

**DOING BUSINESS IN INDIA GUIDE**

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## DOING BUSINESS IN INDIA GUIDE

### INTRODUCTION:

India is the seventh largest country by area and the second-most populous country in the world. India became an independent democratic republic in 1947 and its constitution came into force on 26<sup>th</sup> November 1949, which is the highest law of the country. As of March 2020, there are 28 States and 8 union territories in India and most of the laws are uniformly applicable in almost all the States in India, however few aspects of the regulatory and investment environment may change from one State to another and therefore intricacies of the system need to be thoroughly understood. Over the last decade, India has become one of the world's most attractive investment destinations and will continue to be so in the future. India offers enormous opportunities for overseas investors. Due to continuous liberalisation of foreign policies, in the year 2019, India was the world's eighth-largest destination for FDI, a 16% increase over the previous year.

Indian population is very young, and more than half of the country's population is under the age of 30. Indian population constitutes around 17% of the total world's population. As far as GDP is concerned, India has risen to become the world's fifth largest economy, when ranked by nominal GDP in 2019 and the same stood at around 2.94 trillion dollars. India's GDP growth has been amongst the highest in the world in the past decade. Despite the growth, the road is still very long for India and it has its own challenges and weaknesses to overcome.

India is a developing country and over the past couple of years, the Indian Government has implemented a slew of measures that has resulted in positive developments. The Government has been reducing the India's high corporate tax rates which is a welcome move for inviting investments. The Insolvency and Bankruptcy Code was implemented in 2016, which is resulting in faster recognition and resolution of bankruptcies. The government has also been focusing to promote digitalization in both the private and public sectors. Even though there have been continuous efforts by the Indian Government to ease the doing of business in India and the Government has been continuously trying to simplify the laws, however, it still has few antiquated and complex laws which needs a careful reading and local knowledge in order to ensure compliance of the same.

We have hereinbelow laid down the various laws which are generally applicable to an Indian entity:

1. **Laws governing contractual relationships:** Indian Contract Act, 1872 lays down general principles relating to the formation and enforceability of contracts. Further, Sale of Goods Act, 1930 and Transfer of Property Act, 1882 also govern the sale of movable and immovable property respectively.
2. **Laws governing inbound and outbound investments into and from India:** Foreign Exchange Management Act, 1999 along with circulars, notifications and press notes issued under the same regulates inflow and outflow of foreign exchange and investment into and from India.

3. **Laws governing listed companies in India:** Securities and Exchange Board of India (“SEBI”) is India’s securities market regulator and through various rules and regulations enacted by it including Securities Contract Regulation Act, SEBI Act, SEBI ICDR Regulations, SEBI Takeover Regulations, SEBI Insider Trading Regulations, SEBI Delisting Regulations which inter alia governs the listing, trading and delisting of securities on stock exchanges in India.
4. **Laws governing workmen and employees in India:** In India, the employees are typically categorized as workmen and non-workmen. India has many central labour laws and at the same time each State has enacted separate laws and rules adopting the central laws with certain modifications in order to regulate the employment of employees in the State. The applicability of such laws is determined by various parameters such as the nature of work performed, number of employees, wages drawn, type of industry etc.
5. **Tax laws applicable in India:** India has 2 types of tax i.e. direct tax and indirect tax. Direct tax is paid directly to the Government. Direct tax is paid by individuals and body corporates on the income, profits or revenues under the Income Tax Act, 1961. Indirect tax is paid indirectly to the Government like Goods and Service Tax, 2017 which prescribes the taxing regime for supply of goods and services.
6. **Laws applicable to bankruptcy of individuals and companies:** The Insolvency and Bankruptcy Code of India, 2016 is the primary legislation governing the same and it sets out the law governing insolvencies and bankruptcies of companies, partnerships and individuals. At present, the code has only been notified for the companies.
7. The Competition Act, 2002 regulates combinations (merger control) and anti-competitive behavior.

Above is a broad overview of the applicability of various laws in India. In addition to the aforementioned, there are various laws which are industry and sector specific laws and which needs to be complied with by the entities, as may be applicable to them.

## LEGAL FRAMEWORK OF ENTITIES WHICH CAN BE SET UP IN INDIA:

### A. Type of entities that can be set up in India:

Sl. No:	Type of Entity:	Primary Legislation Applicable:
1.	Company	Companies Act, 2013.
2.	Limited Liability Partnership	Limited Liability Partnership Act, 2008.
3.	Partnerships	Indian Partnership Act, 1932.
4.	Trusts	Private trusts are governed by Indian Trust Act and public trusts are governed by laws as applicable in each State.
5	Branch Office/Project Office/Liaison Office	Exchange Control Regulations.

Business ventures can be carried on in India through sole proprietorships, partnerships, setting up Limited Liability Partnership (“**LLP**”) under the Limited Liability Partnership Act, 2008 or through companies incorporated in India under the Companies Act, 2013 (“**CA, 2013**”). Additionally, Reserve Bank of India (“**RBI**”) has laid down guidelines for setting up of liaison office, branch office and project office in India by foreign companies.

We have hereinbelow laid down in brief on the entities which can be set up in India:

- (a) **Branch Office (BO) / Liaison Office (LO)/ Project Office (PO):** Applications from persons resident outside India for establishing BO / LO/ PO or any other place of business in India shall be considered by the AD Category-I bank as per the guidelines issued by the RBI. If the application to open a BO/LO/PO is received from an entity resident outside India whose principal business falls under sectors where 100 percent Foreign Direct Investment (FDI) is allowed, the AD Category-I bank may consider such applications under the delegated powers.

RBI has also laid down certain instances where a person resident outside India shall require prior approval of RBI for opening of a BO/LO/PO in India. RBI has introduced eligibility criteria for opening of branch and liaison offices. Once a place of business in India is established by way of a BO/LO/PO or any other place of business by whatever name called is required to register with the Registrar of Companies (ROCs) if such registration is required under the CA, 2013 and have to comply with certain provisions of the CA, 2013 including requirements to file certain information and key documents like charter documents, accounts etc. with the ROC. The CA, 2013 has expanded the meaning of a place of business in India in respect of foreign companies, to include physical or electronic mode of existence in the country.

- (b) **Sole Proprietorship:** This is the simplest form of business. The owner of a sole proprietorship is personally entitled to all the profits and is liable for all the losses arising from the business. Non-Resident Indians (“NRIs”) or Overseas Citizen of India (“OCI”) can make investment in a sole proprietorship on a non-repatriation basis (i.e. when investment, sale or maturity proceeds are not repatriated out of India) by way of contribution to the capital of a proprietorship firm without approval of the RBI , provided that, such proprietary concern should not be engaged in any agricultural or plantation activity or print media or real estate business. Prior approval of the RBI is required to make investments in a sole proprietorship by persons resident outside India (other than NRIs investing on a non-repatriation basis) and they are not allowed to make any investment in a sole proprietorship without prior approval of the RBI.
- (c) **Partnership:** Partnerships in India, (other than LLP), are regulated under the Indian Partnership Act, 1932. It is optional for a partnership firm to get itself registered under the Indian Partnership Act, 1932 with the Registrar of Firms of the relevant State. Partners of a firm are jointly entitled to all the profits in the manner agreed amongst them and are also, dependent upon the terms of the partnership deed, jointly and severally responsible for all the liabilities arising from the business, during their respective tenure as partners. NRIs and OCI can make investment in a partnership firm on a non-repatriation basis by way of contribution to the capital of a firm without approval of the RBI, however, provided that, such partnership firm should not be engaged in any agricultural or plantation activity or print media or real estate business. Prior approval of the RBI is required to make investments in a partnership firm by persons resident outside India (other than NRIs investing on a non-repatriation basis) and they are not allowed to make any investment in a partnership firm without prior approval of the RBI.
- (d) **LLPs:** LLPs are a form of hybrid corporate entity with characteristics of both a limited liability company and a partnership and are regulated by the Limited Liability Partnership Act, 2008. The nature of an LLP is that of a body corporate with perpetual succession and it is a legal entity separate from its partners. An LLP can sue and be sued in its own name. Two or more persons (including a body corporate) can incorporate an entity as an LLP and there is no maximum limit on the number of partners that an LLP may have. Every LLP is required to nominate at least two individuals as designated partners, one of whom should be resident in India. FDI is permitted in LLPs under the automatic route in sectors where 100% FDI is allowed through automatic route & there are no FDI-linked performance conditions.
- (e) **Companies under CA, 2013:** The CA, 2013 sets out, inter alia, provisions related to incorporation of a company, issuance of shares, roles and responsibilities of a company and its directors, and dissolution of a company. The companies which can be set up under CA, 2013 may be a ‘private limited company’ or a ‘public limited company’ or a ‘one-person company’. The extent and conditionalities of FDI in a company incorporated in India is regulated by the NDI Rules and various regulations under

Foreign Exchange Management Act. We have hereinbelow laid down in brief the characteristic features of different types of companies:

- (i) **Private Limited Companies:** A private limited company has certain distinguishing characteristics. It must, in its articles of association, restrict the right to transfer shares; the number of members in a private limited company is minimum of 2 and a maximum of 200 shareholders (excluding the present and past employees of the company). Also, its articles of association must prohibit any invitation to the public to subscribe to the securities of the company.
  - (ii) **Public Limited Companies:** A public limited company is defined as a company which is not a private company (but includes a private company that is the subsidiary of a public company). A public limited company shall have a minimum of 7 members but may have more than 200 shareholders and may invite public to subscribe to its securities.
  - (iii) **One Person Company (“OPC”):** OPC is a company that has only one person as its member and minimum one person as director. Only natural persons who are Indian citizens and residents are eligible to form an OPC in India. In case the paid-up share capital of an OPC exceeds fifty lakh rupees or its average annual turnover of immediately preceding three consecutive financial years exceeds two crore rupees, then the OPC must mandatorily convert itself into a private company or a public company.
  - (iv) **Section 8 company:** The Companies Act, 2013 also allows for the incorporation of a 'not for profit' company, commonly referred to as a 'Section 8 Company'. A Section 8 Company may be incorporated for the following objectives i.e. promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any other such object.
- B. Incorporation of companies under CA, 2013:** The minimum number of directors in case of private company is 2 and 3 in case of Public Company. The minimum number of Members is 2 for Private Companies and 7 for Public Company. The entire process of incorporation is online on the MCA portal. The application for incorporation of the company to be filed in Form Spice Plus PART B. The form is to be filed along with Form INC- 33 (e-MOA) and Form INC -34(e-AOA). The proposed directors and subscribers need to obtain Digital Signatures. If the entire documentation is in place, it does not usually take more than 7 days to incorporate a company.
- C. Incorporation process of an LLP under the Limited Liability Partnership Act, 2008:** The minimum number of partners to incorporate an LLP is 2. Obtainment of Digital Signature Certificate is mandatory for atleast one Designated Partner. The entire process of filing of forms for incorporation is online and the LLP can be incorporated in less than 7 days’ time frame.

**D. Appointment of Director and their roles and responsibilities:**

The CA, 2013 provides that only an individual can be appointed as a director of a company. A person appointed as a director of a company is required to give his consent to hold the office as a director and to hold a Director Identification Number. A person cannot hold office as a director, including alternate directorship, in more than 20 companies at the same time. The maximum number of public companies in which a person can be appointed as a director is 10. A non-resident can be appointed as a director of an Indian company. However, it is mandatory for every company to have at least one resident director.

The CA, 2013 specifically lays down the duties of a director which inter alia includes, obligation of a director to act in good faith and to act in the best interests of the company, its employees, the shareholders etc. A director is expected to perform duties with due and reasonable care, skill and diligence and shall exercise independent judgment and to avoid being in a situation in which he may have a direct or indirect interest that conflicts or may conflict with the interest of the company. A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates.

**E. Other Corporate Governance Norms for Companies:**

- (a) mandatory appointment of independent directors and a woman director on the board for certain classes of companies;
- (b) appointment of small shareholders’ directors on boards of listed companies;
- (c) constitution of nomination and remuneration committee, stakeholders’ relationship committee, and audit committee for certain classes of companies;
- (d) mandatory appointment of key managerial personnel for certain classes of companies;
- (e) corporate social responsibility of the companies;
- (f) stringent policy for related party transactions and inter-corporate transactions;
- (g) mandatory rotation of independent directors and auditor;
- (h) minority protection measures.

**F. Hereinbelow is a brief overview of the features of a company versus an LLP:**

<b>Particulars:</b>	<b>Company:</b>	<b>LLP:</b>
<b>Relevant legislation:</b>	The Companies Act, 2013	The Limited Liability Partnership Act, 2008

<b>Legal entity and perpetual succession:</b>	It is a body corporate with a separate legal entity from its members and has perpetual succession.	It is a body corporate with a separate legal entity from its partners and has perpetual succession. An LLP agreement governs the mutual rights of the partners and a change in the partners of an LLP will not affect the existence of the entity.
<b>Restriction on number of members/partners:</b>	The number of members in a private limited company is minimum of 2 and a maximum of 200 shareholders. A public limited company shall have a minimum of 7 members but there is no limit on maximum number of members.	Two or more persons (including a body corporate) can incorporate an entity as an LLP and there is no maximum limit on the number of partners that an LLP may have.
<b>Tax Rate:</b>	The Corporate tax rate is 30% plus applicable surcharge and cess for companies with turnover of more than 400 crore and that avails exemptions while for companies that do not avail exemption, the tax rate shall be 22% and also MAT shall not be applicable. For companies having a turnover less than 400 crore INR and that avail exemption, the tax rate would be 25% plus MAT applicability and for companies that do not avail exemption, the company to pay income tax at the rate of 22% and also MAT shall not be applicable. The tax rates are different for manufacturing firms.	For all LLPs, the tax rate will be 30% plus applicable surcharge and cess, depending on the income of the LLP.



<b>DDT:</b>	The Finance Bill 2020 has abolished the DDT regime for dividends declared, distributed or paid on or after 1 April 2020. Consequently, dividends will be taxed in the hands of the shareholders at applicable tax rates.	An LLP is not required to pay DDT on profits distributed to its members. The said distribution of profits would not be taxable in the hands of the members of the LLP.
<b>MAT/AMT:</b>	A private or public company is required to pay MAT on book profits under section 115JB of the ITA @ 15% plus applicable surcharge and cess, as may be applicable. MAT is payable only in case the tax payable under normal provisions is less than tax payable under section 115JB.	An LLP is required to pay AMT @ 18.5% plus applicable surcharge and cess in case it is claiming deductions under Section 80H to 80 RRB or deduction under Section 35AD and Section 10AA. AMT provisions are applicable only when normal tax payable is lower than AMT in any financial year.
<b>Compliances:</b>	Tax compliances are almost similar for both a company and LLP. However, when it comes to corporate compliance relating to the CA, 2013, LLP enjoys significant advantages in terms of compliances, filings and maintenance of statutory records.	The nature of compliances, filings and maintenance of statutory registers is much more in a company.
<b>Access to Funding:</b>	Companies enjoys better access to funding from banks and also foreign direct investment.	Banks are usually reluctant to provide funding to LLPs. Also, FDI is permitted in an LLP, in those sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI linked performance related conditions
<b>Governance and Control:</b>	Under the company regime, since the shareholders do not directly participate in the	In a LLP, there is no clear distinction between the owners and management

	management of the company, there is a clear distinction between the owners of share i.e. the shareholders and the management i.e. the board of directors of a company.	since the LLP Partners hold ownership and also hold powers to manage the LLP though the same may be regulated by providing elaborate mechanisms in the LLP agreement.
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In order to choose between a company vis-à-vis an LLP the aforesaid factors should be considered. Further, the need for foreign investment and the number of investors involved will also need to be considered. It is also important to note that in a LLP there is no clear distinction between owners and management since the LLP Partners hold ownership and also hold powers to manage the LLP; however in a company there shall be clear distinction between the directors and the shareholders.

**G. Raising of money by way of capital into a company:**

A person resident in India (Indian residents, Indian companies, Indian body corporates or any other person resident in India) is eligible to subscribe to any number of shares of a private company. Investments in Indian companies through equity instruments by persons resident outside India are governed by the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (“**NDI Rules**”) and the provisions of the annual Consolidated Foreign Direct Investment Policy (“**FDI Policy**”) issued by the Department of Industrial Policy and Promotion (“**DIPP**”) in the Ministry of Commerce and Industry, Government of India.

There are few sectors which are prohibited for FDI viz. lottery business, gambling, chit funds, nidhi company, real estate business, manufacturing of cigars etc.

In the sectors/ activities, which don’t fall within prohibited sectors, FDI is either (i) permitted upto the limit indicated against each sector/ activity in Schedule 1 of the NDI Rules, or (ii) is permitted upto 100% under the automatic route, subject to applicable laws/ regulations; security and conditionalities.

FDI may be direct or indirect, and FDI norms apply to both investments. Indirect FDI investment is referred to as downstream investment made by an Indian company, which is owned or controlled by non-residents, into another Indian company.

An investor can bring in money into a company by subscribing to the capital of a company in any of the following manner:

- (a) **Equity Shares:** Equity shares are ordinary shares in the share capital of a company and are entitled to voting rights and dividend rights; or

- (b) **Preference Shares:** Preference shares are shares which carry a preferential right to receive dividends at a fixed rate as well as preferential rights over the equity shares during liquidation of a company. Further the preference shares may be redeemable or convertible into equity shares. However, it may be noted that, in order to be treated as capital, an Indian company can issue only compulsorily convertible preference shares to a person resident outside India.

The Companies Act, 2013 (“**CA, 2013**”) lays down the procedure for issuance of equity shares to the shareholders. The equity shares can be issued by a company in either of the following ways:

- (a) **Rights Issue:** A rights issue is an invitation to the existing shareholders to purchase additional new shares in the company in proportion to their existing holdings. A company may issue equity shares only to its existing shareholders under rights issue by passing a board resolution and complying with the applicable provisions of Section 62 of the CA, 2013.
- (b) **Private Placement:** Issuance of shares through private placement means any offer of securities or invitation to subscribe securities (equity or securities that convert to equity) to a select group of persons by a company, other than by way of public offer, through issue of a private placement offer letter. The issuance of securities through private placement is governed by Section 42 read with the Companies (Prospectus and Allotment of Securities), Rules 2014. As per Section 42 of the CA, 2013 the maximum number of persons to which private placement can be done in a financial year shall not exceed 200 (two hundred) in number and also the number of persons shall not exceed 50 (fifty) in one offer in a financial year.

The NDI Rules, in particular, regulate foreign investment by way of equity instruments into India from persons resident outside India. Under the said Rules, investment can only be made in equity instruments by a person resident outside India by subscribing to (i) equity shares; (ii) fully and compulsorily convertible preference shares (“**CCPS**”); and (iii) fully and compulsorily convertible debentures (“**CCD**”). Additionally, foreign investors can also invest in partly paid equity shares and warrants issued by Indian companies subject to certain conditions on upfront capitalisation and time limits as mentioned in the NDI Rules. Also, any such instrument having a ‘put option’/right to exit in favour of a non-resident shall not be FDI compliant unless in consonance with the following conditions laid down by RBI:

- (a) Exit can be achieved only after fulfilling a minimum lock-in of 1 year or as prescribed for the specific sector, whichever is higher; and

- (b) Exit price cannot be pre-agreed and will be arrived at by using any of the internationally accepted pricing methodology at the time of exit, duly certified by a chartered accountant or a SEBI registered merchant banker or a practicing cost accountant.

**Pricing Requirements:**

The NDI Rules regulate the entry price of investments made under the FDI regime by persons resident outside India. The pricing requirements are different for listed companies and unlisted companies. The price/conversion formula of the convertible instruments should be decided upfront and that the price at the time of conversion should not be lower than the FMV at the time of the issue of such instrument. We have hereinbelow laid down the pricing requirements in various scenarios:

(a) **Pricing Norms in case of Issuance of Shares on Private Placement Basis:**

- **For Listed Company:** Where shares of the Indian company are listed on a recognized stock exchange in India, the price of shares issued to a non-resident must not be less than the price determined in accordance with relevant SEBI guidelines.
- **For Unlisted Company:** Where shares of the Indian company are not listed on a recognized stock exchange in India, the price at which the person resident outside India subscribes / purchases the equity shares of an Indian company shall not be lower than the price computed by any internationally accepted pricing methodology for valuation on an arm's length basis ("**Fair Value**") duly certified by a chartered accountant or a merchant banker registered with SEBI or a practicing cost accountant. However, this Fair Value does not apply in case the foreign investor is subscribing to the memorandum of a company and they can make investments in an Indian company at face value by way of subscription to its Memorandum of Association, so long as they are in compliance with the applicable provisions of the CA, 2013 and the entry route and sectoral caps as mentioned in the NDI Rules.
- Where shares in an Indian company are issued to a person resident outside India in compliance with the provisions of the CA, 2013, by way of subscription to Memorandum of Association, such investments shall be made at face value subject to entry route and sectoral caps.

**(b) Pricing Norms in case of Issuance of Shares on Rights Basis:**

Where the issue of shares is undertaken pursuant to a rights issue, the offer must be: (a) at a price as determined by the company, in case of shares of a listed company; or (b) in case of shares of an unlisted company, at a price which is not less than the price at which the offer on rights basis is made to the resident shareholders.

**Reporting Requirements:**

The following are the reporting requirements in case of issuance of shares:

**(a) Reporting for issuance of shares:**

An Indian company issuing equity instruments to a person resident outside India, shall report such issue in Form FC-GPR, not later than 30 (thirty) days from the date of issue of equity instruments. Equity instruments issued by a company to an NRI/OCI on non-repatriable basis should not be considered as foreign investment and therefore Form FC-GPR is not required to be filed.

**(b) Annual Compliances:**

An Indian Company which has received FDI by way of capital contribution in the previous year, shall submit an annual return on Foreign Liabilities and Assets (“FLA”) to the RBI on or before the 15<sup>th</sup> day of July of each year. The annual return should provide information pertaining to all investments by way of direct-investment/portfolio investments/reinvested earnings/other capital in the Indian company made during the previous years (i.e. the information submitted by July 15 will pertain to all investments made in the previous year up to March 31).

**Mode of Payment:**

(a) In the event of purchase of equity instruments of an Indian company by a person resident outside India, the amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/Escrow account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

(b) In the event of investments by NRI or OCI on repatriation basis, the amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a Non-Resident External (NRE) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

- (c) In the event of investment by NRI or OCI on non-repatriation basis, the amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/NRO account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

**Time limit for allotment:**

The equity shares should be issued and allotted within 60 days from the date of receipt of the inward remittance from foreign investor. Where such equity instruments are not issued within sixty days from the date of receipt of the consideration the same shall be refunded to the person concerned by outward remittance through banking channels or by credit to his NRE/ FCNR (B) accounts, as the case may be, within fifteen days from the date of completion of sixty days.

**Tax Implication on the Company and the Investor on issuance of equity instruments:**

**Tax Implication on the Company:**

Under the provisions of section 56(2)(vii)(b) of the IT Act, if a private company receives any consideration from a person resident in India, for issuance of shares, which is more than the fair market value of the shares, then such issuer will become liable for tax on such amount which exceeds the FMV of such shares. Such additional amount received by the issuer which exceeds the fair market value should be regarded as income from other sources, taxable at the rate of 30% plus applicable surcharge and cess. Further it may be noted that, tax liability should not arise in case of issuance of shares to a foreign body corporate / foreign individual as this section is only applicable to issuance made by a company to a person resident in India.

**Tax Implication on the Investor:**

Section 56(2)(x) of the IT Act provides that where any person receives shares for a consideration which is less than its FMV by an amount exceeding fifty thousand rupees, the aggregate fair market value of the shares that exceeds such consideration shall be taxed in the hands of the investor.

**Snapshot of Compliances required by a company in case of issuance of capital instruments to a person resident in India and to a person resident outside India based on the above analysis:**

<b>Particulars:</b>	<b>Person Resident in India:</b>	<b>Person Resident Outside India:</b>

<b>Type of Instrument:</b>	Equity Shares; Compulsorily Convertible Preference Shares; Compulsory Convertible Debentures.	Equity Shares; Compulsorily Convertible Preference Shares; Compulsory Convertible Debentures.
<b>Type of issuance:</b>	Private Placement as well as Rights Issue.	Private Placement as well as Rights Issue.
<b>Sectoral Caps under NDI Rules:</b>	Not Applicable	Applicable
<b>RBI Reporting:</b>	Not Applicable	Form FC-GPR is to be filed within a period of thirty days from the date of issue of equity instruments.
<b>Obtainment of Valuation Report:</b>	(a) In case of issuance of shares under private placement route, valuation certificate from a registered valuer is required to be obtained under CA, 2013; (b) Also, valuation certificate from a merchant banker is required to be obtained under the IT Act for determining the Fair Value. However, this is not required for issuance of CCDs.	(a) In case of issuance under private placement route, valuation certificate from a registered valuer is required to be obtained under CA, 2013; (b) Also, valuation certificate from a chartered accountant or a merchant banker registered with SEBI or a practicing cost accountant to be obtained under NDI Rules.
<b>Tax Implications:</b>	<b>Tax implication on Company:</b> In case of issuance of shares which is more than the FMV of the shares, then the issuer will become liable for tax on such amount which exceeds the FMV of such shares. <b>Tax Implication on Investor:</b>	<b>Tax implication on Company:</b> Nil <b>Tax Implication on Investor:</b> If an Investor receives shares for a consideration which is less than its FMV by an amount exceeding fifty thousand rupees, the aggregate fair market value of the shares as exceeds such

	<p>If an investor receives shares for a consideration which is less than its FMV by an amount exceeding fifty thousand rupees, the aggregate fair market value of the shares as exceeds such consideration shall be taxed in the hands of the investor.</p>	<p>consideration shall be taxed in the hands of the investor</p>
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**Compliances at the time of sale of shares by the shareholders:**

**(a) Transfer of shares between Resident Shareholders:**

Transfer of shares between resident shareholders of an Indian company is governed by Section 56 of Companies Act, 2013 read with Rule 11 of the Companies (Share Capital and Debentures) Rules, 2014. Any transfer of shares should be in accordance with the provisions of articles of association of a private company. An instrument of transfer of shares i.e. Form SH-4 with the date of its execution specified thereon along with the original share certificate pertaining to the shares to be transferred shall be delivered to the company within 60 (sixty) days from the date of such execution by the transferor and the transferee. The stamp duty for transfer of shares is 25 paise for every Rs. 100 or part thereof of the value of shares and share transfer stamps of appropriate value should be affixed on Form SH-4 prior to its delivery to the company for recording the transfer of shares.

Once the company receives share transfer deed along with requisite documents then the company will check the deed and documents and thereafter pass a resolution for acceptance of same in the Board Meeting of the Company. After passing of Board resolution, the name of transferee shall be entered in the register of members as the beneficial owner of such shares. The company shall within 1 (one) month of passing of the board resolution, issue share certificate in favour of the transferee after endorsing the name of transferee on the back of the share certificates.

**(b) Transfer of shares involving non-resident:**

- **NRI/OCI to non-resident:** A NRI or an OCI holding equity instruments of an Indian company or units on repatriation basis may transfer the same by way of sale or gift to any person resident outside India provided that prior Government approval shall be obtained for any transfer in case the company is engaged in a sector which requires Government approval under the FDI Policy.



- **NRI/OCI to non-resident:** A NRI or an OCI, holding equity instruments of an Indian company or units on a non-repatriation basis, may transfer the same to a person resident outside India by way of sale, subject to the adherence to entry routes, sectoral caps or investment limits, pricing guidelines and other attendant conditions as applicable for investment by a person resident outside India and documentation and reporting requirements for such transfers as laid down hereinbelow.
- **NRI / OCI to another NRI/OCI:** An NRI/OCI holding equity instruments of an Indian company on a non-repatriation basis, may transfer the same by way of sale or gift to an NRI or an OCI who shall hold it on a non-repatriable basis.
- **Non-resident to non-resident:** A person resident outside India (other than an NRI or OCI) can transfer the equity instruments of an Indian company to any other person resident outside India (including NRIs) by way of sale or gift. However, Government approval will be required for transfer of stake from one non-resident to another in sectors which are under the approval route.
- **Non-resident to resident:** A non-resident can transfer the securities to any person resident in India as a gift or sale under private arrangement, subject to compliance with the prescribed sectoral caps, pricing guidelines, reporting requirements, minimum capitalization (where applicable), etc.
- **Resident to non-resident:** A person resident in India can transfer equity instruments of an Indian company, by way of sale under private arrangement to a person resident outside India. Such transactions will be subject to compliance with the prescribed sectoral caps, pricing guidelines, reporting requirements, minimum capitalization (where applicable), etc.

(c) **Pricing Guidelines:**

(i) **Transfer from resident to non-resident:**

- **For listed companies:** The price of shares of a company listed on a recognized stock exchange in India must not be less than the price at which the preferential allotment can be made under applicable SEBI guidelines or the price worked out in accordance with the SEBI guidelines.
- **For unlisted companies:** The price of shares of unlisted companies must not be less than the fair value worked out as per any internationally accepted pricing methodology for valuation of shares on an arm's length basis duly certified by a Chartered Accountant or a Merchant Banker registered with the SEBI or a practicing Cost Accountant.

(ii) **Transfer from non-resident to resident:**

- **For listed companies:** The price of shares of a company listed on a recognized stock exchange in India must not exceed the price at which the preferential allotment can be made under applicable SEBI guidelines or the price worked out in accordance with the SEBI guidelines.
- **For unlisted companies:** The price of shares of unlisted companies must not exceed the fair value worked out as per any internationally accepted pricing methodology for valuation of shares on an arm's length basis duly certified by a Chartered Accountant or a Merchant Banker registered with the SEBI or a practicing Cost Accountant.

(d) **Reporting Requirements:**

Form FC-TRS shall be filed for transfer of equity instruments in accordance with the rules, between: (i) a person resident outside India holding equity instruments in an Indian company on a repatriable basis and person resident outside India holding equity instruments on a non-repatriable basis; and (ii) a person resident outside India holding equity instruments in an Indian company on a repatriable basis and a person resident in India. The onus of reporting shall be on the resident transferor/transferee or the person resident outside India holding equity instruments on a non-repatriable basis, as the case may be.

The Form FC-TRS shall be filed within sixty days of transfer of equity instruments or receipt/remittance of funds, whichever is earlier.

(e) **Tax Implications:**

(i) **Tax Implication on the Transferor:**

Capital gains earned on the sale of shares are subject to capital gains tax. The capital gains can be classified into (a) short-term capital gain; or (b) long-term capital gain, depending on the period of holding. If the period of holding of shares is more than 1 year (for listed shares) then the gains shall be construed as long term capital gains and if the period of holding of shares is less than 1 year then the gains shall be construed as short term capital gains. Unlisted shares are treated as long term only when held for more than 24 months. Tax incidence is generally higher in the case of short-term capital gains as compared to long-term capital gains.

Long term capital gains arising out sale of listed shares on the stock exchange are taxed at 10% plus applicable surcharge and education cess where such gains exceed INR 1,00,000. Long term capital gains earned by a resident on sale of unlisted securities may be taxed at the rate of 10% (provided no benefit of

indexation has been availed) or 20% (if benefit of indexation has been availed) plus applicable surcharge and education cess. Short term capital gains arising out of sale of listed shares are taxed at the rate of 15% plus applicable surcharge and education cess. The short-term capital gain for sale of unlisted shares is added to the income tax return of the taxpayer and the taxpayer is taxed according to his income tax slab.

Long term capital gain earned by a non-resident on sale of listed shares on the stock exchange are subject to a tax rate of 10% plus applicable surcharge and education cess where such gains exceed INR 100,000 provided that securities transaction tax is paid both at the time of acquisition and sale of shares. Short term capital gain earned by a non-resident on sale of listed securities are taxable at the rate of 15% plus applicable surcharge and education cess, or at ordinary corporate tax rate with respect to other securities. Further, the non-resident would be entitled to Double Tax Avoidance Treaty benefits, only if it obtains the required documents as has been laid down hereinbelow. Double Taxation Avoidance Agreement (“DTAA”) is the agreement between two countries with an objective to avoid taxation on same income in both countries.

Provided hereinbelow is the taxation of capital gains in a few countries with which India has entered into Double Tax Avoidance Treaty:

<b>Capital gains tax on sale of Indian securities:</b>	<b>Mauritius:</b>	<b>Cyprus:</b>	<b>Singapore:</b>	<b>Netherlands:</b>
	Mauritius has the right to tax capital gains arising from alienation of shares acquired on or prior to April 1, 2017 in a company resident in India. It is pertinent to note that there is no local tax in	As per the revised DTAA between India and Cyprus, India shall have the right to tax capital gains arising from the transfer of investments made on or after April 01, 2017.	Singapore has the right to tax capital gains arising from alienation of shares acquired on or prior to April 1, 2017 in a company resident in India. It is pertinent to note that there is no local tax in	Dutch residents are not taxed if sale is made to non-resident. Exemption for sale made to resident only if Dutch shareholder holds lesser than 10% shareholding in Indian company. Further, such gains would be taxable if the Dutch

	Mauritius on capital gains. From April 1, 2017, India shall have the right to tax capital gains arising from alienation of shares acquired on or after April 01, 2017 in a company resident in India.		Singapore on capital gains, Singapore residents. From April 1, 2017, India shall have the right to tax capital gains arising from alienation of shares acquired on or after April 01, 2017 in a company resident in India.	resident holds more than 10% of the shares of the Indian company and the sale is made to a resident of India.
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(ii) **Tax Implication on the Transferee:**

Under Section 56(2)(x) of the IT Act, if any person receives, in any previous year, from any person or persons any shares, for a consideration which is less than the aggregate FMV of the shares by an amount exceeding fifty thousand rupees, the aggregate FMV of such property as exceeds such consideration shall be chargeable to income-tax under the head “Income from other sources” in the hands of the transferee.

(f) **Snapshot of Compliances required by a company in case of transfer of equity shares by a person resident in India and by a person resident outside India based on the above analysis:**

<b>Particulars:</b>	<b>Person Resident in India:</b>	<b>Person Resident Outside India:</b>
<b>Approvals required</b>	The transfer of shares is required to be approved by	The transfer of shares is required to be approved by

<b>under CA, 2013:</b>	the board of directors of the company.	the board of directors of the company.
<b>ROC Filing for Allotment:</b>	No filing is required to be made to the ROC. However, the transferor and the transferee are required to executed Form SH-4 and deposit with the company along with original share certificate for approval of transfer of shares.	No filing is required to be made to the ROC. However, the transferor and the transferee are required to executed Form SH-4 and deposit with the company along with original share certificate for approval of transfer of shares.
<b>RBI Reporting:</b>	No RBI reporting for transfer of shares by a resident to another resident.	Form FC-TRS is to be filed within a period of 60 days of transfer of equity instruments or receipt/ remittance of funds, whichever is earlier.
<b>Obtainment of Valuation Report:</b>	Valuation certificate from a merchant banker or an accountant is required to be obtained under the IT Act for determining the Fair Value.	(a) Valuation certificate from a merchant banker or an accountant is required to be obtained under the IT Act for determining the Fair Value. (b) Valuation certificate from a chartered accountant or a merchant banker registered with SEBI or a practicing cost accountant to be obtained under NDI Rules.
<b>Tax Implications:</b>	<b>Tax implication on Company:</b>  Nil  <b>Tax Implication on the Transferor:</b>  Liable to pay capital gains tax as mentioned hereinabove.	<b>Tax implication on Company:</b>  Nil  <b>Tax Implication on the Transferor:</b>  Liable to pay capital gains tax as mentioned hereinabove. DTAA

	<p><b>Tax Implication on Transferee:</b></p> <p>If the transferee receives shares for a consideration which is less than its FMV by an amount exceeding fifty thousand rupees, the aggregate fair market value of the shares as exceeds such consideration shall be taxed in the hands of the transferee.</p>	<p>benefits are available, subject to production of documents as mentioned above. Further, it is also mandatory for the transferor to file income tax return in India in the event he is liable to pay capital gains tax, as applicable under the IT Act.</p> <p><b>Tax Implication on Transferee:</b></p> <p>If the transferee receives shares for a consideration which is less than its FMV by an amount exceeding fifty thousand rupees, the aggregate fair market value of the shares as exceeds such consideration shall be taxed in the hands of the transferee.</p>
<b>Stamp Duty on Form SH-4:</b>	0.25% of the consideration for transfer of shares.	0.25% of the consideration for transfer of shares.

**H. Concept of Downstream Investment:**

Indian entity which has received indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other attendant conditions as applicable for foreign investment. “Indirect foreign investment” means downstream investment received by an Indian entity from,- (a) another Indian entity (IE) which has received foreign investment and (i) the IE is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India; or (b) an investment vehicle whose sponsor or manager or investment manager (i) is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India. Provided that no person resident in India other than an Indian entity can receive Indirect Foreign Investment. Downstream investment by an LLP not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India is allowed in an Indian company operating in sectors where foreign investment up to one hundred percent is permitted under automatic route and there are no FDI linked performance conditions. The first level Indian company making

downstream investment shall be responsible for ensuring compliance with the provisions of these rules for the downstream investment made by it at second level and so on and so forth and such first level company shall obtain a certificate to this effect from its statutory auditor on an annual basis and such compliance of these rules shall be mentioned in the Director's report in the Annual Report of the Indian company.

**I. Other Routes for bringing in monies into India:**

**(a) Investment by a Foreign Venture Capital Investor:**

“FVCI” means a Foreign Venture Capital Investor incorporated and established outside India and registered with the Securities and Exchange Board of India under the Securities and Exchange Board of India (Foreign Venture Capital Investors) Regulations, 2000.

An Foreign Venture Capital Investor (FVCI) may purchase:

- (i) securities, issued by an Indian company which is engaged in biotechnology sector, nanotechnology, seed research, dairy, poultry etc. as mentioned in NDI Rules and whose securities are not listed on a recognised stock exchange at the time of issue of the said securities;
- (ii) units of a Venture Capital Fund (VCF) or of a Category I Alternative Investment Fund (Cat-I AIF) or units of a scheme or of a fund set up by a VCF or by a Cat-I AIF.
- (iii) equity or equity linked instrument or debt instrument issued by an Indian ‘start-up’ irrespective of the sector in which the start-up (as defined by DIPP) is engaged.

Provided that, if the investment is in equity instruments, then the sectoral caps, entry routes and attendant conditions shall apply. The FVCI may invest in securities on a recognised stock exchange subject to the provisions of the SEBI FCVI Regulations, 2000. It may be noted that pricing restrictions as mentioned in the NDI Rules are not applicable to a registered FVCI and a FVCI can purchase and sell shares at any price which is mutually agreed between the buyer and the seller. However, under the income tax laws in India, FVCIs may be liable to pay tax on the income generated through equity investments made at a price lower than the fair market value, in a company which does not have substantial public interest. This limits the benefits available to a FVCI especially with respect to exits from unlisted companies through sale of shares.

**(b) Investment by a Foreign Portfolio Investor:**

In September 2019, the Securities and Exchange Board of India (“SEBI”) notified the SEBI (Foreign Portfolio Investors) Regulations, 2019 (“FPI Regulations”), which superseded the erstwhile SEBI (Foreign Portfolio Investors) Regulations, 2014. A Foreign Portfolio Investor as defined in NDI Rules means a person registered in accordance with the provisions of the FPI Regulations. The FPI Regulations 2019 has done away with the 3 (three) categories of FPIs and clubbed them into 2 (two) categories. Further, the FPI Regulations 2019 has finally

clarified that while resident Indians, non-resident Indians and overseas citizens of India cannot apply for registration as an FPI, they can be stakeholders of an FPI applicant subject to fulfillment of certain conditions.

An FPI may purchase or sell equity instruments of an Indian company listed or to be listed on a recognised stock exchange in India. The aggregate limit for investment would be the sectoral cap applicable to such Indian company. An Indian company may, with the approval of its board of directors and members, by a resolution and a special resolution, respectively: (i) decrease the aggregate limit to a lower threshold of 24% or 49% or 74% as deemed fit, or (ii) increase the aggregate limit to 49% or 74% or the sectoral cap or statutory ceiling respectively as deemed fit. However, once the aggregate limit is increased, the limit cannot be reduced later. If the investments exceed the prescribed limits, FPIs will have the option to divest its excess holdings within 5 trading days, failing which, the entire investment in the company will be considered as FDI. If the investment falls under a category where FDI is prohibited, the aggregate FPI limits are capped at 24%.

(c) **Investment by NRI:**

**Investment by NRI or OCI on repatriation basis:**

A Non-resident Indian (NRI) or an Overseas Citizen of India (OCI) may purchase or sell equity instruments of a listed Indian company on repatriation basis, on a recognized stock exchange in India, provided that the total holding by any individual NRI or OCI shall not exceed 5 percent of the total paid-up equity capital on a fully diluted basis or shall not exceed 5 percent of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company and the total holdings of all NRIs and OCIs put together shall not exceed ten percent of the total paid-up equity capital on a fully diluted basis or shall not exceed ten percent of the paid-up value of each series of debentures or preference shares or share warrants. Provided that the aggregate ceiling of 10 percent may be raised to 24 percent if a special resolution to that effect is passed by the General Body of the Indian company.

A NRI or an OCI may without limit purchase or sell units of domestic mutual funds which invest more than 50 percent in equity. An NRI or an OCI may, without limit purchase or sell shares in public sector enterprises being disinvested by the Central Government, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids.

**Investment by NRI or OCI on non-repatriation basis:**

A NRI or an OCI, including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, may purchase or contribute, as the case may be, on non-repatriation basis the following, namely:-

- ✓ an equity instrument issued by a company without any limit either on the stock exchange or outside it;



- ✓ units issued by an investment vehicle without any limit, either on the stock exchange or outside it;
- ✓ The capital of a LLP without any limit;
- ✓ convertible notes issued by a startup company in accordance with these rules.

The investment detailed at sub-paragraph (a) of paragraph (1) above shall be deemed to be domestic investment at par with the investment made by residents. The pricing guidelines as mentioned in the NDI Rules shall not be applicable for investment in equity instruments by a person resident outside India on a non-repatriation basis.

A NRI or an OCI may purchase, hold, or sell Indian Depository Receipts (IDRs) of companies resident outside India and issued in the Indian capital market, subject to prescribed terms and conditions.

**(d) Fund Raise by Start-up Companies by issuance of convertible notes:**

Convertible Note is an option available to Indian startups that are looking for raising funds apart from directors, relatives or shareholders of the Company. Private companies have limited options of raising funds and this is a new way of fund raise by Indian start-ups and the same does not fall under the purview of deposits. The terms of issuance of convertible notes to a foreign investor is laid down in NDI Rules. ‘**Convertible Note**’ as defined under NDI Rules means an instrument issued by a startup company acknowledging receipt of money initially as debt, repayable at the option of the holder, or which is convertible into such number of equity shares of that company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per other terms and conditions agreed and indicated in the instrument.

“**Start-up company**” under the CA, 2013 means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with notification number G.S.R. 180I dated 17<sup>th</sup> February, 2016 issued by the DIPP, Ministry of Commerce and Industry.

Therefore, a convertible note can only be issued by a start-up company recognised by DIPP. In accordance with the said notification, an entity shall be considered as a ‘startup’, subject to fulfillment of all the below conditions:

- (a) Up to five years from the date of its incorporation/registration;
- (b) If its turnover for any of the financial years has not exceeded Rs. 25 crores; and
- (c) It is working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property.

An entity is considered to be working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property if it aims to develop and commercialize:

- (a) A new product or service or process, or
- (b) A significantly improved existing product or service or process that will create or add value for customers or workflow.

Provided that the mere act of developing, (a) products or services or processes which do not have potential for commercialization, or (b) undifferentiated products or services or processes, or (c) products or services or processes with no or limited incremental value for customers or workflow, would not be covered under this definition.

(e) **Regulatory Overview of External Commercial Borrowings:**

External Commercial Borrowings (ECB's) are commercial loans raised by eligible resident entities from recognized non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters given below apply in totality and not on a standalone basis. ECB can be raised either through automatic route or under the approval route.

1. **Types of ECB:** Based on form of currency in which ECB is raised, they can be divided into two forms as follows:
  - a. **Foreign Currency (FCY) denominated ECB:** Currency of borrowing is in any freely convertible Foreign Currency.
  - b. **Indian Rupee (INR) denominated ECB:** Borrowings is raised in Indian Rupees.
2. **Forms of ECB:** ECB can be raised in following forms:
  - a. Loans including bank loans;
  - b. floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments);
  - c. Trade credits beyond 3 years;
  - d. Foreign Currency Convertible Bond (FCCBs);
  - e. Foreign Currency Exchangeable Bond (FCEBs);
  - f. Financial Lease and
  - g. plain vanilla Rupee denominated bonds issued overseas, which can be either placed privately or listed on exchanges as per host country regulations.
3. **Eligible borrowers:**
  - a. All entities eligible to receive FDI.
  - b. Port Trusts
  - c. Units in SEZ
  - d. SIDBI;
  - e. EXIM Bank of India.

- f. Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/ co-operatives and Non-Government Organizations.

Provided that the eligible borrowers mentioned in 3(f) can raise only INR denominated ECB. Further, from the aforesaid, it can be deduced that now even LLPs are eligible to raise ECB under this new framework. The eligible borrower now includes all entities eligible to receive FDI. Under the extant foreign exchange regulations, foreign direct investments is permitted in an LLP, in those sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI linked performance related conditions. Therefore, an LLP which is engaged in any activity where 100% FDI is permitted and there are no FDI linked performance related conditions is an eligible borrower to raise ECB.

**4. Recognized lenders:**

- a. The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECB.
- b. Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognized lenders;
- c. Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad; Foreign equity holder means (a) direct foreign equity holder with minimum 25% direct equity holding in the borrowing entity, (b) indirect equity holder with minimum indirect equity holding of 51%, or (c) group company with common overseas parent;
- d. Foreign branches / subsidiaries of Indian banks are permitted as recognized lenders only for FCY ECB (except FCCBs and FCEBs);
- e. Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.

- 5. Minimum Average Maturity Period (MAMP):** MAMP for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:

Sl.No:	Category:	MAMP:
(a)	ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.	1 year
(b)	ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans	5 years
<sup>1</sup> (c)	ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes	10 years
(d)	ECB raised for (i) repayment of Rupee loans availed domestically for capital	7 years

	expenditure (ii) on-lending by NBFCs for the same purpose	
(e)	ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose	10 years
for the categories mentioned at (b) to (e) – (i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks (ii) the prescribed MAMP will have to be strictly complied with under all circumstances.		

- 6. All in Cost ceiling per annum:** All in cost ceiling per annum should be benchmark rate plus 450 bps spread. Prepayment charge/ Penal interest, if any, for default or breach of covenants, should not be more than 2 per cent over and above the contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.
- 7. End Uses of ECB:** ECB proceeds cannot be utilized for the following:
- a. Real estate activities.
  - b. Investment in capital market.
  - c. Equity investment.
  - d. Working capital purposes, except in case of ECB mentioned at 5(b) and 5(c) above.
  - e. General corporate purposes, except in case of ECB mentioned at 5(b) and 5(c) above.
  - f. Repayment of Rupee loans, except in case of ECB mentioned at 5(d) and 5(e) above.
  - g. On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at 5(c),5(d) and 5(e) above.
- 8. Limit and leverage:** All eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under the automatic route. Further, in case of FCY denominated ECB raised from direct foreign equity holder, ECB liability-equity ratio for ECB raised under the automatic route cannot exceed 7:1. However, this ratio will not be applicable if the outstanding amount of all ECB, including the proposed one, is up to USD 5 million or its equivalent. Under the erstwhile framework there were sectoral limits on borrowing whereas the new ECB framework allows all eligible borrowers to borrow upto USD 750 million per financial year without any specific sectoral limits.
- 9. Issuance of Guarantee, etc. by Indian banks and Financial Institutions:** Issuance of any type of guarantee by Indian banks, All India Financial Institutions and NBFCs relating to ECB is not permitted. Further, financial intermediaries (viz., Indian banks, All India Financial Institutions, or NBFCs) shall not invest in FCCBs/ FCEBs in any manner whatsoever.

## **CAPITAL MARKETS IN INDIA:**

Indian companies are permitted to raise capital through public issue of shares and other instruments within the regulatory limits of SEBI. India has two national stock exchanges which are the BSE Limited and the National Stock Exchange of India Limited. The public issuance of securities is governed by SEBI (Issue of Capital and Disclosure Requirements), Regulations, 2018 (“**ICDR Regulations**”) which governs public issuance of securities including convertible debt instruments, preferential issue of securities, qualified institutional placement, public offer of depository receipts, public offer by medium and small enterprise or issue of listing on the innovators growth platform through an issue or without an issue. The ICDR Regulations provide detailed provisions relating to public issue such as conditions relating to an initial and further public offer, conditions relating to pricing, promoter’s contribution, restriction on transferability of promoter’s contribution, minimum offer to public, reservations, manner of disclosures in offer documents, etc.

### **A. Public Offer:**

There are 2 types of public offer:

1. **Initial Public Offer:** In initial public offer is made by an unlisted company making a fresh issue of shares/convertible securities or offering its existing shares/convertible securities for sale or both for the first time to the public.
2. **Further Public Offer:** When an already listed company makes either a fresh issue of shares/convertible securities or an offer for sale to the public, it is called a Further Public Offer.

### **Requirements of a Public Offer:**

Different routes are available to issuers for accessing the capital market through public issues. An issuer shall be eligible to make an initial public offer only if it meets the following requirements:

- (a) Net Tangible Assets of at least Rs. 3 crores in each of the preceding three full years of which not more than 50% are held in monetary assets. Provided further that the limit of fifty per cent on monetary assets shall not be applicable in case the initial public offer is made entirely through an offer for sale.
- (b) Minimum of Rs. 15 crores as average operating profit during the preceding three years (of twelve months each), with operating profit in each of these preceding three years.
- (c) A net worth of at least Rs. 1 crore in each of the preceding three full years.
- (d) If the company has changed its name within the last one year, at least 50% revenue for the preceding 1 year should be from the activity suggested by the new name.

An issuer not satisfying the condition stipulated above shall be eligible to make an initial public offer only if the issue is made through the book-building process and the issuer undertakes to

allot at least seventy-five per cent of the net offer to qualified institutional buyers and to refund the full subscription money if it fails to do so.

Further, in case of offer of sale apart from above, it also needs to be ensured that only such fully paid-up equity shares may be offered for sale to the public, which have been held by the sellers for a period of at least one year prior to the filing of the draft offer document.

**Minimum Promoter’s Contribution:**

The promoters of the issuer shall hold at least twenty per cent of the post-issue capital. Provided further that the requirement of minimum promoters’ contribution shall not apply in case an issuer does not have any identifiable promoter. The promoters shall satisfy the requirements of this regulation at least one day prior to the date of opening of the issue. There are certain securities which by the nature of their existence are ineligible for the computation of the promoter contribution, including certain bonus shares, pledged securities and shares acquired for consideration other than cash.

**Lock-in of Securities:**

The minimum promoter’s contribution shall be locked-in for a period of three years from the date of commencement of commercial production or date of allotment in the initial public offer, whichever is later. The holding of the promoters in excess of minimum promoters’ contribution shall be locked-in for a period of one year from the date of allotment in the initial public offer. The entire pre-issue capital held by persons other than the promoters shall be locked-in for a period of one year from the date of allotment in the initial public offer. However, the lock-in restrictions shall not apply in case of equity shares allotted to employees, equity shares held by an employee stock option trust or equity shares held by a venture capital fund or alternative investment fund of category I or category II or a foreign venture capital investor.

**Pricing:**

The issuer may determine the price of equity shares, and in case of convertible securities, the coupon rate and the conversion price, in consultation with the lead manager(s) or through the book building process, as the case may be. The issuer may mention a price or a price band in the offer document (in case of a fixed price issue) and a floor price or a price band in the red herring prospectus (in case of a book built issue) and determine the price at a later date before filing the prospectus with the Registrar of Companies: Provided that the prospectus filed with the Registrar of Companies shall contain only one price or the specific coupon rate, as the case may be.

**Minimum Offer to Public:**

The minimum offer to the public shall be subject to the provisions of clause (b) of sub-rule (2) of rule 19 of Securities Contracts (Regulations) Rules, 1957 i.e. atleast 25% of the securities shall be held by public.

**IPO Grading:**

The issuer may obtain grading for its initial public offer from one or more credit rating agencies registered with the Board.

**Other important considerations:**

- (a) a public issue may be opened within twelve months from the date of issuance of the observations by the Board and an issue shall be opened after at least three working days from the date of filing of prospectus;
- (b) The minimum subscription to be received in the issue shall be at least ninety per cent of the offer through the offer document, except in case of an offer for sale of specified securities;
- (c) Except as otherwise provided in these regulations, an initial public offer shall be kept open for at least three working days and not more than ten working days;
- (d) The issuer shall not make an allotment pursuant to a public issue if the number of prospective allottees is less than one thousand;

The eligibility criteria is different for small and medium scale enterprises and an issuer in this category and making an initial public offer of specified securities shall satisfy the conditions of ICDR Regulations as on the date of filing of the draft offer document with the SME exchange and also as on the date of filing the offer document with the Registrar of Companies.

**B. Eligibility Conditions for a SME for an IPO:**

In order to facilitate capital raising by SME's, SEBI has allowed SME's to list their securities without an IPO and permit trading of specified securities on Institutional Trading Platform ("ITP") in SME Exchanges. SEBI (Listing of Specified Securities on Institutional Trading Platform) Regulations, 2013 govern the process of listing of SMEs without undertaking an IPO. The eligibility criteria have been laid down in the ICDR Regulations which are as under:

- (a) An issuer shall be eligible to make an initial public offer only if its post-issue paid-up capital is less than or equal to ten crore rupees.
- (b) An issuer, whose post-issue face value capital is more than ten crore rupees and upto twenty-five crore rupees, may also issue specified securities in accordance with provisions of this Chapter.
- (c) it has entered into an agreement with a depository for dematerialisation of its specified securities already issued and proposed to be issued.
- (d) all its existing partly paid-up equity shares have either been fully paid-up or forfeited.
- (e) all specified securities held by the promoters are in the dematerialised form.
- (f) it has made firm arrangements of finance through verifiable means towards seventy-five per cent. of the stated means of finance for the project proposed to be funded from the issue proceeds, excluding the amount to be raised through the proposed public offer or through existing identifiable internal accruals.

- (g) The amount for general corporate purposes, as mentioned in objects of the issue in the draft offer document and the offer document shall not exceed twenty five per cent of the amount being raised by the issuer.
- (h) Further, an issuer shall not be eligible to make an public offer:
  - (i) if the issuer, any of its promoters, promoter group or directors or selling shareholders are debarred from accessing the capital market by the Board;
  - (ii) if any of the promoters or directors of the issuer is a promoter or director of any other company which is debarred from accessing the capital market by the Board;
  - (iii) if the issuer or any of its promoters or directors is a willful defaulter.
  - (iv) if any of its promoters or directors is a fugitive economic offender.

**C. Listing on Innovators Growth Platform:**

The issuers who meet the eligibility criteria shall be eligible for listing on the institutional trading platform pursuant to an initial public offer or for only trading on a stock exchange of their specified securities without making a public offer.

**Eligibility:**

An issuer which is intensive in the use of technology, information technology, intellectual property, data analytics, bio-technology or nano-technology to provide products services or business platforms with substantial value addition shall be eligible for listing on the innovators growth platform, provided that as on the date of filing of draft information document or draft offer document with the Board, as the case may be, twenty five per cent of the pre-issue capital of the Issuer Company for at least a period of two years, should have been held by:

- (a) Qualified Institutional Buyers;
- (b) Family trust with net-worth of more than five hundred crore rupees, as per the last audited financial statements;
- (c) Accredited Investors for the purpose of Innovators Growth Platform;
- (d) The following regulated entities:
  - i. Foreign Portfolio Investor;
  - ii. An entity meeting all the following criteria: (I) It is a pooled investment fund with minimum assets under management of one hundred and fifty million USD; (II) It is registered with a financial sector regulator in the jurisdiction of which it is a resident; (III) It is resident of a country whose securities market regulator is a signatory to the International Organization of Securities Commission's Multilateral Memorandum of Understanding or a signatory to Bilateral Memorandum of Understanding with the Board; (IV) It is not resident in a country identified in the public statement of Financial Action Task Force.

The ICDR Regulations lay down the other compliances for listing either pursuant to a public offer or without a public offer.



**D. Listing by Indian Companies on Exchanges Outside India:**

Indian Companies are permitted to list instruments linked to their securities on stock exchanges outside India. This may be achieved through the issue of depository receipts, known commonly as American Depository Receipts or Global Depository Receipts, depending on the location where the Company chooses to list. The Government, on 17 March 2020, introduced the Companies (Amendment) Bill, 2020 (Bill) in the Lok Sabha, which, among a series of changes to the Companies Act, 2013 (Companies Act), includes provisions that provide for Indian companies to list securities directly on overseas stock exchanges. The proposed amendment is enabling in nature. Determination of the classes of public companies that may list overseas, classes of securities that may be listed, and the jurisdictions and stock exchanges where listing may be undertaken, has been delegated to the Government. This would, once implemented, be an additional fund-raising avenue for the corporates looking to expand and boost their business activities.

## **EMPLOYEES RELATED LAWS AND APPLICABILITY:**

Under the Indian Constitution, the Central as well as the State Governments are empowered to enact legislations to regulate and protect the interest of the employees. Depending on the type of industry, nature of work done, number of employees, location of the industry, the applicability of different labour legislations come into picture. In India, the labour laws are employee centric and have been drafted keeping in purview the interest of the employees. The key legislations like Industrial Disputes Act, 1947, Factories Act, 1948 and shops and establishment of the relevant states lay down the provisions pertaining to the working days, number of hours to be worked, conditions of working, termination of employment etc which the companies, depending on the applicability, are required to adhere to. Below is a brief snapshot of the key labour legislations applicable to the companies in India:

<b>Shops &amp; Establishment Acts</b>
Shops and Establishment Acts are State specific legislations which govern the working conditions of the employees employed in a commercial establishment, shop, residential hotels, theatres, eating houses, restaurants and other establishments. These establishments shall have to get themselves registered and shall obtain registration certificate within the timelines as maybe prescribed by the state specific acts. These acts provide in detail the hours of work, holidays, overtime and wages for overtime, leaves, termination from employment and various other duties and obligations of the employers and the employees.
<b>Factories Act, 1948</b>
Factories Act, 1948 is a central legislation which governs and regulates the working conditions of labours employed in a factory. It provides the conditions of safety, health, various benefits, conditions of leave, overtime and the working hours. The central legislation is enforced in various states by way of rules which are formulated under the Factories Act, 1948. The factories shall obtain relevant registration under the Factories Act, 1948 as prescribed by the state specific rules.
<b>Maternity Benefit Act, 1961</b>
The Maternity Benefit Act, 1961 applies to every establishment and factories wherein 10 or more persons are employed and factories, mines, plantations and circus. It provides various conditions with respect to the protection of pregnant women employed in the aforementioned and provides for the payment of maternity benefit to commissioning mothers and adopting mothers as well. Relevant registers shall be maintained by the employer, as prescribed by the rules.
<b>The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013</b>
The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“ <b>SH Act</b> ”) is a central legislation and is applicable to the whole of India. The SH Act applies to every workplace, as defined under section 2 (o) (ii) of the SH Act, which includes almost all types of organizations, i.e. private sector organization or a private venture, undertaking, enterprise, institution, establishment, society, trust non-governmental organization, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service. Although the SH Act is applicable to all the workplace/organizations, however, only such workplace where 10 or more employees are

employed shall constitute an internal complaints committee for each workplace. A sexual harassment policy shall also be formulated.

**Industrial Employment (Standing Orders) Act, 1946**

It applies to railways, mines, quarries, factories, oil fields, tramway, omnibus, docks, plantations, inland steam vessels, workshops, wharves and jetties in which 100 or more persons are employed. It ensures the laying down of clear cut terms and conditions of services and these terms and conditions shall be certified and approved by the concerned labour departments.

**The Employees Provident Funds & Miscellaneous Provisions Act, 1952**

The Employees Provident Funds & Miscellaneous Provisions Act, 1952 (“EPF Act”) is applicable to establishments in which 20 or more persons are employed and employees are required to contribute to the fund constituted whose salary is or is below Rs. 15000/- per month. It is a social security mechanism which provides for pension funds, deposit linked funds to those persons working in a factory or any other establishments as prescribed under the EPF Act. An employer is required to seek registration with the appropriate authority under the EPF Act. 12% of the basic wages shall be contributed to the fund by the employer and the employee.

**The Employee State Insurance Act, 1948**

The Employee State Insurance Act, 1948 (“ESIA”) provides certain benefits to employees in case of sickness, maternity and employment injury and related matters. It is a central legislation and extends to the whole of India and is applicable to factories wherein 10 or more employees are employed. Under the ESIA, an employer is obligated to make certain contributions to the Employees’ State Insurance Corporation, created pursuant to the ESIA, for its employees drawing wages up to Rs. 21,000 per month at 4.75% of the wages of such employee (and the employee is required to contribute 1.75% of his/her wages). An employer is required to make these contributions for its employees and also employees not directly employed by it i.e., employed through a contractor or temporarily employed. If any contribution payable under this Act is not paid by the employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified. The company shall be registered under the ESIA for making the aforesaid relevant contributions.

**The Contract Labour (Regulation and Abolition) Act, 1970**

The Contract Labour (Regulation and Abolition) Act, 1970 has been enacted to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances. It applies to every establishment in which twenty or more workmen, are employed or were employed on any day of the preceding twelve months as contract labour and to every contractor who employs, or who employed on any day of the preceding 12 months, 20 or more workmen. It shall not apply to establishments in which work only of an intermittent or casual nature is performed. Work performed in an establishment shall not be deemed to be of an intermittent nature if it was, performed for more than one hundred and twenty days in the preceding twelve months. It governs the employment of contract labours and the roles and responsibilities of a principle employer and contractor. It also prohibits the employment of contract labours in certain circumstances.

**Equal Remuneration Act, 1976**

The Equal Remuneration Act, 1976 provides for the payment of equal remuneration to men and women workers and for the prevention of discrimination, on the ground of sex, against women in the matter of employment and for matters connected therewith or incidental thereto. It ensures that there is no discrimination made amongst men and women with respect to the payment of remuneration and the provision of employment opportunities, promotion etc.

**Minimum Wages Act, 1948**

This Minimum Wages Act, 1948 is applicable to every employer who employs one or more employees. The wages of the employees are fixed by various state governments and these wages are revised by the state governments as maybe prescribed. It obligates the employer to pay wages to the employees which shall not be below the wages as maybe prescribed by the state governments from time to time. It also governs the payment of overtime wages to the employees employed in scheduled employments as defined under the Minimum Wages Act, 1948.

**Payment of Wages Act, 1936**

The Payment of Wages Act applies to the payment of wages to persons employed in any factory, plantations, railways, tramways, motor transport services, inland vessels, wharves, jetties, mines, quarries, oilfields, workshops and to persons employed in an industrial or any other establishment as maybe notified by the respective state governments. It applies to every employee receiving wages up to Rs. 24,000/- per month. The main objective of the act is to ensure regular and prompt payment of wages and to prevent unauthorized deductions and arbitrary fines from the wages. It regulates and governs the conditions of the payment of wages to the persons employed in the aforesaid.

**Payment of Bonus Act, 1965**

The Payment of Bonus Act, 1965 applies to establishments and factories employing 20 or more persons on any day in the preceding accounting year. The Payment of Bonus Act, 1965 sets out the eligibility criteria for the receipt of bonus by the employee and governs the conditions with respect to the distribution of the profits amongst the employees, made by the establishment.

**Payment of Gratuity, 1972**

The Payment of Gratuity Act, 1972 governs the payment of gratuity to employees upon the cessation of employment. It is applicable to every factory, mine, oilfield, plantation, shops and establishments in which 10 or more persons have been employed or were employed during the 12 preceding months. Gratuity is payable to all employees irrespective of their salary, including those employed in an administrative and managerial capacity, having rendered 5 years of continuous service. The amount of gratuity is to be paid at the rate of fifteen (15) days' wages for every year of service based on the rate of wages last drawn by the employee, subject to a maximum of Rs. 1,000,000, or such higher amount as may be contractually agreed upon by the employer and employee.

**Rights of Persons with Disabilities Act, 2016**

The Rights of Persons with Disabilities Act, 2016, provides with work opportunities to persons with disabilities and prohibits discrimination in this regard. Every employer shall formulate a policy with respect to such equal opportunity and shall publish the policy in the manner prescribed under the Rights of Persons with Disabilities Act, 2016. It shall also publish the number of vacancies and posts in which vacancies are available.

**The Apprentices Act, 1961**

The Apprentices Act, 1961 governs and provides for the training of apprentices. It regulates and controls such training of the apprentices and ensures that the apprentices are trained under the specific departments in which they require to be trained. It also provides for the

entering into a contract of apprenticeship so as to govern the training provided to the apprentices.

**Child and Adolescent Labour (Prohibition and Regulation) Act, 1986**

The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 applies to every establishment which includes a shop, commercial establishment, farm, workshop, eating house, restaurant, residential hotel, theatre etc. It regulates and prohibits the employment of children and adolescents between 14-18 years of age, in certain occupations and processes which would be hazardous in nature. The schedule under the act provides a list of occupations and processes in which children and adolescents shall not be employed.

**Industrial Disputes Act, 1947**

The Industrial Disputes Act, 1947, is a legislation which governs and provides for the resolution of disputes arising between employers and employees. It provides various provisions which govern strikes, lockouts, retrenchment, lay-offs, closing down of the businesses, various labour practices which are unfair etc. It is considered to be one of the most important labour law enactments in India.

**Trade Unions Act, 1926**

The Trade Union Act, 1926 governs and regulates the relationships between the employer and the workmen; workmen and workmen; employers and employers. It enables collective bargaining among the aforesaid persons and provides for a dispute resolution mechanism. Registration is usually not mandatory, however, the registration of a trade union would provide for certain benefits under the Trade Union Act, 1926.

**Relevant Documentation:**

There is no mandatory requirement with regard to the documentation with respect to the employment of a person. However, there are certain States (for eg. Karnataka) in India which require the employers to issue employment letter to their employees. As a matter of practice, the employer and the employee in most cases enter into relevant agreements and have proper documentation in place for the purpose of avoidance of any disputes in the future. The employers usually enter into an employment agreement, a non-disclosure agreement, a non-compete and a non-solicit agreement etc.

Usually, an employment agreement shall suffice, as it provides in detail all the terms and conditions of employment, which would include non-disclosure and confidentiality clause, dispute resolution clause, probation clause, intellectual property clause, non-solicit and non-compete clauses, indemnification clause, term and termination of employment clause, remuneration structure, roles and responsibilities of the employer and the employee etc, and therefore, the employer need not enter into multiple agreements in this regard.

Further, the employer shall also ensure the formulation of a Human Resource Policy, which shall govern the leaves, the maternity benefit, benefits provided to the employee, procedures undertaken for dispute resolution, equal opportunity policy, terms of immigration, policies with respect to compensation, privacy and confidentiality policies, sexual harassment policy, accident policy, travel and expenses reimbursement policies, anti-drug use, code of conduct etc, in detail.

Employment of foreign nationals is permitted in India subject to possession of a valid employment visa by such foreign national. Employment visa is not granted for jobs for which qualified Indians are available or for routine, ordinary, secretarial or clerical jobs. It is granted to highly skilled/ qualified professionals or to persons engaged or appointed on contractual or employment basis.

**Code on Wages, 2019:**

It is evident from aforementioned that there are numerous laws pertaining to labour/human resources. Therefore, in order to simplify the compliances under certain laws, the Government of India has introduced “The Code on Wages, 2019 (“Code”)”. The Code basically seeks to regulate wage and bonus payments in all employments where any industry, trade, business, or manufacture is carried out. The Code has as on this date received assent of the President of India on 8th August, 2019, but its date of enforcement is yet to be notified in the Official Gazette. Upon being notified, the Code shall replace the following four laws:

- (i) The Payment of Wages Act, 1936,
- (ii) The Minimum Wages Act, 1948,
- (iii) The Payment of Bonus Act, 1965, and
- (iv) The Equal Remuneration Act, 1976.

The provisions as laid down in the Code shall be applicable to companies upon being notified through the Official Gazette.

## **INTELLECTUAL PROPERTY:**

Intellectual Property is referred to as creation of one's intellect. It is an intangible property which is considered to have value exactly in a manner as that of tangible property, such as land, house etc. Intellectual Property can be bought and sold like any other tangible property. Intellectual Property Rights are rights which are legally protected, which enable the owners of the Intellectual Property to have complete monopoly and control over such property and have control over the exploitation of such rights, for any form of commercial gain. It provides the right to inventors to stop anyone from exploiting his/her rights. Intellectual Property rights include patents, trademarks, copyrights, industrial designs, geographical indications, integrated circuits and in certain jurisdictions trade secrets. These rights are provided as a reward to the efforts of the innovators. Considering the growth in information technology and the development of knowledge at a rapid pace, the growth in intellectual property has been substantial and the rights are being protected in India, by way of various legislations.

## **TRADEMARKS:**

Trademarks are governed and protected under the Trademarks Act, 1999 ("TM Act"). It provides protection to a mark which can be graphically presented and indicates a trade connection with the proprietor. As per the TM Act, a "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods or packaging or combination of colors or any combination thereof. The TM Act also provides for the registration of collective marks, certification marks and internet domain names. It shall be ensured that such marks are not deceptively similar in nature which would lead to the infringement of trademarks. The registration of a trademark is not considered mandatory but however, once a trademark has been granted, the proprietor gets an exclusive right to use the mark within India. The procedure of registration of a trademark is as follows:

1. **Trademark Search:** A search of the trademark shall be carried on the online trademark registry portal, to find out if there are any similar or same trademarks in existence or pending for registration.
2. **Application Filing:** As per the provisions of the TM Act, one application can be made to the trademark registry, with respect to multiple classes to be filed and registered. In the event of prior use of the mark, the applicant shall file an affidavit along with the application which is filed.
3. **Registration Number:** A date and number is added to the application and a copy of the same is provided to the applicant or the attorney and as and when a mark is registered, the number is called the registration number.
4. **Objections:** The trademark registry might send certain observations made by it by way of an Official Examination Report, for various clarifications and objections raised by it. The applicant shall file a response to such objections raised and overcome such objections. The same can either be accepted by the trademark registry.
5. **Advertisement:** Once the mark has been accepted by the trademark registry, the same is advertised by way of publication in the trademark journal, which is a publication of the Government of India. Such publication is done by the trademark registry.

Trademarks, either registered or unregistered can be assigned, subject to prescribed criteria and procedures. Trademark applications can also be made with respect to well-known trademarks under the Trademark Rules and by following the procedure and guidelines laid down by the trademark registry, the same can be obtained. Further, Indian courts also recognize the matters with regard to trademark infringement and passing off of unregistered trademarks. Civil remedies and criminal penalties can be imposed with respect to infringement of trademarks.

**COPYRIGHTS:**

A copyright is said to subsist in literary, dramatic, musical, artistic work, films and sound recordings and is protected under the Copyrights Act, 1957 (“CA, 1957”) and Copyright Rules. This form of intellectual property right provides protection to the author or the owner of the work, so as to ensure that the same is not copied or reproduced by any other person. The CA, 1957 provides for the owner of the work to either stop or authorize any party for reproducing such work or performing such work or broadcast such work or to record or make copies of such work. The discretion with regard to the above lies with the owner/author of the work. A copyright lies with the owner for their lifetime and a period of 60 years after the lifetime. When a work is given a physical form, only then there exists a copyright in such work. India is a member to the Berne Convention and Universal Copyright Convention and due to the same, any work protected in India is treated with the same stature in the other member nations of the aforesaid conventions. Various special rights are provided to an author under the CA, 1957. The author has the right to claim authorship of the work and claim damages for any act which would be prejudicial to the repute of such author caused due to modification, mutilation or distortion of the work. These rights can also be exercised by the legal representatives of the author. A copyright is said to be infringed when a person does anything which has to be done by the author or owner, without the consent of the owner or author. However, there are exceptions, which could include fair dealing of the copyright etc.

The CA, 1957 provides the author with both civil and criminal remedies and in case of infringement, the author or the owner shall have the right to get injunction, claim damages, an order for the purpose of seizure of the copies and the destruction of the infringing materials and copies.

**DESIGNS:**

The Designs Act, 2000 and the Design Rules, 2014 deals with the protection of an industrial design. The minimum standards for the protection of an industrial design has been dealt with in the TRIPS agreement. The applicant can either be a natural person or a person other than a natural person and the fee for the registration would differ based on the nature of the applicant. A design shall mean the features of shape, configuration, pattern, ornament or composition of lines or colors applied to an article which could either be in a two dimensional or three dimensional or in both the forms, by any industrial process or means, whether manual mechanical or chemical or combined which when finished would have an appeal to the naked eye and is solely judged by the eye. Under the Designs Act, 2000, a civil remedy has been



provided but no criminal remedy has been provided. Civil remedies include injunction, seizure, damages and compensation.

### **TRADE SECRETS:**

Trade Secrets provide for the protection of private knowledge and such knowledge provides for an advantage over competitors. There is no specific legislation in India which provides for the protection of trade secrets but however, these are protected under the common law. The parties shall enter into agreements without loopholes for the protection of trade secrets and there strict procedures and sound policies in place.

### **PATENTS:**

A patent is a form of intellectual property which protects inventions. Inventions are protected under the Patents Act, 1970. An invention means a new product or process which involves an inventive step and is capable of industrial application. An invention needs to be novel, non-obvious and shall have an industrial application to be considered as a patentable invention. A patent is a right which provides for the exclusion of others from using, making, selling a process or product which is patented, without the consent of the patentee. The term of a patent is 20 years and upon the lapse of 20 years, such a patent falls in the public domain. Certain innovations are excluded from the definition of an invention and the same are detailed in Section 3 and 4 of the Patents Act, 1970. In India, a patent is granted to the person who first applies for a particular invention to be patented. An application for obtaining a patent shall be made by the inventor of the invention or the legal representative of the inventor. An application can be filed by an Indian for a patent outside India only after the grant of relevant permission of the patent office. Once a patent has been filed in India, the same can be filed after 6 weeks of filing of the patent in India. However, the same is not applicable to a person resident outside India, who has filed a patent outside India. A patent shall be registered with the patent office by way of filing an online application along with documents which include a provisional or complete specification, declaration of inventorship, abstract, drawings, claims and a power of attorney (in case of appointment of an agent). The application is examined by the patent office and any procedural and substantive objections raised by the patent office are raised in the form of an office action. The Patent (Amendment) Rules, 2016 have allowed that an application for expedited and quick examination can be filed by a start-up or a patent cooperation treaty applicant. The applicant has to respond to the objections raised and if satisfactory, the patent is granted and if not satisfactory, the patent is said to be rejected.

Once a patent has been granted successfully to the applicant, the applicant has an exclusive right over the invention and has a right to excluding the sale, use, import or making of such invention by any third party, without the consent of the patentee. However, if any third party uses the invention without the prior permission of the patentee, such an act is considered as patent infringement and civil remedies can be claimed by the patentee against such third party. For the purpose of initiation of a patent infringement suit, it shall be borne in mind that the invention shall contain the term patent and the patent number assigned to such invention. In the event of failure of the same, the defendant would have a defense stating that he/she did not

have any knowledge about the invention being patented. The Patents Act, 1970 provides for two major exceptions to infringement patents which are referred to as a Bolar provision and an exception of parallel imports.

In the event a patent has a commercial use in the territory of India, a statement shall be filed by the patentee, providing the extent to which the commercial use of the patent is taking place in India failing which such an act would attract a penalty of imprisonment or fine or both as mentioned in the Patents Act, 1970.

An organization in India needs to ensure that it properly utilizes its intellectual property as it may be the cornerstone for its valuation. Further, it shall build frameworks to guarantee that such licensed innovation is satisfactorily recorded and protected. It shall conduct continuous intellectual property right reviews to guarantee that the same does not go unnoticed or is unprotected. The organization shall also ensure that it shall not in any manner indulge in infringement of the intellectual property of any third party either on purpose or by way of an accident. All the relevant statutes on intellectual property have provisions relating to remedies and reliefs available to an owner in case of infringement including injunction, damages or rendition of accounts. In addition to civil remedies, the owner is also, in some cases, entitled to criminal remedies for infringement of copyright and trade-marks. There are detailed provisions relating to such offences which are punishable with imprisonment and fine.

## **ENVIRONMENTAL LAWS IN INDIA:**

The Ministry of Environment and Forests (“MoEF”) was established in 1985, which today is the apex administrative body in the country for regulating and ensuring environmental protection and lays down the legal and regulatory framework for the same. The MoEF has been expanded to Ministry of Environment and Forests and Climate Change. The responsibility of prevention and control of industrial pollution is upon the Central Pollution Control Board (CPCB), which is a statutory authority, attached to the Ministry of Environment and Forests and Climate Change. Each State has formed a State Pollution Control Board and the consents as required by any industry prior to setting up of an industrial unit are granted by the State Pollution Control Board (SPCB) of the respective State.

The main environmental laws, including under which various key environmental permits (or consents) are being issued in India, include the:

- Water (Prevention and Control of Pollution) Act 1974 (Water Act), which also initially identified the powers, functions and hierarchy of the environmental agencies, the CPCB and the SPCBs.
- Air (Prevention and Control of Pollution) Act 1981 (Air Act).
- Environment (Protection) Act 1986 (EP Act). This umbrella law enables the central government to take measures it deems necessary to protect and improve the environment, and to prevent, control and abate environmental pollution. A wide range of rules and notifications have been adopted under it, such as the:
  - E-Waste (Management) Rules 2016, (E-Waste Rules);
  - Bio-Medical Waste Management Rules 2016;
  - Plastic Waste Management Rules 2016;
  - Solid Waste Management Rules, 2016;
  - Construction and Demolition Waste Management Rules 2016;
  - Hazardous and Other Waste (Management and Transboundary Movement) Rules 2016, as amended in 2019 (HW Rules);
  - Manufacture, Storage and Import of Hazardous Chemicals Rules 1989 (MSIHC Rules);
  - Coastal Regulation Zone Notification 2019; and
  - Environment Impact Assessment Notification 2006.
- Forest (Conservation) Act 1980.
- Public Liability Insurance Act 1991.
- National Green Tribunal Act 2010.

Any company falling within the ambit of Air Act or Water Act needs to obtain consent to establish and a consent to operate prior to starting an industrial unit.

The Ministry of Environment, Forests and Climate Change has adopted a new method from 2016 of classifying the industries it regulates into red, orange and green category and has also introduced a new category of "white industries". These white industries are non-polluting industries that no longer need consent to operate or an environmental clearance under the Environmental Impact Assessment (EIA) Notification. Instead, they merely need to notify the relevant SPCB.

Whereas the earlier industry categories (red, orange and green) were essentially determined based on the size of industries, this new method is based on a Pollution Index (PI) for emissions (air pollutants), effluents (water pollutants) and hazardous waste generated apart from the

consumption of resources. A PI score has been allocated to each industrial sector basis which it is categorised as red, orange and green category.

Failure to obtain registration under the Air Act and Water Act shall attract penalty provisions. Further, the State Pollution Control Board have been granted powers under the Water Act and the Air Act to impose penalties and restrictions, such as stoppage of essential supplies as required to run a factory or an industrial unit if a company is found to be violating the provisions of the approvals granted under the Air Act and the Water Act and penalties can also be imposed by SPCB on the polluting industries.

## OVERVIEW OF TAX LAWS IN INDIA:

The law relating to income tax is incorporated under the Income Tax Act, 1961 (ITA). The ITA was enacted to provide for levy and collection of tax on income earned by a person. The Indian financial year runs from April 1 to March 31. The said period is commonly referred to as 'Financial Year' (FY) or 'Previous Year'. The year following the Previous Year is known as 'Assessment Year' (AY). Every year, the ITA is amended by way of Finance Act and every person, whose total income exceeds the maximum amount not chargeable to tax, shall be chargeable to income tax at the rate or rates prescribed in the Finance Act.

The tax structure in India is divided into direct and indirect taxes. While direct taxes are levied on taxable income earned by individuals and corporate entities, the burden to deposit taxes is on the assesses themselves. On the other hand, indirect taxes are levied on the sale and provision of goods and services respectively and the burden to collect and deposit taxes is on the sellers instead of the assesses directly.

**Taxability of Individual:** Taxation of the income of an individual depends upon his residential status, which is defined on the basis of his physical presence in India as per the ITA. Depending on the period of stay, an individual is categorized as resident, resident but ordinarily resident, resident and ordinary resident and non-resident. Depending on the category in which an individual falls, his tax liability shall be determined. According to the current income tax laws in India, the income tax rate on resident individuals varies based on their age:

- Individuals below the age of 60 years, both resident and non-resident;
- Resident senior citizens (60 years and above but below the age of 80 years); and
- Resident super senior citizens (above 80 years of age).

Budget 2020 has announced a new tax regime giving taxpayers an option to pay taxes as per the new tax slabs from FY 2020-21 onwards or pay taxes on the slabs for the previous year i.e. for FY 19-20. Any individual opting to be taxed under the new tax regime from FY 2020-21 onwards will have to give up certain exemptions and deductions. Following is the tax rates for all individuals plus applicable cess for FY 2020-21:

Income Tax Slab:	Tax Rate:
Up to Rs 2.5 lakh	Nil
Rs 2.5 lakh to Rs 5 lakh	5% (Tax rebate of Rs 12,500 available under section 87A)
Rs 5 lakh to Rs 7.5 lakh	10%
Rs 7.5 lakh to Rs 10 lakh	15%
Rs 10 lakh to Rs 12.5 lakh	20%
Rs 12.5 lakh to Rs 15 lakh	25%
Rs. 15 lakh and above	30%

The exemption limit for resident individuals above 60 years of age and below 80 years is INR 3 lakhs. In case of a resident individual of age of 80 years or above, the basic exemption limit is INR 5 lakhs for FY 19-20.

### **Taxability of Corporates:**

The taxability shall vary depending on whether a company is a domestic company or a foreign company. A company shall be considered resident in India if it is incorporated in India or if it is not incorporated in India but its place of effective management is in India. The following rates are applicable to the resident company based on their turnover plus applicable surcharge and health and education cess:

<b>Particulars:</b>	<b>Tax Rate:</b>
Gross Turnover upto Rs. 400 Crore*	25%
Gross Turnover exceeding Rs. 400 Crore*	30%

\*The companies also have the option of paying tax at the rate of 22% in both the above categories, subject to the companies complying with certain prescribed conditions.

Minimum Alternative Tax is payable under the Income Tax Act. The concept of MAT was introduced to target those companies that make huge profits and pay the dividend to their shareholders but pay no/minimal tax under the normal provisions of the Income Tax Act, by taking advantage of the various deductions, and exemptions allowed under the Act. But with the introduction of MAT, the companies have to pay a fixed percentage of their profits as Minimum Alternate Tax. MAT is applicable to all companies, including foreign companies. The tax rate is 15% with effect from AY 2020-21. Every company should pay higher of the tax calculated under the following two provisions i.e. tax liability as per the normal tax rates as mentioned above or tax liability as per MAT provisions.

Further, manufacturing firm, incorporated after October 1, 2019 and beginning operations before March 31, 2023 and does not avail exemption/ incentive shall be taxed at the rate of 15% and MAT shall also not be applicable. Domestic company engaged in manufacturing/ production and set-up and registered on or after 1 March 2016 shall be taxed at 25% and MAT shall also be applicable at 15%.

Foreign companies are taxed at the rate of 40% plus applicable cess and surcharge in all cases.

**Dividend Distribution Tax:** Until financial year 2019-20, a dividend distribution tax (DDT) was imposed on a domestic company, which declares, distributes or pays any dividend to its shareholders. With effect from 1 April 2020 the dividend shall be taxed in the hands of the shareholders at the tax rates as applicable to a shareholder.

Non-resident corporations are essentially taxed on the income earned from a business connection in India or from other Indian sources. If a tax treaty exists between India and the

country of residence of the taxpayer, the provisions of the IT Act or the tax treaty, whichever is more beneficial, will apply. Accordingly, the taxability of NRs in India, if any, under the IT Act, may be restricted or modified and lower tax rates may apply, having regard to beneficial provisions of a tax treaty.

**Taxability of LLP:** An LLP incorporated in India is treated as a tax resident of India and is taxed @ 30% of its global income, plus applicable cess and surcharge. Further, when an LLP distributes its profits to partners, they are not taxed in the hands of the LLP or its partners.

### **Indirect Tax:**

#### **Goods and Service Tax Act, 2017 (GST):**

GST is an indirect tax which has replaced many Indirect Taxes in India. The Goods and Service Tax Act (“Act”) was passed in the Parliament on 29th March 2017. The Act came into effect on 1st July 2017.

In simple words, GST is an indirect tax levied on the supply of goods and services. This law has replaced many indirect tax laws that previously existed in India. Under the GST regime, both the Centre and the States would have concurrent powers to tax goods as well as services and levy GST on a common base.

#### **Custom Duty:**

Customs duty is imposed on the import of goods into India and export of goods outside India. Every person proposing to engage in import of goods into India or export of goods from India is required to obtain an Importer Exporter Code (IEC) from the Director General of Foreign Trade, Ministry of Commerce and Industry. The rates of customs duty for each item is specified under the Customs Tariff Act and is dependent on the classification of the goods determined under the First Schedule of the Customs Tariff Act, which is aligned with the Harmonized System of Nomenclature (HSN) provided by the World Customs Organization. In order to encourage exports, export duty is levied on very few items, mentioned under the Second Schedule of the Customs Tariff Act.

#### **Professional Tax:**

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

Further, every company is also required to withhold professional tax on behalf of its employees and deposit the same with the Government exchequer. The rate of withholding tax is dependent on the number of employees and their monthly salaries and the State in which the employees are employed.

## **INSOLVENCY AND BANKRUPTCY LAWS OF INDIA:**

Until 2016, there was no single law that dealt with insolvency and bankruptcy in India. There were multiple overlapping laws and adjudicating forums for financial failure and insolvency of companies and individuals in India which was time consuming redressal process.

In order to curtail the overlapping jurisdiction of different forums, India had introduced The Insolvency and Bankruptcy Code, 2016 (“**Code**”). This Code streamlines and consolidates all the existing laws to simplify the process. This Code provides an easy exit options for insolvent and sick firms. This act allows quick and prompt action to be taken in the early stage of debt default by a firm, maximizing the recovery amount. The Code ensures quicker resolution of the bad-loan problems.

Another important feature of the Code is time-bound process for insolvency resolutions. The Code was amended in 2019 and the amended Code states that the insolvency process shall be concluded within a period of 330 days from the date of initiation of CIRP, failing which an additional 90 days is provided for the conclusion of CIRP.

The Code further provides an order of priority to distribute assets during liquidation. The first privilege for distribution goes to secured creditors. The secured creditors get the entire amount. Then, the next privilege is given to workmen’s dues for twelve (12) months. Then after the payments due to employees and then, financial dues owed to unsecured creditors, the government dues, for example taxes shall be paid, other debts, preference shareholders and equity shareholders shall receive the last priority.

The adjudicating authority for corporate insolvency processes is the NCLT and its appellate authority, the NCLAT. The adjudicating bodies for individual bankruptcy processes is an existing specialised tribunal dealing with recovery claims of banks and financial institutions – the Debts Recovery Tribunal (DRT) and its appellate authority, the Debts Recovery Appellate Tribunal (DRAT).

IBC has brought in cash flow test to decide whether an entity is insolvent or not as against net worth test followed earlier in India. If a corporate person defaults Rs. One lac or more to a creditor, it qualifies to be dragged into insolvency by a financial creditor, operational creditor or corporate itself can file application for admission into insolvency. Another important construct of IBC is giving control of corporate debtor to the creditors during insolvency resolution process as against equity holders who were continuing to have control in the earlier regime. A mechanism has been put in place in the form of CoC who consists of financial creditors and they shall decide on whether a resolution plan should be accepted besides taking certain other calls such as appointment of resolution professional and liquidator, getting into the shoes of board of directors for the limited activities.

Resolution Applicant is expected to submit a resolution plan for revival of insolvent company covering the resolution amount to creditors, revival strategy, how liabilities are going to be settled etc., Resolution Plan has to be approved financial creditors having voting power of 66% .

However, in the event of rejection of the resolution plan for the revival of the corporate debtor, by the NCLT, the liquidation of the corporate debtor shall commence, the moratorium ceases and the assets of the corporate debtor shall be liquidated in order to repay the creditors, subject to the following as mentioned herein-below:



1. Insolvency Process Costs
2. Liquidation Costs
3. Workmen Dues of 24 months and Secured Creditors Debts
4. Wages and Unpaid Dues of Employees for a period of 12 years
5. Unsecured Creditors
6. Crown Debts (Debts to the Central Government + State Government) and the balances, if any, to the secured creditors
7. Other Debts
8. Preference Shareholders
9. Equity Shareholders

Few assets of the corporate debtor cannot be attached for the purpose of liquidation and these funds are as follows:

1. Pension Funds
2. Gratuity Funds
3. Provident Funds

These funds shall not be attached in the process of corporate resolution and during the liquidation of the assets of the corporate debtor solely for the purpose that these funds belong to the employees employed with the corporate debtor.

All in all, the Government has improved and simplified the path for the creditors to recover their monetary dues with brief and precise legal procedures. A halfway arrangement has been allowed through a resolution plan to the corporate indebted individuals and to forestall the damages faced by them through CIRP.

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