OIFC
Overseas Indian Facilitation Centre

प्रवासी भारतीय कार्य मंत्रालय
Ministry of Overseas Indian Affairs

CII
Confederation of Indian Industry

Doing Business in India - Guide for Indian Diaspora

Knowledge Partner

amarchand mangaldas

Foreword

It gives us a great pleasure in bringing out this publication “Doing Business in India - Guide for Indian Diaspora” on the occasion of the 8th Regional Pravasi Bharatiya Divas, London.

India’s engagement with its Overseas community has been mainstreamed with the establishment of the Ministry.

The Overseas Indian Facilitation Centre (OIFC) is the economic engagement arm of the Ministry of Overseas Indian Affairs and the Confederation of Indian Industry.

The OIFC is engaged in promoting Indian diaspora -led economic engagement including portfolio investments in India. It supports Overseas Indians by way of providing market and operational information about India and encouraging relationships with buyers, suppliers, partners, and institutions in India.

The OIFC operates through its powerful portal www.oifc.in; its Overseas Diaspora Engagement Meets, Webinars and publications.

This Handbook outlines the various Rules & regulations of the Government of India. I hope that you will find this Reference book a useful guide in the quest for information about Doing Business in India.

Prem Narain
Secretary, MOIA and Chairman, OIFC

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INTRODUCTION

India has the distinction of being one of the fastest growing economies in the world. In the past two decades, liberalization has transformed India from being an inward looking state-based economy, into a globalized market-based economy, now identified as one of the most attractive investment locations globally. With Gross Domestic Product (GDP) growth rate of about 5.7% in the first quarter of 2014-15 and a sustained 7-8% average growth for the past decade, the Indian economy has shown itself to be robust and remarkably resilient during the global economic slowdown. The success of Indian economic reforms is evidenced by high GDP growth, high growth rate in manufacturing sector, comfortable foreign exchange reserves, improved short-term debt profile and buoyant exports.

India's potential as a prospective investment destination has been attributed to a variety of reasons such as:

- Stable democratic environment over the 60+ years of its independence;
- Progressive and stable governments, at both the Central and State levels;
- Robust and resilient economy;
- Large market size with increasing purchasing power;
- Access to international markets through membership in regional councils;
- Large and diversified infrastructure spread across the country;
- Well-developed R&D, infrastructure, technical and marketing services;
- Skilled human resources and cost effective production facilities;
- Developed banking system, commercial banking network of over 109,811 branches operated by both Indian and foreign banks; supported by a number of national and state-level financial institutions;
- Vibrant capital markets comprising approximately 22 stock exchanges with over 8000+ listed companies;
- Investor friendly policies with conducive foreign investment environment that provides freedom of entry in most sectors, investment, location, choice of technology, import and export;
- Current account convertibility;
- Established, independent judiciary with a hierarchy of courts;
- Statutory and legal protection for intellectual property rights;
- Common Law based legal system.

Since 1991, the industrial sectors have seen positive structural changes, improvements in productivity, modernization and infusion of new technology. Companies have consolidated around their areas of core competence, within India and overseas, by opting for foreign tie-ups and infusing new technology, management expertise and access to foreign markets. In the technology sector, almost all the major global players have established operations in India. Others procure services from Indian third-party service providers.

The far-reaching and sweeping economic changes that have taken shape since 1991 have unleashed the growth potential of the Indian economy. The Government of India's current policies offer a more transparent economic environment and are geared towards promoting domestic and foreign investment. Over the past two decades, except for a small list of prohibited sectors, foreign investment is permitted in all sectors. Furthermore, the all-important 'Single Brand Retail' sector has been fully opened for foreign investment (up to 49% Automatic and between 49% to 100% with Government approval), and the "Multi Brand Retail" sector has been opened up to 51% with Government approval which are seen as welcome signs of the Government's intent to liberalize further. Recently, the Government further liberalized the FDI policy by permitting (i) 100% FDI (up to 49% Automatic and between 49% to 100% with Government approval) in the Telecom sector; (ii) 100% FDI under the Automatic Route (i.e. without any prior Government's approval) in Petroleum & Natural Gas, (iii) 49% FDI under the Automatic Route for commodity exchanges, power exchanges, stock exchanges; (iv) 100% FDI (up to 49% Automatic and between 49% to 100% with government approval) in the asset reconstruction companies; (v) 74% FDI under the Automatic Route in credit information companies; (vi) 100% FDI under the Automatic Route in the courier services; and (vii) 100% FDI (up to 49% Automatic and between 49% to 100% with government approval) in the Single-Brand Retail trade. With respect to the Defence Sector, FDI up to 49% is allowed with Government approval, while FDI above the 49% limit shall be considered by the Cabinet Committee on Security on a case to case basis.

FDI of up to 100% is permitted under the automatic route in railway infrastructure. Similarly, 100% FDI is allowed in rail track construction. On August 27, 2014, government permitted private sector investment in railway infrastructure by amending the list of industries reserved for public sector. However, this FDI is subject to sectoral guidelines of Ministry of Railways. Further, proposals involving FDI beyond 49% (forty nine percent) in sensitive areas from security point of view will be brought by the Ministry of Railways before the Cabinet Committee on Security for consideration on a case-to-case basis.

FDI in Pharmaceutical sector has been allowed to 100% in the Automatic Route for greenfield pharmaceuticals and 100% through Government approval for brownfield pharmaceuticals. Also, FDI in Insurance sector has been permitted to the extent of 26% under the Automatic Route, subject to conditions such as obtaining of license from the Insurance Regulatory & Development Authority.

Changes are also proposed in FDI rules in B2C e-commerce sector for permitting foreign investment in sale of goods and services over e-commerce.

From a policy perspective, it is clear that the Government of India continues to view foreign investment and private enterprise as a key driver of economic growth in India and the policy measures and changes have been tailored in keeping with this objective. Government of India has also taken initiatives to do away with the obsolete laws and amend the existing laws wherever necessary (for example, labour laws).

The Indian M&A Sphere

India's integration into the global economy has accelerated inbound and outbound M&A, making international headlines and creating domestic valuations of dizzying multiples. The total value of M&A deals in first seven (7) months of 2014 was about US$ 23.82 billion. Further, there were 341 Private Equity transactions in the first seven (7) months of 2014, worth US$ 7.17 billion.

While a number of factors may be attributed to this outcome, the two significant ones are: (i) India has emerged as a player on the global stage, and has acquired the confidence of entrepreneurs and investors alike, both at home and abroad; and (ii) coupled with the ongoing economic transformation and liberalization, as discussed above, this trend is expected to continue in the years ahead.

There are many economic and cultural reasons for the rapid growth of M&A activity in India. The economic factors include India's rapidly growing economy, rising corporate earnings and valuations, cost efficiency of outsourcing and the availability of highly skilled human resources. The cultural factors driving the M&A boom include the Indian entrepreneurial spirit, language skills, comfort with western culture and concepts, comfort of non-Indians with India's business and legal ethos, democracy and rule of law, and the changing attitude of Indian promoters seeking global partnerships. All these economic and cultural factors have largely contributed to and supported the surging M&A activity that we are currently witnessing.

Additionally, liberalized economic policies and timely regulatory review have facilitated an increasing number of inbound and outbound acquisitions. The regulations however, continue to be extensive and vary depending upon the sector of the target company, the mode of acquisition, the instrument proposed to be used, the nature of the acquirer and the nature of the target company.

The M&A laws in India are still evolving and the regulators are still 'catching up' with the global M&A wave into and out of India. This effort to 'catch up' however often results in the regulators applying varying 'interpretations' of a stated law which has created substantial confusion and an upheaval of settled market practice. Further, the core tenets of Indian law, especially those involved in M&A transactions, are in the process of undergoing modernization. For instance, the recent approval of the Parliament to the banking bill has paved the way for foreign investments in the sector and establishment of new private banks, a key reform. At the time of going to press, many major reform bills were pending parliamentary approval. Such major bills include goods and service tax, the Direct Tax Code, the financial sector reforms on banking and insurance.

The efforts to revamp the 5 decades old Companies Act, 1956 (the "1956 Act") had been going for long, and after much deliberations, the Companies Act, 2013 (the "2013 Act"), has been notified in the Official Gazette on August 30, 2013. The 2013 Act empowers the Central Government to bring into force various sections from such date(s) as may be notified in the Official Gazette. 282 sections of the 2013 Act have come into effect till date. The 2013 Act has introduced several new concepts and has also tried to streamline several requirements, including matters in relation to corporate restructurings, mergers and acquisitions. Some of the key changes are in relation to merger/demerger processes, cross border mergers, fast track mergers between small companies and holding – subsidiaries, provisions relating to minority shareholders' protection, and exit opportunities to dissenting shareholders. The changes in the 2013 Act have significant implications on corporates in India. A primer of the 2013 Act highlighting the changes as against its predecessor legislation i.e. the 1956 Act, is provided in Annexure II.

Upon implementation of these legislations, India's outdated laws will leap into the 21st century and smoothen the lifecycle of an M&A deal in India. Of course, the introduction of the Competition Act, 2002 and the revamped SEBI Takeover Regulations in 2011 have created their own sets of issues in India pertaining to their interpretations and impact on deal timelines, valuations and processes. Changes are also in the pipeline for tightening the SEBI Insider Trading Regulations in the near future. These are further discussed in the relevant chapters in this handbook

We now present this handbook to enable readers to have an overview of the systems and legal rules and regulations that are essential for business operations in India.

This booklet has been updated till September 15, 2014. Some of the policy changes are not yet effective and could vary.

IMPORTANT NOTE: This publication has prepared by Amarchand Mangaldas on behalf of OIFC. All information given in this handbook has been compiled from credible, reliable sources. Although reasonable care has been taken to ensure that the information in this handbook is true and accurate, such information is provided 'as is', without any warranty, express or implied as to the accuracy or completeness of any such information. Amarchand Mangaldas shall not be liable for any losses incurred by any person from any use of this publication or its contents. This handbook has been prepared for informational purposes only and nothing contained in this handbook constitutes legal or any other form of advice from Amarchand Mangaldas. Readers should consult their legal, tax and other advisors before making any investment or other decision with regard to any business in India.

I. GENERAL

1. What are the business related laws in India?

India has codified and uniform commercial laws that include legislations relating to contracts, corporations, exchange control, competition, taxation and the like. Statutes are supplemented by policy pronouncements, press notes, notifications and regulations by Governmental departments and regulators.

The key business related legislations in India are:

- the Companies 2013 Act (which governs the incorporation management, restructuring and dissolution of companies);
- the Indian Contracts Act (which lays down the general principles relating to the formation and enforceability of contracts, consideration, the various types of contracts including those of indemnity and guarantee, bailment and pledge, agency and breach of a contract);
- the FEMA (which provides for India's foreign exchange management regime and regulates the inflow and outflow of foreign exchange and investment into/from India) and the regulations issued thereunder, together with the rules/circulars/press notes/guidelines issued by the Government of India setting out the foreign investment policy (including sector-specific requirements);
- the SEBI Act (which governs the functions and powers of SEBI, India's securities market regulator) and the regulations issued thereunder, including, in particular, the SEBI ICDR Regulations (which govern the public offers of securities and offers of securities by listed companies); the SEBI Takeover Regulations (which govern the terms of mandatory and voluntary tender offers for shares of listed companies), the SEBI Insider Trading Regulations (which prohibit dealing in securities when in possession of unpublished price sensitive information), and the SEBI Delisting Regulations (which set out the process for delisting of a listed company);
- the SCRA (which governs listing and trading of securities on stock exchanges in India) and the Listing Agreement with stock exchanges;
- the Competition Act (which regulates combinations (merger control) and anti-competitive behavior); and
- the Income Tax Act (which prescribes the tax treatment of dividend, capital gains, mergers, demergers and slump sales).

In addition, there are several sector specific legislations (e.g. the Indian Telegraph Act, Drugs and Cosmetics Act, Press Council Act, the Banking Regulation Act, the Insurance Act, and various labour legislations (Industrial Disputes Act etc.) that must also be considered depending on the nature and type of the transaction.

2. What are the types of business entities that can be set up in India? What is the process, time and cost for setting up each?

Business ventures can be carried on in India through sole proprietorships, partnerships (including LLPs) or through companies incorporated in India. Additionally, non-residents can carry on certain limited business activities through a branch office, liaison office or a project office.

Sole Proprietorship

This is the simplest form of business. No business registration is required under Indian law. The owner of a sole proprietorship is personally entitled to all the profits and responsible for all the losses arising from the business.

Partnership

Partnerships in India are regulated under the Partnership Act. Partners of a firm are jointly entitled to all the profits and are also jointly and severally responsible for all the liabilities arising from the business. While it is not mandatory to have a partnership deed, most partners do enter into a partnership deed to - govern their inter-se relationship as partners. A partnership does not have a corporate character distinct from its members. A partnership may even have corporations as its members.

LLPs are a new form of a hybrid corporate entity with characteristics of both a limited liability company and a partnership. The nature of an LLP is that of a body corporate with perpetual succession and which has a legal entity separate from that of its partners. An LLP can sue and be sued in its own name. Two or more persons (including a body corporate) can incorporate an entity as an LLP under the LLP Act and there is no maximum limit on the number of partners an LLP may have. FDI is permitted in an LLP, with the prior approval of the FIPB, in those sectors/ activities where 100% (one hundred percent) FDI is allowed, through the Automatic Route and there are no FDI linked performance related conditions. However, there are certain restrictions on the activities of LLPs with FDI.

Company

A company may be incorporated in India either as a private company (including a one person company, a new category of company under the 2013 Act) or a public company.

The minimum paid-up capital for a private company is INR 0.1 million and that of a public company is INR 0.5 million. However, foreign investment in certain sectors such as NBFCs and permitted real estate activities are subject to minimum capitalization requirements.

Branch / Liaison / Project Offices

Setting up branch offices and liaison offices requires prior approval of the Reserve Bank. The activities which may be undertaken by the branch offices and liaison offices have been set out in response to question 3 below. General permission has been given by the Reserve Bank for the establishment of project offices that meet specified conditions. Foreign companies i.e. companies or body corporates incorporated outside India, which establish a place of business in India through a branch office or through electronic mode must be registered with the RoC. No approval of the Reserve Bank is required for foreign companies to establish branch offices/ units in SEZs to undertake manufacturing and service activities, subject to satisfaction of certain conditions.

3. Are there any fetters on the business activities that can be carried on by business organizations in India?

A branch office may enter into contracts on behalf of the non-resident parent and may generate income. However, the activities that can be undertaken by a branch office are restricted to representing the parent company, exporting/ importing goods, rendering professional or consultancy services, carrying on research work in which the parent company is engaged, promoting technical or financial collaborations between Indian companies and the parent or overseas group company, representing the parent company in India and acting as buying/ selling agent in India, rendering services in information technology and development of software in India, rendering technical support to the products supplied by parent/group companies and foreign airlines/ shipping companies.

However, a branch office is not allowed to engage in (a) retail trading activities of any nature, and (b) manufacturing or processing activities in India, whether directly or indirectly. The scope of the activities may be further curtailed by conditions in the approval granted by the Reserve Bank.

A liaison office, on the other hand, is not permitted to carry on business in India. Its activities are restricted to representing the parent company/group companies, promoting export from/ to India, promoting technical/financial collaborations between parent/group companies and companies in India, gathering information for the parent company and acting as a communication channel between the parent company and Indian companies. The expenses of liaison offices are to be met entirely through inward remittances from the Head Office outside India.

A project office is usually set up for execution of large projects such as major construction, civil engineering and infrastructure projects.

An Indian company (even if wholly foreign owned) has no similar fetters on its ability to carry on business that is specified in its Memorandum of Association, except that the foreign holdings in such company may be limited if it is engaged in a sector for which the Government of India has prescribed threshold(s) for foreign shareholding under the extant FDI Policy.

II. COMPANIES

1. Overview of the corporate law regime in India and proposed legal changes

The law governing companies in India is provided in the central / federal legislations of the 1956 Act and its successor law, i.e. the 2013 Act, which is being notified and implemented by the Government in a phased manner. The 2013 Act has replaced substantial provisions of the erstwhile 1956 Act, while the old law continues to apply for provisions for which the corresponding provisions of the 2013 Act have not come into force, including provisions in relation to mergers and acquisitions and winding-up of companies. The main objectives which lie underneath the formulation of the 2013 Act are (i) promoting investments along with sound governance within corporate structures; (ii) enhancing accountability; (iii) protection of investors and minority shareholders; (iv) de-linking substantial law from procedural aspects; (v) introducing compactness by removing redundant provisions; and (vi) consonance with changes in national and international economic environment. The 2013 Act has inter-alia, introduced enhanced corporate governance standards particularly in relation to the independent directors, audit, CSR, mandatory valuation, private placement of securities, cross-border mergers including merger of Indian companies into foreign companies and class action suits. However, it is subject to subordinate legislation wherein the Central Government is empowered to prescribe necessary rules in relation to a wide range of provisions, in order to carry out the objectives of the 2013 Act. A primer on the 2013 Act has been set out in Annexure II.

2. What are the different types of companies that can be incorporated in India?

Companies may be incorporated as private companies or public companies. A private company may also be incorporated as a one person company. Companies may be limited by shares, limited by guarantee (which may or may not have share capital) or unlimited (i.e. no limit on the liability of the members). The most commonly used form in India is a company limited by shares. Private companies must have a minimum paid up capital of INR 0.1 million. The Articles of Association of private companies must restrict the transferability of shares and the number of members to 200 (two hundred) (not including employees), prohibit the company from making any invitation to the public to subscribe for shares or debentures and any invitation or acceptance of deposits except from members, directors or their relatives. A private company is required to have a minimum of 2 (two) members and 2 (two) directors, except a one person company which can be incorporated only with 1 (one) person acting as the member and director of the company.

A company may be a listed company (in case its securities are listed on a recognized stock exchange in India) or an unlisted company.

Unlisted private companies have greater flexibility and less stringent rules in respect of various matters including composition of board of directors, forming committees of the board of directors, holding of members' meetings, number of directors, determination of kinds of share capital and voting rights, determination of managerial remuneration, inter-corporate loans and investments, etc.

As stated above, a private company also can be in nature of a one person company. The introduction of one person company comes with the 2013 Act and will benefit small entrepreneurs; as such a company will, inter alia, be exempt from certain filing requirements and requirements in relation to meetings etc.

The shares of a public company are freely transferable and there is no limit on the number of members that it may have. The minimum paid-up capital for a public company is INR 0.5 million. A public company is required to have a minimum of 7 (seven) members and 3 (three) directors. A private company, which is a subsidiary of a public company, is deemed to be a public company under the 2013 Act.

Further, based on the control and influence test, a company (in connection with another company) may be categorized into a holding company, a subsidiary company or an associate company.

Other types of companies mentioned in the 2013 Act are foreign companies, small companies, government companies, nidhi companies, banking companies, producer companies and dormant companies.

3. What is the incorporation process?

Indian companies (whether private or public, limited or unlimited) are incorporated by registration with the appropriate RoC of the State in which the registered office of the company is proposed to be located. The documents filed with the RoC are available for public inspection.

The first step towards incorporation is obtaining DIN by the proposed first directors. It is to be noted that the concept of provisional DIN has been done away with.

This is followed by obtaining digital signature certificate by at all the directors, from the designated authorities. Thereafter, approval of the name of the company has to be obtained from the RoC. An application for name approval is made in the prescribed form, wherein various details regarding the proposed new company, viz., alternative choice of names, information regarding first directors, details of the promoters and main objects, need to be disclosed. Following the receipt of such name approval, prescribed forms for application and declaration for incorporation of new company, notice of situation of registered office (or address of correspondence until establishment of the registered office) and particulars of subscribers and directors, along with the Constitutional Documents of the proposed company need to be filed with RoC. Note that the other documents to be filed include declaration by the professional engaged in the formation of the company and a director, regarding compliance with requirements of the Act and affidavits from subscribers and directors that they have not been convicted of any offence in connection with the promotion, formation or management of any company, they have not been found guilty of any fraud or misfeasance or of any breach of duty to any company during the preceding five (5) years and all the documents filed with the RoC contain correct, complete and true information, the address for correspondence till the registered office is established, specified particulars of the subscribers to the memorandum, particulars of the persons mentioned in the articles as first directors of the company, and particulars of the interests of the persons mentioned in the articles as first directors of the company in other firms or body corporate along with their consent to act as directors.

Once the Constitutional Documents are approved by the RoC and a certificate of incorporation is issued by the RoC, business can be commenced by the company after filing a declaration by a director stating that every subscriber to the Memorandum of Association has paid the value of shares agreed to be taken, and that the minimum paid-up capital requirement has been complied with and filing verification form regarding the registered office. These filings have to be made by all companies with share capital, including by private companies.

The Constitutional Documents of a company comprise of the Memorandum of Association and the Articles of Association. The Memorandum of Association sets out the name of the company, state where the registered office of the company is/will be situated, objects for which the company is proposed to be incorporated, liability of members, authorized share capital of the company. The Articles of Association set out the rules and regulations of the company in respect of its management and the rights of the members/shareholders inter se and vis-à-vis the company. The 2013 Act permits inclusion of entrenchment provisions in the Articles of Association, enabling companies to place higher approval threshold (above 75% (seventy five percent) voting) for altering the Articles of Association. Entrenchment provisions can be included in the Articles of Association either at incorporation stage or by a subsequent amendment. In case of private companies, the approval needs to be obtained from all members for subsequent amendments to include entrenchment provisions.

In addition to the above, for incorporating a one person company, the Memorandum of Association shall indicate the name of another consenting person, i.e. a nominee, who shall become the member upon death or incapacity of the original member. The name of such one person company should have "OPC Limited" added to its name.

4. How are minority shareholders protected under Indian law?

Minority shareholders have been given greater powers and remedies under the 2013 Act, with an aim to protect their rights. Permissibility of incorporating entrenchment provisions in the Articles of Association is seen as one of the major minority protection tool, under the 2013 Act.

The minority shareholders have exit opportunities as dissenting shareholders, under certain circumstances, including in case of variation of objects of public offering and takeover of an unlisted company or merger of an unlisted company with a listed company. Further, in case of a compromise or arrangement, the NCLT may order for provision of exit opportunity to dissenting shareholders.

Certain rights with the objective of providing enhanced minority protection are available to shareholders owning at least 10% (ten percent) of shares/voting rights, including right to challenge variation of rights attached to shares, right to making an application to NCLT for investigation into affairs of the company, and right to requisition an extra-ordinary general meeting of the company.

Further, in case of an acquirer (with PAC)/person, become registered holder of 90% (ninety percent) or more of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, minority shareholders may also offer the majority shareholders to purchase the shares held by such minority shareholders.

In case of a company having a share capital, right to apply to the NCLT is available to not less than 100 (one hundred) members of the company or not less than 1/10th of the total number of members, whichever is less, or any member(s) holding not less than 1/10th of the issued share capital of the company, subject to specified conditions . In case of a company not having a share capital, not less than 1/5th of the total number of members can apply to the NCLT against oppression of the minority and for mismanagement of the company by the persons in control of the company or the majority shareholders, and if (it is likely that) the affairs of the company are/will be conducted in a manner prejudicial to the interest of members or class of members. However, the burden of proving oppression or mismanagement would be on the member/shareholder alleging the same and the process may take several years.

The 2013 Act has enabled class action suits to facilitate protection of minority interests in the company. In case of a company having a share capital, the application for class action suit may be filed by not less than 100 (one hundred) members of the company or not less than specified percentage of total number of its member, whichever is less, or any member(s) holding not less than specified percentage of share capital of the company, subject to specified conditions. In case of a company not having a share capital, the application for class action suit may be filed by not less than 1/5th of the total number of members. Further, not less than 100 (one hundred) depositors or not less than prescribed percentage of total number of depositors, whichever is less, or any depositor(s) to whom the company owes a prescribed percentage of total deposits of the company, may file an application for class action suit.

The application for class action suit may be filed if the member(s) or depositor(s) are of the opinion that the management or conduct of affairs of the company is prejudicial to the company, members and / or depositors. Direct claim can be made against third parties for damages or compensation for unlawful or wrongful acts, including from or against directors, auditors (firm and partners) or experts, consultants, advisors etc. (for incorrect or misleading statement or any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct).

Additionally, the new law provides for appointment of small shareholders director, establishment of stakeholders relationship committee, procedure for squeeze outs, and other governance related measures for safeguarding minority interests.

5. How does one fund a subsidiary in India?

A subsidiary may be funded by a foreign parent by:

- subscribing to equity shares, compulsorily convertible preference shares, compulsorily convertible debentures and/ or depository receipts;

- extending an ECB, or a foreign currency loan, including through subscription to partially or optionally convertible preference shares, FCCBs, OCDs and NCDs (subject to having the minimum equity contribution and maintaining the debt equity ratio stipulated under the extant regulations) and which would require compliance with the permitted end-use requirements; and/or

- providing advance against services to be rendered (in case of a captive IT/ITES unit). However, the parties must be mindful of transfer pricing restrictions and take care that the advance does not extend beyond specified periods so as to constitute an ECB. Note that provisions in relation to related party transactions may also be applicable in such case.

6. What types of shares can a company issue?

Shares can only be of two kinds:

- Equity shares - These shares have voting rights, or differential rights as to dividend, voting or otherwise; and

- Preference shares - Such shares do not carry voting rights, except in certain circumstances. Preference shareholders have a preferential right over the equity shareholders to dividends and to assets of the company in case of a winding up. These shares may be redeemable or convertible into equity shares. Companies are not permitted to issue irredeemable preference shares, or preference shares with a redemption date beyond 20 (twenty) years (except for infrastructure projects, for which such period could be up to 30 (thirty) years).

  A draft notification was placed before the Parliament on July 14, 2014, proposing exemptions for private companies from certain requirements under the 2013 Act. One such proposal provided that the provisions in relation to share capital and voting rights of equity and preference shareholders should not be applicable to a private company, if specifically provided in its Articles of Association. However, the said draft notification has not yet come into effect.

7. Who can be appointed as a director of a company in India? Can a non-resident be appointed as a director of an Indian company?

The 2013 Act provides that no body corporate, association or firm can be appointed as a director of a company, and only an individual can be so appointed. The 2013 Act, clarifies that no company can appoint or re-appoint any individual as director of the company unless he has been allotted a DIN. The 2013 Act has introduced many changes in relation to Board composition, including mandatory appointment of at least one (1) resident director and one (1) women directors on the Board, as well as independent directors for certain specific class of companies.

The 2013 Act has made further changes in addition to the aforementioned requirements with the objective of increasing board transparency and accountability. For more details on the changes, please refer to Annexure II.

8. What are the liabilities/obligations of a director under Indian law?

The 2013 Act has specifically provided for the statutory duties of directors, which include duty to act in good faith to promote objects of the company, duty of care, skill and diligence and to exercise independent judgment, duty not to involve in a situation of conflicting interests with the company and duty not to achieve any undue gain or advantage. Please note that the independent directors have additional duties, codified under the 2013 Act.

A director who commits a breach may be liable for both civil and criminal consequences, depending upon the nature of the breach and the statutory provisions.

A director is required to act with reasonable diligence and care in the best interest of the company, and has a fiduciary duty to the company and the shareholders of the company as a whole.

Other duties of a director include attending the board meetings, disclosing any conflicting interest and acting in accordance with the Articles of Association of the company.

9. Are there any corporate social responsibility norms in India?

The 2013 Act has for the first time introduced the concept of corporate social responsibility for Indian companies. It requires every company having a net worth of INR 5,000 million or more, or a turnover of INR 10,000 million or more, or a net profit of INR 50 million or more to spend at least 2% (two percent) of the average net profits of the company made during three (3) immediately preceding financial years, as part of the corporate social responsibility. The 2013 Act follows the “comply or explain” approach, and there is no penalty for not spending. However, reporting is mandatory. For a more detailed analysis of the provisions, please refer to Annexure II.

Further the MCA has released the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011 which provides companies with a comprehensive framework for responsible business action that encompasses social, environmental and economic responsibilities of business. Further, the guidelines provide direction for Indian MNCs planning to invest or already operating in other parts of the world. The guidelines are a refinement over the Corporate Social

Responsibility Voluntary Guidelines 2009. The guidelines are not mandatory. In addition, under the Guidelines on CSR and Sustainability for Central Public Sector Enterprises issued by Department of Public Enterprises, Ministry of Heavy Industries and Public Enterprises and effective from April 1, 2013, it is mandatory for all central public sector enterprises to select at least 1(one) project each for (i) development of weaker sections of society and the backward districts and (ii) environment sustainability. These Guidelines also follow the “comply or explain” approach.

In addition, under the Equity Listing Agreement, it is mandatory for top 100 (one hundred) listed companies, to include Business Responsibility Report in their annual reports.

10. Are there any corporate governance norms?

Yes. The 2013 Act has provided for an elaborate mechanism for companies to comply in relation to corporate governance. The wave of corporate governance reforms started with amendments being done to the Equity Listing Agreement and the 1956 Act.

The corporate governance regime brought in place by the 2013 Act, inter alia, provides for mandatory appointment of independent directors and a woman director for certain classes of companies, appointment of small shareholders directors, constitution of nomination and remuneration committee, stakeholders relationship committee, audit committee, vigil mechanism systems for internal audits, appointment of key managerial personnel, clarified ambit for duties and obligations of directors, stringent policy for related party transactions and inter-corporate transactions, accounting standards, rotation of independent directors and auditors, and varied minority protection measures. For instance, it is required for every listed company and public company having a share capital of INR 100 million or more, turnover of INR 1,000 million or more, or outstanding loans and borrowings of INR 500 million or more, to appoint independent directors on the Board, as well as constitute audit committee and nomination and remuneration committee. For a detailed analysis of the provisions, please refer to Annexure II.

The Listing Agreement also requires public listed companies to appoint a specified number of independent non-executive directors and constitute separate sub-committees of the board of directors for functions like audit and remuneration.

In addition to this, the Ministry of Corporate Affairs has released the Corporate Governance Voluntary Guidelines, 2009 and the National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business, 2011 which provide a set of corporate governance practices. These guidelines are not mandatory.

11. Are there any insolvency laws applicable to companies established in India?

Courts in India can order a company to be wound up in certain cases, such as if the company is unable to pay its debts, it has acted against the interests of sovereignty and integrity of India, it has defaulted in filings its financial statements or annual returns for 5 consecutive financial years or if the NCLT believes that it is just and equitable to do so. Separately, under SICA, if a company with one (1) or more industrial undertakings, were to become sick (its accumulated losses are equal to or exceed its net worth), the BIFR could order for the winding up of the sick company. Recently, the obligations of the BIFR have been vested with the NCLT and courts with equivalent powers. The 2013 Act provides framework for revival and rehabilitation of all sick companies (and not only certain scheduled industries). Under the 2013 Act, ‘Sickness’ of a company is now determined by the inability of a company to repay its debts within 30 (thirty) days of receipt of a demand from secured creditors of the company representing 50% (fifty percent) or more of the outstanding debt. In relation to a company whose financial assets have been acquired by a securitization company or reconstruction company, application to the NCLT for determination of revival measures, would be subject to the securitization company/asset reconstruction company granting its consent for the same.

12. Can voting rights be exercised by proxy?

A member of a company who is entitled to attend and vote at a meeting of the company can appoint another person (whether or not a member) as his / her proxy to attend and vote at a meeting instead of him / her, subject to certain compliances. However, in case of companies with share capital, such a proxy is not entitled to speak at the meeting and vote except on a poll. In case of companies without share capital, the Articles of Association may prescribe such restrictions. A member of company registered under Section 8 of the 2013 Act (similar to Section 25 of the 1956 Act) can appoint only another member of the company as a proxy.

13. Can statutory meetings be held through electronic means?

Yes, the MCA has in 2011 permitted meetings of board of directors as well as meetings of shareholders to be held by electronic mode, i.e. video conferencing, subject to conditions specified therein. The same is now allowed under the 2013 Act. However, a director is required to attend at least one board meeting personally in a financial year. Further, every listed company and company having at least 1,000 (one thousand) members is required to provide e-voting facility for its general meetings. In addition, the MCA also prescribed detailed rules in this regard.

III. FOREIGN INVESTMENT

1. How is foreign investment regulated in India?

Foreign investment in India is primarily regulated by: (i) the industrial policy; (ii) FEMA and rules promulgated thereunder; (iii) the regulations and notifications issued by the Reserve Bank; and (iv) the FDI Policy issued by the DIPP.

2. Who are the key regulators that monitor foreign investment in India?

The FIPB, a department of the Ministry of Finance, is the regulatory body responsible for regulating foreign investment in accordance with the Industrial Policy. In addition, the Reserve Bank also regulates foreign investment for the purposes of exchange control in accordance with the provisions of the FEMA.

3. What are the different routes through which a foreign investor (other than NRI or PIO) may invest in India?

A foreign investor may invest in India through four routes, namely:

(a) FDI, either under the Automatic Route or the Approval Route; under Automatic Route, the foreign investor or the Indian company does not require any approval from the Government of India and under Approval Route, prior approval of the Government of India is required. Under both routes foreign investors do not require any prior registration with a regulatory authority in India;

(b) Investment under the Portfolio Investment Scheme as a Registered Foreign Portfolio Investor (RFPI), subject to prior registration with SEBI;

(c) Investment as an foreign venture capital investors, subject to prior registration with SEBI; and

(d) Investment as a QFI through SEBI registered depository participants only in specified securities.

4. What are the different instruments available for investment in India under the FDI Policy?

A foreign investor should consider the applicable FDI regime before selecting instruments as the treatment accorded to each of the instruments is different under the current FDI Policy.

- As per the FDI Policy, a foreign investor can invest in equity shares; fully, compulsorily and mandatorily convertible preference shares; fully, compulsorily and mandatorily convertible debentures. Further, the price/ conversion formula of convertible instruments should be determined upfront at the time of issue of the instruments.
- Investment in warrants and partly paid shares will require prior approval under the Government Route.
- Issuance of preference shares which are non-convertible, optionally convertible or partially convertible would be subject to compliance with extant regulations pertaining to ECB.

5. Is FDI prohibited in any sector/business?

FDI is prohibited in the following sectors:

(a) Lottery business including Government /private lottery, online lotteries, etc.;

(b) Gambling and betting including casinos, etc.;

(c) Chit funds;

(d) Nidhi company;

(e) Trading in transferable development rights;

(f) Real estate business or construction of farm houses;

(g) Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes; and

(h) Activities / sectors not open to private sector investment: e.g: (i) atomic energy and (ii) railway operations (other than permitted activities mentioned in para 6.2 of the FDI Policy).

Additionally, other than specified agriculture related activities, FDI is not permitted in Agriculture sector/activity.

6. Are there any pricing guidelines that a foreign investor has to comply with while investing into any of the instruments of an Indian entity?

The Reserve Bank has prescribed pricing guidelines for both the subscription to, and the acquisition of, shares by non- residents.

Issue of Shares

(a) Where shares of the Indian company are listed on a recognized stock exchange in India, the price of shares issued to a non-resident shall not be less than the price worked out in accordance with the SEBI guidelines, as applicable.

(b) Where shares of the Indian company are not listed on a recognized stock exchange in India, the price of shares issued to a non-resident shall not be less than the fair valuation of shares done as per any internationally accepted pricing methodology for valuation of shares on arm's length basis, duly certified by a Chartered Accountant or a SEBI registered Merchant Banker.

(c) Where the issue of shares is pursuant to a rights issue, the issue price shall subject to SEBI ICDR Regulations be at a price determined by the company (where the investee company is listed) and where the investee company is not listed, the issue price shall not be less than the price at which shares are issued to resident shareholders.

However, where non-residents (including NRIs) are making investments in an Indian company by way of subscription to its memorandum of association, such investments may be made at face value subject to their eligibility to invest under the FDI scheme.

Transfer by Resident to Non-resident

(a) Where shares of the Indian company are listed on a recognized stock exchange in India, the price of shares transferred, by way of sale shall not be less than the price at which a preferential allotment of shares can be made under the SEBI guidelines. The price per share arrived at should be certified by a SEBI registered merchant banker or a chartered accountant.

(b) Where shares of the Indian company are not listed on a recognized stock exchange in India, the transfer of shares shall be at a price not less than the fair value worked out as per any internationally accepted pricing methodology for valuation of shares on arm's length basis which should be duly certified by a Chartered Accountant or a SEBI registered Merchant Banker.

Pricing of optionality clauses

From January 2014, agreements with investors having optionality clauses and return linked to equity has been considered permissible under the extant FDI policy and FEMA regulations, and the following pricing guidelines have been prescribed for exit by foreign investor exercising such option / right

(a) Where shares of the Indian company are listed on a recognized stock exchange in India, the non-resident investor, subject to the lock-in period of one (1) year, shall be eligible to exit by exercising option / right at the market price prevailing at the recognized stock exchanges.

(b) Where shares of the Indian company are not listed on a recognized stock exchange in India, the non-resident investor shall be eligible to exit from the investment in equity shares, Compulsorily Convertible Debentures (CCDs) and Compulsorily Convertible Preference Shares (CCPS) of the investee company at a price not exceeding that arrived at as per any internationally accepted pricing methodology on arm's length basis, duly certified by a Chartered Accountant or a SEBI registered Merchant Banker.

It may be also be mentioned that, in a move to facilitate investments, it has been proposed in the monetary policy for 2014 by the Reserve Bank that the existing regulations on valuation norms relating to acquisition / sale of shares and FDI will be withdrawn and be replaced by operating guidelines which shall be notified in recent times to come.

7. What are the ways for a foreign investor to invest in an Indian company?

FDI in India can be done through the following modes:

Issuance of fresh shares by a company: Subject to compliance with the FDI Policy and FEMA, an Indian company may issue permissible instruments under the FDI Policy to a non-resident investor.

Acquisition by way of transfer of existing shares: Non- resident investors can also invest in Indian companies by purchasing/acquiring existing instruments permissible under the FDI Policy from Indian shareholders or from other non-resident shareholders in the following manner:

(a) Non-resident to Non-resident: A person resident outside India (other than an NRI or OCB) can transfer, by way of sale or gift, the shares or convertible debentures of an Indian company to any person resident outside India.

(b) Resident to Non-resident: A person resident in India can transfer, by way of sale, permissible instruments under private arrangement to a person resident outside India, subject to compliance with the sectoral caps, pricing guidelines, reporting requirements, etc. Gift of such instruments by a resident to a person resident outside India will require the prior approval of the Reserve Bank.

(c) Non-resident on the Stock Exchange: A person resident outside India can sell the shares and convertible debentures on a recognized stock exchange in India through a stock broker registered with stock exchange or a merchant banker registered with SEBI. Only FIIs/FPIs and NRIs (under the Portfolio Investment Scheme) or Qualified Foreign Investors are permitted to invest/trade in the shares of an Indian company on the stock exchange through a registered broker.

Further, a non resident investor who has already acquired and continues to hold the control in accordance with SEBI Takeover Regulations can acquire shares of a listed Indian company on the stock exchange through a registered broker under FDI scheme, subject to the FDI scheme and FEMA regulations in respect of sector cap, entry route, mode of payment, reporting requirement, documentation, etc.

Additionally, it is permitted for Non-resident investor to have FDI in registered LLPs by contribution to the capital or by acquisition or transfer of share of profit of the LLP, subject to approval under the government route and in compliance with the scheme for FDI in LLP.

8. Are there any instances of transfer by way of sale, which require prior approval from the Reserve Bank/FIPB?

The prior permission of the Reserve Bank is required in the following instances of transfer, by way of sale of shares/convertible debentures, or otherwise, from residents to non- residents:

(a) Transfer of shares/convertible debentures of an Indian company engaged in the financial services sector, unless fit and proper / due diligence as stipulated by the respective financial sector regulator, FDI policy, and FEMA regulations (in terms of sectoral caps, conditionalities, etc.), is complied with by the investor;

(b) The transfer is to take place at a price that is not determined in accordance with the pricing guidelines prescribed by the Reserve Bank;

(c) The non-resident investor proposes deferment of payment of the amount of consideration; and

(d) Transfer of securities by way of gift from a resident to a person resident outside India (not being erstwhile OCBs).

The following instances of transfer of shares from residents to non-residents, by way of sale or otherwise, requires prior permission of the FIPB or DIPP, followed by permission from the Reserve Bank:

(a) The transfer of shares of companies engaged in sectors falling under the Government Route; and

(b) The transfer of shares resulting in foreign investments in the Indian company, breaching the applicable sectoral cap.

Further, transfer of shares from NRI to non-resident, requires prior approval of Reserve Bank.

9. What are the ECB norms in India?

Foreign investment in partially or optionally or non-convertible preference shares/bonds/ debentures, is construed as an ECB and would be subject to the ECB norms. At present ECB is governed by the Master Circular on External Commercial Borrowings and Trade Credits issued by the Reserve Bank on July 1, 2014. The Master Circular consolidates all the existing instructions on the subject of ‘External Commercial Borrowings and Trade Credits’ in one place and is updated on a year on year basis in intervening circulars.

As per the Master Circular, ECBs may be accessed under two routes: (a) automatic route; and (b) approval route. If any of the prescribed conditions are not complied with, the automatic route is not available, and prior approval of the Reserve Bank is required for the ECB under the approval route.

Corporates, including those in the hotel, hospital, software sectors (registered under the Companies Act) and infrastructure finance companies except financial intermediaries, such as banks, financial institutions, housing finance companies and NBFCs , NGOs, MFIs, SIDBI and SEZs are eligible to raise ECB under the automatic route. On July 8, 2013, the RBI permitted NBFCs categorized as Asset Finance Companies to avail of ECB under the automatic subject to certain conditions stipulated in the guidelines.

These borrowers can raise ECB from internationally recognized sources such as (i) international banks, (ii) international capital markets, (iii) multilateral financial institutions (such as IFC, ADB, CDC, etc.) / regional financial institutions and Government owned development financial institutions, (iv) export credit agencies, (v) suppliers of equipment, (vi) foreign collaborators and (vii) foreign equity holders (other than erstwhile OCBs).

An ECB, irrespective of whether it is obtained through the automatic or approval route, cannot be obtained at a cost that exceeds the all-in-cost ceilings prescribed by the Reserve Bank. This ceiling includes the rate of interest, other fees and expenses in foreign currency (except commitment fee), pre-payment fee and fees payable in Indian Rupees. These ceilings are reviewed from time to time, and presently stand at 350 (three hundred and fifty) basis points over the six (6) month LIBOR for ECBs with an average maturity period of between 3 (three) and five (5) years, and 500 (five hundred) basis points over the six (6) month LIBOR for ECBs with an average maturity period of more than five (5) years.

The Reserve Bank prescribes minimum average maturity periods over which the borrower must repay the facility. Depending on the value of the facility, the minimum average maturity ranges from three (3) to five (5) years. ECBs of a shorter maturity period require the prior approval of the Reserve Bank. An ECB cannot be refinanced or prepaid before the expiry of the minimum average maturity period applicable to it.

The Master Circular also specifies end-use restrictions on the amounts received as an ECB. The permitted uses include, inter alia, the import of capital goods (as classified by the Directorate General of Foreign Trade in the Foreign Trade Policy), payment for acquisition of 3G and 2G spectrum, acquisition of shares in the disinvestment process by the Government, ODI in JVs / WOS and the implementation of new projects and modernization/expansion of existing production units in the real sector – industrial sector including small and medium enterprises, infrastructure sector and specific service sectors, namely hotel, hospital and software in India. ECBs are not permitted to be raised for (i) on-lending or investment in capital markets or acquiring a company (or a part thereof) in India by a corporate; or (ii) use in real estate (as defined and qualified by the ECB Guidelines); or (iii) working capital, general corporate purposes and repayment of existing Indian rupee loans (except loans taken by infrastructure companies, whereby these companies can use 25% (twenty five percent) of the ECB proceeds to pay off their rupee loans).

10. Are there any limitations on repatriation of royalty/dividend/consultancy fees?

There are no restrictions specific to non-residents on the remittance of dividends. However, as noted above, restrictions do exist on the ability of a company to declare a dividend under the Companies Act. The dividend payable on compulsorily convertible preference shares or bonds (which are treated as FDI) is restricted to 300 basis points over the prime lending rate of the State Bank of India as on the date of the Board meeting approving the issue of such shares. Non-convertible or optionally convertible preference shares and bonds are treated as an ECB and the rate of interest has to be within the limits provided in the ECB policy.

The law relating to royalty payments have been recently liberalized and currently all remittances for royalty fall under the Automatic Route.

Remittances of consultancy fees exceeding US$ 1 million for any consultancy services procured by an Indian entity from outside India (other than consultancy services rendered in respect of infrastructure projects, where the limit is US$ 10 million) requires the prior approval of the Reserve Bank. However, this rule does not apply if payments are made out of funds held in an RFC account of the remitter.

IV. ACQUISITION OF SHARES

1. What are the various modes of acquisition of shares of an existing company?

Shares or instruments convertible into shares, of an existing company may be acquired by way of a preferential allotment of newly issued shares made by the company or a secondary sale of existing shares from a shareholder of the company. Where the company is listed on a stock exchange, the preferential allotment of new issued shares should be in accordance with the Companies Act and the SEBI ICDR Regulations, and the existing (listed) shares may also be acquired through open market purchases from the stock exchange, subject to SEBI Takeover Regulations.

2. Are there pricing restrictions applicable to the subscription / acquisition of shares? Are there special restrictions applicable to foreign investors?

Please refer to our response to question 6 under chapter "Foreign Investments in India". Additionally, in case of both listed and unlisted companies, the price of shares transferred, by way of sale, by a non-resident to a resident, shall not be more than the minimum price at which the transfer of shares can be made from a resident to a nonresident (as provided in our response to question 6 under chapter "Foreign Investments in India".) A non resident investor who has already acquired and continues to hold the control in accordance with SEBI Takeover Regulations can acquire shares of a listed Indian company on the stock exchange through a registered broker under FDI scheme, subject to the FDI scheme and FEMA regulations in respect of sector cap, entry route, mode of payment, reporting requirement, documentation, etc.

3. Can parties enter into put and call options for the sale and purchase of shares?

After long deliberations and debates on the permissibility of the put and call options, in a major move to render an investor friendly atmosphere, SEBI in October 2013 permitted contracts for pre-emption including right of first refusal, tag along rights, drag along rights contained in investment agreements or Articles of Association of a company. It is also allowed to have put and call options subject to a lock-in period of one (1) year and the pricing norms as applicable. This change is in wake of the 2013 Act which enables contractual arrangements for pre-emption such as put and call options to be enforceable as a contract.

4. Can the acquirer enter into an agreement with the other shareholders of the company on governance and transfer related aspects?

Typically an acquirer would enter into a contractual agreement with the shareholders of the company under a shareholders' agreement, to record and set out the mutual rights and obligations inter se the parties and to record and set out the manner in which the company shall be managed and governed including matters concerning the right to appoint directors, affirmative voting rights and transfer restrictions on the shares held by the parties to the agreement. Such rights would only be enforceable if the same have been incorporated into the Constitutional Documents of the company. With the 2013 Act, such arrangements in case of a public company are also enforceable as contracts.

V. COMPETITION LAW

1. What are the laws governing competition/ anti-trust in India?

Competition law in India is governed by the Competition Act, 2002 (the Competition Act) and the rules and regulations made thereunder. The Competition Act aims to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade in markets. The Competition Act provides for, amongst other matters, the establishment of the Competition Commission of India (CCI), the nodal authority for monitoring, enforcement and implementation of competition law in India, and the Competition Appellate Tribunal (COMPAT). Orders passed by the CCI may be appealed to the COMPAT and, thereafter, the orders passed by the COMPAT may be appealed to the Supreme Court of India.

2. What is the scope of the Competition Act?

The Competition Act prohibits anti-competitive practices, which cause or are likely to cause "an appreciable adverse effect on competition in India" (AAEC). It primarily seeks to regulate the following:

(a) anti-competitive agreements (Section 3);

(b) abuse of dominance (Section 4); and

(c) combinations (Sections 5 and 6).

3. What is meant by "relevant market" under the Competition Act?

The Competition Act defines the "relevant market" as the market which may be determined by the CCI with reference to the 'relevant product market' or the 'relevant geographic market' or both. "Relevant geographic market" is defined as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. "Relevant product market" is defined as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

4. What are "anti-competitive agreements"?

Section 3 of the Competition Act prohibits and renders void agreements entered into between enterprises or persons or associations of persons with respect to the production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an AAEC in India. Under the Competition Act, horizontal agreements (i.e., any agreement between enterprises or persons, or associations thereof, which are engaged in identical or similar trade of provision of goods or services), including cartels, are presumed to have an AAEC, though this presumption is rebuttable. There is no presumption of an AAEC in vertical agreements (i.e. agreements between enterprises or persons, or associations, which are engaged at different levels of the production or supply chain).

The CCI may order enterprises found to be in breach of Section 3 to discontinue and/ or modify the agreement. It may also impose a penalty which may be up to 10% (ten percent) of the average turnover for the last 3 (three) financial years. In the case of cartels, the CCI may alternatively impose upon each enterprise or person included in the cartel, a penalty of up to 3 (three) times of its profit or 10% (ten percent) of its turnover for each year of continuance of the agreement, whichever is higher.

5. What is an abuse of a dominant position?

Section 4 of the Competition Act prohibits the abuse of a dominant position by an enterprise or a group. A 'dominant position' is defined to mean a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. A group or an enterprise is presumed to be abusing its dominant position if it imposes unfair prices (including predatory pricing) or unfair conditions on sale or purchase, limits or restricts production/ technical development so as to detrimentally affect consumers, or denies market access to its competitors.

The CCI may order the enterprise to discontinue such an abuse and/or impose a penalty which may be up to 10% (ten percent) of its average turnover for the last 3 (three) financial years. It may also order division of an enterprise enjoying a dominant position to ensure that such enterprise does not abuse its dominant position (though this has not happened to date).

6. What are the factors that the CCI may take into consideration while determining the AAEC in cases involving anti competitive agreements and abuse of dominant position?

Section 19(3) of the Competition Act sets out certain factors that the CCI shall consider while determining whether an agreement has an AAEC under Section 3, including, amongst other matters, creation of entry barriers, foreclosure of competition/removal of competitors, accrual of benefits to consumers, improvements in production or distribution of goods or services, and promotion of technical, scientific and economic development.

Section 19(4) of the Competition Act sets out certain factors that the CCI shall consider while determining whether an enterprise enjoys a dominant position under Section 4, including, amongst other matters, market share, size and resources of the enterprise, economic power including commercial advantages over competitors, extent of vertical integration, dependence of consumers, entry barriers (regulatory and otherwise), countervailing buyer power, market structure and size, social obligations and social costs, and relative advantage by way of contribution to economic development by the dominant enterprise.

7. What is the merger control regime in India?

From 1 June 2011, any merger acquisition or amalgamation, where the parties of their groups cross the jurisdictional thresholds (based on assets and turnover) specified in the Competition Act must be pre-notified to the CCI. These "combinations" are subject to Sections 5 and 6 of the Competition Act which prohibit a combination which causes or is likely to cause an AAEC in the relevant market in India and treats such combinations as void. The merger control regime in India is mandatory and suspensory and transactions subject to review by the CCI cannot be concluded until merger clearance in India has been obtained or a review period of 210 calendar days has passed, whichever is the earlier.

8. What are the transactions that require notification to the CCI?

Section 5 of the Competition Act covers three broad categories of combinations.

First, the acquisition by one or more persons of control, shares, voting rights or assets of one or more enterprises, where the parties or the group to which the target will belong post-acquisition, meet specified assets / turnover thresholds (see below). Acquisitions not involving a change of control are also caught in this category.

Second, the acquisition by a person of control over an enterprise where the person concerned already has direct or indirect control over another enterprise engaged in the production, distribution or trading of similar or identical or substitutable goods, or in the provision of a similar or identical or substitutable service, where the parties, or the group to which the target will belong post-acquisition, meet specified assets/turnover thresholds (see below).

Third, a merger or amalgamation, where the enterprise remaining, or enterprise created, or the group to which the enterprise will belong after the merger/amalgamation, meets specified assets/turnover thresholds (see below).

The CCI also seeks to capture "innovative structuring" of transactions designed to avoid notifications to the CCI. The Combination Regulations provide that a notification requirement must be assessed with respect to the "substance of the transaction" and that any structure of a transaction, comprising a combination, which has the effect of avoiding a filing requirement, will be disregarded by the CCI. The scope of this anti-avoidance provision is very unclear and it remains to be seen how the CCI will assume jurisdiction over transactions which, strictly speaking, do not trigger a notification obligation. However, parties will now have to ensure that transaction structures are not devised in a manner which has the "effect" of avoiding a filing requirement, even where such an effect is not intended.

9. What are the jurisdictional thresholds under the Competition Act?

The jurisdictional thresholds are prescribed in Section 5 of the Competition Act for the Parties and the Group, as well as for the Target and are set out in detail below. It should be noted that there is currently very little formal guidance from the CCI on the calculation of assets and turnover in order to assess whether the thresholds are met.

Thresholds

(i) Parties Test:

- (a) the Parties have combined assets in India of INR 1,500 crores (approx. USD 249.2 million) or combined turnover in India of INR 4,500 crores (approx. USD 747.6 million); or
- (b) the Parties have combined worldwide assets of USD 750 million including combined assets in India of INR 750 crores (approx. USD 124.6 million) or combined worldwide turnover of USD 2,250 million including combined turnover in India of INR 2,250 crores (approx. USD 373.8 million); OR

(ii) Group Test:

- (a) the Group has assets in India of INR 6,000 crores (approx. USD 996.8 million); or turnover in India of INR 18,000 crores (approx. USD 2,990.39 million); or
- (b) the Group has worldwide assets of USD 3,000 million including assets in India of INR 750 crores (approx. USD 124.6 million) or worldwide turnover of USD 9,000 million including turnover in India of INR 2,250 crores (approx. USD 373.8); AND

(iii) Target Test:

The target enterprise (including its subsidiaries, units, or divisions) which is being acquired has:

(a) assets in excess of INR 250 crores (approx. USD 41.53 million) in India; and

(b) turnover in excess of INR 750 crores (approx. USD 124.6 million) in India.

If: (a) either the Parties Test or the Group Test; and (b) the Target Test are met, the transaction qualifies as a combination and is notifiable to the CCI.

As a result of the Target Test, if the target enterprise either has assets or turnover in India, below the stipulated thresholds, the transaction involving such a target would be exempt from the requirement of pre-approval from the CCI, irrespective of whether the other thresholds are met (the Target Exemption).

Due to the wording of the Target Exemption, it is currently only available in relation to transactions effected by way of an acquisition and not through mergers or amalgamations.

10. What is the trigger event that requires a filing?

Under the Competition Act, the trigger event for the notification of a proposed transaction to the CCI is:

(a) final approval of the proposed merger or amalgamation by the boards of directors of the enterprises concerned; or

(b) execution of any agreement or other document[1] for acquisition or acquiring of control.

11. Is there any time period within which the CCI is required to be notified?

The Competition Act requires the parties to notify the CCI of a proposed transaction within 30 (thirty) calendar days of a 'trigger event'.

12. Are internal restructurings notifiable?

Among the various types of transactions that are ordinarily exempt under the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Regulations), Item 8 of Schedule I exempts intra-group acquisitions from notification to the CCI except where the acquired enterprise is jointly controlled by enterprises that are not part of the same group. In respect of intra-group mergers and amalgamations, Item 9 of Schedule I exempts those transactions that take place: (i) when one enterprise holds more than 50% (fifty percent) shares or voting rights in the other enterprise; and/or (ii) where enterprises within the same group hold more than 50% (fifty percent) of shares or voting rights in each of the parties to the merger/amalgamation. It should be noted, however, that the exemption will not apply where the merger/amalgamation results in a transfer from joint control to sole control.

[1] The Combination Regulations clarify that "other document" referred above shall mean any binding document, by whatever name called, conveying an agreement/decision to acquire control, shares, voting rights or assets. However, in the event of a hostile acquisition, "other document" would mean any document executed by the acquirer conveying a decision to acquire, or, where such document has not been executed but the intention to acquire is communicated to the Central Government or State Government or a statutory authority, the date of such communication will be deemed to be the date of execution of the other document for acquisition.

13. What is the process of merger filing?

The Combination Regulations prescribe three forms for filing a merger notification:

(a) Form I (i.e., short form) – All notifications are ordinarily required to be filed in Form I. The parties are required to provide basic information pertaining to the combination, with a filing fee of INR 1.5 million (approximately USD 25,000).

(b) Form II (i.e., long form) – The parties are free to file the merger notification on Form II along with a filing fee of INR 5 million (approx. USD 83,300). The Combination Regulations recommend that Form II be filed for transactions where:

  a. the parties to the combination are competitors and have a combined market share in the same market of more than 15% (fifteen percent); or

  b. where the parties to the combination are active in vertically linked markets and the combined or individual market share in any of these markets is greater than 25% (twenty five percent).

Further in cases where parties have filed Form I, if the CCI believes that it requires information in Form II, it may require parties to file notice in Form II. Relevant time periods will restart if CCI required Form II to be filed where the parties filed Form I.

(c) Form III - is a post-completion application form, which must be filed within 7 (seven) days of an acquisition, share subscription or financing facility entered into by a public financial institution, registered foreign institutional investor, bank or registered venture capital fund, pursuant to any covenant of a loan agreement or an investment agreement.

(d) The obligation to notify the CCI lies with the acquiring company in case of an acquisition and jointly with the parties, in case of a merger or amalgamation.

14. How long will the CCI review process take?

Phase I Investigation

On receipt of a notification, the CCI is required within a period of 30 (thirty) calendar days to form a prima facie opinion on whether a combination causes or is likely to cause an AAEC within the relevant market in India. If the CCI requires the parties to remove defects in the notification or to provide additional information, this will "stop the clock" until the additional information is provided. This means that it can take much longer than 30 (thirty) days for the CCI to reach an opinion.

At this stage the parties are also free to propose "modifications" to the combination up–front in order to satisfy the CCI that the combination will not cause an AAEC in the relevant market in India. In such a scenario the CCI will get an additional 15 (fifteen) days to evaluate the proposed modification.

Phase II Investigation

If the CCI forms a prima facie opinion that a combination is likely to cause an AAEC (which has happened in only one case to date), a detailed investigation will follow and the parties cannot complete the transaction until the earlier of:

(a) a final decision by the CCI; or

(b) the lapsing of 210 (two hundred and ten) days from the date of notification to CCI.

During the Phase II Investigation, if the CCI is of the opinion that the combination has or is likely to have an AAEC, but such adverse effect can be eliminated by suitable modification(s) to the combination, it may propose appropriate modification(s) to address such concerns.

The CCI has stated in the Combination Regulations that it shall endeavor to clear combinations within 180 (one hundred and eighty) calendar days of filing a notice.

15. Are there any exemptions from mandatory pre-notification?

In addition to the transactions that can avail of the Target Exemption (as provided in query 9 above), transactions falling under the following two categories are exempt from making a notification under the Competition Act:

(a) Transactions expressly exempt under the Competition Act: Acquisitions, share subscriptions or financing facilities entered into by public financial institutions, registered FIIs, banks or registered venture capital funds, under a covenant in a loan agreement or an investment agreement, are exempted from obtaining prior clearance from the CCI; instead, a post-facto filing in Form III within seven days of completion of acquisition is required.

(b) Transactions that are 'ordinarily' exempt under Combination Regulations : Certain transactions set out in Schedule I of the Combination Regulations are presumed not to cause AAEC in India and 'normally' do not require a notification as per Regulation 4 of the Combination Regulations. Such transactions include: (a) transactions such as acquisitions of shares or voting rights which do not entitle the acquirer to hold 25% (twenty five percent) or more of the target company, made solely for investment purposes or in the ordinary course of business, not leading to control; (b) acquisitions of additional shares or voting rights of an enterprise by the acquirer or its group, not resulting in gross acquisition of more than 5% (five percent) of the shares or voting rights of such enterprise in a financial year, where the acquirer or its group, prior to the acquisition, already holds 25% (twenty five percent) or more shares or voting rights of the enterprise, but does not hold 50% (fifty percent) or more of the shares or voting rights of the enterprise, either prior to or after such acquisition; (c) acquisition of current assets in the ordinary course of business; and (d) intra-group restructurings as described in Section 12, above.

Until the end of March 2014, the Combination Regulations provided an exemption for transactions between parties outside India provided there was insignificant local nexus and effects on markets in India. The CCI interpreted the exemption narrowly, rendering it virtually redundant. However, the CCI has now withdrawn the exemption, so that foreign to foreign transactions satisfying the standard assets and turnover thresholds under the Competition Act and not covered by any of the other exemptions, will have to be notified even if there is no local nexus and effects on markets in India.

16. Is it possible to have pre-notification discussions with the CCI?

It is possible to have substantive and procedural pre–notification consultations with the CCI. However such consultations are oral and non-binding on the CCI.

17. What are the factors that the CCI may take into consideration while determining the AAEC of a combination in India?

Section 20 of the Competition Act sets out certain factors that the CCI shall consider while determining if a combination causes or is likely to cause an AAEC in the 'relevant market' in India. These include the actual and potential level of competition through imports in the market, entry barriers to the market (regulatory and otherwise), the degree of countervailing power in the market, the availability of substitutes in the market, the market shares of each of the parties to the combination (individual and combined), the likelihood of foreclosure/removal of competitors, and the extent of vertical integration in the market, etc. The CCI is also required to consider the positive effects that a combination could potentially give rise to; i.e., the possibility of saving a failing business, the nature and extent of innovation, and any relative advantage through contribution to economic development brought about by any combination having or likely to have an AAEC in India.

18. What orders can be passed by the CCI in case of merger control?

The CCI can pass an order approving the combination if it does not cause an AAEC in the relevant market in India. If the CCI is of the view that the combination results in an AAEC, it may direct that the combination shall not take effect and/or it can propose suitable modifications to the same, which are required to be carried out within a prescribed time period. The parties to the combination also have the option of submitting amendments to the modifications proposed by the CCI, which may be approved or rejected by the CCI. The CCI may also issue interim orders (by way of a temporary injunction) restraining any party from carrying on any act which is or is likely to be in contravention of Section 6 of the Competition Act.

19. What are the penalties imposed in the event of non-compliance with the provisions of the Competition Act?

In case of failure to notify a combination, the CCI can impose a penalty up to 1% (one percent) of the total turnover or assets of a combination, whichever is higher. Further, a failure to furnish information or providing false information will attract a monetary penalty of between INR 5 and 10 million. The Competition Act also imposes a personal liability on the responsible officers of a company, in case of a contravention by a company.

20. How is the procedure of CCI and the COMPAT regulated?

The CCI and the COMPAT are, in discharging their respective functions, guided by the principles of natural justice, subject to the provisions of the Competition Act and the relevant rules made by the Central Government. They have the power to regulate their own procedures. Both have the same powers as vested in a civil court under the Code of Civil Procedure while trying a suit with respect to matters such as summoning and enforcing attendance of any person and examining him on oath, and receiving evidence on affidavit.

VI. INTELLECTUAL PROPERTY

1. What is the law relating to protection of intellectual property rights in India?

India has a robust intellectual property regime with legislations in place to protect copyright, designs, patents, trademarks, topographies of integrated circuits and semiconductors (mask works), geographical indications, and plant varieties and farmers rights. India is also a common law jurisdiction and Indian Courts do protect proprietary rights including goodwill and reputation of a business - usually represented by a mark, name or get-up – against unauthorized misuse under the common law remedy of passing off.

As a signatory to the TRIPs Agreement and keeping in line with India's obligations, amendments have been made in the existing legislations for compliance. Introduction of a new Trade Mark Regime effective September 15, 2003 and introduction of product patents under the Patents (Amendment) Act, 2005 and Patents (Amendment) Rules, 2006 from January 1, 2005 are in line with India's obligations under the TRIPs Agreement.

2. How are computer software and programs protected in India?

India recognizes and protects computer programmes, tables and compilations including computer databases as 'literary works' under the Copyright Act. Both the object and source codes can be protected as literary works under the said act and the term of protection extends to 60 (sixty) years. In addition to the rights conferred as a literary work, the owner of a computer program also has commercial rental. Under the Copyright Act, the owner of a copyright work is entitled to protect his works against unauthorized use and/ or misappropriation of his work or a substantial part thereof and obtain relief from a court of law including injunction, damages and accounts of profits.

Patent law also provides protection for computer implemented inventions. The Patents Act prohibits patentability of "computer programs per se", which the Patent Office in most cases treats as an absolute preclusion on computer implemented method claims. System claims on the other hand are routinely allowed, subject to meeting the requirements for novelty and inventiveness. The rights provided by patent law bestow on the patentee the exclusive right to prevent third parties from the acts of using, offering for sale, selling or importing for those purposes, the patented article.

3. What patent protection is available to a biotechnology company?

With the Patents (Amendment) Act, 2005 in place and notification of the Patents (Amendment) Rules, 2005 and Patents (Amendment) Rules, 2006, inventions in the field of biotechnology would be subject to the same criteria as any other invention relating to product and process. Patents may not however be secured in respect of plants and animals in whole or any part thereof, including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals (some of which are presently protectable under the legislation addressing plant varieties and farmer's rights.) The preclusion in patentability of plants and animals does not however extend to microorganisms. Further, while the inventions in the field of biotechnology would be governed by the criteria applicable to any other invention relating to product and process, certain exceptions to the rule, however, may be noteworthy, for e.g. an invention, the primary or intended use whereof would be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment, or forms part of traditional knowledge.

4. How are trademarks and service marks protected in India?

Under the Trade Marks Act, trade mark is defined as a mark that is capable of both: a) a graphical representation and b) distinguishing the goods or services of one undertaking from another. Mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.

Registration under the Trade Marks Act confers exclusive rights to use the mark, subject to any conditions imposed, and if these rights are infringed to take action to restrain unauthorized users.

Apart from and/or in addition to registration, a person can also obtain rights in an unregistered mark. By virtue of use of a trademark, a proprietor acquires valuable goodwill which is protectable at common law by way of a passing off action. Indian Courts have also recognized trans-border reputation of a trader and there are a number of judicial precedents wherein foreign proprietors and their trade marks have been protected on the basis of their world wide business goodwill even in the absence of direct business presence in India. The protection also extends to unauthorized use in relation to trade names or domain names.

The civil remedies/reliefs available to trade mark owners, among others, include an injunction, damages or account of profits, order of delivery up and destruction of the infringing labels and marks. One can seek interlocutory ex parte orders against the misusers and seek appointment of local commissioners to seize the infringing goods.

5. How does one protect confidential information and trade secrets in India?

Confidential information and trade secrets are protected in India under principles of equity and the law of contract. The protected information must be such, the release of which would be injurious to its proprietor or of advantage to third parties; it must be confidential or secret, i.e. it is not already within the public domain; and the proprietor should have taken reasonable steps to maintain its secrecy or confidentiality. The methods usually used to protect confidential information are confidentiality clauses in employee contracts, non-disclosure agreements with third parties in the course of a business venture, and internal security mechanisms to restrict access and dissemination of trade secrets and confidential information within an organization.

Legal remedies available to the proprietor of trade secrets or confidential information include, injunctions restraining disclosure or use of information, return of confidential proprietary information on termination of a contract, and damages and account of profits arising out of unauthorized disclosure or use. There are numerous precedents where Courts in India have protected confidential information in the form of Industrial Drawings, concepts of TV shows, information obtained by an employee in the course of employment, etc.

Under common law principles, to obtain relief from a court of law, the burden is upon the plaintiff to: identify what information he was relying on; show that it was handed over in circumstances of confidence; show that it was information of the type which could be treated as confidential; and show that it was used without license or there was a threat to use it.

6. Can the employees of an Indian company be required to sign confidentiality agreements?

Yes. Confidentiality provisions may be included in the employment terms to bind the employee to inter alia keep the information received during the course of employment confidential. Such terms may also include requirements for personnel to return all confidential information and material to their employer at the time of termination of their employment. Additionally, requirements preventing such personnel from utilizing such confidential information in their new job may also be imposed.

7. What is the protection available in case of infringement of intellectual property rights?

All the relevant statutes on intellectual property have provisions relating to remedies and reliefs available to an owner in case of infringement including injunction, damages or accounts. In addition to civil remedies, the owner is also, in some cases, entitled to criminal remedies for infringement of copyright and trademarks. There are detailed provisions relating to such offences which are punishable with imprisonment and fine.

8. Does Indian law recognize transactions carried out electronically?

The IT Act grants legal recognition to electronic records if (a) the electronic records are made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference as well as electronic signatures (which include a digital signature).

The law further provides that in case of contracts, wherein the communication, acceptance, revocation etc. of proposals are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used. Thus, contracts will not be denied validity merely because they are in the form of electronic records.

9. How can a company outsourcing its activities to India safeguard intellectual property; which is created in the course of performance of an outsourcing contract?

Under the Copyright Act, the author of a work is the first owner of the work subject to certain exceptions, inter alia:

(a) In case of a work made in the course of the author's employment under a contract of service or apprenticeship, the employer is deemed to be the first owner of copyright, in the absence of any agreement to the contrary;

(b) a photograph, painting, drawing or engraving or cinematographic film made, for valuable consideration at the instance of any person, such person is deemed to be the first owner of copyright, in the absence of any agreement to the contrary. Further, copyright ownership in any work (except a photograph, painting, portrait, engraving or cinematograph film) created for valuable consideration at the instance of another person under a "contract for service" vest with the author only.

Generally, the law allows an owner to assign the work partially or wholly or for whole of the duration or any part thereof. In case of assignment of rights in a future work, the assignment takes effect only when the work comes into existence.

In a case where company outsources its work to a third party contractor/vendor, it is advisable to ensure that the third party contractor has entered into employee contracts inter alia clearly assigning all works / intellectual property rights created on the job to the third party contractor; and thereafter ensure that the third party contractor/vendor assigns all such works / intellectual property rights to the company. The terms must comply with the provisions of the Indian Copyright law..

10. What are the relevant data protection laws in India?

The IT Act contains provisions relating to data protection and imposes civil liability for negligent handling of “sensitive personal information” and criminal liability with punishment in cases of disclosure of information in breach of a lawful contract. The law imposes liability on a body corporate in the event such body corporate is negligent in implementing and maintaining reasonable security practices and procedures, thereby causing wrongful loss or wrongful gain of such sensitive personal data, to pay damages by way of compensation to the person who is affected. The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 lay down directions to be followed by a body corporate for the protection of personal information including sensitive personal information/ data, procedure to be followed for collection of such data and further disclosure of such collected data. These Rules regarding sensitive personal data or information are applicable to the body corporate or any person located within India.

The law also imposes penalty on any person irrespective of whether it is a private intermediary or a government entity for the disclosure of personal information. For the penalty to become applicable, a service provider has to (i) obtain personal information while providing services under a lawful contract (ii) disclose it without the consent of the person (iii) with the intent to cause, or having the knowledge that it is likely to cause wrongful gain or wrongful loss. Such unauthorized disclosure is punishable with imprisonment up to 3 (three) years and a fine upto Rupees 500,000 or both.

VII. EMPLOYEES

1. What is the general frame work of employment laws in India?

The Indian parliament as well as the legislature of the relevant State has power to concurrently legislate on the subject of labour. Broadly, the key labour legislations in India can be grouped as follows:

Group I

Laws to provide basic protection to industrial workers:

(a) Factories Act;

(b) Payment of Wages Act;

(c) Contract Labour Act;

(d) Employees' Compensation Act;

(e) Employer's Liability Act; and

(f) Fatal Accidents Act.

Group II

Laws for promoting industrial peace, harmony, conciliation and adjudication of industrial disputes:

(a) Industrial Disputes Act;

(b) Industrial Employment (Standing Orders) Act; and

(c) Trade Unions Act.

Group III

Laws providing social security and welfare of employees:

(a) Employees' Provident Funds and Miscellaneous Provisions Act;

(b) Employees' State Insurance Act;

(c) Payment of Gratuity Act;

(d) Payment of Bonus Act;

(e) Maternity Benefits Act.

(f) Minimum Wages Act;

(g) Factories Act;

(h) Labour Welfare Fund Act; and

(i) Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act.

Group IV

General Law:

(a) Constitutional provisions relating to fundamental rights enshrined in the Constitution of India; and

(b) Indian Contracts Act.

Group V

State Laws:

(a) Shops and Establishments Acts in force in various States;

(b) Industrial Establishments (National And Festival Holidays and Other Holidays) Act; and

(c) State rules under and amendments to Central laws.

2. Are there any restrictions on employment of foreign nationals in India?

Employment of foreign nationals is permitted in India subject to possession of a valid employment visa by such foreign national.

Employment visas cannot be issued for routine, ordinary, secretarial or clerical jobs. It can be issued to skilled/ qualified professionals or to persons engaged or appointed on contractual or employment basis and not otherwise.

The salary threshold limit for grant of employment visa is currently, USD 25,000 per annum.

3. What are the statutory working hours prescribed under Indian labour laws and is there a requirement to pay overtime wages?

Indian employment laws typically provide for a maximum of 9 (nine) hours of working hours a day and 48 (forty eight) hours a week.

It may be noted that employment of women employees is restricted during night. However special exemption is available for the IT sector subject to satisfaction of prescribed conditions.

Employees who work in excess of the normal working hours are entitled to over-time wages typically, at the rate of twice the ordinary rate of wages.

Employees who work on National holidays are entitled to compensatory off in addition to overtime payment in most States.

4. Are there statutory requirements for grant of leave or public holidays?

The Factories Act, the relevant Shops and Establishments legislations provide for annual leave with wages to employees.

In addition to the weekly holidays and compensatory holidays prescribed under and the relevant Industrial Establishments (National And Festival Holidays and Other Holidays) Act and the Shops and Establishments Act, the employees are also entitled to national holidays such as Republic Day (26th January), Independence Day (15th August) and Gandhi Jayanthi (2nd October) and 5 (five) to 7 (seven) holidays from amongst a list of holidays notified by the respective State governments for each calendar under the Negotiable Instruments Act.

5. Are employees entitled to maternity/paternity leave?

Women employees are entitled to 12 (twelve) weeks of paid maternity leave, if they have worked for at least 80 (eighty) days in the 12 (twelve) months preceding the expected delivery date.

Paternity leave although, not statutorily recognized in India, may be granted in accordance with the policies of the company.

6. Can employees of the Indian company be granted employee stock options in a foreign company?

A foreign company can issue employee stock options to employees of (i) its office or branch in India; (ii) its subsidiary in India; and (iii) an Indian company in which it has equity, direct or indirect (through a SPV or step-down subsidiary), irrespective of the percentage of the direct or indirect equity stake in the Indian company, provided that the shares under the ESOP scheme are offered (a) globally on a uniform basis; and (b) an annual return in the prescribed format, is submitted by the Indian company to the Reserve Bank giving details of remittances and beneficiaries.

Indian employees are permitted to subscribe to equity shares of a foreign company under a cashless employee stock option scheme subject to the condition that it does not involve remittance from India.

Earlier, under the Liberalized Remittance Scheme of the Reserve Bank, resident individuals were allowed to make remittances through ADs up to USD 75,000 per financial year for investment in foreign securities. However, on June 3, 2014, RBI enhanced the existing limit of USD 75,000 per financial year to USD 1,25,000 per financial year (April - March) for any permitted current or capital account transaction or a combination of both with immediate effect.

7. Can employment contracts contain restrictive covenants like non-compete?

Any agreement in restraint of trade is void under the provisions of the Indian Contracts Act. The Supreme Court of India has held that agreements restraining an employee from carrying on the activities that are similar to that of his/her employer upon the termination of such employment would be void and unenforceable, whereas agreements that impose a restraint during the course of employment could be enforceable.

8. How can the services of an employee be terminated?

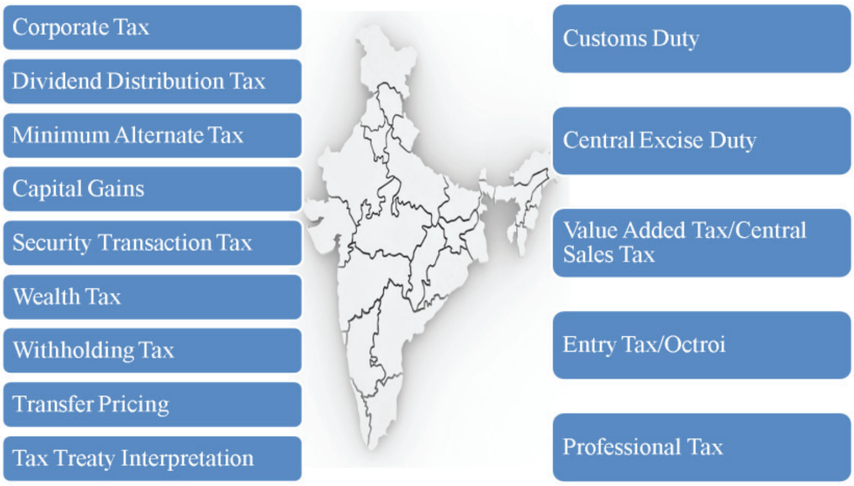
The services of an employee can be terminated in accordance with the terms of his employment contract and in compliance with applicable law. If such employee is covered under the relevant State's shops and establishment act or if such an employee is a 'workman' under the Industrial Disputes Act, then the termination will have to also be in accordance with such statue, which prescribes the minimum notice period, payment in lieu of notice and severance payments. Termination for misconduct will need to be preceded by a domestic enquiry following the principles of natural justice.

9. Are severance payments statutorily required to be paid in India?

Termination of employees and the associated severance payments would depend on whether such employees are classified as workmen or non-workmen. Under the provisions of the Industrial Disputes Act, a workman with at least 1 (one) year of continuous service is entitled to compensation equal to 15 (fifteen) days average pay for every completed year of continuous service or part thereof in excess of 6 (six) months, if his/her services are terminated for any reason, except on account of disciplinary proceedings, voluntary retirement, superannuation, non- renewal of employment contracts or on the ground of continued ill health. Statutory compensation is also payable to workmen in the event of lay off/closure of an undertaking. The shops and establishments legislations in certain states also provide for payment of severance compensation to employees covered under the legislation on termination of their employment.

VIII. TAXES

1. What is the law relating to taxation in India?



The Constitution of India empowers the Central, State and Local Governments to levy taxes over specified subject matters. The Central Government levies direct taxes – personal income tax, wealth tax, corporate tax and indirect taxes – customs duty, central excise duty, central sales tax and service tax. The States are empowered to levy value added tax, entry tax, and professional tax etc. Some local authorities are also empowered to levy municipal taxes e.g., octroi etc.

The Central Government and the State Governments enact their respective Finance Acts annually to establish modified tax rates for the particular fiscal year. At the Central Government level, taxes are administered through the Ministry of Finance ('MOF') and at the state and local levels, taxes are administered by the state or local authorities comprising of State Tax Commissions, Revenue Departments.

A. DIRECT TAXES

2. What are the direct tax legislations, which are applicable in India?

The following legislations govern direct taxes in India:

(a) Income-tax Act, 1961

The law relating to income tax is incorporated under the Income-tax Act, 1961 ('IT Act'). The IT Act undergoes changes every year with amendments brought out through an annual Finance Act passed by the Parliament.

It is proposed to introduce the Direct Taxes Code Bill, 2010 ('DTC'), which consolidates the law relating to direct taxes.

The Indian financial year runs from April 1 to March 31. The said period is commonly referred to as 'Fiscal Year' or 'Previous Year'. The year following the Previous Year is known as 'Assessment Year'.

(b) Wealth Tax Act, 1957

Wealth tax is a direct tax, which is charged on the net wealth of the assessee as on the valuation date viz. 31st March of the relevant fiscal year.

Under the Wealth Tax Act, tax is charged in respect of the wealth held during the relevant financial year by the following persons viz. Individual, Hindu Undivided Family (HUF) and Company.

Net wealth means the value of all specified assets on the valuation date as reduced by the debt incurred to acquire those assets. The net wealth so arrived at is charged to tax at the specified rates. Wealth tax is charged at the rate of 1 per cent of the amount by which the net wealth exceeds INR 3 million

3. What are the income tax rates in force for Individuals in India?

Taxability in India is governed by tax residency of an individual during a fiscal year, which is based on the number of days an individual is physically present in India in a fiscal year. Tax Residency can be categorized as Ordinarily Resident ('ROR'), Not Ordinarily Resident ('NOR') and Non Resident ('NR'). Subject any tax treaty benefits, NOR and NR are generally taxed on India sourced income. ROR are taxed on their worldwide income in India.

The following table provides the income tax rates applicable for individuals in relation to assessment year 2014-2015.

The effective tax rates in case of individual(s) are as under:-

Total Income	Tax Rate	Effective Tax Rate*
Upto INR 2,50,000**	Nil	Nil
INR 2,50,000 to INR 500,000	10%	10.30%
INR 500,001 to INR 10,00,000	20%	20.60%
INR 10,00,001 and above	30%	30.90%

Note:

* The rates are inclusive of applicable education cess and secondary & higher education cess, which is 3%. A surcharge at the rate of 10 per cent of income-tax will be levied, in case total income of an individual exceeds INR 10 million. An Indian resident whose total income does not exceed INR 5 lakhs eligible for a rebate of 100 percent of income tax, subject to a maximum amount of INR 2000

** The exemption limit for resident individuals above 60 years of age and below 80 years is INR 300,000. In case of a resident individual of age of 80 years or above, the basic exemption limit is INR 500,000

4. How are Corporations taxed in India?

A Corporation is regarded as a resident in India if:

- It is incorporated in India ; or

- It is not incorporated in India but the control and management of its affairs are situated wholly in India.

A non-resident corporation is one, whose control and management is situated wholly or partially outside India.

Corporations resident in India are taxed on their worldwide income arising from all sources.

Additionally, a tax of 20 per cent (plus surcharge and cess) is imposed on a domestic company buying back its shares (not being listed company shares) from its shareholders ('Buy Back Tax'). Such tax will be payable on the difference between the buy back price and the issue price of shares. Furthermore, income in respect of such buy back by the company would be exempted in the hands of shareholders

Dividend Distribution Tax ('DDT') is imposed on a domestic company, which declares, distributes or pays any dividend to its shareholders at the rate of 15 per cent (plus surcharge and cess). Finance Act, 2014 has introduced grossing up of the amount of such dividends by such DDT. Such dividend income is exempt in the hands of the shareholders. The IT Act provides for the removal of the cascading effect of DDT in multi-tiered corporate structures, subject to certain conditions.

Non–resident corporations are essentially taxed on the income earned from a business connection in India or from other Indian sources. If a tax treaty exists between India and the country of residence of the taxpayer, the provisions of the IT Act or the tax treaty, whichever is more beneficial, will apply. Accordingly, the taxability of non-residents in India may be restricted or modified and lower tax rates may apply.

In general, India's tax treaties provide that residents of other countries are subject to Indian tax on business profits derived from a business in India only if the non-resident has a Permanent Establishment ('PE') in India.

5. What are the income tax rates in force for Corporations in India?

The effective tax rates applicable to Corporations have been summarized below:

Particulars	Tax Rate	Effective Tax Rate[2]
Corporate Tax Rate		
Domestic Company (a) Taxable income up to INR 10 million (b) Taxable income above INR 10 million but below INR 100 million (c) Taxable income above INR 100 million	30% in all cases	30.90% 32.445% 33.99%

[2]Including applicable surcharge and education cess.

Domestic companies with total income in excess of INR 100 million are subject to a surcharge at the rate of 10 per cent of income tax. In case the total income of the domestic company is in excess of INR 10 million but less than INR 100 million, a surcharge of 5 per cent of the income tax is levied. However, a surcharge of 10 per cent is imposed on DDT and buy back tax in all cases, irrespective of the amounts distributed.. Moreover, in all cases, domestic companies are subject to an education cess of 3 per cent on the amount of income tax as increased by the surcharge payable by such company.

In case of a foreign company with total income in excess of 100 million rupees, a surcharge at the rate of 5 per cent of income-tax will be levied. A surcharge of 2 per cent will continue to be levied on foreign companies with total income in excess of 10 million rupees but which does not exceed 100 million rupees. In all cases, education cess is levied at the rate of 3 per cent.

Foreign Company (a) Taxable income up to INR 10 million (b) Taxable income above INR 10 million (c) Taxable income above INR 100 million	40% in all cases	41.20% 42.024% 43.26%
DDT		
Domestic Company	15%	16.99%
Buy Back Tax		
Domestic Company (unlisted)	20%	22.6%
Minimum Alternative Tax ('MAT')*		
Domestic Company (a) Taxable income upto INR 10 million (b) Taxable income above INR 10 million (c) Taxable income above INR 100 million	18.5% in all cases	19.05% of the book profits 20.01 % of the book profits 20.96% of the book profits
Foreign Company (a) Taxable income upto INR 10 million (b) Taxable income above INR 10 million (c) Taxable income above INR 100 million	18.5% in all cases	19.05% of the book profits 19.44% of the book profits 20.01% of the book profits

* Under the MAT regime, corporations are subject to a presumptive tax on their book profits (i.e. profits shown in their financial statements), if the tax payable as per the regular provisions is less than 18.5 % of the corporation's book profits.

6. What are the withholding tax rates applicable to non-resident corporations in India?

Non-residents are taxed on interest, royalties and fee for technical services ('FTS') sourced in India on a gross basis, at specified rates where the same are not attributable to the non-resident's PE in India.

However, where such royalties and FTS are attributable to the non-resident's PE in India, the same are subject to tax as business profits on a net basis under India's domestic tax laws.

The applicable withholding tax rates for foreign companies are as follows. The tax rates are subject to any beneficial rates available under the applicable tax treaty.

Particulars	Tax Rates	Effective Tax Rates2
Dividends*	Nil	Nil
Interest (a) Taxable income up to INR 10 million (b) Taxable income above INR 10 million (c) Taxable income above INR 100 million	40%/ 20%/ 5%** in all cases	41.2%/ 20.6%/ 5.15% 42.02%/21.01%/5.25% 43.26%/21.63%/ 5.41%

Royalties and FTS*** (a) Taxable income up to INR 10 million (b) Taxable income above INR 10 million (c) Taxable income above INR 100 million	25% in all cases	25.75% 26.27% 27.04%

Note:

* Presently, there is no incidence of withholding tax on the payment of dividends, where DDT is paid

** Non residents are subject to income tax on interest income at the rate of 40 per cent (plus applicable surcharge and cess). However, non residents may avail of special rates applicable to interest income under the IT Act in inter-alia the following cases:

a) A concessional rate of 20 per cent (plus applicable surcharge and cess) on the gross payment will apply, in respect of interest received from an Indian concern on monies borrowed or debt incurred in foreign currency.

b) A concessional rate of 5 per cent (plus applicable surcharge and cess) on the gross payment will apply in respect of interest payments by an Indian company/real estate investment trust/infrastructure investment trust to a non-resident in respect of monies borrowed:

- In foreign currency from a source outside India under a loan agreement as approved by the Central Government, at any time on or after July 1, 2012 but before July 1, 2017 . Government has clarified that no specific approval will be required for borrowings under a loan agreement that comply with ECB regulations as administered by the RBI for availing of the benefit of this concessional tax regime.
- By way of issue of long term bonds including long term infrastructure bonds at any time on or after October 1, 2014 until July 1, 2017

c) Any interest income (described below) paid to a Foreign Institutional Investor or a Qualified Foreign Investor, will be subject to tax at the rate 5 per cent (plus applicable surcharge and cess).However, such interest should be payable on or after the 1st day of June, 2013 but before the 1st day of June, 2015 in respect of investment made by the payee in-

(i) A rupee denominated bond of an Indian company; or

(ii) A Government security:

Provided that the rate of interest in respect of bond referred to in point (i) above, shall not exceed the rate as maybe notified by the Central Government in this behalf.

*** Subject rates apply in case of royalty/FTS being received by a foreign company in pursuance of an agreement made on or after June 1, 2005.

Royalties and FTS, which are not received from the Government of India or Indian organizations, are taxed on a net income basis at the normal rates applicable to foreign corporations. So also are royalties and FTS payable under agreements that are not approved by the Government of India or under arrangements that are not in accordance with India’s Industrial policy. These are taxed on a net basis at the normal rates applicable to foreign corporations.

7. How are Capital Gains taxed in India?

Capital gains earned by the seller of a capital asset (being the sale consideration less the cost of acquisition, cost of improvement and sale-related expenses), are subject to capital gains tax. The capital gains can be classified into (a) short term or (b) long term, depending on the period of holding

Nature of Gains	Period of Holding [listed securities (other than a unit) or unit of equity oriented fund or unit of Unit Trust of India or zero coupon bond)]	Period of Holding (all other assets)
Long Term	>1 year	> 3 years
Short Term	≤ 1 year	≤ 3 years

In certain situations, the period of holding of a previous owner of the asset is counted towards ascertaining whether the capital asset is short term/ long term.

Further, in case of long-term capital gains, the cost of acquisition and cost of improvement is subject to indexation, subject to the residential status of the seller and the nature of asset being alienated.

Tax incidence is generally higher in the case of short-term capital gains as compared to long term capital gains. Detailed below are the present long term and short term effective tax rates on capital gains (including applicable surcharge and education cess) for resident and non-resident companies.

Resident Company:

Particulars	Listed Securities		Unlisted Securities and assets other than securities
	On Market#	Off market	
Long Term Capital gains			
(a) Taxable income up to INR 10 million	Exempt in all cases	20.06%/10.3%*	20.06%
(b) Taxable income above INR 10 million		21.63%/10.82%*	21.63%
(c) Taxable income above INR 100 million		22.66%/11.33%*	22.66%
Short term capital gains			
(a) Taxable income up to INR 10 million	15.45%	30.9%	30.9%
(b) Taxable income above INR 10 million	16.22%	32.45%	32.45%
(c) Taxable income above INR 100 million	16.99%	33.99%	33.99%

Note:

#Where securities transaction tax has been paid

*The lower rate of 10% will apply in case the taxpayer elects to forego the benefit of indexation of cost of acquisition/ improvement

Non-Resident Company*:

Particulars	Listed Securities		Unlisted Securities and assets other than Securities
	On market#	Off market	
Long Term capital gains			
(a) Taxable income up to INR 10 million	Exempt in all cases	20.6% / 10.3%**	20.6% / 10.3%**
(b) Taxable income above INR 10 million		21.01% / 10.51%**	21.01% / 10.51%**
(c) Taxable income above INR 100 million		21.63% / 10.82%**	21.63% / 10.82%**
Short Term capital gains			
(a) Taxable income up to INR 10 million	15.45%	41.2%	41.2%
(b) Taxable income above INR 10 million	15.76%	42.02%	42.02%
(c) Taxable income above INR 100 million	16.22%	43.26%	43.26%

Note:

Where Securities Transaction Tax is paid

*The stated tax rates are subject to rates provided under the relevant tax treaty, to the extent that the tax treaty is more beneficial.

** In case of listed and unlisted securities of public companies, the lower rate of 10.3 % /10.51% / 10.81%, as the case may be, may apply where the benefit of neutralization of foreign exchange fluctuation and indexation of cost of acquisition/ improvement is foregone by the taxpayer

8. Does India have General Anti Avoidance Rules?

Finance Act, 2012 has introduced General Anti Avoidance Rules ('GAAR'), which codify the 'substance over form' doctrine, in the IT Act. GAAR shall come into effect from fiscal year 2015 - 2016. GAAR will empower the Income-tax authorities to re-characterize a transaction the main purpose of which is to obtain a tax benefit and which also satisfies at least one of the following four tests:

(a) It creates rights and obligations, which are not normally created between parties dealing at arm's length

(b) It results in misuse or abuse of provisions of tax laws

(c) It lacks commercial substance or is deemed to lack commercial substance in whole or in part

(d) Is carried out in a manner, which is normally not employed for bonafide purpose

Further, a transaction shall be deemed to lack commercial substance where:

(a) its substance or effect as a whole, is inconsistent with, or differs significantly from, the form of its individual steps or a part; or

(b) it involves or includes -

(i) round trip financing;

(ii) an accommodating party ;

(iii) elements that have effect of offsetting or cancelling each other; or

(iv) a transaction which is conducted through one or more persons and disguises the value, location, source, ownership or control of fund which is subject matter of such transaction; or

(c) it involves the location of an asset or of a transaction or of the place of residence of any party which would not have been so located for any substantial commercial purpose other than obtaining tax benefit for a party

The onus of proving that a transaction falls within the purview of GAAR is on the Income-tax Authorities. Furthermore, the IT Act provides that GAAR shall override the provisions of tax treaties.

The monetary threshold for invoking GAAR is INR 30 million.

9. Are there transfer pricing restrictions in India? What are precautions to be taken to avoid transfer pricing disputes in India?

Under India's transfer pricing regulations, any international transaction and/ or a specified domestic transaction between two or more associated enterprises (including PEs) must be at arm's length price. Transfer pricing regulations require the application of the most appropriate amongst the following prescribed methods:

- Comparable uncontrolled price method.
- Resale price method
- Cost plus method
- Profit split method
- Transactional and net margin method

Taxpayers, who enter into international transactions and / or specified domestic transactions, are required to maintain prescribed documents and furnish an accountant's report, which includes prescribed details.

Advance Pricing Arrangement ('APA')

The IT Act empowers the Central Board of Direct Taxes ('CBDT') to enter into an APA to determine the arm's length price or the manner of determining the arm's length price in relation to international transactions to be entered into by a person for a period specified in such APA, not exceeding five consecutive years. Finance Act, 2014 has introduced roll-back mechanism under which an APA may also apply up to four previous years prior to the first effective year of such APA.

The APA scheme envisages three types of APAs:

(1) Unilateral APA: Entered between the CBDT and the applicant.

(2) Bilateral APA: Entered between the CBDT and the applicant, subsequent to and based on agreement between the competent authority in India with the competent

authority in the other country regarding the most appropriate transfer pricing method or arm's length price.

(3) Multilateral APA: Entered between the CBDT and the applicant, subsequent to and based on agreement between the competent authority in India with the competent authorities in the other countries regarding the most appropriate transfer pricing method or arm's length price.

Safe Harbour Rules

In addition to APAs, the IT Act also provides for safe harbour rules, which were notified by the Central Government in September, 2013. The safe harbour rules broadly cover the following business transactions:

- Software development services
- KPO services
- Contract research and development services
- Manufacture and export of core and non-core auto components
- Intra group loans
- Corporate guarantees

10. What are some direct tax incentives available in India?

To give an impetus to India's economy, the IT Act provides tax incentives such as, tax holidays, deductions and rebates to the industry. These incentives are aimed at encouraging exports and research activities, setting up of new industrial undertakings, development of infrastructural facilities, software industry, research activities and development of backward areas.

Tax Holidays for Special Economic Zones ('SEZ')[3]

Nature of business undertaken	Quantum of Deduction
Undertaking located in SEZ and engaged in manufacture or production of articles or things or provision of service	100% deduction in respect of export profits for a period of five years. For subsequent 10 years, deduction of 50% profits is allowed (for last 5 years, deduction subject to transfer of profits to investment reserve)
SEZ developers	100% deduction of its business profits for 10 years (out of 15 years) beginning from the year in which SEZ is notified by Central Government
Offshore Banking Units and International Financial Services centers located in SEZ	100% deduction of its income for 5 years and 50% for the next 5 years

[3]SEZs are especially delineated duty free enclaves deemed to be foreign territory for the limited purposes of trade operations and duties and tariffs. With SEZs scheme, Government of India aims to promote export-led growth of the economy, supported by integrated infrastructure for export production and a package if incentives to attract foreign and domestic investment.

Though tax holiday is enjoyed by units in SEZ, they are required to pay MAT on book profits and DDT on income distributed as dividend.

Profit Linked Incentives	
Incentives for infrastructure Sector	
Developing/developing and maintaining/ developing, operating and maintaining infrastructure facilities such as a roads, bridges, rail system, highway project, water supply project, water treatment system, a port, airport, inland waterway, inland port or navigational channel in the sea, etc.	100% of profits and gains- 10 years (out of 20 years)
Operating and maintaining a specified hospital	100% for 5 years
Hotel in the specified district having a World Heritage Site	100% for 5 years
Incentives for Power Sector	
Generation or generation and distribution of Powers Transmission or distribution of power by laying a network of new transmission or distribution lines. Substantial renovation and modernization of the existing network of transmission or distribution lines.	100% of profits and gains for 10 years (out of 15 years) where operation of eligible undertakings commence before 31st March, 2017
Incentives for Oil & Gas Sector	
Commercial production of mineral oil Refining of mineral oil Commercial Production of natural gas in licensed blocks	100% for 7 years
Incentives for Undertaking in specified geographical locations	
Manufacture/production of article or thing or operation of cold storage plant by undertaking in Jammu & Kashmir	First 5 years- 100% Next 5 Years- 30%
Manufacture or production of specified article or thing or substantial expansion in Himachal Pradesh/Uttaranchal	First 5 years- 100% Next 5 years- 30%
Undertaking 'permitted activities' as in North Eastern states 'permitted activities'	100% for 10 years

Investment-linked incentives for 'specified businesses'

Investment-linked tax incentives are provided by way of allowing deductions in respect of the expenditure of capital nature incurred wholly and exclusively, for the purposes of certain "specified business" during the previous year in which such expenditure is incurred. This deduction is provided for a period of 8 years beginning from the previous year in which such asset is acquired or constructed.

Specified Business	Permissible Deduction
• Laying, operating a cross-country natural gas pipeline network for distribution including storage facilities being integral part of such network. • Building and operating a new hotel of two-star or above category as classified by the Central Government. • Developing and building a housing project under a scheme for slum redevelopment or rehabilitation framed by the Central Government or State Government and which is notified by the board in this behalf in accordance with the guidelines prescribed. • Setting up and operating an inland container depot or a container freight station notified or approved under the Customs Act, 1962 • Bee-keeping and production of honey and beeswax; and • Setting up and operating a warehousing facility for storage of sugar.	100 % deduction for capital expenditure incurred
• Setting up and operating a cold chain facility. • Setting up and operating a warehousing facility for storage of agricultural produce. • Building and operating a new hospital (with at least 100 beds • Production of fertilizers • Developing and building a housing project under a scheme for affordable housing framed by the Central Government or State Government and which is notified by the board on this behalf in accordance with the guidelines prescribed. • Laying and operating a slurry pipeline for the transportation of iron-ore (on or after 1st of April, 2014). • Setting up and operating a semiconductor wafer fabrication manufacturing unit, if such unit is notified by the Board in accordance with the prescribed guidelines (on or after 1st of April, 2014).	150 % deduction for capital expenditure incurred

Investment linked Incentives for Research & Development

Investment-linked tax incentives are provided by way of allowing deductions in respect of any expenditure of capital nature incurred wholly and exclusively, for the purposes of certain “specified business” during the previous year in which such expenditure is incurred.

Nature of Expenses	Quantum of Deduction
Revenue expenditure incurred on payment of salary to an employee engaged in scientific research or on purchase of materials used in such scientific research during 3 years preceding the commencement of business.	100%
Payment to a research association/university, college or other institution for scientific research.	175%
Payment to an India company to be used for scientific research and development that fulfills certain conditions	125%
Payment to a research association/university or college or other institution for research in social science or statistical research (notified by Central Government)	125%
Capital expenditure incurred in any previous year and within the 3 years immediately preceding the previous year (other than on acquisition of land)	100%

By way of Finance Act, 2013, companies engaged in the business of manufacturing have been granted an investment allowance (in addition to depreciation) on investing more than INR 1000 million in new assets (plant or machinery) during the period April 01, 2013 to March 31, 2015 .Investment allowance to be first claimed during the year in which the cumulative investment in new assets (plant or machinery) exceeds INR 1000 million. Suitable safeguards are provided to restrict the transfer of new assets for a period of 5 years, except in cases of amalgamation or demerger. Finance Act, 2014 has extended such benefit to companies engaged in the business of manufacturing on investing more than INR 25 crore in new assets (plant or machinery) in any year during the period April 01, 2014 to March 31, 2016.

11. Does India tax capital gains arising on the indirect transfer of underlying assets situated in India?

In January 2012, the Hon'ble Supreme Court of India rendered its seminal decision in the case of Vodafone International Holdings B.V v. Union of India. The apex court held that under the IT Act, transfer of shares of a foreign company would not attract capital gains tax in India, even where it entailed the indirect transfer of such company's assets situated in India.

However, Finance Act, 2012 retrospectively amended the IT Act to clarify that a 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 the assets located in India.

Accordingly, where a non-resident earns capital gains from the transfer of the shares of a company incorporated outside India, the same shall be chargeable to tax in India where such shares derive their value substantially, whether directly or indirectly, from assets located in India.

It may be noted that the IT Act offers no guidance as regards the meaning of the expression "substantially". However, a recent decision of the Delhi High Court, in the case of DIT v. Copal Research Limited defines the expression "substantially" to mean that 50 per cent of the value should be derived from assets situated in India. However, the IT Act does not specify the quantum of capital gains, which shall be subject to tax in India where the shares of a foreign company, which derive their value substantially from assets located in India, are transferred.

The said retrospective amendment has a significant bearing on international business reorganizations and acquisition transactions entailing Indian assets.

12. What are the advantages of the India's Double Taxation Avoidance Agreements ('DTAAs') with Mauritius or Singapore?

India's DTAAs with Mauritius and Singapore do not permit India to tax capital gains earned by a tax resident of Mauritius and Singapore respectively, that arise from the alienation of shares of an Indian company. Typically, investments into India are routed through an intermediate holding company set up in such tax jurisdictions.

However, considering the recent pursuits of the Indian Revenue Authorities, the beneficial treatment under such DTAAs may be denied on the premise that the intermediate holding company is a conduit entity, which lacks commercial substance and/or does not qualify as the beneficial owner of the shares of the Indian company.

Note that GAAR (which will come into effect from financial year 2015-16), will empower tax authorities to re-characterize transactions which inter-alia lack commercial substance. Furthermore, a transaction will be deemed to lack commercial substance if it inter-alia it involves the place of residence of any party which is without any substantial commercial purpose other than obtaining a tax benefit. It may be noted that GAAR override the provisions of India's tax treaties.

Therefore, in order to avail the benefit of the DTAA, it is important to demonstrate the commercial substance and beneficial ownership of the intermediate holding company. Please note that the Singapore-India DTAA contains a limitation of benefits clause. Moreover, India and Mauritius have agreed in principle to the introduction of a limitation of benefits clause under the India-Mauritius Double DTAA. The specific details of such clause are, however, to be worked out.

13. Do non-residents require a tax residency certificate to avail of tax treaty benefits?

Non-resident taxpayers may claim tax treaty benefits only where a tax residency certificate ('TRC') issued by the authorities of the relevant jurisdiction, is furnished by such taxpayer. In addition, such taxpayer is required to furnish a self declaration in form 10 F.

The information to be furnished in form 10 F is as follows:

1. Status (individual, company, firm, etc.) of the taxpayer
2. Permanent Account Number (PAN) of the taxpayer if allotted
3. Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others)
4. Taxpayer's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country of the specified territory of which the taxpayer claims to be a resident
5. Period for which the residential status, as mentioned in the TRC, is applicable
6. Address of the taxpayer during the period for which the TRC is applicable

Such additional information under form 10 F is not required to be provided if it is already covered under the TRC. The taxpayer is required to keep and maintain the documents which are necessary to substantiate the above information. Furthermore, the income tax authority may ask for such documents from the taxpayer in relation to his claim for tax treaty benefit.

14. Is prior permission of Indian income tax authorities required before transferring assets?

Section 281 of the IT Act states that where a taxpayer during the pendency of any proceeding under the IT Act or after the completion thereof, but before the service of notice of recovery, transfers any of his assets in favour of another person, such transfer shall be void as against any claim in respect of any tax or any other sum payable by such taxpayer as result of the completion of the said proceeding or otherwise. However, such a transfer shall not be void if:

(i) the transfer is for an adequate consideration; and the transferee does not have notice of the pendency of any proceeding or, as the case maybe, of such tax or other sum payable by the assessee

(ii) with the previous permission of the Assessing Officer

This section only applies to cases where the amount of tax or other sum payable or likely to be payable exceeds INR 5000 and the assets charged or transferred exceed INR 10000 in value.

For the purposes of the said section, assets have been defined to mean land, building, machinery, plant, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business of the taxpayer.

15. What are the major tax registrations and compliances to be followed by corporations in India?

A company doing business in India must obtain a Permanent Account Number ('PAN') and a Tax Deduction Account Number ('TAN').

It is mandatory to quote PAN on returns of income and all correspondence with any income tax authority. For enforcing the requirement to obtain PAN registrations, the IT Act provides that in case the taxpayer does not provide PAN, the deductor will withhold tax at the higher of, rates in force (including treaty rates) or at the rate of 20 %.

Furthermore, the provisions of the IT Act make it mandatory for to quote TAN in all tax deducted at source/tax collection at source/annual information returns, payment challans and certificates to be issued by persons under an obligation to deduct tax at source.

The key compliances to be followed by Corporations under the IT Act are herein under.

Filing of Corporate Tax Return	September 30th
Filing of Tax Audit Report	September 30th 4
Filing of Transfer Pricing Report	November 30th
Filing of TDS Return	Quarterly

Corporate tax liability is required to be estimated and discharged by way of advance tax in four installments on June 15, September 15, December 15 and March 15.

In addition, the Corporations are also required to obtain all applicable registrations and undertake all necessary compliances as are discussed in Part B herein below.

16. What is the ordinary appellate dispute resolution channel in India?

The ordinary appellate dispute resolution procedure in India includes the following forums:

(a) Commissioner of Income Tax (Appeals)

A taxpayer may file an appeal before the Commissioner Income Tax (Appeals) within a period of 30 days against any order passed against such taxpayer by the Assessing Officer in the course of assessment proceedings.

(b) Dispute Resolution Mechanism ('DRP')

The IT Act has constituted a DRP for eligible taxpayers viz. taxpayers with transfer pricing disputes and all foreign companies, irrespective of the nature of their dispute.

The Assessing Officer is required to forward a copy of the draft assessment order to the eligible taxpayer if it is proposed to make a variation in the income/loss of the eligible taxpayer, which is prejudicial to such taxpayer

The eligible taxpayer may object to such draft assessment order by filing objections before the DRP within 30 days of receipt of the draft assessment order.

Upon hearing the objections, the DRP shall issue appropriate directions to the Assessing Officer for completion of income tax assessment within a period of 9 months from the end of the month in which the draft assessment order was forwarded to the eligible taxpayer

Based on the directions of the DRP, the Assessing Officer shall pass the final assessment order.

It may be noted that an eligible taxpayer may elect to contest the assessment order or draft assessment order, as the case maybe, before Commissioner of Income Tax (Appeals) or DRP, respectively.

(c) Income-tax Appellate Tribunal ('ITAT')

An appeal may be filed against the order of the Commissioner of Income Tax (Appeals) or the final assessment order after directions from DRP are issued before the ITAT on any question of fact or law both. The ITAT is a fact finding authority.

(d) High Court

An appeal may be filed before the High Court against the order of the ITAT within 120 days, where the same relates to a substantial question of law.

(e) Supreme Court

The Hon'ble Supreme Court of India is the final appellate authority. An appeal may be filed before the Supreme Court against the order of the High Court.

17. What are other dispute resolution alternatives available to taxpayers?

(a) Authority for Advance Rulings ('AAR')

India has a detailed advance ruling mechanism which can be availed by a non-resident, to facilitate proper planning and avoid any future disputes. Also, an advance ruling can be sought by a resident, in order to determine its own tax treatment or the tax treatment of a non-resident with whom a transaction has been undertaken or is proposed to be undertaken. Furthermore, the scope of the AAR has been widened to include applications made by resident and non-residents on questions implicating GAAR. Such an advance ruling, which is issued by an independent adjudicatory body called the AAR, is binding on the person seeking it in relation to the specific transaction and the Revenue Authorities cannot challenge the same unless there is a change in facts or applicable law. An advance ruling is only binding on the parties to whom it applies, although it does have a persuasive value for other transaction.

Though statutorily no appeal can be preferred from the ruling of an AAR, constitutional remedies like writ can be availed to challenge an AAR ruling.

(b) Settlement Commission

The Settlement Commission is a statutory body and deals with the settlement applications filed by the assesses under the IT Act and the Wealth-tax Act, 1957.

An assessee can approach the Settlement Commission at any stage of the proceedings for assessment pending before an Assessing Officer, subject to certain prescribed conditions.

The Commission has the power to grant immunity from prosecution from any offence under IT Act or the Wealth-tax Act, 1957 and also from imposition of penalty under the IT Act or under the Indian Penal Code or any other Central Acts, in cases where the applicants make a full and true disclosure of their income or wealth and fulfills certain other prescribed conditions.

The order passed by the Settlement Commission is conclusive as to the matters stated therein and no appeal lies to any authority against the order passed by the Settlement Commission.

(c) Mutual Agreement Procedure ('MAP')

MAP is a dispute resolution mechanism provided for under the DTAAs.

MAP can be invoked by the taxpayers where an action of any one of the Contracting States to the DTAA results in or will result for him in taxation, which is not in accordance with the DTAA.

Further, recourse to MAP does not deprive the taxpayer from ordinary legal remedies available under the domestic law. There is no time limit prescribed within which the Competent Authorities of the DTAA are to arrive at a conclusion in respect of the MAP application.

(d) Bilateral Investment Protection Agreements ('BIPA')

The objective of BIPA is to promote and protect the interests of investors of either country in the territory of other country. Such Agreements increase the comfort level of the investors by assuring a minimum standard of treatment in all matters and provides for justifiability of disputes with the host country.

Off-late, foreign investors have been invoking the protection under BIPA to resolve their disputes with the Indian Government in the sphere of income tax.

B. INDIRECT TAXES

1. What are the indirect tax legislations applicable in India?

Customs Duty

Customs duty is imposed on the import of goods into India and export of goods outside India. Customs Duty is levied in terms of the Customs Act, 1962 and Customs Tariff Act, 1975 on the transaction value of goods. Currently, the effective rate of customs duty on import of most non agricultural products in India is 28.85% (approx).

Every person proposing to engage in import of goods into India or export of goods from India is required to obtain an Importer Exporter Code.

(a) Customs Duty on Import of Goods

Customs duty on imports comprises the following components:

Basic Customs Duty (‘BCD’): The rates of basic customs duty for each item are specified under the Customs Tariff Act, 1975, and are dependent on the classification of the goods determined under the Customs Tariff Act, which is aligned with the Harmonized System of Nomenclature (“HSN”) provided by the World Customs Organization. The median rate of basic customs duty on most non-agricultural products is 10%.

Additional Duty of Customs in lieu of Central Excise Duty (‘CVD’): All imports are chargeable to an additional duty of customs at the rate of 12% in lieu of Central Excise Duty, with a few exceptions.

Duty levied on most consumer goods intended for retail sale is calculated on the basis of the Maximum Retail Price (‘MRP’) printed on their packs.

The CVD paid is allowed as an input credit to the importer in order to offset their output excise duty or service tax liability, if any, subject to fulfillment of other conditions prescribed in this regard.

Additional Duty of Customs in lieu of Sales Tax/VAT (‘SAD’): All imports are chargeable to an additional duty of customs at the rate of 4% in lieu of sales tax/VAT, with a few exceptions. However, where the importation takes place for the purpose of further sale in India, SAD paid is allowed as an exemption by way of refund, subject to fulfillment of procedural conditions prescribed in this regard.

Education Cess: An additional levy of 2% in the form of education cess is levied on the aggregate of customs duties on imported goods.

Secondary and Higher Education Cess: An additional levy of 1% in the form of Secondary and Higher education cess is levied on the aggregate of customs duties on imported goods.

(b) Customs Duty on Export of Goods

In order to encourage exports, export duty is levied on very few items, mentioned under the Second Schedule of the Customs Tariff Act, 1975.

Excise Duty

Excise duty is imposed on the manufacture of goods in India. The power to levy excise duty primarily remains with the Central Government, though the power to levy excise duty on alcoholic products and other intoxicants has been conferred upon State Governments.

(i) Central Excise Duty

Central Excise duty is levied on the goods manufactured in India under the provisions of Central Excise Act, 1944 and the Central Excise Tariff Act, 1985.

Every person who produces or manufactures dutiable excisable goods or is a first stage or second stage dealer intending to issue excisable invoice or persons holding warehouses for storing non-duty paid goods etc. are required to register under the Central Excise Rules, 2002. Every such person is required to obtain separate registration for separate premises. Such registration is valid for as long as production activity continues and no renewal is necessary.

Most non-agricultural products attract a uniform rate of 12.36 % (inclusive of education cess @ 2% and secondary & higher education cess @ 1%). However, the Central Government is empowered to exempt products from levy of excise duty wholly or partially. Further, the Central Government has levied a Clean Energy cess on certain specified goods with effect from July 1, 2010.

Central excise duty is a modified VAT (also known as Cenvat) wherein a manufacturer is allowed to take credit of the following:

1) Excise duty paid on locally sourced goods;
2) CVD and SAD paid on imported goods;
3) Service tax paid on input services.

The Cenvat credit so availed can be utilized for payment of excise duty on the clearance of dutiable final products manufactured in India or output service tax liability, if any applicable in accordance with the Cenvat Credit Rules, 2004.

(ii) State Excise Duty

The power to regulate movement of liquor and other intoxicants and to levy tax on liquor and other intoxicants is conferred on State Governments by virtue of the Constitution of India. As a result, movement and sale of liquor and other intoxicants is dependent upon the excise policy of the respective states, which are revised annually.

The scope of State excise policy and Regulations inter alia include requirements for import, export, transport, possession and sale of liquor within the concerned State. State excise legislations also empower the state governments to issue licenses by way of tender, auction, tender-cum-auction or by any other prescribed mechanism.

State excise policies often contain the rules governing filing of statutory returns and other compliances. Such Rules vary from state to state.

Service Tax

The Service Tax regime in India is governed by Finance Act, 1994. Presently all services provided in the Taxable Territory of India (i.e. the whole of India except Jammu and Kashmir) except those specified in the negative list or otherwise specifically exempt are subject to the levy of service tax.

Generally, the liability to pay service tax is that of the service provider. However, in certain specified circumstances such as 'import of services' or with respect to certain specified services such as manpower supply services, works contract services etc., the whole or part of the service tax liability has been shifted on the service recipient under the reverse charge mechanism.

Currently, service tax is levied at an effective rate of @12.36% (inclusive of education cess and secondary & higher education cess).

In cases of cross-border transactions, the taxability of such services in India is determined on the basis of the place of provision of such services. Services for which the place of provision is outside the Taxable Territory of India would not be chargeable to Service Tax in India. The place of provision of a service is required to be determined in terms of the statutory principles laid down in the Place of Provision of Service Rules, 2012.

Service Tax also operates on the principle of value addition and taxes paid on input services/ capital goods are available as credit for set off purposes in accordance with the provisions of Cenvat Credit Rules, 2004.

Every service provider person engaged in providing taxable services over a specified limit, or a recipient of service tax statutorily required to pay service tax under reverse charge etc. is required to obtain service tax registration.

Sales Tax

Sale of almost all movable goods in India is chargeable to a levy of Value Added Tax/Central Sales Tax. Under the federal structure of India, tax on sale of goods may be imposed by the Central Government or the State Government depending upon the situs of the sale. However, import of goods into/export of goods outside India or sale in the course of import/export of goods is not exigible to sales tax.

(i) Intra-State Sales Tax/ Value Added Tax ("VAT")

The power to levy sales tax on intra-state sale is conferred upon State Governments under the Constitution of India. In the event that a sale takes place within a particular State of India, the same would qualify as a local sale or Intra-State Sale, and would be chargeable to VAT at the applicable rates under the relevant State VAT legislation.

Under the VAT regime, the VAT paid on goods purchased from within the State is eligible for input VAT credit. The input VAT credit can be utilized against the VAT/ Central Sales Tax ('CST') payable on the sale of goods subject to fulfillment of conditions in this regard. It is, thus, ensured that cascading effect of taxes is avoided and value addition alone is taxed.

VAT rates are dependent on the relevant State VAT Legislation. However, they are usually classified into four broad slabs depending upon the nature of the products. These are generally nil, 4/5%, 12.5-15.5% and 20%.

Every dealer engaged in sale or purchase of goods over and above the specified threshold limit in a particular State is required to obtain VAT/CST registration in each of such States and undertake necessary compliances in this regard.

Rules concerning filing of VAT returns vary from state to state. Statutory returns are normally filed on a yearly/ quarterly/ monthly basis (depending upon the taxable turnover of the dealer). These returns are filed with the jurisdictional VAT officer.

(ii) Central Sales Tax ("CST")

CST is levied on inter-state sale of goods. Where goods move from one State to another pursuant to a contract of sale, or a sale is affected by the transfer of documents of title during the movement of goods from one state to another, such a sale is known as an inter-state sale.

The power to levy CST is conferred on the Central Government by the Constitution of India. The levy of CST is governed by Central Sales Tax Act, 1957 ('CST Act').

Currently, CST is chargeable at the concessional rate of 2% on submission of requisite statutory form (Form C), prescribed in this regard.

The power to collect CST is in the hands of the State governments. Further, Section 9 of the CST Act provides that the provisions inter-alia including provisions relating to returns, provisional assessment, advance payment of tax, registration and penalties etc. under the local VAT law in a particular state shall also be applicable for the compliances under the CST Act.

Octroi / Entry Tax

a. Entry Tax

Entry tax is levied on the entry of goods in a particular State jurisdiction for use, consumption or sale of goods within such jurisdiction.

The rate of entry tax is contingent on the nature of goods brought within the state territory.

Once again, the rate of tax and the rules governing the filing of returns vary from state to state. Generally, returns are filed on a monthly/ yearly basis, depending upon each State.

Such returns are filed with the jurisdictional VAT officers.

b. Octroi

Currently, entry of specified goods in certain Municipal jurisdictions of Maharashtra, for use, consumption or sale therein, also attracts a levy of Octroi. The rate of Octroi varies from municipality to municipality and is dependent on the goods sought to be brought in.

Every person causing to bring such specified goods in the specified municipalities are required to obtain registration and undertake necessary compliances in this regard.

The rules governing the filing of returns vary within each municipality. Normally, the rules governing levy of Octroi stipulate for filing of requisite declaration at the time of bringing the goods within municipal limits.

Research and Development Cess

Research & Development Cess Act, 1986 levies cess on all payments made by an industrial concern for import of technology. At present, cess is levied at 5 per cent on payment towards technology imports. The R&D cess has to be deposited before the payment for technology import can be made and proof of deposit in respect of R&D cess may be submitted with the bank through whom the technology related payment is being made.

R&D cess can be deposited with any designated bank. Credit for R&D cess is available against the service tax payable on services related to intellectual property rights and technology transfers.

Luxury Tax

Luxury tax is levied on the goods and services 'for enjoyment over and above the necessities of life'. State Governments have been empowered to levy taxes on luxuries at rates specified in the State (Luxury Tax) Acts.

Rules governing filing of returns vary from state to state. Generally, statutory returns are filed on a monthly basis. Such returns are filed with the jurisdictional Excise, Entertainment and Luxury Tax Department or with jurisdictional Commercial Tax Department of the relevant State.

Professional Tax

Certain States in India also levy a tax on every person engaged in any profession, trade, calling or employment in the said State. Every person liable to pay professional tax is required to obtain an enrollment certificate under the professional tax laws and undertake necessary compliance in this regard.

Further, every company is also required to withhold professional tax on behalf of its employees and deposit the same with the Government exchequer. The rate of withholding tax is dependent on the number of employees and their monthly salaries. Further, every such company is also required to obtain a registration certificate in its capacity as employer and also obtain an enrolment certificate.

The rate slabs of professional tax vary from state to state subject to the maximum of Rs 2500 per annum.

2. Are there any restrictions under the indirect taxes in relation to related party transactions in India?

Customs- Special Valuation Branch

Import and export transactions between related parties are generally reviewed by the Special Valuation Branch ("SVB"). The SVB is a division of the Customs Department, specializing in investigation of transactions between related parties in order to determine whether the transaction value of imported or exported goods has been affected by the relationship between the parties.

The correct valuation of transactions between the related parties is required to be determined in terms of the specific Customs Valuation Rules prescribed in this regard which are in line with the General Agreement on Tariffs and Trade (GATT) Valuation Rules.

Excise

In cases where a manufacturer is engaged in selling manufactured goods exclusively to a related person, such transactions are subject to the scrutiny of the valuation officer who would determine the correct valuation of such transactions in terms of special valuation rules. These rules are made to ensure that the value of goods sold is not affected by the relationship between the parties.

VAT

Certain states have incorporated special provisions under the local VAT legislations to govern related party transactions.

These provisions are made to ensure that transaction value on which the tax liability is discharged is not affected by the relationship between the parties and in cases the officer has a reason to believe that the transaction value is less than the fair market value, he may require the tax to be paid on the fair market value.

3. What are some of the indirect tax incentives available in India?

Customs and Central Excise

There are various schemes and incentives available under Customs and Central Excise laws for various sectors including power, oil and gas, transportation, fertilizers, renewable sources of energy etc.

Further India has also signed Free Trade Agreements (“FTA”) with various countries for exemptions from import duty of various specified goods.

Foreign Trade Policy, 2009-2014 (“FTP”)

FTP provides for a suite of export promotion schemes such as the Advance Authorization Scheme, the Export Promotion Capital Goods Scheme, the Duty Free Import Authorization Scheme, Deemed Export benefits etc.

In addition, there are various sector specific incentive schemes notified for handicraft, agricultural, power generation sector and specified service sectors.

Special Economic Zone (‘SEZ’)

Subject to conditions prescribed in this regard, Developers of an SEZ and Units established in an SEZs are entitled to the various indirect tax benefits inter-alia including:

(a) Exemption from payment of import duties on imported goods;

(b) Exemption from payment of excise duty on domestically procured goods;.

(c) Exemption from duty of excise on goods manufactured by an SEZ;

(d) Drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a SEZ or Unit;

(e) Exemption/refund from service tax on services provided in relation to authorized operations in a SEZ, to a Developer or a Unit of Special Economic Zone

(f) Exemption from CST on the sale or purchase of goods if such goods are meant to carry on the authorized operations;

Exemption from VAT on supply of goods to an SEZ developer or Unit or sale of goods by an SEZ developer or Unit is subject to the respective sales tax/VAT legislation of the state in which the SEZ is set up

4. What is the ordinary appellate dispute resolution channel for indirect taxes in India?

Under Customs, Excise and Service Tax Laws

The ordinary appellate dispute resolution procedure in India includes the following forums:

(a) Appeals to Commissioner of Customs/Central Excise (Appeals):- This is the first level of appellate mechanism. An appeal in this regard can be filed within 60 days from the date of receipt of the order passed by an adjudicating authority lower than the rank of Commissioner.

(b) Appeal to the Appellate Tribunal – Customs Excise and Service Tax Appellate tribunal ("CESTAT"):- An appeal to CESTAT can be filed against an order of the Commissioner (Adjudication) or Commissioner (Appeals). Such appeals have to be filed within three months from the date of receipt of the order.

(c) High Court

An appeal may be filed before the High Court against the order of the CESTAT within 180 days, where the same relates to a substantial question of law. However, appeals against a CESTAT Order on the issues of classification or valuation are not admissible before High Court and are required to be filed directly before Supreme Court.

(d) Supreme Court

The Hon'ble Supreme Court of India is the final appellate authority. An appeal may be filed before the Supreme Court against the order of the CESTAT or High Court.

Further, the ordinary appellate dispute resolution channel with respect to VAT and other local levies such as entry tax may depend on local VAT legislation which may vary from State to State

5. What are other dispute resolution alternatives available to indirect taxpayers?

Apart from the above, with respect to central levies i.e. Customs, Excise and Service Tax, the following two dispute resolution alternatives are available:

(a) Settlement Commission

The basic objective of setting up of the Settlement Commission is to expedite payments of Customs & Excise duties involved in disputes by avoiding costly and time consuming litigation process and to give an opportunity to tax payers to come out clean. The provisions of Settlement Commission have also been made applicable to service tax matters vide Finance Act, 2012.

Any assessee can approach the Settlement Commission subject to the fulfillment of the following conditions:

- The proceedings / cases should be pending with aggregate amount of more than INR 3 lakh involved.

- Application to Settlement Commission should be made with prescribed fee and in prescribed form.

- Application once made, cannot be withdrawn.

- One of the pre-condition for application to Settlement Commission is that the proceedings or case must be pending before the adjudicating authority on the date of application. A show cause notice should have been issued.

- Application must make full and true disclosures before the Settlement Commission which is the very basis of settlement.

- Cases which are pending before court or Appellate Tribunal shall not be entertained by the Settlement Commission.

- Cases involving interpretation of classification of goods cannot be taken up by Settlement Commission.

(b) Authority for Advance Rulings

The Central legislations governing levy of Customs, Excise and Service Tax, provide for a scheme of Advance Ruling where the non-residents/ foreign investors and certain specified categories of residents proposing to undertake business in India may approach the authority for ascertaining their tax liability in India.

Advance ruling can be sought for Central Excise, Customs and Service Tax matters pertaining to an investment venture in India. The scheme of advance rulings allows the following categories of applicants to seek an advance ruling:

(i) Any person who is a non-resident;

(ii) Any person who is a resident setting up a Joint Venture in India in collaboration with a non-resident;

(iii) A Wholly Owned Subsidiary in India of which the holding company is a foreign company;

(iv) A Joint Venture in India, which means a contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders is non-resident having substantial interest in such arrangement.

(v) A resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf.

6. What is Goods and Service Tax (“GST”) in India?

The introduction of proposed Goods and Service Tax (GST) is seen as one of the biggest tax reforms in independent India.

At present, various indirect taxes are collected at various points, right from manufacturing to retailer’s outlet. The proposed GST will subsume several existing indirect taxes, including the central level excise duty and service tax, and state level VAT, entertainment tax, lottery tax and electricity duty, with one single tax, thus facilitating the consolidation of a single market across the country and allowing for greater supply chain efficiency and economies of scale.

The adoption of GST is set to streamline multiple indirect taxes with the ultimate objectives of boosting growth, increasing competiveness and contributing to higher economic development. According to a study by the National Council of Applied Economic Research (NCAER), full implementation of GST could lift India's gross domestic product (GDP) growth by 0.9 - 1.7 percentage points.

GST would be applicable on supply of all goods or services (barring few exceptions) as against the present concept of different taxes on the manufacture or on sale of goods or on provision of services.

Further, in line with international taxation principles, it would be a destination based consumption tax seeking to tax services in the jurisdiction in which final consumption by ultimate consumers occur. It would operate on the mechanism of taxing value addition at every stage of the economic process while allowing deduction of taxes on purchases by all but the final consumer.

Keeping in mind the peculiar federal structure, India is currently endeavoring to adopt a dual GST structure wherein GST would have two components i.e. the Central GST to be levied and collected by the Centre and the State GST to be levied and collected by the respective States.

Although implementation of GST is still a work in progress, with the conclusion of the latest meeting by the Empowered Committee of State Finance Ministers on August 20, 2014, India has moved closer towards implementation of Goods and Services Tax (GST). In light of the said development, it is expected that the Central Government should be able to achieve the following by end of this fiscal year:

a. Consensus with all States on all open issues;
b. Introduction of Constitutional Amendment Bill;
c. Introduction of white paper/draft GST Act for public deliberations.

IX. MISCELLANEOUS

1. Are there any restrictions on foreign ownership of land?

A non-resident is not permitted to acquire immoveable property in India (other than through a lease for a term of less than five (5) years) without the prior permission of the Reserve Bank. However, a person who has established a branch office or other place of business (other than a liaison office) for carrying on any activity in India can acquire immoveable property in India which is necessary for or incidental to the carrying on of such activity. A declaration in the prescribed form has to be filed with the Reserve Bank. An Indian subsidiary set up by a company resident outside India would be an Indian resident and is permitted to acquire movable and immoveable property incidental to its business. Similarly an LLP set up by a company resident outside India with the permission of the FIPB would be an Indian resident and is permitted to acquire movable and immoveable property incidental to its business.

2. What are the anti-money laundering standards applicable in India?

Pursuant to the Prevention of Money Laundering Act (which was brought into effect on July 1, 2005), SEBI and the Reserve Bank have issued detailed guidelines on Anti-Money Laundering Standards which apply to every banking company, financial institution and other intermediaries (including merchant bankers, underwriters, portfolio managers, trustees and other such entities registered with SEBI). The detailed guidelines are in line with international requirements in relation to prevention of anti-money laundering. The requirements include maintaining detailed records of all cash transactions of the value of more than INR 1 million or the equivalent in foreign currency. All suspicious transactions (whether or not in cash and including non-monetary transactions) have to be recorded and reported.

3. Does India have anti-corruption laws?

Yes. India has anti-corruption legislations. The Prevention of Corruption Act is the principal anti-corruption legislation in India. This, together with the Indian Penal Code, which is a substantive criminal code, deals with bribery/corruption related offences in India. There also exist special statutes like the Representation of People Act (which regulates the conduct of elections) and a vast body of subordinate legislation formulated as service rules which are applicable to various categories of public servants. These rules, inter alia, amongst other issues, seek to regulate the giving and the acceptance of gifts and hospitality by public servants (including elected representatives).

4. What are the visa and registration requirements for foreign nationals working in India?

The Foreign Registration Office is the primary agency to regulate the registration, movement, stay, departure and also for recommending the extension of stay in India. These offices are located in New Delhi, Mumbai, Kolkata, Amritsar, Chennai, Bengaluru, Hyderabad, Calicut, Cochin, Goa and Trivandrum and Chief Immigration Office in Ahmedabad. In other places, the Superintendents of Police of the district are registration officers for foreigners.

All foreigners including foreigners of Indian origin visiting India on long term (more than 180 (one hundred and eighty) days) basis under: (i) Student visa (including those coming for study of Yoga, vedic culture, Indian system of dance and music), (ii) Research visa, (iii) Employment visa, (iv) Medical visa and (iv) Missionary visa will be required to get themselves registered with concerned Registration Officer within 14 (fourteen) days of his/her first arrival, irrespective of the duration of their stay.

Foreigners visiting India on other categories of long term visa including business/entry visa would not require registration with the concerned Foreign Registration Office if, duration of his/her stay does not exceed 180 (one hundred and eighty) days on a single visit. In case a foreigner intends to stay for more than 180 (one hundred and eighty) days on a single visit he should get himself registered well before the expiry of 180 (one hundred and eighty) days.

The Ministry of Home Affairs has further set out another condition that for the purpose of issuing Employment Visas to foreign nationals, the employee should draw a salary of a minimum of USD 25,000 per annum. For the purpose of calculating this USD 25,000 limit, the salary and all other allowances paid to the foreign national in cash and perquisites such as rent free accommodation etc. will be taken into consideration.

5. Do companies require an industrial license?

Except for the industries falling within the following categories, all industrial undertakings are exempt from obtaining an industrial license:

- industries reserved for the public sector. These are limited to atomic energy and railway transport;
- industries retained under compulsory licensing. These include distillation and brewing of alcohol, hazardous chemicals, etc; and
- items reserved for the small-scale sector (currently there is a list of 20 (twenty) items reserved for manufacturing by the small scale sector);

6. Are there any industry-specific licenses that are necessary?

Yes. Examples of industry-specific licenses are:

- license from the Department of Telecommunications for telecom operating companies;
- license from the Insurance Regulatory Development Authority for insurance companies;
- registration from the Reserve Bank for banks and NBFC;
- registration with SEBI for mutual funds and venture capital funds.

7. Are there any registrations required for activities not falling under the industries specified above?

These would be regular business related registrations, some of which are common to all industries and some would be specific to certain activities proposed to be carried on and the location of the industry.

Illustratively, some of the standard registrations for an establishment proposing to undertake business activities would include:

(a) Income Tax registration;

(b) VAT / Sales Tax registration; and

(c) license under the Shops and Establishment Act of the relevant State in which the establishment is located.

A manufacturing unit would ordinarily also require registration / license / consents under the Factories Act, the different environmental protection legislations, etc. depending on the nature and location of the unit.

ANNEXURE-I
GLOSSARY

AAEC	Appreciable Adverse Effect on Competition
ADs	Authorized Dealer(s)
ALP	Arms Length Price
Approval Route	Foreign investment which requires approval of the FIPB, the Reserve Bank or such other regulator as may be required
Articles of Association	Articles of Association of a company.
Automatic Route	Foreign investment which does not require approval of the FIPB and/or the Reserve Bank
Banking Regulation Act	Banking Regulation Act, 1949
BIFR	Board for Industrial and Financial Reconstruction
CAT	Competition Appellate Tribunal
CCD	Compulsorily Convertible Debentures
CCI	Competition Commission of India
CCPS	Compulsorily Convertible Preference Shares
Central Excise Act	Central Excise Act, 1944
Central Excise Tariff Act	Central Excise Tariff Act, 1985
Central Sales Tax Act	Central Sales Tax Act, 1957
CFC	Controlled Foreign Corporation
CIBIL	Credit Information Bureau (India) Limited
CLB	Company Law Board
Code of Civil Procedure	Code of Civil Procedure, 1908
Companies Act	Companies Act, 1956 (to the extent not repealed by Companies Act, 2013) and Companies Act, 2013 (to the extent notified and applicable)
Competition Act	Competition Act, 2002 as amended by Competition (Amendment) Act, 2007
Combination Regulations	CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011
Constitutional Documents	Memorandum of Association and Articles of Association
Contract Labour Act	The Contract Labour (Regulation and Abolition Act), 1970
Copyright Act	Copyright Act, 1957
CST	Central Sales Tax
Customs Act	Customs Act, 1962
Customs Tariff Act	Customs Tariff Act, 1975
DIPP	Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India
Direct Tax Code	Direct Tax Code, 2010
DDT	Dividend distribution tax
DR	Depository Receipts
Drugs and Cosmetic Act	Drugs and Cosmetics Act, 1940
DTAA	Double Taxation Avoidance Agreements
ECB	External Commercial Borrowings

ECB Guidelines / ECB Policy	Master Circular on External Commercial Borrowings and Trade Credits dated July 1, 2011
ED	Enforcement Directorate
EEFC Accounts	Exchange Earner's Foreign Currency Accounts
Employees' Compensation Act	Employees' Compensation Act, 1923
Employees' State Insurance Act	Employees' State Insurance Act, 1948
Employees' Provident Funds and Miscellaneous Provisions Act	Employees' Provident Funds and Miscellaneous Provisions Act, 1952
ESOP	Employees Stock Option
Factories Act	Factories Act, 1976
Fatal Accidents Act	Fatal Accidents Act, 1855
FCCB	Foreign Currency Convertible Bond
FDI	Foreign Direct Investment
FDI Policy	Foreign Direct Investment Policy issued by the DIPP, Ministry of Commerce and Industry, Government of India. Please refer to the below link. http://dipp.nic.in/English/investor/FDI_Policies/FDI_policy.aspx
FEMA	Foreign Exchange Management Act, 1999 Please refer to the below link. http://www.rbi.org.in/scripts/Fema.a
FEMA 20	Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000
Finance Act	Finance Act, 1994
FII	Foreign Institutional Investor registered under the SEBI (Foreign Institutional Investor) Regulations, 1995.
FPI	Foreign Portfolio Investor registered under the SEBI (Foreign Portfolio Investors) Regulations, 2014.
FIPB	Foreign Investment Promotion Board
Foreign Trade Policy	Foreign Trade Policy 2009 – 2014
GAAR	General Anti Avoidance Rules
GST	Goods and Service Tax
Income Tax Act	Income Tax Act, 1961
Indian Contracts Act	Contracts Act, 1872
Indian Partnership Act	Indian Partnership Act, 1932
Indian Penal Code	Indian Penal Code, 1908
Indian Telegraph Act	Indian Telegraph Act, 1885
Industrial Development and Regulation Act	Industrial (Development and Regulation) Act, 1951
Industrial Disputes Act	Industrial Disputes Act, 1947
Industrial Employment (Standing Orders) Act	Industrial Employment (Standing Orders) Act, 1946
Insurance Act	Insurance Act, 1938
Insurance Regulatory And Development Authority Act	Insurance Regulatory And Development Authority Act, 1999
IT Act	Information Technology Act, 2000
ITES	Information Technology Enabled Product and Services
JV	Joint Venture

Listing Agreement	An agreement entered into by a listed company with the relevant stock exchanges for the listing of its shares
LLP	Limited Liability Partnership
LLP Act	Limited Liability Partnership Act, 2008
LLP Agreement	Limited Liability Partnership Agreement
Maternity Benefits Act	Maternity Benefits Act, 1961
Memorandum of Association	Memorandum of Association of a company.
MAT	Minimum Alternate Tax
Minimum Wages Act	Minimum Wages Act, 1948
M&A	Mergers & Acquisitions
MCA	Ministry of Corporate Affairs
NBFC	Non-Banking Financial Company
Notification	Notification S. O. 480 (E) dated March 4, 2011
NRI	Non Resident Indian
OCB	Overseas Corporate Body
OCD	Optionally Convertible Debentures
ODI	Overseas Direct Investment
PAN	Permanent Account Number
Partnership Act	Indian Partnership Act, 1932
Payment of Bonus Act	Payment of Bonus Act, 1965
Payment of Gratuity Act	Payment of Gratuity Act, 1972
Payment of Wages Act	Payment of Wages Act, 1936
PIO	Person of Indian Origin
Portfolio Investment Scheme	Published as Schedule 2 to FEMA 20
Press Council Act	Press Council Act, 1978
Prevention of Corruption Act	Prevention of Corruption Act, 1988
Prevention of Money	
Laundering Act	Prevention of Money Laundering
Act, 2002	
QIB	Qualified Institutional Buyer
R&D	Research and Development
RD	Regional Director
RFC account	Resident Foreign Currency Account
RFPI	Registered Foreign Portfolio Investor
Representation of People Act	Representation of People Act, 1951
Research and Development Cess Act	Research & Development Cess Act,
1986	
Reserve Bank	Reserve Bank of India
ROC	Registrar of Companies
SCRA	Securities Contracts (Regulation) Act, 1956
SEBI or Board	Securities and Exchange Board of India
SEBI Act	Securities And Exchange Board of India Act, 1992
SEBI Delisting Regulations	Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009
SEBI ICDR Regulations	Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009
SEBI Insider Trading Regulations	Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992

SEBI Takeover Regulations	Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
SEZ	Special Economic Zone
SICA	Sick Industrial Companies (Special Provisions) Act, 1985
SPV	Special Purpose Vehicle
STP	Software Technology Park
STT	Securities Transaction Tax
TRIPS	Trade Related Intellectual Property Rights
Trade Marks Act	Trademarks Act, 1999
Trade Unions Act	Trade Unions Act, 1926
UNCITRAL	United Nations Commission on International Trade Law
VAT	Value Added Tax
VC	Venture Capital
VCF	Venture Capital Fund
WOS	Wholly Owned Subsidiary

ANNEXURE-II THE COMPANIES ACT, 2013 (A PRIMER)

1. Introduction

The Companies Act, 2013 (the “2013 Act”) has been enacted to revise, modify and replace the erstwhile Companies Act, 1956 (the “1956 Act”), in consonance with changes in national and international economic environment. The 2013 Act was passed by the Lok Sabha i.e. the lower house of the Indian Parliament, on December 18, 2012, and by the Rajya Sabha i.e. the upper house of the Indian Parliament, on August 8, 2013. The 2013 Act received the assent of the President of India on August 29, 2013. In order to facilitate smooth transition from the old legal regime to the new one, it has been decided to implement and effect the provisions of the 2013 Act in a phased manner. Substantial provisions of the 2013 Act have been notified and have been made effective, replacing the corresponding provisions of the 1956 Act to such extent.

The 2013 Act is divided into 29 (twenty nine) chapters and contains 470 (four hundred seventy) clauses and seven (7) schedules and has endeavored to achieve modernization and compactness by deleting redundant provisions, regrouping related provisions and modifying various provisions of the 1956 Act to enable easy interpretation, delink procedural aspects from substantive law and provide greater flexibility in rule making. The 2013 Act has inter-alia, introduced enhanced corporate governance standards particularly in relation to the independent directors, audit, CSR, mandatory valuation, vigil mechanism, private placement of securities, cross-border mergers including merger of Indian companies into foreign companies and class action suits.

The 2013 Act is subject to ‘rules’ prescribed by the Central Government. The rules for notified sections of the 2013 Act have been published by the MCA (however, as of the date of this Primer, some rules are not yet into effect).

2. Coverage of this Primer

This Primer broadly highlights the key changes brought in under the 2013 Act and also emphasizes on relevant issues from a practical viewpoint.

3. Incorporation of companies

(i) Incorporation of a one person company has been permitted, wherein an individual can incorporate a company as the member and the director.

(ii) The 2013 Act allows a private company to have up to 200 (two hundred) members as against the limit of 50 (fifty) members under 1956 Act. The 2013 Act now specifically provides that a private company which is a subsidiary of a public company shall be regarded as a public company, irrespective of its status as private company in its articles.

(iii) The concept of a private company being a subsidiary of a foreign body corporate being regarded as a subsidiary of a public company under Section 4(7) of 1956 Act, has been done away with under the 2013 Act.

(iv) A specific provision has now been added stipulating that the articles of company may contain entrenchment provisions whereby specified provisions may be altered only if conditions or procedures that are more restrictive than those applicable to a special resolution, are complied with. Such entrenchment shall either be made on formation of a company or by an amendment to the articles agreed by all the members in case of a private company and by a special resolution in case of a public company.

(v) As part of the incorporation process, the subscribers to the memorandum of association and first directors are now required to provide an affidavit stating that they are not convicted of any offence in connection with the promotion, formation or management of, and that they are not guilty of any fraud or misfeasance or breach of duty in relation to, any company incorporated under the new enactment or any previous company law during the preceding five (5) years. There shall also be filed with the RoC, at the time of incorporation the particulars of interest, if any, in relation to the first directors. If any person furnishes false or incorrect particulars or suppresses any material information, he shall be liable for fraud attracting imprisonment as well as fine.

(vi) A company shall be regarded as holding company of another, if the former is inter-alia, holding more that 50% (fifty percent) of the total share capital of the latter i.e. equity share capital as well as convertible preference share capital, as opposed to only equity share capital under the 1956 Act. Associate company, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company, wherein significant influence means control of at least 20% (twenty per cent) of total share capital, or of business decisions under an agreement.

4. Share Capital

(i) As regards the free transferability of shares of a public company, a new provision has been stipulated providing that a contract or arrangement between two (2) or more persons in respect of transfer of shares shall now be enforceable. Hence, such contracts will be enforceable qua the company, therefore removing the ambiguity in relation to enforceability of the contracts imposing restrictions on transfer of shares, in case of public companies.

(ii) A company cannot issue shares at a discount save and except in case of sweat equity shares.

(iii) In relation to infrastructure projects, the preference shares may be issued for a period exceeding 20 (twenty) years, but not exceeding 30 (thirty) years, subject to redemption of at least 10% (ten percent) shares from the 21st (twenty first) year, on proportionate basis, at the option of preference shareholders.

(iv) Any consolidation and division of share capital by companies which results in change in the voting percentage of shareholders shall require prior approval of the NCLT.

(v) The provisions relating to further issuance of share capital, including preferential issue and bonus issue, are also made applicable to private companies.

(vi) Provisions for issuance of bonus shares have been specifically provided, wherein companies are required to fulfill prescribed conditions before issuance of bonus shares, including:

(a) authorization by its articles;
(b) shareholders approval in a general meeting;
(c) no default in payment of interest or principal in respect of fixed deposit or debt securities issued by it;
(d) no default in payment of statutory dues of the employees; and
(e) no partly-paid up shares.

(vii) With a view to ensure more transparency and accountability on part of the companies, provisions for offer or invitation for subscription of securities on a private placement[5] basis have now been specifically dealt with under the 2013 Act. Accordingly, the offer or invitation to subscribe securities on private placement can be made to such number of persons not 200 (two hundred) in a financial year (excluding qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option) and shall also satisfy such conditions (including the form and manner of private placement) as prescribed in the rules.

(viii) The minimum gap between two (2) buy-backs of securities shall be one (1) year irrespective of whether the same is approved by the board of directors or the shareholders. Under the 1956 Act, if the buy back was undertaken pursuant to the approval of the board of directors, no further offer of buy back was permissible within 365 (three sixty five) days of such buy-back approved by the board of directors.

(ix) In relation to reduction of share capital, the NCLT shall notify the reduction application to the Central Government, RoC, SEBI (in case of listed companies) and the creditors for making any representations on the proposed reduction within three (3) months of receipt of notice, failing which it shall be presumed that they do not have any objection.

5. Corporate Governance

A. Directors

(i) Concept of independent Director has been introduced in the 2013 Act. Some of the important points relating to independent Director are mentioned below:

- Listed companies shall have at least 1/3rd (one third) of the total number of directors as independent Director;
- Public companies having a share capital of INR 100 million or more, turnover of INR 1,000 million or more, or outstanding loans and borrowings of INR 500 million or more, has to appoint at least two (2) independent directors on the Board;

[5] "Private placement" has been defined to mean any offer of securities or invitation to subscribe securities to a select group of person by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the specified conditions.

- In order to qualify as an independent Director, a person is required to satisfy prescribed prerequisites which are more stringent than those stipulated in Clause 49 of the Listing Agreement ("Clause 49");

- Nominee director cannot be regarded as an independent Director[6];

- Maximum term of independent Director has been restricted to five (5) years at once subject to a maximum of two (2) such terms;

- Independent Director cannot be granted any stock options in companies.; and

- Independent Director shall abide by the prescribed code of conduct under Schedule IV of the 2013 Act.

(ii) Duties of directors have been specifically provided, including to act in good faith and in the best interest of the company, not to have any direct/indirect conflict of interest with the interest of the company and to exercise duties with diligence and reasonable care.

(iii) Mandatory appointment of certain key managerial personnel ("KMP")[7], including MD, CEO, CS and CFO for listed companies and public companies with paid-up share capital of 100 million or more have been prescribed, who will inter alia be considered as officers in default.

(iv) An independent Director and non-executive director (not being promoter or KMP), are made liable only in respect of such acts of omission/ commission by the company which had occurred with their knowledge, attributable through board processes, and with their consent or connivance.

(v) Appointment of at least one (1) woman director on the board of prescribed classes of companies has been made mandatory. A transition period of one (1) year has been prescribed for the compliance of this provision, for existing companies.

(vi) Appointment of at least one (1) director resident in India, i.e. a director who has stayed in India for at least 182 (one hundred and eighty two) days in the previous calendar year, is made mandatory for all companies. A transition period of one (1) year has been prescribed for the compliance of this provision, for existing companies.

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[6] "Nominee Director" has been defined to mean a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests. Note that Nominee Director appointed by an institution which has invested in/or lent to the company is deemed as an independent director under Clause 49 of the Equity Listing Agreement.

[7]KMP, in relation to a company, has been defined to mean the following:

i. the Chief Executive Officer or the managing director or the manager;
ii. the company secretary;
iii. the whole-time director;
iv. the Chief Financial Officer if the Board of Directors appoints him; and
v. such other officer as may be prescribed;

(vii) Maximum number of directors has been increased from 12 (twelve) to 15 (fifteen) directors. Further, no Central Government approval is required to increase the maximum number of directors beyond 15 (fifteen). Shareholders of companies may do so by passing a special resolution.

(viii) Maximum number of directorships of an individual is 20 (twenty), with 10 (ten), as compared to 15 (fifteen), in public companies.

(ix) Provisions regarding convening and holding of board meetings through video conferencing or other audio visual means, have been specifically provided. However, the matters which can only be discussed in physical board meeting are: approval of the annual financial statements; approval of the Board's report; approval of the prospectus; audit committee meetings for consideration of accounts; and approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

(x) One third (1/3rd) of the total number of directors are entitled to require the company that any resolution which is being passed through circulation, shall be decided at a board meeting only.

(xi) Provisions in relation to resignation of a director including the manner of tendering such resignation have been specifically provided. The directors are required to file their resignation letter with the RoC, within 30 (thirty) days of resignation.

(xii) Stock options, granted to directors, shall be included in the remuneration. Such stock options shall be valued as perquisites defined under the Income Tax Act, 1961.

(xiii) Minimum seven (7) days' advance notice is required for holding a board meeting. However, in order transact any urgent business, a meeting may be called at shorter notice provided at least one (1) independent Director, if any, shall be present at such meeting, failing which, decisions taken at such meeting shall be circulated to all directors and shall be final only upon ratification by at least one (1) independent Director, if any.

(xiv) Committees of board of directors:

(a) Audit Committee ("AC"): The board of directors of every listed company and public companies having a share capital ofINR 100 million or more, turnover of INR 1,000 million or more, or outstanding loans and borrowings of INR 500 million or more, shall constitute an AC, which shall comprise of minimum of three (3) directors with independent directors forming majority. Majority of members of AC including its chairperson are required to be able to read and understand, the financial statement. The role and powers of the AC has been widened in comparison to the Equity Listing Agreement.

(b) Nomination and Remuneration Committee ("NRC"): The board of directors of every listed company and public companies having a share capital of INR 100 million or more, turnover of INR 1,000 million or more, or outstanding loans and borrowings of INR 500 million or more, shall constitute an NRC, which shall comprise of three (3) or more non-executive directors out of which minimum one half shall be independent directors. Further, the chairperson of the company (whether executive or non-executive) may be appointed as a member of NRC, however, such chairperson shall not chair NRC. NRC shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the board a policy, relating to the remuneration for the directors and KMP.

(c) Stakeholders Relationship Committee ("SRC"): Companies with more than 1,000 (one thousand) shareholders, debenture-holders, deposit-holders and any other security holders at anytime during a financial year to constitute a SRC to consider and resolve the grievances of security holders. SRC shall comprise of a non-executive chairperson and such other members as the board may decide.

B. Auditors & Accounts

(i) Mandatory rotation of auditors every five (5) years. An individual auditor can have one (1) term of five (5) years and an audit firm can have two (2) terms of five (5) years. Three (3) year transition period has been prescribed.

(ii) Ratification of appointment of auditors, by the members at every annual general meeting of the company, has been made mandatory.

(iii) Shareholders are at liberty to decide by passing resolution that audit partner and the audit team, be rotated every year.

(iv) Auditors are prohibited from rendering specified services to the company/its holding company / subsidiary company, inter-alia, including:

(a) internal audit;
(b) investment banking services;
(c) outsourced financial services;
(d) actuarial services;
(e) investment advisory services;
(f) management services;
(g) any other kind of services as may be prescribed.

(v) A company shall be bound to re-open and recast its financial statements wherein pursuant to an application having been made by the Central Government, SEBI, income tax authority, any other statutory regulatory body or authority or any person concerned, an order has been made by the NCLT or a court of competent jurisdiction in that regard.

(vi) Consolidated financial statements of companies are required to also include financial statements of associate companies and joint ventures.

(vii) The Central Government is empowered to constitute, by notification, the National Financial Reporting Authority ("NFRA") to provide for matters relating to accounting and auditing standards. NFRA shall perform functions as specified, including monitoring the compliance and overseeing the quality of service of professionals associated with ensuring the compliance with such standards. NFRA has also been empowered to investigate, either suo motu or on a reference made to it by the Central Government, into the matters of professional and other misconduct committed by any member of Institute of Charted Accountants of India. NRFA has also been empowered to impose specified penalty including debarring the professional from the practice.

C. Dividend

(i) Shareholders/claimants are entitled to claim dividends transferred to Investor Education and Protection Fund.

(ii) Transfer to prescribed sum to reserves before declaration of any dividend has been left at the discretion of the companies.

(iii) In case the company has incurred any losses during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, then the rate of such interim dividend shall not be higher than the average rate of dividends declared by the company during the immediately preceding three (3) financial years.

(iv) Any non-compliance with the provisions relating to acceptance and repayment of deposit, shall bar the company to declare any dividend during the period of such non-compliance.

D. Management, Administration and Compliance

(i) Related parties transactions by companies:

(a) All related party transactions have to be approved by the Audit Committee.

(b) No company can enter into a contract or arrangement or transaction(s) not exceeding prescribed amount, with its related party[8], unless the same has been approved by the shareholders of such company by way of passing a special resolution.

However, the related party shareholders are not permitted to exercise their voting rights, in such special resolution.

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[8]Related party, has been defined to mean:-

i. a director or his relative;
ii. a key managerial personnel or his relative;
iii. a firm, in which a director, manager or his relative is a partner;
iv. a private company in which a director or manager is a member director;
v. a public company in which a director or manager is a director or holds along with his relatives, more than two per cent. of its paid-up share capital;
vi. any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
vii. any person on whose advice, directions or instructions a director or manager is accustomed to act provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;
viii. any company which is:-
(a) a holding, subsidiary or an associate company of such company; or
(b) a subsidiary of a holding company to which it is also a subsidiary;

(ii) Further, any arrangement between a company and its director or connected person, for acquisition of asset for consideration other than cash, shall require the prior approval of the shareholders by way of a resolution, and in case such director or other connected person is a director of the holding company, approval shall also be required from the shareholders of such holding company.

(iii) In relation to acceptance of deposits, companies other than a banking company and non-banking financial company as defined in the Reserve Bank of India Act, 1934 and public companies having net worth of not less than INR1,000 million or a turnover of not less than INR 5,000 million and which has obtained the prior consent of the company in general meeting by means of a special resolution and also filed the said resolution with the RoC before making any invitation to the public for acceptance of deposits, are prohibited from accepting deposits from public. A company may accept deposits from its members subject to fulfillment of various conditions, including:

(a) providing such deposit insurance in such manner and to such extent as may be prescribed; and

(b) providing security, if any, for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property of assets of the company.

(iv) Listed companies, and unlisted public companies having (i) paid-up share capital of INR 500 million or more in preceding financial year, or (ii) turnover of INR 2,000 million or more in preceding financial year, or (iii) outstanding loans of borrowings exceeding INR 10,000 million or more at any point during the preceding financial year, or (iv) outstanding deposits of INR 250 million or more at any point during the preceding financial year, and private companies having (i) turnover of INR 2,000 million or more in preceding financial year, or (ii) outstanding loans of borrowings exceeding INR 1,000 million or more at any point during the preceding financial year, are required to appoint an internal auditor. Such audit shall be conducted and reported to the board of directors in accordance with the rules to be prescribed.

(v) Companies have been prohibited from making investment through more than two layers of investment companies, except in certain specified cases of overseas subsidiaries.

(vi) Specific provisions have been introduced in the 2013 Act prohibiting forward dealing and insider trading of securities. Presently only SEBI regulations regulate forward dealing and insider trading of securities, specifically for listed companies.

(vii) Annual return of companies shall contain detailed/additional disclosures such as details of holding / subsidiaries / associate companies, remuneration of directors and KMPs, shareholding of FIIs/FPIs, and an extract of the Annual Return is required to be included in the Board’s report.

(viii) Listed companies are required to prepare report on the proceedings taken place at each annual general meeting.

(ix) Listed companies are required to file return with the RoC regarding change in shareholding of the promoters and the top 10 (ten) shareholders, within 15 (fifteen) days of such change.

(x) Secretarial standards with respect to the meetings of board and shareholders as issued by the Institute of Company Secretaries of India have been granted statutory recognition.

(xi) Secretarial audit is made mandatory for all listed companies and public companies having paid-up shares capital of INR 500 million or more, or turnover of INR 2,000 million or more.

(xii) E-governance introduced for various company processes including maintenance and inspection of company's statutory records.

E. Mandatory valuation

(i) Appointment of registered valuer for carrying out the valuation of company's property e.g. shares, stocks, debentures, securities or goodwill or net worth of a company or its liabilities, has been made mandatory.

(ii) Registered valuer is required to perform and fulfill specific roles and obligations, including inter alia:

(a) making an impartial, true and fair valuation of any assets which may be required to be valued;

(b) exercising due diligence while performing the functions as valuer;

(c) making the valuation in accordance with such rules as may be prescribed; and

(d) not undertaking valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during or after the valuation of assets.

(iii) Mandatory valuation by registered valuer is required in certain cases, including:-

(a) allotment of shares for consideration other than cash;

(b) acquisition of minority shareholding by an acquirer already holding 90% of issued equity share capital of a company;

(c) exit opportunity to the dissenting shareholders of transferor company/listed company being merged with an unlisted company;

(d) submission of valuation report by liquidator in the event where tribunal has made a winding up order;

(e) declaration of solvency by the board of directors in the event of voluntary winding up.

F. Corporate Social Responsibility ("CSR")

(i) CSR has been made mandatory for a company having net worth of INR 5,000 million or more, or turnover of INR 10,000 or more or a net profit of INR 50 million or more during any financial year.

(ii) Such company is required to constitute a Corporate Social Responsibility Committee of the board ("CSRC") which shall consist of three (3) or more directors, out of which at least one (1) director shall be an independent director. An unlisted public company or a private company which is not required to appoint an independent director pursuant to the 2013 Act, is allowed to have its CSRC without such independent director. Additionally, a private company with only 2 (two) directors is allowed to constitute its CSRC with 2 (two) such directors.

(iii) CSRC shall formulate and recommend to the board a Corporate Social Responsibility Policy ("CSRP") indicating the prescribed corporate social activities as provided under the 2013 Act, to be undertaken by the company.

(iv) CSRC shall recommend to the board the amount of expenditure to be incurred toward CSRC and also monitor the same from time to time.

(v) Such company shall spend, in a financial year, at least 2% (two percent) of the average net profits of the company made during 3 (three) immediately preceding financial years, in pursuance of its CSRP.

(vi) Such company shall also give preference to the local area(s) around it where it operates, for spending the amount earmarked by it for CSR activities.

(vii) In case of any failure on the part of the company in spending the aforesaid amount, the board shall give, in its report, the reasons for not spending the aforesaid amount.

G. Serious Fraud Investigation Office ("SFIO")

(i) Central Government shall establish an office called the SFIO to investigate frauds relating to a company.

(ii) Statutory status has been conferred upon SFIO.

(iii) Report of SFIO filed with the relevant court for framing charges shall be treated as a report filed by a police officer.

(iv) SFIO is empowered to arrest in respect of certain offences involving fraud[9].

(v) The offences shall be cognizable and the accused person shall be released on bail only upon fulfilling the stipulated conditions.

[9] 'Fraud' in relation to affairs of a company or any body corporate, has been defined to include any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

6. Compromises, Arrangements & Amalgamations

(i) Merger of Indian companies with foreign companies incorporated in such countries as may be notified has now been permitted.

(ii) Holding of treasury shares pursuant to any court approved arrangement has now been prohibited.

(iii) Postal ballot has been added as a mode of voting on the scheme of compromise or arrangement.

(iv) Any objection to a scheme can be made only by persons holding not less than 10% (ten percent) of the shareholding or having outstanding debt amounting to not less than 5% (five percent) of the total outstanding debt.

(v) In case of merger of a listed company with an unlisted company, the listed company is required to provide exit opportunity to its shareholders to opt out of the unlisted transferee company.

(vi) An acquirer or a person acting in concert with the acquirer or a person / group of persons holding 90% (ninety percent) or more of the issued equity share capital of a company by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, may now purchase the minority shareholding of the company at a price determined by a registered valuer in accordance with the rules to be prescribed.

(vii) Minority shareholders may also offer to the majority shareholders to purchase the shares held by such minority shareholders at a price determined by a registered valuer in accordance with the rules to be prescribed.

(viii) Merger between small companies[10] or between a holding company and its wholly-owned subsidiary or such other classes of companies as may be prescribed, shall be approved by the Registrar of Companies and Official Liquidator without the requirement of obtaining NCLT's approval, subject to fulfillment of prescribed conditions.

(ix) Mandatory notification of the scheme to multiple regulatory authorities including the Central Government, income tax authorities, RBI, SEBI, stock exchanges, CCI and other relevant sectoral regulators. Such authorities shall make their representations on the proposed scheme within 30 (thirty) days of receipt of notice, failing which it shall be presumed that they do not have any representations. It is pertinent to note that as regards the approval of the CCI, this provision is in direct conflict with the 210 (two hundred ten) days that CCI has been granted under the Competition Act, 2002 to consider a notified transaction.

(x) Any compromise or arrangement may include takeover offer to be made in the manner to be prescribed. In case of listed companies, takeover offer shall comply with the SEBI regulations.

[10] 'Small Company' has been defined to mean a company, other than a public company, and (a) whose paid-up share capital does not exceed INR 5 million (Indian Rupees Five Million only) or such higher amount as may be prescribed which shall not be more than INR 50 million (Indian Rupees Fifty Million); or (b) whose turnover does not exceed INR 2 million (Indian Rupees Two Million) or such higher amount as may be prescribed which shall not be more than INR 200 million (Indian Rupees Two Hundred Million only).

(xi) Any compromise or arrangement may include buy-back of securities provided such buy-back is in accordance with the buy-back provisions stipulated in the 2013 Act.

(xii) Valuation report is now required to be sent to all the members and creditors along with the notice convening their meeting to consider any scheme.

7. Prevention of Oppression and Mismanagement

(i) The 2013 Act provides that shareholders may also make a complaint to seek relief in case of any material change in the management or control of the company whether by alternation in the board of directors of the company or in other manner whatsoever; and by such change it is likely that the affairs of the company will be conducted in manner prejudicial to the interest of members or class of members of in the public interest.

(ii) A new concept of class action suit has been introduced. In case of oppression and/or mismanagement, specified numbers of members/depositors of a company are entitled to file a class action suit before the NCLT on behalf of the members/ depositors, for seeking all or any of the prescribed relief. The concerned members/ depositors may also claim damages or compensation for unlawful or wrongful acts from or against the company, its directors, auditors (firms and partner thereof), experts, advisors etc. The order passed by the NCLT shall be binding on the company and all its members and depositors, and auditors including audit firm or expert or consultant or advisors or any other person associated with the company.

8. Winding up

(i) The following grounds for winding up by the court have been deleted:

(a) non commencement of business within one (1) year;
(b) number of members falling below the minimum prescribed; and
(c) default in providing statutory report to the RoC or in holding the statutory meeting.

(ii) The following new grounds for winding up by the NCLT have been inserted:

(d) the affairs of the company have been conducted in a fraudulent manner;
(e) the company was formed for fraudulent and unlawful purpose; and

(f) the persons concerned in its formation or management have been guilty of fraud, misfeasance or misconduct in connection therewith.

9. NCLT/NCLAT, Special courts and Mediation & Conciliation Panel

(i) The provisions in respect composition and constitution of National Company Law Tribunal (“NCLT”) and National Company Law Appellate Tribunal (“NCLAT”) have been redefined in view of the Supreme Court’s judgment dated May 11, 2010.
(ii) For the speedy trial of offences, Central Government has been empowered to establish Special Courts in consultation with the Chief Justice of High Courts.

Special Courts have liberty to try summary proceedings for offences punishable with imprisonment for a term not exceeding three years.

(iii) Central Government shall maintain the Mediation and Conciliation panel, which shall consist of such number of experts having such qualifications, as prescribed in the rules. Such panel shall facilitate necessary arbitration between the parties during the pendency of any proceedings before the Central Government or NCLT or NCLAT.

10. Miscellaneous

(i) A secured creditor is entitled to make an application to the NCLT to declare a company as sick company, if the said company, upon demand of the secured creditors representing 50% (fifty percent) or more of its outstanding debt, either failed to pay the debt within 30 (thirty) days of the date said notice or to compound it to the reasonable satisfaction of the creditors.

(ii) A company may be struck-off by the RoC inter-alia, on the following grounds:-

(a) subscribers to the memorandum have not paid subscription money within 180 (one hundred eighty) days from the date of incorporation;

(b) company has failed to commence its business within one (1) year from the date of incorporation;

(c) company is not carrying any business or operation for TWO (2) immediately preceding financial years and has not, within aforesaid time period, applied to the RoC for the status of a dormant company.

(iii) A more effective regime for inspection and investigations being proposed.

(iv) Scope of 'officer in default' has been expended so as to also include in its ambit the registrar and transfer agent, merchant banker to issue, in relation to issue and transfer of share.

(v) Penalties for contravention of statutory provisions have been made stringent when compared with the 1956 Act. Maximum as well as minimum quantum of penalty for offence with suitable deterrence for repeat offences, have been provided.

(vi) Fraud is defined to mean in relation to affairs of a company or any body corporate act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from or to injure the interests of the company or shareholders or creditors or any other person, whether or not there is any wrongful gain or wrongful loss. Such fraud is penalized with imprisonment which may be for 10 (ten) years and also fine which could be three times of the amount involved in the fraud.

ANNEXURE-III INFRASTRUCTURE SECTOR

A. INTRODUCTION

B. REGULATORY FRAMEWORK

1. POWER SECTOR

Electricity being a Concurrent subject under the Constitution of India, both the Central and State Government have jurisdiction. The electricity or power sector in India is primarily regulated by the Electricity Act which is the major legislation covering the generation, transmission, distribution and trading of electricity in India.

The primary regulatory authority under the Electricity Act is the Central Electricity Regulatory Commission (CERC), which has jurisdiction over generating companies owned or controlled by Central Government and those generating companies who have entered into or otherwise have a composite scheme for generation and sale in more than one state. The State Electricity Regulatory Commissions (SERCs) have jurisdiction over generating stations within the state boundaries, except those under the CERC's jurisdiction.

FDI up to 100% is permitted under the automatic route in operating companies, carrying out generation, transmission, distribution and trading.

The Central Government announced the National Electricity Policy, 2005 to, inter alia, provide access to electricity for all households in the next five years and meet the power demand by 2012. The Central Government also notified the Tariff Policy on January 6, 2006 in continuation of the National Electricity Policy, which was subsequently amended in 2008, pursuant to which various parameters with respect to tariff-fixation, such as adequate return on investment to the power generator and supplier and ensuring reasonable user charges for the consumer were set out. Additionally, the New Hydro Power Policy was approved by the Cabinet on January 3, 2008 which seeks to create a level playing field for private and public hydro power producers. The Renewable Energy sector has received considerable policy backing as well under the National Rural Electrification Policies, 2006, Tariff Policy 2006, National Electricity Policy 2005 and the National Policy on Biofuels 2009. The Tariff Policy 2006, requires the SERCs to fix a minimum percentage of renewable purchase obligation (RPO) from renewable energy sources taking into account availability of such resources in the region and its impact on retail tariffs and procurement by distribution companies at preferential tariffs determined by the SERCs. The Policy further elaborates on the role of regulatory commission; mechanism for promoting renewable energy and timeframe for implementation, etc. The Tariff Policy was amended in January 2011 to increase the solar-specific RPO from a minimum of 0.25% in 2012 to 3% by 2022. Further, the Central Government has also come up with a Strategic Plan for the New and Renewable Energy Sector for the period 2011-2017.

The Central Government introduced the Mega Power Policy in 1995 for providing impetus to development of large size power projects (above 700 MW for thermal power plants and above 350 MW for hydel power plants) in the country, which was subsequently revised in 2009 to bring it in consonance with the National Electricity Policy 2005 and Tariff Policy 2006.

Tariffs to be charged to end users are subject to the Tariff Policy, as notified by the Ministry of Power under the Electricity Act. The Tariff Policy requires all future requirements of power of distribution licensees after the date of the Tariff Policy to be procured only through a competitive bidding process. Furthermore, the Electricity Act allows the SERCs to determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State subject to the guidance from the National Electricity Policy, National Electricity Plan and the tariff policy.

2. ROADS

Highways fall within the Union list under the Constitution of India and hence the Central Government has jurisdiction. The Department of Road Transport and Highways under the Ministry of Shipping, Road Transport and Highways has the overall responsibility for development of roads and highways in India.

The National Highway Authority of India (NHAI), a statutory body set up under the NHAI Act, has the responsibility to inter alia, develop, maintain, regulate and manage highways and collect fees on behalf of the Central Government for services or benefits and such other fees on behalf of the State Governments on such terms and conditions as may be specified by such State Governments. There is no regulator for the roads sector. NHAI acts as the regulator and as operator. Separate State Governments have set up their own corporations and agencies for overseeing the development of roads.

FDI up to 100% is permitted under the automatic route.

Pursuant to the NHAI Act, NHAI has the right to collect user fees on behalf of the Central Government/State Government and such right is delegated to the concessionaire. Under the Model Concession Agreement provided by NHAI for projects worth INR 100 crores (approx. USD 23 Million) and above, such right has been granted to the Concessionaire who is entitled to collect the Fees from the users of the Project Highway at the rates notified by the Central Government. The Central Government may, by notification in the Official Gazette, specify the rates of the fees for services or benefits rendered in relation to the use of highways.

To fund highway development, the Central Government has also set up a Central Road Fund under the Central Road Fund Act, 2000 pursuant to which a cess is levied on sale of fuel such as diesel and petrol and the money thus collected was to be spent on development and maintenance of National Highways, construction of railway over- or under-bridges and for development and maintenance of roads other than national highways or roads of economic importance.

NHAI has drawn up detailed plans for highway development as part of the National Highway Development Project (NHDP). NHDP has been divided into seven phases of which Phase I and II are almost complete.

3. PORTS

Major ports are under the jurisdiction of the Central Government (the Department of Shipping, under the Ministry of Shipping, Road Transport and Highways), while minor ports are under the jurisdiction of the respective State Governments. Major ports in India are governed by the Major Port Trusts Act, 1963 and minor ports in India are governed by the Indian Ports Act, 1908. A new Indian Ports Bill, 2011 has been proposed which seeks to merge the existing two statutes, the Indian Ports Act, 1908, as well as the Major Port Trusts Act, 1963, governing the sector into a single piece of legislation.

Additionally, some states have set up statutory authorities (for example the Gujarat Maritime Board (established under the Gujarat Maritime Board Act, 1981) and the Maharashtra Maritime Board (established under the Maharashtra Maritime Board Act, 1996)), which play a key role in policy determination and setting up a regulatory framework in the specific States in this regard.

FDI up to 100% is permitted under the automatic route.

The Tariff Authority for Major Ports (TAMP) was constituted in April 1997 to provide for an independent Authority to regulate all tariffs, both vessel related and cargo related, and rates for lease of properties in respect of Major Port Trusts and the private operators located therein. The Major Ports Trust Act, 1963 was amended by the Port Laws (Amendment) Act 1997 to constitute the TAMP. The TAMP has jurisdiction only over major port trusts and private terminals and is responsible for prescribing the rates for services provided and facilities extended by them, and also rates for lease of port trust properties. It is empowered not only to set the rates, but also the conditions governing application of the rates.

Minor ports are governed by the IPA and are under the jurisdiction of the respective State Governments and governed by policy and directives of respective State Government's nodal departments/ agencies. Minor ports do not come under the purview of TAMP and are thus free to set their own tariffs.

The Government of India formulated the National Maritime Development Programme (NMDP) in 2005, to facilitate private investment, improve service quality and promote competitiveness in the ports sector. The NMDP envisages various port capacity improvements and hinterland connectivity projects across the 12 major ports over a 10-year time frame. Under the NMDP, focused and accelerated investment in specific infrastructure, tonnage acquisition and institutional capacity building projects/schemes have been proposed, involving a total investment of INR 55,804 crores (approx. USD 12,646 Million). Public investments will be primarily for common user infrastructure facilities in the ports like deepening and maintenance of port channels, construction of breakwaters, internal circulation systems for cargo within the ports and rail and road connectivity from ports to hinterland. Under the NMDP, 276 projects have been taken up for implementation over the period from 2005 to 2012, while total investment involved is INR 100,339 crores at prices prevalent in 2004 – 2005. Minor ports fall in the Concurrent List of the Constitution of India and are governed in terms of the respective policies of the State Governments. Certain states have established State Maritime Boards which would set policies in relation to the same.

Recently, the Policy Guidelines for Land Management by Major Ports, 2014 ("Policy Guidelines") have been approved by the Union Cabinet. The Policy Guidelines formulated for land management provide the necessary regulatory framework for land allotment and other Port specific practice like waterfront charges/way-leave permissions etc. The endeavour of the Policy Guidelines is to enable the ports to carry out leasing and licensing of port land in a transparent manner. The thrust of the Policy Guidelines has been to maximize the realisation for the port by linking the value of the land resources with the prevailing market rates.

The Ministry of Shipping has also prescribed the guidelines to be followed by major port trusts for private sector participation in the major ports. These guidelines have identified the following areas for participation/ investment by the private sector:

(a) Leasing out existing assets of the port;
(b) Construction/creation of additional assets, such as:

  I. Construction and operation of container terminals;
  II. Construction and operation of bulk, break bulk, multipurpose and specialized cargo berths;
  III. Warehousing, container Freight Stations, storage facilities and tank farms;
  IV. Cranage/ Handling Equipment;
  V. Setting up of captive power plants; and
  VI. Dry docking and ship repair facilities.

(c) Leasing of equipment for port handling and leasing of floating crafts from the private sector;
(d) Pilotage;
(e) Captive facilities for port based industries.

Additionally, guidelines for private sector participation in ports through joint ventures and foreign collaborations are also in place, with the objective to:

(a) attract new technology;
(b) introduce better managerial practices;
(c) expedite implementation of Schemes;
(d) foster strategic alliance with minor ports for creation of optimal port infrastructure; and
(e) enhance confidence of private sector in funding ports.

4. AIRPORTS

The Constitution of India includes aerodromes in item 29 of the Union List, pursuant to which the Central Government alone has the legislative and executive powers relating to airports. The Aircraft Act, 1934 and the rules made thereunder by the Central Government govern the development, maintenance and operation of all airports, including Greenfield airports. Under the Aircraft Act, the Central Government has the sole right to grant a license for setting an airport, and the operations of the airport would be subject to its licensing conditions (Rule 78 of the Aircraft Rules, 1937).

The Directorate General of Civil Aviation ("DGCA") is an attached office of the Ministry of Civil Aviation. The DGCA is the regulatory body in the field of civil aviation primarily dealing with safety issues. It is responsible for regulation of air transport services to/from/within India and for enforcement of civil air regulations, air safety and airworthiness standards. The DGCA also co-ordinates all regulatory functions with the International Civil Aviation Organisation.

The Airports Authority of India (AAI) Act provides the legal framework for airports in India. As per the AAI Act it shall be the function of the AAI to manage the airports, the civil enclaves and the aeronautical communication stations efficiently. It shall also be the duty of AAI to provide air traffic service and air transport service at any airport and civil enclaves. The AAI Act enables AAI to grant a concession to a private entity for financing, development, operation and maintenance of an airport being managed by AAI.

Airports other than those managed by AAI are governed by the provisions of the Aircraft Act and the Rules made thereunder. An entity other than AAI (an "Airport Company") can set up an airport. The Airport Company must function under a license from DGCA to be issued under the Aircraft Act, 1934 read with the rules prescribed thereunder.

Airports Economic Regulatory Authority (AERA), established in May, 2009, is an autonomous body and has the authority to fix, review and approve tariff structure for the aeronautical services and users' fees which may be levied by the service providers for airport development and monitoring prescribed performance standards relating to quality, continuity and reliability of service.

The AAI has the responsibility of managing the airports, the civil enclaves and the aeronautical communication stations while the AERA's functions include fixing, reviewing and approving tariff structure for the aeronautical services and users' fees.

At present, 100% FDI is permitted under the automatic route for greenfield airport projects, maintenance, repair and overhaul (MRO) organizations. For existing airports, FDI up to 74% is permitted under the automatic route and thereafter, FIPB approval is required for FDI beyond 74%.

Under the Greenfield Airports Policy, greenfield airports to be set up by AAI would be preferably constructed through PPP and such airports would be financed substantially through PPP concessions. Financing and development of any other airport would be the responsibility of the Airport Company seeking the license. Land for this purpose may be acquired by the Airport Company either through direct purchase or through acquisition by the State Government as per extant policy.

5. RAILWAYS

The current legal framework under the Railways Act, 1989 allows private railway systems in all forms. However, the government policy enunciated under Industrial Policy Resolution of 1991 as amended from time to time, reserves railway transportation for the public sector. It means that train operations can only be done by the public sector, while all other activities of design, construction, financing, and maintenance can be undertaken through private participation through award of concessions by Government of India. In the container business, the Indian government has announced a policy for permitting private operators to operate private container trains, which involves acquisition of rolling stock and construction and operation of key-side and Inland Container Depots.

Ministerial, commercial, and regulatory powers are vested with a single entity: the Railway Board. The Railway Board is also the railway regulator, dealing with a large number of issues including tariff regulation. Railway Board and the Commissioner of Railway Safety, work as the safety regulator.

FDI of up to 100% is permitted under the automatic route in railway infrastructure as long as railway transport is not involved (other than Mass Rapid Transport System). Similarly, 100% FDI is allowed in rail track construction. One of the initiatives of the new government after the elections has been to recommend 100% FDI in areas like high-speed train corridors, which will be used to run bullet trains, freight corridors, signaling in addition to signaling systems, construction of wagons and coaches and for building railway sidings and similar infrastructure. The proposals also allow for 100 %FDI through the Special Purpose Vehicle (SPV) route in railway projects to provide last mile connectivity to ports, mines and power plants. The proposals, if accepted, would provide a lucrative opportunity for foreign companies to enter into the Indian railways sector which has largely been averse to private and overseas investors.

6. TELECOMMUNICATIONS

In India, the use of telegraphs, phones, communications and other telecom services is governed by the Indian Telegraph Act, 1885 (ITA) and Indian Wireless Telegraphy Act, 1993 (IWA) and the rules made under the ITA and the IWA from time to time. Under ITA, the Government has the exclusive right to establish, maintain and operate telegraphs, and it can also grant licenses to private parties for the same.

Telecom Regulatory Authority of India (TRAI), set up under the Telecom Regulatory Authority of India Act, 1997, has the primary responsibility for regulating the telecommunications sector. It has been granted the authority to regulate service providers and review the licenses, ensure inter-compatibility between service providers, regulate arrangements among service providers etc. It is also the supervisory body to prevent anticompetitive practices, promote efficiency and competition in the telecom sector and protect the consumer’s interests. TRAI also has the authority to settle disputes between service providers.

FDI up to 100% is permitted with 49% under the automatic route and between 49% to 100% with an approval from the Government.

The National Telecom Policy, 2012 aims to provide secure, reliable, affordable and high quality converged telecommunication services anytime, anywhere for an accelerated inclusive socio-economic development. It sets as its mission to develop state-of-art telecommunication network with special focus on rural/remote areas to facilitate socio-economic development, create an inclusive knowledge society through proliferation of affordable and high quality broadband services, reposition the mobile phone as an instrument for socio-economic empowerment of citizens, and make India global hub for telecom equipment manufacturing, centre for converged communication services. It encourages private and foreign investment and has provided for a revenue-share model for licenses issued by the Government for telecom services in India. The National Telecom Policy 2012 aims to promote R&D and design in ICTE technology, products, services with focus on security and green technologies, promote development of new standards to meet national requirements, generation of IPR, and participation in international standardization bodies, create corpus for R&D, IPR creation, entrepreneurship, manufacturing, commercialization and deployment of state-of-art telecom products and services during 12th Five Year Plan period, simplify licensing framework, and put in simplified M&A regime for telecom service sector and adequate competition. In pursuance to the National Telecom Policy 2012, unified licensing regime has been established in India since 2013. The grant of unified licenses is governed by the Guidelines for Grant of Unified Licenses dated January 8, 2014.

TRAI is empowered to fix tariffs for telecommunication services under Section 11 (2) of TRAI Act, 1997, as amended by TRAI (Amendment) Act, 2000. Keeping in view the intensity of competition in access market in general and in the mobile segment in particular, TRAI has deregulated the tariff regime during the last few years. However, the tariffs offered by the service providers in this sector have to be consistent with the principles laid down in the TTO, in this regard which include the principle of Non-Discrimination, Non-Predation, IUC compliance etc.

7. SPECIAL ECONOMIC ZONES

By enacting the SEZ Act, the Government of India has consolidated the granting of approvals and setting up of SEZs in India, which were initially being set up under different state policies. The units set up in an SEZ enjoy several benefits including exemption of customs duty, central excise and income tax. The SEZ Act provides for a single window clearance for all State Government/ Central Government consents for the project.

FDI up to 100% is allowed through the automatic route for all manufacturing activities in Special Economic Zones (SEZs), except for the following activities:

(a) Arms and ammunition, explosives and allied items of defence equipment, defence aircraft and warships;

(b) Atomic substances;

(c) Narcotics and psychotropic substances and hazardous chemicals;

(d) Distillation and brewing of alcoholic drinks;

(e) Cigarettes/cigars and manufactured tobacco substitutes

(f) Sectoral norm as notified by Government shall apply to foreign investment in services

Under the SEZ Act, special economic zones can be set up by private sector or in joint venture with the Government (Central and State). The functioning of the SEZs is governed by a three tier administrative setup. The Board of Approval is the apex body and is headed by the Secretary, Department of Commerce.

Once a SEZ has been approved by the Board of Approval and the Central Government has notified the area of the SEZ, units are allowed to be set up in the SEZ. All the proposals for setting up of units in the SEZ are approved at the Zone level by the Approval Committee consisting of Development Commissioner, Customs Authorities and representatives of State Government. All post-approval clearances including grant of importer-exporter code number, change in the name of the company or implementing agency, etc. are given at the Zone level by the Development Commissioner. The performance of the SEZ units is periodically monitored by the Approval Committee and units are liable for penal action under the provision of Foreign Trade (Development and Regulation) Act, 1992 in case of violation of the conditions of the approval.

Private sector participation is also permitted in the development of infrastructure facility in the existing SEZs. State-specific policies have also been issued for providing fiscal and other economic benefits to the SEZ sector to the private sector.

ANNEXURE-IV AUTOMOBILE INDUSTRY

India is the second largest producer of two wheelers, fifth largest producer of commercial vehicles and sixth largest passenger vehicle producer in the world with a production of 3.073million units in 2013-2014[11]. In 2009, India became 2nd largest exporter of small cars, behind only Japan[12]. The automobile industry currently accounts for nearly 7% of the GDP, employs 19 million people[13], and 17% 0f the indirect tax revenue of the country[14]. It encompasses commercial vehicles, multi-utility vehicles, passenger cars, two wheelers, three wheelers, tractors and auto components. In 2012-2013, the production trend depicts the production of 3,233,561 passenger vehicles, 831,744 commercial vehicles, 839,742 three wheelers, 15,721,180 two wheelers[15]. A total of 17,815,618 automobiles and vehicles of all categories were sold domestically, while a total of 2,898,659 were exported in 2013 -2014.

Policy framework for the automobile industry

The Government of India has allows for 100 percent FDI in the Indian Automobile Industry through automatic route. Furthermore, in 2001, the quantitative restriction in automotive sector was removed. As per the data published by the DIPP, Ministry of Commerce and Industry, the amount of cumulative FDI inflow into the Indian automobile industry during April 2000 to April 2013 was equivalent to US$ 832 million, amounting to 4 per cent of the total FDI inflows (in terms of US$). India majorly attracted FDI inflow for automobile industries (2000-2010) from Japan, USA, Netherlands, Italy, Mauritius, etc.[16]

Automotive Mission Plan 2006 – 2016

The Automotive Mission Plan 2006 – 2016, a mission for development of Indian automotive industry was introduced by the Department of Heavy Industry and Public Enterprises, Government of India. The Automotive Mission Plan 2006 – 2016 has been introduced to maintain a high rate of growth, retain the attractiveness of Indian market and enhance competitiveness of Indian companies.

Automotive Mission Plan, 2006-2016, is launched with an objective to make India to emerge as a destination of choice in the design and manufacture of automobiles and auto components. The said Plan targets exports worth USD 40–45 billion in 2016 and includes component exports worth USD 20–25 billion and outsourced engineering services worth USD 2–2.5 billion. The said Plan targets a total turnover of USD 145 billion by 2016. The Government of India is envisaging in the 11th five year plan to create a National Level Specialized Education and Training Institute for the Automotive Sector and to enhance transportation, communication and

[11] http://acma.in/pdf/Auto-Industry.pdf

[12] http://www.icra.in/Files/ticker/PV-Industry-201103.pdf

[13] http://118.67.250.203//Event/View-Eventhead.aspx?id=286

[14] http://dhi.nic.in/autopolicy.aspx

[15] http://118.67.250.203//scripts/production-trend.aspx

[16] http://dipp.nic.in/English/Publications/SIA_NewsLetter/AnnualReport2010/Chapter6.2.vi.pdf

export infrastructure facilities. Extension of 150% weighted deduction on R&D expenditure to the automotive sector. Increased budgetary allocation for R&D activities in the sector. Establishment of 'National Automotive Testing and R&D Infrastructure Project (NATRIP). Establishment of Auto Design Centre at NID, Ahmedabad.

Some of the specific policies, that have been requested for consideration includes:

- Tax holiday for Automotive Industry for investment exceeding INR. 500 crore (as given to power projects, firms engaged in exports, EOUs, infrastructure projects, etc.)
- Single window clearance for FDI proposal in automotive sector including the local clearances required for setting up manufacturing facilities.
- Tax deductions of 100 % of export profits.
- Deduction of 30 % of net (total) income for 10 year for new industrial undertakings.
- Concession of Import duty on machinery for setting up of new plant or capacity expansion.
- Deduction of 50 % on foreign exchange earnings by automotive companies (like Construction companies, hotels, etc.)

State Government to be urged to offer

- Preferential allotment of land to automotive plants as is given to IT sector.
- Ensuring continuous uninterrupted power supply.
- Captive generation in the sector could be promoted, for instance, by exemption of Electricity duty for 5 years as is done for biotech industry in some states.

Measures to accomplish the Mission

- **Develop a supply base** in terms of technical and human capabilities, achieving economies of scale and lowering manufacturing costs, overcoming infrastructural hindrance.
- **Stimulate domestic demand** and export and international business opportunity by introducing better technology, acquisition of faster product design; enhancing cost competitiveness, providing fiscal incentive for innovation of low cost products; simplification of taxation and documentation; considering elimination of embedded taxes/ levies that do not get off-set under VAT.
- There are two **key players** to the plan namely the Government and the industry. While Government would facilitate infrastructure, promote investment and R&D, the Industry's role will be focused on designing and manufacturing products of international standard.
- **Increase competitiveness** by introducing manufacturing strategies (recommended by the National Manufacturing Competitiveness Commission's National Manufacturing Strategy).
- **Appropriate infrastructure** should be developed in terms of road, rail and port in order to enhance movements, develop transportation system and encourage export.

Further, infrastructure for power and fuel should be invested in as it accounts for 6% of manufacturing cost and is an important factor with regard to manufacturing competitiveness.

- **International brand** image should be established.
- **Promote Export** in the small car segment as Indian companies have gained expertise in the said segment and thereby, enjoy an advantage over other low cost countries.
- **Tariff policies** and conditions of import of vehicles should be reviewed to attract investment.
- **Manpower training** should be encouraged. A National Automotive Institute would be set up to provide and coordinate training in the automotive sector. This goes in consonance with the AMP, 2016 as it will ensure availability of human recourse for the proposed 25 million jobs to be generated as an outcome of the said Mission Plan.
- **Indian safety standards** for auto components are regulated by the Center Motor Vehicle Rules, 1989. Since 2000 ECE safety standards are to be complied with by the automotive industry. However, there is still need for setting up an empowering body to coordinate and monitor the regulations and harmonize the safety standards and road safety regulations.
- **Encouragement will be given to fuel efficient** vehicles appropriate for Indian market. Similarly, innovative and expedient R&D project will be encouraged. The National Hydrogen Energy Board under MNES will act as a regulatory body for the same.

ANNEXURE-V FOOD PROCESSING SECTOR

India is the world's third largest producer of fruits. The Indian Food Industry is expected to grow at a Compounded Annual Growth Rate ("CAGR") of 10% to reach USD 200 billion by 2015.[17] Food processing involves any type of value addition to the agricultural produce. It comprises of fruits and vegetables, meat & poultry, dairy products and grains and cereals. The industry provides direct employment to 1.6 million Indians and constitutes 9-10% of the overall manufacturing output.[18] The food processing industry in India is also a big employer of people from the unorganized sector. It employs about 13 million directly and about 35 million people indirectly. In 2011, an estimated 15 private equity and venture capital deals with a total value of USD 285 million were executed in this sector

Even though the Indian food processing sector is a large one, it is still at a nascent stage. The processing level of food produce is very low in India compared to other countries. Value addition to the raw produce in the country is only 7% compared to as much as 23% in china, 45% in the Philippines and 188% in the U.K.[19]

Policy Framework in the Food Processing Industry

The Government has accorded the sector a high priority and has undertaken several policy measures and initiatives. Some of them are:- (i) Most of the processed food items have been exempted from the purview of licensing under the Industries (Development & Regulation) Act, 1951, except items reserved for small-scale sector and alcoholic beverages; (ii) In 1999, the food processing industries was included in the list of priority sector for bank lending in order to ensure easy availability of credit to them; (iii) Automatic approval for foreign equity upto 100% is available for most of the processed food items, excepting alcohol and beer and those reserved for small scale sector (subject to certain conditions).[20]

Food Safety and Standards Act, 2006 aims to achieve a high degree of consumer confidence in the quality and safety of produced, processed, sold or exported food. It seeks to overcome problems like multiplicity of food laws and standard setting and enforcement agencies which creates confusion in the minds of consumers, traders, investors and manufacturers.

Foreign direct investment

The Government of India allows 100% FDI under the automatic route in the food processing sector, in agricultural products, milk and milk products, and marine and meat products, except in the case of the proposals that require an industrial license and cases where foreign

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17 See 'Indian Food Processing Industry: Brewing Exciting Opportunities', technopak, food and agriculture outlook

18 See note 1

19 See National Food Processing Policy, 2012

20 http://business.gov.in/Industry_services/food_processing.php

investment exceeds 24% equity in units that manufacture items reserved for small-scale industries. These items include bread, pastries, confectioneries, rapeseed oil, mustard oil, sesame oil, groundnut oil, sweetened cashew nut products, ground and processed spices other than spice oil and oleo resin spice, tapioca sago and tapioca flour. Automatic approvals are provided for foreign investment and technology transfer in most cases. Units based on agricultural products that are 100% export-oriented are allowed to sell up to 50% in the domestic market. There is no import duty on capital goods and raw material for 100% export-oriented units.

The following table shows the amount of foreign direct investment in the food processing industry between the period 2000-01 and 2012-13.

Table 1: Total FDI inflows into the Food Processing Industry

FINANCIAL YEAR WISE FDI EQUITY INFLOWS
FROM APRIL 2000 TO MARCH 2013
Sector: FOOD PROCESSING INDUSTRIES

Sl No	*Year (Apr-Mar)*	FOOD PROCESSING INDUSTRIES		Total FDI in India		Share of FPI in Total FDI (Annual)	Cumulative Total (in Million $)	
		FDI (Rs crore)	*FDI (US$ million)*	*FDI (Rs crore)*	*FDI (US$ million)*		*FDI in FPI*	*Total FDI*
1	2000-01	198.13	45.75	10,733	2,463	1.86	45.75	2,463
2	2001-02	1,036.12	219.39	18,654	4,065	5.40	265.14	6,528
3	2002-03	176.53	36.88	12,871	2,705	1.36	302.02	9,233
4	2003-04	502.39	109.22	10,064	2,188	4.99	411.24	11,421
5	2004-05	201.32	43.98	14,653	3,219	1.37	455.22	14,640
6	2005-06	182.93	41.74	24,584	5,540	0.75	496.96	20,180
7	2006-07	457.28	102	56,390	12,492	0.82	598.96	32,672
8	2007-08	279.01	70.17	98,642	24,575	0.29	669.13	57,247
9	2008-09	455.59	102.71	142,829	31,396	0.33	771.84	88,643
10	2009-10	1,314.23	278.89	123,120	25,834	1.08	1050.73	114,477
11	2010-11	858.03	188.67	97,320	21,383	0.88	1239.4	135,860
12	2011-12	826.16	170.21	165,146	35,121	0.48	1409.61	170,981
13	2012-13	2,193.65	401.46	121,907	22,423	1.79	1811.07	193,404
Source: DIPP, Min. of Commerce								

(Source: Ministry of food processing industries)

Mega Food Parks Scheme

The Mega Food Park Scheme aims at providing a mechanism to link agricultural production to the market by bringing together farmers, processors and retailers so as to ensure maximizing value addition, minimizing wastages, increasing farmers' income and creating employment opportunities particularly in rural sector.[22]

The National Mission on Food Processing

The National Mission envisages establishment of a National Mission as well as corresponding Missions in the State and District level. Its basic objective is decentralization of implementation of food processing related schemes for ensuring substantial participation of State Governments/UTs. The mission is expected to improve the Ministry's outreach significantly in terms of planning, supervision, monitoring of various schemes apart from playing a more meaningful role in policy formation.

[22] Ministry of food processing and industries

Agri-Export Zones

Agri-Export Zones ("AEZ") were floated with the objective of promoting agricultural exports. These zones have been set up for end to end development for the export of specific products from a geographically contiguous area. The AEZ's are to be identified by the state governments and they are required to provide certain services such as plant protection, storage, processing and packaging etc. The corporate sector is encouraged to sponsor new-AEZ's or take over already notified AEZ's for encouraging exports from that zone.

ANNEXURE-VI
TEXTILE INDUSTRY

India is the second largest producer of cotton and silk in the world. It contributes to about 18% (eighteen percent) of the total world raw silk production.[23] The Indian Textiles contributes 11% (eleven percent) to the industrial production, 4% (four percent) to the GDP at total manufacturing exports and directly employs about 35 million people and accounts for nearly 12% (twelve percent) share of the country's total exports basket. The textile sector is the second largest producer of employment after agriculture. The report of the Working Group constituted by the Planning Commission on boosting India's manufacturing exports during 12th Five Year Plan (2012-17), envisages India's exports of Textiles and Clothing at USD 64.41 billion by the end of March, 2017.[24]

The export basket contains a wide range of items such as cotton yarn and fabrics, man-made yarn and fabrics, wool and silk fabrics, made-ups and variety of garments. India's textile products, including handlooms and handicrafts, are exported to more than a hundred countries. However, the United States of America and the European Union, account for about two-thirds of India's textiles exports. The other major export destinations are United Arab of Emirates, Bangladesh, China and Turkey.[25]

Policy framework for the textile industry

Foreign direct investment (FDI) of up to 100% is allowed in the textiles sector through the automatic route. Between 2000-2011, the total amount of FDI in this sector amounted to USD 959 million.[26] The Table below shows the % of FDI in textile as compared to the total FDI in the country during 2005-2012.

Table 1: Inflow of FDI in the textile sector

Calendar Year	FDI in textiles (USD)	Total FDI(USD)	% of FDI in textile
2005	0.08	4.36	1.81
2006	0.12	11.12	1.06
2007	0.10	15.92	0.64
2008	0.20	37.09	0.55
2009	0.21	27.04	0.77
2010	0.08	21.01	0.40
2011	0.15	27.58	0.54
2012(Jan-June)	0.10	16.74	0.62

*all figures are in billion Source: Ministry of Textiles

As can be seen from the table above, the amount of FDI inflow as a percentage of the total FDI inflows into the country has been miniscule. FDI in this sector has been at an average of 1% of the total FDI in the country.

[23] See 'Indian Textile Overview', Confederation of Indian Textile Industry

[24] See ' Outcome Budget 2013-14' Ministry of Textiles

[25] See Note 1

The Government of India has taken various initiatives to promote the growth of textiles industry in India. Some of these are: (i) Technology Up-gradation Fund Scheme (TUFS), (ii) The Scheme for Integrated Textile Park (SITP) and (iii) Integrated Skill Development Scheme.

Technology Up-gradation Fund Scheme

TUFS is a flagship scheme of Ministry of Textiles to leverage investments in technology up-gradation in the textiles industry. It provides for support for modernization of textiles industry by the central government in the form of interest reimbursement and capital subsidy. The sectors benefited under

TUFS are spinning, weaving, processing, technical textiles, jute, silk, garmenting, cotton ginning, wool and powerlooms.[27]

The Scheme for Integrated Textile Parks (SITP)

The SITP was approved in the 10th Five Year Plan to provide the industry with world-class infrastructure facilities for setting up their textile units by merging the erstwhile 'Apparel Parks for Exports Scheme and Textile Centre Infrastructure Development Scheme. It targets industrial clusters/locations with high growth potential, which require strategic interventions by way of providing world-class infrastructure support. SITP is implemented through Special Purpose Vehicles (SPVs), where industry associations/group of entrepreneurs are the main promoters of the Integrated Textiles Park (ITP).At each, ITP, there is a separate SPV formed with the representatives of local Industry, Financial Institutions, State and Central Government.

Integrated Skill Development Scheme

It was launched by the Government in 2010 to address the trained manpower needs of textiles and related segments. The Scheme targeted to train approximately 256,000 persons during 2010-11 and 2011-12. The textile industry is also being supported with an extensive skill development programme to train 3 million persons over a period of five years, by leveraging the strength of existing institutions under the textile ministry.

In 2012, the government introduced the National Manufacturing Policy 2012 ("Policy"). The Policy has identified certain priority sectors which require specific policy intervention. One of the sectors identified is the textile and garments sector. According to the Policy, adequate support will be given to the textile industry to promote and strengthen employment and create jobs as the textile industry is highly employment intensive.

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[27] 'Salient Features of the Technology Up-gradation Fund Scheme'; Press Information Bureau, August 8, 2011

ANNEXURE-VII INFORMATION TECHNOLOGY AND INFORMATION TECHNOLOGY ENABLED SERVICES

India is regarded as the premier destination for global Information Technology ("IT") and Information Technology Enables Services ("ITES") outsourcing, accounting for almost 55% of the global sourcing market in 2010. As a proportion of national GDP, the sector revenues have grown from 1.2 per cent in 1997-1998 to an estimated 6.4 per cent in 2010-2011. Its share of total Indian exports has increased from less than 4 % in 1997-1998 to 26 % in 2010-2011.[28] This sector accounts for over 5% of India's GDP, and employs 2.5 million professionals directly and another 8.3 million people indirectly. From April 2000 to May 2013, the total FDI inflow in the computer hardware and software was USD 11.73 million which constitutes 5.73% of the total FDI inflows in the country.[29]

Policies and law governing the Information Technology Sector

The main law governing this sector is the Indian Technology Act, 2000 (as amended). The IT Act sets out the legislative framework for a wide range of e-commerce legislation including (i) give legal recognition to electronic transactions ; (ii) to facilitate electronic filing of documents with the Government agencies; and (iii) recognising cyber offenses as criminal offenses; and (iv) setting out the liability of the intermediaries. Additionally, certain other laws such as the Special Economic Zone Act, 2005, the Income Tax Act, 1961 and the Semiconductor Integrated Circuits Layout Design Act, 2000 are also applicable to this sector.

Some of the relevant policies governing this sector are as follows:

Software Technology Park ("STPs"): STPs were set up as autonomous societies under the Department of Electronics and Information Technology in 1991 to promote software exports from the country. The objectives of STPs include (i) to promote the development and export of software and software services; (b) providing statutory and other promotional services to the exporters; and (iii) promoting micro, small and medium entrepreneurs. STPs enjoy a number of benefits that include exemptions from service tax, excise duty and rebate for payment of Central sales tax. The most important incentive available is 100% exemption from income tax of export profits. As on March 31, 2012, there were 5235 operational STP units.[30]

[28] 'Report of the Working Group on Information Technology Sector-Twelfth Five Year Plan 2012-2017', Planning Commission

[29] Statement on Sector-Wise FDI Equity Inflows from April 2000 to May 2013, Department of Industrial Policy and Promotion

[30] Annual Report 2011-12, Software Technology Parks of India.

National Policy on Information Technology, 2012: In September 2012, the central government approved the National Policy on Information Technology. The Policy aims to: (i) increase revenues of IT and ITES Industry from USD 100 Billion currently to USD 300 Billion by 2020 and expand exports from USD 69 Billion currently to USD 200 Billion by 2020.; (ii) gain significant global market-share in emerging technologies and services;(iii)promote innovation and R&D in areas like localization, location based services, mobile value added services, cloud computing, social media; and (iv) provide fiscal benefits to SMEs and startups for adoption of IT in value creation; (vi) create a pool of 10 million additional skilled manpower in ICT.[31]

Special Economic Zones ("SEZ"): The Special Economic Zone Act, 2005 ("SEZ Act") was enacted by the Government of India in 2005 with an objective of providing an internationally competitive and hassle-free environment for exports. The SEZ Units have been granted the following incentives and facilities: (i) 100% exemption of export profits from income tax for the first five years, 50% for the next five years and 50% for next five years subject to transfer of profits to special reserves; (ii) exemption from central sales tax or service tax; (iii) single window clearance for state and central government approvals; and (iv) External Commercial Borrowing of up to USD 500 million in a year without any maturity restrictions, through recognised banking channels.

According to the SEZ Approval Board of India, the maximum number of SEZs has been approved for the IT-ITES sector. According to the Ministry of Commerce and Industry, out of the total formal approvals given to 588 SEZ's, the IT/ITES sector has been granted 353 approvals, out of which 235 SEZ's have been notified.

[32] In 2006, the central government also enacted the Special Economic Zones Rules, 2006 ("SEZ Rules"). The SEZ Rules provide for certain infrastructure requirements relating to the IT Sector. These include: (a) 24 hours uninterrupted power supply at a stable frequency; (b) reliable connectivity for uninterrupted and secure data transmission; (c) provision for central air conditioning system; and (d) a ready to use, furnished plug and play facility for end-users. The SEZ Rules were amended in 2013 ("Amendment Rules"). Prior to the Amendment Rules, a SEZ set up for electronic, hardware, software or ITES services required a minimum land area of 10 hectares with a minimum built up processing area of 1 lakh square metres. Under the amendments, the requirement of minimum land area has been done away with, while retaining the requirement of minimum built up processing area. The Amendment Rules has also made certain other amendments relating to issues on vacancy of land, exit policy for SEZ units and sector broad banding.

Information Technology Investment Regions ("IITRs"): In 2008, the Government of India approved the creation of IITRs to encourage growth of the IT/ITES sector and the Electronic Hardware Manufacturing Units. The IITRs include new integrated townships, SEZs, industrial parks etc. In the ITIR, there is supposed to be a clear delineation between the IT/ITES areas and Electronic Hardware Manufacturing areas.. Each ITIR is expected to be a specifically notified investment region with minimum area of 40 sq.kms planned for IT/ITES and EHM Units.

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[31] 'Cabinet Approves National Policy on Information Technology, 2012: Policy aims to leverage ICT to address nation's developmental challenges'; Press Information Bureau, September 20, 2012

[32] 'Policy for Information Technology Investment Regions'; Cabinet Committee on Economic Affairs, April 3, 2008

ANNEXURE-VIII LEGAL AND EGULATORY LANDSCAPE GOVERNING PHARMACEUTICAL SECTOR IN INDIA

1. CURRENT FDI AND REGULATORY REGIME IN INDIA

As per the Consolidated FDI Policy issued by the Department of Industrial Policy & Promotion ("DIPP") dated April 17, 2014, foreign investment limits in companies engaged in the pharmaceuticals sector is as follows: (a) up to 100% in greenfield companies under the automatic route; and (b) up to 100% in brown-field companies under the approval route.

India had opened its pharmaceutical sector to 100% FDI via the automatic approval route in 2002 but in 2012 the government had made a distinction between greenfield projects and brownfield projects following fears that Indians will be denied cheap medicines if MNCs continue to buy domestic pharmaceutical companies. FDI in an existing pharmaceutical company now requires FIPB approval.

Since April 2000, nearly INR 56,000 crore FDI has come into the pharmaceutical sector, nearly 5% of the total inflows, making it one of the top five sectors preferred by foreign investors.

The Indian government has decided to introduce safeguards to ensure that MNCs acquiring domestic firms do not stop producing essential drugs. Although the safeguards are not specified in the FDI policy, the FIPB has of late been granting approval for FDI in existing pharmaceutical companies in India subject to the condition that the company may have to continue producing essential drugs and invest in R&D activity for five years after induction of FDI in the company. The R&D expenses for the next five years is decided with reference to the highest level of R&D expenses which has been incurred by the company to be acquired in any of the three financial years preceding the year of induction of FDI.

The current policy stipulates that the 'government may incorporate appropriate conditions for FDI in brownfield cases, at the time of granting approval' giving the FIPB powers to build these safeguards when it approves an investment proposal. Since these conditions apply to all brown-field investments, even a small investment in an existing domestic firm has to meet these norms.

Per Press Note 1 of 2014 series (and as reflected in the Consolidated FDI Policy dated April 17, 2014), the DIPP has decided to continue with the existing policy with the condition that the ‘non-compete’ clause will not be allowed except in special circumstances with the approval of the Foreign Investment Promotion Board (“FIPB”).

2. PRICING AND QUALITY OF DRUGS IN INDIA

The National Pharmaceutical Pricing Authority is an organization of the Indian government, which has been established to fix/revise the prices of controlled bulk drugs and formulations and to enforce prices and availability of the medicines in India, under the Drugs (Prices Control) Order, 2013. It also monitors the prices of decontrolled drugs in order to keep them at reasonable levels. The Drugs (Prices Control) Order, 2013 is an order issued by the Indian government pursuant to provisions of the Essential Commodities Act, 1955 to regulate the prices of drugs. The Drugs (Prices Control) Order, 2013 inter-alia provides the list of controlled drugs and formulations, procedures for fixation of prices of drugs, method of implementation of prices fixed and penalties for contravention of provisions.

The legal and regulatory framework for medicinal/pharmaceutical products in India is embodied in the Drugs and Cosmetics Act, 1940 (“Drugs Act”) and the Drugs and Cosmetics Rules 1945 (“Drugs Rules”).

The primary regulatory authorities under the Drugs Act and the Drugs Rules are the licensing authority and the controlling authority appointed by the government. The licensing authority is the Drugs Controller General of India (“DCGI”) and the controlling authority are persons appointed as such by the respective State Governments.

The main objective of the Drugs Act is to prevent the substandard manufacture, sale and distribution of drugs and cosmetics. The Drugs Act and Drugs Rules provides for a regime to ensure quality management in the import, manufacture, labelling, packaging, sale and distribution of drugs and cosmetics by way of prescribing standards for the drugs, manner of labeling and packaging of drugs and cosmetics, import, registration and licensing requirements for the manufacture, sale and distributions of drugs and cosmetics, periodic inspections and monitoring by regulatory authorities and penal measures for non-compliances.

The Central Government is empowered under the Drugs Act to establish a “Drugs Technical Advisory Board” and an advisory committee in the name of “the Drugs Consultative Committee” to advise the Central and State Governments on technical matters arising out of the administration of the Drugs Act.

The Drugs Act also provides the regulatory framework with respect to clinical trials.

The Central Drugs Standard Control Organization (CDSCO) is the central drug authority for discharging functions assigned to the Central Government under the Drugs Act. It exercises regulatory control over import of drugs, approval of new drugs and clinical trials.

Ministry of Overseas Indian Affairs

प्रवासी भारतीय कार्य मंत्रालय
Ministry of Overseas Indian Affairs

The Ministry of Overseas Indian Affairs (MOIA) is a dynamic, young and interactive ministry, dedicated to the multitude of Indian Nationals settled abroad. Established in May 2004 as the Ministry of Non-Resident Indians' Affairs, it was renamed as the Ministry of Overseas Indian Affairs (MOIA) in September 2004. Driven by a mission of development through coalitions in a world without borders, MOIA seeks to connect the Indian Diaspora community with its motherland.

Positioned as a 'Services' Ministry, it provides information, partnerships and facilitations for all matters related to Overseas Indians (comprising Persons of Indian Origin (PIOs) and Non-Resident Indians (NRIs)).

It is a contemporary, lean and efficient Ministry headed by a Cabinet Minister. The Ministry has four functional service divisions to handle its diverse scope of services:

- Diaspora Services
- Financial Services
- Emigration Services
- Management Services

The Ministry focuses on developing networks with and amongst Overseas Indians with the intent of building partnership with the Diaspora.

Besides dealing with all matters relating to Overseas Indians, the Ministry is engaged in several initiatives with Overseas Indians for the promotion of trade and investment, emigration, education, culture, health and science & technology.

Ministry of Overseas Indian Affairs
Government of India
Akbar Bhawan, Chanakyapuri
New Delhi- 110 021 (India)
Tel: +91 11 24197900, Fax: +91 11 24197919,
Email: info@moia.nic.in, Website: www.moia.gov.in

Overseas Indian Facilitation Centre

The Overseas Indian Facilitation Centre (OIFC) set up by the Ministry of Overseas Indian Affairs' (MOIA) in 2007, in partnership with the Confederation of Indian Industry (CII), provides facilitation services to the Overseas Indians, especially assisting them in deepening their economic and intellectual engagement with India. The OIFC is governed by a Council of prominent Overseas Indians, Industry leaders and senior policy makers from the Government.

OIFC has been uniquely constituted and positioned to serve as a single-point contact for the overseas Indians through its facilitation – whether in areas of information, economic engagement, knowledge partnering, mentoring or build any other association with Indian states that helps the Indian Diaspora, professionals and small/ mid-sized entrepreneurs build strong inter linkages with India, thus effectively enabling them to build upon or expand their engagement with India.

OIFC enjoys the due credibility of serving Indians globally extended under the umbrella of the Government, the Ministry of Overseas Indian Affairs' (MOIA),the Confederation of Indian Industry (CII), coupled with the support of a network of 'Knowledge Partners', Indian states, Indian missions and Indian Diaspora associations.

Currently OIFC's activities include, query addressal on various issues faced by the NRIs & PIOs, a robust online business networking portal, projection of member states' projects, Diaspora Engagement Meets in various countries, Market Place business forums in India and more.

Overseas Indian Facilitation Centre
(C/o Confederation of Indian Industry)
249-F, Sector 18, Udyog Vihar, Phase IV
Gurgaon-122 015. Haryana (India)
Tel: +91 124 401 4055/56 , Fax +91 124 430 9446
Email: oifc@cii.in ,Website: www.oifc.in

Confederation of Indian Industry

Confederation of Indian Industry

The Confederation of Indian Industry (CII) works to create and sustain an environment conducive to the development of India, partnering industry, Government, and civil society, through advisory and consultative processes.

CII is a non-government, not-for-profit, industry-led and industry-managed organization, playing a proactive role in India's development process. Founded in 1895, India's premier business association has over 7200 members, from the private as well as public sectors, including SMEs and MNCs, and an indirect membership of over 100,000 enterprises from around 242 national and regional sectoral industry bodies.

CII charts change by working closely with Government on policy issues, interfacing with thought leaders, and enhancing efficiency, competitiveness and business opportunities for industry through a range of specialized services and strategic global linkages. It also provides a platform for consensus-building and networking on key issues.

Extending its agenda beyond business, CII assists industry to identify and execute corporate citizenship programmes. Partnerships with civil society organizations carry forward corporate initiatives for integrated and inclusive development across diverse domains including affirmative action, healthcare, education, livelihood, diversity management, skill development, empowerment of women, and water, to name a few.

The CII theme of 'Accelerating Growth, Creating Employment' for 2014-15 aims to strengthen a growth process that meets the aspirations of today's India. During the year, CII will specially focus on economic growth, education, skill development, manufacturing, investments, ease of doing business, export competitiveness, legal and regulatory architecture, labour law reforms and entrepreneurship as growth enablers.

With 64 offices, including 9 Centres of Excellence, in India, and 7 overseas offices in Australia, China, Egypt, France, Singapore, UK, and USA, as well as institutional partnerships with 312 counterpart organizations in 106 countries, CII serves as a reference point for Indian industry and the international business community.

Confederation of Indian Industry
The Mantosh Sondhi Centre
23, Institutional Area, Lodi Road, New Delhi – 110 003 (India)
Tel: +91 11 45771000 / 24629994-7 • Fax: +91 11 24626149
E: info@cii.in • Website: www.cii.in

Amarchand Mangaldas & Suresh A Shroff & Co

amarchand mangaldas

Amarchand & Mangaldas & Suresh A Shroff & Co.

- **Number of partners:** 83
- **Number of lawyers:** 673+
- **Languages:** English, German, Japanese, Chinese, Hindi, Gujarati, Marathi, Bengali, Kannada and other Indian languages

Founded in 1917, Amarchand Mangaldas is an award winning full-service law firm to a wide range of premier clients, including domestic and multinational corporations and financial institutions. Often viewed as 'the firm of preference' in India, the Firm helps its clients achieve their goals by combining global standards with local expertise. Having worked on many of the biggest and high profile cases in the region, the Firm continues to remain at the cutting edge of Indian law and has developed a near-instinctive understanding of the issues, opportunities and challenges posed by the ever evolving and complex Indian business and legal environment. Quite often, AMSS has been in the unique position of being an adviser on the public policy formation in India. Distinguished partners of the firm have been members of many legislative panels to assist the Government of India with a legal perspective on policy related matters.

Amarchand Mangaldas' wide geographical reach and the resources it brings to bear bolster its capabilities to deliver excellent service to clients all over the region; and as the exclusive India member firm of the Lex Mundi Network, the firm is able to offer access to excellent legal expertise in more than 100 countries. The approach of the Firm has been and remains, solution-oriented. Its practice is built by adopting a cross-functional and multi-disciplinary approach and by striving to maintain a judicious balance between expertise and efficiency.

Awards & Recognitions

- National Firm of the Year 2014 for the 3rd consecutive year by International Financial Law Review (IFLR)
- Indian Law Firm of the Year for 9 years consistently by Who's Who Legal, 2014
- Indian Deal Firm of the Year 2014, 2013 and 2012 consecutively by Asian Legal Business (ALB)
- Employer of Choice, 2014 by Asian Legal Business (ALB)
- Ranked 1 by deal count and deal volume by Bloomberg 2014 H1 Asia Pacific M&A Legal League Tables
- Law Firm of the Year 2013 for the 4th successive year by India Business Law Journal (IBLJ)

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Offices

New Delhi, Mumbai, Bengaluru, Kolkata, Ahmedabad, Hyderabad, Chennai, Gurgaon

Contact Details

Mr. Shardul S Shroff
Managing Partner
shardul.shroff@amarchand.com

Ms. Pallavi Shroff
Senior Partner
pallavi.shroff@amarchand.com

Amarchand Towers
216, Okhla Industrial Estate, Phase III, New Delhi – 110 020 India
Telephone +91 11 41590700, 40606060

Overseas Indian Facilitation Centre

Overseas Indian Facilitation Centre
C/o Confederation of Indian Industry, 249-F, Sector 18, Udyog Vihar, Phase IV, Gurgaon-122 015. Haryana, India
Tel: +91 124 401 4055 / 56, Fax: +91 124 430 9446; Email: oifc@cii.in ; Website : www.oifc.in

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