

TOP 10 THINGS TO KNOW ABOUT DOING BUSINESS IN INDIA

By Dezan Shira & Associates, Delhi Office
delhi@dezshira.com

1. What are my options for investment?

Foreign investment into India can come in a variety of different legal entities. Your choice of entity depends on the kind of work you plan to do during your time in the country.

Liaison Offices

A foreign company can open a liaison office in India to engage in the following activities:

- Representing the parent company/group companies in India
- Promoting export/import from / to India
- Promoting technical or financial collaboration between parent/group companies and Indian companies
- Acting as a communications channel between the parent company and Indian companies

A liaison office is not allowed to commence any commercial, trading or industrial activities, directly or indirectly, and is required to sustain itself out of private remittances received from its foreign parent company through usual banking channels.

Branch Offices

Foreign companies engaged in manufacturing and trading activities outside of India may open branch offices for the purposes of:

- Representing the foreign parent company or other foreign companies in various matters in India, such as acting as buying and selling agents
- Conducting research in which the foreign parent company is engaged
- Promoting technical and financial collaborations between Indian and parent or overseas group companies
- Rendering professional or consultancy services
- Rendering services in information technology and development of software
- Rendering technical support for products supplied by parent/group companies

A branch office's allowable scope of activities is broader than that of a liaison office, however branch offices are still generally forbidden from engaging in retail trading, manufacturing or processing activities within India.

Project Offices

A project office, which is essentially a branch office set up with the limited purpose of executing a specific project, allows companies to establish a presence for a limited period of time. Project offices are particularly common among foreign companies engaged in turnkey operations.

Wholly Owned Subsidiaries and Joint Ventures

For a foreign enterprise to engage in activities not listed within the limits of liaison, branch and project offices, wholly owned subsidiaries or joint venture companies can be established.

Both wholly owned subsidiaries and joint venture companies have independent legal status as Indian companies distinct from the foreign parent company.

Wholly owned subsidiaries and joint ventures are set up as private limited companies. Private limited companies are the most suitable and widely used form of business enterprise for foreign investors in India because they allow total control over business operations, provide limited liability, and have fewer restrictions on business activities than liaison offices and project offices.

2. How do I establish a company?

Establishing a company in India can be a lengthy administrative process that requires communication with many different authorities. Amongst these are an initial clarification as to whether the business activities requires Reserve Bank of India approval or not. Seeking professional help will ensure that you get it right first time and do not have to make costly changes later on.

Private limited companies are the most common company form used by foreign investors. Private limited companies may be in the form of joint venture collaborations with an Indian partner and/or public issues, or wholly owned subsidiaries having 100 percent foreign ownership. Establishing a private liability company in India takes approximately six to eight weeks.

Shareholder liability is limited to the paid and unpaid capital. The minimum paid up share capital, also known as authorized capital, is INR100,000. The company must maintain the full amount of authorized capital in a specified bank account for the duration of its existence; this capital can only be withdrawn in the case of liquidation or in the case that the amount of authorized capital is lowered by a resolution at a meeting of shareholders. Penalties may apply if a company fails to maintain the full amount of authorized capital.

The incorporation of private limited companies falls under the “automatic route” or the “approval route.” Investments made under the automatic route are done without approval of the central government. The approval route requires prior approval of the Foreign Investment Promotion Board.

After establishing but before commencing business, all companies incorporated in India, whether locally or foreign-owned, must apply for a Permanent Account Number (PAN) for taxation purposes. This unique identification code is used for communications between the company and the tax authorities.

Additional governmental approvals may also be required. These may include an industrial license or statutory clearances relating to pollution control, depending on industry, investment amount and location. Other approvals and clearances at the state level include land, water, electricity and additional registrations.

3. What are the key positions in an Indian company?

Incorporating a private limited company requires a minimum of two directors, and between two and fifty shareholders. Shareholder(s) are the highest authority of the company. The director or board of directors sets the agenda of the company’s operations according to shareholder decisions. Directors can be managing directors, executive directors or non-executive directors.

As part of annual compliance requirements, companies must appoint an auditor to undertake a full audit of company accounts prior to the Annual General Meeting (AGM). The auditor must be a chartered accountant appointed by the board of directors. She or he may not be an employee or partner of the company, hold security of the company nor be indebted to it. She or he is always appointed from one AGM to another by the shareholders, except for the first auditor, who is responsible from start of business until the first AGM. Auditors shall have right of access at all times to the books, accounts and vouchers of the company.

For companies with paid-up capital of more than INR1 million, a company secretary must be appointed to sign an annual compliance certificate; for those with paid-up capital of more than INR50 million, a full-time company secretary must be appointed to act as a compliance officer.

4. What kind of IPR considerations should be taken into account?

An important issue that needs to be taken care of when investing in India is registration of your trademark.

Registration involves several filing procedures, takes about 12 months from commencement to issuance of the certificate, and can be carried out by licensed Indian trademark lawyers at Trademark Registry Offices in Ahmadabad, Chennai, Kolkata, Mumbai or New Delhi.

A trademark can be placed upon a brand, heading, label, ticket, name, sign letter, text, word, numeral, slogan, base line, shape, color or any combination of any of these. The object of the mark must be distinctive, must not be identical or similar to a mark already registered or pending application for registration, must not be prohibited by law, and must be owned by the applicant.

5. What are India's major taxes?

Tax Reform has been on the political agenda for some time, with decreases to expected in both Corporate and Individual Income Taxes. However, political wrangling between different regional governments and the central government over the control of VAT and GST rates have consistently interrupted the intended reforms. An estimated time frame for change would be 2014. As at September 2012, the main taxes impacting foreign investors are as follows:

India Tax Rates (September 2012)	
Corporate income tax	30% - 40%
Standard tax on dividends (Overseas parent co.)	15%
Value-added tax	12.5%

6. How is accounting and bookkeeping done?

In India, accounting is done according to the Accounting Standards issued by the

Institute of Chartered Accountants of India and approved by the Parliament of India. There are more than 30 accounting standards, each governing different aspects of accounting statements. These accounting standards have legal recognition through the Companies Act.

The Accounting Standards are formulated on the basis of the International Financial Reporting Standards with a view to harmonizing India's accounting standards with the rest of the world. They include standards on the valuation of inventories, cash flow statements, net profit or loss for the period of accounts, accounting for fixed assets and revenue recognition.

The RBI regulates the country's foreign exchange markets and prescribes exchange control norms. The Indian rupee is fully convertible on the current account, which means that foreign exchange is freely available for making and receiving trade-related payments. However, on the capital account, the Indian rupee is only partially convertible.

7. What are the annual compliance requirements?

Annual compliance requirements differ for entities depending on whether they are foreign representative offices or companies.

All incorporated companies, whether public or private, are required to undertake an annual audit of accounts. Audited financial reports along with the auditor's report must be sent to the shareholders well before the Annual General Meeting (AGM) is held. Company accounts must be submitted to the office of the concerned Registrar of Companies (ROC) annually, following an AGM.

In addition to the required four board meetings per annum (which can be conducted in India or abroad), an AGM must be held once in every calendar year before September 30, with the time period between two AGMs not lasting more than 15 months. The main agenda points in any AGM include presentation of the annual accounts, and appointment of statutory auditors.

In addition, companies with paid-up capital of between INR1 million and INR20 million are required to file an Annual Compliance Certificate along with the Annual Report. Companies with paid-up capital of more than INR20 million are required to employ a full-time company secretary who will act as their compliance officer.

Since liaison offices and branch offices are permitted to conduct only a limited set of activities, these offices are obliged to demonstrate that they are operating within their legally permissible areas of activity once a year. This reporting takes the form of an Annual Activity Certificate, which must be produced in a specified format provided by the office's auditor. It provides details and sources of funds received, and the nature of expenses on which funds have been spent.

8. How is transfer pricing conducted?

Transfer pricing concerns the prices charged between associated enterprises (those linked through management, control or capital) established in different tax jurisdictions for their intercompany transactions.

For tax and auditing purposes, international transactions between associated enterprises have to be assessed on the basis of the “arm’s length principle.” This arm’s length nature has to be supported by documentation signed and verified by an accountant. Taxpayers involved in internationally related party transactions are also required to maintain a series of more detailed documents showing the ownership structure, property/service involved and so on.

Transfer pricing documents need to be submitted by October 31 following the close of the relevant year. Records also need to be maintained for at least 8 years from the end of the relevant fiscal year. A transfer pricing audit is required if the related party transaction exceeds INR150 million. Even if a related party transaction is lower than INR150 million, an audit is still possible. Therefore, documents on transfer pricing should be maintained by all firms.

9. What visas are needed for my foreign staff?

All foreigners visiting India (excluding overseas citizens of India, persons holding a “Person of Indian Origin” card and Nepalese or Bhutanese nationals) need a visa.

India issues tourist visas, generally for 180 days with multiple entries. A tourist visa on arrival (TVOA) scheme has been set up by the Indian Immigration Department for up to 30 days for nationals of Cambodia, Finland, Indonesia, Japan, Laos, Luxembourg, Myanmar, New Zealand, Philippines, Singapore, and Vietnam. Applications must be made at the consular section at the nearest embassy or high commission. For UK nationals, India has outsourced its visa application services to VF Services and applications at the embassy in London are no longer accepted. In the United States, India’s visa application services are handled by Trivisa Outsourcing.

For business activities, two other types of visa are important to note: business visa (for which the period of stay in India per visit is limited to six months) and employment visa. For the latter, there are additional requirements for employees of the IT and journalism sectors, and a less restrictive regime for the power and steel sectors.

For all foreigners intending to stay in India for longer than 180 days (on any type of long-term visa), there is a requirement to register with the local Foreigners’ Regional Registration Office (FRRO). In most cases, this registration needs to be done within 14 days of arrival in India.

10. What should I look out for when signing labor contracts?

Indian labor laws provide a minimum of guarantees and benefits to all employees and these laws supersede the provisions of labor contracts.

There are three types of contracts in India:

- Permanent (direct) contract
- Fixed contract
- Temporary contract

Investors should pay special attention to the Industrial Disputes Act, which provides a large number of protections for employees; the Shops and Establishments Act, which governs the hours of work, payment of wages, leave, holidays, terms of service and other conditions; as well as the several wage and remuneration acts, which regulate the payment of wages, bonuses, and equalize pay for men and women.

Any termination policy should be checked against the current law prior to it is carried out. For example, companies that employ more than 100 workers need government permission to conduct layoffs.

Besides company rules and regulations, clauses related to the following points can be incorporated into contracts:

- Non-disclosure
- Employee poaching
- Unfair competition
- Trademarks, patents and trade secrets