

# Doing Business in India



Celebrating the 60<sup>th</sup> Year of Excellence



**Professional Development Committee**  
**The Institute of Chartered Accountants of India**  
*(Set up by an Act of Parliament)*  
**New Delhi**

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# FOREWORD

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India is a country where we can find diversity in culture, languages and beliefs of the people. Before taking the decision of doing business in a particular nation requires a focus on a multi-dimensional understanding of its culture and business practices. Understanding those differences and adapting to them is the key to success.

After economic reforms, India has undergone a paradigm shift in its competitive stand in the world. The Indian economy has been witnessing a tremendous growth in recent time. This is because of the relaxed government intervention and a successful foreign trade policy which encouraged FDI in India.

Although there are plenty of reasons for choosing India as a business centre, yet a person should go for an analysis of opportunity and its cost before choosing a destination for business. For doing an analysis, a person needs to know about that country, its culture and tax structure etc.

I appreciate the efforts put in by CA. Rajkumar Adukia, Chairman, Professional Development Committee in bringing out the publication "Doing Business in India". This publication gives a glimpse about Indian culture, legal aspects, tax related issues and Foreign Exchange and Management Act.

I hope this publication would provide an insight about Indian business scenario, which would help a person in choosing India as a business destination.

**CA. Ved Jain**  
*President, ICAI*

Date :February 3, 2009



# PREFACE

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Indian economy has experienced major policy changes in early 1990. Adoption of Liberalization, privatization and Globalization (LPG) model made it an attractive avenue of investment for whole world. This opened boundaries and sent an invitation to outsiders that we are more open to work together. Apart from relaxed regulatory control of the government, the availability of affluent resources has lured the entrepreneur and the government of various countries to make it a hub of their operation.

Although, at present, we have an attractive inflow of foreign exchange in terms of the direct and indirect investment by the foreign companies in India, yet corporate would be interested to know about the culture, political relations, taxation related issues, labour laws of that country along with the competitive advantage before going international.

In view of the above we have come out with a publication “Doing Business in India”. This publication gives a brief description about its culture, constitution and legal framework, foreign exchange management, various tax structure and current FDI limit in various sectors of the industry.

I congratulate CA. Gaurang V C Gandhi for drafting this knowledge disseminating publication. I also appreciate his initiative that he felt an immense opportunity in this area and shared his knowledge, experience and thoughts.

I appreciate the valuable suggestions of the members of Professional Development Committee in drafting the said publication: CA. Ved Jain, President ICAI, CA. Uttam Prakash Agarwal, Vice President ICAI, CA. Abhijit Bandyopadhyay, Vice Chairman, PDC, CA. Bhavana G. Doshi, CA. Jayant Gokhale, CA. Jaydeep Narendra Shah, CA. Shanti Lal Daga, CA. V. Murali, CA. K. Raghu, CA. James V.C, CA. K. P. Khandelwal, CA. Anuj Goyal, CA. Vijay Garg, CA. Vijay Kumar Gupta, CA. Shabbeer Pasha S, CA. Bansal Mukul, CA. Bansal Rattan, CA. Gupta Sunil Kumar, CA. K.K. Soni, CA. Amrit Lal Batra, CA. (Dr.) Suneel Maggo and CA. B. M. Sharma.

I appreciate the secretariat of the committee for their contribution in giving this publication a final shape.

I hope this publication would serve as a guide to our members while dealing with overseas clients.

**CA. Rajkumar Adukia**  
*Chairman, Professional Development Committee*

Date :February 3, 2009

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# *Chapter – 1*

## **Introduction**

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The liberalization process that began about 17 years ago in 1991 has come a long way. The Indian economy is increasingly integrating with the global economy. This integration has created a climate conducive to increase in inward investment, free flow of capital skill and technology between India and the other country. This has also resulted in an increased flow of capital from India, as can be seen from various acquisitions by Indian business overseas.

With GDP growth at 9.4% during the financial year 2006-07 and prospects of maintaining the growth rate, the Indian economy is one of the fastest growing in the world. Its rapidly increasing consuming class provides the world with a huge market potential. Given its strategic strengths and rapidly paced economy, India serves as an ideal catalyst for investors to launch into the Asian market.

During FY 2006-07, India received an estimated USD 16 billion in FDI inflows, growing three-folds over the previous year. The Government is targeting FDI inflows of USD 25 billion during the FY 2007-08. India's attractiveness as the second most favoured destination for FDI in the world is growing. India's long term potential is evidenced by the fact that the median age is 25 years - India is now poised to reap its demographic dividend.

It is in this scenario that a Non-Resident or Foreign Corporation may like to acquaint itself with the regulatory system, tax and other incentives and other information before getting involved into the country in pursuit of economic gains.

This book provides introductory material of a general nature having relevance before setting up of business in India. It deals with framework of legal, financial, taxation, etc. which we believe will be of interest to business concern. Although adequate care has been taken in preparing and validating the information

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contained herein, we must stress that it does not attempt to deal exhaustively with any of the topics covered. The text reflects the laws in force at the time of writing. It is, therefore, advised to seek professional advice before taking any decision.





## Chapter – 3

# General

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India can be explained to the person who does not know it well, as a land which will never cease to amaze. It is a very old adage in India that “**this can happen only in India**”.

The country is a land of contrasts where tradition can coexist with development and where hope manages to flourish in despair.

The present economic and tourism scenario is aptly described in the words “**INCREDIBLE INDIA**”.

### **Constitution and Government**

The Indian federation is the world’s largest democracy with strong foundations having a single citizenship and a single but extremely active judiciary and a parliamentary form of democracy.

The three main arms of the Indian Governance Structure are:

#### **1. The Executive:**

The President of India is the Constitutional head of the Executive of the Union. Under his directions the cabinet of ministers headed by the Prime Minister of the country is responsible for the day-to-day running of the country. Though the President does not interfere with the working of the Prime Minister and his cabinet, he is an important guiding force for the country.

The Prime Minister and his cabinet are answerable to the Parliament of India, which consists of the democratically elected representatives.

#### **2. The Legislature:**

The legislature is known as the Parliament comprised of the Lok Sabha and the Rajya Sabha. The Lok Sabha has a term of five years or it can be dissolved by the President. The Lok Sabha has 543 members elected by universal adult suffrage (right to vote)

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from all parts of India. The Rajya Sabha has 250 members elected by the representatives of state legislatures and some coopted by the President of India on the basis of their contribution to the society.

### **3. Local Governments:**

Many of the state legislatures are bicameral and have a structure similar to the main Parliament.

The state governments have a similar authority structure as the national government and enjoy similar powers.

## **The Land**

### **Topography**

Spread over three million square kilometres, located entirely in the northern hemisphere, India is the largest country in South Asia and the seventh largest country in the world, in terms of geographical size. It is spread over an area of 3.28 million sq. km. (i.e. 2.4% of the total world area) and is 3,214 km. from north to south and 2,933 km, from east to west.

The neighbouring countries in the north are China, Nepal and Bhutan, in the east, Bangladesh and Myanmar, and in the west, Pakistan and Afghanistan. In the south the country tapers off into the Indian Ocean. The Palk Strait separates India and the island country of Sri Lanka, situated to the southeast of India.

A wall of the highest mountains in the world—the Himalayas—to the north and three large water bodies—the Arabian Sea, the Bay of Bengal and the Indian Ocean on the west, east and south respectively separate India from the rest of Asia. It has a land frontier of 15,200 km. and a coastline of 7,516 km. The Andaman and Nicobar Islands in the Bay of Bengal and Lakshadweep Islands in the Arabian Sea are parts of the territory of India. Some of the major rivers that flow in India are the Ganga, Brahmaputra and Indus.

## **Climate**

India has a tropical monsoon climate with four seasons – winter, spring, summer and monsoon. The intensity of the weather varies from region to region. In general, the northern and central parts of the country experience extreme weather during summer (above 40° C) and winter (below 5° C), while the southern and coastal regions experience relatively milder weather. The climate of the country is affected by two seasonal winds – the north east monsoon and the south west monsoon.

## **The People**

### **Population**

India is the second most populous country in the world, second only to China. As per Census 2001, India's population numbers approximately 1.029 billion, with a population density of about 324 people per square kilometre. The population as on 1 October, 2003 was an estimated 1.073 billion. India shelters approximately 16.7 per cent of the world's population though it accounts for only 2.42 per cent of the total land area.

India is a land of contrasts with a unique blend of Indian / Western values. India's different states present a kaleidoscope of a rich and diverse culture. Despite its cultural and ethnic diversity, the country possesses a population having little difference in physical characteristics in North, South and Northeast.

### **Languages**

Hindi is the national language. However, English which is the associate official language is widely used in business, commercial and government work. Apart from Hindi and English, there are several regional languages which are spoken across the country.

### **Religion**

As India is a secular state and it does not officially profess any one religion, all forms of religious beliefs, are accorded equal status before the law.

## **Transportation**

India has an extensive network of roads. The Indian Railways is the largest rail network in Asia and the fourth largest in the world, with a network of about 62,725 km. comprising Broad Gauge, Meter Gauge and Narrow Gauge. The railways play a crucial role in India's development.

India has number of major and minor ports all of which facilitate export to and import from India.

India is well served by air transport. There are large and small domestic airlines which fly across as well as throughout the world. All major airlines also fly to and through India, making it easily accessible.

## **Political System**

India is the largest democracy in the world. India is a Sovereign Democratic Republic and has adopted the Parliamentary system of democracy with a federal structure. The Parliament comprises of two Houses – the Lower House (Lok Sabha) and the Upper House (Rajya Sabha). The members of the Lok Sabha are elected by the citizens directly through general elections. The members of the Rajya Sabha are elected by the members of the Lok Sabha, members of State Legislature and electorate of graduate and teacher's constituencies. The party with the majority in the Lok Sabha forms the government. The tenure of the government is five years.

There are 29 states and 6 union territories. The States are governed by independently elected State Governments, formed by the political party in majority in the State Legislature.

## **Political Parties**

India has over 100 political parties, including national, regional and local parties. Among the major national parties are the Congress (I), the Bhartiya Janata Party (BJP) and the Communist Party of India (CPI). India has a tradition of having strong opposition

parties and the leader of the opposition party in the Parliament is accorded a statutory recognition.

## **The Judiciary**

The legal system in India is well established. India has an independent judicial system with its concepts and procedures resembling those of Anglo-Saxon countries. The Supreme Court is the apex judicial authority in India. It is followed by the High Courts, which head the state judicial system.

The states are further divided into judicial districts, which are presided over by the district and sessions' judges, who are the highest judicial authority in a district. Further down are the courts of civil jurisdiction, wherein the heads are known in different states as munsifs, sub-judges and civil judges. Similarly, criminal judiciary comprises the chief judicial magistrate and judicial magistrates of first and second class. Judgments of lower level courts can be petitioned in the higher level courts. The entire judiciary system is independent of the Government Structure and operates as per the provisions laid down in the Constitution of India.

For knowing more about Indian Legal system, please visit: <http://www.indiafacts.headlinesindia.com/legal-system.html>

## **The Economy**

The economic reforms process which was initiated in 1991 has allowed the private sector the freedom to set-up and expand enterprises. Most sectors, barring a few strategic sectors such as defence and atomic energy are now open to the private sector.

India today is a trillion dollar economy, a major emerging global market with all indications of a brighter future. India's foreign exchange reserves hit the USD 300 billion mark, placing the country in an elite club of nations and reflecting investor's confidence in its economy.

India is rich in natural resources. It is rich in ores such as iron, bauxite, coal, etc. Recently substantial discoveries of natural gas have been made in India.

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It has the third largest pool of trained manpower in the world including scientists, engineers, accountants and lawyers. Indian prowess in the field of software is well-known internationally. India is the first choice among multinational organizations in re-locating back-office operations on account of the abundant qualified manpower available at a fraction of the international cost.

India has a strong presence in steel, cement, textiles, engineering goods, chemicals and allied products, electronics, food processing and other agro-based products and software services.

Agriculture is the dominant sector, though of late the services sector is contributing substantially to the national income.

India is self-sufficient in food production and produces rice, wheat, cereals, spices, fruits and cash crops like cotton, sugarcane and tobacco. It has a huge surplus stock of foodgrains and in recent years has entered the export markets for rice and wheat.

India is being seen as the global destination for R&D, engineering design and prototype development, and a manufacturing hub for high technology products. India's rising middle class and strong demographic advantages will continue to fuel its growth. India has 25% of people in the world under the age of 25, and a full 80% of the population is under 45 years old.

During the financial year 2006-07, India's GDP grew at an estimated 9.4% on top of a growth of 9.0% in the previous year making it one of the best performing economies in the world. Till 2012, India's government has targeted to maintain an annual growth rate of 9%.

### **Domestic Market**

India can boast of being the largest growing market in the world due to its fast growing middle class with increasing standards of living and growing aspirations. The middle class has a high saving and spending potential making India a large market for a variety of goods.

## **Currency**

The Indian currency is known as the Rupee (International Symbol – INR), which is divided into 100 paise. The rupee is fully convertible on the trade front under the liberalized exchange rate management system (“LERMS). All transactions under the LERMS will take place at market-determined rates. The rupee is fully convertible on current account. On the capital account also the rupee is gradually being made fully convertible with residents permitted to invest abroad subject to the completion of certain formalities and non-residents permitted to invest in most sectors except few sectors like defence etc.

The exchange rates, based on RBI Reference Rates, as on February 2, 2009 with some of the world’s main trading currencies are shown in the table below:

<b>Currency</b>	<b>(Rs.)</b>
US Dollar	49.01
Euro	62.38
Pound Sterling	70.54
Japanese Yen	54.69

## **Banking & Finance**

The banking system in India is well developed to meet the requirements of trade, commerce and industry. The country has a vast representation of banks with a huge coverage of branches all over India of Indian and foreign banks also. The banking sector is controlled by the Central Bank i.e. The Reserve Bank of India which though maintaining a watchful eye on the banking sector does not interfere with the day-to-day working of the banks.

Please visit: <http://www.iba.org.in> for knowing more about banking system.

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### **General lending policies**

Broadly, Banks and Financial Institutions in India grant loans for capital expenditure for setting up a new project or for the expansion and diversification programmes of existing businesses. Finance is available for a fixed term depending upon the project requirements. Similarly, the rate of interest varies, depending upon the merits of each case.

Banks also grant working capital facilities against current assets of business entities. Non-fund based facilities in terms of letter of credit for the procurement of raw materials and issuing payment and performance guarantees of business entities are also issued by the Banks.

There are industry specific lending institutions also for power generation, irrigation, railways, roads, shipping, hotels and tourism, films production, housing construction, etc. In addition, special financial institutions for the promotion of small industries, agriculture, etc provide soft finance to eligible business entities.

For knowing about Financial institutions <http://www.banknetindia.com/finance/fi.htm>

## *Chapter – 4*

# **Setting Up of Business in India**

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## **Introduction**

Business activities in India can be carried out either singly or collectively through different legal entities. An entrepreneur has to take a decision about the form of business organization depending upon the availability and requirement of resources, magnitude of risk, need of administration and legal requirements.

The following are the principal forms of business organisations in India:

Sole proprietorship Concern

Partnership Firm

Corporations, both public and private

Limited liability Partnership (LLP)

## **Sole Proprietorship Concern**

One of the easiest organizations under which to do business is the sole – proprietorship concern. The entrepreneur has to just decide a name for the business and commence business activities. Employees may also be employed. The greatest advantage of such an organization is that it requires minimal of legal documentation. Business can commence almost immediately. Bank account can be opened in the name of the proprietorship concern. One may even register a Trade Mark with the appropriate authorities. A major disadvantage of such a set-up is that lenders are hesitant to make available funds to a sole proprietorship concern. However, as one grows, it is possible to convert the sole proprietorship concern into a partnership firm or a company. The risk in such a set-up is entirely that of the proprietor. Losses may have to be made good out of the personal assets of the proprietor i.e. the liability of the proprietor to pay all

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creditors and lenders is unlimited. This form is well suited for carrying on business at a relatively smaller scale with or without the help of family members or friends. The sole owner takes the entire risk, arranges for funds required for the business and exclusively enjoys the fruits of business.

### **Partnership Firm**

Two or more people coming together can start a partnership firm. **The Indian Partnership Act, 1932** which governs this form of organization defines “Partnership” as the relation between person who have agreed to share the profits of a business carried on by all or any of them acting for all.

Although it is permissible to have oral partnership, it is preferable that a Deed of Partnership in writing is made. This deed should clearly specify the name of the partnership firm, the names of the partners, the capital to be contributed by each partner, the profit or loss sharing ratio between partners, the business of the partnership, the duties, rights, powers and obligations of each partner and other relevant details. This partnership deed must be made on paper which is duly stamped as per the laws prevalent at the place of execution. It must be signed by all partners and witnessed by independent persons.

The maximum number of partners which are permissible in a firm is 20 (10 in case of banking business). The Companies Act (Amendment) Bill, 2003 which is pending before the Parliament proposes to permit up to 50 partners in a professional firm.

### **Companies – Both Public and Private**

Companies incorporated in India and foreign corporations having a presence in India are regulated by the provisions of the Companies Act, 1956. The Act is substantially based on the corresponding English Companies Act of 1948, with local variations. The Companies Act, 1956 regulates the formation, management and the dissolution of limited companies. The registrar of companies and the Company Law Board (CLB), both working under the Ministry of Company Affairs, Government of India, have been entrusted with the responsibility to ensure

compliance with the provisions of the Companies Act, 1956. The CLB is the appellate authority in certain circumstances.

The Companies Act, 1956 applies to all trading or other corporations, which are incorporated under the Act or any of the earlier Companies Act, but it does not apply to universities, co-operative societies, unincorporated trading, scientific and other societies. A limited liability company may be either public, in which case its name ends with the word 'Limited' or, private where its name ends with the words 'Private Limited'.

## **Brief Description of Major Types of Corporate Forms**

Companies are broadly classified as private limited companies and public limited companies. Companies may have a limited or unlimited liability. Further, a limited liability company can be limited by shares or by guarantee. In the former, the personal liability of members is limited to the amount unpaid on their shares while in the latter, the personal liability is limited by a pre-decided nominated amount. For a company with an unlimited liability, the liability of its members is unlimited. In addition there can also be foreign companies operating in India.

### **Private Companies**

A private company incorporated under the Companies Act, 1956 has the following characteristics:

The right to transfer shares is restricted.

The maximum number of its shareholders is limited to fifty, not including persons who are in the employment of the company and persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased.

No offer can be made to the public to subscribe to its shares and debentures.

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No invitation or acceptance of deposits from persons other than members, directors or relatives is allowed.

A private company is required to have a minimum paid-up capital of Rs 100,000.

A private company should have at least two directors and at least two members. A private company need not publish all of its financial data and it may allot shares without a prospectus. Private companies are subject to less supervision under the Companies Act than public companies. Provisions governing the managerial remuneration of directors, restrictions on the powers of the Board of directors, prohibitions against loans to directors, additional issues of shares to existing shareholders, retirement of directors by rotation, appointment of the managing director and audit committee, passing of resolutions by postal ballot, restrictions on inter-corporate investments/loans, obtaining a certificate of commencement of business, among others, do not apply to private companies.

### **Public Companies**

A public company is defined as one that is not a private company. A public company registered under the Companies Act cannot have less than seven members and is required to have a minimum paid-up capital of Rs 500,000. There is no restriction with regard to the maximum number who can acquire the shares or debentures of the company. They are freely transferable. Further, any private company, which is a subsidiary of a public company, is treated as a public company and many of the privileges, which are otherwise available to a private company, are not available to such a company.

Public limited companies can be closely held, unlisted or listed on the stock exchange. In case of listed companies, their shares and debentures may be quoted in stock exchanges.

### **Cost of Forming a Company**

For the formation of a company other than the usual costs involved in research and development, documentation, etc., costs have to be incurred for stamp duty and registration fees. The

amount of duty (stamp duty rates vary from State to State) and the registration fees depends on the authorized capital of the company.

## **Formation of a Company**

The whole process of formation of a company may be divided into four stages: namely, (i) promotion, (ii) registration, (iii) raising capital, and (iv) commencement of business.

### **Promotion**

Promotion denotes preliminary steps taken for the purpose of registration and floatation of the company. The persons who undertake these steps are called promoters. However, the persons assisting the promoters by acting in a professional capacity do not thereby become promoters themselves. The status of a promoter is generally terminated when the Board of directors has been formed and they start governing the company.

A promoter is not entitled to recover any remuneration for his services from the company unless there is a valid contract, enabling him to do so, between him and the company. Alternatively, articles may authorize the directors to pay them.

A pre-incorporation contract is void ab initio unless the company adopts the same procedure after incorporation and the contract is warranted by the terms of incorporation.

### **Registration**

The procedure for setting up a limited liability company, whether public or private, can be summarized as follows: -

At least two promoter subscribers in case of a private company and at least seven in the case of a public company must apply for the availability of a suitable name.

The proposed name must be approved by the Registrar of Companies.

Two principal constitution documents of the company must be drawn up: -

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- Memorandum of Association, which states the company's name, the situation of its legal address or registered office (which must be in India), the objects of the company, its limited liability status and the amount of its authorized capital.
- Articles of Association, which regulates the company's internal management and the rights of its members among themselves.

The promoter subscribers must sign two printed copies of the memorandum and the articles of association, in presence of a witness.

In the case of a public company, a declaration by persons agreeing to act as directors must be obtained.

The two signed copies of the memorandum and articles of association, one of which is duly stamped, the declaration (if required) and other specified documents, along with the registration fees prescribed, are presented to the Registrar of Companies for registration. On issue of its certificate of incorporation by the Registrar of Companies, the company comes legally into existence from that date.

A private company may commence business as soon as a certificate of incorporation is issued. A public company, however, may not start operations until the Registrar of Companies, on completion of further formalities, has issued a certificate of entitlement to commence business. Before it actually gets the certificate to commence business, it may have to enter into a number of contracts. Such contracts are called 'provisional contracts'. These contracts become binding, without any need for ratification, on the company becoming entitled to commence business. At any point of time, a private company must have at least two shareholders and a public company at least seven.

## **Raising Capital**

The stage after incorporation and before commencement of business is called the stage of raising capital. At this stage, the

company is required to raise the necessary capital. To get the certificate to commence business, it must have received the minimum subscription. In fact, if minimum subscription is not received the entire money, which remains in a separate bank account, must be repaid forthwith. In case it is not repaid within 8 days, the company and its directors are liable to return the same with interest.

### **Commencement of business**

On complying with certain requirements further, the Registrar of Companies grants the company the certificate to commence business. Now, a public company can commence its business.

### **Capital of a Limited Liability Company**

As stated earlier, the minimum paid-up capital of a Public Company must be at least Rs. 500,000 and that of a Private Company must be at least Rs. 100,000. The memorandum of association must state the amount of the company's initial authorised share capital (the amount of capital available for issue), which can be any amount that the promoters require. Of the authorised share capital not all needs be paid in immediately. Shares may be partly paid. The authorised share capital may be increased by a simple resolution passed at the company's general meeting, if the articles of association so provide.

A limited company can issue only two kinds of shares, equity shares and preference shares, provided they form a part of the authorised share capital of the company. Every member holding equity shares has a right to vote in respect of the capital held on every resolution placed before the company. Every member holding a preference share has a preferential right to be paid a fixed amount or rate of dividend; a preferential right, on winding up or repayment of capital, to be repaid the amount of capital paid up on his shares; right to vote only on resolutions which directly affect the rights attached to preference shares. Under the Companies Act, 1956, consideration for subscriptions to shares may be in forms other than cash such as goodwill, know-how and supply of plant and machinery. While this option is freely available to Indian

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investors, foreign investors must normally contribute cash unless a specific approval from the Government is obtained.

### **Various options as to raising Capital**

A company can opt for various options with regard to its Share Capital

Issue of further Capital

Alteration of Share Capital

Reduction of Share Capital

Diminution of Share Capital

Issue of Shares at par, at discount or at premium

Issue of Sweat Equity Shares

Buy back of Own Shares

Unlike a private company which arranges its share capital primarily, from friends and relatives, a public company normally invites public to subscribe to its share capital. In such a case the public company issues a prospectus inviting subscription. A prospectus is defined to mean any document described or issued as prospectus and includes any notice, circular, advertisement or other documents inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares or debentures of a corporate body.

A Public company can, only in accordance with guidelines issued by Securities Exchange Board of India (SEBI), make an offer of shares or other securities to the public. All offer documents for public issue of shares or other securities by companies intending to be listed on recognized stock exchanges or which are already listed, are required to be filed with SEBI and comply with directions issued by SEBI in this regard. All Rights offer documents are also to be filed with SEBI. Public offer and Rights offer documents must comply with the disclosure norms laid down by SEBI. Shares are now permitted to be held in an electronic form through the depository mode.

## **Administration of Company Law**

The Companies (Amendment) Act, 2000 has made SEBI the administrative authority with respect of listed companies. In case of unlisted companies, the administrative authority continues to be the Department of Company Affairs.

## **Mergers and Acquisitions**

Over the years, restrictive provisions that regulated the expansions, mergers, amalgamations and takeovers of domestic companies have been removed to a large extent. However, certain regulations continue to govern the acquisition of substantial interest in a company.

The Securities and Exchange Board of India (SEBI) (Substantial Acquisition of Shares and Takeovers) Guidelines, 1997 (the Takeover Code) seek to protect the interests of small investors and also strengthen the regulatory framework for takeovers. The Takeover Code essentially gets triggered if the acquisition of the shares of a company listed on a stock exchange (together with shares already held) results in a holding of 15 per cent or more of the voting capital, or a change in management control.

The Takeover Code requires the acquirer to make a public offer to the remaining shareholders to obtain in aggregate, a minimum 20 per cent of the voting capital, at a prescribed minimum offer price.

Acquirers holding more than 15 per cent but less than 75 per cent of the voting capital may increase their holdings by 5 per cent in any twelve month period without triggering the requirement to make a public offer.

If, as a result of a takeover, public shareholding falls to below 10 per cent, the Takeover Code requires the acquirer to either buy out the remaining shares as per the delisting guidelines (which would result in the company being delisted), or to shore-up public shareholding to the minimum required for listing under the stock exchange agreement by offloading existing shares or through fresh issue of shares.

## **Management of a Limited Liability Company**

*The management of a company is vested in the Board of directors, appointed by the shareholders, all of whom must be individuals. Directors need not be a resident and can also be foreign nationals.*

*The minimum number of directors in a public company is 3 and in a private company 2. As to the maximum number of directors, if a public company proposes to increase the number of its directors by more than 12, approval of the Central Government is required.*

*The subscribers to the memorandum are deemed to be the first directors of the company. The shareholders in a General Body Meeting normally appoint subsequent directors.*

*The Board may appoint additional directors when the need arises, if the articles so permit. Such directors however, hold office up to the date of the next Annual General Meeting (AGM) of the company. The appointment of such directors can be regularized in the AGM.*

*In the case of a public company up to one-third of the Board may be comprised of permanent directors. Of the non-permanent directors one-third must retire by rotation at every AGM although a retiring director is eligible for reappointment.*

*Financial stakeholders like Development Banks, Financial Institutions and working capital granting commercial banks can also appoint their representatives as nominee directors. The Act provides for the protection of such directors against many provisions applicable to the ordinary directors. Provisions like retirement by rotation, holding of certain minimum shares etc are not applicable to such directors.*

*A company may appoint one or more managing or full time directors. The appointment and remuneration of a managing or full time director of a public company is required to be approved by the shareholders in their General Body Meeting. Approval of the Government is not necessary if the appointee meets specified conditions and the remuneration is within the limits prescribed under the Companies Act.*

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*Directors' remuneration is normally determined by the articles of association or by the shareholders at a General Body Meeting. A provision is made for minimum remuneration based upon the effective capital of the company, in case there is no profit or profit is inadequate. Unless the Central Government approves otherwise, the remuneration paid to the managing and full time directors of a public company may not exceed 5% of net profits if there is one such director, and 10% if there are more than one such director.*

*The articles of a private limited company can give power to its Board of directors to fix the remuneration of a managing or full time director.*

### **Meetings and Votes in a Limited Liability Company**

*An Annual General Meeting must be held in each calendar year, not more than fifteen months after the preceding meeting and within six months from close of each accounting period. The Annual General Meeting is required to be held during business hours on a working day at a place within the city in which the registered office of the company is situated. Shareholders are entitled to appoint proxies to attend meetings and vote on their behalf.*

*Ordinary resolutions require a simple majority of the votes that are cast by those attending the meeting (in person or by proxy). A company's articles of association can be amended only by a 'Special Resolution' which is one passed by a 75% or greater majority of the votes cast at a general meeting of which due notice has been given. Usually, each shareholder has one vote by a show of hands. On a poll, voting rights are in proportion to each shareholder's share of the paid up capital.*

*A formal meeting of the Board of Directors is required to be held once every three months. These meetings need not be necessarily held in a place within the city of the registered office of the company, and can be held anywhere even outside India.*

## **Publication of Information by a Limited Liability Company**

*In addition to its constitution documents, every limited company must file its annual financial statements with the Registrar of Companies and an 'Annual Return' containing updated particulars of its shareholders, directors and share capital. Information filed with the Registrar of Companies is available to the public for inspection on payment of a nominal fee.*

*Public companies listed on the stock exchanges are required to publish their quarterly results in a local and National newspaper.*

*A limited company must state its name and registered office address in legible characters in all its business letters, bill heads, notices and other official publications; and its name on all communications including invoices, receipts, cheques and endorsements.*

## **Corporate Governance**

*The Government of India has introduced good Corporate Governance (CG) leading to more transparent, ethical and fair business practices to be adopted by corporate entities at large. Certain important features of CG are as under: -*

*The Report of the Board of Directors shall now include a Directors' Responsibility Statement confirming: -*

- (i) Maintenance of adequate accounting records for safeguarding the assets of the company and for preventing and detecting frauds and other irregularities*
- (ii) Judgments and estimates made in a reasonable and prudent manner to ensure true and fair view of the accounts*
- (iii) Preparation of accounts by following the applicable accounting standards*
- (iv) Consistent application of the accounting policies selected, and*

## **Setting Up Business in India**

(v) *Preparation of financial statements on a going concern basis.*

*It is further provided that every public company having paid-up capital of Rs. Five crore (Rs. 50 million) or more shall constitute a committee of the Board known as the Audit Committee. Such a committee shall have full access to the information contained in the records of the company and shall also have powers to seek external professional advice as expedient. All the recommendations of the Committee relating to financial management and audit reporting shall be binding on the Board. Recommendations not acceptable to the Board are to be communicated to the Shareholders with reasons thereof.*

*The Companies Act now debars a person from acting as a Director of a company if there is a default in filing Annual Return / Accounts or repayment of deposits / interest or dividends.*

*Apart from the above requirements, all listed companies are now required to publish their quarterly and half yearly results with a limited review by the Auditors. Such accounts shall be prepared in compliance with the applicable accounting standards and shall also disclose segmental results. With the annual report, all listed companies have to publish audited consolidated accounts also.*

*Listed companies are also required to include a report on CG in their annual report covering certain vital information. Some of the important are listed below:*

*A brief statement on company's philosophy on the code of governance*

*Composition and category of directors, their attendance at the Board Meeting etc.*

*Audit committee, Remuneration committee and Shareholders committee details*

*Certain important disclosure by the Board*

*Means of communication with the company*

*General shareholders information*

## **Accounting Systems and Standards**

India has a well-established system of accounting. All corporate entities follow the mercantile (accrual) system for recording their accounting transactions. The Institute of Chartered Accountants of India, the Accounting regulatory authority, has prescribed 29 Accounting Standards and 32 Auditing and Assurance Standards till date providing comprehensive guidelines. These are compulsory and applicable mainly to listed companies and some of the accounting standards are applicable to private limited companies also. Accounting Standards are available on website at [http://www.icai.org/post.html?post\\_id=474](http://www.icai.org/post.html?post_id=474)

Auditing and Assurance Standards are available on the website at [http://www.icai.org/resource\\_file/7750dept\\_aasb\\_indian\\_scenario.pdf](http://www.icai.org/resource_file/7750dept_aasb_indian_scenario.pdf)

India is also a member of International Accounting Standards Board and whenever the international body prescribes new accounting standards, these are adopted in India also with modifications to suit the Indian environment and laws.

## **Foreign Corporations**

A foreign company is defined as a company, which is incorporated outside India and has established a presence in India in the form of liaison offices, project offices, branch offices, etc. They are also governed by the Companies Act, 1956, which contains special provisions for regulating such entities. Such companies have to register themselves with the Registrar of companies, New Delhi within thirty days of establishing a place of business in India.

Further, the procedure for setting up a liaison office, project office and branch office is elaborated below: -

### **Procedure for setting up Liaison Office**

Setting up a Liaison or Representative Office is a common practice for foreign companies seeking to enter the Indian market. Liaison office can carry on only liaison activities, i.e. it can act as a channel of communication between Head Office abroad and parties in India. It is not allowed to undertake any business activity

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in India and cannot earn any income in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from the Head Office abroad. The role of such offices is, therefore, limited to collecting the information about possible market opportunities and providing information about the company and its products to the prospective Indian customers.

The opening and operation of such offices is regulated by the Foreign Exchange Management Act, 1999 (FEMA). Approval from the Reserve Bank of India (RBI) is required for opening such offices. The companies desirous of opening a liaison office in India may make an application in form FNC-1 along with the documents mentioned therein to Foreign Investment Division – I, Exchange Control Department, Reserve Bank of India, Central Office, Fort, Mumbai 400 001.

Permission to set up such offices is initially granted for a period of 3 years and this may be extended from time to time by the Regional Office in whose jurisdiction the office is set up.

Liaison / representative offices also have to file an annual activity certificate etc. from a Chartered Accountant to the concerned Regional Office of the RBI.

### **Procedure for setting up Project Office**

Foreign companies planning to execute specific projects in India can set up project / site offices in India. The requirement of seeking approval of RBI for opening a project office has been dispensed with, since RBI has granted general permission to a foreign entity for setting up a project office in India, subject to fulfillment of certain conditions.. The foreign entity only has to furnish a report to the jurisdictional Regional Office of RBI giving the particulars of the project / contract comprising the following details :

- (i) Name and address of foreign company,
- (ii) Reference no. and date of the letter awarding the project contract,
- (iii) Particulars of authority awarding the project / contract,

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- (iv) Total amount of contract,
- (v) Address and tenure of project office,
- (vi) Nature of the project undertaken.

### **Procedure for setting up Branch Office**

Reserve Bank permits companies engaged in manufacturing and trading activities abroad to set up Branch Offices in India for the following purposes with the prior approval of RBI: -

- (i) Represent the parent company / other foreign companies in various matters in India e.g. acting as buying / selling agents in India.
- (ii) Conduct research work in the area in which the parent company is engaged.
- (iii) Undertake export and import trading activities.
- (iv) Promote technical and financial collaborations between the Indian companies and overseas companies.
- (v) Rendering professional or consultancy services.
- (vi) Render services in Information technology and development of software in India.
- (vii) Rendering technical support to the products supplied by the parent / Group companies.
- (viii) Foreign airline / shipping company.

A branch office is not allowed to carry out manufacturing, processing activities directly / indirectly. However, foreign companies can establish branch office / unit for manufacturing in a SEZ subject to fulfillment of certain conditions.

Branch office will have to submit activity certificate from a Chartered Accountant on an annual basis to the Reserve Bank of India. For annual remittance of profit, Branch Office has to submit required documents to an authorised dealer.

Permission for setting up branch offices is granted by the Reserve Bank of India. RBI considers the track record of the applicant company, existing trade relations with India and financial position of the company while scrutinizing the application. An application in Form FNC-1 is to be made to RBI. Application may be made to the Reserve Bank of India, Foreign Investment Division (I), Exchange Control Department, S.B.S. Marg, Mumbai 400 001, India.

### **Limited Liability Partnership (LLP)**

The Limited Liability Partnership Act, 2008 has come into force with effect from January 9, 2009. An LLP is an alternative business structure falling between a partnership firm and a corporate body, combining the limited liability benefits of a company with the flexibility of a partnership. An LLP is a corporate body formed and incorporated under this Act and is a legal entity separate from that of its partners and will have a perpetual succession.

An LLP can be formed by two or more persons, who could be individuals and / or bodies corporate, for carrying out lawful trade, business, profession or occupation. Foreign companies and foreign LLP can also become partners in an LLP. At least one of the Partners in the LLP must be a resident of India, as defined under the Income Tax Act, 1961. A firm, private company and a public unlisted company can be converted into an LLP.

At least one partner must be a 'designated partner'. Bodies corporate may nominate their nominees as designated partners. The designated partners shall be answerable for the doing of all acts, matters and things as are required to be done by the LLP in respect of the compliance of the provisions of the proposed legislation and be liable for penalties for non-compliance.

If at any time the number of partners of an LLP falls below two and the business is carried with only one partner for more than six months, the lone partner will be liable for the obligations of the LLP during that period. The mutual rights and duties of the partners of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its partners, shall be governed by

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the limited liability partnership agreement between the partners, or between the limited liability partnership and its partners.

A partner can contribute his share of the capital of an LLP by way of tangible, movable or immovable or intangible property or other benefit to the limited liability partnership, including money, promissory notes, other agreements to contribute cash or property, and contracts for services performed or to be performed.

The rights of a partner to a share of the profits and losses of the LLP and to receive distributions in accordance with the LLP agreement are transferable either wholly or in part. An LLP is required to maintain proper books of accounts and make yearly filings of its 'statement of accounts and solvency', and 'annual return'. All documents, including incorporation documents and statement of accounts and solvency will be available for inspection by any person in the manner prescribed.

An LLP can merge with another LLP. An LLP can be wound up (i) voluntary by its partners or (ii) by the National Company Law Tribunal, if: -

- (a) if the LLP decides that LLP be wound up by the Tribunal;
- (b) if, for a period of more than six months, the number of partners of the LLP is reduced below two;
- (c) if the LLP is unable to pay its debts;
- (d) if the LLP has acted against the interests of the sovereignty and integrity of India, the security of the State or public order;
- (e) if the LLP has made a default in filing with the Registrar the Statement of Account and Solvency or annual return for any five consecutive financial years; or
- (f) if the Tribunal is of the opinion that it is just and equitable that the LLP be wound up.

The tax treatment of an LLP is not addressed and would need to be dealt with separately as a part of the Income Tax Act, 1961. Also, the Foreign Exchange Management Act, 1999 will need to be amended so as to enable foreign companies and foreign LLP to be partners in an LLP in India.

# **Chapter – 5**

## **Direct Taxes**

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### **General**

India has a well-developed tax infrastructure. The direct tax rate i.e. income tax, is moderate and the tax laws are easy to comply with. Moreover, unlike many developed countries, India does not have an inheritance tax or gift tax. All this makes India an ideal investment and business destination.

The Income Tax Act, 1961 (ITA) is the operative (main) Act in India providing the machinery and methodology for the determination, computation and payment of income tax. The Act is substantiated by the Income Tax Rules providing methodology, rules and forms for payment of taxes. The Central Board of Direct Taxes (CBDT) is the final Authority and governs the entire mechanism of direct taxes in India.

### **Income of Previous Year is Assessable in the Assessment Year**

Income-tax is a charge on the Income earned in a financial year which commences on 1<sup>st</sup> April of a calendar year and ends on 31<sup>st</sup> March of the following calendar year. This period is known as the “Previous Year”.

An assessment year is the financial year in which the income of the previous year is to be assessed and brought to tax and means the period of twelve months, commencing on the 1st day of April every year, next following the previous year. For example, the income earned from 1-4-2007 to 31-3-2008 for which the previous year is 2007-08 will be assessed in the next following financial year known as assessment year 2008-09.

### **Persons – Assessable to Tax**

Every person is chargeable to tax in respect of his total income. The term “person” includes the following: -

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Individuals

Hindu Undivided Families (HUF)

Companies

Firms

Association of persons (AOP) or Bodies of individuals (BOI)

Local Authorities

Artificial juridical persons not falling within any of the preceding categories.

The definition of term “person” as given in the Income Tax Act is inclusive in nature, thereby implying that any person not falling in the above mentioned categories may still fall in the four corners of the term “person” and accordingly may be liable to tax under the Income Tax Act.

## **Tax Liability Varies With Factor of Residence**

The ambit of taxation varies with the factor of residence in the previous year. The assessee (persons) are divided into 3 categories: -

- (i) Resident and Ordinarily Resident
- (ii) Resident, but not Ordinarily Resident
- (iii) Non-Resident

The residential status is important as the tax liability is determined by the situs of Income and the residential status of the person.

## **Residential Status**

### **1. Individuals**

Whether an individual is a resident or not depends on the period of his / her stay in India during the previous year. Since the conditions for determining residential status vary from country to

country, it is possible that an individual may be resident of more than one country during a previous year.

### **Basic Conditions for individual becoming a Resident**

The individual should be:-

- a) in India for 182 days or more during the relevant previous year; or
- b) in India for 60 days (182 days in the case of a citizen of India or person of Indian origin, who is abroad, and who is on a visit to India in any year) or more during the previous year and 365 days or more during the 4 years preceding the relevant previous year.

### **Resident and Ordinarily Resident (ROR) / Not Ordinarily Resident (NOR)**

Under the Indian Income Tax Act, a Resident can be either (a) Resident and ordinarily resident or (b) Resident but Not Ordinarily Resident.

A resident who is an individual is considered to be “Ordinarily Resident” if he satisfies both of the following two conditions:-

- (i) he is a resident in India in at least 2 out of 10 years immediately preceding the previous year.
- (ii) he is present in India for at least 730 days during 7 years immediately preceding the previous year.

An individual fulfilling any or none of the above two conditions is considered as Resident but not Ordinarily Resident.

## **2. Company**

A company is considered as a resident if:-

- a) it is an Indian company; or
- b) control and management of its affairs is situated wholly in India during the relevant previous year.

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Thus, for a non-Indian company, if a part of the control and management is outside India, that would make the company non-resident in India.

### **3. Firm, Association of Persons and Other Persons**

Firm, association of persons and every other person is considered as resident in India in all cases, except where control and management of its affairs is situated wholly outside India during the relevant previous year. Thus, having even a part of the control and management in India would make the above persons resident in India.

It must be noted that each year is a separate year and the residential status of a person is to be determined for each year.

### **4. Non-Resident**

Any person who does not fulfill the requirements for being a resident is a non-resident.

## **Scope of Income**

### **Assessment of Residents who are Ordinarily Resident**

Income of a resident and ordinarily resident is charged to tax in India if such: -

- (i) income is received or deemed to be received in India in the previous year, the date or place of its accrual being immaterial;
- (ii) income accrues or arises or is deemed to accrue or arise in India during the previous year, the date or place of its receipt being immaterial;
- (iii) income accrues or arises outside India during the previous year, even if it is not received in or brought into India.

In short, world income of such a person is liable to tax in India.

### **Assessment of Residents who are Not Ordinarily Resident**

Persons who are resident but are not ordinarily resident in India, are assessed in exactly the same manner as persons who are resident and ordinarily resident, but subject to one special exemption. Income, which accrues or arises to such a person outside India is not be taxable in India unless it is derived from a business controlled in or a profession set up in India.

### **Assessment of Non-residents**

Income of a non-resident is charged to tax in India only if such: -

- (i) income is received or deemed to be received in India in the previous year, the date or place of its accrual being immaterial; and
- (ii) income accrues or arises or is deemed to accrue or arise in India during the previous year, the date or place of its receipt being immaterial.

### **What Is Income Subject to Income Tax**

The definition of the term “income” under the Income Tax Act is inclusive and not exclusive in nature. Therefore, it signifies that it includes things according to its general and natural meaning, apart from those specially included in the definition of the term “income” in the Income Tax Act. For e.g. Gains on sale of assets etc.

Income liable to tax during the previous year is to be computed under the following heads: -

Income from Salaries

Income from House Property

Profits and Gains from Business and Profession

Capital Gains

Income from Other Sources

## **When Does Income Accrue In India**

The deeming fiction is of great importance as it covers all types of incomes, of whatever nature, that has any nexus to any activity or source in India, even if the income is not actually received in India or from India. For example, two non-residents may enter into an agreement outside India to transfer an asset in India. The purchaser makes payment for the same directly to the seller, outside India. Except for the asset that is in India, no other part of the transaction is undertaken in India, but the gain arising to the seller as a result of the transaction will be taxable in India (if it is not exempted under the provisions of the I-T Act) as a result of this deeming fiction.

The following items of income are deemed to accrue or arise in India: -

- i) All income, directly or indirectly, accruing or arising through or from: -**
  - a) any business connection in India,**
  - b) any property in India,**
  - c) any asset or any source of income in India, or**
  - d) through the transfer of a capital asset situated in India.**
- ii) Income from salary earned in India.** For this purpose, salary is regarded as earned in India if the service is rendered in India. Salaries earned for the rest or leave period, before or after the services are rendered in India is also regarded as earned in India if the service contract provides for such rest or leave period.
- iii) Salary paid by the Government to an Indian citizen for services outside India.**

The following income which is payable outside India is also deemed to accrue or arise in India: -

- iv) Dividend paid by an Indian company outside India.**

- v) Interest payable by specified entities
- vi) Royalty payable by specified entities.
- vii) Fees for technical services payable by specified entities.

## **Rates of Income Tax Act**

### **Personal Taxes**

For A. Y. 2009 – 10 (relating to the Previous Year 2008 – 09) the following rates have been proposed for taxing the total income of an Individual: -

<b>Total Income</b>	<b>Tax Rate</b>
Up to Rs.1,50,000/-	Nil
Between Rs.1,50,001/- & Rs.3,00,000/-	10%
Between Rs.3,00,001/- & Rs.5,00,000/-	20%
Above Rs.5,00,000/-	30%

The above assessee is also liable to pay surcharge @ 10% if their total income exceeds Rs.10 lac (however, marginal relief is provided in cases where incremental tax liability exceeds incremental income) and Education & Higher Secondary Education Cess of 2% and 1 %, respectively, is leviable on tax plus surcharge.

### **Companies**

For A. Y. 2009 – 10 (Previous Year 2008 – 09) the following rates have been proposed for taxing the total income of partnership firms & companies: -

<b>Entity</b>	<b>Where taxable income exceeds Rs. 1 crore (Rs. 10 Million)*</b>	<b>Other cases</b>

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Partnership Firm	33.99% (30% plus surcharge of 10% plus education cess of 3%)	30.9% (30% plus education cess of 3%)
Domestic Company	33.99% (30% plus surcharge of 10% plus education cess of 3%)	30.9% (30% plus education cess of 3%)
Foreign Company	42.23% (40% plus surcharge of 2.5% plus education cess of 3%)	41.2% (40% plus education cess of 3%)

\* Marginal relief is provided in cases where incremental tax liability exceeds incremental income.

It may be pertinent to point out that the tax rates are fixed annually by the Finance Act passed by the Parliament every year and not by the Income Tax Act. Hence, rates mentioned above are subject to change as mentioned in the Finance Act passed year by year.

## **Dividend Income**

Dividend (other than a deemed dividend explained below) declared by a domestic company is exempted in the hands of the recipient. However, a Dividend Distribution Tax (DDT) is levied on the Company declaring dividend. The effective DDT rate is 16.995% (15% plus 10% surcharge, and education cess of 3%). An exemption from DDT has been granted in case of profits of SEZ developers.

### **Deemed dividend under section 2(22)(e) of the Income Tax Act, 1961 –**

Any payment made by a company (not being a company in which the public are substantially interested) in India to a shareholder holding 10% or more of the voting powers of the company or to any person in which such a shareholder is substantially interested

or any payments made by such company on behalf of or for the individual benefit of such a shareholder is deemed to be a dividend in the hands of the recipient, taxable in the hands of the shareholder and not liable to tax in the company.

## **Minimum Alternate Tax**

With an object to bring zero tax / low tax companies under tax net, Minimum Alternate Tax (MAT) @ 10% (plus applicable surcharge, and education cess) of book profits is levied on companies whose tax payable under normal Income Tax provisions is less than 10% of book profits. Book profits for this purpose are computed by making prescribed adjustments to the net profit disclosed by the corporations in their financial statements. Further, MAT is not applicable to SEZ developers / Units in respect of income arising on or after April 1, 2005.

The effective MAT rate is as follows: -

Company	Where taxable income exceeds Rs. 1 crore (Rs. 10 Million)	Other Cases
Domestic Company	11.330 %	10.30 %
Foreign Company	10.557 %	10.30 %

A credit of such tax paid under MAT provisions by a company w.e.f. financial year 2005-06 shall be allowed against the tax liability which arises in subsequent seven years under the normal provisions of the IT Act.

## **Capital Gains Tax**

Capital gains arising from sale of capital assets are classified into two categories:

**Short term capital gains** means any gains arising from transfer of capital assets which are held for a period of 36 months or less (12 months or less in case of shares held in a company, other

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securities listed on a recognized stock exchange in India or a unit of a mutual fund registered in India).

**Long term capital gains** are capital gains other than short term capital gains.

<b>Particulars</b>	<b>Tax rates</b>	
	<b>Resident</b>	<b>Non-residents</b>
a. Short Term capital assets	Normal corporate / individual tax rates	Normal corporate / individual tax rates
b. Short term capital assets – being shares and units of equity oriented fund which have been charged to Securities Transaction Tax (STT)	10 % (plus surcharge of 10% (where applicable) plus education cess of 3%)	10 % (plus surcharge of 10% (where applicable) plus education cess of 3%)
c. Long term capital assets – being listed shares in a company or unit of an equity oriented fund, which have been charged to STT	Exempt	Exempt
d. Other long term capital asset	20 % (plus surcharge of 10% (where applicable) plus education cess of 3%)	20 % (plus surcharge of 10% (where applicable) plus education cess of 3%)

Exemptions from capital gains tax are available in certain cases if such capital gains or sales proceeds from the capital assets are reinvested in some other specified capital assets.

Indexation of the cost of acquisition and improvement of a long-term capital asset of any nature (other than debentures) is available to Residents. However, the benefit of indexation is available to Non-residents only on long-term capital asset other than shares/ debentures of an Indian Company acquired in foreign currency.

### **Presumptive Taxation**

The Income Tax Act provides for the levy of presumptive taxes in the case of certain very small business.

### **Withholding Tax/Tax Deducted At Source (TDS)**

Under Indian Income Tax laws, tax has to be withheld at source by the person responsible for making the payment if such a payment is taxable in India in the hands of the payee. Such tax has to be deducted at the time of credit to the account of the payee or payment, whichever is earlier. The rates for such deduction are provided in the Income tax Rules.

### **Taxation of Know-How Fee in The Hands of Foreign Companies**

Under domestic law, royalties / technical fees payable to non residents having a permanent establishment in India are taxed on net basis. On the other hand, royalties / technical fees payable to non residents not having a permanent establishment in India are taxed on gross basis. Concessional tax rates, as given below, apply if the agreement relates to a matter included in industrial policy or the agreement has been approved by the Government of India: -

For contracts entered on or after 1st June 2005	10%
For contracts entered into after 31st May 1997 but before 1st June 2005	20%

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For the contracts entered into on or before  
31st May 1997

30%

The above rates are subject to Surcharge (where applicable) and education cess.

## **Tax Incentives**

The Government of India has been extending a host of incentives and concessions to eligible entities in certain specific industries. Broadly, the tax incentives include tax holidays for corporate profits, accelerated depreciation allowances and deductibility of certain expenses subject to the fulfillment of prescribed conditions. There are various deductions and concessions given to the assessee under the other heads of income also which are designed to mainly encourage savings and acquisitions of assets. Some of the key direct tax incentives have been outlined in the following pages.

## **Fringe Benefits Tax (FBT)**

An additional tax termed as “Fringe Benefit Tax” has been introduced with effect from A. Y. 2006-07. The scope of these provisions has been greatly expanded and with effect from the A. Y. 2008 – 09 Employees Stock Option Plans have also been brought within the purview of FBT. It provides for levy of an additional tax @ 30% (plus applicable surcharge and education cess) in the hands of the employer on the value of fringe benefits provided to the employees other than the perquisites on which tax is paid / payable by the employee. FBT is payable irrespective of the fact whether the employer is otherwise liable to tax or not.

Since the FBT is chargeable in the hands of the employer, the definition of “assessee” is amended so as to include employers assessable for fringe benefits.

## **Transfer Pricing**

Comprehensive transfer-pricing regulations (TP) have been introduced, effective from the financial year 1 April 2001 in order to facilitate the computation of reasonable, fair and equitable profits

and tax in India in the case of businesses carried on by multinational companies. To put it simply, Transfer Pricing is the process of adjusting the prices of cross-border transactions between related / associated parties.

Under TP, international transactions between two or more associated enterprises (including permanent establishments) must be at arm's-length prices (ALP). These regulations also apply to cost-sharing arrangements.

TP contains definitions of various terms, including 'associated enterprise', 'ALP', 'enterprise', 'international transaction'. Two enterprises are considered to be associated if there is direct/indirect participation in the management or control or capital of an enterprise by another enterprise or by same persons in both the enterprises.

In determining whether there is participation in management or control, various factors are taken into consideration including:

Direct / indirect shareholding having 26% or more of voting power,

Advancing of loans of 51% or more of total assets,

Appointment of more than 50% of the Board of directors,

Goods manufactured are sold under influenced prices,

Dependence on IPRs owned by either party.

### **Determination of “arms length price”**

A very important aspect of the concept of Transfer Pricing is the process of determining the arm's length price. These regulations specify the following methods for determining ALP, which are generally in line with the guidelines of the Organisation for Economic Co-operation and Development (OECD):

Comparable uncontrolled price method.

Resale price method.

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Cost-plus method.

Profit-split method.

Transactional net margin method.

Any other method that may be prescribed by the Central Board of Direct Taxes (CBDT).

The manner in which these methods are to be applied has also been prescribed. The choice of the appropriate method is determined with respect to the nature and class of transaction, the classes of associated persons, the functions performed by them and other relevant factors.

### **Burden of Proof and Assessment**

The burden of proving that the international transactions are in accordance with the arm's length principle lies with the taxpayer. For this purpose, the IT Act requires the maintenance of prescribed information and documents relating to international transactions undertaken between associated enterprises.

Also, it is mandatory to obtain an accountant's certificate in a prescribed format in respect of all international transactions between associated enterprises. Such a report would have to contain prescribed particulars of the transaction, and would have to be filed with the tax authorities by September 30 of the relevant assessment year.

### **Adjustments to ALP by Revenue**

Once the accountant's certificate has been filed the concerned tax officer may call for the prescribed documentation in the assessment proceedings. Based on available information, the tax officer may adjust or recompute the prices used in international transactions. Such an adjustment would attract tax and interest on the additional amount.

Revenue authorities may determine the ALP and make adjustments, if they determine that any of the following conditions exist:

The prices have not been determined in the prescribed manner.

The prescribed documents and information have not been maintained.

The information or data on the basis of which ALP was determined is not reliable or correct.

Any information or document requested by the tax officer has not been furnished.

Stringent penalties have been prescribed for non-compliance with the procedural requirements and for understatement of profits.

## **Advance Rulings**

The scheme for Advance rulings has been introduced to facilitate proper planning and to avoid any future disputes under the Income Tax Act.

A non-resident can approach the high-powered Authority for Advance Rulings to determine the income tax aspects of any proposed or current transaction. Advance ruling can also be sought by a resident to determine the tax liability of a non-resident with whom a transaction has been undertaken or proposed to be undertaken.

Certain notified residents may also apply to the Authority for Advance Rulings to seek a ruling in respect of the issues relating to computation of total income.

Such advance rulings would be binding on the person seeking it in relation to the transaction and the Income Tax department cannot challenge the same unless there is some change in the facts or law affecting that transaction.

## **Double Tax Relief**

The purpose of a Double Taxation Avoidance Agreement (DTAA) is to assist tax payers in India and abroad to know in advance, to the extent practicable, the tax implications of the various

## ***Doing Business In India***

transactions arising from the implementation of an agreement / transaction between them. Provisions of the DTAA over-ride the provisions of the domestic laws. It is important to understand the provisions of the DTAA because the burden of tax in the two countries becomes much more clearly ascertainable in the light of the DTAA as it grants relief in respect of the income chargeable to tax, both under the IT Act of India and the Income Tax laws in that other country.

## **Procedural Provisions Under Income Tax Act**

### **Filing of Return of Income**

All incomes accruing or arising in India are taxable in India subject to Double Taxation Avoidance Agreement (DTAA) with the country of residence of the taxpayer.

Taxable income is computed for a uniform accounting year, i.e. the fiscal year from 1st April to 31st March.

The taxable income is called "Total Income" which is computed after adding certain disallowances, such as the loss on the sale of asset and miscellaneous expenditure written off, and reducing certain allowances/benefits from the book profits.

Filing of return of income is compulsory for partnership firms, companies and certain other entities irrespective of their income level. It may be noted that return of income includes a return of loss. A return of income is to be filed in the prescribed form.

### **Due Dates for filing of Returns of Income**

The due dates prescribed for filing returns for the A. Y. 2009 – 10 for different categories of assessee are as under:-

Sr. No.	<i>Different situations</i>	Due date of submission of return
1.	Where the assessee is a company	September 30
2.	Where the assessee is a person other than a company :	September 30
	2.1 Where accounts of the assessee are required to be audited under any law.	September 30
	2.2 Where the assessee is a “working partner” in a firm whose accounts are required to be audited under any law.	September 31
	2.3 The assessee is covered under specified category of filing of return of income. For e.g. holder of credit card, owner of motor vehicles etc.	September 31
	2.4 In any other case	July 31

## **Wealth Tax**

This is a tax imposed on certain non-productive assets owned by the assessee. Wealth tax is charged in respect of the net wealth as on March 31st every year (referred to as ‘valuation date’). Wealth tax is charged both on individuals and companies at the rate of 1% of the amount by which the ‘net wealth’ exceeds Rs. 15,00,000 lac (Rs. 1.5 million). The term ‘net wealth’ broadly represents the excess of prescribed assets over the concerned debts. Prescribed Assets include guest house & residential house, motor cars, jewellery-bullion-utensils of gold & silver etc., yachts, boats, aircraft, urban land and cash in hand. Investment in shares and other financial instruments are entirely exempt from Wealth tax. A debt is an obligation to pay liquidated or certain sum of money incurred in relation to those assets, which are included in the ‘net wealth’.



## Chapter – 6

# Other Significant Taxes

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### Securities Transaction Tax (STT)

STT is payable on transactions in equity shares, derivatives and units of an equity oriented fund entered in a recognised stock exchange or on the sale of the units of any equity mutual fund to the mutual fund. The rates of STT would be:

Nature of Transaction	Payable by whom	Rate
Purchase and sale of equity shares or units of equity oriented mutual funds on stock exchange on delivery basis	Both purchaser as well as seller	0.125 %
Sale on stock exchange of equity shares or units of equity oriented mutual funds on non-delivery basis	Seller	0.025 %
Sale of Derivatives on recognized stock exchange	Seller	0.017 %
Sale of an option in securities	Seller	0.017 %
Sale of an option in securities, where option is exercised	Purchaser	0.125 %
Sale of a futures in securities	Seller	0.017 %

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Sale of units of equity oriented mutual funds to the mutual fund	Seller	0.25 %
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## **Commodities Transaction Tax (CTT)**

CTT is payable on transactions entered into on a recognised commodities exchange. The rates of CTT would be:

<b>Nature of Transaction</b>	<b>Payable by whom</b>	<b>Rate</b>
Sale of an option in goods or an option in commodity Derivative	Seller	0.017 %
Sale of an option in goods or an option in commodity Derivative where option is exercised	Purchaser	0.125 %
Sale of any other commodity Derivative	Seller	0.017 %

## **Excise Duty**

Central Value Added Tax (CENVAT) is a duty of excise levied by the Central Government on the manufacture of movable and marketable goods in India. Though the tax levy is on the manufacture of goods, the tax is required to be paid on removal of goods from the factory premises where the manufacture takes place. The duty is levied at the rates specified in the Excise Tariff.

The rate at which excise duty is leviable on the goods depends on the classification of the goods under the Excise Tariff. The Excise Tariff is primarily based on the Harmonized System of Nomenclature (HSN). The Government has adopted an eight digit classification under the Excise Tariff so as to bring it in conformity with the Customs Tariff.

## ***Other Significant Taxes***

The excise duty on most of the consumer goods, which are intended for retail sale is payable on the basis of the Maximum Retail Price (MRP) printed on the goods. However, abatements at the rates ranging from 30% to 50% are admissible from the MRP for the purposes of charging BED. Other goods are generally chargeable to the duty on the 'transaction value' of the goods sold to an independent buyer. In addition, the Central Government has the power to fix tariff values for charging ad valorem duties on the goods.

The duty rates comprising of Basic Excise Duty (BED) under the rationalized structure are Nil, 4%, 8% and 14%. In addition, there are various general Notifications granting partial or complete exemption to specified goods from the payment of excise duties. Apart from BED, education cess @ 2% and Secondary & Higher Education Cess (SHEC) @ 1% is applicable on the aggregate of excise duties.

The central excise duty is a modified VAT wherein a manufacturer is allowed the credit of the excise duty paid on locally sourced goods and the Additional Duty of Customs on imported goods. The CENVAT credit can be utilized for the payment of excise duty on the clearance of dutiable final products manufactured in India. The Finance Act 2004 had introduced the integration of goods and services tax. Therefore, manufacturers of dutiable final products would also be eligible to avail CENVAT credit of the service taxes paid on input services used both in the or in relation to the manufacture of final products and clearances of final products from the place of removal. In addition, CENVAT credit would be admissible on the following input services:

Services used in relation to setting up of a factory or an office relating to such factory.

Advertisement or sales promotion services.

Services in relation to the procurement of inputs.

Activities relating to management of business such as accounting, auditing, financing, recruitment and quality control.

## **Customs Duty**

Customs or import duties are levied by the Central Government of India on the goods imported into India. Customs duties are levied on the transaction value of the imported goods. The transaction value of the goods is the price actually paid or payable by the buyer to the seller. The rate at which customs duty is leviable on the goods depends on the classification of the goods determined under the Customs Tariff. The Customs Tariff is aligned with the HSN provided by the World Customs Organization. Certain goods for import fall under the Negative List whereby a specific permission is required before its import.

The peak customs duty at present is 10% for all goods other than agricultural and other specified products. However, the Central Government has the power to generally exempt goods of any specified description from the whole or any part of duties of customs leviable thereon. In addition, preferential/concessional rates of duty are also available under the various Trade Agreements.

General principles adopted for valuation of the goods under the Customs Act are in conformity with the WTO agreement on customs valuation. In furtherance of this, Customs Valuation Rules for export and import goods have been issued.

The types of customs duties applicable are as follows: -

**Basic Customs Duty (BCD) :** This is calculated at the effective rate applied to the landed value of the goods, which comprises of CIF value and the landing charges.

**Additional Duty of Customs in lieu of excise (CVD) :** This is equivalent to the excise duty applicable on like goods manufactured in India. and is calculated on the landed value and the basic customs duty. However, on most of the consumer goods intended for retail sale, duty is calculated based on the maximum retail price (MRP) printed on their packs.

**Additional Duty of Customs in lieu of Sales Tax / VAT (ADC) :** In addition, all imports w.e.f. 01.03.2006 are chargeable to an

## ***Other Significant Taxes***

additional duty of customs @ 4% in lieu of sales tax/VAT with few exceptions. The exemptions inter alia include: -

Goods which are fully exempt from basic customs duty and Additional Duty of Customs in lieu of excise.

Petroleum crude, kerosene for PDS, LPG for domestic supply, petrol, diesel, coal & coke.

Goods for export promotion schemes under which imports are allowed at zero duty.

Imports by 100% Export Oriented Units (EOUs) and units in EHTPs/STPs or SEZs.

DTA clearance of EOUs / EHTPs / STPs / SEZ units, provided such goods are not exempt from sales tax / VAT.

Education Cess (EC) @3% is also levied on the aggregate of duties of customs (except safeguard duty, countervailing duty and antidumping duty). Goods attracting customs duties at bound rates under international commitments (for example, IT Agreement, Indo-US Textile Agreement) have been exempted from these cess.

## **Service Tax**

Service tax is a tax levied on certain specified taxable services rendered at the rate of 12% of the gross value of taxable services. In addition, a cess @3% is also leviable on the services. The scope and applicability of service tax has been changing on a year to year basis. Currently, there are nearly 107 services under the gamut of service tax.

However, a service provider is not required to pay service tax if the aggregate value services rendered does not exceed Rs.10 lac (Rs. 1 million) in any financial year subject to the fulfillment of the certain conditions.

In terms of the provisions, as amended from time to time, service provider is required to be registered with the jurisdictional service

## ***Doing Business In India***

tax authorities. However, he need not register if the value of service provided does not exceed Rs. 9 lac.

The Cenvat Credit Rules allow a service provider to avail and utilize the credit of additional duty of customs/excise duty (paid on inputs/capital goods used in rendering output services) for the payment of service tax. This is in addition to the availing and utilization of credit of service tax on input services for the discharge of output service tax liability.

Generally, the liability to deposit service tax lies with the service provider. In case the service provider is a non-resident, not having an office in India, the person liable to pay the service tax is the service recipient in India. The services so received shall be treated as input services and shall not to be treated as output services for the purpose of availing of CENVAT credits on inputs / input services.

For more information please visit: <http://www.servicetax.gov.in>

## **Sales Tax<sup>9</sup>**

Sales tax is levied on the sale of movable goods. This tax is imposed by either the central government or the state government depending upon whether the sales are in the nature of interstate sales or intrastate sales.

For intrastate sales, the relevant state sales tax legislation would be applicable. The levy of sales tax and the rates applicable thereto, therefore, varies according to the sales tax law of the relevant state.

For interstate sale, the provisions under the Central Sales Tax Act would be applicable. The rates of Central Sales Tax (CST) vary between 3%, 10% or the State sales tax rate, whichever is higher. Where goods are bought and sold by registered dealers, for use as inputs in the manufacture of other goods or activities (such as mining or telecommunication networks), the rate of sales tax is 3%, provided Form 'C' is issued by the purchasing dealer. In the absence of Form 'C', the rate would be 10% or the State sales tax rate, whichever is higher.

## **Value Added Tax**

### **Introduction**

State level sales tax was replaced by Value Added Tax w.e.f. April 1, 2005 in a majority of Indian states. The essence of Value Added Tax (VAT) is in providing set-off for the tax paid earlier on purchases (input tax credit) and eliminate the cascading effect. This input tax credit in relation to any period means setting off the amount of input tax against the amount of tax paid on his sales (output tax). VAT is based on the value addition to the goods and the related VAT liability is calculated by deducting input tax credit from output tax collected on the sales during the payment period.

**Objectives with which VAT has been implemented in India are briefly enumerated below:**

Set-off available on input tax as well as tax paid on previous purchases.

Deletion of related taxes on act of sale, such as turnover tax, surcharge, additional surcharge, entry tax etc.

Rationalization on tax burden.

With elimination of cascading effect, consumer prices expected to fall in general.

Self-assessment by dealers.

Higher revenue growth for states.

### **Important features of VAT such as**

Replacement of the Sales Tax levied by the States (though some other local taxes like octroi, mandi cess etc. may continue);

The Revenue Neutral Rate (RNR) and other rates;

The tax to be a multi-point levy, with the tax paid on inputs within the State being set off against the tax payable on the dealer's sales (subject to a threshold limit);

## ***Doing Business In India***

Phasing out of Central Sales Tax in 4 years; adoption of uniform classification, etc.

### **Coverage**

In general, all the goods, will be covered under VAT and will get the benefit of input tax credit. Liquor, lottery tickets, petrol, diesel, aviation turbine fuel and other motor spirit shall be outside VAT but continue to be taxed under the Sales Tax Act or any other State Act.

### **Vat Rates**

Only two basic VAT rates of 4% and 12.5%.

4% category comprises items of basic necessities such as medicines and drugs, all agricultural and industrial inputs, capital goods etc.

Special VAT rate of 1% has been prescribed for gold/silver ornaments and precious stones.

Certain goods shall be under tax-exempted goods category which are considered as goods of local social importance, and items which have social implications.

The remaining commodities, common for all the States will fall under the general VAT rate of 12.5%.

For more information please visit: [http://finance.indiamart.com/taxation/central\\_vat.html](http://finance.indiamart.com/taxation/central_vat.html)

### **Works Contract Tax**

The works contract tax is levied on the transfer of property in goods involved in the course of the execution of a works contract. Contracts for the construction of bridges, power plants, etc. or for repairs, erection, etc. could attract the works contract tax.

Basically, the tax is levied only on the value of the material supplied under the contract and thus the value of labour and services are allowed as deductions. In addition, various other deductions are also available and these vary from one state to

## ***Other Significant Taxes***

another. Most states also provide for a scheme of composition whereby, the works contract tax is levied at a fixed rate on the entire value of the contract without any deductions. The rate of tax is either equivalent to the rate of the sales tax on similar goods or in some cases a specific rate of tax is prescribed, regardless of the nature of goods supplied. Further, the law generally requires the contractee to deduct the works contract tax at source from all payments made to the contractor. The rate of such deduction varies from one state to another.

### **Octroi / Entry Tax**

Octroi/entry tax is a levy on the entry of goods into a particular municipal/state jurisdiction for use, consumption or sale within such jurisdiction. Some of the states allow set off of the entry tax paid with the sales tax payable on the sale of goods. The rate of the above tax on different products may vary from state to state.

### **Research and Development Cess**

Under the Research and Development Cess Act, 1986 cess is levied by the central government, at a rate of 5 per cent on the import of technology into India. Such cess is required to be paid by the importer on the payments made for such imports.

The term 'technology' is defined under the above-mentioned legislation to mean any special or technical knowledge or any special service required for any purpose whatsoever by an industrial concern under any foreign collaboration, and includes designs, drawings, publications and deputation of technical personnel.

### **Stamp Duty**

Almost all documents, such as bills of exchange, promissory notes, insurance policies, contracts effecting transfer of shares, debenture, and conveyances for transfer of immovable property, executed in India are chargeable to Stamp Duty at various rates. The rate structure is decided by the states. The legal enforceability of any document requiring to bear stamp duty is considered by any authority only when it bears stamp at the prescribed rate

### ***Doing Business In India***

applicable in the place of its execution. Transfer of shares in India is subject to a stamp duty levy @ 0.25% on market value.

For more information please visit <http://www.salestaxindia.com>

## Chapter – 7

# Foreign Exchange Management Act, 1999

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### Intent & Scope

The Foreign Exchange Management Act, 1999 (FEMA) deals with cross border investments, foreign exchange transactions and transactions between residents and non-residents. It has replaced the erstwhile Foreign Exchange Regulation Act, 1973 (FERA) with effect from June 1, 2000.

The focus under FEMA is on “management” of foreign exchange as against “regulation”. This fact is borne from the preamble to FEMA, which states that it is: **"An Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India"**. It reflects the changed philosophy of the Government to act as a **facilitator** rather than to act as a controller or regulator.

FEMA is a very small statute, it contains just 49 sections. The statute merely lays down the broad guidelines; the actual undertaking of transactions is regulated through Rules, Regulations, Notifications and clarifying Circulars issued from time to time.

The operation of FEMA is akin to any other commercial law. If guidelines, rules etc. are followed, the person can undertake the transaction without any approvals. If proposed transactions fall outside the guidelines, one will have to take necessary approvals.

FEMA is a civilized law compared to FERA. Primarily, the consequence of any violation is a penalty. If penalty is not paid, then there can be prosecution.

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FEMA extends to the whole of India. It also applies to all branches, offices and agencies outside India, which are owned or controlled by a person resident in India.

## **Important Terms Under FEMA**

**Capital Account Transaction** means a transaction which: –

Alters foreign assets and foreign liabilities (including contingent liabilities) of Indian residents.

Alters Indian assets and Indian liabilities of Non-residents.

Is a Specified transaction listed in section 6(3).

Essentially, this is an economic definition and not an accounting or legal definition. It is intended to cover cross border investments, cross border loans and the transfer of wealth across borders. RBI has been empowered to regulate the capital account transactions. Unless the transaction is permitted as per regulations, Foreign Exchange (FX) cannot be drawn for the same.

Capital account transactions though freed to a great extent, continue to be regulated by RBI. Unless RBI permits by way of rules or specific approvals, transactions cannot be undertaken. **But there are two very important purposes for which RBI cannot impose any restrictions viz. drawing of foreign exchange for the repayment of any loans and for replenishing depreciation of direct investments in the ordinary course of business.** (Section 6).

**Current Account Transaction** means all transactions, which are not capital account transactions. Specifically, it includes: –

Business transactions between residents and non-residents.

Short-term banking and credit facilities in the ordinary course of business.

Payments towards interest on loans and by way of income from investments.

## **Foreign Exchange Management Act, 1999**

Payment of the expenses of parents, spouse or children living abroad or expenses on their foreign travel, medical and education.

Gifts .

Primarily there are no restrictions on current account transactions. A person may sell or draw foreign exchange freely for his current account transactions, except in a few cases where limits have been prescribed (Section 5). The Central Government has the power to regulate current account transactions. Unless the transaction is restricted, FX can be drawn for the same.

**Person** includes: –

- a. an individual
- b. a Hindu Undivided Family (HUF)
- c. a company
- d. a firm
- e. an association of persons or body of individuals, whether incorporated or not
- f. every artificial judicial person not falling in any of the above sub-clauses
- g. any agency, office or branch owned or controlled by such a person.

**Resident / Non-Resident:** – If an individual stays in India for more than 182 days during the course of the preceding financial year, he will be treated as a **person resident in India**. There are a few exceptions as under:

**If a person goes/stays outside India** for (a) taking up employment, or (b) carrying on business or vocation, or (c) for any other purpose for an uncertain period; he will be treated as a **person resident outside India (non-resident)**. (It has

## ***Doing Business In India***

been clarified that the students going abroad for further studies will be regarded as non-residents.).

**If a person comes to/stays in India** for (a) taking up employment, or (b) carrying on business or vocation, or (c) for any other purpose for an uncertain period; he will be treated as a **person resident in India**.

The term financial year is not defined, but should normally mean a twelve-month period beginning from April 1 and ending on March 31 next.

Following persons (other than individuals) will be treated as **person resident in India**:

Person or body corporate which is registered or incorporated in India.

An office, branch or agency in India, even if it is owned or controlled by a person resident outside India.

An office, branch or agency outside India, if it is owned or controlled by a person resident in India.

The definition is, however, inadequate to define residential status of a firm, an HUF, a trust or any entity which does not have to be registered.

**Conversely, a non resident** means a person who is not a resident in India.

## **Important Features**

All **dealings in foreign exchange** or foreign security can be done only through an authorized person if permitted by FEMA, rules & regulations framed thereunder, or by general or special permission of RBI. Further **no payments** can be made by a resident to a non-resident unless permitted under FEMA (section 3).

## **Permissible Transactions by Non-Residents**

### **Foreign Investment in India**

The Industrial Policy governs the Foreign Direct Investment in India. Both – FEMA and industrial Policy – should be read together to have a full picture. Sectoral limits for Foreign Direct Investments and Investments by NRIs are almost at par except the sectors of Housing and Real Estate Development, and Domestic Airlines. India has virtually opened the doors for foreigners to invest in India. Various avenues and policy for foreign investment are covered in brief.

Investment is generally allowed in an Indian company, which in turn does actual business. Branches, liaison offices and project offices can be opened for limited purposes. In Special Economic Zone (SEZs), non-residents can invest as a branch/unit, Joint Venture or a Wholly Owned Subsidiary on an automatic basis. Please see Industrial Policy for more details. Investment in a proprietorship, partnership or Association of Persons, is subject to RBI permission in certain cases.

Investment can be made by an incorporated entity, or individuals. Unincorporated entities cannot invest. However, citizens and incorporated entities of Pakistan are not permitted to invest under the Foreign Direct Investment Scheme, while citizens and incorporated entities of Bangladesh can invest only after obtaining prior approval from the Foreign Investment Promotion Board.

Investment in India can be made in almost **ANY** sector without any approval from any authority. This is known as the "Automatic route". Even for the small list of sectors, which are not under the "automatic route", a specific approval can be taken from Secretariat of Industrial Assistance (SIA) / Foreign Investment Promotion Board (FIPB).

“Automatic route” is available for all sectors except: -

- **Sectors where an Industrial License is required (refer to Industrial Policy) i.e. in case of: -**

## ***Doing Business In India***

- i. Distillation and brewing of alcoholic drinks.
  - ii. Cigars and cigarettes of tobacco and manufactured tobacco substitutes;
  - iii. Electronic Aerospace and defence equipment: all types;
  - iv. Industrial explosives, including detonating fuses, safety fuses, gun powder, nitrocellulose and matches;
  - v. Hazardous chemicals;
    - a. Hydrocyanic acid and its derivatives
    - b. Phosgene and its derivatives
    - c. Isocyanates and di-isocyanates of hydrocarbon, not elsewhere specified.
- **List of activities or items in which FDI is prohibited**
- i. Retail Trading (except single brand product retailing)
  - ii. Atomic Energy
  - iii. Lottery Business
  - iv. Gambling and Betting
  - v. Business of chit fund
  - vi. Nidhi Company
  - vii. Trading in Transferable Development Rights (TDRs).
  - viii. Activity/sector not opened to private sector investment.
- **List of activities which require prior permission**
- 1. Where the foreign investor has an existing Joint Venture or technology transfer / trademark agreement in the 'same' field.

## ***Foreign Exchange Management Act, 1999***

2. Foreign investment exceeding 24% in case of items, which are, reserved for small sector undertakings. These items include biscuits, toys, woodwork etc. - which does not require high technology.

**- The investment is not within the sectoral guidelines.**

In case the foreign investment falls within the above-restricted list or does not fall within the sector specific investment limits prescribed for automatic approval, an approval needs to be obtained from SIA / FIPB by satisfying them about the benefits to India. Powers of SIA / FIPB are discretionary.

It is also necessary that the foreign investor should not have any other investment or collaboration or trademarks agreement with an Indian resident in the same field. Otherwise, an FIPB approval is required. This requirement for obtaining FIPB approval will not be applicable to FDI proposals relating to the IT sector as well as to FDI by International Financial Institutions such as Asian Development Bank (ADB), International Finance Corporation (IFC), Commonwealth Development Corporation (CDC), Deutsche Entwicklungsgesellschaft (DEG), etc., as investment made by International Financial Institutions is generally without an element of technical / trademark collaboration. Further, the requirement for obtaining an approval does not apply to an investment by Venture Capital Funds registered with SEBI; where investment by joint venture party is less than 3%; and where the existing venture is sick or defunct.

Investments can be made in Indian companies' shares and convertible debentures only. Business can be done through the companies.

Investment in trading companies (retail trading is not permitted except in 'Single Brand' products) can be made only up to 51% under the automatic route. Remittance of the dividend in respect of such investment is allowed only after the company secures registration as an Export / Trading / Star Trading House.

## ***Doing Business In India***

Investment in retail trading companies engaged in retail trade of 'Single Brand' products can be made up to 51 % under the approval route (after obtaining prior approval from the Secretariat of Industrial Assistance (SIA)) subject to the following conditions: -

- (1) Products to be sold should be of a 'Single Brand' only.
- (2) Products should be sold under the same brand internationally.
- (3) 'Single Brand' product retailing will cover only products that are branded during manufacturing.

Automatic Route is also available for the acquisition of existing shares if the specified conditions are satisfied.

In case of the investments under "Automatic Route" intimation has to be made to RBI about details of investors within 30 days of receipt of funds. Within 30 days of allotment of securities, Form FC-GPR has to be filed with RBI. A company secretary's certificate also has to be filed in the specified format confirming the fulfillment of various legal requirements. A Chartered Accountant's or statutory auditor's certificate indicating the manner of arriving at the price at which the securities have been issued, is also required to be submitted.

## **Foreign Institutional Investors (FIIs)**

FIIs such as Pension Funds, Investment Trusts, Asset Management Companies, etc., who have obtained registration from SEBI, are permitted to invest on full repatriation basis in the Indian Primary & Secondary Stock Markets (including OTCEI) as well as in unlisted, dated Government Securities, Treasury Bills, Units of Domestic Mutual Funds and commercial paper without any lock-in period.

Limits on the Investment in the Primary & Secondary Markets are: -

- a) The total holdings of all FIIs in any Company will be subject to a ceiling of 24 % of its total paid-up capital. The Company concerned can raise this ceiling of 24 % up to the sectoral cap / statutory ceiling as applicable.

## ***Foreign Exchange Management Act, 1999***

- b) A single FII cannot hold more than 10% of the paid-up capital of any Company.
- c) A FII may trade in all exchange trade derivative contracts approved by SEBI from time to time subject to the limits as prescribed in by SEBI.

### **Foreign Venture Capital Investor (FVCI)**

A registered Foreign Venture Capital Investor (FVCI) may, through the Securities and Exchange Board of India, apply to the Reserve Bank for the permission to invest in Indian Venture Capital Undertaking (IVCU) or in a VCF or in a scheme floated by such VCFs. The registered FVCI may purchase equity / equity linked instruments/ debt / debt instruments, debentures of a IVCU or of a VCF through Initial Public Offer or Private Placement or in units of schemes/funds set up by a VCF. The amount of consideration for investment in VCFs/IVCUs shall be paid out of inward remittance from abroad through normal banking channels or out of funds held in an account maintained with the designated branch of an authorized dealer in India. There is no limit on investments. But no FVCI shall purchase shares or convertible debentures of an Indian Company engaged in the print media sector.

### **International Financial Institutions**

Multilateral Development Banks, which are specifically permitted by the Government to float rupee bonds in India, are permitted to purchase Government dated securities.

For more information please visit:<http://www.ciel.org/lfi/programifi.html>

### **Investments by Non-Resident Employees of Indian Companies, Etc.**

An Indian Company can issue shares up to 5 % of its paid-up capital to its employees or employees of its overseas joint venture or wholly owned subsidiary resident outside India, under a SEBI approved Employees Stock Options Scheme. These shares cannot, however, be issued to the employees who are citizens of Pakistan.

## ***Doing Business In India***

The chart below gives the guidelines in brief for foreign direct investment.

### **Sector Specific Guidelines for Foreign Direct Investment**

In the following sectors/activities, FDI is allowed up-to the limit indicated below subject to other conditions as indicated.

<b>Sr. No.</b>	<b>Sector/Activity</b>	<b>FDI Cap / Equity</b>	<b>Entry Route</b>	<b>Other conditions</b>
<b>I</b>	<b>AGRICULTURE</b>			
1.	Floriculture, Horticulture, Development of Seeds, Animal Husbandry, Pisciculture, Aquaculture and Cultivation of Vegetables & Mushrooms under controlled conditions and services related to agro and allied sectors.  <u>Note:</u> Besides the above, FDI is not allowed in any other agricultural sector/activity.	100%	Automatic	
2.	<b>Tea Sector,</b> including tea plantation	100%	FIPB	Subject to divestment of 26% equity in favour of

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	Note: Besides the above, FDI is not allowed in any other plantation sector/activity.			Indian partner/Indian public within 5 years and prior approval of State Government concerned in case of any change in future land use.
<b>II</b>	<b>INDUSTRY</b>			
<b>II A</b>	<b>MINING</b>			
3.	<b>Mining</b> covering exploration and mining of diamonds & precious stones; gold, silver and minerals.	100%	Automatic	Subject to Mines & Minerals (Development & Regulation) Act, 1957 <a href="http://www.mines.nic.in">www.mines.nic.in</a> Press Note 18 (1998) and Press Note 1 (2005) are not applicable for setting up 100% owned subsidiaries in so far as the mining sector is concerned, subject to a declaration from the applicant that he has no

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				existing joint venture for the same area and /or the particular mineral.
4.	<b>Coal &amp; Lignite mining</b> for captive consumption by power projects, and iron & steel, cement production and other eligible activities permitted under the Coal Mines (Nationalisation) Act, 1973.	100%	Automatic	Subject to provisions of Coal Mines (Nationalization) Act, 1973 www.coal.nic.in
5.	<b>Mining and mineral</b> separation of titanium bearing minerals and ores, its value addition and integrated activities. <u>Note</u> : FDI will not be allowed in the mining of “prescribed substances” listed in Government of India notification No. S.O. 61(E) dt. 18.1.2006 issued by the Department of Atomic Energy under the Atomic Energy Act, 1962.	100%	FIPB	Subject to sectoral regulations and the Mines and Minerals (Development & Regulation) Act, 1957 and the following conditions- i. value addition facilities are set up within India along with transfer of technology; ii. disposal of tailing during the mineral

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				separation shall be carried out in accordance with the regulations framed by the Atomic Energy Regulatory Board such Atomic Energy (Radiation Protection) Rules 2004 and the Atomic Energy (Safe Disposal of Radioactive Wastes) Rules 1987.
<b>II B</b>	<b>MANUFACTURING</b>			
6.	<b>Alcohol-Distillation &amp; Brewing</b>	100%	Automatic	Subject to the license by appropriate authority
7.	<b>Cigars &amp; Cigarettes-Manufacture</b>	100%	FIPB	Subject to industrial license under the Industries (Development & Regulation) Act, 1951
8.	<b>Coffee &amp; Rubber processing &amp; warehousing</b>	100%	Automatic	

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9.	<b>Defence production</b>	26%	FIPB	Subject to licensing under Industries (Development & Regulation) Act, 1951 and guidelines on FDI in production of arms & ammunition.
10.	<b>Hazardous chemicals,</b> viz., hydrocyanic acid and its derivatives; phosgene and its derivatives; and isocyanates and diisocyanates of hydrocarbon.	100%	Automatic	Subject to industrial license under the Industries (Development & Regulation) Act, 1951 and other sectoral regulations.
11.	<b>Industrial explosives</b> - Manufacture	100%	Automatic	Subject to industrial license under Industries (Development & Regulation) Act, 1951 and regulations under Explosives Act, 1898.
12.	<b>Drugs &amp; Pharmaceuticals</b> including those involving the use of recombinant DNA technology	100%	Automatic	

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<b>II C</b>	<b>POWER</b>			
13.	<b>Power</b> including generation (except Atomic energy); transmission, distribution and Power Trading.	100%	Automatic	Subject to the provisions of the Electricity Act, 2003 <a href="http://www.powermin.nic.in">www.powermin.nic.in</a>
<b>III</b>	<b>SERVICES</b>			
14.	<b>CIVIL AVIATION SECTOR</b>			
(i)	<b>Airports-</b>			
a.	Greenfield projects	100%	Automatic	Subject to sectoral regulations notified by Ministry of Civil Aviation <a href="http://www.civilaviation.nic.in">www.civilaviation.nic.in</a>
b.	Existing projects	100%	FIPB beyond 74%	Subject to sectoral regulations notified by Ministry of Civil Aviation <a href="http://www.civilaviation.nic.in">www.civilaviation.nic.in</a>
(ii)	<b>Air Transport Services including Domestic Scheduled Passenger Airlines; Non-Scheduled Airlines; Chartered Airlines; Cargo Airlines; Helicopter and Seaplane Services</b>			
c.	<b>Scheduled Air Transport Services/</b>	49%- FDI; 100%-	Automatic	Subject to no direct or indirect

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	<b>Domestic Scheduled Passenger Airline</b>	for NRI investment		participation by foreign airlines and sectoral regulations.
d.	<b>Non-Scheduled Air Transport Service/ Non-Scheduled airlines, Chartered airlines, and Cargo airlines</b>	74%-FDI 100%-for NRIs investment	Automatic	Subject to no direct or indirect participation by foreign airlines in Non-Scheduled and Chartered airlines. Foreign airlines are allowed to participate in the equity of the companies operating Cargo airlines. Also subject to sectoral regulations.
e.	<b>Helicopter Services/Seaplane services requiring DGCA approval</b>	100%	Automatic	Foreign airlines are allowed to participate in the equity of the companies operating Helicopter and seaplane airlines. Also subject to sectoral regulations.
(iii)	<b>Other services under Civil Aviation Sector</b>			

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f.	<b>Ground Handling Services</b>	74%- FDI  100%- for NRIs investm ent	Automatic	Subject to sectoral regulations and security clearance.
g.	<b>Maintenance and Repair organizations; flying training institutes; and technical training institutions</b>	100%	Automatic	
15.	<b>Asset Reconstruction Companies</b>	49% (only FDI)	FIPB	Where any individual investment exceeds 10% of the equity, the provisions of the Section 3(3)(f) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 should be complied with. <a href="http://www.finmin.nic.in">www.finmin.nic.in</a>
16.	<b>Banking - Private sector</b>	74% (FDI+FII)	Automatic	Subject to the guidelines for setting up

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				branches / subsidiaries of foreign banks issued by RBI. <a href="http://www.rbi.org.in">www.rbi.org.in</a>
17.	<b>Broadcasting</b>			
a.	FM Radio	FDI +FII investment up to 20%	FIPB	Subject to the Guidelines notified by Ministry of Information & Broadcasting. <a href="http://www.mib.nic.in">www.mib.nic.in</a>
b.	Cable network	49% (FDI+ FII)	FIPB	Subject to Cable Television Network Rules (1994) Notified by Ministry of Information & Broadcasting. <a href="http://www.mib.nic.in">www.mib.nic.in</a>
c.	Direct-To-Home	49% (FDI+ FII) Within this limit, FDI component not to exceed 20% .	FIPB	Subject to the guidelines issued by Ministry of Information & Broadcasting. <a href="http://www.mib.nic.in">www.mib.nic.in</a>
d.	Setting up hardware facilities	49% (FDI+	FIPB	Subject to Up-linking Policy

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	such as up-linking, HUB, etc	FII)		notified by Ministry of Information & Broadcasting. <a href="http://www.mib.nic.in">www.mib.nic.in</a>
e.	Up-linking a News & Current Affairs TV Channel	26% FDI+FII	FIPB	Subject to the guidelines issued by Ministry of Information & Broadcasting. <a href="http://www.mib.nic.in">www.mib.nic.in</a>
f.	Up-linking a Non-news & Current Affairs TV Channel	100%	FIPB	Subject to the guidelines issued by Ministry of Information & Broadcasting. <a href="http://www.mib.nic.in">www.mib.nic.in</a>
18.	<b>Commodity Exchanges</b>	49% (FDI+ FII) Investment by Registered FII under PIS will be limited to 23% and Investment under FDI Scheme limited	FIPB	FII purchases shall be restricted to secondary market only. No foreign investor/entity, including persons acting in concert, will hold more than 5% of the equity in these companies.

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		to 26%		
19.	<p><b>Construction Development projects</b>, including housing, commercial premises, resorts, educational institutions, recreational facilities, city and regional level infrastructure, townships.</p> <p><b>Note:: FDI is not allowed in Real Estate Business.</b></p>	100%	Automatic	<p>Subject to the conditions notified vide Press Note 2 (2005 Series) including:</p> <p>a. minimum capitalization of US\$ 10 million for wholly owned subsidiaries and US\$ 5 million for a joint venture. The funds would have to be brought within six months of commencement of business of the Company.</p> <p>b. Minimum area to be developed under each project- 10 hectares in case of development of serviced housing plots; and built-up</p>

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				<p>area of 50,000 sq. mts. in case of a construction development project; and any of the above in case of a combination project.</p> <p>[<u>Note 1</u>: For investment by NRIs, the conditions mentioned in Press Note 2 / 2005 are not applicable.</p> <p>Note 2: For investment in SEZs, Hotels &amp; Hospitals, conditions mentioned in Press Note 2(2005) are not applicable].</p>
20.	<p><b>Courier services</b> for carrying packages, parcels and other items which do not come within the ambit of the Indian Post Office Act, 1898.</p>	100%	FIPB	<p>Subject to existing laws and exclusion of the activity relating to distribution of letters, which is exclusively reserved for the State.</p> <p><a href="http://www.indiapost.gov.in">www.indiapost.gov.in</a></p>

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21.	<b>Credit Information Companies.</b>	49 % (FDI+ FII) Investment by Registered FII under PIS will be limited to 24% only in the CICs listed at the Stock Exchanges within the overall limit of 49% foreign investment.	FIPB	Foreign Investment in CIC will be subject to Credit Information Companies (Regulation) Act, 2005. FII investment will be subject to the conditions that: (a) No single entity should directly or indirectly hold more than 10% equity. (b) Any acquisition in excess of 1% will have to be reported to RBI as a reporting requirement; and (c) FIIs investing in CICs shall not seek a representation on the Board of Directors based upon their shareholding.
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22.	<b>Industrial Parks both setting up and in established Industrial Parks.</b>	100%	Automatic	<p>Conditions in Press Note 2(2005) applicable for the construction development projects would not apply provided the Industrial Parks meet with the under-mentioned conditions-</p> <p>i. it would comprise of a minimum of 10 units and no single unit shall occupy more than 50% of the allocable area;</p> <p>ii. the minimum percentage of the area to be allocated for industrial activity shall not be less than 66% of the total allocable area.</p>
23	<b>Insurance</b>	26%	Automatic	<p>Subject to the licensing by the Insurance Regulatory &amp; Development Authority www.irda.nic.in</p>

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24.	<b>Investing companies in infrastructure / services sector (except telecom sector).</b>	100%	FIPB	Where there is a prescribed cap for foreign investment, only the direct investment will be considered for the prescribed cap and foreign investment in an investing company will not be set off against this cap provided the foreign direct investment in such investing company does not exceed 49% and the management of the investing company is with the Indian owners.
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25.	<b>Non Banking Finance Companies</b>			
i) ii) iii) iv) v) vi) vii) viii) ix) x) xi) xii) xiii) xiv) xv) xvi) xvii) xviii)	Merchant Banking Underwriting Portfolio Management Services Investment Advisory Services Financial Consultancy Stock Broking Asset Management Venture Capital Custodial Services Factoring Credit Rating Agencies Leasing & Finance Finance Housing Finance Forex Broking Credit card Business Money changing business Micro credit Rural credit	100%	Automatic	Subject to: a. minimum capitalization norms for fund based NBFCs - US\$ 0.5 million to be brought upfront for FDI up to 51%; US\$ 5 million to be brought upfront for FDI above 51% and up to 75%; and US\$ 50 million out of which US\$ 7.5 million to be brought upfront and the balance in 24 months for FDI beyond 75% and up to 100%. b. minimum capitalization norms for non-fund based NBFC activities- US\$ 0.5 million. c. foreign investors can set up 100% operating

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				<p>subsidiaries without the condition to disinvest a minimum of 25% of its equity to Indian entities subject to bringing in US\$ 50 million without any restriction on the number of operating subsidiaries without bringing additional capital.</p> <p>d. joint venture operating NBFC's that have 75% or less than 75% foreign investment will also be allowed to set up subsidiaries for undertaking other NBFC activities subject to the subsidiaries also complying with the applicable minimum capital inflow.</p>
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				e. compliance with the guidelines of RBI.
<b>26.</b>	<b>Petroleum &amp; Natural Gas sector</b>			
a.	Refining	49% in case of PSUs 100% in case of Private companies.	FIPB (in case of PSUs) Automatic (in case of private companies)	Subject to Sectoral policy <a href="http://www.petroleum.nic.in">www.petroleum.nic.in</a> and <u>no divestment or dilution of domestic equity in the existing PSUs.</u>
b.	Other than Refining and including market study and formulation; investment/ financing; setting up infrastructure for marketing in Petroleum & Natural Gas sector.	100%	Automatic	Subject to sectoral regulations issued by Ministry of Petroleum & Natural Gas <a href="http://www.petroleum.nic.in">www.petroleum.nic.in</a>
<b>27.</b>	<b>Print Media</b>			
a.	Publishing of <b>newspaper and periodicals</b> dealing with news and current affairs.	26%	FIPB	Subject to the Guidelines notified by Ministry of Information & Broadcasting. <a href="http://www.mib.nic.in">www.mib.nic.in</a>

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b.	<b>Publishing of scientific magazines/ specialty journals/ periodicals.</b>	100%	FIPB	Subject to the guidelines issued by Ministry of Information & Broadcasting. <a href="http://www.mib.nic.in">www.mib.nic.in</a>
c.	<b>Publishing of facsimile edition of foreign newspapers.</b>	100% by the owner of the original foreign newspaper (s) whose facsimile edition is proposed to be brought out in India.	FIPB	Publication of facsimile edition of foreign newspapers can be undertaken only by an entity incorporated or registered in India under the provisions of the Companies Act, 1956.  Subject to the guidelines issued by Ministry of Information & Broadcasting. <a href="http://www.mib.nic.in">www.mib.nic.in</a>
d.	<b>Publishing of Indian editions of foreign magazines dealing with news and current affairs</b>	up to 26% (FDI + investment by NRIs/ PIOs/	FIPB	'Magazine', for the purpose of these guidelines, will be defined as a periodical publication, brought out on a non-daily

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		FII)		<p>basis, containing public news or comments on public news.</p> <p>Subject to the guidelines issued by Ministry of Information &amp; Broadcasting.</p> <p><a href="http://www.mib.nic.in">www.mib.nic.in</a></p>
<b>28.</b>	<b>Telecommunications</b>			
a.	<p>Basic and cellular, Unified Access Services, National/ International Long Distance, V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS) and other value added telecom services</p>	<p>74% (Including FDI, FII, NRI, FCCB -s, ADRs, GDRs, convertible preference shares, and proportionate foreign equity in Indian prom</p>	<p>Automatic up to 49%. FIPB beyond 49%.</p>	<p>Subject to the guidelines notified in the PN 3(2007).</p>

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		oters/ invest -ing Comp any.		
b.	ISP with gateways, radio- paging, end-to-end bandwidth.	74%	Automatic up to 49%. FIPB beyond 49%.	Subject to the licensing and security requirements notified by the Department of Telecommunications. <a href="http://www.dotindia.com">www.dotindia.com</a>
c.	(a) ISP without gateway, (b) infrastructure provider providing dark fibre, right of way, duct space, tower (Category I); (c) electronic mail and voice mail;	100%	Automatic up to 49%. FIPB beyond 49%.	Subject to the condition that such companies shall divest 26% of their equity in favour of Indian public in 5 years, if these companies are listed in other parts of the world. Also subject to the licensing and security requirements, where required. <a href="http://www.dotindia.com">www.dotindia.com</a>

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d.	Manufacture of telecom equipments.	100%	Automatic	Subject to sectoral requirements. www.dotindia.com
29.	<b>Trading</b>			
a.	Wholesale/cash & carry trading	100%	Automatic	Subject to the condition that the test marketing approval will be for a period of two years and Investment in setting up manufacturing facilities commences simultaneously with test marketing.  Subject to the guidelines for FDI in trading issued by Department of Industrial Policy & Promotion vide Press Note 3 (2006 Series).
b.	Trading for exports	100%	Automatic	
c.	Trading of items sourced from small scale sector	100%	FIPB	
d.	Test marketing of such items for which a company has approval for manufacture.	100%	FIPB	
e.	Single Brand product retailing.	51%	FIPB	
30.	<b>Satellites - Establishment and operation.</b>	74%	FIPB	Subject to Sectoral guidelines issued by

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				Department of Space/ISRO. <a href="http://www.isro.org">www.isro.org</a>
31.	<b>Special Economic Zones and Free Trade Warehousing Zones</b> covering setting up of these Zones and setting up units in the Zones.	100%	Automatic	Subject to Special Economic Zones Act, 2005 and the Foreign Trade Policy. <a href="http://www.sezindia.nic.in">www.sezindia.nic.in</a>

Note: - In sectors / activities not listed above or not prohibited or not requiring a prior Government approval, FDI is permitted up to 100 % under the automatic route subject to sectoral rules / regulations applicable.

## **Investments By NRI/PIO-**

NRIs can invest in shares and convertible debentures of Indian companies. Foreign investment policy for foreigners applies equally to NRI investment on a repatriation basis. There are only two sectors – Real Estate Development and Domestic Airlines – where investment facilities are different for NRIs and foreigners.

Full repatriation is permitted where the investment is made in foreign exchange by the NRI. Repatriation facility is not available for the investments made in Indian Rupees through NRO accounts of the NRI. It should be noted that while capital cannot be repatriated, income on the investment can be repatriated. Further, NRIs are allowed to remit up to US\$ 1 million per financial year, out of their funds in NRO account, or sale of investments made on non-repatriation basis.

RBI has granted general permission to NRI/PIO to acquire shares from other NRI/PIO.

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NRIs from Nepal are also permitted to make direct investments on a repatriation basis if they remit funds in foreign exchange.

Portfolio Investment in Companies, other than those engaged in the print media sector, listed on Stock Exchanges Permitted up to 5% for each NRI subject to overall ceiling of 10% of the Company's capital. The Company concerned can increase this limit of 10% to 24%.

NRI may invest in exchange traded derivative contracts approved by SEBI from time to time out of INR funds held in India on a non-repatriation basis subject to the limits prescribed by SEBI.

NRI are permitted to invest up to 100% in PSE Capital/ PSU Bonds, Government Securities (other than Bearer Securities), units of UTI & instruments of domestic Mutual Funds (referred to in sec. 10 (23D) of the Income Tax Act, 1961).

Purchase of shares by NRI from existing resident shareholders is permitted under the automatic route if the specified conditions are satisfied.

NRI/PIO can invest on a non-repatriation basis in all sectors except plantations, nidhis, chit funds and real estate trading. In such cases the restrictions placed on investments made on a repatriation basis will also not apply. Investments in Companies, Partnership Firms or Proprietary Concerns can be made up to 100 % of the capital of these entities. These entities can in turn carry on permitted business activity. No prior permission from RBI is required. If they want to invest on repatriation basis they will have to seek a prior approval of SIA / FIPB, which may grant it at its discretion.

NRI can repatriate their investments which were originally made a non-repatriation basis under the automatic route if: -

- (1) The original investment was made in foreign exchange under the FDI Scheme and
- (2) The sector / activity in which the investment was made is on the automatic route for FDI.

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If the above two conditions are not met, approval will have to be obtained from FIPB for the conversion of non-repatriable equity into repatriable equity.

### **Remittances of Proceeds of the Assets By Foreign Nationals And Assets Acquired By NRI/PIO By Way Of Inheritance / Legacy / Settlement.**

Foreign nationals, NRI / PIO can remit up to US \$ 1 million per financial year out of balances held in NRO accounts / out of sale proceeds of assets / assets acquired by him by way of inheritance / legacy / settlement. As in the case of inheritance / legacy, remittance in case of settlement will be permitted only after the death of the settler. The person making the remittance will have to obtain a Chartered Accountant's certificate and / or give an undertaking in the prescribed form, as the case may be.

This facility is not available to the citizens of Pakistan, Bangladesh, Sri Lanka, China, Afghanistan, Iran, Nepal and Bhutan.

## **Temporary Foreign Currency Accounts in India**

Organizers of International Seminars, Conferences, Conventions, etc. who have been permitted by the concerned Administrative Ministry of the Government of India to hold such seminars, etc. are permitted to open temporary foreign currency accounts in India. The account is to be operated for the receipt of delegate fees from abroad and the payment of expenses including the payment to special invitees from abroad. The said account has to be closed immediately after the conference / event is over.

### **Investments Facilities in Brief**

<b>Avenues of Investment</b>	<b>Instruments</b>	<b>Category of Investors</b>
Public /Private Limited	Shares/Convertible Debentures/Preference	Non-Resident Indians/Non-

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Companies	shares	resident/Non-Resident Incorporated Entities/Foreign Institutional Investors
Public Limited Companies	NCDs	NRIs
Trading Companies	Shares/Convertible Debentures/Preference Shares	Non-residents
SSI Units	Shares/Convertible Debentures/Preference Shares	Non-residents
EOU or Unit in Free Trade Zone or in Export Processing Zone	Shares/Convertible Debentures/Preference Shares	Non-residents
Public/Private Ltd. Companies	Right Share	Existing shareholders / Renounces
Under Scheme of amalgamation/ merger	Shares/Convertible Debentures/Preference Shares	Existing shareholders

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Employees Stock Option	Shares/Convertible Debentures/Preference Shares	Employees resident outside India
ADR/GDR	Receipts	Non-residents
Portfolio Investment Scheme	Shares/Convertible Debentures	FII's & NRIs
Investment in Derivatives	Exchange Traded Derivatives	FII's (on a repatriation basis) & NRIs (on a non-repatriation basis)

## **ANNEXURE – 1**

# **INDIA'S DOUBLE TAXATION AVOIDANCE AGREEMENTS**

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India has DTAA agreement with the following countries. The same are reproduced below:

<b>S. No</b>	<b>Country DTAA between India and</b>	<b>S. No</b>	<b>Country DTAA between India and</b>	<b>S. No</b>	<b>Country DTAA between India and</b>
1	Armenia	2	Australia	3	Austria
4	Bangladesh	5	Belarus	6	Belgium
7	Brazil	8	Bulgaria	9	Canada
10	China	11	Cyprus	12	Czech Republic
13	Denmark	14	Finland	15	French Republic
16	Germany (Federal Republic of Germany)	17	Greece	18	Hungary
19	Iceland	20	Indonesia	21	Israel
22	Ireland	23	Italy	24	Japan
25	Jordan	26	Kazakhstan	27	Kenya
28	Korea (South)	29	Kuwait	30	Kyrgyz Republic

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31	Libya	32	Malaysia (Revised)	33	Malta
34	Mauritius	35	Mongolia	36	Morocco
37	Namibia	38	Nepal	39	Netherlands
40	New Zealand	41	Norway	42	Oman (Sultanate of)
43	Philippines	44	Poland	45	Portuguese Republic
46	Qatar	47	Romania	48	Russian Federation
49	Saudi Arabia	50	Singapore as amended vide Protocol signed on 29 <sup>th</sup> June 2005 effective from August 2005.	51	Slovenia
52	South Africa	53	Spain	54	Sri Lanka
55	Sudan	56	Sweden	57	Swiss Confeder- ation
58	Syria	59	Tanzania	60	Thailand
61	Trinidad and Tobago	62	Turkey	63	Turkmenistan
64	Uganda	65	Ukraine	66	United Arab Emirates

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67	United Arab Republic	68	United Kingdom	69	United States of America
70	Uzbekistan	71	Vietnam (Socialist Republic of Vietnam)	72	Zambia

### **Salient Features of Such Agreements**

The following salient features of the agreement are generally found in Indian agreements -

- (i) The agreements apply to residents of either country. In case, one is a resident of both the countries, there are tie-breaking tests laid down for determination of residence.
- (ii) Income from immovable property is taxable only in the state in which such property is situated.
- (iii) Profit derived from shipping or aircraft in international traffic is taxable in the state in which the effective management of enterprise is located.
- (iv) Basic right to tax dividend is with the country of residence but the source country has also been given the right to tax at the maximum rate agreed to.
- (v) What applies to dividend applies to income by way of interest, royalty and in some agreements to fees for technical services also.
- (vi) In agreements with some advanced countries like USA, UK and others, there is a concept of included services which are given the same treatment as royalty. Other services are taxable in source country only subject to the existence of a permanent establishment which require services for a minimum agreed period in source countries.
- (vii) Income from capital gain arising from immovable property is made taxable in the State in which the property is located. Gain from movable properties forming a part of PE are

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taxable where PE is situated. There is a divergence of the provisions with regard to the gains arising from a transfer of shares. In most of the agreements such gains can also be taxed in the State where the companies issuing shares are resident. In certain other agreements like with Mauritius, Cyprus, UAE etc. exclusive right is given to the country of residence.

- (viii) Profits and gains from business are taxable in the source country only if the business activities are carried on through a permanent establishment or, in case of service organizations, where services are rendered through a fixed base there. Only the income attributable to activities carried on through PE or fixed base are taxable in the source country.
- (ix) Provisions also exist for taxing right of two contracting States in respect of the income of entertainers / athletes, directors of companies, income by way of pension and social security payments, remuneration and pension from government service, dependent and independent personal services, payments received by students and apprentices, professors, teachers and research scholars and others.
- (x) Under the residuary provision, all income for which no specific provision exists are made taxable in the State of residence.

## ANNEXURE - 2

# KEY FACTORS

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<b>Main Cities and Business Areas</b>	New Delhi Mumbai ( <i>Bombay</i> ) Kolkata ( <i>Calcutta</i> ) Chennai ( <i>Madras</i> ) Bangalore Jaipur Hyderabad Kanpur Ahmedabad Pune Nagpur Bhopal Lucknow Surat
<b>Population &amp; Size</b>	India has a population of over 1 billion. It is the world's second most populated country. India covers a total area of 3,287,590 sq km ( <i>land area: 2,973,190 sq km</i> ).
<b>Climate</b>	Varies from tropical monsoon in the south to temperate in the north. June - October: summer monsoon from the south west. December - February: Northerly winds

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	reduce the rainfall bringing drought to until March - May.
<b>Currency</b>	The Rupee, abbreviated to Rs. 1 rupiah = 100 paise 1 Lakh = 100,000 rupees; 1 Crore = 100 Lakhs = 10 million rupees
<b>Government</b>	India is a federal republic, the world's largest democracy, with a President elected for five years. There are two Houses of Parliament -the upper is the Council of States, the lower the House of the People.  There are 28 states and 7 union territories.  Each state has an assembly and a Governor.
<b>Time Difference</b>	Winter - GMT + 5.5 hours Summer - GMT + 4.5 hours
<b>Opening Hours</b>	Banks: Mon. - Fri. 10.00 - 14.00 Sat. 10.00 - 12.00 Post Offices: Mon. - Fri. 10.00 - 17.00 Sat. morning only Government offices: Mon. - Fri. 10.00 - 13.00 and 14.00 - 17.00 Shops: Mon. - Sat. 10.00 - 19.30 (however, all big stores are open seven days a week from 10.00 21.00).

## **Annexure –2 Key Factors**

<b>Visa</b>	All visitors need a visa. Tourist visas available from embassies and consulates are normally valid for 90 days from the date of issue.
<b>Languages</b>	The official language is Hindi. There are 17 other official languages including Bengali, Gujarati and Urdu. <i>English enjoys associate status but is widely used in national, political, and commercial communication.</i>
<b>Emergency Telephone Numbers</b>	Police: 100 Fire: 101 Ambulance: 102





