Ease of Doing Business for Foreign Clients in India (Updated upto April, 2019)

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India is among the fastest growing economies in the world with immense human potential and a large market comprising of over 1.2 billion people. **Due to globalization and the efforts of Central Government of India like the "Make in India" initiative is an encouraging step for investors to invest their money in India.** Opportunities in India have attracted a large amount of Foreign Direct Investment (FDI) into the country and each year the amount of FDI inflow keeps increasing due to higher number of foreign businesses starting their operations in India. In this document, the way to setup a business is in India is detailed for Foreign Entities.

Entry Strategy into India for Foreign Businesses

There are mainly two types of entry strategy for foreign businesses in India,

- Registration of a Company or
- Establishing a Branch/Liaison office.

Hence, a foreign company can enter the Indian Market and set up business operations in India in the following manner:

As Indian company (Private Limited Company or Public Limited Company), under following models:

- **Wholly Owned Subsidiary or**
- **Joint Venture**

As foreign company via.

- **Setting up a Liaison Office or**
- **Representative Office or a Project Office or**
- **a Branch Office**

Incorporation of a Private Limited Company

It is the easiest and fastest type of India entry strategy for foreign nationals and foreign companies. Foreign direct investment of upto 100% into a private limited company or limited company is under the Automatic route, wherein no Central Government permission is required. Hence, incorporation of a private limited company as a wholly owned subsidiary of a foreign company or joint venture is the cheapest, easiest and fastest entry strategy for foreign companies and foreign nationals into India.

Registration of Branch Office, Liaison Office or Project Office requires RBI and/or Government approval. Therefore, the cost and time taken for registration of branch office, liaison office or project office for a foreign company is higher than the cost and time associated with incorporation of a private limited company. Further, foreign nationals cannot open branch office, liaison office or project office. Hence, this option is limited to being an India entry strategy only for foreign companies.

<u>Here are some key advantages of doing business in India</u>

- **Growth Potential**: The world's largest democracy and the fastest-growing major economy as projected by the International Monetary Fund October 2018 database. The World Bank has released its latest Doing Business Report (DBR, 2019), according to which India has recorded a jump of 23 positions against its rank of 100 in 2017 to be placed now at 77th rank among 190 countries assessed by the World Bank.

- **Stability of Government and Pro-Business**: Political stability is vital to foreign investments. A pro-business work culture of the Government machinery with the business sector to promote economic growth.

- **Extensive Trade Network**: Trade network backed by regional and bilateral free trade agreements with numerous trading partners helps leverage investor's Return on Investment (ROI).

- **Competitive Tax System**: Competitive tax regime and comprehensive network of Tax Treaties, further modified by the introduction of Direct Taxes Code and the Goods and Service Tax – single tax for the whole nation.

- **Skilled Workforce**: Highly-rated human capital base sought globally for – talent, knowledge and skills.

- **A Well – Developed Financial System**: Well-regulated financial system with access to developed capital markets as an alternative source of financing.
- **Robust Legal System**: Efficient legal and judicial system, improved enforcement of laws.

- **Great Work Ethics**: Professional manner of working and willingness to learn.

Foreign Direct Investment (FDI)

The entry of FDI by non-residents into India is controlled by the Government through two routes –the automatic route and approval route. The automatic route is less restricted and more liberal and aimed for prescribed sectors and levels of investment. While in the case of approval route, FDI is allowable in all sectors and activities specified in the consolidated FDI policy of the government, however, requires prior approval from the RBI/Government and is scrutinised depending on the sector and the nature of the investment.

Foreign Direct Investment (FDI) Procedure

1. Automatic Route

FDI under automatic route is now allowed in quite a few sectors, including the services sector, except a few where the existing and notified sectoral policy prohibits FDI beyond a ceiling limit for Indian companies to accept investment without prior approval of RBI.

To file required document and report in Form FC-GPR with concerned Regional Office of RBI within 30 days after the issue of shares to foreign investors.

The facility is available to NRI/OCB investments also.

2. Government Approval

All FDI proposals other than those under automatic route are considered for Government Approval on the recommendations of the DPIIT (Department of Promotion of Industry and Internal Trade)

- The prescribed application is to be submitted to the Secretariat of Industrial Approvals (SIA), in New Delhi.
- Applications can also be submitted to Indian Mission abroad who in turn forward them to SIA.
- The Proposal received by SIA is placed before DPIIT within 20-30 days.
- The DPIIT has the flexibility of purposeful negotiations with the investors.
- RBI has granted a general permission under FEMA(Foreign Exchange Management Act) with regard to proposals approved by Government.
- Indian companies do not require separate clearance from RBI for receiving inward remittance and issue of shares once DPIIT approval is available.
- An Indian company, issuing shares as prescribed in the Regulations should submit the details of advance remittance to the RBI, no later than 30 days from the date of receipt of the amount of consideration, giving the following details:
    - Name and address of the foreign investors
    - Date of receipt of funds and their equivalent in Indian rupee
    - Name and address of the Authorized Dealer(Authorized Banks) through whom the funds have been received, and
    - Details of the Government approval, if any.

- Once the shares are issued, the company is required to file a report in Form FC-GPR no later than 30 days from the date of issue of shares with the Regional Office of RBI in the place where the registered office of the company is situated.

Establishing a Joint Venture in India

A joint venture (JV) is a tactical partnership where two or more people or companies agree to put in goods, services and/or capital to a uniform commercial project.
For any successful joint venture in India, compatibility between the contracting parties is key.
To maintain a successful joint venture in India, the associated parties should have a clear goal and conditions should be written out in the clauses of the JV agreement.
In this article, we briefly cover the advantages of choosing to enter the Indian market through a JV, the type of business structures available to JVs, regulatory and tax considerations, and key risk mitigation factors to ensure a successful JV operation.

Why choose a JV in India?

In sectors where 100 percent FDI is not allowed in India, a joint venture provides a good medium, offering a low risk option for companies wanting to enter into the vibrant Indian market.

All companies registered in India, even those with up to 100 percent overseas equity, are considered the same as local companies. Hence, doing business via. this medium can also command patronage from Indian customers.
Corporate joint ventures are regulated by the Companies Act, 2013 and the Limited Liability Partnership Act, 2008.
A JV may be formed with any of the business entities existing in India.

Entering into a JV in India

Choosing a good home partner is the most important tool to the success of any joint venture.

Once an associate is selected, normally a memorandum of understanding (MoU) or a letter of intent is signed by the parties – stressing the foundation of the future joint venture agreement.

An MoU and a joint venture agreement shall preferably be marked after consulting a chartered accountant firm well versed in the Foreign Exchange Management Act; Indian Income-tax Act, 1961; the Companies Act, 2013; international laws and applicable Indian rules, regulations, and procedures.

Terms and conditions should be properly assessed before signing the contract. Negotiations need an understanding of the cultural and legal background of all the involved parties. The JV union should obtain all the required governmental approvals and licenses within a specified period.

Foreign companies no longer require a no-objection certificate (NOC) from the Indian associate for investing in the sector where the joint venture operates.

Overseas firms in existing joint ventures can function independently in the same business segment. Previously, they needed prior approval from their Indian partners.

Types of joint ventures in India

<u>Equity joint venture</u>

This is an understanding whereby an independent legal entity is created in accordance with the agreement of two or more parties.

The associated parties undertake to provide money or other resources as their contribution to the capital or assets of the corporate entity.

This structure is ideal for long-term, broad-based joint ventures, and include joint venture companies and joint venture limited liability partnerships (LLPs).

<u>Contractual joint venture</u>

This type of joint venture might be used where the organization of a detached legal entity is not needed or the creation of such a separate legal entity is not feasible.

This type of agreement is preferred in situations that involve a temporary task or a limited activity, or the JV needs to be established for a limited term.

Advantages of Joint Ventures (JV)

The following are the main advantages for a foreign investor choosing a JV structure when entering India:

- Access to the established distribution and marketing channels of the Indian partner;
- Access to the available financial resources of the Indian partners; and,
- Access to the established contacts of the Indian partners, which will help ease the process of setting up operations in India.
- Indian JV Partner will have a better knowledge and understanding of the Indian Market and domestic business environment.

A JV also offers the associated parties an opportunity to jointly manage the risks associated with new ventures. Through a JV, they can limit their individual exposure by sharing the liabilities.

JVs offer many flexible business diversification opportunities to the partners. A JV may be set up as a prelude to a full merger or only for part of the business.

Certain market sectors remain restricted for foreign investment and a local partner with a certain shareholding in the company is a regulatory necessity for commencing business and making investments.

Royalty payments

Earlier there were monetary caps on remittances (both lump sum fees and royalties) made for technology collaborations and license or use of trademark or brand name.

Now, these restrictions and caps have been removed.

Profit repatriation

India allows free of charge repatriation of profits once the entire domestic and federal (tax) liabilities are met.

Historically, there has never been an occurrence that India has failed to provide foreign exchange for repatriation.

Investment exit processes are also fairly simple, and profits can be repatriated once all the tax debt and other compulsions are fulfilled.

Troubles arise only when people escape or dodge these liabilities, or do so out of ignorance.

Intellectual property rights

India recognizes different types of intellectual property (IP), which are protected under separate laws. As a result, registering intellectual property involves navigating complex legalities and submitting numerous documents.

This requires expertise and familiarity with procedural norms to ensure fast and effective registration. Overseas investors entering into JVs in India can protect their IP through registration and detailing provisions in the joint venture agreement.

Additionally, independent documentation may also be executed, such as a name and logo license agreement (also known as a registered user agreement) with Indian organizations.

Typically, the licensing agreement, know-how agreement, technical services or technical assistance agreement, royalty payment, franchise agreement, and agreement including all other profit-making matters, including the use of intellectual property rights form annexes or attachments to the main joint venture agreement.

They can be signed simultaneously or after the joint venture company is recognized.

Tax consideration

Foreign firms should reach out for tax advice at the beginning of an Indian investment. India has a very low entry threshold for creating a taxable presence. Hence, very minimal of actions accumulating profits can arise taxability in India.

The sale of shares in an Indian company is usually taxed in India as capital gains, even if the seller is not a resident of India. India taxes such capital gains as well as interest payments at variable rates.

Some of these DTAAs contain beneficial provisions with regard to capital gains tax and withholding taxes on interest payments.

India has Double Taxation Avoidance Agreement (DTAA) with 88 countries, but presently 85 has been in force. The DTAA treaty has been signed in order to avoid double taxation on the same declared asset in two different countries.

How DTAA works?

The DTAA applies for those individuals wherein an individual will reside as a taxpayer in one country and earns income in another country.

These DTAAs are made to make a country attractive for investment purpose by providing relief on dual taxation. The relief is provided by exempting income earned overseas from tax in the resident country or by providing credit to the extent wherein taxes have already been paid abroad.

In some of the cases, DTAAs are known to provide concession on tax rates. For example, if a person is working in the US for more than 181 days then he/she becomes a Non Resident Indian (NRI). He/she will be unable to handle any domestic saving deposit account in India. So, he/she has to convert his/her savings account to an Non Resident Ordinary Rupee account (NRO) savings account where he/she can put his/her money. It will also allow him/her to make transactions of funds originating in India such as rents, dividends, pensions etc. However, tax deducted at source on interest income earned in NRO account is 30.9 per cent, so much of your returns will be gone paying taxes. In order to avoid paying 30.9 per cent as taxes you need to fill the DTAA form. You will be able to avail Tax Deducted at Source (TDS) of 10 per cent if you live in any of the country having a DTAA with India and you have filled the DTAA form.

Goods and Services Tax (GST)

In addition to the direct taxes, indirect tax namely GST (Goods and Services Tax) is also applicable on the sale of products and services of an organisation.

It is a single comprehensive tax levied on all goods and services produced in India as well as those imported from other countries. The new tax **regime** came into effect on July 1, 2017

GST regime requires the following:

1. Classifying transactions
Using HSN/SAC code mapping, you must classify all transactions under GST as either “goods” or “services”.

2. Place of supply and time of supply
You must be clear regarding the applicable provisions of place and time of supply, as provisions differ with location, industry, and commodities.

3. Tax slabs
Once supplies have been properly classified, make sure to apply the appropriate tax rate on each supply, and to update tax rates in your system as needed based upon the applicable rate of GST (as clarified by official announcements and documents of Indian government from time to time) on the Goods being sold or the Services being rendered by the organisation.

GST has been structured in a way that essential services and food items are placed in the lower tax brackets, while luxury services and products have been placed in the higher tax bracket.

The GST council has fitted over 1300 goods and 500 services under four tax slabs of 5%, 12%, 18% and 28% under GST.

4. GST registration — location

GST law requires all factories, outlets, and warehouses in India to register under GST, and all supply points to be identified. You can obtain GST registrations for different business verticals falling under different jurisdictions to help ease GST compliance and ensure seamless input tax credit (ITC).

Areas where **B M Chatrath & Co LLP** can help Foreign Entities to set-up and operate a business in India:

- **We can facilitate in locating business partners for joint venture partnerships in India**
- **We can help in setting up an incorporated entity in India**
- **We can help in Land Acquisition in India for setting up of business**
- **We can help in getting various approvals from RBI (Reserve Bank of India), DPIIT (Department of Promotion of Industry and Internal Trade) and all other Indian federal authorities**
- **Procurement of PAN (**Permanent Account Number**) and TAN (**Tax Deduction and Collection Account Number**)**
- **Procuring Import Export registration (IEC number)**
- **Opening Bank Account**
- **Procuring GST registration and Conducting Statutory and GST audit**
- **Financial Accounting activities**

- **Taxation consultancy**
- **Labour Law compliances in India**
- **Overall, we can help in all core and related matters of setting up and running of a business entity in India including handling of all legal compliances needed in India.**

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