Rödl & Partner

Guidance TamilNadu

INVESTMENT GUIDE INDIA

FRAMEWORK CONDITIONS FOR INVESTMENTS
WITH A FOCUS ON TAMIL NADU

2023

PROVIDE OUTLOOK

Greetings,

I am delighted to deliver this foreword on Rödl & Partner's guide, which contains a wealth of information on investing in Tamil Nadu. Aptly named the "Industrial Powerhouse of India", the State of Tamil Nadu is the 2nd largest economy in India and India's most industrialized State. It is home to various industries across almost every sector. From the Handlooms of Kanchipuram to the upcoming Spaceports in Kulashekarapatnam, Tamil Nadu has blazed a pioneering trail through every industrial sector to occupy the No.1 spot in India's growth story over the decades.

Businesses from all over the world today favour Tamil Nadu as an investment destination of choice. With its well established eco system in manufacturing, research and development spanning skilled workforce, SME supplier networks, strong linkages to global supply chains, quality transportation networks, logistical efficiency, proximity to ports, peaceful Industrial relations and acclaimed work culture, Tamil Nadu is a destination sought by global companies that want to set up business in India. The State proudly hosts not just more than 130 global Fortune 500 companies, but also nearly 40,000 SMEs. Although businesses worldwide flock to Tamil Nadu, the State's association with companies from the Federal Republic of Germany has been one of the most enduring and successful. German businesses have a strong presence in Tamil Nadu in various sectors, including Heavy Engineering & Components, Machine Tools, Automobiles, Pharmaceutical & Healthcare, Renewable Energy, and more.

At Guidance, our key role is to make investing in Tamil Nadu easier and to help businesses that invest here succeed. Our association with Rödl & Partner has contributed immensely towards helping us meet those goals for many global companies. As one of India's most progressive States, Tamil Nadu has an industrial policy that is one of India's most detailed, liberal, and business-focused policies. The Government of Tamil Nadu also regularly launches sector-specific industrial policies tailored to suit.

Some of the most recently launched policies include the Tamil Nadu Aerospace & Defence Industrial Policy 2022, the Tamil Nadu R&D Policy 2022, and the Tamil Nadu Lifesciences Promotion Policy

2022. Along with other sector-specific policies released in recent years, Tamil Nadu's innovative policies offer many incentives and benefits to businesses investing in the State.

With a highly developed industrial ecosystem, Tamil Nadu has emerged as a global manufacturing hub over the years. It is home to South Asia's only Advanced Manufacturing Hub (AMHUB) and is one of only 13 hubs representing diverse advanced manufacturing ecosystems worldwide. Tamil Nadu is adding to its manufacturing heft by embracing the Industry 4.0 revolution with AI, IoT & Cloud technologies. It is also looking to develop its skilling, innovation and automation ecosystem by partnering with globally renowned German organisations like Fraunhofer. From its vaunted position as India's industrial powerhouse, Tamil Nadu is well on its way to becoming the global manufacturing hub of the future.

As India's most desirable industrial success story, Tamil Nadu presents a bright future to companies looking to invest and grow here. Guidance thanks Rödl & Partner's initiative in curating, collating, and publishing this valuable source of information on investing in Tamil Nadu. I hope you find this guide interesting, engaging and informative.

Welcome to Tamil Nadu.

Mrs. Pooja Kulkarni IAS
Managing Director & Chief Executive Officer
Guidence Tamil Nadu

Dear Friends,

The Prime Minister Narendra Modi and German Chancellor Olaf Scholz on November 16 held a bilateral meeting on the sidelines of the G20 Summit in Bali. Both leaders discussed ways to boost economic ties, defense collaboration, and other important issues. In May 2022, they conducted the sixth round of Inter-Governmental Consultations in Berlin.

As India celebrates the 75th anniversary of its independence, the relationship between Germany and India is firmly rooted in mutual trust, joint interests in servicing the people of both countries and sharing values of democracy, rule of law and human rights, and multilateral responses to global challenges.

The German companies with their presence in India have been successful over so many years. Germany is the largest investor in India with cumulative FDI inflows of $13.70 billion from April 2000 – June 2022. Today, more than 1700 German companies are active in India, providing around 400.000 direct and indirect jobs. Germany is India's largest trading partner in Europe and among India's top ten global trade partners.

The bilateral trade during 2021-22 was valued at $2.48 billion. Some of the major Indian exports include machinery and mechanical appliances, textiles, and chemicals. Some of the major Indian imports include optical and medical instruments, machinery and mechanical appliances, vehicles, and accessories.

Today, the world is shrinking as we go more and more digital. From global transactions to cryptocurrencies, the dynamics of trade are changing rapidly. Digital forms of money could be a boon for emerging markets and lower-income economies if the transition is well-managed and regulated.

We were all forced to slow down and think in the past two years about who is more important to us both at work and in our personal lives. Companies and countries are now forced to think beyond their boundaries due to the uncertain geopolitical situations we face globally today.

The world is a marketplace and has always been but we all learned on how wise we need to be while choosing our partners. Indian and other Asian countries like Vietnam and Indonesia now emerge stronger than before and India today is looked upon as a reliable partner to do long-term business.

The government today is leaving no stone unturned to prove itself competent and capable to share its base for the world market to build here, to be Made in India instead of Made in India.

India is expected to emerge as the third-largest economy behind the United States and China by FY28, two years earlier than initially expected, overtaking Germany and Japan, according to the International Monetary Fund's (IMF) World Economic Outlook database. India has overtaken the UK to emerge as the fifth-largest economy in the world and is set to become the third-largest by 2029.

It's time to revisit our thoughts and meet us in India, we welcome you with open arms.

We are here to support you, your partner, Rödl & Partner.

Rahul Oza
Partner, Director,
Head of Practice of West & South India
Rödl & Partner

Content

About us

Rödl & Partner – The agile caring partner for Mittelstand shaped world market leaders

www.roedl.com/about-us

Our services in India

In our offices in Delhi, Mumbai and Pune as well as in our offices in Chennai, Bangalore and Ahmedabad we provide the following consulting services in German and English:

LEGAL CONSULTANCY

- Company law
- Incorporation of subsidiaries, Liaison Offices and Branch Offices
- Joint ventures, M&A
- Due Diligence
- Mergers, spin-offs, transformations
- Commercial, distribution and customs law
- Franchising
- Public-private partnership
- Concession and public procurement law
- Industrial property protection: patents, trademarks, copyright,
- Know-how and licenses
- Special economic zones, investment treaties
- Strategic industries, foreign investment and foreign exchange law
- General and special contract and commercial law for investments Competition and antitrust law
- Labor and immigration law
- Employee postings
- Procedural and arbitration law
- Business Criminal Law
- Liquidations and insolvency law
- Real estate and construction law, production settlements
- (Greenfield / Brownfield), Environmental Law
- Mortgage and lien
- General and special administrative law

TAX LAW, BANKING AND FINANCIAL SERVICES LAW

<u>Tax consulting / International tax law</u>
- Tax indexed project designs
- Tax structure consulting / optimization of corporate and group structures
- Tax Due Diligence
- Tax advice on M&A transactions
- Reorganization tax law

Ongoing tax consulting

- Tax advice on the acquisition of real estate
- Tax advice on financing
- Permanent establishment taxation
- Assistance during tax audits
- Tax administrative procedure and tax procedural law
- Transfer prices
- Tax advice on the establishment of sales structures and
- Productions

Banking and financial services law

- Banking Supervisory Law
- Financial leasing, structuring of leasing products including cross-border leasing
- Tax-indexed structuring of financing products
- International trade finance
- Insurance law

BUSINESS PROCESS OUTSOURCING

External accounting

- Current financial accounting: balancing and financial statements according to Indian GAAP, payment transactions, document management
- Payroll accounting: personnel administration, tax and social security declaration
- Preparation of financial statements according to international accounting standards
- Special balance sheets, interim balance sheets, consolidated financial statements
- Tax Compliance

Internal accounting

- Controlling and Management Information Systems
- Ongoing internal reporting, outsourcing of functions, and of the internal audit
- Budget planning and control, financial analyses

India is expected to emerge as the third-largest economy behind the United States and China by FY28, two years earlier than initially expected, overtaking Germany and Japan, according to the International Monetary Fund‘s (IMF) World Economic Outlook database. India is also expected to pass the United Kingdom this year to become the fifth-largest economy.

India aims to increase its exports‘ share of world trade from the current 2.1 % to 3 % by 2027 and to 10 % by 2047, and to promote a hundred Indian brands as global market leaders.

To facilitate trade, a “ONE” customs office will be established to clear imports and exports within one hour of arrival at border crossing points and customs ports.

These are some of the goals set by the Ministry of Commerce and Industry in India‘s centennial year of independence under the umbrella of India@2047. This must also include the creation of economic zones outside India as an extension of the Atmanirbhar Bharat initiative.

Targets have been set for international trade in 2047, and by 2027 the Ministry of Commerce will work to lay a solid foundation for achieving these targets, with plans to increase the share of exports in GDP to 25 %.

The focus sectors are pharmaceuticals, gems and jewelry, shipping and agriculture, textiles and leather, technical goods, electronics and telecommunications products, and chemicals. There is also a corresponding concept for the service sector.

The goal is to become number three in global services trade in tourism, IT & ITeS, business services, financial services, health & wellness, education and AV services for the government.

The roadmap also calls for raising India‘s profile as a supplier of high-value, high-growth products, increasing SMEs‘ participation in trade, and achieving a 10 % share of niche products, the so-called “creative industries.”

Branding campaigns would focus on promoting exports of pharmaceuticals, tea, coffee, technical goods and services, and developing districts as export centers.

Industry reports indicate that e-commerce penetration will almost double from 6.5% to 12.3% by 2031. The share of India's manufacturing sector in GDP will increase to 21% by 2031, which means that the manufacturing sector has a growth potential of $1 trillion.

India's share of the global export market is expected to more than earn 4.5% by 2031, representing an additional export opportunity of $1.2 trillion. India's services exports will nearly triple to $527 billion over the next decade (from $178 billion in 2021).

About 25% of the global growth in car sales between 2021 and 2030 will come from India, and 30% of car sales in 2030 are expected to be electric. India's technology services workforce will more than double from 5.1 million in 2021 to 12.2 million in 2031.

State Specific Investment Promotion Business Opportunities in Tamil Nadu

Tamil Nadu hosts the highest number of factories in India-over 37,220 units-and is India's second largest state, accounting for 9.2 % of India's gross domestic product (GDP) in fiscal year 2020-21.

Tamil Nadu has a diversified manufacturing sector and is a leader in various industries such as automotive, pharmaceuticals, textiles, leather, chemicals and more.

Tamil Nadu is located at the southeastern end of the Indian peninsula. The state borders Karnataka and Andhra Pradesh to the north, Kerala to the west, the Bay of Bengal to the east and the Indian Ocean to the south. Tamil Nadu has a well-developed infrastructure with an excellent road and rail network and seven airports. The state's coastline is the second longest in India at 1,076 km and has 4 major ports. Tamil Nadu ranks 4th in the Export Preparedness Index 2021 as well as the National Logistics Index 2021. In addition, the state is the largest contributor to India's renewable energy capacity with 17 GW and has a total installed capacity of 32,620 MW.

The Tamil Nadu government is not just a regulator and tax collector, but is actively taking various measures to attract investment and has also left no stone unturned to encourage the growth of manufacturing by introducing various incentives. The state has a sound industrial policy that primarily encourages investments that move up the manufacturing value chain and provide employment to the state's residents.

The Government of Tamil Nadu (TN) is offering various incentives for setting up new projects or expanding existing industrial plants, industrial parks, R&D projects, warehousing and logistics. Investments made on or after January 1, 2021 are eligible for the incentives.

OVERVIEW OF THE INDUSTRIAL POLICY OF TAMIL NADU

Achieve a 15% growth rate in manufacturing over the life of the policy

Attracting investments worth INR 10,000 billion between 2020 and 2025.

Create employment opportunities for 2 million people by 2025.

Industry: the directive applies to projects for the construction or expansion of industrial facilities, industrial parks, R&D projects, warehousing and logistics, with the exception of projects included in the negative list in the annex.
Timeframe: The policy is effective through 31. March 2025. Investments made on or after January 1, 2021 are eligible to receive the incentives.

Other governmental actions:
Startup and Innovation Policy (2008-2013) | Electric Vehicle Policy 2019 | Aerospace and Defense Policy 2019 | New Integrated Textile Policy 2019 | Food Processing Policy 2019 | Ministry of Industry Memo 2019 – 2020 | Solar Policy 2019 | ICT Policy 2019

ELIGIBILITY

The following four investment obligation areas have been identified for the administration of the tax incentives:

Investment period

ULTRA	INR 50 Billion	7 YEARS
MEGA	INR 5 - 50 Billion	4 YEARS
LARGE	INR 3 - 5 Billion	4 YEARS
SUB LARGE	INR 500Million to INR 3	4 YEARS

* Figures in Indian Rupee (INR)

Details	Sub Large	Large	Mega	Ultta Mega
Capital grant (paid in equal installments over a specified number of years).	From INR 1 Cr to 5 % eligible fixed assets depending on the location of the investment in Tamil Nadu.	Between 0 % and 12 % of eligible fixed assets, depending on the district category in the state of Tamil Nadu.	Between 10 % and 15% of eligible fixed assets, depending on the investment location in the state of Tamil Nadu.	Between 20 % and 25 % of eligible fixed assets, depending on the investment location in the state of Tamil Nadu.
Stamp duty exemption	50 % reduction on the stamp duty payable on the lease or purchase of land / sheds / buildings intended for industrial use is granted in parks promoted by SIPCOT / SIDCO.	50 % reduction on the stamp duty payable on the lease or purchase of land / sheds / buildings for industrial use is provided in SIPCOT / SIDCO promoted parks in ”A” and ”B” category districts. In all ”C” category districts, a 100% reduction in stamp duty is granted on the lease or purchase of land / sheds / buildings intended for industrial use in SIPCOT / SIPCOT JV / SIDCO promoted parks.		
SGST Refund	ZERO	100 % of the SGST payable on the sale of finished products manufactured, sold, and registered in the state is reimbursed for a period of 15 years from the date of commercial production. Note: This option is not available if the capital grant is used.		

Number in Indian Rupee (INR)

Details	Sub Large	Large	Mega	Ultta Mega
Training grant	ZERO	Training allowance of INR 4000 per worker per month for 6 months for residents of Tamil Nadu.		
Country Cost Grant	ZERO	For eligible projects in SIPCOT in "A" and "B" districts, land is allocated at a preferential rate of 110 % and in "C" districts at a preferential rate of 50% for land up to 20 % of the EFA.		
Intellectual Property creation Incentive	ZERO	50 % of the total cost of obtaining certifications such as ISO, ISI, BIS, FPO, BEE, AGMARK and ECOMARK, etc. Limited to INR 2.5 million.		
Intellectual Property creation Incentive	ZERO	50 % of the expenses incurred under the project, up to a maximum of INR 3 million for patents, copyrights and trademarks. Registration of geographical indicators.		
Green industry Grant		25% grant towards the cost of setting up environmental protection infrastructure up to a maximum of INR 10 million (subject to conditions).		
Electricity levy Grant	Exemption from electricity tax for a period of 5 years			

SPECIAL CONSIDERATIONS IN TN POLICY

Projects over 10 years

Projects in Tamil Nadu in existence for over 10 years :

- are reviewed on a case-by-case basis.
- will receive appropriate additional benefits for expansion projects beyond the normal structured package of incentives, provided they make the minimum investments.

Supply chain

TN policy provides discretion to approve higher incentives / concessions and relax the above conditions in exceptional circumstances for meritorious cases, giving appropriate weight to investment, direct and indirect jobs created, and the potential for attracting further investment by vendors and suppliers on a case-by-case basis.

OVERVIEW OF THE R&D POLICY OF TAMIL NADU

Introduction

Tamil Nadu is among the top three states in India in fostering innovation , and has evolved into a human capital hub that serves not only the nation but also the world, ranking first in human capital in India Innovation Index. Tamil Nadu being a manufacturing hub, R&D is mostly driven by industries. To further give a boost to this sector, a sector-specific policy has been drafted.

Goal

To double the R&D expenditure from the Government, Higher Education, and Private Sector by 2030.

Aim of the policy

- Increase the inputs to R&D, including the number of researchers and scientists in both government and private sectors.
- Increase the innovation outputs, such as patents and publications.
- Develop a synergetic innovation ecosystem of research parks, research centres, centres of excellence, and innovation hubs.
- Promote R&D in private sector by targeting new indigenous R&D

- performing firms in both manufacturing and service sectors such as GCCs, stimulating greater R&D investment in R&D performing
- firms, encouraging firms, encouraging do not yet perform R&D, and supporting public-private collaboration in R&D centres and GCCs.

INTERVENTIONS

Fostering linkages
- Knowledge infrastructure to be strengthened. This includes innovation clusters, dedicated hi-tech corridor along with the industrial corridors, knowledge city, and research parks
- Creation of an Industry 4.0 platform
- Setting up of a dedicated Work Lab Cell in Guidance to facilitate industry- academia collaboration
- Development of Centres of Excellence including stand-alone CoEs, CoEs within institutes, and networks of excellence
- Facilitation of national and international R&D collaboration and organisation of conclaves

Enhancing human capital
- Building research capacity by providing grants for R&D labs, support publications and conferences, increase admission intake and stipend for PhD programs, create training programs for faculty members
- 100 Talent Plan to attract renowned academicians and scientists of Tamil origin living abroad to undertake short-term assignments in universities in the state
- Technology transfer offices (TTO) to be set up for capacity-building in technical colleges and universities

MSMEs and start-ups
- TANSIM to set up regional start-up hubs in smaller towns and cities
- SIPCOT to set up Industrial Innovation Centres in upcoming industrial estates starting off with Coimbatore, Sriperumbudur, and Hosur
- Tamil Nadu Technology Hub (iTNT) to build India’s first Deeptech
- Innovation, Network connected to the world
- MSME Innovation Research Program to be set up

Funding avenues

The interventions mentioned above shall be funded through the following:

- Tamil Nadu Start-up Seed Grant Fund (TANSEED)
- Tamil Nadu Emerging Sector Seed Fund (TNESSF)
- Innovation Initiatives
- Research and technology fund proposed in TNIP 2021
- Extension of digital accelerator
- Science and technology schemes

Incentives

The Special Package of Incentives for R&D Centres and GCCs will include the following:

- Special capital subsidy
- Innovation Lab incentive
- Subsidy for software license
- Subsidy for product testing and prototyping facilities
- Training Subsidy

MARKET ENTRY AND OVERVIEW: KEY SECTORS

Automobile and auto parts

Tamil Nadu is one of the top 10 automotive centers in the world

70 % of India's overall exports

Three cars every minute

One motorcycle every 6 seconds

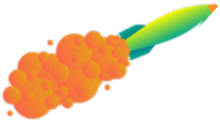
One truck every 2 minutes

Tamil Nadu is India's largest tire manufacturing state and home to over 80 auto component manufacturers.

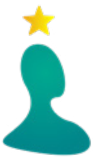
Aerospace

Aerospace park in Sriperumbudur with an Advanced Computing and Design Engineering Centre (ACDEC) is under construction

Tamil Nadu's 120 aerospace manufacturing companies



700 suppliers to various defense PSUs are operating in Tamil Nadu



5000 aerospace engineers graduate every year from Tamil Nadu.

100,000 direct and indirect employment opportunities for highly skilled resources.

Renewable energy

16 GW - Highest Renewable Energy capacity in India Ranks 9 Globally in the net share of Wind energy in Total power generation

Electrically powered vehicle

Chennai is home to major Indian automobile manufacturers such as Hyundai, Ford, Nissan, TVS, Mahindra, Daimler, etc. The first EV SUV made in India was manufactured in Tamn by Hyundai.The government of Tamil Nadu will replace the existing 21,000 public transport buses at the rate of 5% every year and introduce 1000 new buses may be introduced every year.

Electronics

20 % – Total Electronics Production in IndiaThere are two sector-specific SEZs for Electronics & Hardware Sector in the Kancheepuram district. They are the Electronic / Telecommunication Hardware Hi-Tech SEZ (486 acres) in Sriperumbudur, Electronic Hardware Hi-Tech SEZ (348 acres) in Oragadam.

Food Processing

8 % – Tamil Nadu contributes to India’s Food Processing Output

The first state to implement contract farming. Significantly easing investor participation in the Agro & Food processing sector

3.48 lakh hectares of inland waterbodies and 56,000 hectares of backwaters enabling favorable fisheries ecosystem

In Tamil Nadu, frozen shrimp maintained its position as the key contributor to seafood export of 76,414 MT valued at INR 4,106 crores in 2017 – 18

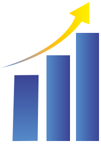
2nd - Highest Number of Food Processing Units in the Country

The Government of Tamil Nadu is establishing 8 Agro-processing clusters and 6 mega Food Park

Heavy engineering

2nd in the Production of General-Purpose and Special-Purpose Machinery

Ranks 2 in India in Heavy Engineering Exports - FY 2017-18.



Heavy Engineering exports have grown at a 5-year CAGR of 8% to reach more than $3 billion

Pharmaceuticals Biotechnology

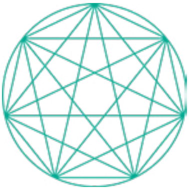
The state government has initiated various flagship infrastructure projects in the sector such as the TICEL Biotech Park-II in Chennai, TICEL Biotech Park-III in Coimbatore, and Marine Biotech Park near Mahabalipuram.

Textile and clothing industry

Tamil Nadu is the largest producer of cotton yarn in India and accounts for 40% of the country's production and is fondly called "Yarn Bowl of India"

The textile and apparel sectors together provide employment to 35% of the state's population

Information Technology



Chennai, the capital of Tamil Nadu, has about 1,780 IT units and employs more than 400,000 professionals

Tamil Nadu had 16 operational SEZs for the IT/ITeS sector as of July 2016. The state government offers various training and capital subsidies to promote investments in the sector

The Indian market is open to foreign companies. The conditions for foreign direct investment (FDI) have been almost completely liberalized, investment barriers have been significantly reduced and procedures simplified. Today, foreign direct investment is restricted or prohibited only in very few sensitive areas. Probably the best-known exceptions remain in the retail trade and insurance sectors. Even in these areas, further reforms are being sought or implemented. For example, the so-called "single-brand retail" has now been opened up to 100 % foreign investment, and the so-called "multi-brand retail" to 51 % foreign investment. In the insurance sector, where there is currently still a 49% restriction, it is planned to lift the restriction so that 100% foreign direct investment will be permitted in the future. The corresponding implementation remains to be seen.

Foreign companies are subject to the regulations of the Foreign Exchange Management Act (FEMA). There are 2 different types of approval procedures: the automatic procedure ("Automatic Route") and the individual approval procedure ("Government Route"). Today, a company can usually be incorporated under the automatic route. For this purpose, the formation of the company must be notified to the Reserve Bank of India ("RBI") after receipt of the foreign capital and after issuance of the share certificates, for which a period of 30 days applies. The notification is made via the so-called "Authorized Dealer" (i.e. the Indian bank). Only a few investments still require the second approval procedure of prior individual approval by the relevant ministries.

Foreign companies can operate in India through the following forms of organization:

- Representative Office (Liaison Office)
- Project Office
- Branch Office
- Corporation (Private Limited Company and Public Limited Company)
- Limited Liability Partnership (LLP)

In India, there are also the legal forms of sole proprietorship and partnership with unlimited liability. Due to their severe restrictions on admissibility and disadvantages in terms of liability, neither of these forms is a good alternative for foreign investors to do business in, which is why they will not be discussed further below.

LIAISON OFFICE

The Liaison Office (LO) is a representative office of the foreign company in India. It does not have its own legal personality. It is not permitted to engage in commercial, sales or production activities. The LO takes care of the activities of the foreign company and looks after its business interests. It serves as a kind of communication channel for the foreign company in India. For this purpose, it can promote its products within certain limits and promote import and export as well as technical or financial cooperation between the foreign parent company and companies in India. As a general rule, the foreign company will not be subject to tax in India as a result of the activities of its LO as long as it adheres to the scope of activities permitted for the LO. The reason for this is that in this case the LO is limited to typical information procurement and support services vis-à-vis the parent company, and these generally do not lead to the creation of a tax permanent establishment of the foreign company in India under the existing double taxation agreements (see below). In order to control the scope of activities, the LO has to file annual tax returns.

PROJECT OFFICE

Foreign companies that carry out projects - for example, longer assemblies - in India must register a Project Office (PO). The

PO also has no legal personality of its own. However, the foreign company becomes liable to pay tax in India as a result of the activities carried out in India within the scope of the PO, typically through an assembly permanent establishment. With the registration of a PO, the foreign company also becomes liable to pay indirect taxes, especially service tax (see below). Registration of the PO requires approval from the RBI and registration with the Registrar of Companies.

BRANCH OFFICE

A Branch Office (BO) is a branch of a foreign company and, in line with the LO and the PO, also has no legal personality of its own. The BO may engage in business activities and generate income. However, business activities are limited to the provision of services, trade and distribution. Production activities are prohibited. From an income tax perspective, the BO is a permanent business establishment of the foreign company in India from which income is generated. Unlike the LO, the BO is not limited to typical support services for the parent company. It creates a permanent establishment for tax purposes. Upon registration of the BO, the foreign company also generally becomes a debtor of indirect taxes (see below). In order to register the BO, a rather complex procedure has to be completed before the RBI, which is comparable to that of a company formation in its effort.

PRIVATE LIMITED COMPANY (PVT. LTD.)

The Private Limited Company is a corporation comparable to the German GmbH and the most common form of company in India. In recent years, this form of company has gained more importance in relation to the other special forms under foreign exchange law due to the massive simplification of the formation (for further information on formation, please refer to the chapter “FAQ Formation of Companies), financing and administration of a private limited company. On the other hand, the requirements for the administration and compliance of the other special forms under foreign exchange law (e.g. liaison office, project office and branch office) have increased significantly. The number of shareholders is set at a minimum of two and a maximum of 200, whereby the distribution of company shares is arbitrary as long as a single shareholder holds at least one share. The capital contributions of the shareholders constitute the company‘s share capital. No minimum capital is required. The liability of the partners is limited to the sum of the individual capital contributions. The Private Limited Company is managed and supervised by the collective management body “Board of Directors”. It consists of at least two directors, whereby at least one director must be resident in India (so-called “resident director”). This requirement is met if the person has resided in India for at least 182 days in the calendar year prior to taking up office. In order to be appointed as a director, it is first necessary to obtain a digital signature certificate (DSC) and to register the person with a director identification number (DIN). The Managing Director can be elected from among the Board of Directors. The managing director can take care of the day-to-day management of the company on his own authority. A restriction of this power of representation is in principle possible by the articles of association. Under certain conditions, the mandatory board meetings and general meetings can be held by video conference. It should be noted that these must be conducted and recorded in a certain manner. The recordings must be carefully stored and the Registrar of Companies must be notified of the video conference.

PUBLIC LIMITED COMPANY (LTD.)

In this form of company, which is comparable to the German stock corporation, the shares can be freely sold and can also be traded on the stock exchange. The Public Limited Company requires at least seven shareholders. It is comparatively rarely chosen by foreign investors, as it is subject to stronger legal restrictions and controls than a private limited company.

It should be noted that in India, a company in which a public limited company holds an interest may also be subject to the regulations for a public limited company, even if it was itself founded as a private limited company. The provision applies if, in addition to the Public Limited Company, an Indian company and/or a (domestic or foreign) natural person is involved as the majority shareholder. In this context, a comparable foreign corporate form, e.g. the German AG, is also deemed to be a Public Limited Company.

CORPORATE SOCIAL RESPONSIBILITY

Indian companies, i.e. a Pvt. Ltd. or a Ltd., with net assets exceeding INR 5 billion, annual sales exceeding INR 10 billion or net profit exceeding INR 50 million must establish a corresponding “Social Responsibility Committee”. This committee must draft a corresponding internal policy and present it to the Board of Directors. A portion of the annual profit must be allocated to corporate social responsibility measures. Non-compliance with these requirements must be justified.

LIMITED LIABILITY PARTNERSHIP (LLP)

Investors can also join forces in the legal form of a Limited Liability Partnership (LLP). The LLP combines the advantages of the limited liability of a company with the flexibility of the administration of a partnership, but has not become established as a form of investment, since in parallel the basic taxation of the Pvt. Ltd. with most recently the abolition of dividend taxation is definitely more attractive. Furthermore, there is an immanent liability risk due to a liability pass-through to the foreign partners “shareholders” of the LLP. Under company law, the LLP is comparable to a Komanditgesellschaft, but can also be structured in the direction of a corporation under company law. From an Indian point of view, it is always a taxable entity itself. An LLP consists of at least two partners. Unlike other Indian legal forms, there is no limit on the number of partners. Each LLP requires at least two so-called Designated Partners, who are personally responsible for ensuring that the LLP as a legal entity fulfills its legal and regulatory obligations. The role of Designated Partners must be assumed by natural persons; in the event that all partners of an LLP are legal entities (this is permissible), natural persons must be designated to perform the function of Designated Partners. At least one of the Designated Partners must be resident in India, which the law defines as a minimum stay of 182 days in India in the preceding year. In most cases, this requirement leads to a situation similar to a joint venture (JV).

For the purpose of establishing a corporation and an LLP, a foreign company may also partner with an Indian company or with an Indian individual. In a JV, either the foreign partner may acquire shares in an existing Indian company or the partners may jointly form a new company. Under company law, foreign individuals are treated equally to Indian individuals, i.e. they are not disadvantaged on the basis of their status. Read more about this topic in the chapter “M&A in India”.

The inflow and outflow of funds across national borders is not fully cleared in India. The existing regulations must be strictly observed and require careful and timely planning. Under the "Ease of doing Business" program, however, India has opened up to much more extensive financing, especially from foreign investors.

EQUITY FINANCING

Stock Capital

A distinction must be made between 3 terms, the "Authorized Share Capital", the "Subscribed Share Capital" and the "Paid Up Capital". The "Authorized Share Capital" refers to the maximum amount that the Company can issue in the form of shares according to par value (hence "authorized share capital"). A capital increase above this amount requires an increase of the Authorized Share Capital in the Articles of Association of the Company, thus involves a certain formal effort, but is possible at any time. The "Subscribed Share Capital" designates, within the specified framework of the Authorized Share Capital, the nominal value of the share capital which the shareholder actually undertakes to pay. If the capital is then paid up accordingly, this is referred to as "paid-up share capital". In practice, the Authorized Share Capital should not be set too low in order to be able to react flexibly in business terms.

Par Value Surcharge

It is possible to inject equity into a company by means of a so-called "share premium", comparable to a share premium, without having to exhaust the limits of the authorized share capital at an early stage. This is done by transferring shares to a shareholder not at par value but at a higher value. The amount in excess of the nominal value is transferred to a special equity account ("share premium account") and forms a reserve that is not free.

Evaluation

It should be noted that the value of the shares must be determined using an internationally accepted pricing method and confirmed by an Indian chartered accountant. The discounted cash flow ("DCF") method is commonly used. This is a valuation based on expected cash flows, with a detailed planning phase of 5 years.

The share value determined on the basis of the DCF may not be undercut, among other things, when new shares are issued.

DEBT FINANCING

Loans in Indian Rupees

Debt capital from Indian capital providers can be raised both as an overdraft and as a loan without further regulatory restrictions. The loan is provided by a local Indian bank on local terms and can be secured by a foreign company and its foreign bank.

Foreign loans

External commercial borrowings (ECB) are subject to strict regulations in India. The regulations were greatly relaxed in 2019 under the “Ease of doing business in India” program. For example, an ECB is now also permitted for the purchase/long-term lease of industrial land as part of a new project/modernization or expansion of existing facilities. Furthermore, service companies can also be borrowers.

The ECB procedure is divided into 2 cases. The allocation of the loan to one of the two cases is based on the endowment of the loan in Indian rupees or the respective foreign currency.

- Case 1: Foreign loan endowed in foreign currency.
- Case 2: Foreign loan endowed in Indian rupees.

Term of the ECB

The term of the ECB is prescribed depending on the purpose of use. Generally, the minimum term is 3 years, but for a foreign loan of up to $50 million where the company is in the manufacturing sector, the term is a minimum of one year. However, for a dedicated foreign loan, the minimum term is 5 years.

Interest rate

The interest to be paid is prescribed and may not be more than 5 percentage points above the reference interest rate. Following the discontinuation of the LIBOR, various reference interest rates are available, depending on the currency selected, such as the EURIBOR. The interest rate should also be reviewed from a transfer pricing perspective. In addition, in the case of a foreign loan in the automated procedure in the amount of more than USD 5 million, the ratio between ECB liabilities and equity may not exceed a ratio of 7:1.

Permitted Lender
A foreign shareholder must hold at least 25% directly (or 51% indirectly) of the shares in the receiving company to be a permissible lender. The granting of loans by sister companies is therefore possible.

Permitted Use
Permissible uses include, on the one hand, long-term loans to finance fixed assets, i.e. the company's long-lived assets (e.g. machinery, equipment for use in the company's own production process), and also long-term working capital loans, e.g. to finance rents or salaries and generally to finance working capital. Permissible uses also include the settlement of a loan debt to an Indian bank. In principle, it is not permissible to take out foreign loans for on-lending to other persons / companies or such projects in which a foreign direct investment would also not be permitted.

Procedure
If the limits of admissibility are complied with, the loan can generally be taken out in a strictly formalized procedure via the borrower's bank in India ("automatic procedure"). Based on a loan agreement, a loan registration number ("LRN") must be applied for from the Indian central bank via the Indian house bank. Only then can the loan amount be transferred. Subsequently, monthly declarations must be made to the Central Bank of India. Only in a few cases an approval procedure has to be conducted before the RBI in advance. In addition, the foreign company as lender may have to submit tax returns in India.

The currency of India is the Indian rupee. A special feature are the designations for higher amounts. For example, in business, 100,000 rupees are referred to as one “lakh” and are expressed by special commas (“1,00,000”). 10 million rupees are also referred to as one “crore” (1,00,00,000). Since mid-2011, the sign has been the official currency symbol in India.

In India, banks have duties and powers that go beyond their pure financing and payment function. They act as authorized dealers of the state or state-owned institutions. For example, notifications from a company to the RBI regarding capital inflows and share issues must be made through its bank. The bank must also be notified at certain intervals if outstanding payments to foreign suppliers or service providers (“trade credits”) have not yet been settled. These may also fall under ECB restrictions. The bank itself carries out an initial check in each case and decides on further measures.

Incoming payments are credited to a business account, usually a current account. It should be noted that a valid “purpose code” communicated by the Reserve Bank of India must be sent to the bank in India, without which a credit cannot be made. Outside the ECBs, there are no actual restrictions on the use of funds. In order to make an outbound payment, the payment must be based on a reason for payment. This is verified by the Indian bank instructed to make the payment before the payment is made. In some cases, confirmation from an Indian chartered accountant that the payment has a legitimate background, is reasonable in amount, and that any withholding taxes have been correctly deducted must be provided to the bank for this purpose. Without such confirmation, the Bank cannot make an outbound payment.

It is possible for a company to set up a foreign currency account in India. This is not a parallel account, but a transit account. Each payment in the corresponding currency is first received in this account and is converted into INR at the latest by the end of the following month after receipt of payment. In the meantime, the account can be used to settle liabilities that are also in foreign currency.

Whereas payment transactions in India a few years ago were still mainly made by check, there are now more and more remittance instruments available (Real Time Gross Settlement (RGTS), National Electronic Funds Transfer (NEFT)). As a result, online transfers have established themselves as a common means of doing business.

For a long time, trademarks had to be registered locally in India separately and independently of any international agreements. In mid-2013, India acceded to the Madrid Protocol on Trademarks and transposed the requirements into national law. An international trademark application can now be extended to India. After registration and forwarding by the "International Bureau" (WIPO, Geneva), the Indian Trademark Office examines the application in accordance with the provisions of the Trade Marks Act 1999 and, if grounds exist, must file an opposition within 18 months. The duration of international trademark protection is 10 years.

In recent years, income tax rates for Indian companies have been significantly reduced. This applies in particular to newly established manufacturing companies. At the same time, tax administration has been increasingly digitized, and queries from the tax authorities and smaller procedures can be handled "faceless," i.e. online, without the tax official appearing in person. This serves to speed up the process on the one hand and to combat corruption on the other. In addition, India's tax law is shaped by the country's federal structure. Decisions of the respective High Courts, even for federal laws such as the Income Tax Act or the Integrated Goods and Service Tax, are only binding on the tax administration of the state in question, but not beyond. This means that other High Courts may well rule differently. This is a challenge for tax planning, i.e. assessing what tax consequences certain business transactions or structures will have in India.

In the following, the main features of Indian tax law relevant for investors are explained.

INCOME TAXES

Natural Person

Under Indian national law, the tax liability of individuals depends solely on the duration of their stay in India. Disregarding intergovernmental regulations, persons who earn income from India must also pay tax on this income in India. For employees, this applies from day 1 of their employment in India. Double taxation agreements (DTAs) mitigate this effect. Under the Germany-India DTA, German employees generally become liable for tax in India only after a stay of 183 days per Indian fiscal year (April 1 to March 31). However, there are exceptions: If they are employed by an Indian company or if they work for a taxable permanent establishment of a German company in India, the tax liability arises from day 1 of the stay in India. Below in detail.

The starting point for assessing tax liability is the national Indian law, the Income Tax Act ("ITA").

- As a rule, a person is deemed to be a "resident", i.e. resident in India for tax purposes, if he or she spends at least 182 days in

India in a fiscal year. Alternatively, a person is also considered a resident if he/she stays in India for at least 60 days in a fiscal year and has stayed in India for at least 365 days in the last 4 previous years.

- An "Ordinarily Resident" is a resident who has been in India for more than 729 days in the last 7 previous years and has had "resident" status in at least 2 of the last 10 previous years. In case the said criteria is not satisfied the person would be Resident but not Ordinarily Resident ("RNOR")
- All other persons are "non-residents", i.e. not resident in India for tax purposes.The status determines the extent of tax liability in India. Resident and Ordinarily Residents are taxable on their worldwide income in India, Residents but not Ordinarily Resident and Non-Residents (in simple terms) are taxable on their income derived from India.

In a second step, the intergovernmental regulations of the DTAs must be observed; according to Sec. 90 (2) ITA, they take precedence over national law. DTAs avoid that a person is considered resident for tax purposes in 2 states and allocate taxation rights to states. For the assessment of the residence of natural persons, there are several examination steps, in which first of all the domicile (not the reporting address) plays a role. If this does not lead to a result, a person is generally considered to be resident for tax purposes in the state in which he or she has his or her center of life. A typical constellation is the longer assignment of a German employee to India, who leaves his home as well as family (spouse / children) in Germany, but is of course also provided with a home in India. It is true that his place of residence cannot be clearly determined due to the two housing options he has. However, he remains subject to unlimited tax liability in Germany due to his continued center of life in Germany. Pursuant to Art. 15 (1) DBA Germany-India, he is only liable to pay tax in India on his wage income received for his work in India.

According to Art. 15 (2) DBA Germany-India, however, the right of taxation remains with Germany, if:

- the duration of stay in India does not exceed 183 days during the relevant Indian fiscal year,
- the remuneration is not paid by or on behalf of an employer who is a resident of India; and

– the remuneration is not borne by a permanent establishment or a fixed base in India.

Therefore, if the employee is sent to India for training purposes for only 5 months, for example, and his so-called “economic employer” remains in Germany, he must pay tax on his wage income only in Germany.

The situation is different for employees who have been living in India with their family for several years, i.e. who have their center of life there. As a rule, they are subject to unlimited tax liability in India, so that they (also) have to pay tax in India on, for example, investment income or income from renting and leasing the home left behind in Germany.

Closely related to the assignment of local employees is the risk of the foreign employer establishing a permanent establishment for tax purposes in India (see below). In the case of employee leasing to affiliated companies, the arm‘s length principle must be observed (transfer prices).

Tax rates
Income tax is levied in increments of up to 30 %. The total tax burden on a taxable income of INR 1,000,000 is approximately 12 %. The tax rate increases to approximately 32 %, on a taxable income of INR 10,000,000. The taxpayer has two options: Taxation at higher rates with the possibility of claiming various deductions or taxation at lower rates, in which case only a few deductions are allowed.

<table>
<tr><th>Annual income (INR)</th><th>Tax rate
(Standard)</th><th>Tax rate
(alternative)</th></tr>
<tr><td>up to 250,000</td><td>–</td><td>–</td></tr>
<tr><td>250,000 - 500,000</td><td>5 %</td><td>5 %</td></tr>
<tr><td>500,001 - 750,000</td><td rowspan="2">20 %</td><td>10 %</td></tr>
<tr><td>750,000 - 1 million</td><td>15 %</td></tr>
</table>

<table>
<tr><td>1 Mio - 1,25 million</td><td rowspan="5">30 %</td><td>20 %</td></tr>
<tr><td>1,25 million - 1,5 million</td><td>25 %</td></tr>
<tr><td>1,5 million - 5 million*</td><td rowspan="3">30 %</td></tr>
<tr><td>5 million - 10 million */**</td></tr>
<tr><td>over 10 million*/**</td></tr>
</table>

For persons over 60 years of age, higher tax allowances apply. It is possible to split the salary for different purposes ("salary split"). This allows tax advantages to be realized, e.g. for rent subsidies and bonus payments. Income tax is withheld and paid by the employer as wage tax. This also applies to German employees posted to India.

COMPANY

Current taxation

Indian resident partnerships and corporations

A company is deemed to be resident in India if its registered office is in India or management or effective corporate control is exercised in India. The tax rate is 30 %. In addition, if the taxable profit exceeds INR 10 million, there is a surcharge of 7 %. The surcharge is 12 % for taxable profits in excess of INR 100 million. In addition, a Education and Higher Education cess of 4 % is payable on the total tax amount. The total tax burden on domestic companies thus amounts to approx. 35 % at the peak. The tax base is the worldwide income. There is no graduated system for companies as there is for individuals. The tax must be calculated by the company itself and paid in the form of quarterly advance payments.

Private Limited Company	Tax rate
Income Tax	30 %
Surcharge on the tax	12 %
Education and Higher Education Cess	4 %
Total (effective)	34.94 %

Alternatively, companies can claim a tax rate reduced from 30 % to 22 % (effectively 25.17 %). This is subject to the condition that no other special tax relief is claimed. Companies have a right of choice, which must be actively exercised when submitting the tax return.

Private Limited Company	Tax rate
Income Tax	22 %
Surcharge on the tax	10 %
Education and Higher Education Cess	4 %
Total (effective)	35.17 %

A reduced tax rate from 30 % to 25 % (effectively 29.12 %) applies to small and medium enterprises (sales in the previous year below INR 4 billion).

Private Limited Company	Tax rate
Income Tax	25 %
Surcharge on the tax	12 %
Education and Higher Education Cess	4 %
Total (effective)	29.12 %

Newly established manufacturing companies are taxed at a particularly low rate. Their effective tax burden is 17.16 %.

Private Limited Company	Tax rate
Income Tax	15 %
Surcharge on the tax	10 %
Education and Higher Education Cess	4 %
Total (effective)	17.16 %

Manufacturing Companies established in India on or after 1 Oct. 2019, that begin operations before 31. March 2024, are considered newly formed. It is still unclear whether the deadline for starting production, i.e. the tax benefit, will be extended. It is further important for the design to limit the company's activities to production and activities directly related thereto. Starting activities besides production will result in denial of the lower tax rate for the entire company.

Partnerships, including LLPs, are subject to a tax rate of 30 % (approx. 35 % if the taxable profit exceeds INR 10 million). They are now rarely formed by foreigners.

Dividend payments and treaty eligibility

Dividends from Indian corporations are subject to a withholding tax of 20 %. The previous Dividend Distribution Tax has been abolished since April 2020. Under national Indian law, the withholding tax is increased in each case by surcharge and education cess levy. Many DTAs, including the one with Germany, provide for a cap of 10.0 %. A company protected by the respective DTA can invoke this. This is problematic for German partnerships, for example. They are "transparent" for tax purposes, so that the German tax authorities generally refuse to issue a residence certificate. As a result, there is no proof of residency in Germany and thus of eligibility for the agreement vis-à-vis the Indian tax authorities. It is currently virtually impossible to rely on the treaty eligibility of the shareholders of the partnership and thus achieve a reduction of the withholding tax in India.

Partnerships and corporations domiciled abroad

Gross taxation ("withholding tax")

India has the right to tax interest, remuneration for technical services and royalties originating in India and paid to German companies. India also makes use of this right. The tax rate on remuneration for technical services and royalties is 10 % in each case, and currently 5 % for interest on approved foreign loans (plus surcharge and eduction cess levy). The tax base is the remuneration paid (without deduction of expenses). Germany allows crediting of withholding tax only within narrow limits (maximum crediting amount). It can only be credited against income tax or corporate income tax payable on income from India ("per country limitation"). Withholding tax is therefore largely a cost factor, at least for corporations.

The Indian person paying the tax, e.g. the customer of an installation service ("payer"), is responsible for withholding the tax. The Indian tax authorities hold him liable – in addition to the German company. If the payer cannot exclude that the payment to be made is attributable to a taxable permanent establishment he must withhold a much higher withholding tax of up to 43% (see also below). He thus becomes the extended arm of the Indian tax authorities. However, the German company can apply to the tax authorities for a lower withholding rate. This is quite common for permanent establishments and is strongly recommended.

In many cases, foreign companies have to file a tax return on income subject to withholding tax in India. Even if there is no permanent establishment. Among other things, if they invoke regulations of a DTA (e.g. capping of withholding tax for dividends at 10.0%) or if the payer has not paid sufficient withholding tax. The foreign company must therefore also monitor the payment of the withholding tax. For this purpose and for filing a tax return, the company must register for tax purposes in India ("Permanent Account Number", PAN). Such registration is a fairly simple process,

Card of a Permanent Account Number / PAN

For more details see our FAQ PAN and Withholding Tax.
https://www.roedl.de/themen/indien-quellensteuern-steuerregistrierung-pan-steuerdeklaration

PROFIT TAXATION ("WITHHOLDING TAX")

Foreign companies are subject to profit taxation in India if their activities (possibly unintentionally) give rise to a tax permanent establishment in India. Whether a permanent establishment is created is primarily regulated by the DTA Germany-India, for example. Frequently, a permanent establishment arises in the case of assembly or assembly supervision of project duration of more than 6 months or in the case of long-term consulting activities on site. The activities of subcontractors are generally considered to be the activities of the company‘s own employees. A dependent-agent can also establish a permanent establishment if the German company regularly obtains orders in India with a certain degree of exclusivity. This applies even if the representative does not have power of attorney to conclude contracts – a feature that surprises many German companies.

The permanent establishment profit is subject to a tax rate of 40 % plus surcharge and training expenses, so that the total effective tax burden is 43.68 %.

Foreign corporation	Tax rate
Income Tax	40 %
Surcharge on the tax	5 %
Training Levy	4 %
Total	43.68 %

As a general rule, if the German and Indian tax authorities assess the facts differently - and this is not infrequently the case - there is a risk of taxation in Germany in addition to taxation in India, and thus double taxation despite the provisions of the DTA. A careful preliminary examination and planning, which is also included in the order calculation, is important. Even if no permanent establishment is created, India taxes remuneration paid to Germany for technical services, royalties and interest (withholding taxes / see above).

The Multilateral Instrument (MLI), which India signed on 7. June 2017 together with more than 60 countries – including Germany – will have a strong influence on the taxation of foreign companies. It provides the basis for incorporating key OECD decisions against harmful tax competition and aggressive tax arrangements (Base Erosion and Profit Shifting - “BEPS”) into existing DTAs without having to renegotiate each of them. The MLI already applies to India‘s DTA with Austria and, for example, Canada. Germany has not yet declared that it intends to apply the MLI to the Germany-India DTA, but is keeping this open for the future.

For more details, see our FAQ Construction and Assembly Sites.
https://www.roedl.de/themen/indien-steuern-bau-montage-betriebsstaetten

Minimum Alternate Tax (MAT)
MAT is a special form of income tax. It is a minimum taxation that applies in the event of significant differences between the accounting profit and the taxable profit. If the amount of income tax actually paid is less than 15 % of the accounting profit, this part of the accounting profit is considered to be the taxable profit of the company. As a rule, the effective tax rate is approximately 17 %. The MAT is generally also applicable to foreign companies taxable in India. The MAT can be credited against the company's regular tax liability for a maximum period of 15 years.

Capital gains taxation
Gains from the disposal of fixed assets are taxed differently in India, depending on the holding period. As a rule, capital gains are considered to be short-term if the goods have been held for less than 24 months. Short-term capital gains are added to the total income of the company and are subject to the general tax rate of e.g. approx. 30 or 40 %. Long-term capital gains, e.g. from the transfer of shares in a non-listed Indian company held for more than 24 months, are taxed at a rate of 10 % (sale by foreign company) or 20 % (sale by Indian company) (plus surcharge and education levy in each case).

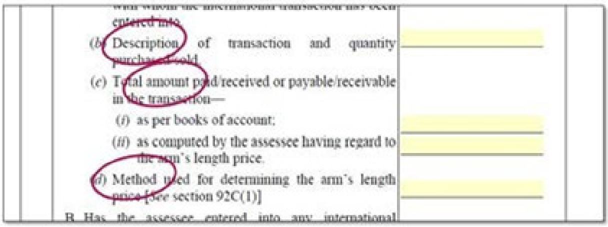
Attempts to avoid tax by structuring the investment via foreign holding locations are under special scrutiny by the tax authorities. The particularly favorable DTAs with Singapore, Mauritius and Cyprus have now been amended. With the introduction of the General Anti Avoidance Rule (GAAR), the tax authorities also have a better tool for detecting circumvention.

TRANSFER PRICING

Cross-border transactions between affiliated companies are closely scrutinized by the Indian tax authorities. There is a suspicion that such transactions are not conducted at arm's length, i.e. that profits are shifted abroad by offsetting services.

It is up to the taxpayer to prove that the transactions are to be recognized for tax purposes on the merits and in the amount. This is the case if mutually independent companies would have concluded the transactions on similar terms. If this is not successful, the profits of the Indian company are adjusted upwards and high penalties are imposed.

Companies are required to file an annual declaration on international business transactions with associated companies ("Form 3CEB"). In addition, comprehensive transfer pricing documentation must be prepared and maintained ("Transfer Pricing Report"). In practice, the preparation of both documents is often handled quite laxly. In the event of a subsequent audit, discrepancies between the information provided and the actual circumstances become apparent. These discrepancies often cannot be closed and lead to profit adjustments.


entered into

(b) Description of transaction and quantity purchased/sold

(c) Total amount paid/received or payable/receivable in the transaction—

(i) as per books of account;

(ii) as computed by the assessee having regard to the arm's length price.

(d) Method used for determining the arm's length price [See section 92C(1)]

B. Has the assessee entered into any international

Wide-ranging issues from a Form 3CEB (description of transactions and method of determining the arm's length price).

An interest barrier applies in India. Interest expenses incurred by Indian companies in relation to affiliated foreign companies are only deductible up to an amount of 30 % of earnings before interest, taxes, depreciation and amortization (EBITDA).

WEALTH TAX

Wealth tax has been abolished since April 1, 2015.

REMEDIES

Taxpayers may appeal to the Commissioner of Income Tax (Appeal) ("CIT(A)") against assessment orders and other tax administration acts within 30 days of receipt. Reasons must be given for the appeal. Further instances are the Income Tax Appellate Tribunal (ITAT), the High Court and the Supreme Court. Payment demands can be suspended, at least in part, until a final decision is reached. A draft tax assessment may be appealed to the "Dispute Resolution Panel" (DRP) as an alternative to an appeal to the CIT(A). The decision of the DRP must be rendered within 9 months. Advance agreements on the determination of arm's length prices ("Advance Pricing Agreements") can also be requested, but this is only recommended for large volumes. Proceedings usually take several years and are often only decided fairly and conclusively for both parties by the ITAT. Appeals to the High Court are rare.

SALES TAX / CUSTOMS

Goods and Service Tax

India has a modern sales tax system in the form of the Goods and Services Tax ("GST"). It taxes the added value created at the respective trade level and basically only burdens the end consumer.

Due to India's federal structure, GST is divided into 3 components:

1. Central GST ("CGST") - Central Government Tax
2. State GST ("SGST") - State tax.
3. Integrated GST ("IGST") - overarching tax

Services within one state are subject to CGST and SGST at the same time. Services between 2 states and imports from abroad are subject to IGST only.

Place of performance	Applicable Tax
Performance within a state	CGST
Power between two states	SGST
Import goods	IGST Customs
Services import	IGST

A service is considered to be domestic if the place of the service provider and the place of the service are located in the same federal state. If they are located in different states or if the place of performance is abroad (case of import), the performance is considered to be made between two states. The place of performance is generally the place of the business establishment from which the performance is made. The place of performance differs depending on the facts of the case. For goods deliveries, it is the place where the movement of goods ends. In the case of B2B services, it is the place where the service is received, provided that the recipient of the service is registered there for VAT purposes. Exports of goods or services are generally tax-exempt.

The standard rate of GST is 18 %. A nomenclature (similar to the HS Code) determines the classification. For services within one state, half of the tax is divided into the CGST and half into the SGST. For services between 2 states, it is entirely IGST. The fact that for services within a state with CGST and SGST 2 taxes are incurred at the same time, therefore, does not make the service more expensive.

Power group	IGST (in oarentheses: CGST + SGST)
Exports	0 %
Important goods for daily needs	5 % (2,5 % + 2,5 %)
Preferential tax rate for subsidized Industries	12 % (6 % + 6 %)
Many plants / machine	18 % (9 % + 9 %)
All other goods (“luxury goods”)	28 % (14 % + 14 %)

The GST allows for an end-to-end input tax deduction for distributors, service providers, and manufacturers. However, it follows the tripartite structure of the GST. CGST paid can be deducted as input tax from CGST owed and IGST, and SGST paid can be deducted as input tax from SGST owed and IGST. There is no provision for deduction of input tax between CGST and SGST. IGST paid is deductible from all types of GST, i.e. IGST, CGST and SGST.

In contrast to the German VAT system, input tax credits are not refunded. Exceptions exist primarily for exporting companies. A special feature is that the input tax deduction is only granted if the entrepreneur / supplier has actually paid the tax received.

For more details see our FAQ GST. https://www.roedl.de/themen/steuer-indien-gst-reform

CUSTOMS

For the import of goods, a standard duty rate of 10% ("Basic Customs Duty") applies. For many machines, the duty rate is reduced to 7.5%. The duty is calculated on the customs value of the goods. India follows international principles in determining the customs value. In addition, there is a surcharge of 10% of the customs duty ("Social Welfare Surcharge" / "SWS"). The import VAT is calculated on the customs value + customs duty + SWS.

The example below calculates duties for a customs value of INR 100, a duty rate of 10% and an IGST rate of 18%.

	Zollsatz	INR
Price (CIF)		100,00
Handling Charges		0,00
Customs value		100,00
Customs	10	10,00
Social Welfare Surcharche	10%	1,00
Total		111,00
IGST	18%	19,98
Total Charges		30,98

As a rule, IGST is input tax deductible for the importer (manufacturer, service provider, trader) and therefore cost-neutral. There are, however, exceptions and these come into play primarily in the case of public tenders. In this case, it is advisable to obtain advice at an early stage and before submitting a financial bid.

Duty-free areas / Export-oriented companies
Special Economic Zones (SEZ) are available as locations for companies in India. Alternatively, companies can register as an Export Oriented Unit (EOU). An SEZ is a demarcated, duty-free area, while an EOU is a company with duty-free warehousing. In particular, import duties and indirect taxes for the purchase of goods and services from the customs territory are largely eliminated in both cases. Both companies in an SEZ and EOUs must be and remain net foreign exchange recipients. This means that they must export a large part of their goods or services. If this is guaranteed, establishing one's own presence in an SEZ or as an EOU is an option for foreign investors.

Customs Procedure - Special Valuation Branch ("SVB"):
If an Indian company wants to import goods from a related company outside India, the Indian importer has to go through an additional customs procedure in India, the so-called "Special Valuation Branch" (SVB) procedure. The SRP procedure is considered to be extremely complex and time-consuming. The purpose of the SRP procedure is for customs authorities to determine whether goods supplied by the supplier from abroad to its related importer have been invoiced at an "arm's length" price or whether they have been "undervalued" in order to reduce customs duties. This procedure is exactly the opposite of the transfer pricing analysis under the income tax rules, which examines whether goods supplied between related parties have been "overvalued" to reduce income tax liability in India. Careful and accurate guidance is required in the conduct of the SBV process. Incorrect valuation methods and information can result in a negative investigation report from the customs authorities, which can increase the overall cost of customs duties in the supply chain and thus significantly reduce the profitability of the Indian company. In addition, litigation with customs authorities related to valuation is time-consuming and can result in additional costs.

The SRP process is a multi-step process where different forms and supporting documents have to be submitted at different times. The SRP procedure starts as soon as the first shipment of goods arrives in India. Upon arrival of the shipment, the SRP customs authority is notified to initiate the procedure. Due to the extensive documentation requirements, upon the first shipment, there are usually delays in the clearance of such goods by the customs authority. Once the process is registered with SVB Customs, additional forms must be submitted within 60 days. In addition, a detailed statement must also be prepared and submitted, substantiating the manner in which the goods were priced as agreed between the related companies. After the submission of the documents, a personal appearance at the customs authorities takes place. As a rule, depending on the availability of the required documents and the responsible officials, it takes 4-6 months before the final SRP investigation report is issued. During the SRP procedure, the goods are provisionally cleared by the customs authorities (after depositing a provisional customs guarantee).

Indian labor law is extremely complex. There are a large number of partially outdated labor law provisions at both the federal and state levels, which are also not always consistent. The applicability and applicability of the various provisions depends on a number of factors, including the number of employees, the location and sector of the company, and the type of activity (e.g., most of the labor protection provisions apply to ordinary workers, while there is greater scope for deviating individual contractual provisions for employees in management positions).

EMPLOYMENT CONTRACTS

Usually, permanent employment contracts are concluded with a probationary period of between 3 and 6 months. The law also permits the conclusion of fixed-term employment contracts. In principle, the employment relationship can be concluded without any formalities. Some local labor laws require a written contract with minimum content. However, it is advisable to draw up the employment contract in writing in order to ensure that it can be proven. In addition, it is advisable to set out important regulations on working hours, vacation regulations, IT guidelines and general rules of conduct in detailed internal HR guidelines and to incorporate these into the employment relationship in a binding manner via the employment contract. In practice, the employment relationship begins with the acceptance of the employment contract, often in the form of a "Letter of Appointment" or "Offer Letter". As a rule, the contracts are agreed with a salary split. In this split, the agreed "Cost to Company (CTC)" is divided into a gross base salary and allowances in order to take advantage of any income tax benefits at the level of labor law.

Mandatory statutory provisions must be observed when drafting employment contracts for "Workmen". In the case of other individual contracts, on the other hand, there is considerable scope for drafting. Here, local labor law regulations must also be observed, which sometimes stipulate a minimum amount of information in the employment contract. Details on working hours, vacation entitlement and termination depend on the location of the job and the type of business. A 6-day week is not unusual. The weekly working time is limited to a maximum of 48 hours. Since overtime must be compensated at double the hourly rate, companies should have clear rules on overtime and overtime compensation. With regard to vacation entitlement, a distinction is made between “earned”, “casual” and “sick leave”. Depending on the industry and location, between 15 – 25 days are common with a 5-day week. The number of sick days with continued pay is predetermined and can generally be limited. Since 1. April 2017, women working in companies with ten or more employees are entitled to 26 weeks of paid maternity leave after the birth of a child instead of the previous 12 weeks. Paternity leave is not required by law, but is granted at the discretion of many companies. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 contains provisions to protect sexual harassment at the workplace. It provides for a strict reporting procedure in case of sexual harassment. In this context, the concept of employee and workplace is to be understood very broadly in order to guarantee the widest possible scope of application. Companies with ten or more employees must provide a so-called “Internal Complaint Committee, which is the investigating and deciding council in cases of sexual harassment in the workplace. Depending on the federal state, a company‘s Internal Complaint Committee must also be registered with the relevant authorities.

The employment relationship may be terminated unilaterally subject to the notice period or extraordinarily under special circumstances. In principle, precise termination provisions should be set out in the employment contract. Whether further requirements exist, e.g. regarding a prior warning or grounds for termination, must be examined in each individual case. Particularly strict termination regulations apply in companies with 100 or more employees. A statutory compulsory severance pay entitlement, so-called gratuity entitlement, must be paid to employees with 5 years or more of service in a company with 10 or more employees. In addition, any accrued vacation days must be paid out.

SOCIAL SECURITY LAW

Social security systems in India are still under construction. The level of protection is not comparable to the standard in developed countries, and large parts of the population are not covered. For example, employers and employees are generally only required to pay contributions to the pension insurance fund (Provident Fund) for companies with at least 20 employees. Foreign employees working in India may also be required to pay contributions. However, the German-Indian social security agreement must be observed (see below). Contributions to the Indian statutory health insurance must only be paid for employees with a very low income (INR 21,000 per month or less). However, many companies now offer group health insurance or other social health insurance benefits.

LABOR REFORMS

India is planning comprehensive labor law reforms after more than 20 years. Four new labor codes are to uniformize and reform a total of more than 29 individual laws (Code of Wages, Code of Social Security, Occupational Safety, Health and Working Conditions Code and Industrial Relations Code).

The new labor codes introduce mostly balanced changes for industry and workers in an attempt to provide more social security at the same time. Important highlights include the adjustment of the definition of “wages”, the introduction of a uniform national minimum wage rate, the codification of the employment relationship, the expansion of the social security system for platform workers and gig workers, the introduction of fixed-term employment relationships in which the legal right to severance pay applies after just one year of service, uniformed registrations for companies, stricter regulations on strikes, and simplified dismissal options in the event of mass layoffs.

Despite the introduction of these new labor codes, other individual laws already in place will continue to exist and there will continue to be different regulations at the federal and sectoral levels. Furthermore, different labor regulations will continue to apply to manufacturing and service companies. It remains to be seen when the new labor codes will be introduced.

FOREIGN EMPLOYEES

Foreign employees need a work visa (employment visa) to be allowed to work in India. The employment visa can be applied for by submitting an employment offer / employment contract. Although there are no special formal requirements for the drafting of the employment contract, it is recommended that the special qualification of the employee is included in the contract. As a rule, a work visa is only granted if the minimum salary is USD 25,000 / year. Exceptions are sometimes made to this internal guideline. A business visa can only be applied for when traveling on business, such as attending meetings, participating in trade shows, etc.

For foreign employees ("International Workers"), there is an obligation to contribute to the Indian social security system, irrespective of the amount of remuneration. Foreign employees may be exempt from an obligation to contribute to the Indian social security system if there is a social security agreement with the country of origin and the employee continues to pay social security contributions in his or her country of origin on the basis of the social security agreement. Furthermore, a foreign employee who comes from a country of origin with which a social security agreement exists and who has paid into the Indian social security system can have the accumulated amount paid out when leaving India.

A corresponding social security agreement exists between Germany and India. It allows an exemption from the Indian pension insurance obligation. The German employee's social security obligation in India and Germany should always be checked on a case-by-case basis before a posting/transfer.

Whether and to what extent the employee's salary and income must be taxed in India depends on the employee's resident status (see above).

There are registration requirements for foreign employees in India. They must register with the Foreign Registration Office within 14 days of arrival in India. If there are changes in the name, address or visa of the foreign employee, these must be reported to the authorities.

MINIMUM REQUIREMENTS FOR THE ANNUAL FINANCIAL STATEMENTS

The same accounting obligations apply to all companies with a "place of business" in India. In principle, therefore, there is a "commercial law" accounting obligation for
- Liaison Offices,
- Branch Offices, Project Offices and
- Corporations.

The Indian "commercial law" individual financial statements in accordance with Indian GAAP (set of financial statements, annual accounts) consist of the following components:

BALANCE

The format of the balance sheet is prescribed by law. Sec. 129 Companies Act, 2013 mandates that the balance sheet be prepared in the form prescribed in the notes to the financial statements in Schedule III Part I. Even minor deviations are taken up and sanctioned (up to 1 year imprisonment for violation of the requirements and / or a fine of at least INR 50,000 up to INR 500,000).

PROFIT AND LOSS ACCOUNT (P&L)

Schedule III also includes an explicit format template for the income statement. The closing period is 12 months and must necessarily cover the period April 1 to March 31. Exceptions require explicit approval following a separate application procedure. However, this approval is only granted for the commercial accounting obligation and not for the tax audit (see below).

DETERMINATION AND DISCLOSURE REQUIREMENTS

Every Indian company, irrespective of size, type or listing, for as long as it exists and whether or not it has an operating business, is required to file the following 2 documents annually with the Registrar of Companies.

ANNUAL ACCOUNTS (BALANCE SHEET, PROFIT AND LOSS ACCOUNT)

An Annual General Meeting (AGM) must be held within 6 months of the end of the financial year, at which the Annual Accounts (the annual balance sheet and profit and loss account), the Auditors‘ Report and the Directors‘ Report must be presented to the shareholders. At least 21 days before this meeting, the Board of Directors must send the balance sheet and the profit and loss account to the shareholders. The balance sheet and annual accounts of a company are not final until they have been approved by the shareholders‘ meeting after appropriate appraisal. A certified copy of the annual accounts and auditors‘ report and directors‘ report must be sent to the Registrar of Companies within 30 days of the annual accounts being approved by the shareholders‘ meeting, but no later than 30 days after six months have elapsed since the end of the financial year (disclosure).

For Branch Offices, Liaison Offices and Project Offices, a certified copy of the Annual Account must be filed with the Registrar of Companies within six months of the close of the fiscal year.

ANNUAL RETURN

Within 60 days after the Annual General Meeting, but no later than 60 days after six months have elapsed since the end of the financial year, the Company shall file the Annual Return with the Registrar of Companies. The annual return shall contain a status overview of the shareholders, directors and other material data of the company as well as information on any changes that may have occurred since the last annual return.

For Branch Offices, Liaison Offices and Project Offices, the Annual Return must be filed with the Registrar of Companies within 60 days of the close of the fiscal year.

Listed companies are required to send their annual financial statements to the respective stock exchange and also prepare quarterly financial statements and send the same to the stock exchange as well. Additional documents such as the Annual Activity Certificate must be submitted to the Central Bank of India by the authorized bank for the Branch Office, Liaison Office and Project Office.

ANNUAL AUDIT

All companies, banks and insurance companies must have their annual financial statements audited by an auditor. This audit is also known as the "Statutory Audit". There is therefore a general obligation to have financial statements audited in India. The financial statements of branch offices, liaison offices and project offices are also subject to this obligation. The duty to audit exists irrespective of the size of the turnover.

The auditor for the first year after incorporation is appointed by the Board of Directors, and the auditor for all subsequent financial years is appointed by the shareholders. In the case of a newly formed Pvt. Ltd., this must be done within 30 days of the company's registration with the Registrar of Companies. The auditor shall prepare an audit report in accordance with the Companies Act, 2013. In it, he must deal with the accounting records, each item of the balance sheet, profit and loss account and any other document that forms part of the financial statements and is presented to the shareholders' meeting.

TAX AUDIT

Every company with an annual turnover of more than INR 10 million (in some cases INR 100 million) and every self-employed person with an annual turnover of more than INR 5 million must prepare the annual financial statements in a separate presentation in such a way that they comply with the provisions of the Income Tax Act; the adjustment must also be accompanied by an audit opinion. This audit, which is additional to the Statutory Audit, mainly contains confirmations of certain facts, figures and information which are generally required by the tax authorities as part of the assessment process. The audited financial statements and information are intended to facilitate the work of the assessing tax authority and save time.

OTHER TESTS

All business transactions with associated companies must be presented separately each year in a formal statement, with details of the nature and scope of the business transactions and the method used to determine the transfer price. This disclosure must be certified by an auditor ("Transfer Pricing Audit", Form 3CEB). If the volume of such business transactions exceeds INR 10 million, comprehensive transfer pricing documentation must also be kept. Failure to comply with these obligations will result in severe penalties.

Depending on the industry and size of the company, further audits of certain sub-sectors and sub-aspects may be required, such as a separate audit of sales tax, GST. Liaison offices are required to file a tax return (Form 49C) in which the foreign company operating the LO must provide information on, among other things, its sales in connection with India. There is no tax liability associated with this.

Although joint ventures are often highly controversial in India, participation in an Indian joint venture remains a form of investment in India that should not be lost sight of the risks inherent in joint ventures can be outweighed by the benefits if properly planned and implemented.

Corporate acquisitions have recently become increasingly important in India, as they offer rapid market access through good basic economic infrastructure. This trend is reinforced by the growing number of Indian start-ups that are strong in innovation and technology.

FORMS OF TAKEOVER IN INDIA

In contrast to a merger, in which at least two companies merge into one, in a takeover the individual companies remain in existence. A company acquires the majority or even all of the business shares or assets of a target company in order to gain control over it.

Participation in partnerships is not legally possible unless it is a Limited Liability Partnership (LLP), comparable to a KG. The following transaction forms are available:

Share Deal

This involves the purchase of most or all of the shares in the target company. The advantage for the seller is that double taxation is avoided and all liabilities are transferred to the buyer.

Reasons for a share deal are, for example, the transfer of certain contracts (provided that no "change of control" clauses apply which entitle the contractual partner of the target company to terminate the contract if a transfer of shares in the target company takes place) or of licenses / intangible assets which are connected with the target company.

The advantages of a share deal are that a share deal is usually more favorable in terms of tax law and the transaction is usually faster and easier to implement. In addition, thanks to the universal succession of rights, the company can be seamlessly continued. On the other hand, the buyer assumes all rights and liabilities and is therefore subject to a high liability risk. This type of transaction is only permitted for corporations and (for all intents and purposes) limited partnerships.

Asset Dealt

The buyer also has the option of taking over a company de facto by purchasing the assets and liabilities, i.e. individual assets. In this way, the buyer can ”cherry-pick” the best assets and thus limit the liabilities transferred to him. This results in a significantly reduced liability risk. This type of transaction can be carried out if the target company is a partnership or a general partnership. However, an asset deal is usually disadvantageous in terms of tax law and, as a rule, a new company must be formed which becomes a party to the asset deal. Generally, the contractual documentation is extensive and complex, as all assets and liabilities to be transferred must be listed in detail. Since there is no universal succession, all legal relationships such as supply contracts, employment contracts, rental contracts, etc. must be newly concluded with the new company.

Slump Sale

The slump sale is comparable to a transfer of business. In this type of transaction, the target company is sold as a whole for a lump sum, whereby no value is assigned to the individual assets and liabilities in the slump sale. All assets and all liabilities of the target company are transferred. In the event that the target company is a partnership or a general partnership, this type of transaction can be carried out. In addition, the slump sale may be better than an asset deal for tax purposes. However, there is a higher liability risk since the buyer assumes all rights and liabilities. Generally, a new company must be formed to become a party to the slump sale. Since there is no universal succession, all legal relationships such as supply contracts, employment contracts, rental contracts, etc. must be restructured with the new company.

The decision between the aforementioned transaction forms makes due diligence indispensable, so that the prospective buyer is precisely informed about all opportunities and risks associated with the company takeover before the contract is concluded.

MERGING IN INDIA

A merger in India is a complex, very formalistic process. Since a merger can only take place between two Indian companies, this legal form is effectively downstream from a traditional takeover.

ACQUISITION OF SHARES IN INDIAN COMPANIES

The acquisition of shares in an Indian company inevitably leads to a joint venture situation if not all shares are acquired.
In a joint venture situation, in addition to the acquisition of the company shares, the rules for future cooperation must also be taken into account. These are usually agreed in a shareholders' agreement (joint venture agreement) separate from the share purchase agreement (SPA).

Special attention must be paid to the following exemplary aspects:
- Composition of the Board of Directors
- Shareholder rights
- Reservations of approval for certain legal transactions
- Termination rights
- Sale of shares
- Put and call options (rights and obligations)
- Information and intervention rights
- Non-compete agreements
- Confidentiality rights
- Technology transfer rights

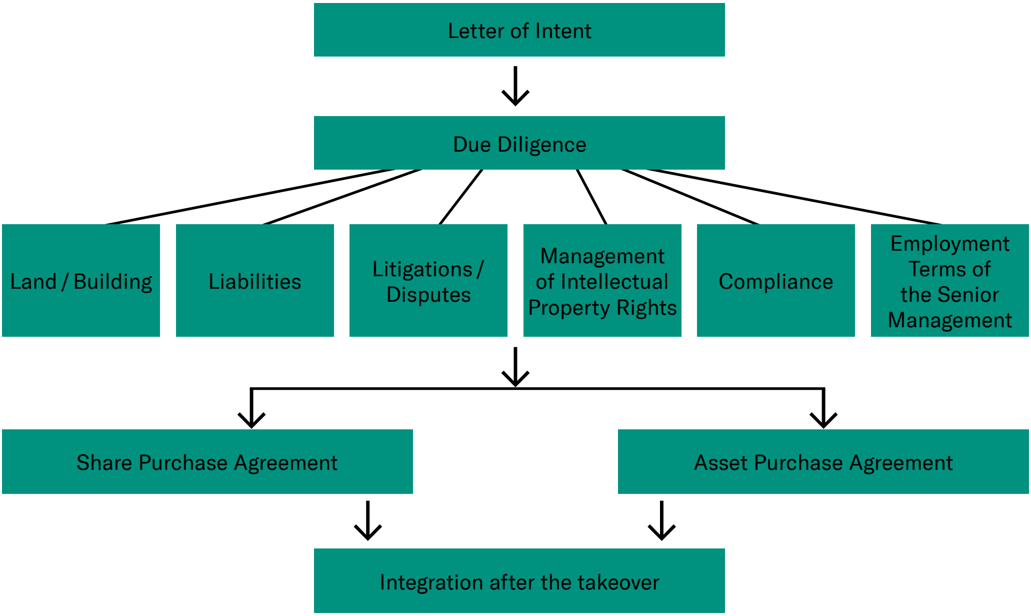
TAKEOVER OF STOCK MARKET ORIENTED COMPANIES

Although it is possible in principle to take over / invest in listed companies in India, this is extremely challenging in practice. The Indian capital market is highly overregulated. This over-regulation also affects the possible takeover of a listed company. However, this is an option for a quick market entry, where a lot of know-how, qualified and experienced employees, brand names, customers and products are transferred.

The high level of formalism coupled with regulatory requirements and spiced with short deadlines tends to deter foreign companies from taking over such companies. Furthermore, the transfer of risks and liabilities entails a high liability risk. The integration process after a merger should not be underestimated, nor should any loyalty to former shareholders.

Sometimes the sale of a company is a successful strategic move to avoid financial or other difficulties, even insolvency. However, the sale of a company can also mean growth potential and/or easier access to technologies. The sale of a company can also clarify the succession of a family-run business.

OVERVIEW PROCEDURE



LETTER OF INTENT (LOI) OR TERM SHEET

The letter of intent or term sheet defines the type of transaction (asset or share deal or slump sale), the valuation of the assets or shares, and the time frame of the transaction.

DUE DILIGENCE

The following aspects in particular must be taken into account during due diligence:

– Land and buildings of the business operation – the business premises should be purchased or leased on a long-term basis to exclude third-party claims.
– Encumbrances - if trade credits are present, the seller must obtain the bank's written consent prior to sale
– Pending or announced litigation
– Handling and administration of property rights, especially in the event of future transfer of own property rights
– Adherence to compliance – setting deadlines for correction and warranty in case of non-compliance
– Contractual conditions of key management personnel

It is important to understand that contractual warranties provide only complementary protection and therefore legal, financial and tax due diligence are essential!

BEFORE THE CONCLUSION OF THE CONTRACT

For the potential buyer, the overall view of the company is decisive. This includes the financial situation of the company and the risks and liabilities that pass with the acquired company, particularly with regard to taxes, legal matters and finances. Of course, the appropriateness of the purchase price demanded and the opportunities to be expected from the acquisition also play a decisive role.

CONTRACT

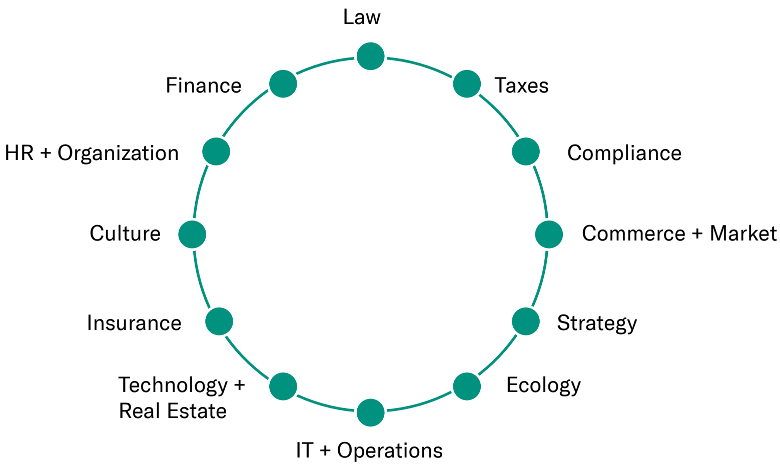
When a contract is concluded, a share purchase agreement or an asset purchase agreement is concluded. Earn-out arrangements are important in this context: here, the seller retains a minimum share of the company or part of the purchase price can be made dependent on the economic success of the company in the following financial years and is only paid out after these financial years have elapsed. This creates an incentive for the seller to continue to act in favor of the company after the takeover. Limits under foreign exchange law must be observed.

INTEGRATION AFTER THE TAKEOVER

Long-standing high-ranking employees of the company, such as CEO and managing directors, should be involved in decision-making processes for the integration to avoid their departure.

Especially in the case of family-run companies, integration is often a challenge, as such companies in India are often run in a very patriarchal manner and rarely have professional management.

LEGAL
The actions and contents of an acquisition are regulated primarily by the following legal provisions:
- Company law
- Foreign exchange law
- Tax law
- IT Law
- Industrial property protection
- Labor law
- Contract law
- Commercial law
- Competition and antitrust law



DUE DILIGENCE

Legal Due Diligence
- Examination of corporate law
- Examination and presentation of the entrepreneurial situation
- Contractual relationships
- Personnel matters
- Litigation
- Protection of intellectual property
- Real Estate – Due Diligence

Financial Due Diligence
- Examining the revenue to identify key performance factors and establish sustainable business results
- Audit of net assets to identify accounting risks
- Checking the financial position to ensure a sustainable flow of capital
- Checking the business accounting

Tax Due Diligence
- Examination of the previous tax periods to determine tax risks (e.g. provision of tax obligations for previous transactions)
- Checking future accounting periods to recognize tax benefits from the acquisition (e.g. depreciation of the purchase price, use of tax loss carry-onwards)

Other Due Diligence
- Commercial Due Diligence
- Technical Due Diligence
- Environmental Due Diligence
- IT Due Diligence

WHAT IS THE PURPOSE OF DUE DILIGENCE?

The purpose of due diligence is to provide the buyer with an overall view of the economic situation of the target company. Only in this way an he make the decisive decisions, taking into account all opportunities and risks.

The result of a complete due diligence includes the following factors:

- Overall picture of the entrepreneurial processes and the type and amount of revenues – All liabilities of the target company
- Securities / Warranties / Assurances
- Thresholds, liability limits and purchase options
- Indemnifications (e.g. from tax obligations)
- Deposit (partial retention of the purchase price)
- Bank and personal collateral
- Actual value of the target company
- The purpose of due diligence is to identify and resolve liabilities

TYPICAL ACQUISITION PROCESS:

Reparation & Research

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Closing

First, the budget for the planned acquisition by the buyer must be determined. Subsequently, the decisive criteria for a potential target company must be determined. Subsequently, the search for a suitable target company begins.

A feasibility study considers the feasibility of the venture once the potential target company is found.

The final point of this phase is to submit a justification of interest to the seller.

Letter of intent and preliminary offer

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Closing

Usually a non-binding expression of interest is now submitted to the potential seller by presenting a letter of intent (LOI). If the seller agrees, the letter of intent is signed by the buyer and representatives of the target company. As a rule, a non-disclosure agreement (NDA) is also agreed and signed. Under certain circumstances, a non-binding purchase price indication based on the company valuation is already made here.

LOI						
Purchase price factors / -indication		>	Exclusivity	>	Confidentiality Agreement	∨
∧	Legal Commitment / non-commitment	<	Possible transaction structure	<	Valuation method	

Due Diligence

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Closing

Most Important Due Diligence		
Legal	Financial	Tax
– Corporate Law – Legal obstacles regarding the acquisition and due to significant legal risks – Important contracts (external and internal) – Licenses, patents – Litigation – Employment Law – Property Due Diligence	– Operational & organizational – Products & Markets – Customer- & supplier structure – Historical & budgeted – Balance sheets, profit & Loss, cash flow – Accounting & Controlling	– Tax Assessments – Tax Audits – Restructuring / re- organizations – Intercompany Relationships / Transfer pricing – Transaction Taxes

Commercial	Technical
– Salary structure – Qualification structure – Pension scheme – Information about the management	– Evaluation and record of product lines and technical systems – Investment needs

Structuring

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Closing

First of all, it must be examined which form of transaction is to be given preference in the specific case (share deal versus asset deal or slump sale). Guarantees and warranties must be determined taking into account the results of the due diligence reviews. In the event of a breach of contract, the amount of liability must be determined (so-called de minimis thresholds and / or ceiling or tipping basket). Escrow, security and set-off rights should be considered. It should be determined whether termination will take place without penalty or damages should the deal not close. The purchase price is determined by the locked box mechanism or the purchase price adjustment. Accordingly, both models should be compared. Then it comes to the corporate and tax structuring of the transaction.

Negotiations

The contract structure was negotiated and the exact amount decided, taking into account the risks and liabilities. The company valuation prepared is also an important negotiating criterion. The findings, especially from financial due diligence, are incorporated into the company valuation in a value-increasing or (usually) value-reducing manner. The internationally recognized valuation methods such as the discounted cash flow method (DC.F) also form the basis of the company valuation in India.

It should be noted that in addition to pricing, the company valuation is also required for regulatory purposes (foreign exchange and tax law). It then comes to the contract of sale of shares in the company: The final agreement between the buyer and seller on the sale of the company.

Execution / Closing

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Closing

In this phase, compliance with all conditions of execution (Conditions Precedent) is verified.

At the end of the closing there is the transfer in rem of the company shares or assets.

Examples include:
- New appointment to the management
- Elimination of any legal obstacles identified during the due diligence process
- Preparation of the transfer in rem of the business shares
- Partial or full payment of the purchase price
- Obtaining antitrust approvals, although due to the very high thresholds under antitrust law, the provisions of merger control rarely apply
- It should be noted that following the payment of the purchase price, a corresponding foreign exchange compliance as well as a tax compliance (on the seller‘s side) must be carried out.

EXCURSUS: NEGOTIATIONS WITH INDIANS

It is no secret that Indians like to negotiate intensively and sometimes very emotionally. The frequent alternation of rational and emotional negotiation can sometimes confuse one or the other negotiator with European experience – not to say bring him to the brink of despair.

It is important that you stay in charge of the negotiation and calmly assert your points or negotiate workable compromises. Resolving “dramatic” problems is often easier than you might think.

Frequently discussed “Dos and Don‘ts” may be a good indication, but they are certainly not the sole truth. Be very patient and flexible. An apparent end need not be an actual end.

WHAT ARE THE FORMS OF SETTING UP A BUSINESS ENTITY IN INDIA AVAILABLE FOR FOREIGN INVESTORS? WHICH ONE IS THE MOST POPULAR?

Foreign investors can operate in India through separate legal entities such as Private Limited Company (Pvt. Ltd.), Public Limited Company (Ltd.) and Limited Liability Partnership (LLP) or through dependent representative offices such as the Liaison Office (LO), Project Office (PO) and Branch Office (BO). The Private Limited Company is the most frequently chosen form to set-up a business in India, as it is particularly convincing due to its relatively uncomplicated incorporation process and high flexibility when it comes to business models. There are other investment vehicles like partnerships etc., but they are not available for foreign investors.

WHAT IS A PRIVATE LIMITED COMPANY?

A Private Limited Company is a separate legal entity, which offers limited liability to its shareholders. The liability of the shareholders can be either limited by shares or limited by guarantee. A Private Limited Company is comparable to a German GmbH.

A Private Limited Company generally consists of shareholders and Board of Directors. The Memorandum of Association (MoA) and the Articles of Association (AoA) constitute the statutes of the Private Limited Company.

IS THERE A MINIMUM NUMBER OF SHAREHOLDERS REQUIRED FOR AN INDIAN PRIVATE LIMITED COMPANY?

Yes, minimum of two shareholders are required to form a Private Limited Company in India. It is sufficient if one of the two shareholders hold only one share and the other holds all of the remaining shares. Shareholders can be either individuals or legal entities, as long as they are legally recognized.

WHAT ARE THE DUTIES AND RIGHTS OF SHAREHOLDERS OF AN INDIAN PRIVATE LIMITED COMPANY?

The essential duty of every shareholder is to pay his capital contribution. In return, the shareholder receives dividends.

However, the declaration whether to and to what extent dividends may be distributed is made solely by the Board of Directors. The shareholders only have an approval right in the General Meeting.

The shareholder acts more as a silent investor or promoter. The shareholders can carry out their rights exclusively through General Meetings. Shareholders have a right, among others, to vote on matters concerning the substrate of the company. Such matters include, but are not limited to, liquidity, the sale of assets, the MoA/ AoA, inspect statutory registers and minute books and appointment and removal of Directors. The shareholders are obliged to participate in the General Meetings and exercise their voting rights.

There are two different kinds of General Meetings, the Annual General Meeting (AGM) and the Extraordinary General Meeting (EGM). The AGM confirms the auditor, Directors and finances. EGMs can be called upon by the shareholders or the Board of Directors to discuss urgent matters that cannot wait until the next AGM, such as the appointment or resignation of a Director. Unlike the EGM, the AGM must take place at the company's registered office in India.

Our Tip: The shareholders of the Private Limited Company need to be physically present for certain steps in India, for example for the AGM. Therefore, it may be easier to have two legal entities as shareholders, since an individual shareholder may not be able to give power of authorization to someone else and thus would have to continue to be physically present in India for attending the meeting.

WHO IS RESPONSIBLE FOR MANAGING A PRIVATE LIMITED COMPANY?

The responsibility to manage the company is on the Board of Directors, as a collective management body. It carries out a double function: On one hand, it is the collective management body but on the other hand, it is also carrying out the controlling functions and is therefore comparable to a supervisory or advisory board.

The Board of Directors consists at least two members of which at least one has to be Resident of India (Resident Director). Resident of India is a person who stayed, means who has been physically present, in India for 182 days or more within the last Financial Year. The purpose of his stay in India does not matter.

Our Tip: In order to ensure that the Board of Directors can operate anytime, it is advisable to appoint at least two Directors from the same country and one from another country, if required. However, it is advisable to appoint two Directors from India in order to ensure that the management of the business is carried out to a sufficient extent in India and therefore no risk of constituting a permanent establishment is arising.

WHAT ARE THE DUTIES AND RIGHTS OF DIRECTORS OF A PRIVATE LIMITED COMPANY?

The Board of Directors is responsible for implementation of shareholder resolutions and is therefore the sole executive body responsible to the shareholders.

Therefore, all Directors are obligated to fiduciary duties and to the Duty of Care, Skill and Diligence. Fiduciary duties ensure that Directors always put interests of the company and its shareholders first and above their own. Fiduciary duties arise from the general authorization granted to the Board of Directors, according to which Directors have to act in good faith and their best knowledge. In addition, their position is comparable to that of a trustee due to their power to dispose of the company's assets, which means that the Directors are also subject to similar fiduciary obligations of a trustee. Further, Directors have the fiduciary duty to act in accordance with the AoA of the Company. All Directors must exercise their powers with due skill and care and act honestly without being negligent. An objective standard is applicable while assessing this. In principle, the Directors fulfill their obligation as a collective body.

The Directors are entitled to both individual and collective rights. Individual rights include, for example, the right to inspect the books and various voting rights. The collective rights of the Board of Directors include, in particular, the right to propose dividends, to appoint a Chairman and a Managing Director. A Managing Director is, who is appointed by virtue of the articles of the company or agreement with the company or resolution passed in its general meeting or by its board of Directors, entrusted with substantial powers of management. The Managing Director usually manages the day-to-day business of the company. He has a double role, as he is both a Director and also an employee of the company. It is not mandatory to appoint a Managing Director for a Private Limited Company.

HOW DO THE DIRECTORS PASS A RESOLUTION?

Resolutions of Directors are taken in Board Meetings. There must be at least four Board Meetings in a year, with a maximum gap between two meetings of not more than 120 days. In order to pass a resolution, at least two Directors or one third of the Directors must attend the Board Meeting either in person or via video conference. Earlier, at least once a year a Board Meeting must have been held in person, i.e. physically, in order to legitimately confirm the company's finances. However, nowadays the Board Meeting to confirm the company's finances can be held also via video conference. In addition, every director is required to attend at least one Board Meeting in a year. Board Meetings can also be held outside of India.

WHAT IS THE LIABILITY OF A DIRECTOR?

Liability of Directors may result from willful acts, gross negligence or slight negligence.

Directors are personally liable to the company for all unlawful acts and for transactions for which they were not authorized and are inadmissible for being ultra vires. This liability also includes damage compensation.

Directors are in general not liable for gross negligence or slight negligence, if the Directors have acted truly in the interest of the company and within the scope of their powers of disposal and with such due diligence, as it is appropriate for their level of knowledge and experience.

In addition, there are several liabilities of the Directors for violations against the Companies Act, 2013.
For example, directors are liable under the Companies Act, 2013

if the required compliances under the Act are not carried out. In such scenario, the Directors are jointly and severally liable. A personal individual liability of a Director under the Companies Act, 2013 can only be possible in special individual cases and is based on Supreme Court jurisprudence ("lifting up the corporate veil").

A liability may also result from Indian Income Tax Law. In principle, directors are not liable for outstanding tax debts of the company. However, an exception is Sec. 179 of Income Tax Act, 1961, which provides for joint and several liability of Directors for the payment of outstanding taxes for those financial years in which they have acted as Directors and if the due tax payment cannot be recovered by the company.

Furthermore, various liability cases may arise from Labor and Social Security Law. For example, as per the Factories Act, 1948, the Manager or the Occupier, who is usually also appointed as Director, shall be punished with a fine or imprisonment for noncompliance regarding safety, health and welfare.

IS IT REQUIRED TO HAVE A STATUTE?

Yes, every Indian Private Limited Company has to have a statute which is the Memorandum of Association (MoA) and the Articles of Association (AoA). The MoA defines the name, objectives, registered office address and the capital of the company. Therefore, it explains the relationship of a company with the outside world. The AoA regulates the internal rules and regulations and the internal relationship with the outside world. Both documents can be seen as public documents at the Registrar of Companies (ROC).

IS THERE A REQUIREMENT FOR MINIMUM SHARE CAPITAL IN INDIA?

There is no minimum share capital required for incorporating a Private Limited Company. However, the amount of capital required depends on the requirements of the proposed business model of the company. Therefore, the company should have at least enough capital in order to secure business activities for a few months after incorporation.

Our tip: Depending on the business model, the company should have a minimum capital for running its business activities for three to six months. If you are planning a manufacturing company in India, please reach out to us.

WHAT DIFFERENT TYPES OF CAPITAL EXIST?

There are three different “types” of capital: Authorised Share Capital, Subscribed Share Capital and Paid-up Capital. Authorised Share Capital is the maximum amount of share capital, up to which a company can issue shares. The Subscribed Share Capital is a subgroup of Authorised Capital and it indicates the number of shares that the shareholders have to subscribe to. Each shareholder must subscribe for at least one share, but is not obliged to convert the shares he subscribed for into capital in full. The Paid-up Capital is the capital which is actually paid into the company‘s bank account by the shareholders in accordance with their Subscribed Share Capital. Upon receipt of the Subscribed Share Capital, the company must issue shares to the shareholders in the form of Share Certificates. This process has to be documented and reported to the authorities.

The personal liability of the shareholders then only extends to unpaid capital on their shares.

IS THERE A NEED TO OBTAIN ADDITIONAL PERMITS OR APPROVALS FOR FOREIGN ENTITIES INVESTING IN INDIA?

No, Foreign Direct Investment in India has been greatly liberalized in recent years and is now almost 100 % permitted in all sectors through the automatic route. However, foreign exchange regulations and procedures under the Foreign Exchange Management Act (FEMA) must be carried out in the case of cash payments from foreign shareholders. For example, payments have to be made via the international banking channel and via the Reserve Bank of India (RBI). After the payment has been made, it has to be reported that the shares were issued at a fair value.

Only in some highly sensitive sectors, such as Defence and Defence Industries, Foreign Direct Investment is only allowed via the

Approval Route. Further, it is to be mentioned that the Foreign Direct Investment in the e-commerce sector is subject to restrictions.

CAN THE CAPITAL OF AN INDIAN PRIVATE LIMITED COMPANY BE INCREASED?

Yes, the Paid-up Capital can be increased as long as it is not exceeding the Authorized Share Capital.

The Authorized Share Capital can also be increased. However, increasing the Authorized Share capital is rather time-consuming, as the MoA has to be changed for this purpose. For changing the MoA, a Special Resolution has to be passed at an EGM. Any change in the MoA must be filed with the ROC.

Our Tip: At the time of incorporation it may be wise to plan your Authorised Capital at 10 – 20 % higher than your planned Paid-up Capital. This ensures a fast increase of Paid-up Capital at a later stage. Please note that the amount of registration fees charged by the ROC for incorporation is calculated on the amount of the Authorised Capital.

SPECIAL CASE SHARE PREMIUM

With the so-called “Share Premium” Equity Capital can be provided to the company without having to exhaust the limits of Authorized Share Capital at an early stage. This is done by leaving shares to a shareholder not at nominal value, but at a higher value. The amount exceeding the nominal value is then set in a special equity account (Share Premium Account) and forms a non-free reserve.

CAN AN INDIAN PRIVATE LIMITED COMPANY TAKE A LOAN?

Yes, an Indian Private Limited Company can either take a loan or overdraft facilities without any regulatory restrictions. The loan is usually provided by an Indian bank at local conditions.

Loans from a foreign shareholder are considered as External Commercial Borrowings (ECB). These ECBs are subject to strict regulations. For example, minimum term and maximum interest rate are prescribed. Further, restrictions also exist with regard to the borrower, the lender and the end use of the loan. However, in January 2019 these regulations were considerably relaxed. Now trading companies and service companies are also eligible borrowers. Further, the purchase of land is now considered a permissible end use for ECB loan.

Our tip: Consider whether you prefer equity / loan financing for your company at an early stage.

HOW DO YOU INCORPORATE A PRIVATE LIMITED COMPANY IN INDIA?

If the shareholders are legal entities, they must report their will for incorporating a new company in a Board Resolution. Some basic information of the newly incorporated company such as name of the company, Authorized Share Capital, Paid-up Capital, registered office, etc. has to be reflected in the Board Resolution. Regulations clarify when a company would be considered inadmissible. Among other things, this can be a case when the name of the planned company is identical with the name of an already existing company or the name is generally confusing or misleading. Further, after the name of the company the applicable appendix (Pvt. Ltd., Ltd., LLP or UC.) has to be added.

At least two Directors have to be appointed, from which one of them has to be Resident Director. All Directors have to apply for a Director Identification Number (DIN) and a Digital Signature Certificate (DSC) during the incorporation process. In addition, the Directors would require an Indian tax identification number, the Permanent Account Number (PAN), once the company has financial transaction of more than INR 250,000 in a Financial Year. Further, every shareholder who has provided more than INR 100,000 paid-up capital has to apply for a PAN.

Several required documents must be signed and stamped by the shareholders. This documentation process is usually quiet time-consuming. In case of foreign entities, it could be the case that the foreign country has not recognized India as a signatory state under the Hague Apostille Convention of 1961. This would mean that all documents, which are relevant for Indian authorities, have to be first notarized by a notary, then Regional Court and then legalized by the Indian Embassy. Subsequently, all documents as well as the MoA and AoA must be submitted to the ROC and the registration fee has to be paid. Usually after submitting the documents, the ROC will raise further queries and / or questions. With an approval from ROC, the company will receive a Company Identification Number (CIN) and a Certificate of Incorporation (COI) will be issued. The company‘s Permanent Account number (PAN) is automatically created with incorporation.

HOW LONG DOES THE INCORPORATION PROCESS TAKE?

Usually the incorporation process for a Private Limited Company takes three to four months. However, this duration heavily depends on the participation of the shareholders and the procurement of necessary documents. Only after incorporation, can start the process of opening a bank account. Documents such as the COI, PAN along with Know Your Customer (KYC) documents of the Directors are mandatory to open a bank account in India. This process takes about one to three months and can differ from bank to bank.

Only after opening a bank account can the newly incorporated Private Limited Company be declared to be fully operational. This entire incorporation process can take anything between four to seven months.

Our tip: With us, you can do it also faster! Read more in the next point.

WHAT IS A FAST TRACK INCORPORATION?

It is possible to first incorporate a company with local shareholders. The incorporation process and the bank account opening process are significantly faster in such a scenario. After incorporation, this fully operational company can then be transferred to the foreign shareholders. Do you want to know more about this? Please contact us!

HOW DO I CLOSE MY INDIAN PRIVATE LIMITED COMPANY?

An Indian Private Limited Company can be closed in three ways: through voluntary liquidation, through striking-off via Fast Track Exit (“FTE”) or through insolvency proceedings.

The voluntary liquidation procedure gives creditors and shareholders an opportunity to settle their affairs amongst themselves. The voluntary liquidation procedure is only possible in case of a solvent company.

The striking off of the company via the so-called Fast-Track Exit is only possible if it is an inactive company that has no assets nor liabilities and / or has not started any business or carried out any activities since its incorporation. The insolvency takes place via an official insolvency procedure according to the Insolvency & Bankruptcy Code, 2016, in which a court-appointed insolvency administrator carries out the liquidation. This Act has significantly simplified and shortened the insolvency process. Insolvency proceedings can now also be initiated by application of the creditors and should be concluded within 180 days. For newly incorporated companies and companies with assets of less INR 10 million, the procedure is to be completed within 90 days.

Since mid-2014, India has been trying to make the transition from a service-based economy to a global manufacturing hub. To this end, India is focusing on important reforms such as the pioneering "Make in India" initiative, reform of the indirect tax rate (GST reform), reduction of income tax from over 35 percent to only 17 percent in some cases for manufacturing companies, abolition of local dividend taxation and adjustment to the standard international withholding tax system, and the pending reform of labor law. India has created a strong incentive for foreign companies to establish a production site in India. Legal and tax aspects are summarized here for you.

ACQUISITION OF PROPERTY

According to the provisions of the Indian foreign exchange law, a plot of land can only be acquired by an Indian, natural or legal person. It is therefore a prerequisite that a corresponding company exists to acquire the land.

However, there is also the alternative of establishing an asset holding company in India whose sole purpose is to lease the subject property to an affiliated company, or the Indian subsidiary of a foreign company.

In principle, there are two ways to acquire land in India: On the one hand, companies can buy the land free of charge ("free hold"); on the other hand, there is the possibility of "leasing" a plot of land for a period of 99 years via a state leasehold ("lease hold").

GOVERNMENT HEREDITARY LEASE

There are state-level corporations (e.g. State Industries Promotion Corporation of Tamil Nadu-SIPCOT Maharashtra Industrial Development Corporation-MIDC, or Karnataka Industrial Development Board, or KIDB, etc.) that operate state industrial areas. In the areas, land can be acquired by way of the above-mentioned ground lease for 99 years.

This is a relatively simple and safe option for acquiring a plot of land, since the land was purchased by the respective state governments, which grants grandfathering as well as a certain freedom from encumbrances. This is especially true for old industrial areas as well as industrial areas that were built per se on state-owned land. If both criteria are not met, the usual private-law ownership conditions apply, which means that in the event of any infringement of rights by third parties, they can assert their rights for 30 years. Therefore, the same standard of due diligence should be applied to the acquisition of newer state-owned industrial zones as to purchases of private land.

The following considerations may weigh in favor of choosing land in a state industrial park:

- High degree of legal certainty in ownership, despite enormous regulatory burden;
- Industrial development of basic infrastructure is provided to a considerable extent by Indian standards;
- Often there are already well-developed plots of land;
- In sector-specific industrial zones (such as chemical, heavy metal, food processing), industry-specific operating permits can be obtained more easily. It should be noted, however, that the ground lease is not a classic acquisition of ownership. In addition, the right can sometimes only be acquired at a very high price. In addition to an initial payment, high annual rents and levies must be paid in some cases. In addition, there are many complex reporting and building requirements as well as development restrictions.

PURCHASE OF A PRIVATE PROPERTY

In addition to acquiring a state leasehold, it is generally possible to purchase land in India from private sources. Due to the supply shortages of land within the state-owned industrial areas, the classic purchase of land is attracting increased interest from foreign companies. It should be noted that agricultural land cannot be purchased. In that case, a rezoning procedure must take place prior to the purchase. Once the land is successfully rezoned to industrial land, the acquisition can take place.

WHY DUE DILIGENCE IS NECESSARY

Real Estate Due Diligence is one of the most important steps in the acquisition of a property. The primary objective is to verify the title of the property and to determine whether the land is free of encumbrances. Although there are land registries in India, their registers lack public faith. As a result, the entries in the registers merely indicate whether a transfer of ownership of a plot of land has taken place, but not whether it was legal.

Real estate due diligence examines a time span of 30 years, as third party claims to a property only become time-barred after that time. The due diligence is performed by attorneys for the buyer. In addition, since the determination of compliance with building codes and regulations is checked, an architect should possibly be consulted.

WHERE ARE THIRD-PARTY CLAIMS OR LAND CHARGES DOCUMENTED?

- There are the following documents that are required for the title examination of agricultural / nonagricultural land:
- Land registry record (7 / 12 excerpts or similar, depending on state): includes land survey number, number and names of all previous and current owners of the land and their share of the land, area of the land, reservation on the land, etc.
- Mutation entries recorded in the land register: official record of changes in ownership due to inheritance, sale, mortgage, exchange, gift or bequest. As already shown above, this is merely a historical representation without legal appraisal.
- Family tree, 6c certificate or inheritance register of the seller: contains the result of the examination of all transactions in the proper consideration of all family and inheritance law claims. This is because it is very common in India for property sales to take place without obtaining the consent of family members as required by family law.
- Maps are used to determine the exact location and access to the property and also provide clarity as to whether the property is located on forest land, near reservoirs, etc. that may affect the property and its usability.

- Khate Utara (8A extract or similarly named document): includes the exact size of the property.
- Lis Pendens: documents whether a dispute is pending before a court of competent jurisdiction with respect to the real property, as such real property cannot thus be transferred for the duration of the pendency of the dispute.
- Non-agricultural (NA) order: confirms that the land can be used for industrial purposes. This is generally the case if the land is non-agricultural, the site has a prescribed access road and a water and electricity supply is ensured - in other words, if the site is developed under building law. Otherwise, the local development plan must be amended in advance by application.
- If the land is already built on, further documents and permits for state power departments, forestry departments, building permit, building plans, etc. must be checked. They are regulated differently at the state level

After the examination, a lawyer will prepare the so-called "Title Search Report" or a "Title Certificate". The document represents a legal opinion on the legal status of the property.

FINANCING

The legal structuring options for financing a land acquisition were significantly expanded in January 2019. Prior to the landmark reform, there were two main financing options; firstly, financing through share capital, and secondly, financing by taking out a local loan.

The inherent problem of financing through share capital lies in the high commitment of the capital, which cannot be repatriated or can only be repatriated to a very limited extent.

Financing through a loan from an Indian bank poses the problem of high interest rates. Despite a downward trend of the Indian prime rate, an interest level of at least 10 percent must be expected. Considering the fact that the price level of legally sound and infrastructurally good properties is already very high, debt financing in India remains economically unviable.

Due to the above mentioned reform from 2019, it is now possible that the acquisition of a property by a foreign shareholder is financed by issuing shareholder loans. Further aspects on the topic of shareholder loans can be found above.

TAX EFFECTS OF SETTING UP A PLANT IN INDIA

Working construction and Taxation of the German Company

The German company generates income from India through the sale of the production facilities, through their construction and training services as well as through royalties. India has a limited right of taxation for part of this income.

On the one hand, this concerns income from technical services, i.e. from the assembly itself and the associated training. This is subject to withholding tax in India, capped at 10 percent under the double taxation agreement (DTA) with Germany. Depending on the case and the contractual arrangement, income from the planning and design of the facility may also be included. This applies even if neither is done in India. License fees for the use of production know-how are also subject to withholding tax at the rate of 10 percent. In many constellations, withholding tax is a cost factor for the German company. The reason is the limited deductibility in Germany.

The tax consequences become more complicated if the assembly results in a taxable permanent establishment of the German company. According to the DTA Germany-India, this occurs from an assembly period of six months. For the period calculation, the length of stay of individual employees in India is not decisive. As a rule, it begins with the entry of the first employee entrusted with assembly (or preparatory work) and ends with the departure of the last employee, usually after completion of commissioning. Periods of employment of subcontractors, regardless of the country, are to be included in the calculation of the time limit. Interruptions are regularly irrelevant. According to the current opinion (as of October 2020) of the OECD, this also applies to interruptions due to travel restrictions caused by the Covid 19 crisis.

This view can at least be debated. In our view, the occurrence of coronavirus is so exceptional and, if applicable, the time of absence is so significant compared to the time of presence on site that interruptions should be excluded. At the very least, the individual case must be considered. It remains to be seen how the legal interpretation in India and Germany will develop. Austria currently adopts the view of the OECD.

It should be noted that, in addition to assembly activities, isolated assembly supervision is also sufficient to establish a permanent establishment in India. It is therefore not necessary for the actual assembly of the plant to be carried out by the German company. This applies at least if it is a so-called “responsible” supervision. If the German company merely advises the Indian company, different rules apply.

The permanent establishment profit is subject to a tax of approximately 43 percent in India. Not part of the permanent establishment profit is usually the profit from the delivery of the goods or the plant itself. German companies are better protected than, for example, Austrian companies by the provisions of the agreement. The risk can be further reduced by structuring the terms of supply accordingly. Nevertheless, there are always double taxation effects, despite the existence of the DTA. In many cases, Germany (and Austria) are mainly affected by the profit from the use of subcontractors for on-site assembly. VAT costs can also arise – especially if the German company uses Indian subcontractors.

DEDUCTIBILITY OF COSTS AT THE PRODUCTION COMPANY

Expenses incurred prior to or upon formation of the company can be amortized over five years. This applies in particular to the costs of legal advice and feasibility studies. However, maximum amounts apply that are based on a percentage of the value of the property, plant and equipment and the company‘s share capital.

Expenses incurred after the company is founded but before the start of business operations are generally not deductible. In the case of production companies, the start of business activity is generally deemed to be the start of production. This point in time can be quite late after the establishment of the company. Time elapses until all production equipment has been set up and is ready for use. Payments for rent and salaries are affected by the prohibition of deductions. Exceptions can be justified within limits for sales employees, as they start customer acquisition at an early stage. Expenses for administrative staff, on the other hand, are difficult to justify. In most cases, these costs cannot be deducted, even on a pro rata basis.

Expenses for the acquisition of production equipment are capitalized and depreciated in groups using the declining balance method. This also includes the cost of own personnel employed in assembly, for example.

ARMSLENTGH PRINCIPLE

The tax deductibility of expenses is limited by the arm‘s length principle. At least if the expenses result from business transactions with affiliated companies. Only costs that benefit the Indian company are deductible in principle. Personnel and travel expenses for typical control functions of the shareholders are not. Furthermore, the expenses must also be reasonable in amount. When purchasing production equipment, a third-party comparison price will rarely exist, so that at least in the case of a licensed or in-house manufacturer, the gross margin of the group company is more likely to provide guidance (cost-plus method). The same applies to services provided by the German company.

Conversely, it must be shown to the Indian customs authorities that the production equipment was not purchased too cheaply in order to save customs duties. The findings of the tax and customs authorities are not mutually authoritative. The customs value of the equipment is influenced by the license fee for the production know-how.

TRADE UNIONS IN INDIA

Setting up production in India usually requires hiring and employing a significant number of workers. Indian labor law is (still) considered complex and employee-friendly, although numerous laws and regulations usually apply only to workers (so-called “workmen”) and are not applicable to other employees or at least can be waived. Trade unions are therefore predominantly found only in manufacturing companies in India‘s private sector.

The first thing to note is that there are no uniform regulations on trade unions in India. The right to form and join a trade union and to bargain collectively is enshrined in the Indian Constitution and in laws such as the Industrial Disputes Act of 1947 (“IDA”), the Trade Union Act of 1926 and the Industrial Employment (Standing Orders) Act of 1946.

The term “Trade Union” includes any association, whether temporary or permanent, formed primarily for the following purposes:

- to regulate the relations between employees and employers or between employees and employees or between employers and employers
- or to impose restrictions on the conduct of a trade or business; which includes any merger of two or more unions.

Therefore, trade unions in India include not only employee representative bodies but also employer associations.

In order to be registered as a trade union under the TU Act, the trade union must have either at least 100 employees of an enterprise or 10 percent of the employees of an industry as members. In the latter case, at least seven members must be employed by the company at the time of registration.

Registration of a union is not mandatory, but only registered unions have certain rights and obligations. Nevertheless, unions typically seek registration under the TU Act in order to enjoy the benefits of being a registered union under the IDA. Indeed, under Sec. 2 (gg) of the IDA, only registered unions are defined as a “trade union” under the Act. On the other hand, unregistered unions may also properly declare strikes under the procedures set forth in Sec. 22 and 23 of the IDA – but they are not entitled to the immunities under the TU Act.

The fact that registration is not mandatory makes it difficult, especially for employers, to initially recognize unorganized unions and negotiate with them accordingly.

India is a preferred location for outsourced IT/ engineering services. The country has a large pool of well-trained software developers and engineers. Particularly for medium-sized companies, which have to overcome special challenges in the competition for the best specialists, interesting opportunities can arise through the establishment of their own structures or the acquisition of IT companies / start-ups. This opens up a highly interesting alternative to traditional outsourcing and the cumbersome or expensive recruitment of Indian specialists to Germany.

PROTECTION OF INTELLECTUAL PROPERTY

When setting up or taking over a development site in India and working with external service providers, there are various aspects to consider when securing intellectual property – also known as intellectual property ("IP").

First of all, it should be noted that patents, trademarks, copyrights and designs enjoy comprehensive legal protection in India (Patents Act, 2005, Trademark Registration Act, 1999, Copyright Act 1957, Design Act, 2000) and India is a party to the most important international conventions on industrial property protection. Thus, there is – with few limitations – a functioning legal system in the field in India.

At a glance:

- Patents (products, processes / procedures) are protected for 20 years after registration;
- Trademarks (goods and services) ten years after registration, renewable as often as desired;
- Design patent (design) ten years after registration, renewable once for five years.
- IP rights that are already registered and protected in Germany or internationally should therefore also be registered locally if possible.

COOPERATION WITH EXTERNAL THIRD PARTIES

When awarding research and development contracts or in connection with cooperations with Indian partners, confidential information and certain know-how are typically exchanged and made available (technical know-how, design and construction plans, specifications, software codes, etc.).

In India, there is no law on the protection of trade secrets. For this reason, it is also common practice in India to conclude contractual provisions on non-disclosure agreements. Other essential contractual contents are liability clauses and quality control.

When drafting the contract, it is usually more advantageous to agree on Indian law, as the Indian contracting party is likely to have its place of jurisdiction and assets in India.

Confidentiality agreements can also be enforced in court by way of an injunction. Due to the long duration of proceedings before ordinary courts, it is also advisable to agree on an arbitration clause. For this purpose, the place of arbitration should be agreed to be India.

OWN STRUCTURE ON SITE

Such aspects are naturally not so much in the foreground in the case of an own structure, e.g. through an own subsidiary. The first step in securing IP in one‘s own engineering hub lies in the proper structuring and management of the subsidiary. In the usual legal form of a Private Limited Company, for example, two directors must be appointed, one of whom must be resident in India. The parent company should ensure to appoint majority company-owned directors to exercise control over the company at all times. The requirement of a local director can also be fulfilled by external service providers. Also, without necessity, corporate participation of senior executives should not be made or offered.

Another focus is on contractual documentation, as tax and transfer pricing issues are particularly relevant here. For example, it must be ensured that the subsidiary is remunerated at arm‘s length for the services provided, i.e. comparable with third parties, and that arm‘s length can also be proven.

Furthermore, special attention should be paid to the form of the employees' employment contracts, as will be explained below:

EMPLOYEE INVENTIONS

According to the Copy Right Act, 1957, the copyright in a work belongs in principle to the author (e.g. also to the software developer). However, if the work was created by the employee in the performance of his duties under an employment contract, it depends on whether the employer provides the employee with detailed instructions on the work process or merely supervises measures taken independently by the employee. In the former case, the employer is considered the author, in the latter case, the employee may be. It therefore depends on the actual circumstances. In order to avoid legal uncertainties, employment contracts with employees should always include a passage stating that the employee transfers to the employer all copyrights acquired in the course of his or her employment and / or grants the employer a perpetual right of use, whereby the transfer and assignment are already compensated by the salary. The agreement should also include the consent to cooperate in any registrations of the copyright. Although registration of the copyright is not required for its creation or recognition, it is advisable for evidentiary reasons, since registration is considered prima facie evidence of ownership by the registered party.

A transfer of copyright is permissible, unlike in Germany. This means that it is also possible to transfer copyrights that have arisen at the Indian subsidiary to the parent company in Germany.

CONFIDENTIALITY OBLIGATIONS AND NON-COMPETITION CLAUSE

In India, there is no law on the protection of trade secrets. Therefore, employment contracts must contain corresponding confidentiality obligations. Particular care must be taken when drafting the relevant clauses. On the one hand, the drafting of contracts in the common law legal system generally requires that the parties regulate all essential points comprehensively and in detail, since only the contract can be used for interpretation. On the other hand, care must be taken not to make the confidentiality obligation too broad. Not all processes and information of which the employee becomes aware in the course of his employment can be qualified as trade secrets and protected. In the event of a dispute, the employer must prove that the information contains secret formulas or processes information or know-how that could be considered a proprietary interest of the employer that is not intended for third parties. Skills and knowledge acquired by an employee during the course of his or her employment are therefore not, in principle, know-how eligible for protection. It is therefore all the more important to have it carefully checked in advance which information is to be protected as secret and to take appropriate precautions.

In India, non-competition clauses are possible for the duration of the employment relationship, but there are very narrow limits to post-contractual non-competition clauses. As a rule, it will not be possible to prohibit employees from being employed by competitor companies after the end of their employment for a limited period of time.

A post-contractual confidentiality obligation that is too broad can also be regarded as a de facto non-competition clause and be invalid from that point of view.

Nevertheless, the inclusion of a (time-limited) non-competition clause and comprehensive non-disclosure agreement can be useful in practice in order to make employees aware of the issue and at least preserve the possibility of legal action.

PATENT APPLICATIONS

Possible inventions of the Indian development site can also be patented in India. Patent law in India is governed by the Patent Act, 1970, which has been reformed several times since then to bring Indian patent law in line with international requirements and standards. It is possible to patent products and processes. The term for patents is 20 years. Only inventions that are new and commercially applicable are protected. The novelty of the invention is excluded if it has already been used or published worldwide before the patent application in India.

However, India is a member of the Paris Convention, a patent application in another member state (e.g. Germany) can also have a priority effect in India if the application is also filed in India within a certain time limit, so that the patent protection is also valid in India from the date of the first application.

PRIVACY

Currently, India has not enacted any specific laws on data protection. In India, data protection law is currently governed primarily by the Information Technology Act, 2000 ("IT Act") and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("IT Rules"). In addition, the Indian government has long planned to adopt and implement a new Personal Data Protection Act, which is intended to be modeled on the European General Data Protection Regulation, 2016 ("GDPR").

PROVISIONS OF THE IT ACT/IT RULES

The IT Rules apply only to companies located in India, whether they process data of individuals located inside or outside India. Processing includes collecting, receiving, possessing, storing, trading or processing sensitive or personal information. "Sensitive personal information or data" means passwords, financial information, physical, physiological or mental health conditions, sexual orientation, medical records and medical history, and biometric information. However, it does not include personal information that is freely available or publicly accessible or provided under the Right of Information Act, 2005 or any other applicable law.

EXPORT OF SENSITIVE PERSONAL DATA

The export of sensitive personal data or information outside India is permitted, provided that the data protection standards required in India are met and that a lawful contract is in place and prior consent to the export of the sensitive personal data or information has been obtained.

RETENTION PERIODS

The IT Rules stipulate that data and information should not be retained longer than necessary. There is no general statute of limitations for the retention of data. However, sector-specific retention periods may be applicable, such as in the financial sector. However, general practice shows that data is generally retained for the duration of the applicable limitation periods under contract law with regard to potential causes of action.

COMPLIANCE

The IT Rules require companies to have a privacy policy in place. Furthermore, when collecting or transferring sensitive personal data or information, companies should obtain the consent of the individuals concerned and inform them of the receipt of the data collected. If such consent is obtained as part of a standard contract, the terms of the contract must be reasonable. In addition, individuals who have provided their data or information to companies must be able to withdraw their consent. In those cases, companies are free not to provide the goods or services for which the information was requested. In addition to the right to opt out, individuals have the right to review the data and information they have provided and request that it be corrected or amended if it is inaccurate.

DATA LOCALIZATION

There is a key innovation in the area of data localization requirements. It is envisaged that companies collecting or processing data must store this data or a copy of this data on local servers within the territorial jurisdiction of India.

The law also requires that companies not transfer or store sensitive personal data or certain categories of personal data classified by the government as critical abroad.

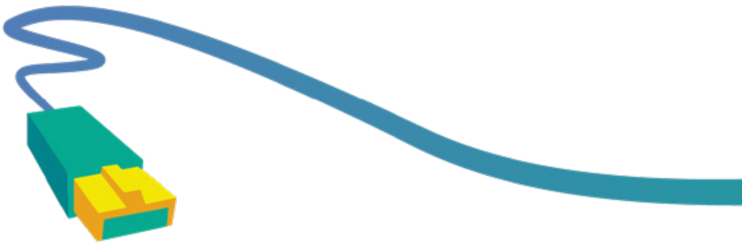
Transfers abroad should also only be permitted if an adequate level of protection is ensured during the transfer, the data subject has consented, and the Indian authorities responsible for enforcing the relevant laws can access the data if necessary.

At this point in time, most of this information is either partially or completely stored outside of India, especially for foreign-invested companies. Due to the requirement for data localization, companies should examine the need for action in good time and, if necessary, invest in the expansion of local IT infrastructure.

THE DSGVO AND ITS APPLICABILITY IN INDIA

According to the GDPR, the exchange of personal data from the territory of the European Union to non-European countries may only take place if this non-European country complies with the standards of the GDPR. In this context, certain criteria have been defined that the non-European country must meet in order for the exchange of data to take place without additional authorization. This involves examining whether the country has created a secure environment for the protection of personal data and information.

The data protection provisions are reviewed and their effectiveness calculated. The international conventions or treaties concluded by non-European nations are also reviewed. The European Union has granted adequacy of its data protection provisions to only 13 countries, and India has not yet received this approval. India hopes that with the new PDP Bill, consent will be granted soon. In the meantime, it is necessary for companies in India to comply with the additional compliance requirements of the GDPR in order to continue to transact with companies in the EU. Checklists, compliance structures and regular reviews can help. Here, Indian companies must pay particular attention to ensuring that all consents, data protection policies and notices are GDPR-compliant.



It should be understood that all companies, no matter how big or small they are in India, must comply with the provisions of the GDPR if they process data of EU individuals. This is especially the case for IT / ITES companies. Such companies are accustomed to submitting IT audits and affidavits regarding the implementation of cybersecurity and data protection in accordance with the GDPR in order to continue doing business with companies in the EU.

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