DOING BUSINESS IN INDIA

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I. OVERVIEW

It has become extremely necessary for a foreign investor or a corporate entity to have a background of some of the applicable laws while venturing into India. '*Doing Business in India*' provides an overview of some of the laws and procedures that may be applicable for setting up business and/or investment in India.

The laws of India are derived from its Constitution, legislations, statutes, delegated notifications, customary law, and judicial precedents. Such laws have evolved from English jurisprudence providing an excellent foundation for a country based on the '*Rule of Law*'.

1. Culture

With over 1.2 billion citizens, India is the second most populous nation in the world. India has a diverse cultural heritage and almost all the major religions prevalent across the globe can be found in India, although Hindus constituting almost 80% of the entire population form a majority. India is a multilingual society with more than 200 languages. While *Hindi* is one of the official languages and the primary tongue of 30% of the population, English being the other official language is the preferred language for national, political, and commercial purposes.

2. Government

India is a sovereign, socialist, secular, democratic republic with a parliamentary system of government. It is a union of states with certain powers reserved for the states in accordance with its constitution. The political system is democratic. The constitution provides for a parliamentary system of government with a bicameral parliament including the indirectly elected Rajya Sabha or the Council of States and the directly elected Lok Sabha or the People's Assembly. For an ordinary bill to become a law in India, it must be passed in both the houses of the parliament. Thereafter, the bill is presented before the President for his assent and signature, post which, a parliamentary statute to come into force as law.

India has primarily two levels of governments namely the central government and state governments. The Government of India (also known as the central or union government) and state governments have three branches namely the executive, legislative and the judiciary. New Delhi is the capital of India. At the centre, the head of State of India is the President and the head of the executive branch is the Prime Minister. Similarly, the state governments are headed by their respective

Governors, while the executive branches of the states are headed by their respective Chief Ministers.

3. Legal System

The legal system of India has evolved from the religious prescriptions and treaties followed during the Vedic period to the dynamic legal system established today. The seeds of common law in India were sowed by the British. Therefore, the legal system in India is predominantly based on British law, the British legal system and the *English* language. India is a common law country with a written constitution which guarantees individuals fundamental rights and is based on the principles of independence of justice. There is a single hierarchy of courts. Indian courts and the constitution provide adequate safeguards for the enforcement of the rights pertaining to life, personal liberty, property and contractual rights. The legal system has limited judicial review of the legislative acts and accepts compulsory ICJ jurisdiction, with reservations.

The highest court of the land is the Supreme Court of India as established under the provisions of the constitution and situated in New Delhi. The role of the Supreme Court is that of a federal court, guardian of the constitution and the highest court of appeal. The Supreme Court has original, appellate and advisory jurisdiction and is empowered to issue directions, orders or writs for fundamental rights and to enforce them. At the state level are the High Courts in each state. The High Courts have original and / or appellate jurisdictions and the power to issue writs in terms of the constitution. Unlike the Supreme Court, the High Courts have wider powers to issue writs in order to enforce not only fundamental rights but also for any other purposes. The hierarchy of courts in India stretches lower at the district level, to the District Courts and even further, to other lower courts. District Courts are subject to pecuniary or territorial limitations, as laid down by the legislature. In addition to the abovementioned judicial bodies, the laws of the land provide for the establishment of certain quasi-judicial bodies such as Tribunals and other regulatory authorities.

4. Economy

The Government of India is continuously striving and carrying out reforms for facilitating investments, improvement of the infrastructure and similar facilities, simplifying operations and administration of business in India, bringing in major tax reforms along with simplification of the labour, employment and compliance requirement. The focus of the economy has shifted to maximum governance through minimum governmental interference. Such dynamic policies, reforms and measures are leading to visible positive changes in the attitudes, expectations and processes within the country and aboard. Significant growth is evident from the rising wealth, the success of many new entrepreneurial businesses and the quantum of foreign direct investment flowing into the country. In the financial year of 2018-19, the total foreign direct investment in India was in excess of USD 37,366 million[1].

Foreign entities and investors, recognizing India's potential and considering its vast, qualified and well equipped human and capital resources, are becoming increasingly involved and have ventured into India. Economic growth has become rewarding for both Indians and foreign entities to do business in India as the policies are relatively simple, transparent and directed towards promoting domestic and foreign investment and infrastructure development. Policies are designed for capital inflows and to encourage technology collaboration agreements between Indian and foreign firms which have resulted in inflows of foreign investment in all areas of the economy, except a few of strategic practice. India continues to be a major exporter of software services and software workers.

The large growing market, developing infrastructure, well developed financial sector, flexible regulatory environment, incentives, stable policies and strong economic outlook make India an attractive investment destination and conducive for achieving high level of sustainable growth.

5. Present Scenario:

In the times of a globalized environment all over the world, the policies of the country act as a key determinant for getting the real benefits of the same. Particularly for the developing nations, the Government's policies largely affect its economic environments. The Government of India has taken up a series of measures to improve and facilitate the ease of doing business in India. In the last two years, the government has introduced various legislations such as Goods and Services Tax, 2017, Insolvency and Bankruptcy Code, 2016, Real Estate (Regulation and Development) Act, 2016 and amendments to the Negotiable Instruments Act, 1881 Specific Relief Act, 1963 etc. The Government has initiated reforms to digitize various compliances and processes so as to encourage ease of doing business. Owing to the efforts of the government and legislature, India has

[1] Foreign Direct Investment Flows to India: Country-wise and Industry-wise published by the RBI: https://rbi.org.in/Scripts/AnnualReportPublications.aspx?Id=1249

recorded a jump of about 53 positions in the last two years and 65 positions in last four years in the World Bank Ease of Doing Business Report[2]. India's rank has improved in construction permits, starting a business, trading across borders and enforcing contracts. The emphasis has been on simplification and rationalization of the existing rules and introduction of information technology to make governance more efficient and effective. Some of the recent measures undertaken are[3]:

a. The Goods and Services Tax Act, 2017 introduced facilitates uniformity in rates and elimination of multiple other indirect taxes. Registration and filing of returns under Goods and Services Tax Act, 2017 is a digitized and simplified process.

b. The Corporate Insolvency and liquidation provisions of the Insolvency and Bankruptcy Code, 2016 have been notified to facilitate smooth and time-bound settlement of insolvency and faster turnaround of businesses.

c. With the introductions in the amendments to the Specific Relief Act, 1963, India's rank for contract enforcement indicator has improved by 6 points.

d. Income Computation and Disclosure Standards (ICDS), an accounting standard for the purpose of income tax was introduced. It advances some income and postpones some expenses to arrive at the profitability of companies. Hence, data gathering has become automated due to the use of the latest software.

e. Process of applying for Industrial License (IL) and Industrial Entrepreneur Memorandum (IEM) has been made online and this service is now available to entrepreneurs on a 24x7 basis at the eBiz website. This has led to ease of filing applications and online payment of service charges.

f. 20 services are integrated with the e-Biz portal, which functions as a single window portal for obtaining clearances from various governments and government agencies. These services amongst others include application for availability of name, certificate of incorporation, issue of Permanent Identification Number (PAN), Importer Exporter Code License, Industrial License, filings with the Reserve Bank of India for the transfer of shares from resident to the non-resident and vice versa, etc.

g. With respect to starting a business, the procedures in Delhi have reduced from

[2] http://pib.nic.in/newsite/PrintRelease.aspx?relid=184513
[3] http://pib.nic.in/newsite/PrintRelease.aspx?relid=184513, https://dipp.gov.in/sites/default/files/EoDB_Reforms_Newsletter_28April2017.pdf

11 to 10 and 12 to 10 in Mumbai, the time has been reduced from 30 to 16 days in Delhi and 29.5 to 17 days in Mumbai.

h. Company incorporation is now more simplified vide a consolidated SPICe application form.

i. The Companies (Amendment) Act, 2015 has been passed to remove requirements of minimum paid-up capital, common seal for companies and for simplifying a number of other regulatory and compliance requirements.

j. The application forms for Industrial Licence (IL) and Industrial Entrepreneur Memorandum (IEM) have been simplified. Initial validity period of IL has been increased to 3 years from 2 years. This will give enough time to licensees to procure land and obtain the necessary clearances/approvals from authorities.

k. A checklist with specific time-lines has been developed for processing all applications filed by foreign investors in cases relating to Retail/Non-resident Indians (NRIs) /Export Oriented Units (EOUs) foreign investments.

l. To offset disability and attract investments in Electronic manufacturing, Modified Special Incentive Package Scheme provides 20-25% subsidy for investments in capital expenditure for setting up of new electronic manufacturing facility or expansion of the existing electronic manufacturing facility.

m. Electronics Manufacturing Clusters (EMC) Scheme provides support for creation of world-class infrastructure for attracting investments in the Electronics Systems Design and Manufacturing (ESDM) Sector.

n. Special Economic Zones (SEZ) Units are allowed removing goods for repair, replacement, testing, calibration, quality testing and research and development on self-attestation.

o. Process of applying for Environment and Forests clearances has been made online through Ministry of Environment and Forests and Climate Change's portals http://environmentclearance.nic.in/ and http://forestsclearance.nic.in/.

p. The processes for the registration with Employees Provident Fund Organization (EPFO) and Employees State Insurance Corporation (ESIC) have been automated by eliminating all physical touch points.

q. Shram Suvidha Portal has been launched to issue unique Labour Identification Number (LIN) making submission of common electronic returns under Labour Acts and facilitate risk based inspections.

r. A unified portal for registration of Units for Labour Identification Number (LIN), reporting of inspection, submission of returns and grievance redressal has been launched by Ministry of Labour and Employment.

s. Formulation of four Labour Codes on (i) Wages; (ii) Industrial Relations; (iii) Social Security & Welfare; and (iv) Occupational Safety, Health and Working Conditions by amalgamating, simplifying, and rationalizing the relevant provisions of the existing Central Labour Laws.

t. The introduction of an integrated Customs Declaration compiling the information requirements of and separate forms required by different agencies and Customs.

u. The time required for giving a new electric connection in Mumbai has been reduced to 21 days from 67 days. The number of procedures involved has been cut down to 3 in Delhi and 4 in Mumbai. Simplified procedure for new electric connection in Delhi with reduced procedures and time. Municipal Corporation of Delhi has launched online application process for grant of construction permits for residential and industrial buildings.

v. In addition to the above, Department of Industrial Policy and Promotion (DIPP) has requested all secretaries of Government of India and chief secretaries of the States/Union Territories to simplify and rationalize the regulatory environment. In order to improve the regulatory business environment they have been requested to take the following measures on priority: a) All returns should be filed online through a unified form; b) A check-list of required compliances should be placed on Department's web portal; c) All registers required to be maintained by the business should be replaced with a single electronic register; d) No inspection should be undertaken without the approval of the Head of the Department; and e) For all non-risk, non-hazardous businesses a system of self-certification should be introduced.

w. In relation to construction permits procedures have been reduced from 37 to 20 in Mumbai and from 24 to 16 in Delhi, time to procure permits has reduced from 128.5 to 99 days in Mumbai and from 157.5 to 91 days in Delhi, building quality control index has improved from 12 to 14 in Mumbai and 11 to 14 in Delhi and the cost of obtaining construction permits reduced from 23.2 percent to 5.4 percent.

I. INCORPORATION OF COMPANIES:

The Companies Act, 1956 (erstwhile Act) which governed the formation and operation of companies in India was replaced by the Companies Act, 2013 (Act). Under the provisions of the Act, a company means a company incorporated under the Act or an existing company formed or registered under the erstwhile Act. A company, under the prevailing laws, is a voluntary association of persons formed for a purpose in accordance with the provisions of the Act. A company is a juristic person having a separate legal entity distinct from the members who constitute it. A company has perpetual succession, i.e. the death of one or more shareholders of the company does not in any way affect the existence of the company or its continuity. As per the Act, a company is not mandatorily required to have a common seal. A company has its own name, can acquire property, sue or be sued and may enter into contracts under its own name. A company has to be registered with the Registrar of Companies (ROC). On registration, a certificate of incorporation is granted by the ROC which is conclusive evidence that all the requirements of the Act have been complied with and the company has been lawfully formed.

a. <u>Memorandum of Association and Articles of Association:</u>

The memorandum of association and the articles of association are the charter/ constitutional documents of a company. The memorandum of association of a company contains the fundamental provisions of the company's constitution. It contains the essential conditions upon which the company is incorporated such as the name, registered office, objects, liability, share capital, subscribers to the memorandum. These fundamental conditions are for the benefit of the creditors, outside public and shareholders. It defines as well as confines the powers of the company. It not only shows the object of formation but also determines the utmost possible scope of its operations and any action beyond the powers given in the memorandum of association is void.

The articles of association of a company provide the manner in which the objects, the day to day operations and management of the company are to be carried out and executed. The articles of association are predominantly for the management of internal affairs of the company.

There are mainly 2 types of companies, namely: (i) Private Companies and (ii) Public Companies

Private Companies:

A private company is a company which has provisions in its articles of association to:

- restrict the right to transfer its shares;

- restricts its members to 200, except in the case of a One Person Company (excluding present employees and former employees who became members when they were employees)

prohibits any invitations for the subscription of shares or debentures or any other securities from the general public and;

It usually has the words '*Private Limited*' at the end of its name. As per the provisions of the Act, the a minimum capitalization requirement of INR 1,00,000 in case of private companies has been done away with.

Public companies:

The Act states that every company which is not a private company is a public company. A public company usually has the initials '*Limited*' written at the end of its name. As per the provisions of the Act, a minimum capitalization requirement of INR 5,00,000 for public companies has been done away and a certificate of commencement of business is no longer required to be obtained.

Holding and Subsidiary companies:

A company being an artificial person, may invest in another company in its own name and may also hold shares in another company. Thus a holding company and subsidiary company are two different legal entities. A subsidiary is a company in which the holding company -

- Controls the composition of its board of directors.
- Exercises or controls more than half of its total voting power (51% or more) either on its own or together with one or more of its subsidiary companies.

Further, if one company is a subsidiary of another, then the subsidiary of the former is also a subsidiary of the latter. The Act, also envisages a restriction on the number of layers of subsidiary companies which may be made effective in due course.

b. <u>Directors:</u>

A company acts through its board of directors. Only individuals can be appointed as directors of a company and a body corporate, association or firm cannot be appointed as a director in a company. The board of directors is the controlling authority of the company and are elected by the shareholders of the company.

The minimum strength of the board of directors of a public company are 3 directors, whereas for a private company it is 2. However, the requirement to have at least 1 resident director is mandatory.

c. Membership to a Company and Shareholders:

The subscribers to a memorandum of association of a company are deemed to have agreed to become members of the company, and on the registration/incorporation of the company, their names must be entered as members in the register of members of the company.

Every other person who agrees in writing to become a member of a company and whose name is entered in the register of members shall be a member of the company. Every person holding shares of company and whose name is entered as beneficial owner in the records of the depository shall become a member of the concerned company.

d. Shareholder Rights:

The shareholders are really the ultimate owners of the company. They bear the risks of the business and stand to gain the benefits arising out of the company. All profits of the company ultimately belong to them. They get this in the form of dividends, by bonus shares as well as in form of capital appreciation. The Shareholders are entitled to alter the Articles of Association and Memorandum of Association, convene, attend and vote in general meetings, transfer shares, receive dividends, etc.

e. Auditors:

The shareholders appoint the auditors of the company to ensure that the affairs of the company are being carried out properly in a true and fair manner. Every company in India is mandatorily required to appoint an auditor in order to check and verify the accounts and prepare the audit report. A company can appoint more than one auditor. The company can appoint (a) a person who is a chartered accountant within the meaning of Chartered Accountant Act, 1949 or (b) a firm where all the partners practicing in India are qualified for appointment as the auditor of a company.

f. Company Secretary:

Every company having the prescribed share capital is mandatorily required to appoint a whole time company secretary, appointed by the board of directors of the company. Any individual who is a member of the Institute of Company Secretaries of India can be appointed as a company secretary.

A company secretary is a person who looks after the routine, compliance, corporate secretarial and procedural matters of the company, like organizing meetings of the board of directors and shareholders, keeping minutes of meetings, records of members and other security holders etc. The company secretary ensures that the company is in compliance with the various provisions of the Act and is an indispensable part of the company.

g. Books of Accounts & Statutory Records:

Every company is required to maintain its books of accounts not only to comply with the provisions of the Act but also to have control over the business.
The financial statements of the company should give a true and fair view of the state of affairs of the company and should be prepared in accordance with the provisions of the Act and the applicable accounting standards. The term 'financial statements' include the following:

a. a balance sheet at the end of the financial year; a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;
b. cash flow statement for the financial year;
c. a statement of changes in equity, if applicable; and
d. any explanatory note forming part of any document listed above.

The Act prescribes that every company should keep proper books of accounts in respect of the following:

a. All sums of money received and expended by the company and the matters in respect of which the receipt and expenditure take place;
b. All sales and purchases of goods and services by the company;
c. The assets and liability of a company; and
d. In case of a company engaged in production, processing, manufacturing or mining activities, it has to maintain such particulars relating to utilization of material or labour or to such other items of costs as may be prescribed by the Central Government.

The above compliances are also applicable to a foreign company, where the principal place of business of such foreign company is India.

h. Statutory Records:

The Act requires every company to keep certain books, documents and registers such as register of members, Index of members, register of charges, register of renewed and duplicate share certificates, register of employee stock options, register of directors and their shareholdings, register of debenture holders, Index of debenture holders, register of security holders, register of loans, securities and guarantees given by the company, minutes of the meetings of the board of directors as well as the meetings of shareholders, accounting records etc. Subject to certain exceptions as provided under the Act, these records are to be maintained at the registered office of the company. Such records are called statutory records and registers.

i. Annual General Meetings:

The Act requires every company to hold at least one meeting of its members every year and such a meeting is called as the Annual General Meeting (AGM) of the company. The notice of such a meeting has to specify that it is the AGM of the Company. Moreover, the gap between two consecutive AGMs should not be more than 15 months as per the provisions of the Act. The AGM is ordinarily held at the registered office of a company. Alternatively, the AGM may be held at any other place within the city, town or village where the registered office of the company is located. The unlisted companies can hold their meeting at any place in the country with the consent of all the members.

There are two kinds of business to be transacted at an AGM i.e. 'Ordinary Business' and 'Special Business':
The items given below, if applicable are generally considered at every AGM of the company and are as 'Ordinary Business':

a. Consideration of the financial statements and the reports of the Board of Directors and the Auditors;
b. Declaration of dividends (if any);
c. Appointment of directors in place of retiring directors (only in case of public companies);
d. Appointment of auditors and fixing their remuneration;

All businesses other than ones mentioned above i.e. Ordinary Business whether conducted at the AGM or any other general meeting i.e. EGMs (as defined below) of the shareholders of a company are deemed to be ‘Special Business’.

All the meetings of the shareholders other than the AGM are called Extra-Ordinary General Meetings (EGMs). An EGM may be called by the board of directors of a company at any time which they may deem fit. An EGM may also be called by a requisition, by the shareholders of the company. As per the secretarial standards, an EGM must be mandatorily held at any place in India.

II. BRANCH OFFICE, LIAISON OFFICE AND PROJECT OFFICE

A body corporate incorporated outside India including a firm or other association of individuals may set up a Liaison Office (LO), branch office (BO) or project office (PO) in India after obtaining requisite approval from the Reserve Bank of India (RBI).

a) Branch Office:

Companies incorporated outside India and engaged in manufacturing or trading activates are allowed to set up their BOs in India with specific approvals of the RBI. Branch Offices help companies with easier management of their businesses in particular areas. A BO is an extension of the Parent Company.

Normally, a BO should be engaged in the activity in which the parent company is engaged. A BO is permitted to undertake the following activities:

a. Export/Import of goods.
b. Render professional or consultancy services.
c. Carry out research work, in areas in which the parent company is engaged.
d. Promote technical or financial collaborations between Indian companies and the parent or overseas group company.
e. Represent the parent company in India and act as a buying/selling agent in India.
f. Render services in information technology and development of software in India.
g. Render technical support to the products supplied by parent / group companies.
h. Representing a foreign airline/ shipping company.

The requests for undertaking activities in addition to what has been initially permitted may be made to RBI.

b) Liaison Office:

A Liaison Office (LO) (also known as a representative office) can undertake only liaison activities i.e. it can act as a channel of communication between head office abroad and parties in India. It is not allowed to undertake any business activity in India and cannot earn any income in India. The role of such offices is, therefore, limited to collecting information about possible market opportunities and providing information about the company and its products to the prospective Indian customers.

Permission to set up an LO is initially granted for a period of 3 years which may be extended. However, the validity period for LOs of non-banking financial companies and those entities engaged in the construction and development sectors is 2 years and no further extension is granted for such the LOs. Upon the expiry of the validity period of such entities, such LOs either have to close down or be converted into joint venture or wholly owned subsidiaries in accordance with the FDI Policy.

The liaison office can undertake the following activities:

a. Representing in India, the parent company/group companies.
b. Promoting export/ import from/to India.
c. Promoting technical /financial collaborations between parent/group companies and companies in India.
d. Acting as a communication channel between the parent company and Indian companies.

c) Application for BO/LO/PO:

Vide FEMA 22 (R)/(2)/2019-RB, approval of the RBI is not required in case where Government approval or license/permission by the concerned Ministry/Regulator has already been granted. However, the term "permission" used does not include general permission, if any, available under Foreign Direct Investment in the automatic route with respect to four sectors namely Defense, Telecom, Private Security and Information and Broadcasting.

RBI has granted general permission to foreign companies to establish Project Offices (POs) in India, provided they have secured a contract from an Indian company to execute a project in India, and

a. the project is funded directly by inward remittance from abroad; or
b. the project is funded by a bilateral or multilateral International Financing Agency; or
c. the project has been cleared by an appropriate authority and secured the necessary regulatory clearances; or
d. a company or entity in India awarding the contract has been granted term loan by a Public Financial Institution or a bank in India for the project,

However, if the above criteria is not met, the foreign entity has to approach the RBI for approval. The validity period of the project office is for the tenure of the project.

Similarly, general permission to non-resident companies for establishing BO in the Special Economic Zones (SEZs) to undertake manufacturing and service activities is granted subject to certain criteria.

The application for establishing BO / LO/ PO in India should include details such as:

a. Details of the applicant;
b. Details of the capital including paid up capital, free reserves, intangible assets, etc;
c. Details of activities/services proposed to be undertaken/rendered by the office.
d. Place where the office is located.
e. Value of goods imported from and exported to India by the applicant during each of the previous 3 years.
f. Details of the banker of the applicant in their home country;
g. Such other information as prescribed in by RBI.
h. Declaration in the prescribed format provided by the RBI;
i. Certificate of incorporation or registration and memorandum of association and articles of association attested by notary public
j. Latest Audited Balance Sheets of the applicant entity.
k. Bankers' Report from the applicant's banker in the host country / country of registration showing the number of years the applicant has had banking relations with that bank.
l. Power of Attorney in favour of the signatory of the prescribed application form in case the head of the overseas entity is not signing the prescribed form.

d) Track Record:

The non-resident entity applying for a BO/LO in India should have a financially sound track record viz:

a. For Branch Office — a profit making track record during the immediately preceding five financial years in the home country and net worth of not less than USD 100,000 or its equivalent.

b. For Liaison Office — a profit making track record during the immediately preceding three financial years in the home country and net worth of not less than USD 50,000 or its equivalent.

The applicants who do not satisfy the eligibility criteria and are subsidiaries of other companies can submit a Letter of Comfort from their parent company in the prescribed format subject to the condition that the parent company satisfies the eligibility criteria as prescribed above.

If a foreign company has established a place of business within India, the concerned ROC has to be intimated (in the prescribed format).

III. LIMITED LIABILITY PARTNERSHIP

A Limited Liability Partnership (LLP) is viewed as an alternative corporate business vehicle that provides the benefits of limited liability and also allows its members the flexibility of organizing their internal structure as a partnership, based on a mutually agreed agreement. The LLP is governed by the Limited Liability Partnership Act, 2008 (LLP Act). It enables entrepreneurs, professionals and enterprises providing services of any kind, to form commercially efficient vehicles suited to their requirements.

LLP is a body corporate having a perpetual succession and is a legal entity separate from its partners. The LLP can continue its existence irrespective of changes in partners. It is capable of entering into contracts and holding property in its own name. As a separate legal entity, the LLP is liable to the full extent of its assets but liability of its partners is limited to their agreed contribution in the LLP. Thus, an LLP is a hybrid between a company and a partnership as it contains elements of both 'a corporate structure' as well as 'a partnership firm structure'.

1. <u>Partners and designated partners:</u>

A minimum of 2 partners are required for formation of a LLP. There is no limit to the maximum number of partners of a LLP. Any individual or body corporate can be a partner in a LLP. However, an individual shall not be capable of becoming a partner of a LLP, in case:

a. he has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;
b. he is an un-discharged insolvent; or
c. he has applied to be adjudicated as an insolvent and his application is pending.

Every LLP is required to have at least 2 partners who are the 'Designated Partners'. Such Designated Partners shall be individuals and at least 1 of the Designated Partners shall be a resident of India. The appointment of Designated Partners is mandatory for all LLPs and in the event of a vacancy, the position must be filled in within 30 days of the same. The Designated Partners are mainly accountable for regulatory and legal compliances, besides their liability as partners of the LLP. In case of an LLP in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least 2 individuals who are partners of such LLP or nominees of such bodies corporate shall act as Designated Partners.

2. <u>LLP Agreement:</u>

Any 2 or more persons, associated for carrying on a lawful business with a view to profit, may form an LLP. The mutual rights and duties of partners inter se and those of the LLP and its partners are governed by the agreement between partners or between the LLP and the partners. Such an agreement is called as a 'LLP Agreement'. The LLP Act provides flexibility to devise the agreement as per their choice and requirements subject however to mandatory provisions of the LLP Act. In the absence of any provisions in the LLP agreement, the rights and duties shall be governed by the provisions of the LLP Act.

3. Registration:

Every LLP is required to be registered with the Registrar of Companies (ROC) in accordance with the provisions specified in the LLP Act. Every LLP shall have a registered office and name which either has the words 'Limited Liability Partnership' or the acronym 'LLP' as the last words of its name.

The LLP Act allows foreign nationals including foreign companies and LLPs to incorporate LLPs in India provided at least 1 Designated Partner is a resident of India. However, the LLP and its partners have to comply with all relevant exchange control laws/ rules/ regulations/ guidelines.

4. Accounts:

Every LLP is under an obligation to maintain annual accounts reflecting true and fair view of its state of affairs. A statement of accounts and solvency has to be prepared within the prescribed period from the end of each financial year in a prescribed form and must be filed by every LLP with the ROC every year. The accounts of LLP are required to be audited, subject to any class of LLPs being exempted from this requirement by the Central Government.

5. Foreign Direct Investment (FDI) in LLPs:

Currently, FDI is permitted in LLPs. A person or entity resident/incorporated outside India (other than Pakistan or Bangladesh) not being a Foreign Portfolio Investor or a Foreign Venture Capital Investor, is permitted to contribute to the capital of an LLP in India subject to the following conditions:

a. FDI is permitted under the automatic route in LLPs operating in sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI linked performance conditions.
b. An Indian company or an LLP, having foreign investment, is also permitted to make downstream investment in another company or LLP in sectors in which 100% FDI is allowed under the automatic route.

c. A company having foreign investment can be converted into an LLP under the automatic route only if it is engaged in a sector where foreign investment up to 100 percent is permitted under automatic route and there are no FDI linked performance conditions.
d. FDI in LLP is subject to the compliance of the conditions of LLP Act.

However, investment in an LLP either by way of capital contribution or by way of acquisition/ transfer of profit shares, should not be less than the fair price worked out as per any valuation norm which is internationally accepted/ adopted as per market practice and a valuation certificate to that effect should be issued by a Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government. Similarly, in case of transfer of capital contribution/ profit share of an LLP from a person resident in India to a person resident outside India, the transfer should be for a consideration not less than the valuation as stated above.

6. Ownership:

A LLP will be considered as owned by resident Indian citizens if more than 50% of the investment in such an LLP is contributed by resident Indian citizens and/or entities, which are ultimately 'owned and controlled, by resident Indian citizens'. Similarly, a LLP is owned by persons resident outside India' if more than 50% of the investment in such an LLP is contributed by persons resident outside India/ or entities which are ultimately 'owned and controlled, by such persons.

IV. SETTING UP OFFICE

A person resident outside India may for the establishment of an office (or a branch) in India for any permitted activities excluding a liaison office, may acquire any immovable property in India, which is necessary for or incidental to carrying on such activity, provided that:

a. all applicable laws, rules, regulations or directions for the time being in force are duly complied with; and
b. the person files with the RBI, a declaration the prescribed form not later than 90 days from the date of such acquisition.

However, acquisition of immovable property in India by an office (or branch) or other place of business, of entities of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea shall require the prior approval of the RBI unless the immovable property is acquired on lease for a tenure not exceeding 5 years.

Under Indian laws, commercial real estate may be acquired in the following manner:

1. <u>By Purchase/Sale:</u>

In case of sale of immovable property, stamp duty payable is at the rate of market value of the property. Every deed of conveyance where the property involved is INR 100/- or more must to be compulsorily registered under the Registration Act, 1908.

2. <u>By Lease:</u>

A lease of an immovable property is a transfer of right to enjoy such property for a certain time expressed or implied or in perpetuity, for a consideration of a price paid or promised. A lease may be of the following types:

a. Lease from year to year;
b. Lease reserving yearly rent;
c. Lease for a fixed period exceeding one year; and
d. Lease in perpetuity.

A lease from year to year is a continuing tenancy so long as the party desires to continue but is terminable at the option of either of the parties at the end of one year. A lease reserving a yearly rent is for an indefinite period. A lease for a fixed period exceeding 1 year or a lease in perpetuity can be made only by a registered instrument.

Stamp duty in case of lease is payable on the basis of the annual rent and the number of years of the lease or on premium or partly on premium or partly on rent and certain percentage on the market value of the property which is dependent on the number of years of the lease, as the case may be.

3. General Covenants of a Lease:

a. Covenants by lessee: The usual covenants of a lessee are (a) to pay rent; (b) to pay taxes and outgoings (subject to any agreement to the contrary); (c) to use the land for the purpose for which the lease is given and no other purpose; (d) to keep the property in repairs and good condition subject to normal wear and tear; (e) to observe all municipal and other rules and regulations governing the property and the use thereof; (f) to permit the lessor or his agent to inspect the property; (g) not to do anything on the property which would be dangerous or hazardous or a nuisance to the adjoining owners or occupiers; (h) to keep the property insured; and (i) to yield up possession of the property to the lessor on the expiration of the lease period or earlier termination thereof.

b. Covenants by lessor: The statutory or implied covenant of lessor is that so long as the lessee pays the rent and observes and performs his covenants and other terms and conditions of the lease, the lessee shall hold the property without any interruption on the part of the lessor.

V. CORPORATE TAXATION

In India, like in any other democratic country, corporate tax is payable on the company's taxable profits (i.e. total business income (other than income from agricultural business) less permissible deductions) for a financial year from April to March, in accordance with the following principles:

1. <u>Corporate Entity</u>

A corporate entity is either a:

a. '*resident company*' if it is an Indian Company or its place of effective management, in that year is in India. This provision of the place of effective management came into effect from financial year 2016-2017;or

b. '*non-resident company*' in every other case.

In case of a resident company, corporate tax is payable on the whole of its taxable profits, wherever they arise. A non-resident company carrying on business through a permanent establishment (for e.g. an office, a branch, etc.) in India, will be taxable to profits that are attributable to such a permanent establishment. In other cases, they may be liable to taxation on income having an Indian source.

2. <u>Tax rates:</u>

a. In case of a domestic company:

A domestic company is a company under the Act or a company which pays dividend in India out of its income taxable in India; such a domestic company is taxable at the rate of 25% (plus applicable rate of surcharge and education cess) if its gross turnover was upto Rupees 250 crores in the Financial Year 2016-2017. In case the gross turnover exceeds Rupees 250 crores, the tax rate would be 30% (plus applicable rate of surcharge and education cess) of its total income taxable under the (Indian) Income Tax Act.

b. In case of a non-resident company:

i. On income by way of royalties or fees for technical services received by a foreign corporation from the government or any Indian concern under an agreement made before April 1, 1976 and approved by the central government- 50% (plus applicable rate of surcharge and education cess) and

ii. On any other income - 40% (plus applicable rate of surcharge and education cess)

3. Deduction:

a. Office Expenditure:

No deduction will be permissible in respect of the head office expenditure in excess of:

i. an amount equal to 5% of the total income (before allowing for depreciation, set-off/carry forward of losses, etc.), or
ii. the amount of so much of the expenditure in the nature of head office expenditure incurred by the assesse as is attributable to the business or profession of the assesse in India, whichever is the least.

b. Losses:

Losses can be carried forward for 8 years and, for the year in which they arise can be adjusted against any other taxable income and for the remaining years only against business income.

c. Taxability of Dividends:

In case of a branch or office, profits that arise in India can be repatriated to the parent company pursuant to the payment of applicable tax in India and other clearances from the RBI.

In case of dividends, in the hands of the recipient, it is exempt from tax, but the companies declaring dividend are chargeable to a dividend distribution tax of 15% (plus applicable rate of surcharge & education cess) of the dividend they declare. However, with effect from financial year 2016-2017, where the total income of an assesse, being a resident individual, Hindu Undivided Family or firm includes dividend income in aggregate exceeding INR 10 lakhs, the income tax payable shall be at the rate of 10% on dividends exceeding such amount in the hands of recipient.

d. Transfer Pricing Regulations (in case of associated enterprises):

Where in an international transaction, two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.

e. Industry Specific Exemptions:

India being a developing economy, the government has in place many industry specific tax sops, which promote the growth of the industry. For e.g. agricultural income is virtually exempt from tax, etc.

VI. GOODS AND SERVICES TAX

Goods and Services Tax (GST) Act that came into effect on July 1st 2017, is said to be the biggest and the most significant tax reform of all times. A 'taxable person' under GST, is a person who carries on any business at any place in India and who is registered or required to be registered under the GST Act. GST registration is mandatory for any business whose turnover in a financial year exceeds Rs 20 lakhs (Rs 10 lakhs for North Eastern and hill states). Goods and services are divided into five different tax slabs for collection of tax - 0%, 5%, 12%, 18% and 28%.

1. Registration:

Every person has to apply for registration in every State in which he is liable, within thirty days from the date on which he becomes liable to registration. Registration under GST Act is a simplified, time bound and electronic process. Registration number for GST is PAN based and hence, having PAN is a prerequisite for obtaining registration.

2. Returns:

A normal taxpayer will be required to furnish three returns monthly and one annual return. There are separate returns for a taxpayer registered under the composition scheme, Input Service Distributor, a person liable to deduct or collect the tax.

3. Casual taxable Person or Non-resident:

Casual taxable Person is a person who occasionally supplies goods and/or services in a territory where GST is applicable but he does not have a fixed place of business. Such a person will be treated as a casual taxable person as per GST. Further, a non-resident occasionally supplies goods/services in a territory where GST applies, but he does not have a fixed place of business in India. A casual taxable person or a non-resident taxable person shall apply for temporary registration for a period of 9- days at least five days prior to the commencement of business.

4. GST caused a number of changes in the indirect tax sphere such as:

a. GST is applicable on "supply" of goods or services as against the previous concept of tax on manufacture of goods or on sale of goods or on provision of services.

b. GST is based on the principle of destination based consumption taxation as against the previous principle of origin-based taxation.

c. Various tax authorities which were in existence, for instance, those for VAT, Sales Tax, Service Tax, Excise, etc. are all subsumed under one Authority.

d. Limitation period for raising demand for short-payment, non-payment of tax or erroneous refund and its adjudication which in turn will reduce litigation cases.

e. An anti-profiteering clause has been provided in order to ensure that business passes on the benefit of reduced tax incidence on goods or services or both to the consumers.

5. Input tax credit:

A registered taxable person is eligible to claim input credit of such goods and services that are used or intended to be used in the course or furtherance of business. However, there are certain goods and services where credit is not available under GST.

6. Import of goods and services:

The import of goods under the GST regime will be subject to Integrated Goods and Services Tax and Compensation Cess (if applicable), along with Basic Custom Duty (BCD) and Social Welfare Surcharge (at 10% levied on the BCD).

7. Export of goods and services:

Export of goods and services are zero rated under GST. Exporters can claim refund of input tax credit of inputs/input services used in export of goods/services, subject to fulfilment of prescribed conditions.

8. E-way bills:

The e-way bill is an electronic bill that will be required for the movement of goods in case the value of the consignment is above INR 50,000. The movement of goods may be (i) in relation to supply, (ii) for reasons other than supply, or (iii) due to inward supply from unregistered persons.

The bill can be generated from the GSTN portal, and every GST-registered taxpayer is required to comply with the requirement to issue an e-way bill.

VII. INDIVIDUAL TAXATION

1. Residential Status:

Liability to Indian Income Tax depends on an individual's residential status. Residential status is divided into 3 categories viz. resident, resident but not ordinarily resident and non-resident.

An individual will be resident for tax purposes in India if in any previous year he:

a. is in India in that year for a period equal to or more than 182 days; or
b. has in 4 years preceding the year in which he is sought to be taxed, stayed in India for a period aggregating to 365 days or more; or
c. has stayed in India for a period or periods amounting in all to 60 days or more in that year.

An individual will be resident but not ordinarily resident if in any previous year he-

a. is not a resident in 9 out the 10 previous years; or
b. has not during 7 previous years been in India for a period of 730 days or more.

In every other case the individual will be a non-resident.

2. Basis of charge:

A person who is a resident shall be chargeable to tax in respect of all of his income from whatever source derived.

In case of a person who is not ordinarily resident in India, the income which accrues or arises to him outside India will not be included unless it is derived from business controlled in or profession set-up in India (even if it is not directly attributable to the business or profession in India)

In case of a person who is a non-resident, generally no income which accrues or arises to him outside India will be taxable in his hands. However, if the income is attributable to a business connection in India, that portion of the income which is so directly attributable will be taxable in India.

3. Heads of Income:

a. Income from Salaries:

Income from salaries includes any advance payment, bonus, perquisites, commission, remuneration and any type of payment paid by the employer to an employee. Salary income will be taxable at the regular slab rates and has only a certain fixed deductions available to it.

b. Income from House properties:

This head includes the annual income derived from renting, leasing a house property. This too, like salaries has only a certain fixed deductions available to it.

c. Income from Business or Professions:

Income from any trade, commerce, or profession is included under this head. This is the most flexible head and has a matrix of provisions, most of which are progressive in nature and some prohibitive.

d. Capital Gains:

This head includes income that arises on account of transfer of capital assets. An asset can be classified as a long term asset (LTA) or short term asset (STA) depending on the period of their holding i.e. the period for which the taxpayer has held the asset from the time that it was acquired. The rules in relation the same are frequently revised.

Current rates of capital gains taxes for different assets:

Type of Capital asset	**Period of holding**	**Short Term / Long Term capital asset**	**Rate of tax**
Listed securities	<= 12 months	STA	15%
Listed securities	>12 months	LTA	10% on gains above Rs.1,00,000/-
Unlisted shares	< = 24 months	STA	Slab rates
Unlisted shares	> 24 months	LTA	20% with indexation
Immovable Property	< = 24 months	STA	Slab rates
Immovable Property	> 24 months	LTA	20% with indexation
Any other capital asset	<= 36 months	STA	Slab Rates
Any other capital asset	> 36 months	LTA	20% with indexation

e. Income from Other Sources:

This is a remainder head and will allow all that has not been covered specifically by the other four heads. Income under this head is also subject to restrictive deductions and profits are chargeable to tax at the normal slab rates.

f. Rates of Income Tax for Individuals:

Income	**Rate of tax**
Up to 2,50,000	Nil
Where the total Income exceeds INR 2,50,000 but not exceed INR 5,00,000	5% * of (total income minus INR 2,50,000)
Where the total Income exceeds INR 5,00,000 but not exceed INR 10,00,000	INR 12,500 plus 20%* (total income – Rs.5,00,000)
Where the total Income exceeds INR 10,00,000	INR 1,12,500 plus 30%* (total income – Rs.10,00,000)

*plus applicable rate of surcharge and education cess

Note: Issues such as the transfer pricing regulations, treatment of losses as cited in the chapter of corporate taxation will equally apply to individuals.

VIII. EMPLOYEE BENEFITS & INSURANCE

1. Employees' Provident Fund & Miscellaneous Provisions Act, 1952 (EPF Act) Coverage:

a. Coverage:

i. Establishments employing 20 or more persons and engaged in any of industries/ classes of businesses specified in Schedule I to the said EPF Act;

ii. Voluntary Coverage,

Those establishments not covered by EPF may seek voluntary coverage if the employer and majority of the employees are so willing.

b. Contributions:

Contributions are payable on a maximum wage ceiling of Rs.15,000/- (Rupees Fifteen thousand). The employer and the employee are required to contribute equally at a rate of 12% of the basic pay, dearness allowance and retaining allowance, if any. Voluntary higher contributions are also acceptable at the instance of the employee.

c. Interest rate:

The rate of interest is fixed by the Government of India in consultation with the Central Board of trustees every year during the months of March/April. The interest is credited to the members account on monthly running balance with effect from the last day in each year.

2.

d. Foreign Residents:

Foreigners employed by an Indian establishment are coverable under the EPF Act as International Workers. International Worker can withdraw his/her PF amounts either on retirement after attaining an age of 58, on occurrence permanent disability or as prescribed by Social Security Agreements.

3. Employees Pension Scheme (EPS): Coverage:

a. Coverage:

It covers similar establishments covered by EPF.

b. Contribution:

No separate contribution is payable additionally by the member for EPS benefits. From and out of employer's share of EPF contributions, 8.33% of the total wages is credited to the EPS. The Government of India also contributes at the rate of 1.16% of total wages.

c. Tax exemptions:

Deductions are available under the Income Tax Act for contributions made to Pension Funds up to maximum of INR 1,50,000 per annum.

4. <u>Public Provident Fund (PPF):</u>

PPF is a statutory scheme of the Government of India framed under the provisions of the Public Provident Fund Act, 1968.

a. Coverage:

An individual can open a PPF account in his own name. He can also open an additional account on behalf of a minor of whom he is guardian.

b. Contribution:

He can subscribe any amount in multiples of INR 5/- of not less than INR 500/- and not more than INR 1,50,000/- in a year in each of his account. A year for this purpose means a financial year (i.e. from 1st April to 31st March).

c. Interest Rate:

The interest rate is fixed periodically by the government. For now, it is 8 percent compounded annually. The interest for a month is calculated on the lowest balance between the close of the 5^{th} day and the end of the month, and is credited to the account at the end of each year.

d. Tax exemptions:

Deductions are available under the Income Tax Act for contributions made to Provident Funds upto maximum of INR 1,50,000 per annum. The interest credited to the fund is totally exempt from Income Tax. Lump sum withdrawals are also tax free.

5. Employees' State Insurance (ESI):

ESI scheme is an integrated social security scheme tailored to provide social protection to workers and their dependants, in the organized sector, in contingencies, such as, sickness, maternity and death or disablement due to an employment injury or occupational hazard.

a. Coverage:

Coverage of Factories:

i. Non-seasonal factories using power and employing ten or more persons.
ii. Non-seasonal and non power using factories and establishments employing 20 or more persons.
iii. It also extends to shops, hotels, restaurants, cinemas including preview theatres, road-motors transport undertakings and newspaper establishments etc., employing 10 or more persons. The scheme has also been extended to Private Medical and Educational institutions employing 10 or more persons in certain States/Union Territories.
iv. A factory once covered remains covered even if the number of employees at any later stage falls short of the stipulated number of 10 or 20 or the manufacturing process therein ceases to be carried on with the aid of power. It does not apply to workers engaged in mining operations, railway running sheds, certain seasonal factories operating for less than 7 months in a year.

Coverage of Employees:

A monthly wage limit is prescribed by the Government of India for the purpose of coverage of employees/workers of the aforesaid factories or establishments. The wage ceiling is enhanced from time to time. The existing ceiling is INR 21,000/- per month.

b. Contribution:

The contribution payable in respect of an employee shall comprise of employer's contribution and employee's contribution at a specified rate. The rates are revised from time to time. Currently, the employee's contribution is 1.75% of the wages and that of employer's is 4.75% of the wages paid/payable in respect of the employees in every wage period. For newly implemented areas, the contribution rate is 1% of wages of Employee and 3% payable by Employers for first 24 months. Employees in receipt of a daily average wage upto INR 137/- are exempted from payment of their part of the contribution.

c. Benefits:

Employees covered under the scheme are entitled to medical facilities for self and dependants. They are also entitled to cash benefits in the event of specified contingencies resulting in loss of wages or earning capacity. The insured women are entitled to maternity benefit for confinement. They are also insured for medical treatments. Where death of an insured employee occurs due to employment injury, the dependants are entitled to family pension.

6. <u>New Initiatives:</u>

The Government of India has announced a National Pension Scheme which is a voluntary and long-term investment plan for retirement under the purview of the Pension Fund Regulatory and Development Authority (PFRDA) and Central Government. This scheme will apply to:

1. New entrants to Government service, except to the armed forces, and
2. To all Indian citizens on a voluntary basis.

This pension system, is based on defined contribution, shared equally in the case of Government employees between the Government and the employees. There will, of course, be no contribution from the Government in respect of individuals who are not Government employees.

The pension scheme is portable, allowing transfer of the benefits in case of change of employment, and will go into 'individual pension accounts' with Pension Funds. The Ministry of Finance will oversee and supervise the Pension Funds through a new and independent Pension Fund Regulatory and Development Authority.

[*Please note that the topics covered in this report may be subject to changes or additional requirements subject to state enactments depending upon where the business will be commenced and carried on.*]

IX. LABOUR & EMPLOYMENT

1. Contract of Employment:

In India, a contract of employment is governed by the Industrial Employment (Standing Orders) Act, 1946 (Standing Orders Act) governing the conditions of recruitment, discharge, disciplinary action, holidays, leave, etc. The Standing Orders Act applies to industrial establishments employing 100 or more workmen and to such other industrial establishments as government may specify. The employers and the employees are normally bound by the terms of the contract of service. However, the agreement stands modified by the Standing Orders.

Some of the important items in the Schedule are: (a) Classification of workmen e.g. permanent, temporary, etc. (b) hours of work, holidays, pay days and wage rates; (c) termination of employment and the notice to be given for the purpose by either party; (d) suspension or dismissal for misconduct; (e) means of redress of workmen against unfair treatment.

2. Pay:

For regulating payment of wages to certain classes of workmen employed in industries in India, Payment of Wages Act, 1936 and Minimum wages Act, 1948 have been enacted. Every employer is responsible for payment of wages to persons under their employment. No wage period can exceed 1 month. When the employment of any person is terminated the wages earned by him must be paid before the expiry of the 2nd working day from the date on which such employment in terminated.

The general rule is that the wages of an employee must be paid to him without any deductions of any kind. However, certain deductions are authorised such as: (a) fines; (b) for absence from duty to the extent and in the manner prescribed (c) for damage to or loss of goods entrusted to the employee or for loss of money for which he is accountable; (d) for housing accommodation supplied; (e) for such amenities and services supplied by the employer as may be authorised by the employee etc.

3. Health, Safety and Welfare:

Under the Factories Act,1948 every factory must be kept clean and free from effluvia arising from any drain or other nuisance. Effective and suitable provisions must be made for adequate ventilation by circulation of fresh air and keeping up a certain temperature in the factory premises according to the prescribed rules. Rules have also been made in respect of factories in which humidity of the air is artificially increased. No part of any factory may be overcrowded to an extent injurious to the health of the workers. Every factory must also provide and maintain sufficient and suitable lighting (natural or artificial factory).

In every factory, the machinery, handling of which may cause injury, must be securely fenced by safeguards of substantial construction in accordance with the rules framed. No young person (i.e. one who has not completed his 18th year of age) can work on any machine unless he is fully instructed as to the dangers arising in connection with the machine and only after receiving sufficient training. In every factory all floors, steps, stairs, passages, etc., must be of sound construction and properly maintained and provision must be made of safe means of access to every space at which a person is required to work. Every factory must also provide suitable means of escape in case of fire and there must also be effective and clearly audible means of giving warning in case of a fire.

Every factory must provide adequate and suitable facilities for washing and for keeping clothing not worn during working hours. It is also obligatory to provide and maintain first-aid boxes or cupboards equipped with the prescribed contents.

4. Working Time:

An '*Adult*' is defined in the Standing Orders Act to mean a person who has completed his 18th year of age. No adult worker can be required or allowed to work in the factory for more than 48 hours in any week. Subject to this over all limit, no adult worker can be required or allowed to work for more than 9 hours a day.

The period of work for each day must be so fixed that no period shall exceed 5 hours at a time. The effect of this is that hours of work during the day should be suitably spaced so as to allow adequate rest to worker. No worker should be made to work for more than 5 hours before he has an interval of rest of at least half an hour.

5. Weekly Holidays:

Every worker working in a factory must be given 1 day's rest in 7. The day of rest need not necessarily be a Sunday. The day of rest may also not necessarily be the same day in each week. One day may be substituted for the other for rest provided that such substitution should not result in any worker working more than 10 days continuously without a holiday for a whole day.

6. Overtime Payment:

Where a worker works in excess of the hours prescribed, he is entitled to wages at the rate of twice his ordinary rate of wages. The State government may make rules and provide for exemption from the above restrictions in case of persons holding position of supervision or management or those employed in a confidential position.

7. <u>Employment of Young Persons:</u>

A child under the age of 14 years cannot work in any factory. However, a child above the age of 14 years is permitted to work in any factory but he cannot work: (a) for more than 4 and one-half hours a day or (b) during the night.

8. <u>Leave:</u>

Every worker who has worked for a period 240 days or more in a factory during a calendar year must be allowed during the subsequent year leave with wages as follows: (a) In case of an adult, one day for every 20 days of work performed; (b) if a child, one day for every 15 days of work performed.

A worker who has been allowed leave for not less than 4 days, in the case of an adult, and 5 days in case of a child, can claim payment of wages in advance for the leave period.

9. <u>Penalties and Procedure:</u>

Different kinds of penalties are prescribed for contravention of the provisions of the Factories Act, and in some cases criminal prosecution may also be launched and if certain facts are established, the result may be either imposition of fine or imprisonment of the person found guilty of the offence.

10. <u>Trade Union:</u>

a. Registration of Trade Unions:

Any 7 or more persons by subscribing their names to the rules of the Trade Union and otherwise complying with the provisions of the Trade Union Act, 1926 can apply for registration of a trade union.

The application for registration is made to the Registrar appointed under the Act and this application must comply with certain requirements of the Act and must contain particulars prescribed in that behalf, such as names and occupations of the members, name of the Trade Union etc.

b. Cancellation of Registration:

A certificate of registration may be withdrawn or cancelled on the application of the Trade Union, or if the Registrar is satisfied that the certificate of registration has been obtained by fraud or mistake, or that the Trade Union has ceased to exist or that it has wilfully contravened any of the provisions of the Act.

c. Body Corporate:

Every registered Trade Union becomes a body corporate by the name under which it is registered and has perpetual succession and a common seal with power to acquire and hold properties and to enter into contracts.

d. Rights and Liabilities of Registered Trade Union:

The general funds of Registered Trade Union can be spent only on specified objects, the main being the conduct of trade disputes on behalf of the Union or any member thereof and payment of compensation to members for losses arising out of trade disputes. However, it is open to a Trade Union to constitute a separate fund from contributions from members for the promotion of civic and political purposes.

e. Annual Returns:

A Trade Union is required to furnish a general statement audited in the prescribed manner of all receipts and expenditure together with a statement showing all changes of officers of the Union during the year.

f. Rights of Recognised Trade Unions:

The executives of a Recognised Trade Union are entitled to negotiate with the employers in respect of matters connected with a trade dispute and to carry on correspondence with the employers. The executives of a Recognised Trade Union are entitled to display notices of a Trade Union in any premises in which its members are employed and the employers must afford reasonable facilities for that purpose.

11. Dismissal and Remedies for unfair dismissal:

'*Retrenchment*' is defined to mean the termination by an employer of the services of a workman for any reason whatsoever otherwise than as a punishment by way of disciplinary action. This expression does not include (a) voluntary retirement, (b) retirement of the workmen on reaching the age of superannuation if the contract of employment contains a stipulation in that behalf (c) termination of the service of the workman as a result of non-renewal of the contract of employment between the employer and the workman or (d) termination of services of a workmen on the ground of continued ill health.

No workman in any industry who has been in continuous service for not less than one year can be retrenched until: (a) the workman is given one month's notice indicating the reasons for retrenchment or he is paid in lieu of such notice wages for the period of the notice, (b) the workman is paid at the time of retrenchment, compensation equivalent to 15 days average pay for every completed year of service or any part thereof in excess of 6 months and (c) notice in the prescribed manner is served on the Government.

In the absence of any agreement, the employer has ordinarily to retrench the workman who was the last person to be employed in the category in which retrenchment takes place unless for reasons to be recorded the employer retrenches any other workmen.

Every workman in continuous service for not less than 1 year becomes entitled to notice and compensation in accordance with the rules.

Where an undertaking is closed down for any reason, every workman becomes entitled to notice and compensation in accordance with the provisions indicated above, provided that if the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation is not to exceed the workman's average pay for three months.

X. INTELLECTUAL PROPERTY RIGHTS

An enterprise proposing to establish a business in India should consider measures to protect its intangible assets such as trademark, copyright, designs, inventions etc. There is a well-established statutory, administrative, and judicial framework to safeguard intellectual property rights in India, whether they relate to patents, trademarks, copyrights, or industrial designs.

The Government of India has taken several measures to streamline and strengthen the intellectual property administration system in the country. Projects relating to the modernization of patent information services and trademarks registry have been implemented with help from the World Intellectual Property Organization (WIPO) and the United Nations Development Project (UNDP).

The Government of India is also in the process of strengthening and modernizing the Trade Marks Registry. The Trade Marks Registry is in the process of preserving its records in electronic format.

As regards enforcement, Indian enforcement agencies are now working very effectively and there has been a notable decline in the levels of piracy. In addition to intensifying raids against copyright infringement, the Indian government has taken a number of measures to strengthen the enforcement of copyright law. Special cells for copyright enforcement have been set up in 23 States and Union Territories. In addition, for collective administration of copyright, copyright societies have been set up for different classes of works.

1. <u>Trade Marks:</u>

Trade Marks are presently protected under The Trade Marks Act, 1999 (Trade Marks Act) which replaced the Trade and Merchandise Marks Act, 1958. The Trade Marks Act consolidates the law relating to trade marks, provides for registration and better protection of trade marks for goods and services and for the prevention of the use of fraudulent marks. Under the Trade Marks Act, trademarks and service marks are registered for a period of 10 years and may be renewed for further periods of 10 years.

The Trade Marks Act provides for the registration and protection of trademarks and service marks. It is highly recommended to register a trademark with the Trade Marks Registry as the owner of a trademark, unless registered with the authorities, cannot claim exclusive rights of user of his trademark.

In the absence of registered trademark, the proprietor of the mark could seek relief under the common law of passing off. However, there is a higher risk of uncertainty in such actions, as one would have to prove some degree of actual financial loss to establish a valid claim.

India follows the NICE Classification of goods and services, which is incorporated in the Schedule to the Trade Marks Rules, 2017 ("**New Trade Mark Rules**"). The proprietor of the registered trademark gets an exclusive right in relation to that trademark within the territorial jurisdiction of India, once it is granted.

There are several categories of marks that can also be registered under the Trademarks Act, such as Certification Marks, Collective Marks, Internet Domain Names, among others.

2. Patents:

Patents in India are protected under the Patents Act 1970 (Patents Act), which was amended in the year 2005. The Patents Act protects foreign companies on the same basis as Indian nationals as long as there is reciprocity of protection from the corresponding country. An invention must involve a new product or process involving an inventive step which is capable of industrial application. The Patents Act grants patent protection for 20 years from the date of filing.

Patenting of software in India:

Computer programme or software has been under the domain of copyright in the Indian context in spite of an increasing trend of the same being included in the patents regime in US. The Patents (Amendment) Act, 2002, has revised the definition of "*invention*" to mean a "*new product or process involving an inventive step and capable of industrial application.*"

Certain innovations are specifically excluded from patentability under Section 2 (I)(j) of the Patents Act, 1970 even though it fulfils the criteria of an invention. These inventions are listed in Section 3 and 4 of the Patents Act. Patent Rights are granted in India on a first-to-apply basis. The application can be made either by (i) the inventor or (ii) the assignee or legal representative of the inventor.

In the new amendment a mathematical or business method or a computer program or algorithms had been excluded from patentability. The Amendment Act, 2002 appears to have legitimized the grant of patents to software related inventions, wherein the software is coupled with a novel hardware. However, software *per se* is not patentable. Now, software patents cannot be rejected on the basis that they are not permissible by law. As long as the software to be patented solves a technical problem, it might be patented.

3. <u>Copyright:</u>

India has some of the most modern copyright protection laws in the world. India is a member of the Universal Copyright Convention and the Berne Convention for the Protection of Literary and Artistic Works. The Copyright Act 1957 (Copyright Act) provides protection during the author's life, plus 60 years after death.

One major development in copyright law was the amendment in 1999 to the Copyright Act to make it fully compatible with the provisions of the TRIPS Agreement. The Copyright (Amendment) Act 1999, came into force on January 15, 2000. The International Copyright Order 1999, extended the provisions of the Copyright Act to nationals of all World Trade Organization (WTO) member countries. The earlier 1994 amendment to the Copyright Act provides protection to all original literary, dramatic, musical and artistic works, and cinematography, as well as films and sound recordings. It also brought sectors such as satellite broadcasting, computer software and digital technology under Indian copyright protection. The Copyright Act is now in full conformity with the TRIPS agreement obligations.

4. <u>Geographical Indications:</u>

The Government of India passed the Geographical Indications of Goods (Registration & Protection) Act, 1999 for the registration and better protection of Geographical Indications relating to goods. The Government has also issued the Geographical Indications of Goods (Registration & Protection) Rules, 2002 with respect to the same.

5. <u>Industrial Designs:</u>

In the case of industrial designs the property consists in the exclusive right to apply the design registered under the Designs Act 1911, in relation to the class of goods for which it is registered for a maximum period of 15 years subject to payment of renewal fees prescribed by the rules. This right can also be licensed for use by third parties or assigned to any person. On expiry of the term of registration, the design is available for public use. The Design Rules, 2001 were amended on 30th December 2014, to incorporate the official fees for filing a new design application and the category of applicants have been divided into two main categories- 'natural person' and 'other than natural person'. The fee will subsequently depend on the type of applicant.

6. <u>Protection of Plant Varieties and Farmers rights:</u>

As part of the TRIPS agreement, India was obliged to enact a plant variety protection law. The Protection of Plant Varieties and Farmers Rights Act, 2001 was passed by the Parliament with a view to establish an effective system for the protection of plant varieties, the rights of farmers and plant breeders.

7. Remedies against Infringement:

The remedies available against infringement of intellectual property rights are broadly similar. Thus in the case of infringement of a patent the patentee may obtain an injunction restraining the infringer from using the patent and may either seek damages or an account of profits. The remedies available against infringement of a registered design are of a similar nature.

In respect of trademarks and copyrights, civil remedies are available against infringement. In addition to injunction and damages, there is a right to claim delivery of the infringing articles for erasure or destruction. Criminal action may extend to imprisonment and fine of the infringer.

XI. INFORMATION TECHNOLOGY AND BUSINESS

1. Information Technology and Business:

The Information Technology Act, 2000 (IT Act) is based on the model laws on e-commerce adopted by UN Commission on International Trade Laws and extends to the whole of India. The IT Act aims to provide legal recognition to transactions carried out by means of electronic data exchange and other means of electronic communication. No provision of the IT Act applies to documents such as negotiable instruments, power of attorney, trust, will, contract for sale or conveyance of immoveable property or interest in such property and such classes of documents as may be notified by the government. To bring various other laws in consonance with the IT Act, it seeks to amend some of the earlier legislations such as the Indian Penal Code, Indian Evidence Act, and the Negotiable Instruments Act etc.

The protection of data and sensitive personal information has gained significance with the advent of technology and growth of e-commerce businesses in India. The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (Sensitive Data Rules) (IT Rules) define '*personal information*' and '*sensitive personal data*'. Any company/ firm/ sole proprietorship or other association that engages in commercial or professional activities (body corporate) must obtain prior written consent for collecting and/or further disclosing to a third party, any '*sensitive personal data or information'* of the person concerned regarding its usage. Such consent may be obtained through letter, fax or email from the person concerned. The body corporate must before collecting such information including sensitive personal data, give an option to the concerned person to not to provide such information and data sought to be collected and also provide an option for withdrawal of such consent.

The body corporate or any person whose on behalf of a body corporate collects, receives, stores, deals with information of any person providing information, shall provide a privacy policy for handling of or dealing in personal information including sensitive personal data or information and ensure that the same are available for view by such providers of information who should have provided such information under lawful contract. Such privacy policy shall be published on website of body corporate or any person on its behalf and shall provide for clear and easily accessible statements of its practices and policies, type of personal or sensitive personal data or information collected, purpose of collection and usage of such information, disclosure of information including sensitive personal data or information and the reasonable security practices and procedures as provided.

Any information which is freely available in the public domain or furnished under the Right to Information Act, 2005 or any other law in force from time to time is not regarded as sensitive personal data or information for the purposes of the Sensitive Data Rules.

Some important conditions under the Sensitive Data Rules are:

a. A body corporate or any other person shall not collect any sensitive personal data or information unless, the information is collected for a lawful purpose connected with a function or activity of the body corporate or any person on its behalf; and the collection of the sensitive personal data or information is considered necessary for that purpose.
b. Obtaining prior written consent from each person whose personal information is sought to be/ has been collected, used and/ or uploaded by the body corporate.
c. Creation of a privacy policy (if it does not have one), or review the existing privacy policy to ensure that it sets out the provisions prescribed under the Sensitive Data Rules.
d. Compliance with all other obligations set out in the Sensitive Data Rules and the IT Act such as maintenance of security and ensure that the data is adequately protected and there is no unauthorised access in compliance with the provisions of the IT Act.

The IT Act also provides for legal recognition of electronic records and digital signatures, facilitates electronic governance, forms and records can be put online and any breach of confidentiality and privacy is made a punishable offence.

2. <u>Jurisdiction of the IT Act:</u>

The courts in India have begun to take cognizance of matters and exercise jurisdiction on the basis of accrual of a part of cause of action or on basis of access to Internet. General principles of jurisdiction are taken into consideration for determining the same. Provisions of the IT Act also apply to any offence or contravention committed outside India by any person irrespective of his nationality and if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

A dispatch of electronic records occurs when it enters a computer resource outside the control of the originator. Except if otherwise agreed, an electronic record is deemed to have been dispatched at the place where the originator has his place of business, and is deemed to have been received at the place where the addressee has his place of business. If the originator or the addressee has more than 1 place of business, the *principal* place of business shall be the place of business. If either of the parties do not have a place of business, the *usual* place of residence shall be deemed to be the place of business. '*Usual place of residence*' in relation to a body corporate, means the place where it is registered.

The Information Technology (Amendment) Bill, 2018 which is pending parliamentary approval provides for punishment for publishing or transmitting material repugnant to cultural ethos under Section 67BA. Section 67BB provides for punishment for hosting a dangerous online gaming resource which induces users to cause injury to themselves or commit an illegal act. It also introduces Chapter XIIB which lays down 'Special Provisions Relating to Online Gaming'.

3. Digital Signature Certificates:

The introduction of Digital Signature Certificates is an important feature of the IT Act and is deemed to be an electronic procedure used to authenticate an electronic message. Certain attributes necessary are that the signature must be unique to the message and must be created using asymmetric cryptography (i.e. private key and public key for verification) and all such keys should be unique to that user.

A provision is also made for a digital signature to which some additional security procedure, as decided between the 2 people who are communicating, has been applied which is recognized as Secure Digital Signatures. The signature must be created using some method which is under the sole control of the signer and the signed electronic message should be connected in such a way that if the message is altered then the signature should stand invalidated

4. Certifying Authority:

The Government has appointed a Certifying Authority, which is a body that authenticates a person's public key and issues a Digital Signature Certificate. It is the responsibility of the Certifying Authority to provide a reasonable level of reliability in the services provided, follow all security procedures to ensure that the secrecy and privacy are assured, and observe other specific standards.

5. Legal Framework for E-Governance:

E-Governance is the use of electronic records and digital signatures by the Government and its bodies. The IT Act creates the necessary legal framework for implementation of E-Governance in India. It contains provisions in relation to the acceptance of electronic records in place of typewritten or printed documents by Government departments, legal recognition of digital signature certificates in place of hand written signatures and retention of electronic records by Government and its agencies. The IT Act envisages a Controller of Certifying Authorities who has been given the function of exercising supervision over the Certifying Authorities i.e.

persons/ entities who have been granted the license to issue electric signature certificates which include also digital signature certificates. Further, it provides for establishment of Cyber Appellate Tribunal which preside over appeals against the orders of the adjudicating officer.

For the development of the electronic infrastructure, the Department of Information Technology has formulated a National e-Governance Plan (NeGP). It facilitates setting up of Common Service Centres that assist in delivering electronic services to rural parts of the country. Additionally, the Government has provided for State Wide Area Networks, national and state data centres, and the electronic service delivery gateways to aid closer government network.

6. E- Banking:

India's central bank, the RBI lays down the regulatory framework which governs banks in India. The existing regulatory framework over banks is extended to Internet Banking also. All banks are under an obligation to maintain secrecy and confidentiality of customers' accounts and such other regulations as may be prescribed by the RBI from time to time.

7. Domain name Disputes:

In case of domain name disputes, resolution mechanisms stressed on defences like whether the domain name registration predates the traditional trademark registrations or the domain name holder has a trademark registered already and in the absence of both, the name should be put on hold. These solutions have ramifications as where the trademark is registered and how territorial prior use could he used in internet terrain. The World Intellectual Property Organization took an initiative on consultation of domain disputes and has initiated a settlement mechanism.

8. Recognition of Right to Privacy:

The inception of the right to privacy in India was marked with the apex courts judgment in *Justice K.S. Puttaswamy (Retd.) v. Union of India*[4], wherein Right to Privacy was recognized as a fundamental right. It was this judgment that was the genesis of the Data Protection Bill.

9. Data Protection Bill, 2018:

The Committee, constituted by the Ministry of Electronics & Information Technology, Government of India, chaired by Justice Srikrishna put together a draft of data protection law for India released a Personal Data Protection Bill, 2018

[4] W.P. (Civil) No. 494/2012.

(the "***Bill***") on July 27, 2018 along with the report titled '*A Free and Fair Digital Economy Protecting Privacy, Empowering Indians*'. There are striking similarities between the Bill and the General Data Protection Regulation (the "***GDPR***") recently notified in the European Union. The Bill, on turning into an Act, will supersede Section 43-A of the IT Act and the SPDI Rules and bringing in much needed regulation on processing, storage and disclosure of "Sensitive Personal Data".

XII. COMPETITION LAW

1. Objective:

   The Competition Act, 2002 (the Competition Act) has come into effect in its entirety from 1 June 2011. The Competition Act intends to curb those practices which cause '*appreciable adverse effect on competition*' in the relevant market (AAEC). The Competition Act specifically aims at curbing three major practices in the country causing AAEC, which are:

a. Anti-Competitive Agreements (to include cartelization)
b. Abuse of Dominant Position
c. Combinations

2. Competition Commission of India (CCI):

The Competition Commission of India (CCI) was established in the year 2003 to take over the affairs of the MRTP Commission (repealed entirely in September 2011) and to regulate, develop and enforce the anti-trust law in the country in a phased manner. The Competition Appellate Tribunal (CompAT) is the appellate body to hear appeals against certain specific orders passed by CCI. The CCI has been given extensive powers by the Act to regulate competition law in the India. Being empowered to impose high penalties upon entities found in contravention of the Act, CCI, in the recent past, has proved that it does not shy from penalizing entities with heavy penalties running, burning a major hole into the pockets of the enterprises and eating up into their profits.

CCI, with an objective of establishing fair competition in the Indian economy aims at raising the competition law standards in the country at par with those in developed economies such as USA, UK and EU. CCI has now actively interfered into almost all the major industries in the economy, bringing under its scanner industries like real estate, entertainment, aviation, sugar, fuel, cement, etc.

3. Director General, Competition Commission of India (DGCCI):

The DGCCI is an office under the provisions of the Competition Act prescribed with the responsibility of investigating into the matters before the CCI. The DGCCI being the investigation arm of the commission carries out detailed enquiries and investigation into the cases put before it by the CCI after reaching upon a prima facie opinion of any contravention by the parties involved. Although the anti-trust regulator is not bound by the investigation report furnished by the DGCCI, it has been seen that the same holds high persuasive value and that the CCI takes the same into strict consideration while hearing the parties involved and deciding upon the matter.

The DGCCI is independent of the commission while investigating into the matter and the Act clearly provides the rights and the duties of the DGCCI while looking into any contravention. The investigation report furnished by the DGCCI is scrutinized by the commission and can be challenged before it during the pendency of the case.

4. Competition Appellate Tribunal (CompAT):

The Act also provides for the formation of an appellate body i.e. CompAT to hear and decide upon appeals from certain specific orders passed by the CCI. The Act enumerates the various orders against which an appeal could be preferred before the CompAT and hence, not all orders of the CCI can be appealed against before the appellate body. The Act provides for a limitation period of 60 days from the date of receipt of the order of CCI for an appeal to be preferred before the CompAT. A person aggrieved with the direction, decision or order of the COMPAT can appeal to the Supreme Court of India within 60 days from the date of communication of the direction, decision or order.

5. Combinations:

The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be considered as a combination under the Competition Act in case the parties to the acquisitions, merger or amalgamation meet the thresholds prescribed in the Act. Such combinations are required to take the approval of the CCI and no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. Various amendments have been made in the Competition Act to ensure that the CCI disposes off combination applications in a speedy manner. Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018 have been introduced to provide certainty & transparency and further expedites faster disposal of combination cases before CCI.

6. Relevant Market

The Competition Act, for the purposes of determining whether or not an enterprise or an action is in contravention of the provisions of the said Act, looks into a particular case on the background of '*relevant market*'. In determining the relevant market, which needs to be done on a case to case basis, the CCI looks into the relevant product market and the relevant geographic market surrounding the issue at hand. The CCI and the DGCCI base their decision on various factors provided for in the Act, and establish the relevant market in every case before looking into the alleged contravention.

Taking into consideration the correct relevant geographic and product markets is paramount whilst determining any contravention under the Act, as an incorrect interpretation of the same would necessarily result in incorrect evaluation and investigation into the matter.

7. <u>Appreciable Adverse Effect on Competition in the Relevant Market (AAEC):</u>

An enterprise or association of enterprises or person or association of persons must not enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. The Competition Act neither defines the word appreciable nor gives a water tight definition of the term Appreciable Adverse Effect on Competition. However, various factors that CCI needs to consider while determining AAEC are provided in the Competition Act such as creation of barriers to new entrants in the market, driving existing competitors out of the market, foreclosure of competition by hindering entry into the market, accrual of benefits to consumers, improvements in production or distribution of goods or provision of services, promotion of technical, and scientific and economic development by means of production or distribution of goods or provision of services.

8. <u>Anti- Competitive Agreements:</u>

The Competition Act prohibits agreements with respect to production, supply, distribution, storage, acquisition or control of goods or provision of services which may result in AAEC. Section 3 of the Competition Act provides for certain horizontal and vertical agreements that hinder competition to be anti-competitive in nature.

Horizontal agreements are agreements between competitors or enterprises at the same level in the economic process i.e. production or distribution chain which aim at restricting competition. These are agreements between producers or between wholesales or between retailers, dealing in similar kinds of products. The Competition Act presumes that such horizontal agreements have an AAEC and provides that such agreements are void.

Although a bare perusal of the section seems to indicate that such horizontal agreements are presumed to have AAEC, CCI through its orders has stated that it is necessary to examine such agreements and understandings in light of the factors provided in the Competition Act to interpret whether or not an agreement results in AAEC, before the concerned parties could be held in contravention of the provision.

Vertical agreements are between non competing undertakings operating at different levels of manufacturing and distribution. Such vertical agreements are prohibitive/ void only if such agreements cause or are likely to cause an AAEC.

The Competition Act also protects the economy from cartel like activities between enterprise; and any effect on free and fair competition that such cartels might have.

XIII. EXCHANGE CONTROL LAWS

The exchange control laws in India govern the foreign direct investments (**FDI**) i.e. investment by foreign entities in Indian companies and the overseas direct investments (ODI) i.e. investments made by Indian companies in foreign entities amongst other things. FDI and ODI are regulated under the Foreign Exchange Management Act, 1999 (FEMA) and the regulations issued by the RBI on matters such as, investments made outside India by persons resident in India. Such regulations issued by the RBI are consolidated annually in the form of Master Directions. Most aspects of foreign currency transactions with India are governed by FEMA and the delegated legislations thereunder. Investments in, and acquisitions (complete and partial) of, Indian companies by foreign entities, are governed by the terms of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 ("**TISPRO Regulations**") and the provisions of the annual Consolidated Foreign Direct Investment Policy Circular ("**FDI Policy**") issued by the DIPP in the Ministry of Commerce and Industry, Government of India.

1. <u>FDI</u>

a. FDI is generally permitted up to 100% in Indian companies unless otherwise specifically provided. Depending on the business and/or the field of operations of the Indian investee companies in which the FDI is made, certain conditions and restrictions varying from sector to sector are applicable. Some examples of such conditions are sectoral caps i.e. permissible percentage limits on direct or indirect foreign shareholding in Indian companies, minimum foreign capital requirements etc. Conditions such as minimum foreign capital requirements in certain businesses/ sectors need for specific government approval in some sectors.

b. FDI is only permitted through capital instruments namely the issue of equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares and share warrants issued by an Indian Company.

c. FDI in India has two entry routes i.e. (i) the automatic route and (ii) the government route. Entry through the automatic route requires no prior governmental approval for the investment. However, entry through the government route requires prior government approval from the relevant governmental authority.

d. Foreign investment in particular sectors/activities either under the automatic route or under the government route, as applicable is only permitted upto the sectoral caps. Examples of two sectors in which FDI is restricted are the insurance sector (100%) FDI into defence sector (subject to the industrial license under Industries (Development and Regulation) Act, 1951) and manufacturing of small arms and ammunition under Arms Act, 1959 has been permitted where up to 49% is under the automatic route. For investment above 49% approval of government will be required wherever it is likely to result in access to modern technology or for other reasons to be recorded) where FDI is permitted only up to 49% under the automatic route and the defence sector where FDI is permitted only up to 49% under the government route. Investment in both these sectors is also subject to certain additional specific conditions contained in the FDI Policy.

e. In February 2019, the Government of India released the Draft National e-Commerce Policy which encourages FDI in the marketplace model of e-commerce. Further, it states that the FDI policy for e-commerce sector has been developed to ensure a level playing field for all participants.

f. Additionally, the FDI Policy specifically states that foreign investment is allowed up to 100% under the automatic route in sectors that are not restricted or prohibited. Even where 100% is allowed under the automatic route, in some sectors such as non-banking financial companies, FDI is subject to conditions such as a minimum foreign capital requirement. In January 2018, Government of India allowed 100 per cent FDI in single brand retail through the automatic route. 51% foreign investment is permitted for Multi brand retail trading under the government approval route, which shall be in compliance with conditions prescribed.

g. The sectors in which FDI is completely prohibited is as follows:

i. Lottery business including government/private lottery, online lotteries, etc.
ii. Gambling and betting including casinos etc.
iii. Chit funds
iv. Nidhi companies
v. Trading in Transferable Development Rights
vi. Real estate business or construction of farm houses
vii. Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes

viii. Activities/sectors not open to private sector investment like railway operations and atomic energy.

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

2. <u>ODI</u>

Overseas investments (or financial commitment) in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognised as important avenues for promoting global business by Indian entrepreneurs. The same is regulated by Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 and the Master Direction – Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad. Direct investment outside India has been defined as the investment by way of contribution to the capital or subscription to the Memorandum of Association of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, but does not include portfolio investment**.** Further, an Indian Party being an Indian company or any entity formed by an Act of the Parliament or any partnership firm registered under the Partnership Act, 1932 or a LLP registered under the Limited Liability Partnership Act, 2008 can make an investment in a Joint Venture or Wholly Owned Subsidiary outside India.

a. Routes for Direct Investment outside India and Eligibility:

Overseas Investment (or financial commitment) can be made under two routes viz. (i) Automatic Route and (ii) Approval Route.

Under the Automatic Route, an Indian Party does not require any prior approval from the RBI for making overseas direct investments in a Joint Venture or Wholly Owned Subsidiary abroad where the same is within the limits as prescribed by the RBI. Under the Automatic Route, an Indian Party may approach an Authorized Dealer Category – I bank with the prescribed application for remittances towards such investments abroad. The Indian Party intending to make overseas direct investment under the automatic route is required to fill up form ODI duly supported by the documents listed therein, i.e., certified copy of the Board Resolution, Statutory Auditors certificate and Valuation report (in case of acquisition of an existing company) as per the valuation norms and approach an Authorized Dealer (designated Authorized Dealer) for making the investment/remittance. Any financial commitment exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the RBI.

On the other hand, where an application is made to the RBI under the approval route, the RBI shall consider

i. Prima facie viability of the JV / WOS outside India;
ii. Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment);
iii. Financial position and business track record of the Indian Party and the foreign entity; and
iv. Expertise and experience of the Indian Party in the same or related line of activity as of the JV / WOS outside India.

b. Permitted and Prohibited Sectors:

An Indian Party may make overseas direct investment in any bonafide activity (except those that are specifically prohibited). ODI is prohibited in real estate business i.e. buying and selling of real estate or trading in Transferable Development Rights (TDRs) (but does not include development of townships, construction of residential/commercial premises, roads or bridges).

c. Prescribed Limit for ODI:

The total amount of direct investment by way of contribution to the equity, loans, 100% of the amount of guarantees or 50% of the performance guarantees i.e. financial commitment made by an Indian party in Joint Ventures/Wholly Owned Subsidiaries shall not exceed 400% of the net worth of the Indian Party as on the date of the last audited balance sheet. The RBI may revise such prescribed limit from time to time.

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