shall be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business, including the IGST charged on import of goods. The said input tax credit could be set off against the liability of taxes on the outward supplies of the importer.

BCD, Social Welfare surcharge and any other abovementioned customs duty, if applicable, shall however, not be available as input tax credit and the same shall be a cost for the Importer.

¶6-640 Classification of Goods

The Customs Tariff Act consists of XXI Sections and 98 chapters. A section is a grouping of a number of chapters which codify a particular class of goods. The section notes explain the scope of chapters/headings, etc. The chapters consist of chapter notes, brief description of commodities arranged according to HSN Numbers, which are allotted in the schedules either in four digits or in six digits or in eight digits. Every four digit code is called a "heading" and every six-digit code is called a "sub-heading" and the eight-digit code indicates the "specific commodity number".

The process of arriving at a particular heading/sub-heading/specific commodity number, either at four-digit or six-digit or eight-digit level for a commodity in the Tariff Schedule is called "classification". This helps in determining the rate of duty leviable as prescribed by the law.

Further, classification of goods under a particular tariff heading is governed by a set of General Interpretative Rules, which form an integral part of the Customs Tariff Act. According to these Rules, classification is to be determined according to the terms of the headings or sub-headings or chapter notes.

¶6-650 Advance Ruling

Advance rulings enable a non-resident investor to know in advance the customs duty liability on the proposed imports into India and proposed exports from India.

Advance ruling means the determination, by the Authority, of a question of law or fact specified in the application regarding the liability to pay customs duty in relation to the proposed imports into or exports from India, by the applicant.

The Advance ruling authority is meant to provide binding ruling on the important issues so that prospective investors will have a clear indication of their customs duty liability in advance. It assures the applicant of the finality of the customs duty liability.

Issues on which advance rulings can be sought

(a) Classification of goods under the Customs Tariff Act;

(b) Applicability of a notification issued under Section 25(1) of the Customs Act having a bearing on the rate of duty;

(c) The principles to be adopted for the purposes of determination of the value of the goods under the provisions of the Customs Act;

(d) Applicability of notifications issued in respect of duties under the Customs Act, the Customs Tariff Act and any duty chargeable under any other law for the time being in force in the same manner as duty of customs leviable under the Customs Act;

(e) Determination of origin of the goods in terms of the rules notified under the Customs Tariff Act and matters relating thereto.

It may be noted that the Central Government has the power to notify certain additional cases other than the above mentioned, where Advance Ruling can be sought.

Vide the Union Budget 2018-19, any importers, exporters and other persons seeking justiciable cause has been allowed to file the application for advance ruling. The facility has also been extended to a non-resident applicant where he may be represented by a duly authorised person who is a resident in India.

Other recent changes introduced to expand the scope of Advance ruling scheme includes the following:

- A specific authority called "Customs Authority for Advance Rulings" shall be constituted to provide advance rulings specifically for the Customs Act.

- An appeal mechanism shall be introduced for both to the applicant as well as customs authorities.
- The time period within which the authority shall pronounce its advance ruling has been reduced from 6 months to 3 months.

The relevant provisions for obtaining an advance ruling are contained in Chapter V-B of the *Customs Act, 1962*. The *Customs (Advance Rulings) Rules, 2002* notified vide Notification No. 55/2002-Customs (N.T.) dated August 23, 2002 provide for the format to be used for filing an application.

¶6-660 Administration

Customs law is administered by the Customs Commissionerates functioning under the Central Board of Excise & Customs (CBEC) now known as Central Board of Indirect Taxes and Customs (CBIC), Department of Revenue, Ministry of Finance, Government of India.

Annexure 1
Rates of Income Tax

I. Individuals (Resident as well as Non-resident)

The rates for income tax for individuals for the assessment year 2019-20 are as follows:

Income Range(INR)	Tax rate (%) for AY 2018-19	Tax rate (%) for AY 2019-20
Upto 2,50,000	Nil	Nil
2,50,000 - 5,00,000	5.15%	5.2%
5,00,000 – 10,00,000	20.60%	20.8%
10,00,000 – 50,00,000	30.90%	31.20%
50,00,000 – 1,00,00,000	33.00%	34.32%
Above Rs. 1,00,00,000	35.53%	35.88%

- Where an individual, being resident in India, whose total income/taxable income does not exceed INR 3,50,000 shall be entitled to deduction from the amount of income tax equal to 100% (one hundred percent) of his income tax or Rs. 2,500 whichever is less[1].
- Senior citizens (above 60 years but less than 80 years being resident in India) with income up to INR 300,000 are exempted from income tax.
- Very senior citizens (80 years or above being resident in India) with income upto INR 5,00,000 are exempted from tax.
- Surcharge of 12% (twelve percent) is applicable in cases with where taxable income is more than INR 1 crore (Ten Million) (Marginal relief applicable).
- Includes health and education cess of 4% (four percent) on the amount of income tax and surcharge .

II. Companies

Company/Tax	Tax rate (%) for AY 2018-19	Tax rate (%) for AY 2019-20
A. Domestic Company		
(i) Upto Rs. 10 crores		
(a) Income upto Rs. 1 cores	25.75%	26%
(b) Income above Rs. 1 crore (inclusive of surcharge @ 7%)	27.55%	27.82%

1 Section 87A of the ITA

Company/Tax		Tax rate (%) for AY 2018-19	Tax rate (%) for AY 2019-20
	(ii) Rs. 10 crores to Rs. 256 crores		
	(a) Income upto Rs. 50 crores (inclusive of surcharge @ 12%)	**28.84%**	**29.12%**
	(b) Income above Rs. 50 crores (inclusive of surcharge @ 12%)	34.61%	34.12%
	(iii) Above Rs. 250 crores		
	(a) Income above Rs. 250 crores (inclusive of surcharge @ 12%	**34.61%**	**34.94%**
B. Foreign Company			
	(i) Regular Tax		
	(a) Upto Rs. 1 crore	**41.2%**	**41.6%**
	(b) Rs. 1 crore to Rs. 10 crores (inclusive of surcharge @ 2%)	42.02%	42.43%
	(c) Above Rs. 10 crores (inclusive of surcharge @ 5%)	34.61%	34/94%
	(ii) Minimum Alternate Tax (inclusive of cess)		
	(a) Where total income is equal to or less than INR 10 million	**19.06%**	
	(b) Where total income is more than INR 10 million and less than 100 million	19.436%%	
	(c) Where total income is equal to or more than INR 100 million	20.007%	

Annexure 2

Name of the Country	Name of the Country	Name of the Country
▪ Armenia	▪ Kazakhstan	▪ Slovenia
▪ Australia	▪ Kenya	▪ Serbia
▪ Austria	▪ Korea	▪ South Africa
▪ Albania	▪ Kuwait	▪ Sudan
▪ Afghanistan	▪ Kyrgyz Republic	▪ Spain
▪ Bangladesh	▪ Latvia	▪ Sri Lanka
▪ Belarus	▪ Lebanon	▪ Sweden
▪ Belgium	▪ Libya	▪ Switzerland
▪ Brazil	▪ Lithuania	▪ Swiss Confederation
▪ Bulgaria	▪ Luxembourg	▪ Syrian Arab Republic
▪ Bhutan	▪ Macedonia	▪ Syria
▪ Bostwana	▪ Malaysia	▪ Taipei (Specified Associations Agreement)
▪ Colombia	▪ Maldives	▪ Tanzania
▪ Croatia	▪ Malta	▪ Tajikstan
▪ Canada	▪ Mauritius	▪ Thailand
▪ China	▪ Mongolia	▪ Trinidad and Tobago
▪ Cyprus	▪ Montenegro	▪ Turkey
▪ Czechoslovakia	▪ Morocco	▪ Turkmenistan
▪ Czech Republic	▪ Mozambique	▪ UAE
▪ Denmark	▪ Myanmar	▪ United Arab Emirates
▪ Estonia	▪ Namibia	▪ United Kingdom of Great Britain *Northern Ireland
▪ Ethiopia	▪ Nepal	▪ Uganda
▪ Fiji	▪ Netherlands	▪ United Kingdom
▪ Finland	▪ New Zealand	▪ United States of America
▪ France	▪ Norway	▪ Ukraine
▪ Georgia	▪ OECD Member Countries	▪ Uzbekistan
▪ Germany	▪ Oman	▪ Vietnam
▪ Greece	▪ Oriental Republic of Uruguay	▪ United Mexican States
▪ Hungary	▪ Pakistan	▪ Yemen Arab Republic
▪ Iceland	▪ People's Democratic Republic of Yeman	▪ Zambia
▪ Indonesia	▪ Philippines	
▪ Iran	▪ Poland	
▪ Israel	▪ Portuguese Republic	
▪ Ireland	▪ Qatar	
▪ Italy		
▪ Japan		
▪ Jordan		

Name of the Country	**Name of the Country**	**Name of the Country**
	▪ Romania ▪ Russia ▪ SAARC ▪ Saudi Arabia ▪ Singapore	

Chapter 7 Labour and Industrial Laws

¶7-010 Background

Labour is a subject both in the "Union List" as well as in the "Concurrent List" under the Constitution of India. Thus, both the Central and State Governments are competent to enact legislations on this subject, however, to reservation of certain matters for the Central Government. The constitutional status of labour jurisdiction has been explained in the following table:

Union List (Central Government)	**Concurrent List (Central as well as State Government)**
Entry No. 55 Regulation of labour and safety in mines and oil fields	**Entry No. 22** Trade unions, industrial and labour disputes

Union List (Central Government)	**Concurrent List (Central as well as State Government)**
Entry No. 61 Industrial disputes concerning union employees	**Entry No. 23** Social security and social insurance, employment and unemployment
Entry No. 65 Union agencies and institutions for "... vocational ... training ..."	**Entry No. 24** Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old-age pensions and maternity benefits
	Entry No. 25 Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

The Ministry of Labour and Employment, Government of India (the "**Ministry**") seeks to protect and safeguard the interests of workers in general and those who constitute the poor, deprived and disadvantaged sections of the society, in particular, with due regard to creating a healthy work environment for higher production and productivity, and developing and coordinating vocational skill training and employment services.

The Government of India's attention is also focused on promotion of welfare activities and providing social security to the labour force both in the organised and unorganised sectors, in tandem with the process of liberalisation. These objectives are sought to be achieved through enactment and implementation of various labour laws, which regulate the terms and conditions of service and employment of workers.

The Ministry seeks to promote an enabling environment for the country's inclusive growth, where the gains of both labour and industry coincide. The Government of India seeks to enhance transparency and accountability and boost compliance with the ultimate aim of effectively promoting industrial peace, harmony and all-round development with "*Minimum Government, Maximum Governance*".

India has a number of labour laws that govern almost all the aspects of employment such as payment of wages, minimum wages, equal remuneration, payment of bonus, payment of gratuity, contributions to provident fund and pension fund, working conditions, health and insurance, accident compensations, prevention and prohibition of sexual harassment at workplace, etc.

The Central Government has enacted certain legislations, viz, the Employees' Provident Funds and Miscellaneous Provisions Act, Employees' State Insurance Act, Payment of Wages Act, Minimum Wages Act, Equal Remuneration Act, Maternity Benefit Act, etc.

In addition, at the State level, the State Governments usually have a separate labour ministry, which seeks to ensure compliance with State labour laws (viz, State Shops and Establishments Act, Labour Welfare Fund Act, etc) through its labour department, which is generally operational at the district (local) level.

The various labour legislations enacted by the Central Government and State Governments can be classified into the following different broad categories as below.

A. **Laws relating to industrial relations**

   1. *Industrial Disputes Act, 1947*
   2. *Trade Unions Act, 1926*
   3. *Industrial Employment (Standing Orders) Act, 1946*

B. **Laws relating to wages**

   1. *Minimum Wages Act, 1948*
   2. *Payment of Wages Act, 1936*
   3. *Payment of Bonus Act, 1965*

C. **Laws relating to social security**

   1. *Employees' Provident Funds and Miscellaneous Provisions Act, 1952*
   2. *Employees' State Insurance Act, 1948*
   3. *Labour Welfare Fund Act (of respective States)*
   4. *Payment of Gratuity Act, 1972*
   5. *Employees' Compensation Act, 1923*

D. **Laws relating to working hours, conditions of service and employment**

   1. *Factories Act, 1948*

2. *Shops and Commercial Establishments Act (of respective States)*
3. *Contract Labour (Regulation and Abolition) Act, 1970*
4. *Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979*
5. *Plantations Labour Act, 1951*
6. *Mines Act, 1952*

E. **Laws relating to equality and empowerment of women**

1. *Equal Remuneration Act, 1976*
2. *Maternity Benefit Act, 1961*

F. **Prohibitive labour laws**

1. *Child and Adolescent Labour (Prohibition and Regulation) Act, 1986*
2. *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*

G. **Laws relating to employment and training**

1. *Apprentices Act, 1961*
2. *Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959*

¶7-020 Laws Relating to Industrial Relations

Industrial Disputes Act, 1947

The Hon'ble Supreme Court in *Workmen of Dimakuchi Tea Estate v The Management of Dimakuchi Tea Estate* 1958 I L.L.J. 500 (S.C.) has succinctly summed up the principal objects of the *Industrial Disputes Act, 1947* (the "**ID Act**") as under:

" …(1) the promotion of measures for securing and preserving amity and good relations between the employer and workmen;

(2) an investigation and settlement of industrial disputes, between employers and employers, employers and workmen, or workmen and workmen, with a right of representation by a registered trade union or federation of trade unions or association of employers or a federation of associations of employers;

(3) prevention of illegal strikes and lock-outs;

(4) relief to workmen in the matter of lay-off and retrenchment; and

(5) collective bargaining."

The ID Act draws a distinction between "workmen" and "managerial" or "supervisory staff" and confers benefit on the former only. Thus, in its applicability, the ID Act is limited to class of employees who are "workmen" as defined therein. Moreover, the ID Act encompasses only disputes or differences connected with employment or non-employment or the terms of employment or with the conditions of labour of any person.

The ID Act provides for- Grievance Redressal Committee, Works Committees, Conciliation Officers, Boards of Conciliation, Courts of Inquiry, Labour Courts and Industrial Tribunals. The Grievance Redressal Committee and the Works Committee, consisting of representatives of employers and workmen, is constituted to promote measures for securing and preserving amity and good relations between the employer and the workmen and, to that end, to comment upon matters of their common interest or concern and endeavor to resolve any material difference of opinion in respect of such matters. The Conciliation Officers and the Board of Conciliation are entrusted with the duty of mediating in and promoting the settlement of industrial disputes. The courts and tribunals are entrusted with the duty of inquiring and, as far as practically possible, expeditiously adjudicate over any industrial dispute. Aside above, the ID Act permits disputing parties to voluntarily settle their disputes through arbitration.

The ID Act regulates change in service conditions, operation of settlements and awards, strikes and lockouts, lay-off, closure and retrenchment as well as compensation payable thereof, unfair labour practices, penalties and miscellaneous matters with respect to workmen.

Trade Unions Act, 1926

The *Trade Unions Act, 1926* (the "**Trade Unions Act**") seeks to provide for the registration of trade unions in India and for the protection of the same. Further, the Trade Unions Act also, in certain respects, defines the law relating to registered trade unions like mode of registration, application for registration, provisions to be contained in the rules of a trade union, minimum requirement for membership of a trade union, etc.

Industrial Employment (Standing Orders) Act, 1946

The *Industrial Employment (Standing Orders) Act, 1946* (the "**IESO Act**") requires employers in industrial establishments to formally define conditions of employment under them. "Standing Orders" mean the rules which govern the relationship between the employer and a workman in an industrial establishment and provides for matter such as working hours, holidays, leaves, punishment for misconduct, etc.

The IESO Act is applicable to every industrial establishment wherein hundred or more workmen are employed or were employed on any day of the preceding 12 months.

The IESO Act requires every employer employing hundred or more workmen in an industrial establishment to clearly define and publish standing orders with respect to conditions of employment/service rules and to make them known to the workmen employed by it. The IESO Act further specifies that every employer is required to submit to the Certifying Officer five draft copies of the standing orders which he intends to adopt for his establishment.

Matters which are generally provided in standing orders include:

- Workmen classification into categories such as permanent, temporary, on probation, etc;
- Method of informing the workmen about working hours, holidays, etc;
- Work shifts;
- Temporary stoppages of work;
- Provisions with respect to termination of employment and the notice period;
- Actions/inactions which are treated as misconduct and the consequences arising therefrom;
- Grievance redressal mechanism in case of unjust or unfair treatment by the employer;
- Attendance marking system for workmen;
- Procedure for availing leave and encashment, accumulation of leaves;
- Workmen records and information, etc.

Model standing orders (as provided under rules made by each state) apply to an industrial establishment from the time the IESO Act becomes applicable to such establishment till the time the standing orders of the establishment are duly certified.

Further, the IESO Act requires display of standing orders in a prominent place for the knowledge of workers.

Recently, the *Industrial Employment (Standing Orders) Central Rules, 1946* were amended to allow employers, across all sectors, to hire employees on a fixed term employment contract. Prior to the amendment, this benefit was restricted only to apparel manufacturing sector.

¶7-030 Laws Relating to Wages

Minimum Wages Act, 1948

The *Minimum Wages Act, 1948* (the "**Minimum Wages Act**") provides for fixing of minimum rates of wages in certain employments. The minimum wages are prescribed by the Appropriate Government for different classes of workers employed in an employment which are mentioned in part-I and part-II of the Schedule. The wages which are paid by an employer cannot be lower than the prescribed minimum wages.

In terms of the provisions of the Minimum Wages Act, an employee means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates of wages have been fixed; and includes (i) an outworker, to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises not being premises under the control and management of that other person; and (ii) an employee declared to be an employee by the appropriate Government but does not include any member of the Armed Forces of the union.

The term "wages" mean all remuneration capable of being expressed in terms of money which would, if the terms of the contract of employment, express or implied, were fulfilled and includes house rent allowance but does not include:

- The value of:
  - Any house accommodation or supply of light, water and medical attendance; or
  - Any other amenity or any service excluded by general or special order of the appropriate Government;
- Any contribution paid by the employer to any personal fund or provident fund or under any scheme of social insurance;

- Any travelling allowance or the value of any travelling concession;
- Any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or
- Any gratuity payable on discharge.

Payment of Wages Act, 1936

The *Payment of Wages Act, 1936* (the "**Payment of Wages Act**") is an Act to regulate the payment of wages to certain classes of employed persons. The Payment of Wages Act seeks to ensure that the employers make a timely payment of wages to the employees working in the establishments and to prevent unauthorised deductions from the wages.

According to the Payment of Wages Act, all wages shall be paid in current coin or currency notes or by cheque or by crediting the wages in the bank account of the employee.

Payment of Bonus Act, 1965

The *Payment of Bonus Act, 1965* (the "**Bonus Act**") provides for the payment of bonus to persons employed in certain establishments in India and is applicable to all employees (other than an apprentice) drawing a remuneration of less than or equal to Rs. 21,000 per month in a factory and every establishment in which twenty or more persons are employed. However, certain State Governments have notified their own coverage limits for factories as well as establishments employing less than twenty employees.

In order to receive bonus, the employees must have worked for not less than 30 working days. However, employees who have been dismissed from service due to fraud, riotous or violent behavior or theft, misappropriation or sabotage are disqualified from receiving bonus under the Bonus Act.

The Bonus Act provides for the payment of bonus between 8.33% (minimum) to 20% (twenty percent) (maximum) of the salary or wage earned by the employee during the accounting year. For the calculation of bonus, a threshold limit of higher of (i) a maximum monthly salary of Rs. 7,000; or (ii) the minimum monthly wage rates prescribed for the scheduled employment, is to be considered.

Only statutory amount which is required to be paid as bonus is prescribed by the Bonus Act and this does not stop any employer from (i) paying ex-gratia amount to the employees who are not entitled to receive statutory bonus owing to remuneration being more than Rs. 21,000 per month; or (ii) paying amount higher than the prescribed amount as bonus to the employees eligible to receive statutory bonus under the Bonus Act.

A newly setup establishment is exempted from payment of statutory bonus under the Bonus Act for the first 5 accounting years, following the year in which it sells goods produced by it or renders services. This benefit is not available to the newly setup establishment in any of the year during such period of 5 years in which it earns profit.

¶7-040 Laws Relating to Social Security

Employees' Provident Funds and Miscellaneous Provisions Act, 1952

The *Employees Provident Funds and Miscellaneous Provisions Act, 1952* (the "EPF **Act**") provides for the institution of provident funds, pension funds, and deposit-linked insurance funds for employees.

EPF Act applies to all factories and establishments employing 20 or more persons or class of persons. An establishment to which the EPF Act applies shall continue to be governed by the EPF Act, notwithstanding that the number of persons employed therein at any time falls below twenty. Once an establishment gets covered under the EPF Act, branches of such establishment situated at any other place shall also be treated as parts of the same establishment. Moreover, even contract labourers employed through a contractor are to be covered by the said establishment.

The benefit of the EPF Act for the employees is that the employees receive the amount contributed to the fund with interest at retirement and also receive pension after their retirement. Premature withdrawals in certain exigencies like ill-health, repayment of loans, etc, are allowed. Further, the EPF Act contains provisions to enable the employee to get accumulations lying to his/her credit, transferred in case of change of employment.

Employees drawing wages exceeding Rs. 15,000 per month are excluded from the provisions of the EPF Act. However, this rule does not apply to an "International Worker". An "International Worker" means an Indian employee who has or is going to work in a foreign country with which India has entered into social security agreement by virtue of which such employee becomes eligible to avail benefits under social security programme of such foreign country or a foreign national who is not holding Indian passport and working in an Indian establishment to which the EPF Act applies.

Contributions to the provident fund are to be made at the rate of 12% (twelve percent) of the wages by the employers with the employee contributing an equal amount. The employee may voluntarily contribute a higher amount but the employer is not obliged to contribute more than the prescribed amount. 8.33% employer contribution gets diverted to the pension scheme while balance 3.67% of employer contribution is retained in the provident fund scheme. However, with respect to employee contribution, entire sum goes to the provident fund scheme. Aside contribution, the employer is additionally required to pay Employees' Provident Fund Organisation charges towards administration of the fund. Over the past few years, these administrative charges have been gradually reduced from 1.10% to 0.5% of the pay to the employee.

In case of failure in making contributions, penalty, interest and damages can be levied. Recovery can also be made by attaching employer's property and such recovery takes precedence in winding up/insolvency proceedings.

With an aim to generate employment, the Government of India has launched "Pradhan Mantri Rojgar Protsahan Yojana" wherein the government is bearing employer's contribution in respect of new employees for the first 3 years of their employment.

Employees' State Insurance Act, 1948

The *Employees' State Insurance Act, 1948* (the "**ESI Act**") is a social welfare legislation enacted with the objective of providing certain benefits to employees in case of sickness, maternity and employment injury. In terms of the provisions of the ESI Act, the eligible employees are entitled receive medical relief, cash benefits, maternity benefits, pension to dependents of deceased workers and compensation for fatal or other injuries and diseases.

It is applicable to all factories including factories belonging to Government, other than seasonal factories. The Central and State Governments can apply the provisions of the ESI Act to any establishment. All employees, including casual, temporary or contract employees drawing wages less than Rs. 21,000 per month, are covered under the ESI Act. The limit has been increased to Rs. 21,000 from Rs. 15,000 with effect from January 01, 2017.

Registration under the ESI Act is now fully online, without requirement of submission of any physical application documents either before or after the registration.

The employer is required to contribute at the rate of 4.75% of the wages paid/payable in respect of every wage period. The employees are also required to contribute, at the rate of 1.75% of their wages. With effect from October 06, 2016, for newly implemented areas, the contribution rate is 1% (one percent) of wages for employee and 3% (three percent) for employers for the first 24 months.

Labour Welfare Fund Act (of respective States)

The State Labour Welfare Fund Act provides for the constitution of labour welfare fund to promote and carry out various activities conducive to the welfare of labour in the State. Both employer and employee have to make monthly contribution of a small amount into the labour welfare fund. Besides above, certain State Governments require the employer to deposit all unpaid accumulations due to employees or fines recovered from employees into this fund.

Payment of Gratuity Act, 1972

Gratuity is a gratuitous payment by an employer to an employee for serving the organisation for a long period of time. Under the *Payment of Gratuity Act, 1972* (the "**Gratuity Act**"), employee needs to provide continuous service of 5 years to be eligible to receive gratuity. Gratuity becomes payable to an employee on (i) retirement; (ii) resignation; (iii) termination of employment due to death/disablement on account of accident/disease. Condition of providing minimum 5 years of continuous service is not applicable in case of death/disablement. The Gratuity Act applies to (i) every factory, mine, oilfield, plantation, port and railway company; and (ii) every shop or establishment within the meaning of any law, for the time being in force, in relation to shops and establishments in a State, in which ten or more persons are employed or were employed on any day of the preceding 12 months.

The gratuity is payable at the rate of 15 days wages based on the wages last drawn, for every year of completed service or part thereof in excess of 6 months, subject to an aggregate amount of Rs. 20,00,000. However, if an employee has the right to receive higher gratuity under a contract or under an award, then the employee is entitled to get higher gratuity.

The gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, is forfeited to the extent of the damage or loss so caused. Further, the gratuity payable to an employee may be wholly or partially forfeited if the services of such employee have been terminated for:

- employee's riotous or disorderly conduct or any other act of violence; or
- any act which constitutes an offence involving moral turpitude, provided that such offence is committed by the employee in the course of employment.

Employees' Compensation Act, 1923 (formerly known as "Workmen's Compensation Act, 1923")

The *Employees' Compensation Act, 1923* (the "**Employees' Compensation Act**") aims to provide financial protection to workmen and their dependents, by means of compensation, in case of any accidental injury arising out of or in course of employment (including occupational diseases) and causing either death or disablement of the worker.

The Employees' Compensation Act applies to factories, mines, docks, construction establishments, plantations, oil fields and other establishments listed in Schedules II and III, but excludes establishments covered by the ESI Act.

The Employees' Compensation Act provides for payment of compensation by the employer to the employees for suffering any injury by an accident or contracting any occupational disease during the course of employment. Generally, companies take insurance policies to cover their liability under the Employees' Compensation Act.

Employer is not liable:

- In respect of any injury which does not result in the total or partial disablement of the employee for a period exceeding 3 days;
- In respect of any injury, not resulting in death or permanent total disablement caused by an accident which is directly attributable to the employee having been at the time thereof under the influence of drink or drugs;
- Wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of employee; or

- Wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of employee.

¶7-050 Laws Relating to Working Hours, Conditions of Service and Employment

Factories Act, 1948

The *Factories Act, 1948* (the "**Factories Act**") consolidates law regulating factories including provisions for the health, safety, welfare and service conditions of workers working in factories. It contains provisions for registration and issue of license, working hours of adults, employment of young persons, leaves, overtime, etc.

It applies to all factories employing more than ten or more workers and working with the aid of power, or employing twenty or more workers and working without the aid of power. It covers all workers employed in the factory premises or precincts directly or through an agency including a contractor, involved in any manufacturing activity.

Some major provisions of the Factories Act are explained below:

- Every factory is required to appoint an occupier who has the ultimate control over the affairs of the factory. An occupier is liable for non-compliance or contraventions of any provisions of the Factories Act. Where the organisation is a partnership firm or other association of individuals, any one of the individual partners or members thereof is deemed to be the occupier. In case of a company, only a director can be appointed as an occupier. If no director is specifically appointed as occupier, any of the directors can be prosecuted for any contravention.
- The Factories Act provides that no employee shall work more than 9 hours in a day and 48 hours in a week. Where a worker works beyond normal work timings, the worker is entitled to receive overtime pay at twice the ordinary rate of wages.
- The Factories Act requires the employer to undertake steps to ensure health, safety and welfare of workers. This includes casing or fencing of machineries, medical examination of workers, provision of drinking water, maintaining and regulating humidity of air, installation of hydro meter, proper ventilation, sufficient number of latrines and urinals, canteens, lunch rooms, crèches, etc.

- Every factory undertaking hazardous processes is required to get site appraisals, make disclosures regarding dangers and health hazards and measures to overcome them, maintain accurate and up to date medical records of the workers who are exposed to any chemical, toxic or any other harmful substances, get initial and periodic medical examinations of workers done, etc.

Shops and Commercial Establishments Act (of respective States)

The Shops and Commercial Establishments Act(s) of the respective States generally contain provisions relating to registration of an establishment, working hours, overtime, leave, notice pay, working conditions for women employees, etc. Certain industries like IT and IT-enabled services have been given relaxations by various State Governments in respect of the observance of certain provisions of their respective Shops and Commercial Establishments Act.

Contract Labour (Regulation and Abolition) Act, 1970

The main objectives of the *Contract Labour (Regulation and Abolition) Act, 1970* (the "**Contract Labour Act**") are: (i) to prohibit the employment of contract labour in certain circumstances; and (ii) to regulate the working conditions of contract labour, wherever such employment is not prohibited.

The Contract Labour Act applies to every establishment or contractor wherein/with whom twenty or more workmen are employed or were employed on any day of the preceding 12 months as contract labour. The Contract Labour Act is not applicable to establishments in which work only of an intermittent or casual nature is performed. The appropriate government may, by notification in the Official Gazette, prohibit employment of the contract labour in any process, operation or other work in any establishment.

The Contract Labour Act provides that no contractor shall undertake any work through contract labour, except under and in accordance with a licence issued in that behalf by the licensing officer. Under the Contract Labour Act, the principal employer has to make an application in the prescribed form accompanied by the prescribed fee payable to the registering officer for registration.

The appropriate government may prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.

A workman is deemed to be employed as "contract labour" in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer. A contractor is a person who undertakes to produce a given result for establishment other than mere supply of goods or articles to the establishment through contract labourers. Alternatively, a contractor may supply contract labourers for any work of the establishment.

Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979

The *Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979* (the "**ISMW Act**") is an Act to regulate the employment of inter-state migrant workmen and to provide for the conditions of service and for matters connected therewith.

The ISMW Act applies to (i) any establishment in which five or more inter-State migrant workmen are employed or who were employed on any day of the preceding 12 months; and (ii) every contractor who employs or who employed five or more inter-State migrant workmen on any day of the preceding 12 months.

An "inter-State migrant workman" means any person who is recruited by or through a contractor in one State under an agreement or other arrangement for employment in an establishment in another State whether with or without knowledge of the principal employer.

The ISMW Act provides for obtaining registration by principal employer, payment of displacement allowance and journey allowance to inter-State migrant workmen and further provides for regular wage payments, equal pay for equal work, suitable residential accommodation, free of charge medical facilities, etc, to inter-State migrant workmen.

Plantations Labour Act, 1951

The *Plantations Labour Act, 1951* (the "**PLA**") seeks to provide for the welfare of labour and to regulate their conditions in plantations.

The PLA defines an employer as the person who has the ultimate control over the affairs of the plantation and where the affairs of the plantation are entrusted to any other person, such other person shall be the employer in relation to that plantation. The PLA applies to all plantations including offices, hospitals, dispensaries, schools and any other premises used for any purposes connected with such plantation but does not include any factory on the premises to which the provisions of the Factories Act apply. The PLA makes it mandatory for every employer to get their plantation registered within 60 days of its coming into existence.

The PLA further makes provisions relating to health, welfare and safety including drinking water, medical facilities, canteens, crèches, housing facilities (*for worker and family of worker*), educational facilities, recreational facilities, latrines and urinals in sufficient numbers, effective arrangements for the safety of workers in connection with the use, handling, storage and transport of insecticides, chemicals and toxic substances, hours of work, weekly holidays, etc.

Mines Act, 1952

The *Mines Act, 1952* (the "**Mines Act**") aims to secure safety, health and welfare of workers working in the mines. "Mine" under the Mines Act means a place where any excavation work is carried on for the searching and obtaining of minerals.

Under the Mines Act, every mine is required to be under a sole manager who must have the prescribed qualifications and the owner or agent of every mine must appoint a person having such qualifications to be the manager of the mine. Owner or agent can be appointed as manager of the mine if they possess requisite qualifications. The Mines Act lays down various duties and responsibilities of owners, agents and managers of mines.

The Mines Act provides that persons working in the mine should not be less than 18 years of age, should not be asked to work for more than 6 days in a week and caps number of working hours in mine to 10 hours inclusive of overtime. The Mines Act lays down time-limits for working above or below ground and provisions for appointment of one chief inspector who shall be responsible for regulating all the territories in which mining is done and an inspector for every mine who would be sub ordinate to the chief inspector. Moreover, the District Magistrate is also empowered to perform the duties of an inspector subject to the orders of the Central Government. The chief inspector or any of the inspectors may make such inquiry, at any time whether day or night, in order to check whether the law is being abided in the mines or not.

¶7-060 Laws Relating to Equality and Empowerment of Women

Equal Remuneration Act, 1976

The *Equal Remuneration Act, 1976* (the "**ER Act**") provides for the payment of equal remuneration to male and female workers for the same work and prevents discrimination, on the ground of sex, against women in the matter of employment, recruitment and for matters connected therewith or incidental thereto.

The ER Act applies to virtually every kind of establishment and the provisions of the ER Act have an overriding effect on all other laws or any award, agreement or contract of service, whether made before or after the commencement of the ER Act, or any instrument having effect under any law for the time being in force.

No employer can pay remuneration to any worker at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex for performing the same work or work of a similar nature. Further no employer can make any discrimination against women while recruiting for the same work or work of a similar nature, or in any condition of service such as promotions, training or transfer.

Maternity Benefit Act, 1961

The *Maternity Benefit Act, 1961* (the "**Maternity Benefit Act**") regulates the employment of women in certain establishments for a certain period before and after childbirth and provides for maternity benefits, and certain other benefits including maternity leave, wages, bonus, nursing breaks, crèche facilities, leave on account of miscarriage and medical termination of pregnancy, etc.

The Maternity Benefit Act applies to:

- A factory, mine or plantation including any such establishment belonging to Government;
- Every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances; and
- Every shop or establishments within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed on any day of the preceding 12 months.

The provisions of the Maternity Benefit Act shall not apply to the employees who are entitled to receive maternity benefits under the ESI Act.

To qualify for maternity leave, the woman employee must have not worked less than 80 days in the 12 months immediately preceding the date of her delivery.

Pregnant women employees are entitled to maternity leave as set out in the below table:

Particulars	Maternity Leaves	Pre-delivery maternity leaves	Post-delivery maternity leaves
1st child birth	26 weeks	8 weeks	18 weeks
2nd child birth	26 weeks	8 weeks	18 weeks
3rd child onwards	12 weeks	6 weeks	6 weeks

After Canada and Norway, India has reached the third position in terms of number of weeks granted as maternity leave.

Any woman employee adopting a child below the age of 3 months would be entitled to maternity benefit for a period of 12 weeks from the date the child is handed over to her.

Any woman employee who becomes a "commissioning mother" (*as explained below*) would be entitled to maternity benefit for a period of 12 weeks from the date the child is handed over to her. Commissioning mother means a biological mother who uses her egg to create an embryo implanted in any other woman.

A pregnant woman is also entitled to request her employer not to give her work of arduous nature or which involves long hours of standing, etc, during the period of 1 month immediately preceding the period of 6 weeks before the date of her expected delivery or any period during the said period of 6 weeks for which the woman does not avail leave of absence.

When a woman absents herself from work in accordance with the provisions of the Maternity Benefit Act, it shall be unlawful for her employer to discharge or dismiss her during or on account of such absence or to vary to her disadvantage any of the conditions of service.

Every establishment with fifty or more employees are required to provide a crèche facility with a provision allowing female employees four visits a day to the crèche. Furthermore, every establishment is required to intimate to every woman at the time of her initial appointment, all the benefits available to her under the Maternity Benefit Act.

¶7-070 Prohibitive Labour Laws

Child and Adolescent Labour (Prohibition and Regulation) Act, 1986

The *Child and Adolescent Labour (Prohibition and Regulation) Act, 1986* (the "**Child Labour Prohibition Act**") expressly prohibits the employment of a child below the age of 14 years in any hazardous occupations and processes except in specified cases and prohibits the employment of adolescents (between the age of fourteen to 18 years) in any factory or mine or engagement in any other hazardous employment.

The Child Labour Prohibition Act regulates hours and period of work, intervals for rest, weekly holidays, etc, of adolescent labourers. The Child Labour Prohibition Act requires the occupiers of establishments employing adolescents to give written notice to the local inspector and maintain the prescribed register which may be inspected at any time.

Rules framed under the Child Labour Prohibition Act:

- Enunciate the conditions in which a child can help his family by getting employed without jeopardising his own education.
- Provide for certain safeguards with respect to employment of a child artist.
- Provide that school teachers and representatives from school management committee, child protection committee, panchayat or municipality may file a complaint in the event that any of students in their respective schools is employed in contravention to the provisions of the Child Labour Prohibition Act.

Apart from the Child Labour Prohibition Act, there are several other labour legislations that protect the interest of a child. For example, the *Factories Act, 1948* and the *Mines Act, 1952* prohibit the employment of children below the age of 14 years.

Directions of the Supreme Court on the Issue of Elimination of Child Labour

In a landmark judgment delivered by the Supreme Court of India in the case of *MC Mehta v State of Tamil Nadu and others* (1996) 6 SCC 756, the Hon'ble Apex Court gave certain directions on the issue of elimination of child labour. The main features of the judgment are aptly captured in the book "*The Elimination of Child Labour - Whose responsibility, A Practical Workbook*" by author Pramila H. Bhargava, as under:

- Survey for identification of working children;
- Withdrawal of children working in hazardous industry and ensuring their education in appropriate institutions;
- Contribution at the rate of Rs. 20,000 per child to be paid by the offending employers of children to a welfare fund to be established for this purpose;
- Employment to one adult member of the family of the child so withdrawn from work and if that is not possible a contribution of Rs. 5,000 to the welfare fund to be made by the State Government;
- Financial assistance to the families of the children so withdrawn to be paid out of the interest earnings on the corpus of Rs. 20,000/25,000 deposited in the welfare fund, as long as the child is actually sent to a school; and
- Regulating hours of work for children working in non-hazardous occupations so that their working hours do not exceed 6 hours per day and education for at least 2 hours is ensured. The entire expenditure on education is to be borne by the concerned employer.

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

The *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013* (the "**SHW Act**") was enacted by the Parliament to provide protection against sexual harassment of women at workplace and prevention and redressal of complaints of sexual harassment and for matters connected therewith.

The SHW Act makes it mandatory for every organisation to frame an anti-sexual harassment policy. Further an organisation having ten or more employees is required to constitute an Internal Complaints Committee ("**ICC**") to entertain complaints that may be made by an aggrieved woman. At least half the members of ICC should be women and one member should be from amongst NGOs or associations committed to the cause of women or a person familiar with the issues of sexual harassment.

The SHW Act also incorporates provisions for formation of a Local Complaints Committee ("**LCC**") in every district for entertaining complaints of sexual harassment at workplace from organisations where ICC has not been established due to having less than 10 employees.

The SHW Act provides that an aggrieved woman may, in writing, make a complaint of sexual harassment to ICC or LCC as the case may be within a period of 3 months from the date of occurrence of such incident. Further, in a case where the aggrieved woman is unable to make a complaint on account of her physical incapacity or death, a complaint may be filed inter alia by her legal heirs.

Upon receiving complaint, ICC or LCC may attempt to arrive at an amicable settlement between the aggrieved woman and the person against whom a complaint has been made. Where amicable settlement could not be arrived or terms of settlement are breached, the SHW Act provides for an elaborate procedure of inquiry.

The Transgender Persons (Protection of Rights) Act, 2019 :

The provisions the Transgender Persons (Protection of Rights) Act, 2019 ("Transgender Act") came into effect on December 10, 2019. The Transgender Act, amongst other provisions, prohibits discrimination against a transgender person, including unfair treatment in relation to employment, discrimination in employment matters (recruitment and promotion) etc. The employers must, *inter alia,* designate a complaint officer responsible for dealing with violations of the provisions of the Transgender Act. The employers are required to ensure that the provisions of the Transgender Act are complied with in addition to other labour law compliances.

¶7-080 Laws Relating to Employment and Training

Apprentices Act, 1961

The *Apprentices Act, 1961* (the "**Apprentices Act**") provides for the regulation and control of training of apprentices. The objective of the Apprentices Act is to impart on-the-job skill training to the students or young graduates. Apprentice is defined as a person who is undergoing apprenticeship training in pursuance of a contract of apprenticeship.

The Apprentices Act provides for qualification for being engaged as an apprentice, contract for apprenticeship, novation of contract of apprenticeship, period for apprenticeship training, termination of apprenticeship contract, obligations of employers and apprentices, payment to apprentices, health safety and welfare of apprentices, hours of work, overtime, leave and holidays and other working conditions of apprentices.

The Apprentices Act makes it obligatory on employers under notified industries to hire certain number of apprentices in certain designated trades and optional trades, as notified by the Government. Accordingly, appointment of apprentices, according to the Apprentice Act, will be obligatory if the company falls under the notified industry.

A person is not qualified for being engaged as an apprentice to undergo apprenticeship training in any designated trade, unless he:

- Is not less than 14 years of age, and for designated trades related to hazardous industries, not less than 18 years of age; and
- Satisfies such standards of education and physical fitness as may be prescribed.

Further, no person can be engaged as an apprentice to undergo apprenticeship training in a designated trade unless such person or, if he is a minor, his guardian has entered into a contract of apprenticeship with the employer.

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959

The *Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959* (the "**Employment Exchanges Act**") provides for the compulsory notification of vacancies to employment exchanges by the employers. Employment exchanges mean offices maintained by the government for collecting or furnishing information regarding persons who seek to engage employees, persons who seek employment and vacancies to which persons seeking employment may be appointed.

The Employment Exchange Act makes it obligatory on every establishment in the public sector to notify, before filling up any vacancy in any employment in that establishment, vacancies to such employment exchanges as may be prescribed. Further, the Employment Exchange Act provides that the appropriate Government may, by notification in the Official Gazette, require that from such date as may be specified in the notification, the employer in every establishment in the private sector or every establishments pertaining to any class or category of establishments in private sector shall, before filling up any vacancy in any employment in that establishment, notify vacancies to such employment exchanges as may be prescribed.

¶7-090 e-Kranti: e-Governance Initiative of the Ministry

The Ministry has come up with a unique *e*-governance initiative called "e-Kranti" (*Kranti means "revolution"*) which aims to make government services accessible to the common man in his locality, through common service delivery outlets and ensure efficiency, transparency and reliability at affordable costs.

For the purpose of e-governance in the arena of labour laws, the Ministry has developed a unified web portal called *"Shram Suvidha Portal"* (*Shram means "labour" and Suvidha means "facilitation"*). This portal integrates four major labour authorities under the Ministry, viz, the Chief Central Labour Commissioner, the Directorate General of Mines Safety, the Employees' Provident Fund Organisation and the Employees' State Insurance Corporation. The portal facilitates the following:

- A unique Shram Pehchan Sankhya, ie, labour identification number (LIN) for units to facilitate online registration.
- Filing of self-certified and simplified single consolidated online return by the industry units instead of filing multiple returns under different labour statutes.
- Transparent labour inspection scheme through computerised system.

For more information, please visit *www.shramsuvidha.gov.in/eRegister*

¶7-100 Start-up India Action Plan: An Initiative of the Government of India Providing Several Relaxations to Start-ups

Under the Start-up India Action Plan, an entity is considered as a "Start-up":

- If it is incorporated as a private limited company under the *Companies Act, 2013* or registered as a partnership firm under the *Partnership Act, 1932* or a limited liability partnership under the *Limited Liability Partnership Act, 2008* in India; and
- If its turnover for any of the financial years since incorporation/ registration has not exceeded Rs.100 crores; and
- If it is working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation.

***Notes**:*

- *Any entity formed by splitting up or reconstruction of a business already in existence is not considered as a "Start-up".*
- *An entity can enjoy the benefits made available to a "Start-up" only for a period up to ten years* from *the date of its incorporation/registration;* Process of recognition as a "Start-up"

The process of recognition as a "Start-up" is through an online application made over the mobile app/portal set up by the Department of Industrial Policy and Promotion. Entity should submit the online application along with the Certificate of Incorporation/Registration and a write-up about the nature of entity's business highlighting how it is working towards innovation, development or improvement of products or processes or services, or its scalability in terms of employment generation or wealth creation.

Relaxations for recognised start-ups with respect to labour law compliances

The Ministry proposed several relaxations in compliances under labour laws for startups including relaxations with respect to inspections by authorities under various labour statutes, provision for self-certification, etc. In line with the recommendations of the Ministry, various States have amended their laws to provide incentives under the Startup India Action Plan.

For more details, please visit: *www.startupindia.gov.in*

¶7-110 Labour Law Reforms

Government of India is keen on fostering a conducive labour environment wherein labour rights are protected and harmonious labour relations lead to higher productivity.

Since many of the Indian labour laws are overlapping and archaic in nature, the Government of India has amalgamated twenty nine existing labour laws into four Codes, namely, the *Code on Wages, 2019*, the *Industrial Relations Code, 2020*; the *Occupational Safety, Health and Working Conditions Code, 2020*; and the *Code of Social Security, 2020*. These four Codes together consolidate laws relating to: (i) wages; (ii) industrial relations; (iii) safety, working conditions and welfare; and (iv) social security.

Out of the four Codes mentioned above, the Code on Wages, 2019 received Presidential assent in 2019 on August 8. The rest of the three Codes, i.e., the *Industrial Relations Code, 2020*; the *Occupational Safety, Health and Working Conditions Code, 2020*; and the *Code of Social Security, 2020*, received Presidential assent on September 28th, 2020. The four Codes post receiving Presidential assent have also been published in the Gazette, they will however, be brought into force only once the appointed date for their implementation is notified by the Central Government.

The Ministry of Labour and Employment had also published the draft rules on the *Code on Wages 2019*, viz, *Draft Code on Wages (Central) Rules, 2020*, on the 10th of July 2020. The Ministry had sought inputs from the stakeholders on the Draft Rules which were to be submitted till the 24th of August 2020. Once the Code on Wages 2019, along with the Rules is notified, the corresponding legislations will stand repealed.

The Code on Wages, 2019:

The Code on Wages, 2019 (hereafter referred to as 'the Wage Code') subsumes the *Payment of Wages Act, 1936*; the *Minimum Wages Act, 1948*; the *Payment of Bonus Act, 1965* and the *Equal Remuneration Act*, 1976. The objective of the Wage Code is to amend and consolidate the laws relating to wages, bonus and other related matters. It envisages uniformity in the timely payment of wages and minimum wages, irrespective of the sector and wage ceiling. The intent behind the Wage Code is to create a uniform system of governance to ensure a compliance regime that can be easily and effectively implemented and enforced.

The Key highlights of the Wage Code are given below:

(i) The Definition of 'Wages'

Prior to the Wage Code, there was no standard definition of the term "wages" as it varied across enactments. The Wage Code has provided a single and uniform definition of 'wages' and it includes all remuneration payable to a person employed in respect of his employment or work including basic wage, dearness allowance and retaining allowance if any. However, it excludes bonus, housing rent allowance, conveyance, overtime allowance and few more components. It may be noted that, if such excluded components are more than 50% (fifty percent) of total wages, then the amount in excess will deem to be the wages and should be added back to the total wages.

Further, if any part of the remuneration is given in kind then the value of the said remuneration, which does not exceed 15% (fifteen percent) of the total wages payable to the employee, will also form part of the employee's wages. Certain exclusions mentioned in the definition of wages would still be considered while computing wages for the purpose of wage parity between genders and for payment of wages.

(ii) Definition of "worker" and "employee"

The Wage Code has widened the definition of 'employee' and it includes any person employed on wages by an establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, as well as those persons declared to be an employee by the appropriate Government. Thus, the Wage Code also regulates the service conditions of managerial and supervisory employees including the manner of paying them their salary.

The Code also introduces the concept of 'worker' which covers those individuals who are captured within the scope of the term 'employee' including working journalists and sales promotion employees, but excludes (i) supervisors whose monthly salary is INR 15,000 or more; and (ii) those employed in managerial and administrative capacity.

(iii) New definition of 'establishment' under Wage Code covers any place where any industry, trade, business, manufacturing, or occupation is carried out and includes Government establishments. The scope has therefore been widened to include every type of establishment.

(iv) Minimum Wages

Under the *Minimum Wages Act*, minimum wages are fixed for scheduled employment and for categories of employees through various notifications issued by the relevant Government. Under the Wage Code, however, the appropriate Government is required to fix minimum rates of wages for all the employees irrespective of the industry they are employed in.

Under the Wage Code, the Central Government can fix the floor wage based on the living standard of the workers and their geographical location ("Floor Wage"). The minimum rates of wages fixed by the Central or State Governments cannot be lower than the prescribed Floor Wage. Further, if the minimum rates of wages fixed prior to the Floor Wage being implemented is higher than the Floor Wage, then the relevant Government is prohibited from reducing those rates.

(v) Equal Remuneration

Section 3 of the Wage Code provides that there shall be no discrimination among employees on the ground of gender in matters relating to wages for the same work. The Wage Code ensures protection not only to female and male employees, but also to transgender employees.

Further in terms of the Wage Code, experience, can be considered while determining the question of pay parity and conditions of service for work which is same or of similar nature.

(vi) Definitions of "contractor" and "contract labour"

Under the Wage Code, the term 'employer' has been widened to specifically include contractors. Therefore, the contractors will also be responsible for compliance with applicable provisions of the Wage Code in relation to their employees who are deployed by the contractor to various client locations as contract labour.

Further, while the *Contract Labour Act* does not distinguish between regular employees and those who were hired by the contractor for the work of an establishment, the Wage Code specifically excludes those employees from the definition of contract labour who are in the regular employment of a contractor and receive increments, social security coverage and welfare benefits.

(vii) Period and Payment of Wages

The *Payment of Wages Act* which is applicable (a) to employees whose monthly salary does not exceed Rs. 24,000 and (b) to "industrial or other establishments" like docks, wharfs, mines, quarries, oilfields, plantations, factories, or those which are notified by the appropriate Government. The Wage Code has done away with these restrictions and the provisions of the Wage Code, in relation to the payment of wages, are applicable to all employees, across industries.

The *Payment of Wages Act* provided that a wage period shall not exceed one month and prescribed two different time limits for the payment of wages based on the number of employees in an establishment. However, the Wage Code departs from this system and provides that the employer can fix the wage period on a daily, weekly, fortnightly or monthly basis and further provides the time limits for payments of wages to the employees, under each such wage period.

Time limit for payment of wages in case of monthly payment has been made uniform as 7th of following month

(viii) Payment of Bonus

The provisions regarding the computation of bonus remain consistent with those of the *Payment of Bonus Act*. However, the appropriate government has been asked to decide the threshold of wages for the purpose the payment of bonus to employees. Further, the Wage Code introduces dismissal from service due to conviction for sexual harassment a ground for disqualification for receipt of bonus.

The prescribed bonus ranges from a minimum of 8.33% to a maximum of 20% (twenty percent) of the employee's wages.

(ix) Overtime rate

As per the Wage Code where an employee whose minimum rate of wages has been fixed by the hour, by the day or by such a longer wage-period as may be prescribed, works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him for every hour or for part of an hour so worked in excess, at the overtime rate which shall not be less than twice the normal rate of wages

The Wage Code provides for full payment of wages to part time employees in order to avoid a situation wherein payment of full wages is avoided by showing employees as part time employees.

The Industrial Relations Code, 2020:

The *Industrial Relations Code, 2019* (hereafter 'the IR Code') subsumes and replaces three labour laws, namely, the *Industrial Disputes Act, 1947*; the Trade Unions Act, 1926; and the *Industrial Employment (Standing Orders) Act, 1946*.

The Key highlights of the IR Code are given below:

(i) The IR Code applies to all establishments except those engaged in charitable and philanthropic work, domestic work, any activity of the appropriate Government relatable to the sovereign functions of the appropriate Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space and any notified activity.

(ii) Seven or more members of Trade Union can apply for its registration. Trade unions that have a membership of at least 10% (ten percent) of the workers or 100 workers will be registered.

(iii) If more than one registered Trade Union of workers are functioning in an industrial establishment, then, the Trade Union having seventy-five per cent or more workers on the muster roll of that industrial establishment, supporting that Trade Union shall be recognised by the appropriate Government or any officer authorised by such Government as the sole negotiating union of the workers.

(iv) An employee cannot go on strike unless he gives notice for a strike within sixty days before striking, or within 14 days of giving such notice. Similar provisions exist for lock-out by employer.

(v) Every industrial establishment wherein three hundred or more than three hundred workers, are employed, or were employed on any day of the preceding twelve months shall prepare standing order on certain matters. The Central Government shall make model standing orders relating to conditions of service and other matters incidental thereto based on which employer shall prepare the standing order.

(vi) Factories, mines or plantations in which 300 or more workers are employed are required to take prior permission of the Central or State Government before lay off or retrenchment or closure.

(vii) IR Code provides for the constitution of Industrial Tribunals for the settlement of industrial disputes. Each Industrial Tribunal will consist of a Judicial member and an Administrative member.

(viii) IR Code allows industrial dispute to be voluntarily referred to arbitration. Where any industrial dispute exists or is apprehended and the employer and the workers agree to refer the dispute to arbitration, they may, by a written agreement, refer the dispute to arbitration, and the reference shall be to such person or persons as an arbitrator or arbitrators as may be specified in the arbitration agreement.

(ix) IR Code provides that the Central or State Government may by notification exempt in public interest any new industrial establishment or class of new establishments from all or any of the provisions of this Code for such period, from the date of establishment of the new industrial establishment or class of new establishments, as may be specified.

The Code on Social Security, 2020:

The *Code on Social Security, 2020* (hereafter 'the Social Security Code') simplifies, amalgamate, rationalize and replaces the following Central labour legislations: the *Employees' Compensation Act, 1923*; the *Unorganised Workers' Social Security Act, 2008*; the *Payment of Gratuity Act, 1972*; the *Employees' State Insurance Act, 1948*; the *Cine Workers Welfare Fund Act, 1981*; the *Employees' Provident Fund and Miscellaneous Provisions Act, 1952*; the *Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959*; the *Maternity Benefit Act, 1961*; and the *Building and Other Construction Workers Cess Act, 1996*.

The key highlights of the Social Security Code are given below:

(i) The Social Security Code introduces the definition of "career centre" to mean any office (including employment exchange, place or portal) established and maintained in the manner prescribed by the Central Government for providing career services(including registration, collection and furnishing of information, either by the keeping of registers or otherwise, manually, digitally, virtually or through any other mode) as may be prescribed by the Central Government, which may, inter alia, relate generally or specifically to— (i) persons who seek to employ employees; (ii) persons who seek employment; (iii) occurrence of vacancies; and (iv) persons who seek vocational guidance and career counselling or guidance to start self-employment..

(ii) It introduces the term "*aggregator*" to mean a digital intermediary or marketplace for a buyer or user of a service to connect with the seller or the service provider.

(iii) It also introduces the terms "*gig worker*" and "*platform worker*". The term '*gig worker*' has been defined to mean a person who performs work and earns from such activities outside of the traditional employer-employee relationship. The Social Security

Code does not, in this regard, clarify the expression 'outside of traditional employer-employee relationship'.

(iv) The term '*platform worker*' has been defined to mean a person engaged in undertaking platform work. The term "platform work" as defined under the Social Security Code means a work arrangement outside of a traditional employer-employee relationship in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services or any such other activities which may be notified by the Central Government, in exchange for payment.

(v) The Social Security Code also gives the definition of "*home based worker*". It means a person who is engaged in the production of goods or services for an employer in his home or other premises of his choice other than the workplace of the employer, for remuneration, irrespective of whether or not the employer provides the equipment, material or other inputs.

(vi) The Social Security Code also provides for registration of every unorganised worker, gig worker or platform worker based on a self-declaration provided either electronically or otherwise along with AADHAR number in a form and manner that shall be prescribed by the Central Government.

(vii) The Social Security Code specifies different applicability thresholds for the various schemes framed under the Code i.e. Employees' State Insurance Scheme, Employees' Provident Fund Scheme, Employees' Pension Scheme, Employees' Deposit Linked Insurance Scheme. For example, the Employees' State Insurance Scheme will apply to every establishment other than a seasonal factory in which ten or more persons are employed. It shall also apply to all establishments which carry out hazardous or life-threatening work notified by the Central Government. The Employees' Provident Fund Scheme will apply to every establishment in which twenty or more employees are employed. These thresholds may however be amended by the Central Government.

(viii) Every establishment to which the Code of Social Security applies shall be registered within such time and in such manner as may be prescribed by the Central Government. However, the establishment which is already registered under any other Central labour law for the time being in force shall not be required to obtain registration again under this Code and such registration shall be deemed to be registration for the purposes of the Social Security Code.

(ix) The Code provides for the establishment of several bodies to administer the social security schemes. These include: (i) a Central Board of Trustees, headed by the Central Provident Fund Commissioner, to administer the EPF, EPS and EDLI Schemes, (ii) an Employees State Insurance Corporation, headed by a Chairperson appointed by the Central government, to administer the ESI Scheme, (iii) national and state-level Social Security Boards, headed by the central and state Ministers for Labour and Employment, respectively, to administer schemes for unorganised workers, and (iv) state-level Building Workers' Welfare Boards, headed by a Chairperson nominated by the state government, to administer schemes for building workers.

(x) The scheme of penalties and offences under the Social Security Code have also undergone certain changes. It allows employers an opportunity to correct non-compliance for any offence prior to the initiation of prosecution or proceedings. However, repeat offenders have been prescribed enhanced punishments under the Code.

The Occupational Safety, Health and Working Conditions Code, 2020:

The Occupational Safety, Health and Working Conditions Code,2020 (hereafter 'the Safety Code') is an Act to consolidate and amend the laws regulating the occupational safety, health and working conditions of the persons employed in an establishment and for matters connected therewith or incidental thereto. The Safety Code consolidates thirteen existing labour laws namely,

(a) the *Factories Act, 1948*; (b) the *Plantations Labour Act, 1951*; (c) the *Mines Act, 1952*; (d) the *Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955*; (e) the *Working Journalists (Fixation of Rates of Wages) Act, 1958*; (f) the *Motor Transport Workers Act, 1961*; (g) the *Beedi and Cigar Workers (Conditions of Employment) Act, 1966*; (h) the *Contract Labour (Regulation and Abolition) Act, 1970*; (i) the *Sales Promotion Employees (Conditions of Service) Act, 1976*; (j) the *Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979*; (k) the *Cine-Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981*; (l) the *Dock Workers (Safety, Health and Welfare) Act, 1986*; (m) the *Building and Other*

Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.

The Key highlights of the Safety Code are given below:

(i) The Safety Code applies to establishments employing at least 10 workers. The establishment under Safety Code means— (i) a place where any industry, trade, business, manufacturing or occupation is carried on or (ii) motor transport undertaking, newspaper establishment, audio-video production, building and other construction work or plantation or (iii) factory, (iv) a mine or port or vicinity of port where dock work is carried out.

(ii) The definition of 'factory' has been amended to mean any premises including any precincts thereof where twenty or more workers are working, or were working on any day or the preceding twelve months, and in any part of which a manufacturing process is carried on with the aid of power or where forty or more workers are working or were working on any day or the preceding twelve months, and in any part of which a manufacturing process is carried on without the aid of power.

(iii) The manpower limit on hazardous conditions has been removed and the Safety Code shall be applicable on the contractors employing fifty or more workers instead of twenty.

(iv) Every employer of any establishment which comes into existence after the commencement of the Safety Code; and (b) to which this Code applies is required to register itself within sixty days from the date of such applicability of this Code.

(v) The Safety Code stipulates certain duties of employers which, inter alia, include (a) providing a workplace that is free from hazards, (b) providing free annual health examinations in notified establishments, and (c) informing relevant authorities in case any accident at the workplace leads to death or serious bodily injury to any employee (d) provide and maintain a working environment that is safe and without risk to the health of the employees; (e) ensure the disposal of hazardous and toxic waste including disposal of e-waste; Additional duties are prescribed for employers in factories, mines, docks, plantations, and building and construction work, including provision of a risk-free work environment, and instructing employees on safety protocols.

(vi) Prior consent of workers will be required for overtime work and the workers must be paid wages at the rate of twice the rate of wages in respect of overtime work and the period of overtime work shall be calculated on a daily basis or weekly basis, whichever is more favourable to such worker.

(vii) No worker will be required or allowed to work in any establishment for more than eight hours in a day. Women can work past 7 pm and before 6 am, subject to any safety-related or other conditions prescribed by the government. Further, workers cannot be required to work for more than six days a week and must receive one day of leave for every 20 days of work per year.

(viii) Welfare facilities that need to be maintained in an establishment include but are not limited to a) adequate and separate washing facilities for men and women b) facilities for bathing and locker-rooms for men, women and transgender employees separately, c) space to store clothes that are not used during the hours of work, d) seating arrangements for employees obliged to work in a standing position, e) canteen in an establishment for employees thereof, wherein 100 or more workers including contract labourers are ordinarily employed

(ix) The Safety Code provides for setting up occupational safety and health advisory boards at the national and state level to advise the Central and State governments on the standards, rules, and regulations to be framed under the Safety Code.

The Central Government has also taken various legislative initiatives such as:

- Notified "*Ease of Compliance to maintain Registers under various Labour Laws Rules, 2017*" which has replaced fifty-six registers/forms in to five common registers/forms under the following nine central labour laws and rules made thereunder:

  (i) the *Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996*; (ii) the *Contract Labour Act*; (iii) the *Equal Remuneration Act*; (iv) the *Migrant Workmen Act*; (v) the *Mines Act*; (vi) the *Minimum Wages Act*; (vii) the *Payment of Wages Act*; (viii) the *Sales Promotion Employees (Conditions of Service) Act, 1976*; and (ix) the *Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955*.

- Notified "*Rationalization of Forms and Reports under Certain Labour Laws Rules, 2017*" which reduces thirty-six forms/returns to twelve forms/returns under the following three acts:

  the *Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996*; (ii) the *Contract Labour Act*; and (iii) the *Migrant Workmen Act*.

- Circulated "*Model Shops and Establishments (Regulation of Employment and Conditions of Service) Bill, 2016*" to all States/Union Territories for adoption with appropriate modification.

The said Bill inter alia provides for freedom to operate an establishment for entire year without any restriction on opening/closing time and enables employment of women during night shifts if adequate safety provisions exist. Maharashtra became the first state to adopt this Model Bill by passing the *Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017*. Modified Standing Orders Rules to permit employment of employees on a fixed term basis across industry. Care has been taken that the existing permanent employees are not migrated to fixed term employment system.

Apart from the Central Government, even State Governments have taken steps to rationalise labour laws/rules.

Some noteworthy reforms are as under:

- Employer employing hundred or more workmen must obtain prior government approval to retrench the employees or close down a factory. Certain State Governments have increased the threshold limit from hundred workmen to three hundred workmen.

- Subject to adequate safeguards, many States Governments now permit women employees to work in night shifts.

  (i) Introduced online local registrations, online submissions of returns, voluntary compliances schemes, self-certifications schemes, etc.

Chapter 8 Important Considerations for Expatriates Working in India

¶8-010 Engagement of Foreign Personnel

Registration Formalities for Foreign Nationals entering India

The requirements for the foreigners to register with the Foreigners' Regional Registration Office (FRRO)/Foreigners' Registration Office (FRO) are as follows:

(i) If the foreigners are entering India on a student, medical, employment, research, or missionary visa, which is valid for more than 180 days, they are required to register themselves with the FRRO/FRO, under whose jurisdiction they propose to stay. The registration should be done within 14 days of their arrival in India.

(ii) Foreigners visiting India on any other category of long-term visa are not required to register themselves with the FRRO/FRO, if their continuous stay in India during each visit does not exceed 180 days. If such a foreigner intends to stay in India for more than 180 days during a particular visit, he/she should get registered within 180 days of their arrival in India.

(iii) Certain categories of foreign nationals are exempted from registration, namely:

  (a) those visiting India on any short-term visa, ie, valid for 180 days or less, and

  (b) children below 16 years of age (irrespective of the type of visa).

(iv) Registration is also required in the case of visa less than 180 days and if there is special endorsement "for registration required".[1]

(v) Pakistani nationals are required to register within twenty four hours of their arrival in India and Afghanistani nationals are required to register

1 http://boi.gov.in/content/general-instructions-registration-foreigners; last seen on 05-08-2018

within 14 days of their arrival in India except those Afghan nationals who enter India on a visa valid for 30 days or less provided the Afghan national concerned gives his/her local address in India to the Indian Mission/FRRO/FRO. The Afghan nationals who are issued visas with "Exemption from police reporting" are exempt from Police reporting as well as Exit permission provided they leave within the Visa validity period.

[1](vi) The Registration Certificate is required to be surrendered to the authorities prior to the foreign national's departure.

Note**:** It is advisable to check the latest requirement with respect to any specific issue with the concerned Government office/website.

Remittance of Salary Abroad

A foreign national who is an employee of a foreign company and is on deputation to the office/branch/subsidiary/joint venture of such a foreign company in India can avail the facility of opening and maintaining foreign currency account with a bank outside India and receive the whole salary payable to him for the services rendered to the office/branch/subsidiary/joint venture in India of the foreign company, by credit to such account, provided that the income tax chargeable under the *Income Tax Act, 1961* is paid on the entire salary that accrued in India. [Substituted by *the FEMA (Foreign Currency Accounts by a person Resident in India) (Amendment) (Second Amendment) Regulations, 2009*, w.r.e.f. September 09, 2009.] For the purpose of this, the expression "company" shall include a "Limited Liability Partnership" as defined under the *Limited Liability Partnership Act, 2008*.[2]

Employment Visa

Foreigners coming to India for taking up employment should apply for an Employment visa which is issued by Indian missions abroad. The Employment visa is granted to foreign nationals subject to fulfillment of the following conditions:

(i) The applicant is a highly skilled and/or qualified professional, engaged or appointed by a company/organisation/industry/undertaking in India on contract or employment basis.

(ii) Employment visa shall not be granted for jobs for which qualified Indians are available. Employment visa shall also not be granted for routine, ordinary or secretarial/clerical jobs.

(iii) The foreign national seeks to visit India for employment in a company/firm/organisation registered in India or for employment in a foreign company/firm/organisation engaged for execution of some project in India.

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1 Point (a) of Page 1 of http://boi.gov.in/sites/default/files/ForeigD-FRRO_version 223.6.11.pdf ; last seen on 05-08-2018

2 https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=9470; last seen on 05-08-2018

(iv) The foreign national being sponsored for an Employment visa in any sector should draw a salary in excess of US$ 25,000 per annum. However, this condition will not apply to: (a) Ethnic cooks, (b) Language teachers (other than English language teachers)/ translators and (c) Staff working for the concerned Embassy/High Commission in India.

(v) The foreign national must comply with all legal requirements like payment of tax, etc.

(vi) The Employment visa is issued from the country of origin or from the country of domicile of the foreigner provided the period of permanent residence of the applicant in that particular country is more than 2 years.

(vii) Embassy/Consulate may grant employment visa which is valid for a year irrespective of the contract. The visa duration starts from the day of issuance and not from the day of entry in India. Foreign technician may get visa for a period of five years or as per the bilateral agreement between Indian and foreign government whichever is less with multiple entries. For highly skilled IT person, the visa validity is up to 3 years with multiple entries. Others can be granted visa with validity of 2 years with multiple entries.

The foreign national must furnish the following documents along with the visa application form[1]: (a) passport with 6-month validity; (b) passport size photographs; (c) photo copy of passport; (d) copy of online filled form; (e) appointment/contract letter; (f) resume of the applicant; (g) organisation registration; (h) tax liability letter; (i) project details; (j) sponsor letter from organisation in India; and (k) justification letter from employer.

The *Companies Act, 2013* also stipulates the above conditions in case of appointment of managerial persons in companies to which Schedule V is applicable.

Proviso to Part I of Schedule V to the *Companies Act, 2013* specifically mentions that a person being a non-resident in India shall enter India only after obtaining a proper employment visa from the concerned Indian mission abroad and shall furnish, along with the visa application form, a profile of the company, the details of principal employer, and the terms and conditions of such person's appointment.

Income Tax

The total income of an assessee is determined on the basis of his residential status in India. According to Section 5 of the *Income Tax Act, 1961* ("ITA"), Indian residents are liable to be taxed on their worldwide income, whereas non-residents are taxed only on income that has its source in India.[2]

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1 https://boi.gov.in/content/employment-visa-e

2 Income is said to have its source in India if it is "income which accrues or arises in India; is deemed to accrue or arise in India, or is received in India"

The scope of Section 5 is expanded by the legal fiction contained in Section 9, which deems certain incomes to be earned in India. Section 9 provides for circumstances when various types of incomes are deemed to be earned in India and hence liable to be taxed in India. It specifically provides that all incomes accruing or arising, whether directly or indirectly, through or from any business connection[1] in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situated in India, or income earned from services rendered in India, or interest or royalty income or fees for technical services earned in India are deemed to be taxable in India to the extent attributable to Indian operations.

Residential Status

Section 6 of the ITA defines the term "resident" and contains different criteria to determine the residential status of various entities such as a company, a firm and an individual, etc.

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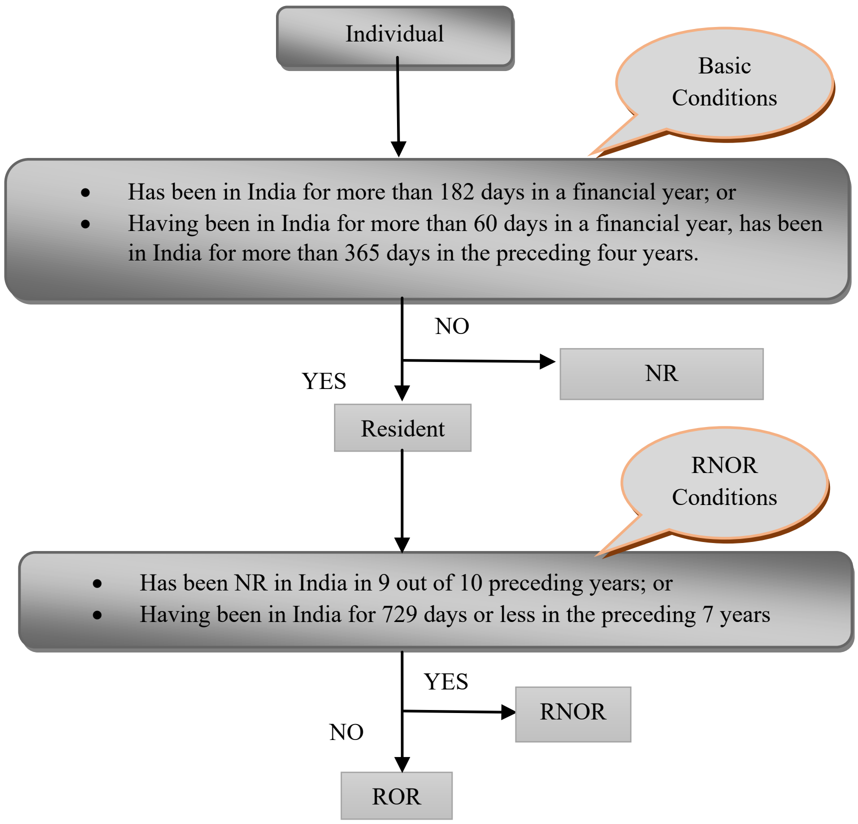
1 The expression "business connection" as used in this provision was not originally defined in the ITA. The Supreme Court in the case of *RD Aggarwal* [56 ITR 20] laid down the definition of the term as: "*Business connection means something more than business. It presupposes an "element of continuity between the business of the non-resident and his activity in the taxable territory, rather than a stray or isolated transaction".*

The ITA was amended by the *Finance Act, 2003*, and an inclusive definition of the expression was inserted, w.e.f. April 01, 2004 (Section 9(1), Explanation 2))As per this definition, a business connection includes *"any business activity carried out through a person who, acting on behalf of the non-resident, (a) has and habitually exercises in India an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or (b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or (c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non- resident."* ***Provided*** *that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business:*

Provided further *that where such broker, general commission agent or any other works mainly or wholly on behalf of a non- resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non -resident and other non -residents which are controlled by the principal non- resident or have a controlling interest in the principal non -resident or are subject to the same common control as the principal non -resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status*

Tax Liability to be determined according to the Residential Status

The tax liability of a person having different residential status has been explained in the following table:



It must be borne in mind that in transactions covered by a *Double Taxation Avoidance Agreement* (DTAA), the ITA provides that its provisions shall be applicable only insofar as they are more beneficial to the taxpayer[1]. Therefore, the incidence and quantum of one's tax liability, in a cross-border scenario, must always be determined in the light of the provisions of the relevant DTAA, if any.[2]

List of countries with whom India has singed DTAA are:	
1	India-Albania
2	India-Afghanistan

1 Section 90(2), ITA

2 Currently, India has signed 91 Double Taxation Avoidance Agreements (DTAAs) and 17 TIEAs (Tax Information Exchange Agreements) entered into with several countries uptil November 2015, as updated by Income tax authority. Source: https://www.cchtaxonline.com/web/guest/comprehensive-agreements and https://www.cchtaxonline.com/web/guest/tiea

List of countries with whom India has singed DTAA are:	
3	India-Armenia
4	India-Australia
5	India-Austria
6	India-Bangladesh
7	India-Belarus
8	India-Belgium
9	India-Bhutan
10	India-Botswana
11	India-Brazil
12	India-Bulgaria
13	India-Canada
14	India-China
15	India-Colombia
16	India-Croatia
17	India-Cyprus
18	India-Czechoslovakia
19	India-Czech Republic
20	India-Denmark
21	India-Estonia
22	India-Ethiopia
23	India-Fiji
24	India-Finland
25	India-France
26	India-Georgia
27	India-Germany
28	India-Greece
29	India-Hashemite Kingdom of Jordan
30	India-Hungary
31	India-Iceland
32	India-Indonesia
33	India-Iran
34	India-Ireland

List of countries with whom India has singed DTAA are:	
35	India-Israel
36	India-Italy
37	India-Japan
38	India-Kazakstan
39	India-Kenya
40	India-Korea
41	India-Kuwait
42	India-Kyrgyz Republic
43	India-Latvia
44	India-Lebanon
45	India-Libya
46	India-Lithuania
47	India-Luxembourg
48	India-Macedonia
49	India-Malaysia
50	India-Maldives
51	India-Malta
52	India-Mauritius
53	India-Mongolia
54	India-Montenegro
55	India-Morocco
56	India-Mozambique
57	India-Myanmar
58	India-Namibia
59	India-Nepal
60	India-Netherlands
61	India-New Zealand
62	India-Norway
63	India-Oman
64	India-Oriental Republic of Uruguay
65	India-Pakistan
66	India-People's Democratic Republic of Yemen

List of countries with whom India has singed DTAA are:	
67	India-Philippines
68	India-Poland
69	India-Portuguese Republic
70	India-Qatar
71	India-Romania
72	India-Russia
73	India-Saudia Arabia
74	India-Serbia
75	India-Singapore
76	India-Slovenia
77	India-South Africa
78	India-Spain
79	India-Srilanka
80	India-Sudan
81	India-Sweden
82	India-Switzerland
83	India-Swiss Confederation
84	India-Syrian Arab Republic
85	India-Taipei (Specified Associations Agreement)
86	India-Tajikistan
87	India-Tanzania
88	India-Thailand
89	India-Trinidad and Tobago
90	India-Turkey
91	India-Turkmenistan
92	India-UAE
93	India-UAR (Egypt)
94	India-Uganda
95	India-UK
96	India-Ukraine
97	India-United Arab Emirates
98	India-United Arab Republic (Egypt)

List of countries with whom India has singed DTAA are:	
99	India-United Kingdom of Great Britain * Northern Ireland
100	India-United Mexican States
101	India-USA
102	India-Uzbekistan
103	India-Vietnam
104	India-Yemen Arab Republic
105	India-Zambia

Rates of Income Tax for Individuals

The rates of income tax for individuals for the Assessment Year 2019-20 (ie, Financial Year 2018-19) are as follows:

I. Individual resident aged below 60 years (ie, born on or after April 01, 1956)

Income Slabs	Tax Rates	Education Cess	Secondary and Higher Education Cess
Where the taxable income does not exceed Rs. 2,50,000/-.	-Nil-	-Nil-	-Nil-
Where the taxable income exceeds Rs. 2,50,000/- but does not exceed Rs. 5,00,000/-.	5% of (total income minus Rs. 2,50,000) [*] Less (in case of Resident Individuals only): Tax credit under Section 87A – 10% of taxable income up to a maximum of Rs. 2000/-	2% of Income Tax	1% of Income Tax
Where the taxable income exceeds Rs. 5,00,000/- but does not exceed Rs. 10,00,000/-.	Rs. 12,500 + 20% of the amount by which the taxable income exceeds Rs. 5,00,000/-.	2% of Income Tax	1% of Income Tax

Income Slabs	Tax Rates	Education Cess	Secondary and Higher Education Cess
Where the taxable income exceeds Rs. 10,00,000/-.	Rs. 1,12,500 + 30% of the amount by which the taxable income exceeds Rs. 10,00,000/-.	2% of Income Tax	1% of Income Tax

Surcharge: 10% of the Income Tax, where taxable income is more than Rs. 50 lakh, but not exceeding Rs. 1 crore. 15% (fifteen percent) of the Income Tax, where taxable income is more than Rs. 1 crore (Marginal Relief in Surcharge, if applicable)

Health and Education Cess: 4% (four percent) of the total of Income Tax and Surcharge.

II. Individual resident who is of the age of 60 years or above at any time during the year but below the age of 80 years, ie, born during April 01, 1936 to March 31, 1956

Income Slabs	Tax Rates	Education Cess	Secondary and Higher education Cess
Where the taxable income does not exceed Rs. 3,00,000/-.	-Nil-	-Nil-	-Nil-
Where the taxable income exceeds Rs. 3,00,000/- but does not exceed Rs. 5,00,000/-	5% of the amount by which the taxable income exceeds Rs. 3,00,000/-. **Less :** Tax Credit under Section 87A - 10% of taxable income up to a maximum of Rs. 2000/-.	2% of Income Tax	1% of Income Tax
Where the taxable income exceeds Rs. 5,00,000/- but does	Rs. 10,000 + 20% of the amount by which the taxable	2% of Income Tax	1% of Income Tax

Income Slabs	Tax Rates	Education Cess	Secondary and Higher education Cess
not exceed Rs. 10,00,000/-	income exceeds Rs. 5,00,000/-.		
Where the taxable income exceeds Rs. 10,00,000/-	Rs. 1,10,000 + 30% of the amount by which the taxable income exceeds Rs. 10,00,000/-.	2% of Income Tax	1% of Income Tax

Surcharge: 10% of the Income Tax, where taxable income is more than Rs. 50 lakh, but not exceeding Rs. 1 crore. 15% (fifteen percent) of the Income Tax, where taxable income is more than Rs. 1 crore (Marginal Relief in Surcharge, if applicable)

Health and Education Cess: 4% (four percent) of the total of Income Tax and Surcharge.

III. Individual resident who is of the age of 80 years or above at any time during the year, ie, born before April 01, 1936)

Income Slabs	Tax Rates	Education Cess	Secondary and Higher education Cess
Where the taxable income does not exceed Rs. 5,00,000/-	-Nil-	-Nil-	-Nil-
Where the taxable income exceeds Rs. 5,00,000/- but does not exceed Rs. 10,00,000/-	20% of the amount by which the taxable income exceeds Rs. 5,00,000/-	2% of Income Tax	1% of Income Tax
Where the taxable income exceeds Rs.	Rs. 100,000/- + 30% of the amount by which the taxable income	2% of Income Tax	1% of Income Tax

Income Slabs	Tax Rates	Education Cess	Secondary and Higher education Cess
10,00,000/-	exceeds Rs. 10,00,000/-		

Surcharge: 10% (ten percent) of the Income Tax, where taxable income is more than Rs. 50 lakh, but not exceeding Rs. 1 crore. 15% (fifteen percent) of the Income Tax, where taxable income is more than Rs. 1 crore (Marginal Relief in Surcharge, if applicable)

Health and Education Cess: 4% (four percent) of the total of Income Tax and Surcharge

IV. Non-Resident Individual irrespective of age

Income Slabs	Tax Rates	Education Cess	Secondary and Higher education Cess
Where the taxable income does not exceed Rs. 2,50,000/-	-Nil-	-Nil-	-Nil-
Where the taxable income exceeds Rs. 2,50,000/- but does not exceed Rs. 5,00,000/-	5% of amount by which the taxable income exceeds Rs. 2,50,000/-	2% of Income Tax	1% of Income Tax
Where the taxable income exceeds Rs. 5,00,000/- but does not exceed Rs. 10,00,000/-	Rs. 12,500 + 20% of the amount by which the taxable income exceeds Rs. 5,00,000/-	2% of Income Tax	1% of Income Tax
Where the taxable income exceeds Rs. 10,00,000/-	Rs. 1,12,500 + 30% of the amount by which the taxable income exceeds Rs. 10,00,000/-	2% of Income Tax	1% of Income Tax

Surcharge: 10% (ten percent) of the Income Tax, where taxable income is more than Rs. 50 lakh, but not exceeding Rs. 1 crore. 15% (fifteen percent) of the Income Tax, where taxable income is more than Rs. 1 crore (Marginal Relief in Surcharge, if applicable).

Health and Education Cess: 4% (four percent) of the total of Income Tax and Surcharge.

Note: Please note that the tax rates for resident females are the same as mentioned above.

Exempted Categories

- Salary from the United Nations Organisation is not taxable.[1] Further, remuneration received by foreign nationals as diplomatic personnel, consular personnel, trade commissioners and staff of a foreign mission is exempt from income tax.[2]
- Remuneration for the services rendered by foreign nationals in India is not taxable if[3]:
  (1) the foreign enterprise is not engaged in any trade or business in India;
  (2) the period of stay of such an employee does not exceed ninety days; and
  (3) such remuneration is not deducted from the income of the employer chargeable to tax in India.

Applicability of Social Security Schemes[4] to Expatriates working in India

- Effective on October 01, 2008, the Government of India (Ministry of Labour and Employment) has extended the applicability of the Employees' Provident Fund Scheme (EPFS) and the Employees' Pension Scheme (EPS), notified under the *Employees Provident Fund and Miscellaneous Provisions Act, 1952* (EPF Act), to international workers through notifications.[5]

According to the said notifications "International Worker" means:

(a) an Indian employee having worked or going to work in a foreign country with which India has entered into a social security agreement and being eligible to

1 Section 2 of the *United Nations (Privileges and Immunities) Act, 1947* grants exemptions from income tax to salaries and emoluments paid by the United Nations to its officials. Besides, salary, any pension covered under the *United Nations (Privileges and Immunities) Act, 1947* and received from United Nations is also exempt from tax

2 Section 10(6)(ii) of the ITA

3 Section 10(6)(vi) of the ITA

4 Employees Provident Fund and Employees Pension Scheme

5 Notification Nos. G.S.R. 705(E) and 706(E), both dated October 01, 2008

avail the benefits under a social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement;

(b) an employee other than an Indian employee, holding other than an Indian passport, working for an establishment in India to which the Act applies.

- The notifications further define the term "excluded employee" with reference to an international worker as under:

"an international worker, who is contributing to a social security programme of his/her country of origin, either as a citizen or resident, with whom India has entered into a social security agreement on a reciprocity basis and enjoying the status of a detached worker for the period and terms, as specified in such an agreement."

- Pursuant to the above notifications, every international worker employed with an establishment in India to whom the EPF Act applies (the EPF Act applies to an establishment employing 20 or more employees) would be required to become a member of the Employees Provident Fund, unless he/she qualifies as an excluded employee.
- International workers working in India with an establishment to which the EPF Act applies are required to contribute 12% (twelve percent) of their salary (which includes basic pay, dearness allowance, retaining allowance and cash value of food concessions) under the EPF Act.
- However, in case the expatriates are from such countries with which India has entered into Social Security Agreements and are making contributions towards social security in their home countries, such expatriates would not be required to make contribution under the EPF Act.

An International Worker may withdraw the full amount of accumulations in the fund on retirement from services at any time after the attainment of 58 years or on retirement on account of permanent or total incapacity to work due to bodily or mental infirmity (substituted by *Ministry of Labour & Employment's Notification No. G.S.R 148, dated September 03, 2010*).

Compliance requirements

- Every employer in India, to whom the EPF Act applies, is required to file a consolidated return in a prescribed form within fifteen days of the commencement of the *above Schemes for International Workers* with the jurisdictional Provident Fund Commissioner indicating the nationality of each and every international worker. If there is no international worker employed in the establishment, the employer shall file a nil return.
- In addition, the employers are required to file monthly Provident Fund returns in the prescribed form within fifteen days of the close of the month, giving the required information in respect of the international workers.

Chapter 9 Competition Policy and Law

¶9-010 Competition Laws in India — An Overview

In the wake of economic liberalisation and widespread economic reforms introduced in 1991, and in its attempt to move from a "command and control" regime to a regime based on free market principles, India decided to replace its then existing competition law — the *Monopolies and Restrictive Trade Practices Act, 1969* (**MRTP Act**) which was primarily designed to restrict the growth of monopolies in the market — with a modern competition law in sync with globally established competition law principles. As the first step towards this transformation, the *Competition Act, 2002* (**Competition Act or the Act**) was enacted and received presidential assent on January 13, 2003. The Competition Act seeks to achieve the following objectives:

i. To prevent practices that have an adverse effect on competition;
ii. To promote and sustain competition in the markets;
iii. To protect the interests of consumers; and
iv. To ensure freedom of trade carried on by other participants in markets in India.

The Competition Commission of India (**CCI**), was accordingly established by the Central Government with effect from October 14, 2003. The CCI is mandated to prohibit anti-competitive agreements and abuse of dominant position by enterprises and to regulate combinations (ie, mergers, amalgamations, or acquisitions) through a process of inquiry and investigation. However, before the CCI could be fully constituted, a public interest litigation was filed in the Supreme Court challenging its constitutional validity.[1] This matter was finally disposed of by the court in January 2005 after the Government of India gave an assurance to amend the Competition Act and create a separate quasi-judicial appellate authority while leaving the expert regulatory space for the CCI.

1 *Brahm Dutt v Union of India,* AIR 2005 SC 730

Accordingly, the Competition Act was amended in September 2007 to provide for, among other things, the establishment of a Competition Appellate Tribunal (**COMPAT**) to be headed by a judicial member to adjudicate appeals against CCI orders and to determine compensation claims arising out of CCI's decisions. However, the COMPAT has ceased to exist with effect from May 26, 2017 on account of amendments to Section 410 of the *Companies Act, 2013* by Section 172 of the *Finance Act, 2017* and its powers are presently exercised by the National Company Law Appellate Tribunal (**NCLAT**).

Constitution of the CCI and the Appellate Tribunal

The CCI is constituted of a Chairman and not less than two members and not more than six other members to be appointed by the Central Government.

The NCLAT consists of a chairperson and such number of judicial and technical members, not exceeding eleven, as the Central Government may deem fit. As on May 29, 2020, the NCLAT consists of an acting chairperson from the judicial side and ten members, of whom 4 are judicial members and 6 are technical membrs .

¶9-020 Growth of Legislations Governing Competition in India

Regulating concentration of economic powers to the common detriment and controlling monopolistic, unfair and restrictive trade practices coupled with consumer welfare and enhancement of efficiency in the market, (which are also included in the Directive Principles of State Policy), form the bulwark of competition law in India. To attain these objectives, the Government has set up various committees. The Mahalanobis Committee Report on "Distribution and Levels of Income", 1964 stated that the top 10% (ten percent) of the population accounted for 40% (forty percent) of income and big business houses were emerging because of the planned economy model. The *Monopolies Inquiry Commission Report, 1965* stated that there was a concentration of economic power and a few industrial houses were controlling a large number of companies and there existed large-scale restrictive and monopolistic trade practices. The *Hazari Committee Report, 1966*, on industrial licensing procedure under the *Industries (Development and Regulation) Act, 1951*, *inter alia*, stated that the licensing system had resulted in the disproportionate growth of some big houses. Pursuant to the recommendations of these Reports, the Government enacted the *Monopolistic and Restrictive Trade Practices Act, 1969* (MRTP Act).

Monopolistic and Restrictive Trade Practices Act, 1969 ("MRTP Act")

The MRTP Act governed the activities/practices of all industrial undertakings engaged in production, storage, supply and distribution of articles/goods either directly or indirectly through any of its units or divisions. Till 1991, public sector undertakings were out of the purview of the MRTP Act.

The MRTP Act was designed to ensure that the operation of economic system does not result in the concentration of economic power to the common detriment and to prohibit such monopolistic and restrictive trade practices prejudicial to public interest. The MRTP Act prohibits the following types of trade practices:

1. Monopolistic Trade Practice: This refers to a trade practice that has the effect of maintaining the price of goods at unreasonable levels or that prevents or limits competition or that increases the prices of goods or services to an unreasonable extent.

2. Restrictive Trade Practice: This refers to a trade practice that has the effect of preventing or restricting competition in any manner and that tends to bring about manipulation of prices or that affects the flow of supplies of goods and services in the market so as to impose unjustified costs and restrictions on the consumers.

3. Unfair Trade Practice: This refers to a trade practice, where for the purpose of promoting the sale or use of any goods or services, any unfair means or deceptive practices including falsely representing the characteristics, performances, uses or benefits of a product are adopted in a manner that misleads the consumer/public.

However, with the passing of the *Competition (Amendment) Act, 2009*, which was passed by Parliament on December 16, 2009, and received the assent of the President of India on December 22, 2009, the MRTP Commission stands dissolved and the governing statute, the MRTP Act stands repealed with effect from October 14, 2009. The pending cases are being disposed by the COMPAT/NCLAT and pending investigations or proceedings relating to unfair trade practices referred to in Section 36A(1)(x) of the MRTP Act, relating to "giving false or misleading facts disparaging the goods, services or trade of another person", stand transferred to the CCI from the said date.

The Competition Act, 2002

With the liberalisation of economic policy and growth in the market, the Government of India decided to review the MRTP Act, which had lost its sheen and lacked teeth insofar as the recent international trade developments and their impact on Indian markets was concerned. As a result, the Government formulated a new Competition Policy. For this, the Government of India in October 1999, appointed a High-level Committee on the Competition Policy and Law (Raghavan Committee) to formulate a competition law in sync with international competition law regimes. Acting on the report of the Raghavan Committee, the Government enacted the Competition Act, which replaced the MRTP Act.

The objective of the Competition Act is to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade.

The Competition Act attempts to make a shift from curbing “monopolies” under the archaic MRTP Act to curb practices having “adverse effects on competition” and promote and sustain competition. A major feature of the Competition Act is that it does not prohibit monopolies or dominant position *per se*, it only forbids its abuse.

The Competition Act has been designed as a code to deal with matters relating to the existence and regulation of competition and monopolies. Thus, it aims at curbing anti-competitive activities which disturb the competitive equilibrium. The CCI sits and conducts its functions from New Delhi, India.

The Competition Act seeks to regulate the following important areas:

Anti-competitive agreements (Section 3)

An “agreement” under the Competition Act need not be in writing or even legally enforceable. It includes any arrangement, understanding or action in concert or an informal agreement. Such agreement in respect of the production, supply, distribution, storage, acquisition or control of goods or the provision of services, which causes or is likely to cause an "*appreciable adverse effect on competition*" within India, is defined as an “anti-competitive agreement”. The Competition Act prohibits anti-competitive agreements and declares that such agreements shall be void. However, the prohibition contained in Section 3 is not absolute and permits joint venture agreements when certain parameters are met. Further, exemptions are available to help exercise of reasonable restrictions on intellectual property rights by their holders. Anti-competitive agreements can be “horizontal” (agreement between direct competitors) or “vertical” (agreements between enterprises at different levels of the production chain in different markets, such as agreements between a manufacturer and a distributor or a distributor and a retailer) or both.

Horizontal agreements include:

i. Agreements to fix prices;
ii. Agreements to limit production, supply, markets, technical development, investments or provisions of services;
iii. Agreements to allocate markets or the source of production or provision of services through the allocation of, for example, geographical area, type of good or service or the number of customers; and
iv. Bid rigging or collusive bidding.

Horizontal agreements are presumed to have an appreciable adverse effect on competition, which is similar to the *per se* rule prevalent in the United States and the concept of “object infringement” prevalent in the European Union. Where such a rule applies, the burden of disproving appreciable adverse effect on competition is on the alleged infringers. “Cartel” is the most pernicious form of horizontal agreement and has been defined as an association of producers, sellers, distributors, traders or service providers which, by an agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of or trade in goods or the provision of services.

Vertical agreements include:

i. Tie-in arrangements;

ii. Exclusive supply agreements;

iii. Exclusive distribution agreements;

iv. Refusal to deal; and

v. Resale price maintenance.

However, such arrangements are common business practices and infringe the law only if they adversely affect competition. The five above-mentioned inclusive categories of vertical agreements have the potential for foreclosing competition by hindering the entry of new players into the market or driving out existing competitors from the market and hence may be considered anti-competitive. Horizontal agreements other than those mentioned above and vertical agreements including those mentioned above are dealt with on a case-by-case basis. Agreements that are entered into to protect the rights of holders of patents, copyrights and other IP rights under their respective statutes are not considered anti-competitive agreements, provided that they contain "reasonable conditions" to permit the exercise of such rights. Similarly, export agreements related exclusively to the production, supply, distribution or control of goods or the provision of services are also not considered anticompetitive as they do not have an effect on competition in India.

Implications of enforcement of Section 3

Any agreement which may cause an adverse effect on competition within India is null and void and hence legally unenforceable. Since such agreements are private agreements, they are unlikely to be known to the outside world, except either when any of the parties to the agreement choose to file a case or when a third party likely to be affected by such agreement (eg, customers or consumers) chooses to challenge the agreement before the CCI or when the CCI by its own motion takes cognisance of it. Further, cartel participants also have the option to approach the CCI themselves and avail a 100% (one hundred percent) reduction in any prospective penalty, subject to satisfaction of certain criteria, under the *Competition Commission of India (Lesser Penalty) Regulations, 2009* ("**Leniency Regulations"**).

Abuse of Dominant Position (Section 4)

The Competition Act defines a "dominant position" as a position of strength enjoyed by an enterprise, in the relevant market which enables it to operate independently of competitive constraints. However, the holding of a dominant position by an enterprise or a group in itself is not prohibited. The Competition Act prohibits abuse of such a dominant position by an enterprise or a group. The

CCI is empowered to inquire whether an enterprise or group has the dominant position and whether it has abused such dominant position on the basis of:

i. Its own motion;

ii. Information received from any person, consumer or association or any trade association; or

iii. On a reference received from the Central Government, State Government or a statutory authority

The Competition Act provides for the following business practices which, if found to be conducted by an enterprise or a group, will lead to the inference of abuse of a dominant position, provided that the enterprise or group is found to be dominant in the relevant market:

i. Imposition of an unfair or discriminatory condition on the purchase or sale of goods or services, or on price in the purchase or sale of goods or services, including predatory pricing;

ii. The limitation or restriction of the production of goods or the provision of services or the market thereof;

iii. The limitation or restriction of technical or scientific development relating to goods or services to the prejudice of consumers;

iv. Denial of market access in any manner;

v. Making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or commercial usage, have no connection with the subject of such contracts; or

vi. Use of its dominant position in one relevant market to enter into or protect another relevant market.

Implications of enforcement of Section 4

The enforcement of Section 4 brings within its ambit all enterprises that enjoy a dominant position in the relevant market, including public sector enterprises or government departments engaged in any trade or business activity that is not covered under the sovereign functions of the State. In an inquiry under Section 4, unlike that under Section 3, an appreciable adverse effect on competition in the relevant market need not be proved. However, any of the six prohibited business practices listed in Section 4 is sufficient to bring the dominant enterprise within the ambit of the CCI's scrutiny. The Competition Act mandates the CCI to follow "competitive neutrality" and the public sector no longer enjoys any special privileges or exemptions so far as violation of the Competition Act is concerned. For instance, if a public sector enterprise attempts to deny market access to a private enterprise that may be its competitor in any product market, a case of abuse of a dominant position may be brought against such public sector enterprise before the CCI. Even multinational corporations that operate in India and have large market shares in the relevant market are subject to the CCI's scrutiny if they are found to be indulging in any prohibited business practices. The consequences of inquiry by the CCI into any such allegation of abuse of dominance by a large enterprise are too serious to be ignored, as it can even order the division of such enterprise into smaller divisions, which may have serious consequences for the business and investors.

Regulation of combination (Section 6)

Under the Competition Act, "combinations" mean:

i. Acquisition of control, shares, voting rights or assets;

ii. Acquiring of control by a person over an enterprise where such person has control over another enterprise engaged in competing businesses; and

iii. Mergers and amalgamations between or among enterprises; when the combining parties exceed the thresholds, as set out in the Act.

The thresholds are clearly specified in terms of assets or turnover in India and abroad. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combinations would be void.

The threshold limits as prescribed by the Act are as under:

Thresholds

The threshold limits at the enterprise level are as follows:

i. Combined assets of the parties more than Rs. 20 billion in India;

ii. Combined domestic turnover of the parties more than Rs. 60 billion in India;

iii. Combined worldwide assets of the parties more than USD 1 billion (including at least Rs. 10 billion of assets in India); or

iv. Combined worldwide turnover of the parties more than USD 3 billion (including at least Rs. 30 billion turnover in India).

If the merged entity belongs to a group post-combination, the threshold limits are as follows:

i. Combined group assets in India of more than Rs. 80 billion;

ii. Combined group turnover in India of more than Rs. 240 billion;

iii. Combined worldwide assets of the group value of more than USD 4 billion (including at least Rs. 10 billion group assets in India); or

iv. Combined worldwide group turnover of more than USD 12 billion (including at least Rs.30 billion group turnover in India).

The thresholds refer to the preceding financial year and the following rules apply:

i. There are no sector-specific rules for calculating the turnover for determining the thresholds. "Turnover" includes value of sale of goods or services. It is the overall turnover which is taken into consideration and not turnover limited to the relevant product market.

ii. The official exchange rate of the Indian rupee with the US dollar and the euro is announced daily by the Reserve Bank of India (RBI) as the RBI Reference Rate on its website. It is advisable to follow the reference rate to determine thresholds.

iii. Market shares are not to be taken into account for the threshold test.

iv. The value of assets includes the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trademark, registered user, homonymous geographical indication, geographical indications, design or layout design or other similar commercial rights. Thus, intangible assets are also included.

Stages

Unlike most jurisdictions, there are no well-defined Phase I and Phase II inquiries in India. The relevant provisions of the Competition Act prescribe a maximum waiting period of 210 days for scrutiny of the proposed combination by the CCI, after which the combination is deemed to have been approved. It should be noted that the transaction cannot be consumed as long as either the CCI has not given its approval to the same or the statutory limit of 210 days has expired.

However, the following identifiable steps are prescribed under the Competition Act for merger control.

1. Filing of notice by parties

The notice, disclosing the details of the proposed combination (including acquisitions, acquisition of control, mergers and amalgamations) is compulsorily required to be given to the CCI before consummation of the transaction.[1] The notice is accompanied by a summary of the combination (within 1000 words) with the following information: (i) name of the parties; (ii) nature and purpose of the combination; (iii) product/services or business of the parties; and (iv) the markets in which they operate. The summary will also be published by the CCI on the website. From the date of the receipt of acknowledgement of the filing, there is a mandatory waiting period of a maximum of 210 days. On the expiry of the waiting period, the combination will be deemed to have been approved.

1 The time-limit of 30 days previously prescribed under the Competition Act has now been removed vide Ministry of Corporate Affairs notification dated June 29, 2017

2. Issue of show cause notice

On filing the notice, the CCI may either approve the combination or, if it is of the *prima facie* opinion that the combination may result in an appreciable adverse effect on competition within the relevant market in India, issue a show cause notice within 30 days of filing of such notice as to why investigation in respect of such combination should not be conducted. After issue of the show cause notice, the CCI may also require a report from the Director General of the CCI.

3. Publication of details of combination

On receipt of the parties' response to the show cause notice and the director general's report, if the CCI is still of the *prima facie* opinion that the combination may result in an appreciable adverse effect on competition within the relevant market in India, it may, within 7 working days of receipt, direct the publication of details of the combination within 10 working days, in a manner specified by the CCI, to bring the combination into public knowledge.

4. Invitation of comments and objections from the public

Within 15 working days of publication of the details, the CCI may invite objections and comments from members of the public or call for such information from the parties as it deems fit.

5. Passing of order

On receipt of all information, the CCI may approve the combination unconditionally or with conditions and modifications, or it may disapprove the combination. The "modifications" correspond to "remedies" in other jurisdictions. The parties who accept the modifications proposed by the CCI shall implement the same within the time period specified by the CCI.

Penalties under the Competition Act

Unlike the erstwhile MRTP Act, the CCI has vast powers in relation to anti-competitive agreements and abuse of dominant positions. If the CCI concludes that there is an anti-competitive agreement which has caused or is likely to cause an appreciable adverse effect on competition within India, or that any enterprise has abused its dominant position in the market, it may pass all or any of the following orders:

A. A cease and desist order, which directs the parties involved in such agreement or abuse of a dominant position to discontinue acting upon such agreement and not to re-enter such agreement, or to discontinue such abuse of a dominant position, as the case may be;

B. An order which imposes a monetary penalty, as deemed fit but that does not exceed 10% (ten percent) of the average turnover for the last 3 preceding financial years, on each party to the agreement or abuse.

Provided that in case any agreement referred to in Section 3 has been entered into by a cartel, the CCI may impose on each producer, seller, distributor, trader or service provider included in that cartel a penalty of up to three times its profit for each year of the continuance of such agreement or 10% (ten percent) of its turnover for each year that it continues such agreement, whichever is higher;

C. An order that directs that the agreement must stand modified to the extent and in the manner that may be specified in the order;

D. An order that directs compliance with its orders and directions, including payment of costs;

E. An order that directs the division of an enterprise that is abusing its dominant position to ensure that it can no longer abuse its dominance; and

F. Any other order or direction as the CCI deems fit.

An important development in the jurisprudence, which has somewhat circumscribed the quantum of penalty that can be imposed by the CCI, is the development of the concept of "relevant turnover" by the Supreme Court.[1]

In addition, any person may apply to the NCLAT for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered by such person as a result of any conduct of the enterprise which has been found to be a violation of the Act either by the CCI or the NCLAT, or for losses arising to the said person out of contravention of the orders of the CCI or the NCLAT by the said enterprise:

Execution of CCI orders imposing monetary penalty

The CCI has framed exhaustive regulations for recovery of monetary penalty imposed under the Act. Such procedure may also include a reference to the Income Tax Authority for recovery of the penalty as tax due under the Income Tax law(s).

Consequences of contravention of CCI orders

The CCI has vast powers to ensure compliance with its orders and directions, including those relating to "modifications" for combinations. The first non-compliance instance entails punishment with a fine of up to Rs. 100,000 for each day that such noncompliance occurs, subject to a maximum of Rs. 100 million. Failure to pay the penalty for non-compliance is to be tried before the Delhi chief metropolitan magistrate on a complaint filed only by the CCI and may entail imprisonment for up to 3 years or a fine of up to Rs. 250 million, or both.

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1 The Hon'ble Supreme Court in *Excel Crop Care v Competition Commission of India and Ors.*, AIR 2017 SC 2734 has held that the in case of multi-product companies, CCI can impose penalty only on the relevant turnover, ie, *turnover of the infringing product and not the total turnover*

Penalty for failure to comply with CCI directions

If a person fails to comply, without reasonable cause, with a CCI direction given under Section 36(2) or (4) or a Director General direction given under Section 41(2), such person will be punishable with a fine of up to Rs. 1,00,000 for each day during which such failure continues, subject to a maximum of Rs. 10 million. Power to impose penalty for non-furnishing of information on combinations if any person or enterprise fails to give notice to the CCI under Section 6(2), the CCI will impose a penalty which may extend to 1% (one percent) of the combination's total turnover or assets, whichever is higher.

Penalty for making false statement or omission to furnish material information

If any party to a combination makes a statement which is false or is known to be false in any particular material, or omits to state any material that is known to be material, such party will be liable to a penalty of no less than Rs. 5 million, which may extend to Rs. 100 million, as may be determined by the CCI.

Penalty for offences in relation to furnishing of information

Without prejudice to Section 44, if a person knowingly furnishes false information or suppresses any material fact or willfully alters or destroys any document that is required to be furnished with the information, such person will be punishable with a fine of up to Rs. 10 million, as may be determined by the CCI.

Power to impose lesser penalty: Leniency scheme for cartel members

If the CCI is satisfied that any producer, seller, distributor, trader, service provider or an individual who is involved in a cartel which is alleged to have violated Section 3 has made a full and true disclosure in respect of the alleged violations and that such disclosure is vital, it may impose on such producer, seller, distributor, trader or service provider a lesser penalty than is leviable under Section 27 of the Competition Act. Such a lesser penalty, which is also available to the leniency applicant's officials/officers is not available in cases where the investigation report has already been received from the Director General and where the member of the cartel refuses to cooperate with the CCI until completion of the proceedings before it.

Further, the CCI has made regulations to facilitate such disclosure by members of cartels wherein up to a 100% (one hundred percent) waiver of the penalty is permissible to such members on a first come, first served basis.

¶9-030 Recent Developments in Competition Law in India

The CCI has proved itself to be an effective regulator for preserving competition in markets in India. As on March 31, 2019, the CCI has reviewed 1008 antitrust cases, 642 merger filings and has conducted around 500 advocacy events throughout India The CCI has also imposed penalties amounting to Rs. 138.81 billion till March 31, 2019, in around 177 cases[1] of violations of the Competition Act. The leniency scheme has also started yielding results and CCI has so far decided three cases under the leniency regulations.

Salient Features of the Merger Control Regime in India

Some of the key features of the combination regime in India are listed below:

- **Target Exemption - Under the Competition Act -** The Central Government has granted an exemption from the provisions of Section 5 of the Competition Act where the value of assets being acquired, taken control of, merged or amalgamated in India is not more than Rs. 3.5 billion or turnover is not more than Rs. 10 billion in India. The said exemption expires on March 27, 2022.
- **Pre-merger Consultation** - The CCI has provided for voluntary pre-merger consultation on a specific request made by the parties. However, the opinion rendered by CCI at such consultation is verbal and non-binding on CCI.
- **Shorter Review Period** – CCI is mandated to form its *prima facie* opinion whether to investigate the proposed combination within 30 days of the filing of the notice under the Competition Act. Further, the maximum time prescribed for scrutiny of any proposed combination by the CCI is 210 days from the date of filing of the notice after which the merger is deemed to be approved unless rejected earlier.

  However, under the Combination Regulations, CCI endeavors to pass its order within an even shorter time period of 180 days, as opposed to the 210 days' maximum time period as required under the Competition Act.
- **Green Channel Approval-** By way of an amendment to the Combination Regulations in August 2019, a green channel mechanism has been introduced which provides for deemed approval of a combination for certain types of transactions. The green channel approval route is available to transactions where the parties do not have any horizontal, vertical, or complementary overlaps.

1 Ch. D Para (a) of the CCI Annual Report 2016-17

- **Exclusions - Under the Combination Regulations**

  Certain categories of combinations are ordinarily not likely to cause an appreciable adverse effect on competition within India and are normally excluded from notification to the CCI under Regulation 4 read with Schedule-I of the Combination Regulations. Such categories of transactions are as under.

  - **Acquisitions of less than 25% (twenty-five percent) of the shares or voting rights** in the ordinary course of business, provided no other controlling rights are acquired; [Category 1]
  - **Acquisition of additional shares or voting rights** by the acquirer where the acquirer**,** already holds 25% (twenty-five percent) or more but less than 50% (fifty percent) or more, either prior or after the acquisition, except when such acquisition results in **joint or sole control**; [Category 1A]
  - Acquisition of shares or voting rights, where the acquirer **prior to acquisition has 50% (fifty percent) or more shares and voting rights** except when it results in transfer from **joint to sole control**; [Category 2]
  - Acquisitions of assets "not directly related to the business activity and not leading to control" except where the assets acquired are substantial for a particular location or for a particular product or service of the enterprise being acquired; [Category 3]
  - Any amended or renewed offer made by the acquirer after filing the notice to CCI, prior to such amendment or renewal, provided that the CCI was kept duly informed of any such change; [Category 4]
  - An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and similar current assets the ordinary course of business; [Category 5]
  - Acquisitions of shares or voting rights by a securities underwriter or pursuant to a bonus issue, stock split/consolidation, or rights issue, to the extent of the entitled proportion, provided no control is acquired; [Categories 6 and 7]
  - **Intra-Group acquisition, merger or amalgamation** provided the combination doesn't result in change from joint to sole control; **[**Categories 8 and 9**]**
  - Acquisition of shares, control, voting rights or assets by a **purchaser approved by the Commission** in accordance with its order under Section 31 of the Competition Act; [Category 10]

- **Exemptions - Under the Combination Regulations**

  In addition to the exclusions provided under the statutue, the Central Government, in exercise of its statutory powers under Section 54 of the Competition Act, has also exempted certain categories of combinations in certain sectors, from the merger control provisions of the Competition Actas under:

- Regional Rural Banks which has been notified under Section 23A of the *Regional Rural Banks Act, 1976* (21 of 1976), for the period of 5 years with effect from August 10, 2017 to August 09, 2022. All cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalised banks, under the *Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970* (5 of 1970) and the *Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980* (40 of 1980), for a period of 10 years with effect from August 30, 2017 to August 29, 2027. Central Public-Sector Enterprises (CPSEs) operating under the *Oil and Gas Sectors under Petroleum Act, 1934*, along with their wholly or partly owned subsidiaries for the period of 5 years with effect from November 22, 2017 to November 21, 2022.

- **Three types of Notice Formats** - The Combination Regulations provide for three forms of notices to be filed for obtaining approval wherever required.
  - **Form-I** (annexed to the Combination Regulations and published on the CCI's website) - Ordinarily filed for all combinations including green channel notifications.
  - **Form II-** Preferred in instances where:
    - For a horizontal combination, if the combined market share of the combining parties is 15% (fifteen percent) or more in the relevant market;
    - For a vertical combination, if the combined market share of the combining parties is 25% (twenty-five percent) or more in the relevant market;
  - **Form III** – This Notice Form is to be used by public financial institutions, foreign institutional investors, bank or venture capital fund, in respect of share subscription or financial facility or any acquisition made by them pursuant to any covenant of a loan agreement or investment agreement, in pursuant to sub-section (5) of Section 6 of the Competition Act.
- **Filing Fee** – The amount of fee payable along with the notice in Form I or Form II, as may be applicable, shall be as under:
  - Form-I – Rs. 2 million
  - Form-II – Rs. 6.5 million
- **Request for Confidentiality** – Any request for confidentiality of the documents submitted during the investigation shall be duly considered

having due regard to the procedure laid down in the General Regulations.

- **Appointment of independent agencies to oversee modification** - The Combination Regulations provide for the appointment of independent agencies to oversee the carrying of modifications suggested by the CCI in cases where the parties have accepted such modifications and their implementation by the parties, in the opinion of CCI, needs supervision. The agencies to be appointed shall have no conflicts of interest. Such agencies may include an accounting firm, management consultancy, law firm or any other professional organisation, or part thereof, or independent practitioners of repute.

Observations

The provisions of the Competition Act relating to anti-competitive agreements and abuse of dominant position have been in force for 11 years now; while the provision relating to Combinations have been in force for more than 9 years. In the intervening years, the CCI has decided around 1000 cases relating to anti-competitive agreements and abuse of dominance. Similarly, the CCI has given orders in notices filed in around 650 combinations till date. As on May 19, 2020, no combination has been disapproved by the CCI. Since 2011, modifications in the form of structural and behavioral commitments have been offered in 15 cases. The evolving body of jurisprudence provides a greater outlook on various aspects related to the modern competition law in India. For example, the jurisprudence relating to the concepts of “agreement/cartels”, “dominant position”, combination review, “enterprise” and “group”, “composite transactions”, etc, are evolving and expanding by the day.

Important Website

Competition Commission of India : www.cci.gov.in

Chapter 10 Intellectual Property Laws

¶10-010 Introduction

With the rapid globalisation and opening up of the Indian economy, "Intellectual Capital" has become one of the key wealth drivers in the present international trade. Intellectual property rights have become significantly conspicuous on the legal horizon of India both in terms of new statutes and judicial pronouncements. India ratified the agreement for establishing the World Trade Organisation (the "WTO"), which contains the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Indian Statutes, enforcement provisions and methods of dispute resolution with respect to intellectual property (IP) protection are now fully TRIPS-compliant.

India has laws covering various areas of intellectual property as enumerated herein below:

- Trade Marks
- Patents
- Copyrights and Related Rights
- Industrial Designs
- Geographical Indications
- Layout Designs of Integrated Circuits
- Plant Varieties
- Information Technology and Cyber crimes
- Data Protection

Broadly, the following acts deal with the protection of intellectual property:

1. *Trade Marks Act, 1999*
2. The *Patents Act, 1970* (as amended in 2005)
3. The *Copyright Act, 1957*
4. The *Designs Act, 2000*
5. The *Geographical Indications of Goods (Registration and Protection) Act, 1999*
6. The *Semiconductor Integrated Circuits Layout Design Act, 2000*
7. The *Protection of Plant Varieties and Farmers' Right Act, 2001*
8. The *Information Technology Act, 2000*

Trademarks

¶10-020 Introduction

India's obligations under the TRIPS Agreement for protection of trademarks, inter alia, include protection to distinguishing marks, recognition of service marks, indefinite periodical renewal of registration, abolition of compulsory licensing of trademarks, etc.

With the globalisation of trade, brand names, trade names, marks, etc, have attained an immense value that require uniform minimum standards of protection and efficient procedures for enforcement as were recognised under the TRIPS. In view of the same, extensive review and consequential repeal of the old *Indian Trade and Merchandise Marks Act, 1958* was carried out and the new

Trade Marks Act, 1999 was enacted. The said Act of 1999, with subsequent amendments, conforms to the TRIPS and is in accordance with the international systems and practices.

The Trade Marks Act provides, inter alia, for registration of service marks, filing of multiclass applications, increasing the term of registration of a trademark to 10 years as well as recognition of the concept of well-known marks, etc. The Indian judiciary has been proactive in the protection of trademarks, and it has extended the protection under the trademarks law to Domain Names as demonstrated in landmark cases of *Tata Sons Ltd. v Manu Kosuri & Ors* [90 (2001) DLT 659] and *Yahoo Inc. v Akash Arora* [1999 PTC 201].

India, being a common law country, follows not only the codified law, but also common law principles, and as such provides for infringement as well as passing off actions against violation of trademarks. Section 135 of the Trade Marks Act recognises both infringement as well as passing off actions.

Well-known Trademark and Trans-border Reputation

India recognises the concept of the "Well-known Trademark" and the "Principle of Trans-border Reputation". A well-known Trademark in relation to any goods or services means a mark that has become so to the substantial segment of the public, which uses such goods or receives such services such that the use of such a mark in relation to other goods and services is likely to be taken as indicating a connection between the two marks.

Trans-border Reputation concept was recognised and discussed by the Apex Indian Court in the landmark case of *N. R. Dongre v Whirlpool (1996) 5SCC 714*. The Trademark "WHIRLPOOL" was held to have acquired reputation and goodwill in India. The mark "WHIRLPOOL" was also held to have become associated in the minds of the public with Whirlpool Corporation on account of circulation of the advertisements in the magazines despite no evidence of actual sale. Hence, the trademark WHIRLPOOL was held to have acquired trans-border reputation which enjoys protection in India, irrespective of its actual user or registration in India.

Legal Remedies against Infringement and/or Passing off

Under the Trade Marks Act, both civil and criminal remedies are simultaneously available against infringement and passing off.

Infringement of trademark is violation of the exclusive rights granted to the registered proprietor of the trademark to use the same. A trademark is said to be infringed by a person, who, not being a permitted user, uses an identical/similar/deceptively similar mark to the registered trademark without the authorisation of the registered proprietor of the trademark. However, it is pertinent to note that the Indian trademark law protects the vested rights of a prior user against a registered proprietor which is based on common law principles.

Passing off is a common law tort used to enforce unregistered trademark rights. Passing off essentially occurs where the reputation in the trademark of party A is misappropriated by party B, such that party B misrepresents as being the owner of the trademark or having some affiliation/nexus with party A, thereby damaging the goodwill of party A. For an action of passing off, registration of a trademark is irrelevant.

Registration of a trademark is not a pre-requisite in order to sustain a civil or criminal action against violation of trademarks in India. In India, a combined civil action for infringement of trademark and passing off can be initiated.

Significantly, infringement of a trademark is a cognisable offence and criminal proceedings can be initiated against the infringers. Such enforcement mechanisms are expected to boost the protection of marks in India and reduce infringement and contravention of trademarks.

Relief granted by Courts in Suits for Infringement and Passing off

The relief which a court may usually grant in a suit for infringement or passing off includes permanent and interim injunction, damages or account of profits, delivery of the infringing goods for destruction and cost of the legal proceedings.

The order of interim injunction may be passed ex parte or after notice. The Interim reliefs in the suit may also include order for:

(a) Appointment of a local commissioner, which is akin to an "Anton Pillar Order", for search, seizure and preservation of infringing goods, account books and preparation of inventory, etc.

(b) Restraining the infringer from disposing of or dealing with the assets in a manner which may adversely affect plaintiff's ability to recover damages, costs or other pecuniary remedies which may be finally awarded to the plaintiff.

(c) The "John Doe" order, known as "Ashok Kumar Orders" are injunction orders passed by a court of law against entities, whose identity is not known at the time of the issuance of the order. These orders are an exception to the general rule which requires the defendant to be identified prior to the filing of a law-suit. The John Doe order is important in cases of fly-by-night operators who do not operate from a fixed location. It allows the plaintiff to search the premises and deliver up evidence of infringement of the rights of the plaintiff against the unknown infringers.

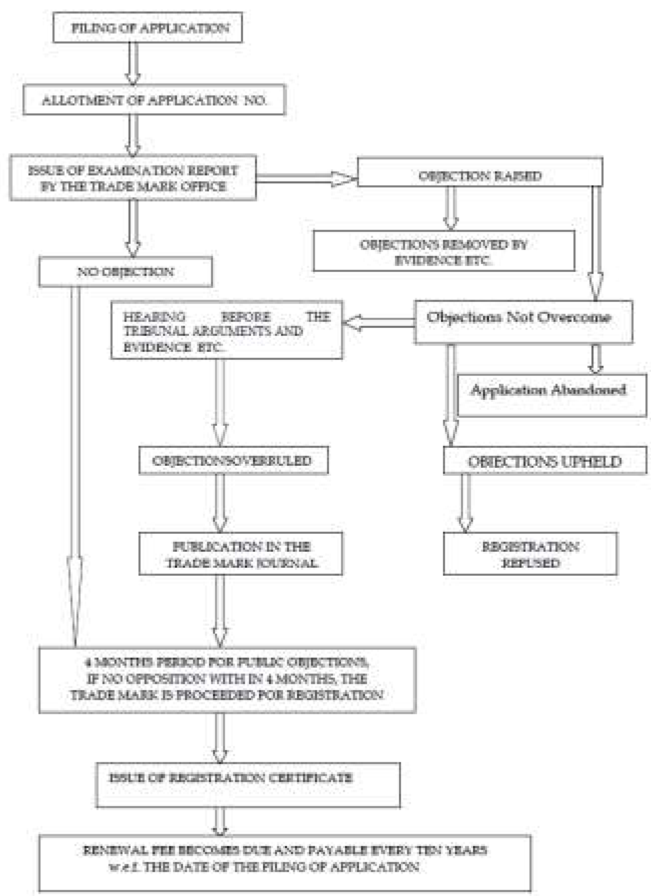
(d) A "Norwich Pharmacal" order is a court order for the disclosure of information or documents against a third party. It is usually granted against a third party which has been innocently mixed up in wrongdoing, forcing the disclosure of documents or information. In the case of *Souza Cruz v N K Jain* (1995) PTR 97, the Court directed excise and customs commissioners to disclose the complete export records of infringing cigarettes to Ukraine by the Defendant.

Offences and penalties

In case of a criminal action for infringement or passing off, the offence is punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 3 years and fine which shall not be less than Rs. 50,000 (approx. US$ 800) but may extend to Rs. 2,00,000 (approx. US$ 3,000).

¶10-030 Procedure of Registration of Trademark in India

The procedure for registration of a trademark in India is given below:



Convention applications

In order to fulfill the obligations of any treaty, convention or arrangement with a country or countries that are members of inter-governmental organisations, which accord to Indian citizens similar privileges as granted to their own citizens, the Central Government notifies such countries to be Convention Countries. In case of an application for registration of a trademark made in any of the Convention countries, a priority date can be claimed with regard to the application in India, provided that the application is made within 6 months of the application having been filed in the Convention country. The Government has notified and extended this privilege of priority to the members who have ratified the Paris Convention on Protection of Industrial Property.

Madrid Protocol

After the amendment in the Trade Marks Act in 2010, Chapter IVA was inserted, which contains the special provisions relating to protection of trademarks through international registration under the Madrid Protocol. This amendment allows Indian entities to register their trademarks in 97 countries by filing a single application and in the same way also allows the foreign entities of the member countries of the Madrid Protocol to register their mark in India. India has joined the Madrid Protocol with effect from July 08, 2013. As per the Amendment Act, from the date of the international registration of a trademark where India has been designated or the date of the recording in the register of the International Bureau about the extension of the protection resulting from an international registration of a trademark to India, the protection of the trademark in India shall be the same as if the trademark had been registered in India.

One of the major changes brought about by the 2010 amendment is inclusion of the words **"within eighteen months of the filing of the application" in** Section 23 of the Trade Marks Act. The said inclusion puts an obligation on the Registrar to complete the registration process for a mark in a time bound manner. This change will challenge every aspect of the registration process within trademark office in India, forcing deadlines at every stage of the registration procedure laid out under the Trade Marks Act and supplemented by the Trade Mark Rules in India.

Classification of goods and services

For the purpose of classification of goods and services for registration of trademarks, India follows the International Classification of Goods and Services (Nice Classification) published by World Intellectual Property Organisation (WIPO). For the purpose of classification of the figurative elements of marks, India follows the Vienna Agreement.

Opposition proceedings

After advertisement of a trademark in the Trade Marks Journal, (which is available online at the website of Office of Registrar of Trademarks) an opposition challenging the application for registration can be filed by any person within a period of **4 months.**

¶10-040 Renewal of Registration

The trademark is initially registered for a period of 10 years, which is calculated from the date of filing of the application and in case of convention application, from the date of priority. The registration is required to be renewed within 12 months before the date of expiry of the registration, ie, 10 years from the date of the application or subsequent renewals.

The failure in renewing the trademark within the stipulated period of time and a grace period of maximum 1 year granted for restoration of the trademark, automatically leads to removal of the trademark from the Register of Trademarks.

¶10-050 Rectification of Trademark

An aggrieved person may file an application before the Registrar of Trademarks or to the Intellectual Property Appellate Board (IPAB) for cancellation or varying the registration of the trademark on the ground of any contravention or failure to observe a condition entered on the Register in relation thereto.

The application for rectification can also be filed for removal of an entry made in Register, without sufficient cause or wrongly remaining on the Register and for correction of any error or defect in any entry in the Register.

¶10-060 Assignment, Transmission and Licensing of Trademarks in India

"Assignment" means an assignment in writing by an act of the parties concerned. While in case of licensing, the right in the trademark continues to vest with the proprietor, the assignment of the trademark leads to a change in the ownership of the mark. A registered trademark is assignable with or without the goodwill in respect of all or only some of the goods/services for which the mark is registered. India is a member to TRIPS and Article 21 of the TRIPS dealing with Licensing and Assignment mandates that "… the owner of a registered trademark shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs." Section 39 of the *(Indian) Trade Marks Act, 1999* allows for the assignment of an unregistered trademark with or without the goodwill of the business concerned.

Indian law contains restriction on the assignments of trademark, whether registered or unregistered, whereby multiple exclusive rights would be created in more than one person which would result in confusion. However, the assignment with limitations imposed, such as goods to be sold in different markets, ie, within India or for exports are valid. The Registrar is authorised to issue a certificate of validity of the proposed assignment on a statement of case by the proprietor of a registered trademark who proposes to assign the mark.

The said certificate as to validity is conclusive unless vitiated by fraud. The assignments, wherein exclusive rights are created with respect to different markets within India are also valid.

A trademark is a property which can be transferred by a document for consideration, subject to certain provisions in the relevant Act. An assignment of trademark has to be in writing by acts of the parties concerned. When an assignment of a trademark is made, the assignee must apply to the Registrar of Trade Marks to register his or her title. Until such an application is filed by the Assignee, the assignment shall be ineffective against a person acquiring a conflicting interest in or under the registered trademark without the knowledge of the assignment. Where the validity of an assignment is in dispute, the Registrar of Trade Marks may refuse to register the assignment, unless adjudicated by a competent court.

Patents

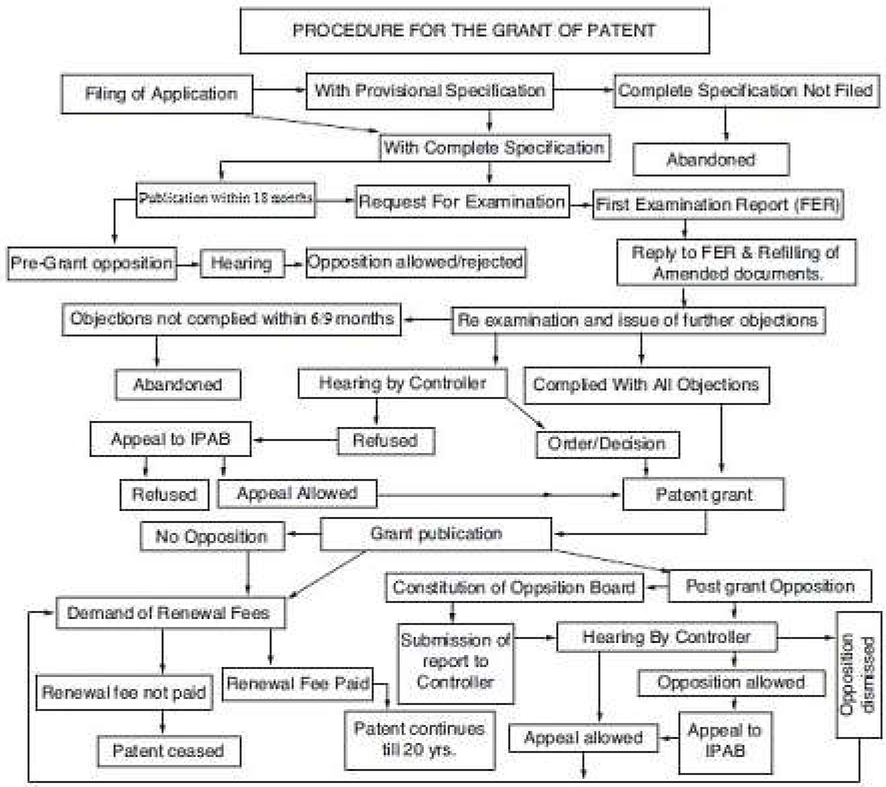
¶10-070 Background

The history of Patent law in India starts from 1911 when the *Indian Patents and Designs Act, 1911* was enacted. The present *Patents Act, 1970* came into force in the year 1972, amending and consolidating the existing law relating to Patents in India. The *Patents Act, 1970* was again amended by the *Patents (Amendment) Act, 2005*, wherein product patent was extended to all fields of technology including food, drugs, chemicals and micro-organisms. After the amendment, the provisions relating to Exclusive Marketing Rights (EMRs) have been repealed, and a provision for enabling grant of compulsory license has been introduced. The provisions relating to pre-grant and post-grant opposition have been also introduced.

An invention relating to a product or a process that is new, involving inventive step and capable of industrial application can be patented in India. However, it must not fall into the category of inventions that are non-patentable as provided under Sections 3 and 4 of the *(Indian) Patents Act, 1970*. In India, a patent application can be filed, either alone or jointly, by true and first inventor or his assignee.

¶10-080 Procedure for Grant of a Patent in India

After filing the application for the grant of patent, a request for examination is required to be made for examination of the application in the Indian Patent Office within 48 months from the date of priority of the application or from the date of filing of the application. After the first examination report is issued, the applicant is given an opportunity to meet the objections raised in the report. The applicant has to comply with the requirements within 6 months from the issuance of the first examination report which may be extended for further 3 months on the request of the applicant. If the requirements of the first examination report are not complied with within the prescribed period of 9 months, then the application is treated to have been abandoned by the applicant. After the removal of objections and compliance of requirements, the patent is granted and notified in the Patent Office Journal. The process of the grant of patent in India can also be understood from the following flow chart:



¶10-090 Filing of Application for Grant of Patent in India by Foreigners

India being a signatory to the Paris Convention for the *Protection of Industrial Property, 1883* and the *Patent Cooperation Treaty (PCT), 1970*, a foreign entity can adopt any of the aforesaid treaties for filing of application for grant of patent in India.

Where an application for grant of patent in respect of an invention in a Convention Country has been filed, then similar application can also be filed in India for grant of patent by such applicant or the legal representative or assignee of such person within 12 months from the date on which the basic application was made in the Convention Country, ie, the home country. The priority date in such a case is considered as the date of making of the basic application.

¶10-100 Pre-grant Opposition

A representation for pre-grant opposition can be filed by *any person* under Section 11A of the *Patents Act, 1970* within 6 months from the date of publication of the application, as amended (the "Patents Act") or before the grant of patent. The grounds on which the representation can be filed are provided under Section 25(1) of the Patents Act. There is no fee for filing representation for pre-grant opposition. Representation for pre-grant opposition can be filed even though no request for examination has been filed. However, the representation will be considered only when a request for examination is received within the prescribed period.

¶10-110 Post-grant Opposition

Any *interested person* can file post-grant opposition within 12 months from the date of publication of the grant of patent in the official journal of the patent office.

¶10-120 Grounds for Opposition

Some of the grounds for filing pre-and post-grant opposition are as under:

(a) Patent wrongfully obtained;

(b) Prior publication;

(c) The invention was publicly known or publicly used in India before the priority date of that claim;

(d) The invention is obvious and does not involve any inventive step;

(e) That the subject of any claim is not an invention within the meaning of this Act, or is not patentable under this Act;

(f) Insufficient disclosure of the invention or the method by which it is to be performed;

(g) That in the case of a patent granted on convention application, the application for patent was not made within 12 months from the date of the first application for protection for the invention made in a convention country or in India;

(h) That the complete specification does not disclose or wrongly mentions the source and geographical origin of biological material used for the invention; and

(i) That the invention was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

¶10-130 Term of Patent

The term of every patent in India is 20 years from the date of filing the patent application, irrespective of whether it is filed with provisional or complete specification. However, in case of applications filed under the Patent Cooperative Treaty (PCT), the term of 20 years begins from the international filing date.

¶10-140 Payment of Renewal Fee

It is important to note that a patentee has to renew the patent every year by paying the renewal fee, which can be paid every year or in lump sum.

¶10-150 Restoration of Patent

A request for restoration of patent can be filed within 18 months from the date of cessation of patent along with the prescribed fee. After the receipt of the request, the matter is notified in the official journal for further processing of the request.

¶10-160 Patent of Biological Material

If the invention uses a biological material which is new, it is essential to deposit the same in the International Depository Authority (IDA) prior to the filing of the application in India in order to supplement the description. If such biological materials are already known, in such a case it is not essential to deposit the same. The IDA in India located at Chandigarh is known as Institute of Microbial Technology (IMTECH).

¶10-170 Rights Granted by a Patent

If the grant of the patent is for a product, then the patentee has a right to prevent others from making, using, offering for sale, selling or importing the patented product in India. If the patent is for a process, then the patentee has the right to prevent others from using the process, using the product directly obtained by the process, offering for sale, selling or importing the product in India directly obtained by the process.

Before filing an application for grant of patent in India, it is important to note *"What is not Patentable in India?"* Any invention which is (a) frivolous; (b) obvious; (c) contrary to well established natural laws; (d) contrary to law; (e) morality; (f) injurious to public health; (g) a mere discovery of a scientific principle; (h) the formulation of an abstract theory; (i) a mere discovery of any new property or new use for a known substance or process, machine or apparatus; (j) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance; (k) a mere arrangement or rearrangement or duplication of known devices; (l) a method of agriculture or horticulture; and (m) inventions relating to atomic energy, are not patentable in India.

¶10-180 Maintainability of Secrecy by the Indian Patent Office (IPO)

All patent applications are kept secret up to 18 months from the date of filing or priority date, whichever is earlier, and thereafter they are published in the Official Journal of the Patent Office published every week. After such publication of the patent application, public can inspect the documents and may take the photocopy thereof on the payment of the prescribed fee.

¶10-190 Compulsory Licensing

One of the most important aspects of *Indian Patents Act, 1970* is compulsory licensing of the patent subject to the fulfillment of certain conditions. At any time after the expiration of 3 years from the date of the sealing of a patent, any person interested may make an application to the Controller of Patents for grant of compulsory license of the patent, subject to the fulfillment of following conditions, ie,

- The reasonable requirements of the public with respect to the patented invention have not been satisfied;
- That the patented invention is not available to the public at a reasonable price; or
- That the patented invention is not worked in the territory of India.

It is further important to note that an application for compulsory licensing may be made by any person notwithstanding that he is already the holder of a licence under the patent.

For the purpose of compulsory licensing, no person can be stopped from alleging that the reasonable requirements of the public with respect to the patented invention are not satisfied or that the patented invention is not available to the public at a reasonable price by reason of any admission made by him, whether in such a licence or by reason of his having accepted such a licence.

The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price, may order the patentee to grant a licence upon such terms as he may deem fit. However, before the grant of a compulsory license, the Controller of Patents shall take into account following factors:

- The nature of invention;
- The time elapsed, since the sealing of the patent;
- The measures already taken by the patentee or the licensee to make full use of the invention;

- The ability of the applicant to work the invention to the public advantage;
- The capacity of the applicant to undertake the risk in providing capital and working the invention, if the application for compulsory license is granted;
- As to the fact whether the applicant has made efforts to obtain a license from the patentee on reasonable terms and conditions;
- National emergency or other circumstances of extreme urgency;
- Public non-commercial use; and
- Establishment of a ground of anti-competitive practices adopted by the patentee.

The grant of compulsory license cannot be claimed as a matter of right, as the same is subject to the fulfilment of above conditions and discretion of the Controller of Patents. Further judicial recourse is available against any arbitrary or illegal order of the Controller of Patents for grant of compulsory license. In 2012, the Controller of Patents has granted the first compulsory license to Natco Pharma to sell a generic version of the patented cancer drug "Nexavar" in India. However, the subsequent applications, by BDR Pharmaceuticals for Bristol-Myers Squibb's Dasatinib and Lee Pharma for AstraZeneca's Saxagliptin, to sell generic version of these patented drugs were rejected.

The Government of India has while exercising its power under Section 66 of the *Patents Act, 1970* in the Public Interest, revoked Patent No. 252093, entitled "a synergistic, ayurvedic functional food bioactive composition (Cinata) and a process of preparation thereof" granted to M/s Avesthagen Ltd., on the ground that the aforesaid patent is prejudicial to public.

¶10-200 Infringement of Patent

Patent infringement proceedings can only be initiated after grant of patent in India but may include a claim retrospectively from the date of publication of the application for grant of the patent. Infringement of a patent consists of the unauthorised making, importing, using, offering for sale or selling any patented invention within the India. Under the *(Indian) Patents Act, 1970*, only a civil action can be initiated in a Court of Law. Further, a suit for infringement can be defended on various grounds including the grounds on which a patent cannot be granted in India and based on such defence, revocation of Patent can also be claimed.

¶10-210 Licensing and Assignment of Patent

An assignment in a patent or a share in a patent or a mortgage, license or the creation of any other interest in a patent is permissible. In the case of patents, assignment is valid only when it is in writing and the agreement is reduced to the form of a document embodying all the terms and conditions governing the rights and obligations of the parties to the agreement. The application for registration is required to be made by the transferee in the prescribed form.

Copyright

Indian copyright law is at parity with the international standards as contained in TRIPS. The *(Indian) Copyright Act, 1957*, pursuant to the amendments in 1999, 2002 and 2012, fully reflects the *Berne Convention for Protection of Literary and Artistic Works, 1886* and the Universal Copyrights Convention, to which India is a party. India is also a party to the Geneva Convention for the Protection of Rights of Producers of Phonograms and is an active member of the World Intellectual Property Organisation (WIPO) and United Nations Educational, Scientific and Cultural Organisation (UNESCO).

¶10-220 "Work" Protected in India

Under the *Copyright Act, 1957*, the term "work" includes an artistic work comprising of a painting, a sculpture, a drawing (including a diagram, a map, a chart or plan), an engraving, a photograph, a work of architecture or artistic craftsmanship, dramatic work, literary work (including computer programmes, tables, compilations and computer databases), musical work (including music as well as graphical notations), sound recording and cinematographic film.

In order to keep pace with the global requirement of harmonisation, the *Copyright Act, 1957* has brought the copyright law in India in line with the developments in the information technology industry, whether it is in the field of satellite broadcasting or computer software or digital technology. The amended law has also made provisions to protect performer's rights as envisaged in the Rome Convention.

¶10-230 Registration of Copyright

In India, the registration of copyright is not mandatory as the registration is treated as mere recordal of a fact. The registration does not create or confer any new right and is not a prerequisite for initiating action against infringement. The view has been upheld by the Indian courts in a catena of judgments.

¶10-240 Need for Registration of Copyright

The awareness of Intellectual Property (IP) Laws is considerably low among the enforcement authorities in India, and most of the IP litigation is confined to metropolitan cities. Despite the fact that the registration of copyright is not mandatory in India and is protectable through the *International Copyright Order, 1999*, it is advisable to register the copyright as the copyright registration certificate is accepted as a "proof of ownership" in courts and by police authorities, and acted upon smoothly by them.

¶10-250 Enforcement of Copyright in India

The law of copyright in India not only provides for civil remedies in the form of permanent injunction, damages or accounts of profits, delivery of the infringing material for destruction and cost of the legal proceedings, etc, but also makes instances of infringement of copyright, a cognisable offence punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 3 years with a fine which shall not be less than Rs. 50,000 (approx. US$ 800) but may extend to Rs. 2,00,000 (approx. US$ 3,000). For the second and subsequent offences, there are provisions for enhanced fine and punishment under the Copyright Act. The *(Indian) Copyright Act, 1957* gives power to the police authorities to register the Complaint (First Information Report, ie, FIR) and act on its own to arrest the accused, search the premises of the accused and seize the infringing material without any intervention of the court.

¶10-260 Protection to Foreign Works in India

Copyright of "works" of foreign nationals, whose countries are member of Convention Countries to which India is a signatory, are protected against any infringement of their "works" in India through the *International Copyright Order, 1999*. The Indian courts have also been pro-active for the protection of copyright of foreign authors/owners, which includes software, motion pictures including screen play of motion pictures and database.

The Government of India is also taking initiative to combat piracy in the software industry, motion pictures and the music industry along with players in the industry through their associations and organisations like NASSCOM (National Association of Software and Service Companies), NIAPC (National Initiative Against Piracy and Counterfeiting), etc.

¶10-270 Licensing and Assignment of Copyright

Copyright in any work, present or future, can only be assigned or licensed in writing by the copyright owner or his duly authorised agent.

¶10-280 Duration/Term of Copyright

In the case of original literary, dramatic, musical and artistic works, the duration of copyright is the lifetime of the author or artist, and 60 years counted from the year following the death of the author.

In the case of cinematograph films, sound recordings, posthumous publications, anonymous and pseudonymous publications, works of government and works of international organisations are protected for a period of 60 years which is counted from the year following the date of publication.

Industrial Designs

The TRIPS provides minimum standards of protection of industrial designs. The *Designs Act, 2000* duly adheres to the said minimum standards by providing protection to original and aesthetically appealing designs capable of being applied commercially and is in consonance with the changes in technology and economic advances.

¶10-290 Registrability of Designs

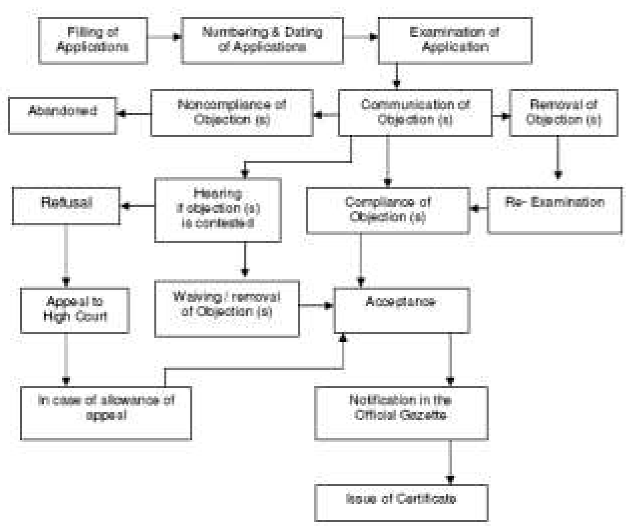
Features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article, whether in two dimensional or three dimensional or in both forms, can be registered under the *(Indian) Designs Act, 2000*. However, functionality aspects of a design are not protected under the *(Indian) Designs Act, 2000*, as the same are subject matter of patents.

¶10-300 Term of Design

The total period of validity of registration of an Industrial Design under the *(Indian) Designs Act, 2000* is 15 years. Initially, a design is registered for a period of 10 years, giving the owner of registered design exclusive rights to sell, make or import the articles and initiate a legal action against infringement. This initial period of 10 years can be further extended by a period of 5 years on the payment of renewal fees.

¶10-310 Process of Registration of Design

The process of registration of an industrial design in India can be understood with the help of following flowchart:



¶10-320 Cancellation, Protection and Enforcement of Designs

Design of an article is not registrable in India, if it:

- is not new or original;
- has been disclosed to the public anywhere in *India or in any other country* by publication in tangible form or by use in any other way prior to the filing date or priority date of the application;
- is not significantly distinguishable from known designs or combination of known designs; or
- comprises or contains scandalous or obscene matter.

The above grounds may also be used for revocation or cancellation of the registration of any design, as well as a defense in an infringement proceeding.

The *(Indian) Designs Act, 2000* only provides for civil remedies. Besides injunction, monetary compensation is recoverable by the proprietor of the design either as contract debt or damages. An action for infringement of design can only be initiated after the registration of the design.

Any foreign entity, interested in protecting any of its Industrial Design in India, must register its industrial design by filing an appropriate application within 6 months from the date of the corresponding convention application, ie, the first application filed in the home country.

Geographical Indications

A geographical indication (GI) is an indication, whether in the form of a name or sign, used on goods that have a specific geographical origin and possesses qualities or a reputation that are due to the place of origin. Geographical indications are valuable rights, which if not adequately protected, can be misused by dishonest commercial operators to the detriment of both the consumers and the legitimate users.

The TRIPS prescribes minimum standards of protection of GIs and additional protection for wines and spirits. Articles 22 to 24 of Part II Section III of the TRIPS prescribe minimum standards of protection to the geographical indications that WTO members must provide. India, in compliance with its obligation under TRIPS, has taken legislative measures by enacting the *Geographical Indications of Goods (Registration and Protection) Act, 1999*, which came into effect on September 15, 2003 and the *Geographical Indications of Goods (Registration and Protection) Rules, 2002*.

As per the *(Indian) Geographical Indications of Goods (Registration and Protection) Act, 1999* “Geographical Indication”, in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.

GIs have been used in India for a wide variety of products, such as Basmati Rice, Darjeeling Tea, Kangra Tea, Feni, Alphonso Mango, Alleppey Green Cardamom, Coorg Cardamom, Kanchipuram Silk Saree, Kohlapuri Chappal, Rasgulla, etc.

By registering a geographical indication in India, the rights holder can prevent unauthorised use of the registered geographical indication by others by initiating infringement action by way of a civil suit or criminal complaint. Registration of the GIs in India is not mandatory as an unregistered GI can also be enforced by initiating an action of passing off against the infringer. It is, however, advisable to register the GI as the certificate of registration is prima facie evidence of its validity and no further proof of the same is required.

¶10-330 Registration of Geographical Indications

An application for the registration of a GI is to be made to the Registrar of Geographical Indications in the form prescribed under *the Geographical Indications of Goods (Registration and Protection) Act, 1999* (the GI Act) read with the *Geographical Indications (Registration and Protection) Rules, 2002* (the GI Rules).

¶10-340 Duration of Protection

A Geographical Indication is registered for a period of 10 years and the registration may be renewed from time to time for a period of 10 years at a time.

¶10-350 Infringement of Geographical Indications

The remedies relating to the infringement of Geographical Indications are similar to the remedies relating to the infringement of Trademark. Similarly, under the *(Indian) Geographical Indications of Goods (Registration and Protection) Act, 1999*, falsification of a Geographical Indication will carry a penalty with imprisonment for a term which may not be less than 6 months but may extend to 3 years and with a fine which may not be less than Rs. 50,000 (approx. US$ 800) but may extend to Rs. 2,00,000 (approx. US$ 3,000).

Plant Varieties

India, having ratified the TRIPS and in order to give effect to it, have enacted the *Protection of Plant Varieties and Farmer's Rights Act, 2001* (the "Plant Act") (based on the recommendations of the International Union for Protection of New Varieties of Plants, Geneva). The Plant Act provides for setting up of a Protection of Plant Varieties and Farmers' Rights Authority (the "Authority") that shall be responsible for promoting the development of new varieties of plants and protecting the plant varieties and rights of the farmers and breeders. The

Protection of Plant Varieties and Farmers' Rights Authority has been established and is located at NASC Complex, DPS Marg, Opp. Todapur, New Delhi - 110012, India.

The Plant Act contains elaborate provisions to safeguard the rights of Indian farmers in addition to plant breeder's rights and researcher's rights. Till now, the Government of India has notified 114 crops with their genera eligible for registration of varieties.

¶10-360 Procedure for Registration

A new variety shall be registered if it conforms to the criteria of novelty, distinctiveness, uniformity and stability. After an application is made for the registration of the Plant Variety, the Registrar examines the application to see if it fulfills the criteria for registration of a Plant Variety. On being satisfied, the Registrar accepts the application, resulting in publication in the Journal for public objections, if any. The Registrar registers the application if the application remains unopposed or the opposition is decided in favour of the Applicant.

¶10-370 Duration of Protection

The duration of protection of registered varieties is different for different crops, as given below:

- For trees and vines - 18 years;
- For other crops - 15 years;
- For extant varieties - 15 years from the date of notification of that variety.

¶10-380 Rights under the Plant Act

Under the Plant Act, the researcher has the liberty to conduct experiment with a registered variety, and the farmer has been given the exclusive right to save, use, sow, re-sow, exchange, share or sell his farm produce including seed or a variety protected under the Plant Act. However, the farmer is not allowed to sell the branded seed of a protected variety. Further, a certificate of registration for a variety issued under the Act shall confer an exclusive right on the breeder or his successor, agent or licensee to produce, sell, market, distribute, import or export the variety.

¶10-390 Infringement of Plant Varieties and Farmers' Rights

Any person, who produces, sells imports or exports any variety without the permission of the owner, infringes the rights of owner. Use of a denomination which is similar to a registered denomination and likely to confuse the general public also amounts to infringement. Infringement of any right under the Plant Varieties and Farmers' Rights attracts both civil and criminal action. A criminal action under the Act entails punishment up to 2 years or a fine up to Rs. 5,00,000 (approx. US$ 8000), or with both.

Layout Designs of Integrated Circuits

In compliance with the TRIPS Agreement, India has enacted the *Semiconductor Integrated Circuits Layout-Designs Act, 2000* in order to provide protection to layout designs of integrated circuits. The Act defines "Layout Design" to mean a layout of transistors and other circuitry elements and includes lead wires connecting such elements and expressed in any manner in a semiconductor integrated circuit. Under the *(Indian) Semiconductor for Integrated Circuits Layout-Designs Act, 2000*, a Semiconductor Integrated Circuit has been defined as a product having transistors and other circuitry elements which are inseparably formed on a semiconductor material or an insulating material or inside the semiconductor material and designed to perform an electronic circuitry function.

¶10-400 Registrability of Layout-Design

A Layout Design which is (a) not original (b) has been commercially exploited in India or in a convention country or (c) not inherently distinctive or distinguishable from any other registered Layout-Design cannot be registered as a Layout Design. In order to claim protection for Layout Design, it is mandatory that it should be registered.

¶10-410 Duration of Protection

Registration of a Layout-Design is valid only for a period of 10 years from the date of filing an application for registration or commercial exploitation in any country, whichever is earlier.

¶10-420 Infringement of Layout-Design

In addition to the civil remedies available, an infringement of a Layout-Design is considered to be a criminal offence in India. Infringement of a registered layout design has been made punishable under the *(Indian) Semiconductor for Integrated Circuits Layout-Designs Act, 2000* with imprisonment of up to 3 years or fine of Rs. 50,000 (approx. US$ 800) up to maximum of Rs. 10,00,000 (approx. US$ 16,000), or with both.

¶10-430 Trade Secrets

At present, there is no particular legislation to protect undisclosed information/trade secret outside the normal recourse to breach of contract. Under the Indian contract law, restrictive agreements pertaining to confidentiality and trade secrets would usually fall under the ambit of agreements in restraint of profession and trade. The validity of these agreements is tested on the reasonableness of the restrictions imposed. This protection is limited in relation to the protection sought as per Article 39 of the TRIPS. There is also no provision at the moment in India at the national level for data protection with respect to confidential and valuable information submitted to the Government or regulatory agencies. International pressure on the Indian Government is rising on the data protection issue and the Government is likely to take concrete steps towards the same soon.

Enforcement of Intellectual Property Laws in India

India has a well-established statutory, administrative and judicial framework to safeguard Intellectual Property Rights (IPRs); however, it is still facing problems with the enforcement of IPR. It has always been a concern about slow judicial system involving lengthy and time-consuming procedure of trial in India, however, in recent years, Indian courts have shown dynamism and zeal for effective protection of Intellectual Property Rights. It has been observed that by adopting right policies and strategies, IPR can be effectively protected with the help of law enforcement authorities.

For any IPR-related litigation, it is necessary to understand the Indian Judicial system and its psychology. It has been observed that the Indian Courts are very active in granting equitable reliefs like injunctions, etc, but are still reluctant in awarding punitive pecuniary damages.

¶10-440 Authorities Involved in the Execution of Orders of Courts

The Government Authorities including police are bound to execute and enforce the orders of court, and as such the courts are empowered to direct any government authority to do or not to do or prevent/compel any person to comply with the orders of the court. There are effective methods for the enforcement of the orders of the court, including Contempt of Court proceedings, which provides for a fine as well as imprisonment, in case of non-compliance of the order of the court. Execution/compliance of the orders of the court are also done by way of appointment of the Local Commissioner/Receivers by the court. In India, certain State Governments have formed special Intellectual Property Cells, which deal with offences relating to infringement of IPR.

In any civil action for enforcement of Intellectual Property Rights, the following reliefs may be claimed in such suit:

- Permanent Injunction;
- Interim Injunction;
- Damages;
- Accounts and handing over of profits;

- Anton Pillar Order (Appointment of Local Commissioner by the Court for custody/sealing of infringing material/accounts);
- Delivery up of goods/packing material/dies/plates for destruction.

Additionally, in case of infringement of Trademark, infringement of Copyright, Geographical Indication, Plant Variety and Semiconductor Integrated Circuits Layout Design following **Criminal** action can also be initiated:

- Registration of First Information Report (FIR); or
- Filing of a Criminal Complaint before a Competent Magisterial Court with application for issue of search and seizure warrants directing the police to raid of the premises of the accused for seizure of the infringing material and arrest of the infringers.

It is interesting to note that in India, wherever provisions have been made for criminal prosecution for violation of any Intellectual Property Rights, a criminal case can be filed against known as well as unknown persons. It is also important to note that both civil and criminal remedies, wherever applicable, can be availed simultaneously and both the remedies are coexistent.

¶10-450 Competent Court

In India, a suit may be instituted in any court of original jurisdiction, subject to their pecuniary and territorial jurisdiction. In relation to IPR litigation, the designation of the lowest court is "District and Sessions Judge". These cases can also be filed in the High Court, directly, if such High Court is having original jurisdiction. The jurisdiction of the High Court can be invoked, subject to the payment of court fees. The structure of court fees payable varies from state to state.

¶10-460 Border Control Measures for Enforcement of IPR

The Government of India under Section 11 of the *(Indian) Customs Act, 1962* is empowered to prohibit importation and exportation of goods of specified description, if it deems necessary to do so. The provision, *inter alia*, empowers the government to prohibit the import or export of goods for "the protection of patents, trademarks and copyrights". The goods imported in contravention of the provisions of the Customs Act or any other laws for the time being in force are liable to be confiscated. In this regard, a customs officer is empowered to inspect any premises, conveyance, x-ray any person and effect search and seize in case where they have reasons to believe that the goods are of contraband nature. They can also investigate or interrogate any person and arrest him.

Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007

India has notified the *Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007*. The rules comply with border measures as required by the TRIPS

Agreement empowering the Customs Officers to enforce IPR over the imported products. Actions under Customs Act are independent to the remedies provided under various statues on Intellectual Property. As per Rule 2(b) of the *Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007*, Intellectual Property includes patents, designs, and geographical indications together with trademarks and copyrights.

Upon receipt of the Application, in the prescribed format, the Custom Authorities may register the Complaint and enforce Border Control measure for the protection of the Intellectual Property Rights. It is important to note that this right is not unfettered. Certain provisions have been also made and an elaborate procedure has been laid down for the release of the seized goods upon an application of the importer of the goods.

Data Protection Laws in India

Data Protection refers to the set of privacy laws, policies and procedures that aim to minimise intrusion into one's privacy caused by the collection, storage and dissemination of personal data. Personal data generally refers to the information or data which relate to a person who can be identified from that information or data whether collected by any Government or any private organisation or an agency.

The Constitution of India does not patently grant the fundamental right to privacy. However, the courts have read the right to privacy into the other existing fundamental rights, ie, freedom of speech and expression under Article 19(1)(a) and right to life and personal liberty under Article 21 of the Constitution of India. However, these Fundamental Rights under the Constitution of India are subject to reasonable restrictions given under Article 19(2) of the Constitution that may be imposed by the State. Recently, in the landmark case of *Justice K S Puttaswamy (Retd.) & Anr. v Union of India and Ors*., the constitution bench of the Hon'ble Supreme Court has held Right to Privacy as a fundamental right, subject to certain reasonable restrictions.

India presently does not have any express legislation governing data protection or privacy. However, the relevant laws in India dealing with data protection are the *Information Technology Act, 2000* and the *(Indian) Contract Act, 1872*. A codified law on the subject of data protection is likely to be introduced in India in the near future.

The *(Indian) Information Technology Act, 2000* deals with the issues relating to payment of compensation (Civil) and punishment (Criminal) in case of wrongful disclosure and misuse of personal data and violation of contractual terms in respect of personal data.

Under Section 43A of the *(Indian) Information Technology Act, 2000*, a body corporate who is possessing, dealing or handling any sensitive personal data or information, and is negligent in implementing and maintaining reasonable security practices resulting in wrongful loss or wrongful gain to any person, then such body corporate may be held liable to pay damages to the person so affected. It is important to note that there is no upper limit specified for the compensation that can be claimed by the affected party in such circumstances.

The Government has notified the *Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011*. The Rules only deals with protection of "Sensitive personal data or information of a person", which includes such personal information which consists of information relating to:

- Passwords;
- Financial information such as bank account or credit card or debit card or other payment instrument details;
- Physical, physiological and mental health condition;
- Sexual orientation;
- Medical records and history;
- Biometric information.

The rules provide the reasonable security practices and procedures, which the body corporate or any person who on behalf of body corporate collects, receives, possess, store, deals or handle information is required to follow while dealing with "Personal sensitive data or information". In case of any breach, the body corporate or any other person acting on behalf of body corporate, the body corporate may be held liable to pay damages to the person so affected.

Under Section 72A of the *(Indian) Information Technology Act, 2000*, disclosure of information, knowingly and intentionally, without the consent of the person concerned and in breach of the lawful contract has been also made punishable with imprisonment for a term extending to 3 years and fine extending to Rs. 5,00,000 (approx. US$ 8,000).

It is to be noted that Section 69 of the Act, which is an exception to the general rule of maintenance of privacy and secrecy of the information, provides that where the Government is satisfied that it is necessary in the interest of:

- the sovereignty or integrity of India,
- defence of India,
- security of the State,
- friendly relations with foreign States,
- public order,
- for preventing incitement to the commission of any cognisable offence relating to above, or
- for investigation of any offence.

It may by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource. This section empowers the Government to intercept, monitor or decrypt any information including *information of personal nature* in any computer resource.

Where the information is such that it ought to be divulged in public interest, the Government may require disclosure of such information. Information relating to anti-national activities which are against national security, breaches of the law or statutory duty or fraud may come under this category.

¶10-470 Information Technology Act, 2000

The *Information Technology Act, 2000* (hereinafter referred to as the "IT Act") is an act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternative to paper-based methods of communication and storage of information to facilitate electronic filing of documents with the Government agencies.

Grounds on which Government can interfere with Data

Under Section 69 of the IT Act, any person, authorised by the Government or any of its officer specially authorised by the Government, if satisfied that it is necessary or expedient so to do in the interest of sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognisable offence relating to above or for investigation of any offence, for reasons to be recorded in writing, by order, can direct any agency of the Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource. The scope of Section 69 of the IT Act includes both interception and monitoring along with decryption for the purpose of investigation of cyber-crimes. The Government has also notified the *Information Technology (Procedures and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009*, under the above section.

The Government has also notified the *Information Technology (Procedures and Safeguards for Blocking for Access of Information) Rules, 2009*, under Section 69A of the IT Act, which deals with the blocking of websites. The Government has blocked the access of various websites.

Penalty for Damage to Computer, Computer Systems, etc, under the IT Act

Section 43 of the IT Act, imposes a penalty without prescribing any upper limit, doing any of the following acts:

1. Accesses or secures access to such computer, computer system or computer network;
2. Downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;
3. Introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
4. Damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
5. Disrupts or causes disruption of any computer, computer system or computer network;
6. Denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;
7. Provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;
8. Charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network, he shall be liable to pay damages by way of compensation to the person so affected.
9. Destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;
10. Steals, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage.

Tampering with Computer Source Documents as provided for under the IT Act, 2000

Section 65 of the IT Act lays down that whoever knowingly or intentionally conceals, destroys, or alters any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to 3 years, or with fine which may extend up to Rs. 2,00,000 (approx. US$3,000), or with both.

Computer-related offences

Section 66 provides that if any person, dishonestly or fraudulently does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to 3 years or with fine which may extend to Rs. 5,00,000 (approx. US$ 8,000) or with both.

Penalty for Breach of Confidentiality and Privacy

Section 72 of the IT Act provides for penalty for breach of confidentiality and privacy. The Section provides that any person who, in pursuance of any of the powers conferred under the IT Act Rules or Regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned, discloses such material to any other person, shall be punishable with imprisonment for a term which may extend to 2 years, or with fine which may extend to Rs. 1,00,000, (approx. US$ 3,000) or with both.

Amendments as introduced by the IT Amendment Act, 2008

Section 10A was inserted in the IT Act which deals with the validity of contracts formed through electronic means which lays down that contracts formed through electronic means "shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose".

The following important sections have been substituted and inserted by the *IT Amendment Act, 2008*:

1. Section 43A – Compensation for failure to protect data
2. Section 66 – Computer-Related Offences
3. Section 66A – Punishment for sending offensive messages through communication service, etc. (This provision had been struck down by the Hon'ble Supreme Court as unconstitutional on March 24, 2015 in *Shreya Singhal v Union of India*)
4. Section 66B – Punishment for dishonestly receiving stolen computer resource or communication device
5. Section 66C – Punishment for identity theft
6. Section 66D – Punishment for cheating by personation by using computer resource
7. Section 66E – Punishment for violation for privacy
8. Section 66F – Punishment for cyber terrorism
9. Section 67 – Punishment for publishing or transmitting obscene material in electronic form
10. Section 67A – Punishment for publishing or transmitting of material containing sexually explicit act, etc, in electronic form
11. Section 67B – Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc, in electronic form
12. Section 67C – Preservation and Retention of information by intermediaries

13. Section 69 – Powers to issue directions for interception or monitoring or decryption of any information through any computer resource
14. Section 69A – Power to issue directions for blocking for public access of any information through any computer resource
15. Section 69B – Power to authorise to monitor and collect traffic data or information through any computer resource for cyber security.
16. Section 72A – Punishment for disclosure of information in breach of lawful contract
17. Section 79 – Exemption from liability of intermediary in certain cases
18. Section 84A – Modes or methods for encryption
19. Section 84B – Punishment for abetment of offences
20. Section 84C – Punishment for attempt to commit offences

Chapter 11 Insolvency and Bankruptcy Code

¶11-010 Background of Insolvency Laws in India

A plethora of laws covered the bankruptcy and insolvency landscape in India. The *Presidency Towns Insolvency Act, 1909* (for the erstwhile Presidency towns) and the *Provincial Insolvency Act, 1920* governed personal insolvency whereas corporate insolvency fell under the domain of the *Sick Industrial Companies (Special Provisions) Act, 1985*. Combined with these were supplementary laws such as the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002* (also known as the SARFAESI Act), the *Recovery of Debts Due to Banks and Financial Institutions Act, 1993* (*now renamed as the Recovery of Debts and Bankruptcy Act, 1993*) and the *Companies Act, 2013*. Non-statutory framework by the Reserve Bank of India in the form of guidelines for the Joint Lender Forum, the Corporate Debt Restructuring Scheme, Strategic Debt Restructuring Scheme and Scheme for Structuring of Stressed Assets (all of which are now replaced by the Prudential Framework for Resolution of Stressed Assets dated June 7, 2019) were also a feature of the insolvency resolution panorama. However, this fragmented framework made the insolvency and bankruptcy process in India complicated, confusing and rife with delays.

A new bankruptcy law was the need of the hour which was tended to by the establishment of the Bankruptcy Law Reform Committee in 2014. This committee proposed the Insolvency and Bankruptcy Code in 2015 which received the presidential assent on May 28, 2016 and christened as the *Insolvency and Bankruptcy Code, 2016* ("**Code**"). This Code aims to consolidate and amend the laws relating to (i) Corporate persons; (ii) Partnership firms; and (iii) Individuals.

It ensures that the insolvency and bankruptcy of the aforementioned entities is resolved in a time bound manner for maximisation of the value of their assets. It also intends to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. This Code alters the order of priority of payment of Government dues, establishes the Insolvency and Bankruptcy Board of India ("**Board**"), and deals with all matters connected or incidental thereto. This Code has simplified and expedited the insolvency resolution process in India by amalgamating different laws under one umbrella and providing strict timelines for their enforcement.

¶11-020 Institutional Framework in the Code

If this Code were to be seen as a vehicle driving towards successful resolution of insolvencies and bankruptcies in India, the following entities are its four wheels that make the journey possible.

Insolvency and Bankruptcy Board of India

At the helm of operations relating to insolvency and bankruptcies in India lies the Board. It serves as a regulator overseeing the insolvency and bankruptcy proceedings in India, regulating other entities such as Insolvency Professionals, Insolvency Professional Agencies and Information Utilities. It is a key pillar of the ecosystem responsible for implementation of the Code and is instrumental in drafting as well as enforcing a multitude of regulations to that end. The Board has wide and far reaching powers some of which include registering and administering insolvency professional agencies, insolvency professionals and information utilities; collecting and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases; constituting advisory and executive committees; entering into memorandum of understanding with any other statutory authorities; making regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under the Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor. The Board also makes model bye-laws to be adopted by insolvency professional agencies and has all the powers of civil court while trying a suit.

Insolvency Professional Agencies

Insolvency Professional Agency as provided in the Code and its regulations is a non-profit organisation registered with the Board for the purpose of enrolling insolvency professionals as its members subsequent to which these professionals can undertake insolvency resolution activities as per the Code. In order to obtain the certificate of registration, these agencies must formulate bye-laws modelled after the *Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016*. An Insolvency Professional Agency not only accepts insolvency professionals as their members; it also lays down standards of professional conduct for its members, monitors their performance, safeguards their rights, privileges, and interests, redresses the grievances of consumers against their members, publishes information about its functions, list of its members, the performance of its members and such other information as are specified by regulations.

Insolvency Resolution Professionals

Insolvency Resolution Professionals are persons enrolled with insolvency professional agencies as its members and registered with the Board. They are appointed to conduct the insolvency resolution process and liquidation/ bankruptcy process of different entities (as the case may be) as have been envisaged under the Code. Insolvency Resolution Professionals are regulated by the bye-laws of the insolvency professional agencies of which they are members as well as the regulation framed by the Board for their overall governance. There are examinations conducted to enable a person to qualify as an Insolvency Resolution Professional. Insolvency Professionals have an array of duties and powers under the Code and its regulations. Their importance cannot be overstated once the resolution process begins as the management of the corporate debtor vests in the Insolvency Professional during the insolvency process. The Insolvency Professional has very wide powers conferred for managing the corporate debtor as a going concern including dealing with the legal issues, entering into contracts on behalf of corporate debtor, raising interim finance, assisting creditors for collection of relevant information, providing them with periodic reports, instructing personnel of corporate debtor, placing before the creditors the resolution plans submitted by suitable applicants and endeavouring to get the resolution plan prepared and approved within the given time frame.

Information Utilities

Information utilities are information repositories that store the financial data of companies such as their borrowings, security interest, defaults, etc., among other things. These information utilities are required to create and store financial information in a universally accessible format. They accept electronic submissions of financial information from persons who are under obligations to submit it. They are expected to meet minimum service quality standards as specified by the regulations framed. In order to ensure that the information they receive is credible, they are required to get such information authenticated by all concerned parties before storing such information. They are required to provide access to the financial information stored by them to any person who intends to access such information as provided under law. These information utilities are expected to have inter-operability with each other so that the quality and the standard of information available improves and is uniform. Banks and other financial institutions are required to actively contribute to the databases of these information utilities. The records maintained by information utilities can immeasurably help lenders in taking informed decisions about credit transactions. It would also make debtors circumspect in their dealings as their credit information would be available with the utilities. Further, information available with the utilities can be used as evidence in insolvency and bankruptcy disputes before the relevant adjudicatory authorities as well. National E-Governance Services Limited or NeSL has been set up as India's first Information Utility. On May 12, 2020, the National Company Law Tribunal has directed that in respect of all new petitions filed under Section 7 of the Code, default records will have to be filed alongwith the petitions. Further, default records are also required to be filed in respect of all cases pending for admission under Section 7 of the Code before the next date of hearing.

¶11-030 Adjudicating Authority under the Code

Corporate persons

The adjudicating authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof is the National Company Law Tribunal ("**NCLT**") having territorial jurisdiction over the place where the registered office of the corporate person is located. Where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before an NCLT, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of such corporate debtor has to be filed before the same NCLT. The NCLT has the jurisdiction to entertain the following matters:

1. Any application or proceeding by or against the corporate debtor or corporate person.
2. Any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India.
3. Any question of priorities or any question of law or facts, in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person.

Any person aggrieved by the order of the NCLT can prefer an appeal to the National Company Law Appellate Tribunal ("**NCLAT**") which has to be filed within 30 (thirty) days however on proving sufficient cause for delay an extension of 15 (fifteen) days may be permitted. Any person aggrieved by an order of the NCLAT has to file an appeal to the Supreme Court on a question of law arising out of such order under this Code within 45 (forty-five) days from the date of receipt of such order. An extension of 15 (fifteen) days is provided here as well on proving sufficient cause for delay.

No civil court or authority has jurisdiction to entertain any suit or proceedings in respect of any matter on which the NCLT or the NCLAT has jurisdiction under this Code.

Individuals and Partnership Firms

Part III of the Code covers insolvency resolution and bankruptcy for individuals and partnership firms and has been partly notified with effect from December 1, 2019 vide a notification dated November 15, 2019. It is pertinent to note that Part III of the Code applies to matters relating to fresh start, insolvency and bankruptcy of individuals and partnership firms. By way of the said notification, the part relating to fresh start has not been notified and the only part that has been notified pertains to the insolvency and bankruptcy of personal guarantors to the corporate debtors and the part relating to insolvency and bankruptcy of other individuals and partnership firms has not been brought into effect vide the said notification.

The adjudicating authority, in relation to insolvency matters of individuals and of partnership firms (other than personal guarantors of corporate debtors whose proceedings are pending before the NCLT) is the Debt Recovery Tribunal having territorial jurisdiction over the place where the said individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under this Code regarding such person. The adjudicating authority, in relation to insolvency and bankruptcy for personal guarantors to the corporate debtor would remain the NCLT in cases where a corporate insolvency process has been initiated or is pending against the corporate debtor of the personal guarantor. In cases where the corporate insolvency resolution process is not pending against the corporate debtor, the jurisdiction in respect of the personal guarantor would be the Debt Recovery Tribunal where the personal guarantor actually and voluntarily resides or carries on business or personally works for gain.

The NCLT, thus while dealing with the cases pertaining to insolvency and bankruptcy for personal guarantors to the corporate debtor would have the same jurisdiction and powers as it has for corporate persons.

The Debt Recovery Tribunal has the jurisdiction to entertain the following matters:

1. Any suit or proceeding by or against the individual debtor.
2. Any claim made by or against the individual debtor.
3. Any question of priorities or any other question whether of law or facts, in relation to insolvency and bankruptcy of the individual debtor or firm.

An appeal from an order of the Debt Recovery Tribunal has to be filed within 30 (thirty) days before the Debt Recovery Appellate Tribunal. The time period for filing the appeal may be extended by 15 (fifteen) days on proving sufficient cause for delay.

An appeal from an order of the Debt Recovery Appellate Tribunal on a question of law under the Code has to be filed before the Supreme Court within 45 (forty-five) days from the receipt of the order which is also subject to extension for a further period not exceeding 15 (fifteen) days on proving sufficient cause for delay.

¶11-040 Corporate Insolvency Resolution Process

As mentioned above, the Code deals with the insolvency resolution process of corporate persons, partnership firms and individuals. This section deals with insolvency resolution process of a corporate debtor and is known as Corporate Insolvency Resolution Process ("**CIRP**"). A default of a minimum amount of Rs.100,000 (Indian Rupees One Hundred Thousand) is required to initiate a CIRP. This minimum default value can be increased by the Central Government - however it cannot be more than Rs.10,000,000 (Indian Rupees Ten Million). The Central Government has since then by a notification dated March 24, 2020 increased the minimum default value to Rs.10,000,000 (Indian Rupees Ten Million) in the wake of the recent outbreak of the COVID–19.

Since the enforcement of the Code, the adjudicating authority has been dealing with countless applications to initiate CIRP. Hereunder, we explain this process as provided in the Code and its regulations.

Who may initiate Corporate Insolvency Resolution Process (CIRP)?

A financial creditor (by itself or jointly with other financial creditors or any other person on behalf of the financial creditor, as may be notified by the Central Government), an operational creditor or the corporate debtor itself can initiate a CIRP in the event of a default. A financial creditor refers to any person to whom a financial debt is owed or a person to whom such a debt has been legally assigned. All lenders who have extended any kind of loan facility, guarantees or financial credit are covered within its ambit. Banks and other financial institutions are a primary example of financial creditors. An amendment to the Code in 2018 has included amounts raised from allottees of a real estate project in the definition of financial debt. Accordingly even homebuyers and other allottees of real estate projects are deemed to be financial creditors and can initiate CIRP. By a subsequent amendment in 2020, it is now provided that in cases where there is a class of financial creditors, an application for initiation of CIRP against the corporate debtor shall be filed jointly by not less than 100 (one hundred) of such creditors in the same class or not less than 10% (ten percent) of the total number of such creditors in the same class, whichever is less. In case of homebuyers and other allottees of real estate projects, an application for initiating of CIRP against the corporate debtor shall be filed jointly by not less than 100 (one hundred) of such allottees under the same real estate project or not less than 10% (Ten percent) of the total number of such allottees under the same real estate project, whichever is less. Operational creditors are those persons to whom an operational debt is owed or persons to whom such debt has been legally assigned. Operational debt is a debt in respect of the provision of goods and services, employment and government dues, therefore examples of operation debtors include vendors and suppliers, employees, government, etc. The primary difference between financial creditors and operation creditors is that financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or debt security while operational creditors are those whose liabilities from the entity comes from a transaction on operations. The Code also provides for cases where a creditor has both financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.

Who may not initiate the Corporate Insolvency Resolution Process (CIRP)?

The following persons are explicitly barred from initiating CIRP:

1. Corporate debtor undergoing a corporate insolvency resolution process.
2. Corporate debtor who has completed corporate insolvency resolution process 12 (twelve) months before the date of making of the application.
3. Corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved 12 (twelve) months before the date of making of an application.
4. Corporate debtor in respect of whom a liquidation order has been made.

It has been clarified in an amendment to the Code in 2020, that a corporate debtor referred to in sub clauses (1) to (4) may initiate corporate insolvency resolution process against another corporate debtor. Further, any creditors other than financial creditors and operational creditors cannot initiate corporate insolvency. There was a lot of confusion whether the Code envisaged creditors other than the ones mentioned above to seek relief under the Code with conflicting judgements by several adjudicating authorities. An amendment was made in the *Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016* whereby a third and residuary category of creditors was created. This amendment, however, does not allow such a third category of creditors to trigger the CIRP. It only allows them to submit claims once the application of CIRP has already been admitted.

Filing of application to commence CIRP

Financial creditor

The financial creditor is supposed to file an application to commence the CIRP in the prescribed form and manner along with the prescribed fees. It is required to furnish the following with its application:

1. A record of the default recorded with the information utility or such other record or evidence of default.

2. The name of the resolution professional proposed to act as an interim resolution professional.
3. Any other information as may be specified by the Board.

The corporate insolvency resolution process commences from the date of admission of such application and the adjudicating authority is required to communicate this order to the financial creditor and the corporate debtor.

Operational creditor

Before an operational creditor files an application to initiate CIRP, it has to deliver a demand notice to the corporate debtor which shall include an invoice demanding payment of the defaulted amount in the prescribed form and manner. Within 10 (ten) days of the receipt of such demand notice, the corporate debtor shall either bring to the notice of the operational creditor that a dispute already exists with respect to the default or pay the unpaid debt. If the corporate debtor fails to show the existence of a dispute or pay the unpaid debt within 10 (ten) days of receipt of demand notice, then the operational creditor can file an application for CIRP in the prescribed form and manner. It is required to furnish the following at the time of making the application:

1. A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor.
2. An affidavit stating that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt.
3. A copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available.
4. A copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available.
5. Any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed by the Central Government.

The operational creditor in its application may also propose to appoint a resolution professional to act as an interim resolution professional. The corporate insolvency resolution process commences from the date of admission of such application and the adjudicating authority is required to communicate this order to the operational creditor and the corporate debtor.

Corporate Debtor

On commission of a default, a corporate debtor itself can file an application for CIRP in the prescribed form and manner. Its application must be accompanied with the following:

1. The information relating to its books of account and such other documents for such period as may be specified by the Board.
2. The information relating to the resolution professional proposed to be appointed as an interim resolution professional.
3. The special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourths of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.

The corporate insolvency resolution process commences from the date of admission of the application.

Admission of application to commence CIRP

The adjudicating authority admits the application in case of a financial creditor when:

1. A default has occurred.
2. The application is complete.
3. There are no disciplinary proceedings pending against the proposed resolution professional.

In case of an operational creditor, the following conditions are required to be satisfied for the application to be admitted:

1. A demand notice must be delivered by the operational creditor before filing the application.
2. The operational creditor should not have received a notice of dispute and there must be no record of dispute in the information utility.
3. The unpaid debt must not have been paid.
4. The application must be complete.
5. There must be no disciplinary proceedings pending against the proposed resolution professional.

In order to admit the application of a corporate debtor, the adjudicating authority simply has to ensure that its application is complete and no disciplinary proceeding is pending against the proposed resolution professional.

If an application made by any of the abovementioned applicants is rejected, the adjudicating authority is required to give them 7 (seven) days to cure any defect in the application.

Moratorium

A moratorium refers to temporary suspension of an activity. Under the Code, moratorium means a period where activities that are prejudicial to the assets of the corporate debtor come to a standstill. Once the application to initiate the CIRP is admitted by the adjudicating authority, a moratorium is declared. Under such a moratorium, the following activities are prohibited:

1. Institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order passed by any authority.
2. Disposing of, in any manner, by the corporate debtor, any of its assets or any legal right or beneficial interest with respect to the assets.
3. Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002*.
4. Recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

The supply of essential goods or services to the corporate debtor cannot be terminated, suspended or interrupted during the moratorium period. By an amendment to the Code in 2020, it is now provided that where the resolution professional considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified. Further, the moratorium would not apply to a surety in a contract of guarantee to a corporate debtor and to any transactions which are notified by the Central Government in consultation with any financial sector regulator. The order of moratorium would be effective from the date of such order till the completion of CIRP. The moratorium shall also cease to have an effect on the adjudicating authority approving the resolution plan or passing an order for liquidation of corporate debtor.

Appointment of interim insolvency resolution professional

After admitting the application for CIRP, the adjudicating authority makes a public announcement to that effect and appoints an interim resolution professional on the insolvency commencement date. The adjudicating authority appoints the interim resolution professional as recommended by the financial or operational creditor or corporate debtor in the application, if no disciplinary proceedings are pending against him. In case of an operational creditor, if no interim resolution is recommended then it makes a reference to the Board to appoint one. The appointment of the interim insolvency resolution professional continues till the date of appointment of the resolution professional. During this period, the powers of the board of directors of the corporate debtor stand suspended and is exercised by the interim resolution professional. The management of the affairs of the corporate debtor also vests in the interim insolvency resolution professional till the resolution professional is appointed. The officers of the corporate debtor are required to report to the interim resolution professional and provide access to such documents and records as required by him. Even the financial institutions maintaining the accounts of the corporate debtor are required to co-operate with the interim resolution professional and act on his instructions. They must also furnish all information relating to the corporate debtor available with them. During the tenure of interim resolution professional, he is expected to perform the following duties:

1. Collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor.
2. Receive and collate all the claims submitted by creditors, pursuant to the public announcement.
3. Constitute a committee of creditors.
4. Monitor the assets of the corporate debtor and manage its operations.
5. File information collected with the information utility.
6. Take control and custody of any asset over which the corporate debtor has ownership.
7. Perform such other duties as may be specified by the Board.

All personnel of the corporate debtor including its promoters and its management are required to co-operate and lend support to the interim resolution professional to discharge its functions.

Committee of Creditors

Once the interim resolution professional receives all the claims from the creditors pursuant to the public announcement made by the adjudicating authority and determines the financial position of the corporate debtor, he must constitute a committee of creditors which shall comprise all the financial creditors. Only the financial creditors have voting rights in the committee of creditors. If a financial creditor or the authorised representative of the financial creditor is a related party of the corporate debtor, then it does not have a right of representation in this committee and it cannot participate or vote at its meetings. However this restriction shall not apply to a financial creditor regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares prior to the insolvency commencement date. All decisions of the committee of creditors are taken by a vote of not less than 51% (fifty one percent) of voting share of the financial creditors. In case a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise such persons to exercise such functions in such manner as specified by the Board. The CIRP regulations provide that in this case, (a) 18 (eighteen) largest operational creditors by value, (b) one representative of workmen not included in (a), and (c) one representative of employees not included in (a) shall constitute the committee of creditors. Once the committee of creditors is formed, it shall appoint a resolution professional to replace the interim resolution professional. It can decide to continue the interim resolution professional as resolution professional as well. The Board has to confirm the appointment of the resolution professional.

Insolvency resolution professional

The resolution professional after his appointment by the committee of creditors picks up where the interim resolution professional left off. He is the one that conducts the entire CIRP and manages the operations of the corporate debtor during CIRP period. He holds the meetings of the committee of creditors, preserves and protects the assets of the corporate debtor, represents and acts on behalf of the corporate debtor with third parties, exercises rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings, raises interim finances subject to the approval of the committee of creditors, appoints accountants, legal or other professionals, maintains an updated list of claims, prepares the information memorandum, invites prospective resolution applicants to submit resolutions plans and presents them in the meeting of committee of creditors, files application for avoidance of transactions, etc. The resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period until an order approving the resolution plan or appointing a liquidator is passed by the adjudicating authority. The resolution professional despite his expansive powers cannot undertake the following activities without the consent of the committee of creditors:

1. Raise any interim finance in excess of the amount as decided by the committee of creditors.
2. Create any security interest over the assets of the corporate debtor.
3. Change the capital structure of the corporate debtor, including by way of issuing additional securities, creating a new class of securities or buying back or redemption of issued securities.
4. Record any change in the ownership interest of the corporate debtor.
5. Give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction in excess of the amount as decided by the committee of creditors.
6. Undertake any related party transaction.
7. Amend any constitutional documents of the corporate debtor.
8. Delegate its authority to any other person.
9. Dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties.
10. Make any change in the management of the corporate debtor or its subsidiary.
11. Transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business.

12. Make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors.
13. Make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

In case the resolution professional does any of the above acts without the consent of the committee of creditors, such acts are void and the resolution professional will be reported to the Board for any disciplinary action as it may deem fit.

Resolution Plan

Information Memorandum

Before a resolution plan can be submitted, an information memorandum is prepared by the insolvency resolution professional with all the relevant information. Relevant information refers to the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified on a case to case basis. On the basis of this information memorandum, the resolution applicant submits the resolution plan along with an affidavit stating that he is eligible to be a resolution applicant under the Code.

Resolution Applicants

The Code places limitations on the persons who can submit a resolution plan. An invitation to submit the plan is given to only those persons who fulfil such criteria as may be laid down by the resolution professional with the approval of the committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as maybe specified by the Code. The following persons have been explicitly barred from submitting a resolution plan:

1. An undischarged insolvent.
2. A wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the *Banking Regulation Act, 1949*.
3. A person who at the time of submission of the resolution plan has as an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the *Banking Regulation Act, 1949* or the guidelines of a financial sector regulator issued under any other law and at least a period of 1 (one) year has lapsed from the date of such classification till the date of commencement of CIRP of the corporate debtor. However, the person shall be eligible to submit a resolution plan if such a person makes payment of all overdue amounts relating to non-

performing asset accounts before submission of resolution plan. Further this restriction shall not apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

4. A person who has been convicted for any offence punishable with imprisonment:

   (i) for 2 (two) years or more under any law specified by the Board under the Twelfth Schedule ; or

   (ii) for 7 (seven) years or more under any other law in force.

   However this shall not apply to a person after the expiry of a period of 2 (two) years from the date of his release from imprisonment. This shall also not apply to Connected Persons (*as defined under point 10 below)*.

5. A person who is disqualified to act as a director under the *Companies Act, 2013*. This shall also not apply to Connected Persons (*as defined under point 10 below)*.

6. A person who is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets.

7. A person who has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the adjudicating authority. This restriction shall not apply if any of the abovementioned transactions have taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme/plan approved by a financial sector regulator or a court and such resolution applicant has not otherwise contributed to any of the abovementioned transactions.

8. A person who has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted and such guarantee has been invoked by the creditor and remains unpaid in full or part.

9. A person who is subject to any of the abovementioned disabilities under any law in a jurisdiction outside India.

10. A person who is a connected person is not eligible due to the abovementioned disqualifications. "Connected Person" means (a) any person who is the promoter or in the management or control of the resolution applicant; (b) any person who shall be promoter or in management or control of business of corporate debtor during the implementation of the resolution plan; (c) the holding company, subsidiary company, associate company or related party of any of the persons mentioned sub-clause (a) and (b). The disqualifications in sub-

clause (c) does not apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor.

Restrictions provided in relation to persons under points 3 and 8 above shall not apply to resolution applicants in respect of corporate insolvency resolution process of any micro, small and medium enterprises.

Essentials of a resolution plan

A resolution plan must provide for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor. It must also provide for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to such creditors in the event of a liquidation of the corporate debtor and shall not be less than the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority under the waterfall mechanism. It should lay down a structure for the management of the affairs of the corporate debtor after approval of the resolution plan. It should put forward a mechanism for the implementation and supervision of the resolution plan. Further, it must not contravene any provisions of law and it must conform to any other requirements as specified by the Board.

Approval of the resolution plan

A resolution plan needs a two-fold approval. Firstly, from the committee of creditors. The committee of creditors must approve a resolution plan by a vote of not less than 66% (sixty-six percent) of voting share of the financial creditors. Thereafter, the plan is submitted to the adjudicating authority who shall ensure all the essentials of the resolution plan are met with, the resolution plan has provisions for its effective implementation and it is approved by the required majority. If these conditions are met, the adjudicating authority shall approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The Hon'ble Supreme Court has held that (a) it is the commercial wisdom of the requisite majority of the committee of creditors that must prevail, (b) on receipt of the resolution plan by the adjudicating authority, it is required to satisfy itself that the resolution plan as approved by committee of creditors meets the requirements specified in Section 30(2) of the Code - no more and no less, (c) the adjudicating authority is endowed with limited jurisdiction and the adjudicating authority has not been endowed with the jurisdiction to reverse the commercial wisdom of the committee of creditors. The resolution professional is required to obtain necessary approvals required under any law for the time being in force within 1 (one) year from the date of approval by adjudicating authority or within such period as provided for under the law, whichever is later.

Time limit for completion of insolvency resolution process

The corporate insolvency resolution process shall be completed within a period of 180 (one hundred eighty) days from the date of admission of the application to initiate such process. The resolution professional shall file an application to the adjudicating authority to extend the period of the corporate insolvency resolution process once by a further period not exceeding 90 (ninety) days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 66% (sixty-six percent) of the voting shares. However, the corporate insolvency resolution process shall mandatorily be completed within a period of 330 (three hundred and thirty) days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

Withdrawal of insolvency resolution application

Withdrawal of insolvency resolution application is permitted on an application for withdrawal being made to the adjudicating authority before the constitution of committee of creditors, by the applicant through the interim resolution professional. Withdrawal of applications admitted is also permitted after the constitution of committee of creditors, but in such case an application for withdrawal can only be made by approval of 90% (ninety percent) voting share of the committee of creditors. However, in case the withdrawal application is made after the issue of invitation for expression of interest, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

It has been further clarified that the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the adjudicating authority and no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the adjudicating authority, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not:

1. a promoter or in the management or control of the corporate debtor or a related party of such a person; or
2. a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Liquidation of the Corporate Debtor

The adjudicating authority can pass an order liquidating the corporate debtor in the event that:

1. The adjudicating authority does not receive the insolvency resolution plan within the prescribed period;
2. It rejects the insolvency resolution plan;
3. The committee of creditors, at any time before the confirmation of a resolution plan during the corporate insolvency resolution period, decides to liquidate the corporate debtor; or
4. The corporate debtor contravenes the approved resolution plan.

When a liquidation order has been passed, no suit or other legal proceeding can be instituted by or against the corporate debtor without prior approval of the adjudicating authority. This does not affect the rights of the secured creditors as provided in the Code. The order for liquidation is supposed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process.

Liquidator

The adjudicating authority makes a public announcement of the liquidation order and thereafter appoints a liquidator. The same resolution professional appointed for the corporate insolvency resolution is appointed as the liquidator, with his written consent, unless replaced by the adjudicating authority. On the appointment of a liquidator, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, cease to have effect and are vested in the liquidator. The personnel of the corporate debtor are required to extend assistance and cooperation to the liquidator in managing the affairs of the corporate debtor. The liquidator is vested with extensive powers just as the insolvency resolution professional, some of which include verifying the claims of creditors, taking control and custody of all assets of creditors, protecting the same, carrying on the business of the corporate debtor, selling the assets of the corporate debtor by way of public auctions, settling claims of creditors, investigating the financial affairs of the corporate debtor to determine undervalued or preferential transactions, accessing any information systems for the purpose of carrying out the liquidation process, etc.

Liquidation Estate

The Code requires the liquidator to form an estate of the assets of the corporate debtor called the liquidation estate. This liquidation estate has to be held by the liquidator in fiduciary capacity for the benefit of the creditors. The assets are required to be distributed by the liquidator in the manner of priorities laid down under the Code itself.

Claims by the creditors

The liquidator is required to consolidate the claims within a period of 30 (thirty) days from the date of the commencement of the liquidation process. A creditor is permitted to withdraw or vary his claim under this within 14 (fourteen) days of its submission. Once the claims are consolidated, the liquidator verifies the claims within such time as specified by the Board. After the verification, the liquidator may, either admit or reject the claim, in whole or in part. A creditor can appeal to the adjudicating authority against the decision of the liquidator accepting or rejecting the claims within 14 (fourteen) days of the receipt of such decision.

Distribution of assets of the insolvent

The Code has altered the order of priority for distribution of assets. A key diversion from the *Companies Act, 2013* is the difference in priority accorded to dues to the Government – such dues have been ranked below the debts due to unsecured creditors, in order to enhance the availability of credit to corporate entities. The proceeds from the sale of assets of the liquidation estate have to be distributed as per the following priority waterfall:

1. Insolvency resolution process costs and the liquidation costs.
2. Workmen's dues for the period of 24 (twenty-four) months preceding the liquidation commencement date and debts due to secured creditors who have relinquished their security interest.
3. Wages and dues of employees other than workmen for the period of 12 (twelve) months preceding the liquidation commencement date.
4. Financial debts owed to unsecured creditors.
5. Dues to the Government and dues owed to a secured creditor who has realised security interest but the proceeds are insufficient to meet the debts.
6. Residuary debts and dues.
7. Preference shareholders.
8. Equity shareholders or partners.

Any contractual arrangements between the abovementioned recipients with equal ranking, if disrupting the order of priority will be disregarded by the liquidator.

A secured creditor may relinquish its securities to the liquidation estate and receive proceeds from the sale of assets by the liquidator as per the waterfall mechanism set forth hereinabove. Alternately, a secured creditor may also choose to stand outside the liquidation process and sell its security in which case any shortfall in recovery of such secured creditor's dues would rank fifth in priority as in the waterfall mechanism set forth hereinabove.

Once the assets have been completely liquidated, the liquidator makes an application to the adjudicating authority for the dissolution of such corporate debtor. The adjudicating authority on such an application being filed makes an order that the corporate debtor shall be dissolved from the date of that order.

Avoidance of Transactions

The Code has provided for a mechanism to reverse or avoid certain transactions entered into by the corporate debtor prior to the commencement of the insolvency process. Such provisions have been made to ensure that the assets of the corporate debtor are not disposed of in a manner that is prejudicial to any creditors. It helps prevent the race to the corporate debtor's assets when there is a threat of insolvency and allows maximisation of the value of the assets of corporate debtor for equitable benefit of all creditors. The Code recognises three types of such transactions which can be avoided:

Preferential Transaction

Transfer of an interest of the corporate debtor for the benefit of a creditor, surety or guarantor on account of a previous financial or operational debt which has the effect of putting such a person in a more beneficial position than they would have been in the event of liquidation of a corporate debtor is a preferential transaction. Such a preferential transaction can be avoided if it is made 2 (two) years preceding the insolvency commencement date, if it is made to a related party and 1 (one) year if it is made to a person other than a related party. However, any transfer which is (a) made in the ordinary course of business or (b) which creates a security interest which secures new value in the property acquired by the corporate debtor and meets stipulated conditions, will not be a preferential transaction.

Undervalued Transaction

An undervalued transaction takes place when the corporate debtor either makes a gift to a person or transfers its assets for a consideration that is significantly less than the value of the consideration provided by the corporate debtor and such transaction has not taken place in the ordinary course of business of the corporate debtor. Such undervalued transaction can be avoided if it is made 2 (two) years preceding the insolvency commencement date, if it is made to a related party and 1 (one) year if it is made to a person other than a related party.

Extortionate Credit Transactions

Under extortionate credit transactions, the corporate debtor receives financial or operational debt on terms that are unconscionable in nature. They require the corporate debtor to make exorbitant payments in respect of the credit provided. Examples of extortionate transaction would be corporate debtor being charged an unfairly high rate of interest or being subject to unfair credit terms (such as severe default provisions). However, any debt extended by any person providing financial services which is in compliance with any law for the time being in force will not be considered an extortionate credit transaction.

Voluntary Liquidation

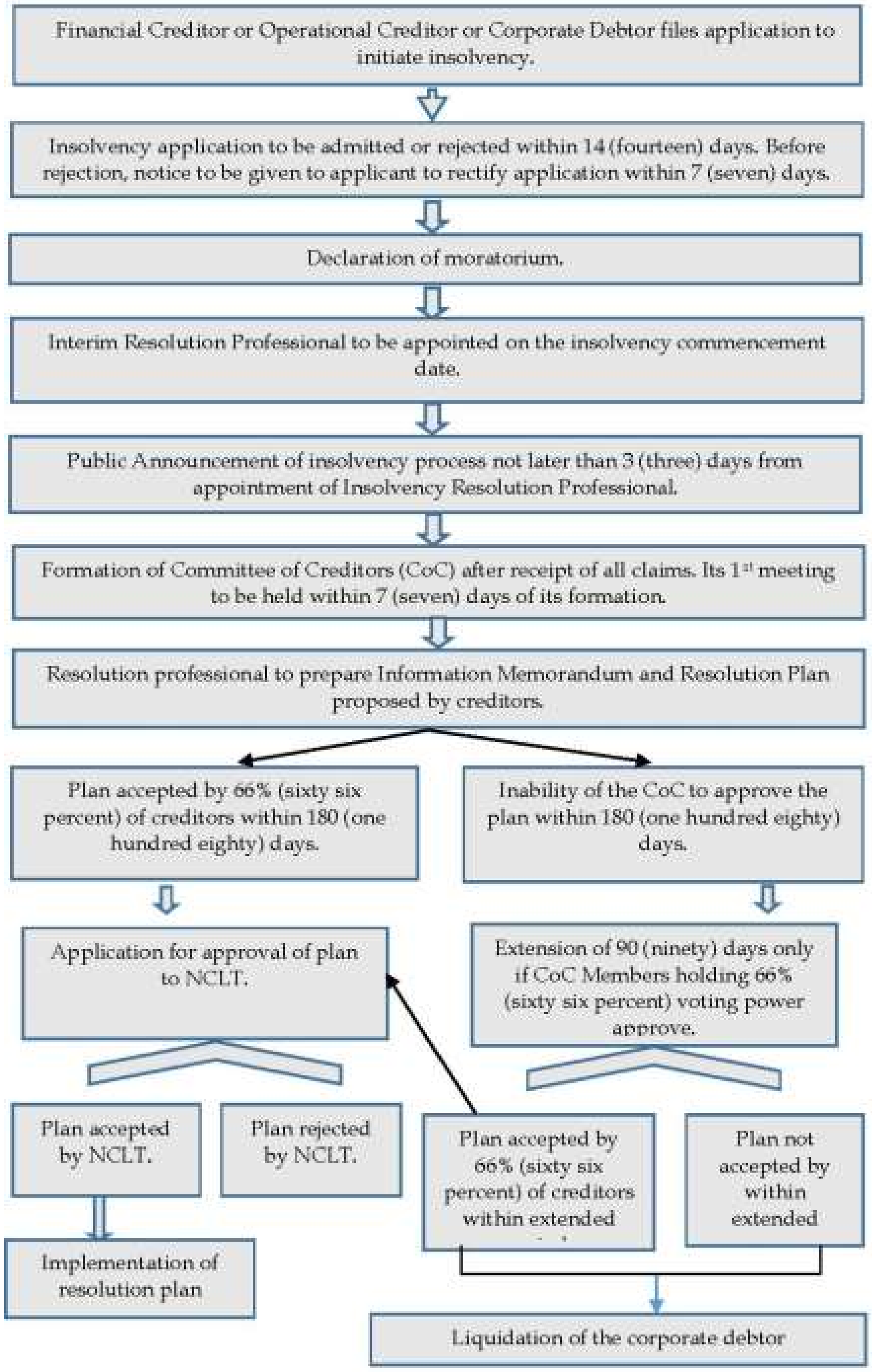
The Code provides for voluntary liquidation of a corporate person who has not committed any default. *Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017* with respect to the same have also been enacted by the Board. Earlier, the *Companies Act, 1956* provided for voluntary liquidation/winding-up. Provisions pertaining to the same were also provided in the *Companies Act, 2013* however they were never notified. The regulations enacted under the Code have repealed the provisions on voluntary liquidation under the *Companies Act, 1956* and *2013*. The major difference between the previous law and the new one is that under the *Companies Act, 1956*, voluntary liquidation/winding-up was divided into two categories- members' voluntary winding up and creditors' voluntary winding up. However, under the Code, both these categories have been combined. For a corporate person to initiate voluntary liquidation, a special resolution of the members of the company in a general meeting is required. Further, if the company owes any debt to any person, creditors representing two thirds in value of the debt of the company are required to approve the resolution passed by the members.

Fast Track Insolvency

Not all insolvency processes are equally complex and long-winded. Insolvency processes of smaller entities require a much shorter time frame to be completed. In order to expedite the insolvency resolution of such entities, the Code has provided for Fast Track CIRP. In this case, the insolvency process needs to be completed within a period of 90 (ninety) days from the insolvency commencement date. This period can be extended up to 45 (forty-five) days. An application can be made by the following persons to initiate the fast track corporate insolvency resolution process:

1. A small company as defined under the *Companies Act, 2013*.
2. A start-up (other than the partnership firm) as defined in the Notification dated May 23, 2017 by the Ministry of Commerce and Industry.
3. An unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding Rs.10,000,000 (Indian Rupees Ten Million).
4. Any other corporate persons as may be notified by the Central Government.

Timeline for CIRP



¶11-050 Insolvency Resolution and Bankruptcy of Individuals and Partnership Firms

Even though the Code came into force in 2016, Part III of the Code which covers fresh start process, insolvency resolution and bankruptcy for individuals and partnership firms has only been partly notified with effect from December 1, 2019 by a notification dated November 15, 2019. In the said Part III only the provisions relating to the insolvency and bankruptcy of personal guarantors to the corporate debtors has been notified and the part relating to insolvency resolution and bankruptcy for other individuals and partnerships is yet to be notified. Since all the provisions of this part has not come into effect, a brief insight has been provided into the mechanism set out in the Code for insolvency resolution and bankruptcy of individuals and partnership firms.

The Code lays down two different processes to facilitate the insolvency resolution, namely, the fresh start process and insolvency resolution process. The Code provides for a bankruptcy process as well after all means to resolve the insolvency have failed. In order to initiate the fresh start, insolvency resolution or bankruptcy process, a default of a minimum of Rs. 1000 (Indian Rupees One Thousand) has to be made by an individual or partnership firm. Each of these processes are dealt with separately hereunder.

Fresh Start Process

The fresh start process is like a debt waiver enabling the debtor to discharge his debts and make a fresh start without any existing liabilities. This route is available only to a debtor if:

1. His gross annual income does not exceed Rs. 60,000 (Indian Rupees Sixty Thousand).
2. The aggregate value of his assets does not Rs. 20,000 (Indian Rupees Twenty Thousand).
3. The aggregate value of his debts does not exceed Rs. 35,000 (Indian Rupees Thirty-Five Thousand).
4. He is not an undischarged bankrupt.
5. He does not own a dwelling unit, whether encumbered or not.
6. A fresh start, insolvency resolution or bankruptcy process is not subsisting against him.
7. No previous fresh start order has been made in relation to him in the last 12 (twelve) months before the date of the application for fresh start.

This application can be filed by the debtor himself or through a resolution professional. The resolution professional has to examine the fresh start application and submit a report to the adjudicating authority with its recommendations. The adjudicating authority thereafter accepts or rejects the application within 14 (fourteen) days of receiving the report. After the admission of the application, a moratorium period comes into effect during which there are restrictions on the debtor as well as prohibition on legal action or proceeding in respect of any debt of the debtor. During the moratorium period, objections are received from the creditors of the debtor and the resolution professional examines them. Based on these objections, a final list of debts is prepared and submitted to the adjudicating authority. After receiving this list, the adjudicating authority passes an order for discharge of the debtor from the debts mentioned in the list.

Insolvency Resolution Process

Any debtor can apply either personally or through a resolution professional to the adjudicating authority for initiating the insolvency resolution process by submitting an application. A partner of a partnership firm can file such an application only if majority of the partners of the firm file the application jointly. A creditor can also either by itself or jointly with other creditors, or through a resolution professional apply to the adjudicating authority for initiating the insolvency process. Upon filing of the application, an interim moratorium period shall commence during which any legal action or proceeding pending in respect of any debts of the debtor shall be deemed to be stayed and no creditor would be allowed to initiate any legal action or proceedings.

If the application is filed through a resolution professional, the adjudicating authority shall direct the Board within 7 (seven) days of the date of the application to confirm that there are no disciplinary proceedings pending against resolution professional. Where an application is filed by the debtor or the creditor himself, as the case may be, and not through the resolution professional, the adjudicating authority shall direct the Board, within 7 (seven) days of the filing of such application, to nominate a resolution professional for the insolvency resolution process.

After filing the insolvency application, the same will be examined by the resolution professional who shall then within 10 (ten) days of his appointment submit a report to the adjudicating authority recommending it to either accept or reject the application. Where the application has been filed by the creditor, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor and where the debt for which an application has been filed by a creditor is registered with the information utility, the debtor shall not be entitled to dispute the validity of such debt. Based on the report submitted by the resolution professional, the adjudicating authority shall pass an order either admitting or rejecting the application within 14 (fourteen) days from the date of the submission of the report made by the resolution professional. Upon admission of the application, the moratorium commences. The adjudicating authority shall then issue a public notice within 7 (seven) days of the passing of the order inviting claims from all creditors.

The creditors are required to register their claims with the resolution professional within 21 (twenty-one) days from the issuance of the notice. The resolution professional shall then prepare a list of all the creditors on the basis of the application filed with the adjudicating authority and claims received from the creditors. The debtor shall, in consultation with the resolution professional, prepare a repayment plan with a proposal to the creditors for restructuring the debts of the debtor. The resolution professional shall submit the repayment plan along with its report on the same to the adjudicating authority within a period of 21 (twenty-one) days from the last date of the submission of the claims. The report submitted by the resolution professional shall also specify the date on which, and the time and place at which, the meeting should be held if he is of the opinion that a meeting of the creditors should be summoned and the date on which the meeting is to be held shall be not less than 14 (fourteen) days and not more than 28 (twenty-eight) days from the date of submission of report by the resolution professional. The resolution professional shall thereafter issue a notice calling the meeting of the creditors at least 14 (fourteen) days before the date fixed for such meeting and shall send the notice of the meeting to the list of creditors prepared by him. The notice of meeting shall be accompanied by a copy of the repayment plan, a copy of the statement of affairs of the debtor, a copy of the said report of the resolution professional and forms for proxy voting. During the meeting, if any modifications are suggested by the creditors, the resolution professional shall ensure that consent of the debtor shall be obtained for each modification.

A creditor shall be entitled to vote at every meeting of the creditors in respect of the repayment plan in accordance with voting share assigned to him. A creditor shall not be entitled to vote in a meeting of the creditors if he is not a creditor mentioned in the list of creditors and/or is an associate of the debtor. Secured creditors shall be entitled to participate and vote on the repayment plan in the meetings of the creditors provided that they shall forfeit their right to enforce the security during the period of the repayment plan in accordance with the terms of the repayment plan. In case a secured creditor does not forfeit his right to enforce security, he shall only have the right to vote in respect of the unsecured part of the debt. The repayment plan or any modification to the repayment plan must be approved by a majority of more than three-fourths in value of the creditors present in person or by proxy and voting on the resolution in a meeting of the creditors. The resolution professional shall then prepare a report on the same and submit it to the adjudicating authority.

The adjudicating authority shall then by an order approve or reject the repayment plan on the basis of the report submitted to it by the resolution professional. The repayment plan would be binding on all the creditors and the debtor if it is approved by the adjudicating authority. The creditors shall be entitled to file an application for bankruptcy if the repayment plan is rejected by the adjudicating authority. The implementation of the repayment plan shall be supervised by the resolution professional. On completion of the implementation of the repayment plan, the adjudicating authority shall pass a discharge order to that effect.

Bankruptcy Order for Individuals and Partnership Firms

A debtor or a creditor individually or jointly with other creditors can file an application for bankruptcy of the debtor to the adjudicating authority where the application for initiation of insolvency process has been rejected by the adjudicating authority or where the repayment plan is rejected by the adjudicating authority or where the repayment plan is not completely implemented or the claims under the repayment plan have not been fully satisfied. The said application has to be filed within 3 (three) months from the date of the order passed by the adjudicating authority in the cases mentioned above. In case the application for bankruptcy of the debtor has been filed by the creditor then the application shall be accompanied with a statement by the creditor having the right to enforce the security that he shall, in the event of a bankruptcy order being made, give up his security for the benefit of all the creditors of the bankrupt; or a statement by the creditor stating that the application for bankruptcy is only in respect of the unsecured part of the debt and an estimated value of the unsecured part of the debt. Upon filing of the application, an interim moratorium period shall commence on all actions against the properties of the debtor in respect of his debts and such moratorium shall cease to have effect on the bankruptcy commencement date. During the interim moratorium any pending legal action or legal proceeding against any property of the debtor in respect of any of his debts shall be deemed to have been stayed and no creditor would be allowed to initiate any legal action or proceedings against any property of the debtor in respect of any of his debts. An insolvency professional is appointed as the bankruptcy trustee who carries out the bankruptcy process once the bankruptcy order is passed by the adjudicating authority. On passing of the bankruptcy order, the estate of the bankrupt shall vest in the bankruptcy trustee and shall be divided among his creditors. The adjudicating authority shall thereafter issue public notice inviting claims from the creditors and the creditors shall register claims with the bankruptcy trustee within 7 (seven) days of the publication of the public notice. The bankruptcy trustee shall thereafter, within 14 (fourteen) days from the bankruptcy commencement date, prepare a list of creditors of the bankrupt and summon the meeting of creditors within 21 (twenty-one) days from the bankruptcy commencement date. Every creditor whose name appears in the list of creditor shall be entitled to vote in respect of the resolutions in the meeting of the creditors in accordance with the voting share assigned to him. The creditor who is an associate of the bankrupt shall not be entitled to vote. The Code also sets out a mechanism for avoidance of preferential, undervalued and extortionate credit transactions the way it does in case of liquidation of a corporate debtor. In the event an individual dies whilst his bankruptcy proceedings are ongoing, the proceedings are to be continued as if he were alive. The priority of payments with respect to bankruptcy of individuals and partnership firms is also specified in the Code. Upon completion of the administration and distribution of the estate of the bankrupt, the bankruptcy trustee shall convene a meeting of the committee of creditors and shall provide the committee of creditors with a report of the administration of the estate of the bankrupt in the said meeting. The committee of creditors shall approve the report submitted by the bankruptcy trustee within 7 (seven) days of the receipt of the report and determine whether the bankruptcy trustee should be released. Further, the bankruptcy trustee shall apply to the adjudicating authority for a discharge order on the expiry of one year from the bankruptcy commencement date or within 7 (seven) days of the approval of the committee of creditors of the completion of administration of the estate of the bankrupt. The adjudicating authority shall thereafter pass a discharge order on an application by the bankruptcy trustee.

Insolvency Resolution and Liquidation Proceedings of Financial Service Providers

The Central Government has also notified the procedure and rules for insolvency resolution and liquidation proceedings of financial service providers and in consultation with the Reserve Bank of India, by notification dated November 18, 2019 notified Non-banking finance companies (which include housing finance companies) with asset size of Rs.500 (five hundred) crores or more, as per last audited balance sheet as the category of financial service provider for the purpose of their insolvency and liquidation proceedings, which may be conducted under the Code.

¶11-060 Applicability of the Limitation Act, 1963

The provisions of the *Limitation Act, 1963* are applicable to proceedings or appeals before the adjudicating authority, the NCLAT, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal.

Chapter 12 Regulation of Real Estate in India

¶12-010 Introduction

Real estate plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. Recognising the same and in order to regulate and develop the real estate sector, the Government of India had enacted the *Real Estate (Regulation and Development) Act, 2016* ("RERA"). All the sections of the RERA have come into force with effect from May 01, 2017. The main objective of the RERA is to establish the Real Estate Regulatory Authority ("Authority") for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, or sale of real estate project, in an efficient and transparent manner. The RERA aims to protect the interest of consumers in the real estate sector, to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Real Estate Appellate Tribunal ("Appellate Tribunal") to hear appeals from the decisions, directions or orders of the Authority and the adjudicating officer.

RERA requires the appropriate governments to establish the Authority and Appellate Tribunal to exercise the powers conferred on it and to perform the functions assigned to it under RERA and to make rules and regulations for carrying out the provisions of RERA. Accordingly, the state governments have established the respective Authorities and Appellate Tribunals and notified the rules and regulations for the said purposes.

The provisions of RERA are in addition to, and not in derogation of, the provisions of any other law for the time being in force. The provisions of RERA have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

¶12-020 Registration of Real Estate Projects

A promoter cannot advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Authority.

"Real estate project" or "project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto.

Who needs to register?

Following persons ("promoters") are required to register the real estate project with the Authority:

(a) A person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees;

(b) A person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon;

(c) Any development authority or any other public body in respect of allottees of (i) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the government; or (ii) plots owned by such authority or body or placed at their disposal by the government, for the purpose of selling all or some of the apartments or plots;

(d) An apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings;

(e) Any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(f) Such other person who constructs any building or apartment for sale to the general public.

Where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified.

Exemption from registration

Following real estate projects are exempted from registration with the Authority:

(a) Where the area of land proposed to be developed does not exceed 500 m^2 (five hundred square meters) or the number of apartments proposed to be developed does not exceed 8 (eight) inclusive of all phases. However, the appropriate government can reduce the threshold below 500 m^2 (five hundred square meters) or 8 (eight) apartments, inclusive of all phases, for exemption from registration;

(b) Where the promoter has received completion certificate for a real estate project prior to commencement of RERA, that is, prior to May 01, 2017; or

(c) If the real estate project is for the purpose of renovation or repair or re-development, which does not involve marketing, advertising selling or new allotment of any apartment, plot or building.

It has been clarified that where the real estate project is to be developed in phases, every such phase shall be considered a stand-alone real estate project, and the promoter is required to obtain registration for each phase separately.

Registration of ongoing projects

Projects that were on-going on the date of commencement of the RERA, that is, on May 01, 2017 and for which the completion certificate had not been issued, the promoter was required to make an application to the Authority for registration of the said project within a period of 3 (three) months from the date of commencement of the RERA, that is, by July 31, 2017.

For the projects which are developed beyond the planning area but with the requisite permission of the local authority, the Authority may, by order, direct the promoter of such project to register with it, and the provisions of RERA or the rules and regulations made thereunder, will apply to such projects from that stage of registration.

Application for registration

Every promoter is required to make an application to the Authority for registration of the real estate project in the form, manner, within such time and accompanied by such fee as prescribed. The promoter shall enclose the following documents along with the application:

(a) A brief detail of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies, competent authority), the particulars of registration of such enterprise and the names and photographs of the promoter;

(b) A brief detail of the projects launched by the promoter in the past 5 (five) years, whether already completed or being developed, including the current status of the said projects, any delay in its completion, details of cases pending, details of type of land and payments pending;

(c) An authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;

(d) The sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;

(e) The plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including fire-fighting facilities, drinking water facilities, emergency evacuation services and use of renewable energy;

(f) The location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project;

(g) Proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;

(h) The number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas apartment with the apartment, if any;

(i) The number and areas of garage for sale in the project;

(j) The names and addresses of the real estate agents, if any, for the proposed project;

(k) The names and addresses of the contractors, architect, structural engineer, if any, and other persons concerned with the development of the proposed project;

(l) A declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:

(A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;

(B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;

(D) that 70% (seventy percent) of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose;

(E) that he shall take all the pending approvals on time, from the competent authorities;

(F) that he has furnished such other documents as may be prescribed by the rules or regulations made under RERA; and

(m) Such other information and documents as may be prescribed.

Grant of registration

On receipt of the application, the Authority shall within a period of 30 (thirty) days, either (a) grant registration and provide a registration number, including a Login Id and password for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or (b) reject the application and record the reasons in writing, if such application does not conform to the provisions of the RERA or the rules or regulations made thereunder. However, application cannot be rejected unless the applicant has been given an opportunity of being heard in the matter.

If the Authority fails to grant the registration or reject the application, the project is deemed to be registered, and the Authority shall within a period of 7 (seven) days of the expiry of the said period of 30 (thirty) days as specified above, shall provide a registration number and a Login ID and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.

Period of registration

The registration granted is valid for a period declared by the promoter while submitting the application for completion of the project or phase thereof. The registration granted can be extended by the Authority on an application made by the promoter due to "*force majeure*" in such form and on payment of such fee as prescribed. "*Force majeure*" means a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

Further, in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, registration granted to a project can be extended by the Authority for such time as it considers necessary, which shall, in aggregate, not exceed a period of 1 (one) year. However, no application for extension of registration can be rejected unless the applicant has been given an opportunity of being heard in the matter.

Revocation of registration

On receipt of a complaint, *suo motu* or on the recommendation of the competent authority, registration of the project can be revoked by the Authority if: (a) the promoter makes default in doing anything required by or under RERA or the rules or the regulations made thereunder; (b) the promoter violates any of the terms or conditions of the approval given by the competent authority; (c) the promoter indulges in any fraudulent practices; or (d) the promoter is involved in any kind of unfair practice or irregularities.

"Unfair practice" means a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including the practice of making any statement, whether in writing or by visible representation which (a) falsely represents that the services are of a particular standard or grade; (b) represents that the promoter has approval or affiliation which such promoter does not have; (c) makes a false or misleading representation concerning the services; or the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered; (d) the promoter indulges in any fraudulent practices.

The Authority cannot revoke the registration granted to the promoter unless at least 30 (thirty) days' notice, in writing, has been given to the promoter, stating the grounds for proposed revocation of the registration, and has considered any cause shown by the promoter within the period of notice against the proposed revocation.

Instead of revocation, the registration can also be permitted to remain in force by the Authority subject to such further terms and conditions as imposed in the interest of the allottees and any such terms and conditions so imposed shall be binding upon the promoter.

Consequence of revocation

Upon revocation of the registration by the Authority, the promoter will be debarred from accessing the website in relation to the project. The Authority will specify his name in the list of defaulters and display his photograph on its website and also inform the other Authorities in other states and union territories about such revocation or registration. The bank holding the project bank account will be directed to freeze the account and thereafter to take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works. Further, the Authority may, in order to protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.

Upon lapse of the registration or on revocation of the registration, the Authority may consult the appropriate government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority. However, no direction, decision or order of the Authority will take effect until the period of appeal provided RERA has expired.

Further in case of revocation of registration of project, the association of allottees shall have the first right of refusal for carrying out remaining/balance development works in the project.

¶12-030 Functions, Duties and Obligations of Promoter

Opening of escrow account

Promoter is required to deposit 70% (seventy percent) of the amounts realised for the real estate project from the allottees, from time to time, in a separate account which is required to be maintained in a scheduled bank. Such amount will cover the cost of construction and the land cost and it can be used only for said purpose.

Promoter can withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project. Further, the amounts from the separate account can be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project.

Audit of accounts

Promoter is required to get his accounts audited within 6 (six) months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilised for the project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

Creation of web page

The promoter, upon receiving his Login Id and password, shall create his web page on the website of the Authority and enter all details of the proposed project, in all the fields as provided, for public viewing, including:

(i) Details of the registration granted by the Authority;

(ii) Quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;

(iii) Quarterly up-to-date the list of number of garages booked;

(iv) Quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;

(v) Quarterly up-to-date status of the project; and

(vi) Such other information and documents as may be specified by the regulations made by the Authority.

Making information available during advertisements/bookings

The advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.

The promoter at the time of the booking and issue of allotment letter is responsible to make available to the allottee, the information, namely: sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority; and the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

Responsibility of the promoter

The promoter is responsible for all obligations, responsibilities and functions under the provisions of RERA or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, till the conveyance of all the apartments, plots or buildings, to the allottees, or the common areas to the association of allottees or the competent authority. The responsibility of the promoter, with respect to the structural defect or any other defect for such period, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

Formation of association/society

The promoter shall enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable. In the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of 3 (three) months of the majority of allottees having booked their plot or apartment or building, in the project.

Execution of registered conveyance deed

The promoter shall execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be.

Payment of outgoings until transfer of physical possession

The promoter shall pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project). Where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter will continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person.

Not to mortgage or create charge on the property

The promoter shall after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be.

Not to take deposit/advance without first entering into agreement for sale

A promoter cannot accept a sum more than 10% (ten percent) of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

The agreement for sale shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

Adherence to sanctioned plans and project specifications

The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

Once the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agreed to take one or more of the said apartment, plot or building, as the case may be, the promoter cannot make:

(i) Any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person. However, the promoter may make such "*minor additions or alterations*" as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised architect or engineer after proper declaration and intimation to the allottee. "*Minor additions or alterations"* excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

(ii) Any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

The allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc, by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as 1 (one) allottee only.

In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of 5 (five) years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within 30 days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under RERA.

Insurance of real estate project

The promoter is required to obtain the insurances as may be notified by the appropriate government, including but not limited to insurance in respect of title of the land and building as a part of the real estate project and construction of the real estate project. The promoter will be liable to pay the premium and charges in respect of the insurance and is required to pay the same before transferring the insurance to the association of the allottees. The insurance will get transferred to the benefit of the allottee or the association of allottees, as the case may be, at the time of promoter entering into an agreement for sale with the allottee. On formation of the association of the allottees, all documents relating to the insurance are required to be handed over to the association of the allottees.

Transfer of title

The promoter is required to execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws. In the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, shall be carried out by the promoter within 3 (three) months from date of issue of occupancy certificate.

After obtaining the completion certificate and handing over physical possession to the allottees, it is the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws.

In the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, the association of the allottees or the competent authority, as the case may be, within 30 (thirty) days after obtaining the occupancy certificate.

Other obligations

The promoter is required to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and make it available to the allottees individually or to the association of allottees.

The promoter is required to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and make the lease certificate available to the association of allottees.

The promoter is required to provide and maintain the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees.

The promoter can cancel the allotment only in terms of the agreement for sale. If the promoter cancels the allotment and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause, then the allottee can approach the Authority for relief.

The promoter is also required to prepare and maintain all such other details as may be specified, from time to time, by regulations made by the Authority.

¶12-040 Registration and Functions of Real Estate Agents

A real estate agent cannot facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building, in a real estate project or part of it, being the part of the real estate project registered under RERA, being sold by the promoter in any planning area, without obtaining prior registration.

"Real estate agent" means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called.

Registration

Every real estate agent is required to make an application to the Authority for registration in such form, manner, within such time and accompanied by such fee and documents as prescribed. The Authority can, within such period, in such manner and upon satisfying itself of the fulfillment of such conditions, as prescribed, either (a) grant a single registration to the real estate agent for the entire state or union territory; or (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of RERA or the rules or regulations made thereunder. However, no application can be rejected unless the applicant has been given an opportunity of being heard in the matter.

On the completion of the period as prescribed, if the applicant does not receive any communication about the deficiencies in his application or the rejection of his application, he shall be deemed to have been registered.

Every real estate agent who is registered under RERA, is granted a registration number by the Authority, which shall be quoted by the real estate agent in every sale facilitated by him. The registration is valid for such period as may be prescribed, and shall be renewable for a period in such manner and on payment of such fee as may be prescribed.

Where any real estate agent who has been granted registration commits breach of any of the conditions thereof or any other terms and conditions specified under RERA or any rules or regulations made thereunder, or where the Authority is satisfied that such registration has been secured by the real estate agent through misrepresentation or fraud, the Authority may, without prejudice to any other provisions of RERA, revoke the registration or suspend the same for such period as it thinks fit. No such revocation or suspension can be made by the Authority unless an opportunity of being heard has been given to the real estate agent.

Functions

A real estate agent registered with the Authority shall:

(a) Not facilitate the sale or purchase of any plot, apartment or building, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority.

(b) Maintain and preserve such books of account, records and documents as prescribed.

(c) Facilitate the possession of all the information and documents, as the allottee, is entitled to, at the time of booking of any plot, apartment or building.

(d) Not involve himself in any unfair trade practices, namely: permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered; or the practice of making any statement, whether orally or in writing or by visible representation which (i) falsely represents that the services are of a particular standard or grade, (ii) represents that the promoter or himself has approval or affiliation which such promoter or himself does not have, or (iii) makes a false or misleading representation concerning the services.

(e) Discharge such other functions as may be prescribed.

¶12-050 Rights and Duties of Allottees

"Allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent.

Rights

Following rights are available to allottee under RERA:

(a) To obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in RERA or the rules and regulations made thereunder or the agreement for sale signed with the promoter.

(b) To know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.

(c) To claim the possession of apartment, plot or building, as the case may be. Further association of allottees are entitled to claim the possession of the common areas, as per the declaration given by the promoter.

(d) To claim the refund of amount paid along with interest at such rate as may be prescribed and compensation, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration.

(e) To get the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.

Duties

Following are the duties of the allottees:

(a) To make necessary payments in the manner and within the time as specified in the agreement for sale and pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any and to pay interest, at such rate as may be prescribed for any delay in such payment. Such obligations to make payment and the liability towards interest may be reduced when mutually agreed to between the promoter and such allottee.

(b) To participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.

(c) To take physical possession of the apartment, plot or building as the case may be, within a period of 2 (two) months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

(d) To participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be.

¶12-060 Transfer of Real Estate Projects

The promoter cannot transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority. However, such transfer or assignment will not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

For the purpose of obtaining consent from two-third allottees, the allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

On the transfer or assignment being permitted by the allottees and the Authority, the intending promoter is required to independently comply with all the pending obligations under RERA or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.

It is pertinent to note that the transfer or assignment shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter will be liable to the consequences of breach or delay, as the case may be, as provided under RERA or the rules and regulations made thereunder.

¶12-070 Return of Amount and Compensation

Veracity of the advertisement or prospectus

If any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under RERA. Further, if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner as provided under RERA.

Failure to discharge obligations

If the promoter fails to complete or is unable to give possession of an apartment, plot or building (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under RERA or for any other reason, he shall be liable on demand, if the allottee intends to withdraw from the project, without prejudice to other remedy available, to return the amount received by him, including compensation, in respect of that apartment, plot, building, as the case may be, with interest at such rate as prescribed.

If the allottee does not intend to withdraw from the project, he shall be paid by the promoter interest for every month of delay, till the handing over of the possession, at such rate as prescribed.

The promoter is also liable to compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed. The claim for such compensation is not barred by limitation provided under any law for the time being in force.

If the promoter fails to discharge any other obligations imposed on him under RERA or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he can be made liable to pay such compensation to the allottees, as provided under RERA.

Adjudication of compensation by the adjudicating officer

For the purpose of adjudging compensation, the Authority has appointed judicial officer to be an adjudicating officer. These adjudicating officers can hold inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard.

Any person whose complaint is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under Section 9 of *the Consumer Protection Act, 1986*, on or before the commencement of RERA, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer.

The application for adjudging compensation is to be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of 60 (sixty) days from the date of receipt of the application. However, if any such application could not be disposed of within the said period of 60 (sixty) days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

While holding an inquiry the adjudicating officer has power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions under RERA, he may direct to pay such compensation or interest, as the case any be, as he thinks fit.

Factors to be taken into account by the adjudicating officer

While adjudging the quantum of compensation or interest, the adjudicating officer shall have due regard to the following factors, namely:

(a) The amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) The amount of loss caused as a result of the default;

(c) The repetitive nature of the default;

(d) Such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

¶12-080 Investigation and Adjudication

Filing of complaints with the Authority or the adjudicating officer

Any aggrieved person can file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of RERA or the rules and regulations made thereunder against any promoter, allottee or real estate agent, as the case may be. Here, the term "person" includes association of allottees or any voluntary consumer association registered under any law for the time being in force.

Call for information and conduct of investigation by the Authority

The Authority, on a complaint or *suo motu*, can, by order in writing and recording reasons thereof, call upon any promoter or allottee or real estate agent, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require. The Authority can also appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be.

While exercising the said powers, the Authority has the same powers as are vested in a civil court under *Code of Civil Procedure, 1908* while trying a suit, in respect of the following matters:

(i) Discovery and production of books of account and other documents, at such place and at such time as may be specified;

(ii) Summoning and enforcing the attendance of persons and examining them on oath;

(iii) Issuing commissions for the examination of witnesses or documents;

(iv) Any other matter which may be prescribed.

Issue of interim orders, directions and imposing of penalty by the Authority

Where during an inquiry, the Authority is satisfied that an act in contravention of RERA or the rules and regulations made thereunder, has been committed and continues to be committed or that such act is about to be committed, the Authority may, by order, restrain any promoter, allottee or real estate agent from carrying on such act until the conclusion of such inquiry of until further orders, without giving notice to such party, where the Authority deems it necessary.

For the purpose of discharging the functions under RERA, the Authority can issue such directions to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions are binding on all concerned. The Authority can also impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents.

Reference to Competition Commission of India (CCI) by the Authority

Where an issue is raised relating to agreement, action, omission, practice or procedure that has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, can *suo motu*, make reference in respect of such issue to the CCI.

Application for settlement of disputes and appeals to Appellate Tribunal

Any appropriate government or competent authority or any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter. However, where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least 30% (thirty percent) of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard. Here, the term "person" includes the association of allottees or any voluntary consumer association registered under any law for the time being in force.

The applicant or appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Authority or the adjudicating officer, as the case may be.

Every appeal made hereinabove shall be preferred within a period of 60 (sixty) days from the date on which a copy of the direction or order or decision made by the Authority or the adjudicating officer is received by the appropriate government or the competent authority or the aggrieved person and it shall be in such form and accompanied by such fee, as may be prescribed. The Appellate Tribunal may also entertain any appeal after the expiry of 60 (sixty) days if it is satisfied that there was sufficient cause for not filing it within that period.

On receipt of an appeal, the Appellate Tribunal may after giving the parties an opportunity of being heard, pass such orders, including interim orders, as it thinks fit. The appeal preferred hereinabove, is to be dealt as expeditiously as possible by the Appellate Tribunal and endeavour shall be made by it to dispose of the appeal within a period of 60 (sixty) days from the date of receipt of appeal.

The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any order or decision of the Authority or the adjudicating officer, on its own motion or otherwise, call for the records relevant to deposing of such appeal and make such orders as it thinks fit.

Appeal to High Court

Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court of a State or Union territory where the real estate project is situated, within a period of 60 (sixty) days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in Section 100 of the *Code of Civil Procedure, 1908*. The High Court may entertain the appeal even after the expiry of the said period of 60 (sixty) days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time. However, no appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

Bar of jurisdiction of civil courts

A civil court does not have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under RERA to determine. Further, no injunction can be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under RERA.

Cognisance of offences by courts

The courts cannot take cognisance of any offence punishable under RERA or the rules or regulations made thereunder except in a case when a complaint in writing is made by the Authority or by any officer of the Authority duly authorised by it for this purpose. The court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class cannot try any offence punishable under RERA.

¶12-090 Violations and Consequences

Penalty for promoter

Advertisement by promoter without registration

Any promoter who advertises, markets, books, sells or offers for sale, or invites persons to purchase in any manner any plot, apartment or building, in any real estate project or part of it, in any planning area, without registering the real estate project with the Authority, is liable to a penalty which can extend up to 10% (ten percent) of the estimated cost of the real estate project as determined by the Authority. In case of continued violation or failure to comply with order, decision or direction of the Authority, the punishment can extend to imprisonment for a term up to 3 (three) years or fine, which can extend up to a further 10% (ten percent) of the estimated cost of the real estate project, or with both.

Non-registration or providing false information during registration

Any promoter who is required to register under RERA, but fails to do so, or provides false information while applying for registration, is liable to a penalty which can extend up to 5% (five percent) of the estimated cost of the real estate project, as determined by the Authority.

Contravention where specific penalty not stipulated

Any promoter, who contravenes any provisions of RERA or the rules or regulations made thereunder, where the specific penalty is not stipulated, is liable to a penalty which can extend up to 5% (five percent) of the estimated cost of the real estate project as determined by the Authority.

Failure to comply with orders of Authority

Any promoter, who fails to comply with, or contravenes any of the orders or directions of the Authority, is liable to a penalty for every day during which such default continues, which may cumulatively extend up to 5% (five percent) of the estimated cost of the real estate project as determined by the Authority.

Failure to comply with orders of Appellate Tribunal

Any promoter, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, is punishable with imprisonment for a term which may extend up to 3 (three) years or with fine for every day during which such default continues, which may cumulatively extend up to 10% (ten percent) of the estimated cost of the real estate project, or with both.

Penalty for real estate agent

Non-registration

Any real estate agent who is required to register under RERA, but fails to do so, is liable to a penalty of Rs. 10,000 (Indian rupees ten thousand) for every day during which such default continues, which can cumulatively extend up to 5% (five percent) of the cost of plot, apartment or buildings, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority.

Failure to comply with orders of Authority

Any real estate agent, who fails to comply with, or contravenes any of the orders or directions of the Authority, is liable to a penalty for every day during which such default continues, which may cumulatively extend up to 5% (five percent), of the estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated and as determined by the Authority.

Failure to comply with orders of Appellate Tribunal

Any real estate agent, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, is punishable with imprisonment for a term which may extend up to 1 (one) year or with fine for every day during which such default continues, which may cumulatively extend up to 10% (ten percent) of the estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated, or with both.

Penalty for allottee

Failure to comply with orders of Authority

If any allottee, who fails to comply with, or contravenes any of the orders, decisions or directions of the Authority he shall be liable to a penalty for the period during which such default continues, which may cumulatively extend up to 5% (five percent) of the plot, apartment or building cost, as the case may be, as determined by the Authority.

Penalty for failure to comply with orders of Appellate Tribunal

If any allottee, who fails to comply with, or contravenes any of the orders or directions of the Appellate Tribunal, as the case may be, is punishable with imprisonment for a term which may extend up to 1 (one) year or with fine for every day during which such default continues, which may cumulatively extend up to 10% (ten percent) of the plot, apartment or building cost, as the case may be, or with both.

Offences by companies

If the offence under RERA is committed by a company, every person who, at the time, the offence was committed was in charge of, or was responsible to the company for the conduct of, the business of the company, as well as the company, is deemed to be guilty of the offence and is liable to be proceeded against and punished accordingly. However, if such person proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence, then he shall not be liable.

Further, if the offence under RERA is committed by a company, and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer is also deemed to be guilty of that offence and is liable to be proceeded against and punished accordingly.

The term “company” means any body corporate and includes a firm, or other association of individuals. The term “director” in relation to a firm, means a partner in the firm.

Compounding of offences

Notwithstanding anything contained in the *Code of Criminal Procedure, 1973*, if any person is punished with imprisonment under RERA, the punishment may, either before or after the institution of the prosecution, be compounded by the court on such terms and conditions and on payment of such sums as may be prescribed. However, such sum as prescribed shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded.

Recovery of interest/penalty/compensation and enforcement of order

If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Authority or the Appellate Tribunal, as the case may be, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.

If any adjudicating officer or the Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under RERA or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed.

Chapter 13 Consumer Protection Law

The Consumer Protection Act, 1986

¶13-010 Introduction

The *Consumer Protection Act, 1986* (CPA) is an Act that provides for effective protection of interests of consumers and as such makes provision for the establishment of consumer councils and other authorities that help in settlement of consumer disputes and matters connected therewith.

The CPA seeks to protect the interests of individual consumers by prescribing specific remedies to make good the loss or damage caused to consumers as a result of unfair trade practices.

¶13-020 Background

Unlike the law of torts which is not codified in India, there are certain legislations that have been formulated for the protection of interests of consumers. Some of the significant enactments that are aimed at protection of such interests of the consumers include the *Sale of Goods Act, 1930*, the *Agricultural Produce (Grading and Marketing) Act, 1937*, the *Drugs and Cosmetics Act, 1940*, the *Indian Standards Institution (Certification Marks) Act, 1952*, the *Food*

Safety and Standards Act, 2006, the *Essential Commodities Act, 1955*, the *Legal Metrology Act, 2009*, etc.

These legislations contain regulatory provisions contravention of which, in most cases, attract civil liability. Earlier, the aggrieved consumer had no remedy but to initiate action by way of a civil suit, a lengthy and expensive process which caused undue harassment to the consumers. As a consequence, the cost and time involved was disproportionate to the compensation claimed and granted to the aggrieved consumer.

The CPA provides for quick and easy remedy to consumers under a three-tier quasi-judicial redressal agency at the District, State and National levels. The CPA has been amended from time to time to extend its coverage and scope and to enhance the powers of the redressal machinery.

¶13-030 Scope

Broadly speaking, the CPA seeks to protect the following basic rights of consumers:

- Right against the marketing of goods and services which are hazardous to life and property;
- Right to be informed about the quality, quantity, potency, purity, standard and price of goods or services;
- Right to choice, wherever possible through access, to a variety of goods and services at competitive prices;
- Right to be heard and to be assured that consumers' interests will receive due consideration at appropriate forums;
- Right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers;
- Right to consumer education; and
- Right to clean and healthy environment.

Who is a consumer?

Section 2(d) of the CPA defines "consumer" as a person who:

> "*(a) Buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for a consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or*
>
> *(b) Hires or avails of any services for consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than*

the person who hires or avails of the services for a consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose. It may, however, be noted that "commercial purpose" does not include use by a person of goods bought and services exclusively for the purposes of earning his livelihood by means of self-employment."

From the above definition, it can be observed:

- The goods or services must have been purchased or hired or availed of for a consideration which has been paid in full or in part or under a system of deferred payment, ie, in respect of hire-purchase transactions;
- The goods purchased should not be meant for resale or for a commercial purpose. Goods purchased by a dealer in the ordinary course of his business and those which are in the course of his business to supply would be deemed to be for re-sale;
- In addition to the purchaser(s) of goods, or hirer(s) or user(s) of services, any beneficiary of such services, a user of goods/services with the approval of the purchaser or hirer or user would also be deemed to be a "consumer" under the Act.

¶13-040 Consumer Protection Council

The interests of consumers are sought to be protected and promoted under the Act inter alia by establishment of Consumer Protection Councils at the District, State and National levels.

¶13-050 Redressal Machinery under the Act

The Act provides for a three-tier quasi-judicial redressal mechanism at the District, State and National levels for redressal of consumer disputes and grievances, namely:

National Consumer Disputes Redressal Commission (commonly known as National Commission)

It has jurisdiction to entertain complaints where the value of goods/services complained against and the compensation, if any claimed, exceeds Rs. 10,000,000 (Indian Rupees 10 million).

State Consumer Disputes Redressal Commission (commonly known as State Commission)

It has jurisdiction to entertain complaints where the value of goods/services complained against and the compensation, if any claimed, exceeds Rs. 2,000,000 (Indian Rupees 2 million) but less than Rs. 10,000,000 (Indian Rupees 10 million).

District Consumer Disputes Redressal Forum (commonly known as District Forum)

It has jurisdiction to entertain complaints where the value of goods/services complained against and the compensation, if any claimed, is less than Rs. 2,000,000 (Indian Rupees Two Million).

¶13-060 Applicability of the Law of Limitation

The District Forum, the State Commission and/or the National Commission shall not admit a complaint unless it is filed within 2 years from the date on which the cause of action has arisen. However, where the complainant satisfies the Forum/Commission, as the case may be, that he has sufficient cause for not filing the complaint within 2 years, such a complaint may be entertained by such Forum/Commission after recording the reasons for condoning the delay.

¶13-070 Remedies under the CPA

Depending on the facts and circumstances, the redressal forums may issue orders for one or more of the following relief(s):

- Removal of defects from the goods;
- Replacement of the goods;
- Refund of the price paid;
- Award of compensation for the loss or injury suffered;
- Withdrawal of the hazardous goods from being offered for sale; or
- Award for adequate costs to parties;
- Removal of defects or deficiencies in the services; and
- Discontinuance of unfair trade practices or restrictive trade practices or direction not to repeat them.

¶13-080 The Consumer Protection Act, 2019

In order to strengthen the consumer protection mechanism, the *Consumer Protection Bill, 2018* ("Bill") was introduced in Lok Sabha (Lower House) on 5th January, 2018 to replace the *Consumer Protection Act 1986* ("Act"). The Bill was passed in both the houses and received assent of the President on 9th August 2019. The Consumer Protection Act, 2019 shall come into force on such date as the Central Government notifies.

This act introduces various concepts which include provisions relating to product liability action, e-commerce and establishment of a regulating body.

Moreover, the significant proposed amendments also include the following:

- The Act expanded the definition of a consumer by insertion of sub-clause to the explanation appended to the section. Now, the expressions "buys any goods" and "hires or avails any services" includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing.

- The Act seeks to enhance the pecuniary jurisdiction of Consumer Protection Councils at the District, State and National levels to entertain complaints where the value of goods/services complained against and the compensation, if any claimed.
  - Pecuniary jurisdiction for National Consumer Disputes Redressal Commission will be in respect of claims exceeding Rs. 100,000,000 (Indian Rupees 100 million);
  - Pecuniary jurisdiction for State Consumer Disputes Redressal Commission will be in respect of claims exceeding Rs. 10,000,000 (Indian Rupees 10 million) but less than Rs. 100,000,000 (Indian Rupees 100 million); and
  - Pecuniary jurisdiction for District Consumer Disputes Redressal Commission will be in respect of claims not exceeding Rs. 10,000,000 (Indian Rupees 10 million)
- The Act seeks to provide for the establishment of an executive agency to be Central Consumer Protection Authority (CCPA) to promote, protect and enforce the rights of consumers; make interventions when necessary to prevent consumer detriment arising from unfair trade practices and to initiate class action including enforcing recall, refund and return of products, etc.
- The Act also seeks to provide for severe penalties in case of false and misleading advertisement. It provides that if any manufacturer or service provider who causes a false or misleading advertisement to be made which is prejudicial to the interest of consumers shall be punished with imprisonment for a term which may extend to 2 years and with fine which may extend to Rs. 1,000,000 (Indian Rupees 1 million) and for every subsequent offence, be punished with imprisonment for a term which may extend to 5 years and with fine which may extend to Rs. 5,000,000 (Indian Rupees 5 million).
- Severe penalties are also specified for adulterated products and spurious goods.
- Act also provides that a consumer can also file the compliant electronically. The rules in this regard may be issued separately in due course.
- Act also seeks to provide for product liability action on account of harm caused to consumers due to a defective product or by deficiency in services. Also, provision of “Mediation” as an Alternate Dispute Resolution Mechanism has been provided for.

¶13-090 Interplay with Real Estate and Arbitration

As per Section 71 of the Real Estate (*Regulation and Development*) Act 2016, any person whose complaint in respect of matters covered under Sections 12, 14, 18 and Section 19 of RERA is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission on or before the commencement of this Act, may with the permission of such Forum or Commission withdraw the complaint pending before it and file an application before the adjudicating officer under the RERA.

The Supreme Court has examined the interplay between RERA and the CPA in the case of *Pioneer Urban Land and Infrastructure v Union of India* 2019 SCC Online SC 1005 held that the rights of a real estate allottee as a consumer are concurrent and he may avail of concurrent remedies under Consumer Protection Act 1986 along with Real Estate (*Regulation and Development*) Act 2016 or the Insolvency and Bankruptcy Code of 2016. RERA does not bar a consumer from approaching Consumer Forum for remedies under CPA 1986. The reasoning was adopted by the Delhi Court in the case of *Messrs M3M India Private Limited v. Dr Dinesh Sharma* (CM (M) 1244 of 2019 & CM APPL 38052-38053 of 2019).

Further, the Supreme Court in judgment dated 10.12.2018 in *M/S Emaar Mgf Land Limited vs Aftab Singh* in Review Petition (C) Nos. 2629-2630 of 2018 in Civil Appeal Nos. 23512-23513 of 2017 upheld the ruling of the NCDRC refusing to compel parties in a real estate transaction to enter into arbitration in terms of arbitration clause in agreement, and further holding that consumer disputes are non-arbitrable.

The National Commission in the case of *Aftab Singh v. Emaar MGF Land Limited & Anr* (Consumer Case No. 701 of 2015) held that for matters arising out of arbitration clauses the Consumer Forum is the appropriate forum to hear the disputes. Thus, the consumer disputes are within the 'non arbitrable disputes'.

¶13-100 Legal Metrology Act, 2009

The Legal Metrology Act had repealed and replaced the *Standard of Weights and Measures Act, 1976* and the *Standards of Weights and Measures (Enforcement) Act, 1985*. Ever since science and technology started changing rapidly, there have been a lot of improvements in techniques of weighing and measuring products.

The Central Government had come up with a new set of laws in order to (a) establish standards of Weights & Measures; and (b) to regulate trade and commerce in Weights and Measures. For achieving the aforesaid, the Government had enacted the *Legal Metrology (Packaged Commodities) Rules, 2011* thereby regulating the content and manner of declarations to be made on a packaged commodity which is meant for sale.

Recently, Ministry of Consumer Affairs and Food and Public Distribution has notified an amendment in the *Legal Metrology (Packaged Commodities) Rules, 2011* which will come in force from January 01, 2018.

Pursuant to the above amendment, the manner and content of the declarations which are made on packaged commodities will be regulated and shall serve in interest of the consumers.

Chapter 14 Environment Laws

¶14-010 Background

The need for protection and conservation of environment and sustainable use of natural resources is reflected in the constitutional framework of India and also in the international commitments of India. The Constitution under Part IVA (Article 51A - Fundamental Duties) casts a duty on every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures. Further, the Constitution of India under Part IV (Article 48A - Directive Principles of State Policies) stipulates that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

The Ministry of Environment, Forest and Climate Change (MoEFCC) is the nodal agency in the administrative structure of the Central Government for the planning, promotion, co-ordination and overseeing the implementation of India's environmental and forestry policies and programs.

Since the 1970s, a number of environment legislations have been put in place. The MoEFCC and the pollution control boards (“CPCB”, ie, Central Pollution

Control Board and "SPCBs", ie, State Pollution Control Boards) together form the regulatory and administrative core of the sector.

Some of the important legislations and rules for environment protection are as follows:

- The *National Green Tribunal Act, 2010*
- The *Air (Prevention and Control of Pollution) Act, 1981*
- The *Water (Prevention and Control of Pollution) Act, 1974*
- The *Environment Protection Act, 1986*
- The Hazardous Waste Management Rules/Regulations
  - The *Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016*
  - The *Bio-Medical Waste Management Rules, 2016*
  - The *Solid Waste Management Rules, 2016*
  - The *Construction and Demolition Waste Management Rules, 2016*
  - The *Plastic Waste Management Rules, 2016*
  - The *E-Waste (Management) Rules, 2016*, etc.

Legislation for Environmental Protection in India

¶14-020 The National Green Tribunal Act, 2010

The *National Green Tribunal Act, 2010* (No. 19 of 2010) ("NGT Act") has been enacted with the objectives to provide for the establishment of a National Green Tribunal ("NGT") for the effective and expeditious disposal of cases relating to environment protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith of incidental thereto.

NGT has been established to deal with and to expeditiously attend to the matters pertaining to environmental protection and conservation of forests and other natural resources. NGT has also been entrusted with the responsibility to enforce legal rights relating to environment and providing relief in cases related to environment. It is important to note that while the NGT is not strictly bound to follow the procedures laid under the *Code of Civil Procedure, 1908*, it continues to be guided by the principles of natural justice.

NGT, today is playing a pivotal role in protection of the environment. It should also be noted that, as per Section 26(1) of the NGT Act, any person who fails to comply with the order or award or decision of the NGT, is punishable with imprisonment for a term which may extend to 3 years, or with fine which may extend to Rs. 10,000,000 (Indian Rupees 100 million only), or both. It further provides that in case of any continuing offence, additional fine which may extend to Rs. 25,000 (Indian Rupees Twenty-Five Thousand only) for everyday of such continuing default, may also be levied.

In case a company fails to comply with any order or award or a decision of the NGT, such company shall be punishable with fine which may extend to Rs. 250,000,000 (Indian Rupees 250 million only), and in case the failure or contravention continues, with additional fine which may extend to Rs. 100,000 (Indian Rupees One Hundred Thousand only) for everyday during which such failure or contravention continues, after conviction for the first such failure or contravention.

¶14-030 The Air (Prevention and Control of Pollution) Act, 1981

The *Air (Prevention and Control of Pollution) Act, 1981* (the "Air Act") is an act to provide for the prevention, control and abatement of air pollution and for the establishment of Boards at the Central and State levels with a view to carrying out the aforesaid purposes.

To counter the problems associated with air pollution, ambient air quality standards were established under the Air Act. The Air Act seeks to combat air pollution by prohibiting the use of polluting fuels and substances, as well as by regulating appliances that give rise to air pollution. Section 19 of the Air Act empowers the State Government, after consultation with the State Pollution Control Boards ("SPCBs"), to declare any area or areas within the Sate, as air pollution control area, or areas. Under the Air Act, establishing or operating any industrial plant in the pollution control area requires consent from SPCBs. SPCBs are also expected to test the air in air pollution control areas, inspect pollution control equipment, and manufacturing processes.

¶14-040 The Water (Prevention and Control of Pollution) Act, 1974

The *Water Prevention and Control of Pollution Act, 1974* (the "Water Act") was passed under clause (1) of Article 252 of the Constitution of India with the object to provide for the prevention and control of water pollution and to maintain or restore wholesomeness of water in the country. It further provides for the establishment of Boards for the prevention and control of water pollution with a view to carry out the aforesaid purposes. Section 7 of the Water Act prohibits the discharge of pollutants into water bodies beyond a given standard, and lays down penalties for non-compliance. At the Central level, the Water Act has set up the CPCB which lays down standards for the prevention and control of water pollution as prescribed under chapter V of the Act. At the State level, SPCBs function under the direction of the CPCB and the State Government.

Further, the *Water (Prevention and Control of Pollution) Cess Act, 1977* was enacted in 1977 to provide for the levy and collection of a cess on water consumed by persons operating and carrying on certain types of industrial activities. This cess is collected with a view to augment the resources of the Central Board and the State Boards constituted under the *Water (Prevention and Control of Pollution) Act,* 1974, for the prevention and control of water pollution.

¶14-050 The Environment Protection Act, 1986

The *Environment Protection Act, 1986* (the "Environment Act") provides for the protection and improvement of environment. The Environment Protection Act establishes the framework for studying, planning and implementing long-term requirements of environmental safety and laying down a system of speedy and adequate response to situations threatening the environment. It is an umbrella legislation designed to provide a framework for the coordination of central and state authorities established under the Water Act and the Air Act. The term "environment" is understood in a very wide term under Section 2(a) of the Environment Act. It includes water, air and land as well as the inter-relationship which exists between water, air and land, and human beings, other living creatures, plants, micro-organisms and property.

Under the Environment Act, the Central Government is empowered to take measures necessary to protect and improve the quality of environment by setting standards for emissions and discharges of pollution in the atmosphere by any person carrying on an industry or activity; regulating the location of industries; management of discharge and disposal of hazardous wastes, and protection of public health and welfare. From time to time, the Central Government issues notifications under the Environment Act for the protection of ecologically sensitive areas or issues guidelines for matters under the Environment Act.

In case of any non-compliance or contravention of the Environment Act, or of the rules or directions under the said Act, the violator is punishable with imprisonment up to 5 years or with fine up to Rs. 100,000 (Indian Rupees One Hundred Thousand only), or with both. In case of continuation of such violation, an additional fine of up to Rs. 5,000 (Indian Rupees Five Thousand only) for everyday during which such failure or contravention continues after the conviction for the first such failure or contravention, may be levied. Further, if the violation continues beyond a period of 1 year after the date of conviction, the offender is punishable with imprisonment for a term which may extend to 7 years. It is further relevant to note as per Section 24 Environment Act, where any contravention is punishable under the Environment Act and also under any other Act, then the offender found guilty of such offence shall be liable to be punished under the other Act and not under the Environment Act.

¶14-060 Hazardous Wastes Management Regulations

Hazardous waste means any waste which, by reason of any of its physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics, causes danger or is likely to cause danger to health or environment, whether alone or when in contact with other wastes or substances.

There are several legislations that directly or indirectly deal with hazardous waste management. The relevant legislations are the *Factories Act, 1948*, the *Public Liability Insurance Act, 1991*, the *National Environment Tribunal Act, 1995* and rules and notifications under the Environmental Act. Some of the important rules dealing with hazardous waste management are discussed below:

- **The *Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016***: These rules primarily provide for procedure for management (including its storage, handling, imports, and storage, etc.) of hazardous and other wastes and also provide for the responsibilities of the occupier in this regard. The occupier is responsible for safe and environmentally sound management of hazardous and other wastes. Import and export of hazardous waste is strictly regulated under these rules. These rules supersede the *Hazardous Wastes (Management, Handling and Transboundary) Rules, 2008*.
- **The *Bio-Medical Waste Management Rules, 2016*:** These rules regulate all persons who generate collect, receive, store, transport, treat, dispose, or handle bio-medical waste in any form and include hospitals, nursing homes, clinics, dispensaries, veterinary institutions, pathological laboratories, blood banks, research or educational institutions, etc. The rules provide guidelines which must be adhered to by the occupier of an institution or premises generating bio-medical waste, which collecting, storing, transporting, treating, handling and disposing-off bio-medical wastes. The ambit of the rules has been expanded to include vaccination camps, blood donation camps, surgical camps or any other healthcare activity. Under these Rules, hospitals are required to put in place mechanisms for effective disposal of bio-medical wastes either directly or through common biomedical waste treatment and disposal facilities. Operators of common bio-medical waste treatment and disposal facility are also required to establish bar coding and global positioning system for handling of bio-medical wastes. These rules superseded the *Bio-Medical Waste (Management and Handling) Rules, 1998*.
- **The *Solid Waste Management Rules, 2016***: These rules aim at enabling generators of solid wastes to dispose-off such waste in a scientific manner. The applicability of these rules are now not limited to municipal areas, rather it extends to urban agglomerations, census towns, notified industrial townships, areas under the control of Indian Railways, airports, airbase, port and harbour, defence establishments, special economic zones, State and Central Government organisations, places of pilgrims, religious and historical importance and every domestic, institutional, commercial and any other non-residential solid waste generator situated in the areas. Group Housing Societies have been made responsible to develop in-house waste handling, and processing

arrangements for bio-degradable waste. These rules superseded the *Municipal Solid Waste (Management and Handling) Rules, 2000*.

- **The *Construction and Demolition Waste Management Rules, 2016*:** These rules provide for disposal of wastes resulting from construction, re-modelling, repair and demolition of any civil structure. These rules apply to every waste resulting from construction, re-modeling, repair and demolition of any civil structure of an individual or an organisation or an authority who generates construction and demolition waste such as building materials, debris, rubble, etc. As per Rule 6, local authorities are responsible for proper management of construction and demolition waste within its jurisdiction including placing appropriate containers for collection of waste, removal at regular intervals, transportation to appropriate sites for processing and disposal.
- **The *Plastic Waste Management Rules, 2016*:** These rules give thrust on plastic waste minimisation, source segregation, recycling, etc. These rules also provide for stringent conditions for manufacturers, importers, distributors, etc., of carry bags, plastic sheets, etc. The rules also detail out role and responsibilities of urban local bodies for development and setting up of infrastructure for segregation, collection, storage, transportation, processing and disposal of plastic wastes. These rules superseded the *Plastic Waste (Management and Handling) Rules, 2011*.
- **The *E-Waste (Management) Rules, 2016***: These rules prescribe for detailed guidelines for collection, storage and disposal of e-wastes with primary objective to reduce the use of hazardous substances in electrical and electronic equipment by specifying threshold for use of hazardous material and to channelise the e-waste generated in the country for environmentally sound recycling. These Rules apply to every producer, consumer or bulk consumer, collection centre, dismantler and recycler of e-waste involved in the manufacture, sale, purchase and processing of electrical and electronic equipment or components. These rules superseded the *E-waste (Management and Handling) Rules, 2011*. As per the *E-Waste Management (Amendment) Rules, 2018*, in case of any violation of the rules, all persons to whom these rules apply (i.e. manufacturer, producer, importer, transporter, refurbisher, dismantler and recycler), shall be liable to pay financial penalties as levied under the provisions of the *Environment (Protection) Act, 1986* and rules made thereunder by the State Pollution Control Boards with the prior approval of the Central Pollution Control Board in accordance with the guidelines published by the Central Pollution Control Board.
- ***Batteries (Management & Handling) Rules, 2001:*** These Rules deal with the proper and effective management and handling of lead acid batteries waste. The aforesaid rules require all manufacturers, assemblers, re-conditioners, importers, dealers, auctioneers, bulk consumers, consumers, involved in manufacture, processing, sale, purchase and use

of batteries or components thereof, to comply with the provisions of these rules. The Ministry of Environment, Forest and Climate Change ("MoEFCC"), through a gazette notification dated February 20, 2020, has issued the *Draft Battery Waste Management Rules, 2020* ("Draft Rules"), with the aim of superseding the *Batteries (Management and Handling) Rules, 2001*. The Draft Rules aim at ensuring safe recycling of batteries. The propose rules also lay out the responsibilities of the manufacturer, importer, assembler, re-conditioner, consumer, exporter, dismantler, collection centre and State/Central pollution control board. The Draft Rules are pending approval of the Central Government as on date.

Other Laws Relating to Environment

In addition, there are many other laws relating to environment, namely:

¶14-070 The Wildlife Protection Act, 1972

The *Wild Life (Protection) Act, 1972* was enacted with the objective of effectively protecting the wild life of this country and to control poaching, smuggling and illegal trade in wildlife and its derivatives. The Act was amended in January 2003 pursuant to which, punishment and penalty for offences under it were made more stringent. The Government of India has proposed further amendments in the law by introducing more rigid measures to strengthen the Act. The objective is to provide protection to the listed endangered flora and fauna and ecologically important protected areas. Further the Act was amended in 2006 with the purpose to strengthen the conservation of tigers and other endangered species by combating crimes against them through the special Crime Control Bureau. The Wildlife Protection Amendment Bill, 2013, was introduced by Environment Minister but was subsequently withdrawn in 2015 to review the proposed amendments to ensure that all relevant issues pertaining to wildlife protection are adequately covered in addition to the obligations of the country under various international treaties. A revised amendment to the Act is pending as on date.

¶14-080 The Forest Conservation Act, 1980

The *Forest Conservation Act, 1980* was enacted to help conserve the country's forests. It strictly restricts and regulates the de-reservation of forests or use of forest land for non-forest purposes without the prior approval of Central Government. To this end, the Act lays down the pre-requisites for the diversion of forest land for non-forest purposes.

¶14-090 The Indian Forest Act, 1927

The *Indian Forest Act, 1927* consolidates the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce.

¶14-100 The Public Liability Insurance Act, 1991

The *Public Liability Insurance Act, 1991* was enacted with the objectives to provide for damages to victims of an accident which occurs as a result of handling any hazardous substance. The Act applies to all owners associated with the production or handling of any hazardous substances notified under the *Environment (Protection) Act, 1986,* in excess of such quantity as may be notified by the Central Government from time to time. The Act provides for procurement of adequate insurance policies before handling of any hazardous substance is undertaken.

¶14-110 The Biological Diversity Act, 2002

The *Biological Diversity Act, 2002* was born out of India's attempt to realise the objectives enshrined in the *United Nations Convention on Biological Diversity (CBD), 1992* which recognises the sovereign rights of states to use their own biological resources. The Act aims at the conservation of biological resources and associated knowledge as well as facilitating access to them in a sustainable manner. The National Biodiversity Authority in Chennai has been established for the purposes of implementing the objects of the Act.

Coastal Regulation Zone Notification

The Ministry of Environment and Forests had issued the Coastal Regulation Zone Notification *vide* Notification No. S. O. 19(E), dated January 06, 2011 to declare certain coastal stretches as Coastal Regulation Zones (CRZ) and impose restrictions on the setting up and expansion of industries in such zones. The said notification has been amended from time to time to facilitate sustainable development of the CRZ with due consideration to the management and conservation of marine and coastal ecosystems, development in coastal areas eco-tourism, livelihood options and sustainable development of coastal communities.

The Ministry of Environment, Forest and Climate Change (MoEF&CC) had framed a new draft Coastal Regulation Zone (CRZ) Notification, 2018 which was notified on January 18, 2019 *vide* notification GSR 37(E). The new CRZ notification aims at facilitating economic growth, tourism and employment in the coastal areas which maintaining a balance in respect of conservation efforts undertaken in the CRZ.

¶14-120 The Compensatory Afforestation Fund Act, 2016

This act provides for setting up Compensatory Afforestation Fund Management and Planning Authority (CAMPA) at both central and state level to ensure expeditious and transparent utilisation of amounts realized from various industries in lieu of forest land diverted for non-forest purposes. The utilisation of funds is expected to mitigate the impact of diversion of such forest land.

Useful Web Link:

1. Ministry of Environment, Forest and Climate Change : http://www.moef.gov.in/
2. National Green Tribunal (NGT): http://www.greentribunal.gov.in/

Chapter 15 Special Schemes for Export Promotion (SEZs/EOUs/STPs/EHTPs/BTPs/IFSC)

Various schemes have been introduced by the Government from time to time to encourage exports, viz., Special Economic Zones (SEZs), Export Oriented Units (EOUs), Software Technology Parks (STPs), Electronics Hardware Technology Parks (EHTPs), Bio-technology Parks (BTPs), etc.

¶15-010 Special Economic Zones

With a view to providing an internationally competitive environment for exports, the Government of India announced the SEZ Policy in April 2000. The objectives of the SEZ Policy include making available goods and services free of taxes and duties supported by integrated infrastructure for export production, expeditious and single-window approval mechanism and a package of incentives to attract foreign and domestic investments for promoting export-led growth.

Initially, SEZs in India functioned from 01st November, 2000 to 09th February, 2006 under the provisions of the Exim Policy/Foreign Trade Policy and fiscal incentives were made available through the provisions of relevant statutes. This system did not lend enough confidence to the investors to commit substantial investment for development of infrastructure and for the setting up of units for export of goods and services.

In order to provide a long-term and stable policy framework with minimum regulatory regime and to provide expeditious and single-window clearance mechanism in line with the international best business practices, a Central Act for Special Economic Zones was therefore found to be necessary. The *Special Economic Zones Act, 2005* (SEZ Act) was enacted by the Government in 2005. Subsequently, the *Special Economic Zones Rules, 2006* (SEZ Rules) were notified on February 10, 2006. Consequently, the SEZ Act came into operation w.e.f. February 10, 2006.

The SEZ Policy provides for simplified procedures and single-window clearance mechanism to deal with matters under Central/State enactments. For SEZ developers, there are different minimum-land requirements for different classes of SEZs. Every SEZ is divided into a processing area, within which only the SEZ units would come up, and the non-processing area, where the supporting infrastructure is to be created.

The salient features of the SEZ Policy are as follows:

- Simplified procedures for development, operation, and maintenance of the SEZs and for setting up units and conducting business in SEZs;
- Single-window clearance for setting up of SEZ;
- Single-window clearance for setting up units in SEZ;
- Single-window clearance on matters relating to Central as well as State Governments;
- Simplified compliance procedures and documentation with an emphasis on self-certification; and
- Availability of package of fiscal incentives and concessions.

The principal objectives behind the design of creating the Special Economic Zone (SEZ) in the country like India include the following[1]:

i. Generation of additional economic activity;

ii. Promotion of exports of goods and services;

iii. Promotion of investment from domestic and foreign sources;

iv. Creation of employment opportunities; and

v. Development of infrastructure facilities.

Further, the Government of India has taken various steps to strengthen SEZs in the country, as illustrated under:

i. Minimum Land Area requirement for setting up of new SEZs has been reduced to 50 hectares.

1 Refer-http://pib.nic.in/newsite/PrintRelease.aspx?relid=154912

ii. The classification of Multi product and Sector specific SEZ has been removed. All existing and new SEZs would become Multi product SEZs thereby enabling coexistence of an SEZ unit from any sector along with any other SEZ unit.

iii. Sectoral broad-banding has been introduced to encompass similar/ related areas under the same Sector.

iv. A new sector "agro-based food processing" sector has been introduced to encourage agro-based industries in SEZs.

v. Dual use of facilities like Social & Commercial infrastructure by SEZs and non-SEZs entities has been allowed in order to make SEZ operations more viable.

vi. Online processing of various activities relating to SEZ Developers and Units has been introduced for improving ease of doing business.

vii Initiatives of setting up International Financial Services Centre (IFSC) in India were undertaken as a further extension to SEZs and to attract foreign investment by way of establishing international trade hub in India.

Administrative Set-up

- The administrative set-up for functioning of SEZs is as under:

Board of Approval

↓

Zonal Development Commissioner(s)

↓

Unit Approval Committee(s)

↓

Development Commissioner(s)

- The Board of Approval (BoA) is the apex body and is headed by the Secretary, Department of Commerce, Ministry of Commerce and Industry, Government of India.
- The Unit Approval Committee (UAC) at the Zonal level deals with approval of units in the SEZs and other related issues.
- Each SEZ is headed by a Development Commissioner, who is *ex officio* chairperson of the UAC.
- Once an SEZ has been approved by the BOA and Central Government has notified the area of the SEZ, units are allowed to be set up in that SEZ. All the proposals for setting up of units in the SEZ are approved at the Zonal level by the UAC consisting of Development Commissioner, Customs Authorities and representatives of the State Government.

"Ease of Doing Business in India" initiative-Online Filing Facility for SEZ Proposals

Ministry of Commerce and Industry vide Notification No. D.12/25/2012-SEZ (Pt.) dated 30th June, 2015[1] provides for digitisation of application/permissions by SEZ Units/Developers (Phase-II).

The Department of Commerce, Ministry of Commerce and Industry (MoCI), had announced the online filing of SEZ proposals *vide Circular F. No. D.12/13/2008-SEZ, dated October 21, 2008*. The following online services were being offered through the SEZ online link on the website http://www.sezindia.nic.in/:

- Filing of application (Form A) for setting up SEZ.
- Filing of other requests, viz, Application for authorised operations, addition of co-developer, application for conversion of in-principle approval to formal approval, application for validity extension of approvals, change in developing entity, change in sector, change in area/location, land details.
- Inbuilt e-mail box for each developer/co-developer to enable them to communicate with the Department.
- Online status of requests.

For filing of new applications, a physical copy of the complete application form after due signatures and authentication has to be submitted along with necessary enclosures.

In addition to the various applications digitised *vide Department's Circular No. D.12/25/2012-SEZ dated October 28, 2014*, as a part of "Ease of Doing Business" initiative of Department of Commerce, the following additional transactions are identified by Department of Commerce as important applications made by SEZ units and Developers to Development Commissioner's office and Department of Commerce for various approvals/intimations/reporting.

Accordingly, with effect from July 01, 2015, online submission process for the following transactions has been made part of the SEZ Online System:

For SEZ Developers:

1. Application for change of sector of SEZ (Form C3).
2. Application for addition of land in notified SEZ (Form C4).
3. Application for deletion of land in notified SEZ (Form C5).
4. Application for De-notification of Notified SEZ (Form C6).
5. Application for Form I for CST Exemption (this now subsumed into GST and supplies to SEZs are zero rated under IGST Act, 2017).

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1 Refer-http://sezindia.nic.in/writereaddata/GeneralNotifications/Digitazation%20of%20application.pdf

6. Application to lease out space for canteen facilities, etc, in processing area.
7. Application for approval of list of materials and services to carry on authorised operation in SEZ.
8. Receipt and examination of the proposal by DC Office for setting up of SEZ, Processing the proposal along with site inspection report to DOC for consideration by Board of Approval (BoA).

For SEZ Units

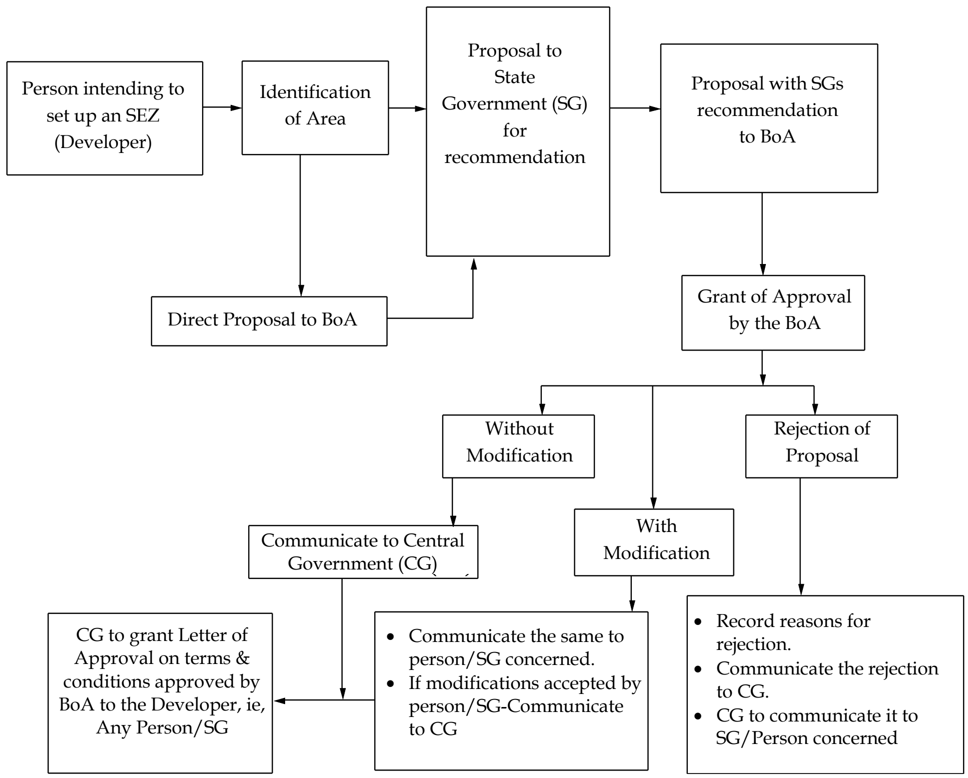
1. Application for Issuance of Importer Exporter Code.
2. Application for Issuance of Registration-Cum-Membership Certificate.
3. Application for issuance of Form-I for CST Exemption (this now subsumed into GST and supplies to SEZs are zero rated under IGST Act, 2017).
4. Application for approval of list of services.
5. Application for addition of area of unit.
6. Application for deletion of area of unit.

Further, no manual interface is to be allowed with effect from 01st July, 2015 w.r.t. applications already identified and conveyed *vide* aforementioned circular of even number dated 28th October, 2014 (Phase-I).

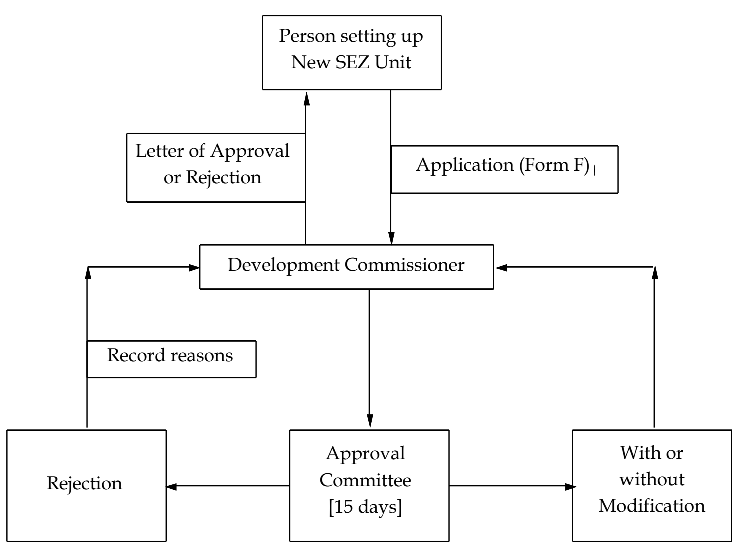
Process of setting up of SEZ

Setting up of a Special Economic Zone

(a)



(b)



It is to be noted that as per the amendment under the *SEZ (Amendment) Rules, 2016*, it has been made mandatory for SEZ units or developer (including co-developer) and the Export Oriented Units (EOUs) to obtain Registration-cum-Membership-Certificate (RCMC) from the Export Promotion Council to avail exemptions, drawbacks and concessions.

Incentives to the SEZs

SEZs are deemed to be a foreign territory for the purposes of trade operations, duties and tariffs.

Incentives to SEZ Developers

Major incentives and facilities available to SEZ Developers include:

- Exemption from customs duty on import of goods for authorised operations.
- 100% (one hundred percent) deduction from income tax on income derived from the business of development of the SEZ in a block of 10 consecutive years out of 15 years under Section 80-IAB of the Income Tax Act.
  Note: *A sunset clause has been introduced by the Finance Act, 2016. Accordingly, the provisions of Section 80-IAB shall not apply to an assessee, being a Developer, where the development of SEZ begins on or after the 1st day of April, 2017.*

  In other words, the income-tax incentive under Section 80-IAB of the Income Tax Act shall not be available to the SEZ Developers who begin development of SEZ on or after April 01, 2017.
- Under the GST regime, the supplies made to an SEZ Developer will be zero rated.
- As per the recent amendments now a Developer including Co-Developer shall obtain an RCMC for availing exemptions, drawbacks and concessions.

Incentives to SEZ Units:

Major incentives and facilities offered to the Units in SEZs include:

- Duty free import/domestic procurement of goods meant for the authorised operations of SEZ units.
- 100% (one hundred percent) income tax exemption on export income for SEZ units under Section 10AA of the Income Tax Act for first 5 years, 50% (fifty percent) for next 5 years thereafter, and 50% (fifty percent) of the ploughed back export profit for next 5 years.

  Note: *A sunset clause has been introduced by the Finance Act, 2016. Accordingly, exemption under Section 10AA is available only to an entrepreneur whose unit begins operations before 1st day of April 2021.*
- **External Commercial Borrowing (ECB)** by SEZ units up to US$ 750 million in a year through recognised banking channels, is allowed under

the automatic route. SEZ Units (as Eligible borrowers) are eligible to raise foreign currency denominated ECB as well as Indian Rupee denominated ECB with the applicability of minimum average maturity criteria prescribed under the extant ECB legal framework. *SEZ Units can however raise ECB only for their own requirements.*

- Under the GST regime, the supplies made to an SEZ unit will be zero rated.
- As per the recent amendments, now the SEZ unit shall obtain an RCMC for availing exemptions, drawbacks and concessions.

Obligations of SEZ Units

- To achieve positive Net Foreign Exchange (NFE), in accordance with the formula provided under Rule 53 of the *SEZ Rules, 2006*.
- To execute Bond-cum-Legal Undertaking and submit to the Development Commissioner in the prescribed Form-H under the *SEZ Rules, 2006.*
- To submit Annual Performance Report to the Development Commissioner, in the prescribed Form-I under the *SEZ Rules, 2006*.
- To abide by local laws, rules, regulations or bye-laws with regard to the area planning, sewerage disposal, pollution control and the like.
- To comply with Industrial and Labour Laws, as are applicable locally. It may be noted that the labour laws will apply to all the units inside the SEZs. However, the respective State Government may declare units within the SEZ as public utilities and may delegate the powers of Labour Commissioner to the Development Commissioner of the SEZs.
- To obtain Registration-cum-Membership-Certificate (RCMC) from the Export Promotion Council to avail exemptions, drawbacks and concessions.

Conclusion

The SEZ scheme has generated tremendous response amongst investors, both in India and abroad. As on February 29, 2020, there were 421 SEZs which have been formally approved, out of which 373 SEZs have been notified. Further, out of 373 notified SEZs, 240 SEZs were operational as on December 31, 2019. Nearly 5,258 units/companies have set up their operations in these operational SEZs by making cumulative investment of Rs. 5,37,657.67 crore. During the financial year 2019-2020 the exports from the operational SEZs stood at Rs. 5,96,659 crore (as on December 31, 2019), which constituted nearly 33% (thirty-three percent) of India's total exports[1].

1 Refer: http://sezindia.nic.in/upload/5e68cb85d806eupdated%20factsheet.pdf

Exports from the operational SEZs during the last 14 years and current year are as under[1]:

Years	Exports		Growth over previous year (INR)
	(Value in Rs. crore)	(Billion USD)	
2005-2006	22,840	5.08	-
2006-2007	34,615	7.69	52%
2007-2008	66,638	14.81	93%
2008-2009	99,689	21.71	50%
2009-2010	2,20,711	46.54	121.40%
2010-2011	3,15,868	69.30	43.11%
2011-2012	3,64,478	76.01	15.39%
2012-2013	4,76,159	87.45	31%
2013-2014	4,94,077	81.67	4%
2014-2015	4,63,770	75.84	6.13%
2015-2016	4,67,337	71.38	0.77%
2016-2017	5,23,637	78.07	12.05%
2017-2018	5,81,033		10.96%
2018-2019	7,01,179		20.68%
2019-2020	5,96,659 (as on December 31, 2019)		12.85%

The facts suggest that the SEZ scheme has generated a large flow of foreign and domestic investment:

Fact sheet on Special Economic Zones[2]

Number of Formal approvals (as on February 29, 2020)	421
Number of notified SEZs (As on February 29, 2020)	354 + (7 Central Govt. + 12 State/Pvt. SEZs)
Number of In-Principle Approvals (As on February 29, 2020)	33

1 Refer: http://sezindia.nic.in/cms/export-performances.php and http://sezindia.nic.in/upload/5e68cb85d806eupdated%20factsheet.pdf

2 Refer: http://sezindia.nic.in/upload/5e68cb85d806eupdated%20factsheet.pdf

Operational SEZs (As on December 31, 2019)	240		
Unit approved in SEZs (As on December 31, 2019)	5,258		
Investment	**Investment (As on February, 2006)**	**Incremental Investment**	**Total Investment (As on December 31, 2019)**
Central Government SEZs	Rs. 2,279.20 crore	Rs. 17,911.47 crore	Rs. 20,190.67 crore
State/Pvt. SEZs set up before 2006	Rs. 1,756.31 crore	Rs. 11,684.26 crore	Rs. 13,440.57 crore
SEZs Notified under the Act	-	Rs. 5,04,026.43 crore	Rs. 5,04,026.43 crore
Total	**Rs. 4,035.51 crore**	**Rs. 5,33,622.16 crore**	**Rs. 5,37,657.67 crore**
Employment	**Employment (As on February, 2006)**	**Incremental Employment**	**Total Employment (As on December 31, 2019)**
Central Government SEZs	1,22,236 persons	85,355 persons	2,07,591 persons
State/Pvt. SEZs set up before 2006	12,468 persons	97,403 persons	1,09,871 persons
SEZs Notified under the Act	0 persons	19,16,318 persons	19,16,318 persons
Total	**1,34,704 persons**	**20,99,076 persons**	**22,33,780 persons**
Exports in 2017-18	**Rs. 5,81,033 crore**		
Exports in 2018-19	**Rs. 7,01,179 crore**		
Exports in 2019-20 (as on December 31, 2019)	**Rs. 5,96,659 crore** (Growth of 12.85% over the exports of the corresponding period of FY 2018-19)		

Export Oriented Units (EOUs), Software Technology Parks (STPs), Electronics Hardware Technology Parks (EHTPs) and Bio-Technology Parks (BTPs)

With the objectives to promote exports, enhance foreign exchange earnings, attract investment for export production and employment generation, the Government has introduced schemes such as EOUs, STPs, EHTPs and BTPs. Chapter 5 of the Foreign Trade Policy contains provisions relating to these schemes.

Units undertaking to export their entire production of goods and services (except permissible sales in DTA), may be set up under the Export Oriented Unit (EOU) Scheme, Electronics Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) Scheme for manufacture of goods, including repair, re-making, reconditioning, reengineering, rendering of services, development of software, agriculture including agro-processing, aquaculture, animal husbandry, bio-technology, floriculture, horticulture, pisciculture, viticulture, poultry and sericulture. *Trading units are not covered under these schemes.*

An EOU/EHTP/STP/BTP unit may export all kinds of goods and services except items that are prohibited in ITC (HS). EOU/EHTP/STP/BTP unit shall, in general, be a positive net foreign exchange earner.

¶15-020 Export Oriented Units (EOUs)

The Export Oriented Unit Scheme was introduced in 1980 and is covered under Chapter 6 of the Foreign Trade Policy. Establishment of units and their performance is monitored by the jurisdictional Development Commissioner under the Foreign Trade Policy provisions.

The purpose of the scheme was to boost exports by creating additional production capacity. Under this scheme, units undertaking to export their entire production of goods are allowed to be set up as an EOU. These units may be engaged in manufacturing, services, development of software, trading, repairing, remaking, reconditioning, re-engineering including making of gold/silver/platinum jewellery and articles thereof, agriculture including agro-processing, aquaculture, animal husbandry, bio-technology, floriculture, horticulture, pisciculture, viticulture, poultry, sericulture and granites. EOUs can export all products except prohibited items of exports in ITC (HS) without payment of duty. However, permissions required for import under other laws shall be applicable.

A minimum investment of Rs. 10 million in plant and machinery is required for establishment of an EOU. Applications for setting up of units under EOU scheme, other than proposals for setting up of units in the services sector (except R&D, software and IT-enabled services or any other service activity, as may be delegated by the BOA), is approved or rejected by the Unit Approval Committee.

EOUs may import, without payment of duty, all types of goods, including capital goods, as defined in the Policy, required by it for its activities or in connection therewith, provided they are not prohibited items of imports in the ITC (HS). The units are also permitted to import goods required for the approved activity, including capital goods, free of cost or on loan from clients.

EOU units are exempted from customs duty on import of capital goods, raw materials, consumables, spares, etc.

Supplies from Domestic Tariff Area (DTA) to EOUs are considered deemed exports and Indian suppliers can claim benefits of deemed exports. In addition, foreign investment up to 100% (one hundred percent) is allowed, subject to sectoral norms.

FAQs relating to GST implication on EOUs[1]

Q1. Whether the EOU scheme will continue to be in operation in the GST regime and whether EOU is required to take registration under the GST law?

EOU is like any other supplier under GST and all the provisions of the GST law will apply. However, the benefit of Basic Customs Duty exemption on imports will continue.

Q2. What tax benefits will be available to EOU scheme in GST regime?

The duty free imports under GST regime will be restricted to Basic Custom duty. Exemption from the additional duties of Customs, if any under Section 3(1), 3(3) and 3(5) of the *Customs Tariff Act, 1975* and exemption from Central Excise duty will be available for goods specified under the Fourth Schedule to the Central Excise Act. IGST or CGST plus SGST will be payable by the suppliers who make supplies to the EOU. The EOU will be eligible, like any other registered person, to take Input Tax Credit of the said GST paid by its suppliers.

Q3. Whether supplies to or from EOU will be exempted from GST?

No. Under the GST law, IGST or CGST plus SGST will be payable by the suppliers who make supplies to the EOU. The EOU will be eligible to take Input Tax Credit of the said GST paid by its suppliers. The supplies from EOU will not be exempted from GST, except in the case of zero-rated supplies defined under Section 16 of the IGST Act, ie, supplies made by EOU in the form of physical export or supplies to an SEZ unit or SEZ Developer for authorised operations.

Q4. What procedure will be followed by EOU to import goods without payment of Customs duty in the GST regime?

To avail such import benefits, EOUs will have to follow the procedure under the *Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017*.

Q.5 Whether an EOU can clear goods to another EOU (Inter-unit transfer)? And whether an EOU can send goods for carrying out job work on such goods? In such situations, how will the tax liability be discharged?

1 Refer -https://www.nsez.gov.in/resources/GST%20FAQ%20on%20Exports%20regarding%20EOU.pdf

Supply of goods from one EOU to another EOU will be treated as any other supply under GST Law. An EOU can send goods for job work as per Section 143 of the *CGST Act, 2017* and Rule 45 of the *CGST Rules,* 2017 and the tax liability shall be discharged accordingly.

¶15-030 Software Technology Parks (STPs)

The Software Technology Parks Scheme is covered under Chapter 6 of the Foreign Trade Policy. The STP Scheme is a 100% (one hundred percent) export-oriented scheme for the development and export of computer software and services using data communication links or in the form of physical media including the export of professional services. The major attraction of this scheme is a single-point contact service to the STP units.

For implementing the STP scheme, the Ministry of Communications and Information Technology formed the Software Technology Park of India (STPI) in 1991. STPI is an autonomous body for the management and regulation of IT Parks or STPs in India. The main aim of STPI is to develop India into an IT giant and one of the leading generators and exporters of IT and software within the coming few years. STP scheme approvals are given under a single-window clearance mechanism.

An STP unit can be located in areas designated as STP complexes or at any place where EOUs can be set up. Such a unit is a duty-free custom bonded area and is entitled to refund of GST paid on purchases. STP units are allowed to import all types of goods (except prohibited goods, namely capital goods, raw materials, consumables, office equipment, etc) for the purpose of manufacture/ production of export products and export thereof, without payment of duties. Units can export software through data communication channel or through physical transport.

For the STP units, the period of realisation and repatriation of export proceeds shall be 9 months from the date of export.[1]

Further, foreign investment up to 100% (one hundred percent) is allowed, subject to sectoral norms.

¶15-040 Electronics Hardware Technology Parks (EHTPs)

The Electronics Hardware Technology Parks Scheme is covered under Chapter 6 of the Foreign Trade Policy. The EHTP Scheme is administered by the Ministry of Communications and Information Technology. Under the EHTP Scheme, an EHTP can be set up by the Central Government, State Government, public or private sector undertaking or any combination of them.

An EHTP unit can be located in areas designated as EHTP complex or at any place where EOUs can be set up. Such a unit is a duty-free custom-bonded area

1 RBI Master Direction No.16/2015-16 dated January 01, 2016 on Export of Goods and Services (as updated on January 12, 2018)

and is entitled to refund of GST paid on purchases. EHTP units are allowed to import all types of goods (except prohibited goods, namely capital goods, raw materials, consumables, office equipment, etc) for the purpose of manufacture/ production of export products and export thereof, without payment of duty. Units can export software through data communication channel or through physical transport.

For EHTP units, the period of realisation and repatriation of export proceeds shall be 9 months from the date of export.[1] Further, foreign investment up to 100% (one hundred percent) is allowed, subject to sectoral norms.

¶15-050 Bio-technology Parks (BTPs)

The Bio-technology Parks Scheme is covered under Chapter 6 of the Foreign Trade Policy. The BTP units can export all products, except prohibited items of exports in ITC (HS) without payment of duty. Units may import, without payment of duty, all types of goods, including capital goods, as defined in the Foreign Trade Policy, required by it for its activities or in connection therewith, provided they are not prohibited items of imports in the ITC (HS).

For BTP units, the period of realisation and repatriation of export proceeds shall be 9 months from the date of export.[2]

¶15-060 International Financial Services Centre (IFSC)[3]

An International Financial Services Centre (IFSC) is the latest initiative of the Government of India to foster the concept of SEZs whereby IFSC is set up at Gandhinagar, Gujarat as a part of a Special Economic Zone (SEZ) *also known as GIFT City-IFSC-SEZ.* Technically, an IFSC is a jurisdiction that provides financial services to non-residents and residents, to the extent permissible under the current regulations, in any currency except Indian Rupee.

The IFSC seeks to bring to the Indian shores, those financial services transactions that are currently carried on outside India by overseas financial institutions and overseas branches/subsidiaries of Indian financial institutions to a center which has been designated for all practical purposes as a location having the same eco system as their present offshore location, which is physically on Indian soil. It is a great boast for the Indian exporters and importers, for promoting inward and outward trade activities globally by operating their units or set ups under this arrangement of IFSC.

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1 RBI Master Direction No.16/2015-16 dated January 01, 2016 on Export of Goods and Services (as updated on January 12, 2018)

2 RBI Master Direction No.16/2015-16 dated January 01, 2016 on Export of Goods and Services (as updated on January 12, 2018)

3 Refer-http://www.giftgujarat.in/faq.aspx

Strategic objective of setting up the IFSC are:

- To create high value jobs by having production of financial services take place on Indian soil
- To create an avenue into financial globalisation which would benefit the Indian economy and give policy makers an enhanced set of instruments

The IFSC provides various benefits to the entities setting up operations under GIFT City such as:

- State-of-the-art infrastructure at par with other global financial centres
- Liberal tax regime for 10 years
- Strong regulatory and legal environment
- A wholly transparent operating environment, complying with global best practices and internationally accepted laws and regulatory processes
- Pool of skilled professionals
- A modern transport, communications and internet infrastructure
- Only place in India which allows offshore transactions

Further, Tax Incentive under IFSC set-up are granted hereunder:

- Minimum Alternate Tax (MAT) - 9% (nine percent) for IFSC units
- Security Transaction Tax (STT) - NIL
- Commodity Transaction Tax (STT) - NIL
- Dividend Distribution Tax (DDT) - NIL
- Long-Term Capital Gain (LTCG) - NIL
- Tax Holiday (10 years)
- State Government has also exempted stamp duty for entities having registered office in GIFT for capital market activities

Chapter 16 Anti Money-Laundering Laws

The Prevention of Money-Laundering Act, 2002 (PMLA)

The Prevention of Money-Laundering Act, 2002

¶16-010 Introduction

As the name suggests, The *Prevention of Money-Laundering Act (PMLA), 2002* is an Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. Illegally obtained funds are laundered and moved around the globe using shell companies, intermediaries. In this way, the illegal funds are given the colour of legitimacy, and it finds its way into the economy.

¶16-020 Offence of Money-Laundering

The definition of "Money-Laundering" is comprehensive enough to cover most of the instances of converting black money into white.

Money-laundering has been defined in PMLA under section 3, wherein a person shall be guilty of the offence of money-laundering if such person is found to have:

- directly or indirectly

  - attempted to indulge or
  - knowingly assisted or
  - knowingly is a party or
- is actually involved in one or more of the following processes or activities connected with *proceeds of crime*, namely:
  - concealment; or
  - possession; or
  - acquisition; or
  - use; or
  - projecting as untainted property; or
  - claiming as untainted property.

Section 2(u) of PMLA defines "Proceeds of Crime" as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a *scheduled offence* or the value of any such property, or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

"Proceeds of Crime" include property not only derived or obtained from a scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.

The Schedule to PMLA lists all offences which have been defined as scheduled offences.

As per section 2(1)(y) of PMLA, Scheduled offence means:

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or

(iii) the offences specified under Part C of the Schedule.

An offence of money-laundering cannot exist independently. It is evident that money-laundering comprises a predicate offence as well and is usually the result of the commission of a predicate offence. It is sine qua non for the existence of an offence under PMLA that the money in question is 'proceeds of crime' derived from the commission of a predicate offence. In the absence of a predicate offence, there can be no offence of money-laundering. The predicate offences are mentioned in the Schedule to PMLA.

¶16-030 Attachment of Property under PMLA

Under section 2(v) of PMLA, the term "property" has been defined as any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

It is often seen that the assets that may constitute "Proceeds of Crime" may be situated outside India, and it becomes difficult for the authorities to attach such property, which is in a foreign jurisdiction. Therefore, in order to overcome this hurdle, an amendment to the definition of "Proceeds of Crime" was made by the Finance Act, 2015, which enables the attachment and confiscation of *equivalent assets* in India where the asset located abroad cannot be forfeited.

The Finance Act, 2018 has further amended the definition of 'proceeds of crime' to include the right of attachment of such property held, which is equivalent to the proceeds of crime.

Section 2(d) of PMLA defines the word "attachment" to mean the prohibition of transfer, conversion, disposition, or movement of property by an order under PMLA.

The power of attachment has been granted to, under section 5 of PMLA to a Director or any other officer not below the rank of Deputy Director authorized by the Director appointed by the Central Government to be authorities under the Act for the purpose of attachment of property involved in money-laundering. It is important that to exercise the right of attachment; the concerned officer has to show that based on material in his possession, he has reason to believe, which have to be recorder in writing, that such person is in possession of any proceeds of crime which is likely to be *concealed, transferred, or dealt with in a way which might interfere with proceedings, investigations which relates to the confiscation of such proceeds linked with a crime*, he may in such a case order the prohibition of transfer, conversion, disposition, or the movement of any such proceeds or property. The attachment is valid for a period of 180 days from the date of the order and following the attachment, the officer must forward the attachment order along with the material in his possession to the Adjudicating Authority of the matter. He must also explain the facts of the case and also the reasons for such attachment to the Adjudicating Authority. The aggrieved person also has the right to present his defense before the Adjudicating Authority records that the attached property forms part of the money-laundering ring and is considered as a proceed of the crime.

Nevertheless, the aggrieved person can challenge the attachment order and the validity of the Reasons to Believe formed by the authorized officer, for attaching the property of the aggrieved person, at the appropriate forum, and then it will be open to the Court or forum to examine whether the reasons for the believe have any rational connection with the material in possession, or the officer has any basis for forming such belief. On examination, if the Court or forum reaches the conclusion that the belief formed by the officer is not able to satisfy the statutory requirement as enumerated under section 5(1) of PMLA, then the whole proceedings for attachment of property of the aggrieved person will get vitiated. The attachment shall continue while the proceedings for the crime go on for the scheduled offence and will become final only after the guilty judgment from the Court has been passed.

¶16-040 Arrest Under PMLA

Under Section 19 of PMLA, the Director, Deputy Director, Assistant Director or any other officer authorized in this behalf by the Central Government by general or special order, has the power to arrest a person. A person can be arrested by the concerned authority if such authority on the basis of material in his possession,

- has reason to believe that such person has been guilty of an offence punishable under PMLA, and
- the reason for such belief has been duly recorded in writing.

After arresting such person, the authority is bound to

- inform the arrested person about the grounds for his arrest.
- forward a copy of the arrest order along with the material in his possession to the Adjudicating Authority.
- Produce such person, within twenty-four hours, before the Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction.

From the bare perusal of Section 19 of PMLA, it is apparent that there is no requirement under the section to obtain an arrest warrant from the Court before arresting a person. If the conditions mentioned in Section 19 of PMLA are fulfilled, the relevant authority under PMLA can arrest such person.

The question of whether the offences under PMLA are cognizable or non-cognizable is irrelevant for the purpose of arrest under PMLA. However, there are contradictory judgments of High Courts on the point whether the offences under PMLA are cognizable or non-cognizable. The matter is now sub-judice before the Hon'ble Supreme Court.

¶16-050 Bail under PMLA

Section 45 of PMLA deals with the provisions relating to bail under the Act. Under section 45, an offence under PMLA shall be cognizable and non-bailable. A cognizable offence means an offence in which a police officer has the authority to make an arrest without a warrant and to start an investigation with or without the permission of a court. Bail for an offence under PMLA cannot be given as of right but only after the accused has been presented before a judge in this case, before the relevant Special Court. It may be noted that the provisions of PMLA do not provide for any right of seeking *anticipatory bail. The said right is derived from section 65 of PMLA, and as a result the accused can seek the relief of anticipatory bail given under the provisions of* the *Code Of Criminal Procedure, 1973* (Cr.P.C.). The privilege of the pre-arrest bail is not a matter of right, and is generally granted only in exceptional cases under section 438 of Cr.P.C.

¶16-060 Summon, Survey & Search

Section 16 of PMLA deals with the Power of Survey. An officer under PMLA has the power to enter and survey a property or premises if such officer believes that the survey will allow him the opportunity to inspect necessary records which might be available in the premises in question, help verify proceeds of a crime or any transactions related to the proceeds which might be found on the premises, or might assist them with any other proceedings being conducted under the Act. The officer is under an obligation to record the reasons for choosing to survey the premises as well as the findings.

Section 17 of PMLA deals with the power of search and seizure by the authority. A Director or any person authorized by the Director having reasons to believe on the basis of information provided to him or already in his possession, which needs to be put in writing, that a person has indulged in money-laundering or is in possession of any proceeds of crime, and such records evidencing such a crime, or is in possession of property related to the crime, in such a case he will be within his powers to authorize an officer to:

- enter and search any building, place, vessel, vehicle, or aircraft where he has reason to suspect that such records or proceeds of crime are kept;
- break open the lock of any door, box, locker, safe, almirah, or other receptacles where the keys thereof are not available;
- seize any record or property found as a result of such search;
- place marks of identification on such record or make or cause to be made extracts or copies therefrom;
- make a note or an inventory of such record or property;
- examine on oath any person who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under PMLA.

Section 18 of PMLA deals with the power to search a person. If an authority, has reason to believe (the reason for such belief to be recorded in writing) that any person has secreted about his person or in anything under his possession, ownership or control, any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, the authority may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act.

¶16-070 Retention of Records under PMLA

Section 21 of PMLA deals with the retention of records. As per the aforesaid section, where any records have been seized under Section 17 or Section 18 or frozen under sub-section (1A) of Section 17 and the officer authorized by the Director in this behalf has, on the basis of material in his possession, reason to believe, which shall be recorded in writing, that such records are required to be retained for the purposes of adjudication under section 8, such records may, if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such records were seized or frozen, as the case may be. On the expiry of the period of one hundred and eighty days, the records shall be returned to the person from whom such records were seized or whose records were ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such records beyond the said period. The Adjudicating Authority, before authorizing the retention or continuation of freezing of such records beyond the period of one hundred and eighty days, shall satisfy himself that the records are prima facie involved in money-laundering and the records are required for the purposes of adjudication under Section 8. The person from whom records seized or frozen shall be entitled to obtain copies of records.

¶16-080 Interconnected Transactions

Section 23 of PMLA deals with presumption relating interconnected transactions. As per the aforesaid section, here money-laundering involves two or more inter-connected transactions and one or more such transactions is or are proved to be involved in money-laundering, then for the purposes of adjudication or confiscation under Section 8, or for the trial of the money-laundering offence, it shall unless otherwise proved, be presumed that the remaining transactions form part of such inter-connected transactions associated with money-laundering.

¶16-090 Presumptions & Onus of Proof

Under Section 24 of PMLA, the burden of proof lies on the person who claims that the proceeds of the crime alleged to be involved in money-laundering, are not so involved. The presumption against the accused or any 3rd party is good enough to discharge the onus of the authorities under PMLA. Even in the case of records and properties which are found in the possession or control of any person in the course of a survey or search under PMLA (Section 16, Section 17, and Section 18), under Section 22 of PMLA, a presumption is raised that such records or property belongs to such person, and the contents of such records are true, and further that signatures and any part of such records is in hand-writing of a particular person or in the hand-writing of such person.

Where any records have been received from any place outside India, duly authenticated by such authority or person and in such manner, as may be prescribed, in the course of proceedings under PMLA, the Special Court, the Appellate Tribunal or the Adjudicating Authority, as the case may be, shall presume, that the signature and every other part of such record which purports to be in the hand-writing of any particular person or which the Court may reasonably assume to have been signed by, or to be in the hand-writing of, any particular person, is in that person's hand-writing; and in the case of a record executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested.

The presumptions are absolute, and the onus to prove the same otherwise lies on such person.

It is clear that a person accused of an offence under Section 3 of PMLA, whose property is attached and proceeded against for confiscation, shall discharge the onus of proof (Section 24) vested in him by disclosing the sources of his income, earnings or assets, out of which or means by which he has acquired the property attached, to discharge the burden that the property does not constitute proceeds of crime. Where a transaction of acquisition of property is part of inter-connected transactions, the onus of establishing that the property acquired is not connected to the activity of money-laundering, is on the person in ownership, control or possession of the property, even if such person is not accused of a Section 3 offence under the Act, provided one or more of the interconnected transactions is or are proved to be involved in money-laundering.

Under the Act, a person accused or being investigated for money-laundering is required to give a truthful statement if such person is summoned by the Director. This power to the Director is given under Section 50(2) of PMLA, which provides that the Director (or additional Director, joint Director, deputy director or assistant Director) has the power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding. All such summoned persons are bound to state the truth or make statements and produce such documents as may be required under Section 50(3) of the Act.

A person called upon to make a statement before the authorities under Section 50 of PMLA during investigation cannot be said to be accused of an offence. The investigation is only for the purpose of collecting evidence with regard to proceeds of crime in the hands of the persons suspected and their involvement in the offence of money-laundering. It is only at the stage of filing of the complaint for prosecution under PMLA envisaged under Section 44, that such persons or suspects be termed as accused. Accordingly, all such statements can be used against the accused during the course of prosecution.

¶16-100 Offences of Cross-Border Implications

Offences with cross-border implications are scheduled offences under Part C of the Schedule to PMLA and, accordingly, PMLA may be applicable to such offences. The offence of wilful attempt to evade tax under Section 51 of the *Black Money Act* has also been included in the list of scheduled offences under PMLA, and accordingly, PMLA may be applicable to such offences. Further, the *UN Security Council Resolution 1373* obliges countries to freeze without delay the funds or other assets of persons who commit, or attempt to commit, terrorist acts, or participate in or facilitate the commission of terrorist acts; entities owned or controlled directly or indirectly by such persons; and persons and entities acting on behalf of or at the direction of, such persons and entities, including funds or other assets derived or generated from property owned or controlled, directly or indirectly, by such persons and associated persons and entities.

Each country has the authority to designate the persons and entities that should have their funds or other assets frozen. Additionally, to ensure that effective cooperation is developed among countries, countries should examine and give effect to, if appropriate, the actions initiated under the freezing mechanisms of other countries. To give effect to the requests of foreign countries under *UN Security Council Resolution 1373*, the Ministry of External Affairs examines the requests made by the foreign countries and forwards it electronically, with their comments, to a designated officer for freezing of funds or other assets. The freezing orders shall take place without prior notice to the designated persons involved.

Chapter 17 Black Money Act, 2015

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

¶17-010 Introduction

The *Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015* hereinafter referred to as the *Black Money Act* ('BMA') came into force with effect from 01st July, 2015. It is a comprehensive code dealing with taxation and other related facets of undisclosed foreign income and assets held by resident assessees outside India. The basic intent of BMA is to tackle the menace of undisclosed wealth being hidden outside India by Indian residents.

¶17-020 Background

Black Money in normal parlance means income that has been illegally obtained or not declared for tax purposes. The definition of Black Money, ascribed by the Indian Government in the White Paper on Black Money is 'assets or resources that have neither been reported to the public authorities at the time of their generation nor disclosed at any point of time during their possession'.

The Government of India, in its endeavor to reinforce its commitment towards not only tackling the menace of a parallel economy, but also to bring money of this nature back into India, brought out a legislation in the form of the BMA.

This legislation aims at putting in place, an administrative and penal machinery to address this centuries old practice of generation of Black Money. This legislation is applicable only to Residents (other than not ordinarily resident) and to assessees in default with respect to foreign undisclosed income and assets.

The BMA provides for a completely different mechanism for charging to tax the value of undisclosed assets located outside India. The undisclosed assets located outside India are taxable in any year when such asset comes to the notice of the Assessing Officer ('AO'). It is important to note that the provisions of BMA are devoid of any period of limitation for issuance of notice or charge, this itself has a very far-reaching effect as the AO can now invoke the BMA at any point in time upon the asset coming to his notice.

In order to attain the objective of controlling the menace of the Black money, the Government vide Press Release[1], notified one time compliance opportunity to provide for filing of declaration in the prescribed form before the specified tax authority within a specified period i.e. upto 30th September, 2015 in respect of any undisclosed asset located outside India.

¶17-030 Applicability and the Scope of the BMA

The BMA applies only to undisclosed foreign income and assets (i. e, those located outside the territory of India) and thus is a separate comprehensive legislation to regulate and tackle the issue of foreign income and assets which have escaped the Indian tax net.

Initially when the Act was introduced, BMA applied only to an 'assessee' (defined under section 2(2) of BMA) which meant Residents of India as per section 6 of the *Income Tax Act, 1961* ('IT law'). Meaning thereby, that 'Non-residents' and 'Residents but not-ordinarily residents' were outside the purview of this law.

Subsequently, the definition of an 'assessee' under BMA was amended retrospectively vide the *Finance (No.2) Act, 2019*, w.e.f 1st July 2015 to include individuals/entities who were residents at the time when undisclosed offshore incomes were earned/ undisclosed offshore assets were acquired, but later on such individuals/entities became non-residents .

Sub-section (12) of Section 2 of the BMA defines the term "undisclosed foreign income and asset" to mean aggregate value of the undisclosed income of

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1 Government Press Release1 dated July 1, 2015

the assesse from a source located outside India and the value of an undisclosed asset located outside India referred to in section 4, and computed in the manner laid down in Section 5. Thus for BMA to apply, the situs of the asset and the source of income has to be outside India.

Further, sub-section (11) of Section 2 of the BMA elucidates the meaning of the term "undisclosed foreign asset" to mean:

- an asset located outside India (including Financial Interest in an entity),
- directly held in his own name or of which he is a beneficial owner, and
  - has no explanation about the source of investment in such an asset or
  - the explanation provided is unsatisfactory in the opinion of the tax authority

The term "Beneficial owner "has not been defined in the BMA, however, the CBDT vide Circular[1] has borrowed the definition of the aforesaid term from Explanations 4 and 5 to Section 139(1) of the IT Law in the following words:

""Beneficial owner" in respect of an asset means an individual who has provided, directly or indirectly, consideration for the asset for the immediate or future benefit, direct or indirect, of himself or any other person."

The undisclosed foreign income under the BMA means income from a source located outside India which has not been disclosed in the return of income filed under the IT Law or income from a source located outside India, in respect of which no Income Tax return has been filed by the resident assessee.

It is important to note that while the BMA is effective from assessment year 2016-17 and onwards, however, it seeks to tax the undisclosed assets acquired prior to assessment year 2016-17. In that sense the BMA can be said to have retrospective application.

¶17-040 Chargeability *under the BMA*

Section 3(1) of the Act is the charging section, which brings to tax (@30%) the undisclosed foreign income and asset of an assessee "of the previous year" and clearly provides that such tax shall be charged for every assessment year commencing from 2016-17 and onwards.

The relevant portion of section 3(1) of the Act reads as under:

> **"3 *Charge of tax***
>
> *(1) There shall be charged on every assessee for every assessment year commencing on or after the 1st day of April, 2016, subject to the provisions of this Act, a tax in respect of his total undisclosed foreign income and asset **of the previous year** at the rate of thirty per cent of such undisclosed income and asset.*
>
> ***Provided** that an undisclosed asset located outside India shall be charged to tax on its value in the previous year in which such asset comes to the notice of the Assessing Officer."*

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1 CBDT vide Circular No. 13 dated 06.07.2015

Upon reading of clause (1) of Section 3 above, it is very clear that, undisclosed foreign income and assets relating to previous year 2015-16 and onwards can only be brought to tax under Black Money Law in terms of the said section of the Act. The proviso to Section 3(1), further makes it clear that there is no period of limitation to tax acquisition of an Undisclosed Foreign Asset in earlier year(s). Undisclosed assets located outside India shall be charged to tax on its value in the previous year in which such asset comes to the notice of the Assessing Officer.

It may be pertinent to point out that prior to the enactment of BMA, the provisions of the IT Law gave powers to the tax authorities to collect tax in relation to undisclosed foreign income and assets of a resident in India.

However, sub-section (3) of the Section 4 of the BMA ring-fences the assessee from double taxation by clarifying that the Undisclosed Foreign Income and Asset taxed under the BMA shall not be included in the income for the purposes of the IT Law.

The provision of Section 4 of the BMA reads as under:

4. Scope of total undisclosed foreign income and asset

"(3) The income included in the total undisclosed foreign income and asset under this Act shall not form part of the total income under the Income-tax Act."

From the above, it is clear that, the income which is falls under the provisions of this BMA shall not form part of the total income under the IT Law.

¶17-050 Valuation Methodology

Chapter II under BMA prescribes the basis of charge of tax. Sub-section (2) of Section 3 provides that, for the purpose of chargeability, the value of undisclosed asset shall be the Fair Market Value ('FMV') of the asset determined in such manner as prescribed.

The Central Board of Direct Taxes (CBDT) vide notification[1] laid down the *Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015* ('Black Money Rules') wherein Rule 3 outlines the prescribed methodology for arriving at the FMV of Undisclosed Assets.

For the purposes of sub-section (2) of section 3 of the Act, the fair market value of the assets shall be determined in the following manner, namely:

FMV of quoted shares and securities	**Higher of:** • Cost of acquisition • Average of highest and lowest price quoted on any established securities market on the valuation date (or preceding date, in case there is no trading on valuation date)

1 The Central Board of Direct Taxes (CBDT) Notification No. 58/2015(issued on 2 July, 2015)1

<table>
<tr>
<td>FMV of unquoted equity shares</td>
<td>Higher of:

Cost of acquisition
Book-Value of all assets (with some exclusions) plus FMV of assets as provided by other Rules less book value of liabilities (with some exclusions) multiplied by ratio of paid up value of such equity shares and total paid up equity share capital (A+B-L)/PE X PV
A=book value of all the assets (other than bullion, jewellery, precious stone, artistic work, shares, securities and immovable property) as reduced by any amount of income-tax paid, if any, less the amount of income-tax refund claimed, if any, and any amount shown as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset
B=fair market value of bullion, jewellery, precious stone, artistic work, shares, securities and immovable property as determined in the manner provided in this rule
L= book value of liabilities, but not including the following amounts, namely:
<ol type="i">
the paid-up capital in respect of equity shares;
the amount set apart for payment of dividends on preference shares and equity shares;
reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;
any amount representing provision for taxation, other than amount of income-tax paid, if any, less the amount of income-tax claimed as refund, if any, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;
any amount representing provisions made for meeting liabilities, other than ascertained liabilities;
any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares

PE=total amount of paid up equity share capital as shown in the balance-sheet
PV=the paid up value of such equity shares
</td>
</tr>
</table>

<table>
<tr><td>FMV of unquoted shares and securities other than equity shares</td><td>Higher of:
• Cost of acquisition
• The value that may be fetched if sold in open market on the valuation date. Assessee may obtain report from registered valuer recognised by the Government of the country or any of its agency</td></tr>
<tr><td>FMV bank accounts</td><td>• Sum of all deposits made in the account with the bank since the Opening Date of the account
(Sum of deposits shall not include deposits made from the proceeds of any withdrawal from the account).</td></tr>
<tr><td>FMV of bullion, jewellery, precious stone and artistic work</td><td rowspan="2">Higher of:
• Cost of acquisition
• The value that asset may have fetched if sold in open market on the valuation date. (Valuation report from registered valuer recognised by the Government of the country or any of its agencies)</td></tr>
<tr><td>FMV of immovable property</td></tr>
<tr><td>Interest in partnership firm, AOP, LLP</td><td>• Net assets to be valued at FMV (as per mechanism given for unquoted equity shares)
• Net assets to the extent of capital to be allocated in capital contribution ratio and balance in the ratio agreed for dissolution</td></tr>
<tr><td>Other assets</td><td>Higher of:
• Cost of Acquisition
• Price it would fetch in open market on valuation date (arm's length market price/ arm's length transaction)</td></tr>
</table>

Thereafter, the CBDT has issued Circular(s)[1], by which the CBDT has clarified valuation and taxing methodologies by means of illustrations embodied in the form of Frequently Asked Questions.

Section 5 of the BMA prescribes the computation mechanism of total undisclosed foreign income and asset of any previous year of an assessee. The provision of section 5 of the BMA provides that for computing the total undisclosed foreign income and assets, the following points are to be considered:

- no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee, whether or not it is allowable in accordance with the provisions of the IT Law;
- any income, (a) which has been assessed to tax for any assessment year under the Income-tax Act prior to the assessment year to which this Act applies; or, (b) which is assessable or has been assessed to tax for any assessment year under this Act, shall be reduced from the value of the

1 CBDT Circular No. 13 dated 6th July, 2015 and the Circular No. 15 dated 3rd September 2015

undisclosed asset located outside India, if, the assessee furnishes evidence to the satisfaction of the Assessing Officer that the asset has been acquired from the income which has been assessed or is assessable, as the case may be, to tax.

The above provision for computation of total undisclosed foreign income and asset of any previous year of an assessee is tabulated as below:

Computation of total undisclosed foreign income and asset	
Income from source located outside India (foreign income or 'FI') which has not been disclosed in IT Return	XX
FI in respect of which no IT return has been filed	XX
FMV of Unexplained Foreign Assets (no explanation or unsatisfactory explanation about the source of income has been provided) –in the manner of valuation provided above	XX
Less	
Income which has been assessed to tax for any assessment year under the IT Law prior to relevant AY in which undisclosed foreign income and asset applies	XX
Income which is assessable or has been assessed to tax for any assessment year	XX
In case of immovable properties, the deduction will be: Value of Undisclosed Foreign Asset in the same proportion as assessed / assessable foreign income bears total cost	XX
Total value of undisclosed foreign income and asset	**XX**
Tax @ 30%	**XX**

¶14-060 One time disclosure window

The BMA offered a one-time disclosure window effective from 1st July 2015 to 30th September 2015. This was an opportunity for resident taxpayers to voluntarily declare/disclose any undisclosed asset located outside India acquired from income chargeable to tax under IT Law prior to AY 2016-17. The due date for payment of tax and penalty was 31st December 2015.

Under the said disclosure window, any person declaring any undisclosed foreign asset within specified time frame as stated above, was liable to pay tax at the rate of 30% (thirty percent) on the value of such undisclosed asset along with the penalty of the equal amount of tax paid in respect of undisclosed asset. In other words, the resultant liability under BMA would have been 60% (sixty percent) on the value of asset so disclosed.

Further, the onetime disclosure window provided for immunity from prosecution under the BMA, however, any declaration made by misrepresentation or suppression of fact shall be deemed as void-ab-initio.

¶17-070 Penal consequences

The BMA provides for stringent penal consequences for default in form of penalties equal to three times of the tax and prosecution in certain cases. The penalty and prosecution provisions are contained in section 41 to section 58 of the BMA. Penalties leviable and offences that are subject to prosecution under BMA are as under:

Particulars	Penalty
Penalty in respect of tax computed on undisclosed foreign income and asset-Section 41	03 times the tax amount
Penalty for non-filing of Return of Income (ROI) under section 139(1) by an assessee having an undisclosed foreign income or asset-Section 42	INR 10, 00, 000
Non-disclosure or incorrect disclosure in ROI of foreign income or asset-Section 43	INR 10, 00, 000
Default in tax payment- Section 44	Equal to the tax amount
Other defaults (as per section 45 of the Act: Failure to answer any questions/sign any statement made by him/attend or produce documents)	INR 50, 000 up to INR 2, 00, 000
Offence	**Prosecution**
Wilful failure to furnish a return of income (before expiry of AY) in respect of Undisclosed Foreign Income and Assets-Section 49	Rigorous imprisonment from 6 months to 7 years with fine
Wilful failure to disclose information relating to foreign income and assets in return of income- Section 50	Rigorous imprisonment from 6 months to 7 years with fine
Wilful attempt to evade tax, penalty or interest in relation to Undisclosed Foreign Income and Assets-Section 51	Rigorous imprisonment from 3 to 10 years with fine
A person who makes false statement in any verification or delivers false account or statement- Section 52	Rigorous imprisonment from 6 months to 7 years with fine

Particulars	Penalty
A person who abets or induces another person to make and deliver false account, statement or declaration- Section 53	Rigorous imprisonment from 6 months to 7 years with fine

For the purposes of prosecution under Sections 49 to 53 of the BMA, Section 54 of the BMA by way of a deeming fiction presumes culpable mental state on the part of the accused assessee. However, the assessee has been provided a right of defense by demonstrating the non-existence of such culpable mental state.

The culpable mental state has been clarified to include intention, motive or knowledge of a fact or belief in, or reason to believe a fact.

¶17-080 Assessment Procedure

Chapter III of the BMA provides for the assessment procedure. Sections 10-11, provide for the procedure and time limit for making assessment/re-assessment under the BMA.

The provisions of section 10 of the BMA provide that the **Assessing Officer** may, on receipt of an information from an income-tax authority under the IT Law or any other authority under any law for the time being in force or on coming of any information to his notice, serve on any person, a notice requiring him on a date to be specified to produce or cause to be produced such accounts or documents or evidence as the Assessing Officer may require for the purposes of this Act and may, from time to time, serve further notices requiring the production of such other accounts or documents or evidence as he may require.

The statute confers powers with the Assessing Officer that he may make such inquiry, as he considers necessary, for the purpose of obtaining full information in respect of undisclosed foreign income and asset of any person for the relevant financial year(s). In case any person fails to comply with the terms of the notice issued by the Assessing Officer, the Assessing Officer shall, after taking into account all the relevant material which he has gathered and after giving the assessee an opportunity of being heard, make the assessment/reassessment of undisclosed foreign income and asset to the best of his judgment and determine the sum payable by the assessee.

The provisions of Section 11 of the BMA, 2015, provide that no order of assessment or reassessment shall be made under Section 10 after the expiry of two years from the end of the financial year in which the notice under sub-section *(1)* of Section 10 was issued by the Assessing Officer.

It is of significance to note that unlike its principal legislation i.e. the IT Law, the BMA, does not specify the time limit for issuing notice under Section 10 for the purposes of making assessment/reassessment under the Act. Thus, on plain reading of Section 10, as it stands on the statute, it does not provide a roadmap for taking recourse to assessment or reassessment within a set time frame and instead is dependent upon the discretion of the authority exercising such power.

Sub-section (2) of the Section 10 of the BMA, provides that the assessing officer may make such inquiry, as he considers necessary, for the purposes of obtaining full information in respect of undisclosed foreign income and assets of any person for the year under consideration.

Thus, on reading of the above provisions the BMA it can be seen that the assessing officer has wide and unfettered powers to make assessment/ reassessment for the year(s) under consideration.

¶17-090 Appellate Procedure

Chapter III of the BMA provides for the appellate procedure under the BMA. Section 15, of the BMA, provide for the procedure and time limit for filing appeal against the order of assessment/re-assessment passed under the BMA. Thus, a person aggrieved by the order of the assessing officer has right to file an appeal before the Commissioner (Appeals).The provisions of section 15(1) of the BMA provide the persons who can prefer an appeal to be a person who is:

(a) Objecting to the amount of tax on undisclosed foreign income and asset

(b) Denying liability to be assessed under this Act; or

(c) Objecting to any penalty imposed

(d) Objecting to order of rectification having the effect of enhancing the assessment or reducing the refund; or

(e) Objecting to an order refusing to allow the claim made by the assessee for a rectification under section 12

The provisions of Section 15(2) of BMA read with Rule 6(4), stipulates the manner of filing of appeal as per the said provisions an appeal shall be presented in Form No. 2 within a period of thirty days from:

(a) the date of service of the notice of demand relating to the assessment or penalty, or

(b) the date on which the intimation of the order sought to be appealed against is served in any other case, like, order rejecting rectification under section 12 of BMA

The Commissioner (Appeals) shall hear and determine the appeal and, subject to the provisions of the BMA, pass such orders as he thinks fit and such orders may include an order enhancing the assessment or penalty. The order enhancing the assessment or penalty shall not be made unless the assessee has been given a reasonable opportunity of being heard.

It may also be pertinent to note that the powers of Commissioner (Appeals) are enshrined in Section 17 of the BMA, 2015 which provides that the Commissioner (Appeals) in disposing of an appeal against the assessment order, shall have the power to confirm, reduce, enhance or annul the assessment. Thus, on reading of the above it can be said that the powers of the Commissioner (Appeals) are co-terminus of the Assessing Officer.

If any assessee is aggrieved by an aforesaid order passed by the Commissioner (Appeals) under Section 15 of the BMA, he may appeal to the Appellate Tribunal against such order within a period of sixty days from the date on which the order sought to be appealed against is communicated to the assessee, as per the provisions of section 18 of the BMA. Sub-section (7) of Section 18 of the BMA provides that the Appellate Tribunal shall exercise the same powers and follow the same procedure for hearing and disposing the appeal as contained in the IT Law.

The statute also provides for a further appeal against the order of the Tribunal before the Division Bench of the High Court, provided the High Court is satisfied that the appeal involves a substantial question of law. Lastly, Section 21 provides for a further appeal against the order of the High Court shall be made before the Supreme Court.

¶17-100 Miscellaneous

I. Stay and Recovery of Demand

Section 30 of the BMA provides that any amount specified as payable in a notice of demand under section 13 shall be paid within a period of 30 days of the service of the notice. It further provides that the Assessing Officer may, on an application made by the assessee, before the expiry of a period of thirty days or the reduced period or during the pendency of appeal with the Commissioner (Appeals), extend the time for payment, or allow payment by instalments, subject to such conditions as he may think fit to impose in the circumstances of the case. Further, where an assessee defaults in paying any one of the instalments within the time fixed, he shall be deemed to be an assessee in default in respect of the whole of the then outstanding amount.

Section 35 of the BMA provides that a manager of the company shall be jointly & severally liable for payment of amount due under the Act if amount cannot be recovered from the company unless he proves that non-recovery cannot be attributed to any neglect, misfeasance or breach of duty on his part. It may be noted that Section 179 of IT Law provides for recovery of dues from directors only in case of a Private Limited company whereas the present Act empowers recovery in any type of company.

II. Revision of orders

It is pertinent to note that under BMA, unlike Income-tax Act, there is no power with the assessing to do re-assessment. However, the provisions of Sections 23 and 24 of BMA provide the Principal Commissioner or the Commissioner to revise the order passed by the assessing officer, if any error is found in such order.

III. Amendment in Prevention of Money Laundering Act, 2002

Section 88 of the BMA, provides that the amendment was carried out in the *Prevention of Money-laundering Act, 2002*, ('hereinafter referred as PMLA') wherein, in the Schedule, in Part C, after entry (3), relating to the offences against property under Chapter XVII of the *Indian Penal Code* (45 of 1980), the offence of wilful attempt to evade any tax, penalty or interest referred to in Section 51 of the BMA, 2015 was inserted.

¶17-110 Impact of BMA on Assessees

Holding undisclosed assets and income by the Indian residents outside India had been an old perennial problem for the Indian Government. While the IT Law, contain several provisions to bring such undisclosed income to tax, however, tax authorities missed focus to assess such income and such tax was only leviable on the actual undisclosed income.

BMA seeks to bring back the focus of tax authorities in taxing such undisclosed income stashed outside India, as also to levy tax, not only on the actual undisclosed income but also impose tax on undisclosed assets held outside India and that, too, at the current value of such assets, when the same comes to notice of the Revenue authorities.

Further, unlike under IT Law, where there are several checks/limitation in following the procedure to issue notices in bringing to tax undisclosed assets/income held outside India, no such fetters have been placed on tax authorities in the BMA. Furthermore, in addition to the higher tax rate of 60% (sixty percent) on such undisclosed assets/income and penalty thereon, the offence under BMA has been notified as a schedule offence for PMLA. In view of the above, it would be noted that the provisions of BMA are quite severe, if the same are applied by the tax authorities, which makes this law more stringent on assessees vis-à-vis Income-tax Act.

Further, pursuant to tax information exchange agreements entered amongst several countries, there has been an increasing trend of sharing of information amongst nations. In view of the same, BMA Law would come in handy for tax authorities to implead defaulting assessees, who need to be careful in complying with the provisions of the BMA, like disclosure of Foreign Assets in the return of income, having in place robust documentation relating to source of investments, RBI/FEMA compliances etc.