

Setting up presence in the country- Project office (PO)

Setting up

1. Who can set up a PO in India?

Any foreign entity (a body corporate incorporated outside India, including a firm or other association of individuals) can set up a PO in India following the Reserve Bank of India ('RBI') guidelines.

2. Is approval under FEMA required to set up a PO?

A foreign company that has secured a contract from an Indian company to execute a project in India can establish a PO under general permission by filing an intimation to the Authorised Dealer Bank ('AD Bank'). Please note that AD Bank is any commercial bank permitted by RBI to deal in foreign exchange.

However, in certain cases prior approval from RBI, in consultation with the Government of India, would be required, which are listed below:

- a. A citizen of or entity registered/incorporated in Pakistan.
- b. A citizen of or entity registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau and the application is for opening a PO in Jammu and Kashmir, Northeast region and Andaman and Nicobar Islands.
- c. The principal business falls in Defense, Telecom, Private Security, or Information and Broadcasting sector and Government approval or license/permission by the concerned Ministry/Regulator has not been granted.
- d. A Non-Government Organisation, Non-Profit Organisation, Body/ Agency/ Department of a foreign government. Where such an entity is engaged in any activities governed by the Foreign Contribution (Regulation) Act, 2010 then it shall obtain registration as per FCRA and shall not seek permission under FEMA.

3. Is the approval under FEMA given by RBI? If yes, which application form is required to be submitted?

The application for establishing PO in India is to be submitted in Form FNC to an AD Bank along with the prescribed documents and the Letter of Comfort, wherever applicable.

4. What documents are to be submitted with RBI along with the application?

The following is a list of indicative documents that are required to be submitted along with the application:

- a. Copy of the contract awarded by the Indian concern.
- b. Copy of the Certificate of Incorporation / Registration, Memorandum of Association and Articles of Association attested by the Notary Public in the country of registration.

[If the original Certificate is in a language other than English, then an English translation duly notarised and attested by the Indian Embassy/ Consulate should also be furnished].
- c. Banker's Report from the banker in the host country / country of registration showing the number of years the applicant has had banking relations with that bank.
- d. Board Resolution passed by the foreign entity for the set up of an LO in India.
- e. Power of Attorney in favour of authorised signatory in India.

The AD Bank may request additional information depending on the facts.

5. Who is authorized to file such application with RBI?

Any individual authorized by the applicant can sign the application for setting up a PO under the appropriate Power of Attorney.

6. Are there any timelines for filing the application with RBI?

PO activities can only be commenced after the intimation along with the relevant documents is filed with AD Bank.

7. Can this application and approval be granted online or physical presence in India is required for any meetings?

A duly completed application must be filed physically with the AD Bank. Generally, all clarifications are requested through post/email. Physical presence is not required as such unless required by the AD Bank/RBI.

8. What is the maximum number of POs can be established by any foreign entity in India?

A separate PO is required to be set-up for each project. There is no restriction on maximum number of POs.

9. Whether securing of contract to execute a project necessary for establishment of project office in India?

Yes, a foreign company that has secured a contract from an Indian company to execute a project in India can establish a PO under general permission.

In addition, the project must have secured the necessary regulatory clearances, if any.

The funding of the project should be either by:

- inward remittance from abroad or
- a bilateral or multilateral International Financing Agency or
- the entity in India awarding the contract has been granted Term Loan by a Public Financial Institution or a bank in India

10. Whether there is any time-limit for granting of approval by RBI for setting up of PO in India?

Since there is a general permission is available for setting-up a PO, no specific timeline applies.

11. For how many years is the approval valid?

The validity period of the project office is the tenure of the project for which the approval is granted.

12. Whether permission to establish PO in India is required to be intimated to AD Bank?

An applicant shall inform the AD bank as to the date on which the PO has been set up, as soon as possible.

13. What is the time-limit for opening of PO once approval is granted?

The PO shall be opened within six months from the date of application/intimation.

14. Whether extension can be obtained setting up of PO on India, incase initial time-limit for opening of PO has expired?

The term of PO is co-terminus with the tenure of the contract.

15. Whether an application is required to be filed with ROC?

16. Which form is required for filing of such application with ROC?

17. Whether PAN is required to be obtained by an PO?

Yes, PAN would be required by a PO.

Operating in India

18. Whether a PO is required to open a bank account in India?

Yes, a PO may open a bank account in India under the automatic route.

However, entities from Pakistan, shall require prior approval of the RBI to open a bank account for its project office in India.

19. Whether more than one bank account can be opened by an PO with prior permission of RBI?

Yes, a PO may open more than 1 bank account in India, which can be a foreign currency account. Further, two foreign currency account can be in USD or in the home currency of the foreign company.

20. What are the permitted debits and credits in the bank account of an PO?

The permissible debits are as follows project related expenditure

The permissible credits are :

- i) foreign currency receipts from the Project Sanctioning Authority or
- ii) remittances from parent/group company abroad or
- iii) remittances from bilateral / multilateral international financing agency.

21. Whether PO need GST registration?

As per the GST law, every supplier who makes a taxable supply of goods and/or services, whose aggregate turnover exceeds the prescribed limit is required to get registered in the state from where it makes the taxable supply.

Requirement of GST registration will depend upon the activities undertaken by it. If PO does not undertake any activity of supply, it will not be required to obtain registration. However, if PO engages itself in any supply in of goods and/or services, then it shall be required to obtain registration (subject to other prescribed conditions)

Therefore, each of the case needs to be evaluated separately basis the facts of the case and relevant statutory provisions.

22. Whether transfer pricing provisions are applicable in case of transactions between HO and PO?

Yes, transfer pricing provisions are applicable and accordingly compliances are required to be carried out by an Indian PO for transactions with HO assuming the relevant income of Indian PO is taxable in India as per Income-tax Act, 1961.

Following compliances are to be undertaken:

- Filing of Form 3CEB (Accountant's Certificate) which can be referred to as Transfer Pricing Return of Income for reporting of international and specified domestic transactions.
- Preparation and maintenance of transfer pricing documentation (commonly referred as 'TP study report')

[Section 92E of the Income-tax Act, 1961 and Section 92D read with Rule 10D of the Income-tax Rules, 1962]

23. What are the consequences for non-compliance of transfer pricing provisions?

Answer: Following penalties may be levied incase of non-compliance of transfer pricing provisions

Section 271B	Penalty for failure to furnish report under section 92E	One hundred thousand rupees i.e. INR 100,000
Sec 271AA (i)	Fails to keep and maintain any such information and document as required by sub-section (1) or sub-section (2) of section 92D	2% of the value of the international transaction or specified domestic transaction
Sec 271AA (ii)	Fails to report such transaction which he is required to do so;	2% of the value of the international transaction or specified domestic transaction
Sec 271AA (iii)	Maintains or furnishes an incorrect information or document	2% of the value of the international transaction or specified domestic transaction
Sec 271G	Penalty for failure to furnish information or document under section 92D	2% of the value of the international transaction or specified domestic transaction

24. Which POs require registration with State Police Authorities?

Applicants from Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong, Macau or Pakistan desirous of opening PO in India shall have to register with the state police authorities.

25. What activities can be carried out by an PO in India?

PO can undertake only those activities as per the scope of work in the project awarded.

26. What activities cannot be carried out by a PO in India?

A PO cannot practice any legal profession in India.

27. Can the initial approval granted by RBI be extended? if yes, then who grants this extension?

Extension may not be required as the term of PO is co-terminus with the tenure of the contract.

28. What is the time limit to grant approval for extension of POs?

Refer Q28 above

29. Are there any conditions which must be fulfilled before filing an application for extension of PO in India?

Refer Q28 above

30. Whether an application for undertaking of additional activities or setting-up additional POs can be filed with RBI?

The activities carried out by the PO should be as per the scope of work awarded in the contract. A separate PO can set-up for each contract entered into by the applicant.

31. Whether change/alteration in the document delivered to the ROC for registration is required to be intimated? If yes, which form is applicable and what is the time limit for filing of such change/alteration?

32. What are the requirements for maintaining books of account by an PO?

33. Whether audit of annual accounts of an PO required?

34. Whether audited financial statements are required to be filed with ROC? If yes, which form is applicable?

35. What is the time limit for filing of audited financial statements with ROC? If not filed timely, what are the consequences?

36. Is there any reporting requirement on setting up of an PO in India?

37. What is an AAC and with which authority is it required to be filed?

An Annual Activity Certificate (AAC) is a certificate confirming that the activities undertaken by PO during the year are as per the RBI approval letter. It is required to be obtained in the prescribed format from the auditor. The PO needs to submit AAC each year to the AD Bank.

38. What is the time limit for filing of an AAC? If not filed timely, what are the consequences?

The AAC should be filed within six months of the close of the financial year. In case of non-filing, penal action may be taken against the PO as per relevant FEMA provisions.

39. Whether PO is required to file any Annual Statement?

An AAC needs to be filed annually as discussed in Q38 and Q39 above.

40. How are the operations of an PO funded?

The operations can be funded in the following manner:

- i) foreign currency receipts from the Project Sanctioning Authority or
- ii) remittances from parent/group company abroad or
- iii) remittances from bilateral / multilateral international financing agency.

41. Whether a PO can remit funds to its head office?

AD bank can permit intermittent remittances by POs pending winding up / completion of the project as detailed in Q43.

42. Whether intermittent remittances are permitted? What are the conditions required to be fulfilled?

Yes, intermittent remittances are permitted with the approval of the AD bank. The following documents need to be submitted to the AD Bank for verification :

- a. An Auditors' / Chartered Accountants' Certificate to the effect that sufficient provisions have been made to meet the liabilities in India including Income Tax, etc.
- b. An undertaking that the remittance will not, in any way, affect the completion of the project in India and that any shortfall of funds for meeting any liability in India will be met by inward remittance from abroad.

43. Whether an PO can purchase immovable property in India?

An PO is permitted to acquire property for its own use and to carry out permitted/incidental activities. It may carry out these activities from a leased property as well, subject to the lease period not exceeding 5 years. However, the PO cannot lease or rent out the property.

Further, entities from Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran, Nepal, Bhutan, China, Hong Kong and Macau require approval of the RBI to acquire immovable property in India for an PO.

44. Does a PO create PE of the foreign entity in india? If, yes what are the tax implications?

The term permanent establishment in Article 5 of the tax treaties is generally defined as the fixed place of business through which the business of an enterprise is wholly or partly carried on. A PO generally constitutes a PE depending upon the number of days the project continues in India. Such threshold for number of days differs in the treaties with different countries. Thus, if the project continues for a longer period, the PO is likely to create a PE in India. However, if the PO is carrying out only the activities that are preparatory or auxiliary in nature, then such PO would not fall under the definition of PE as per the tax treaties.

Article 7 of the tax treaties provides that if an enterprise carries on business in the other contracting state through a PE, the profits of the enterprise may be taxed in the other state but only so much as is attributable to that PE. Further, once the profit of a foreign enterprise becomes taxable in India, it is required to carry out the required compliances as well, such as filing the tax return in India, obtaining PAN number, tax withholding, etc.

45. How is a PO taxed in India?

PO is not an incorporated entity; thus, it holds the same status as that of its foreign principal entity. It is taxed in the same manner as a foreign company i.e. liable to pay taxes at 40% (Plus applicable surcharge as cess).

46. Is the PO required to file its tax return in India? If yes, what are the consequences of non -filing tax return?

Every company or firm or a person who has income assessable under the Act must furnish a return of income, on or before the due date, in the prescribed form or manner. Since a PO is an unincorporated entity, it holds the same status as that of its foreign principal entity. Thus, if the foreign entity is a company or firm, or any person who has income assessable under the act, the PO has to mandatorily file return of income in India.

Non-filing of income tax return results into penal consequence such as penalty of Rs. 5,000 under the Act, denial of carry forward of losses, best judgment assessment by revenue authorities, denial of TDS refunds, etc.

[Section 139 and section 234F of the Income-tax Act, 1961]

47. Whether tax withholding is applicable on remittance made to HO?

Any person responsible for paying to a non-resident or a foreign company any sum chargeable under the provisions of the Act is required to deduct income tax thereon at the rates in force at the time of credit of such sum to the account of the payee or at the time of actual payment, whichever is earlier. Thus, PO would be required to deduct tax provided the amount paid to HO is income chargeable under the Act.

[Section 195 of the Income-tax Act, 1961]

48. Are there any other annual/periodic compliances required under the income tax laws? If yes, what are the consequences of non-compliance?

Apart from filing tax return, PO is also required to comply with the following-

- **Advance tax** if the tax payable during that year is Rs. 10,000 or more. If the taxpayer fails to pay the advance tax or the advance tax paid is less than 90% of the assessed tax, then interest under section 234B shall be paid at the rate of 1% per month or part of the month on the unpaid advance tax. Further, interest under section 234C at the rate of 1% per month or part of the month is payable if there is any shortfall in the quarterly installments of the advance tax
- **Collect tax at source.** Non-compliance can result in penal consequences such as penalty equivalent to 100% of the tax not collected and interest at the rate of 1% per month.
- **Deduct tax at source** under various provisions of the Act. Non-compliance can result in penal consequences such as penalty equivalent to 100% of the tax not collected, interest at the rate of 1% per month, disallowance of expenditure and prosecution.
- **File TDS/TCS returns.** Non-furnishing of TDS/TCS return can result into late filing fees of Rs. 200 per day of continuing failure and penalty of minimum Rs. 10,000 which can go up to Rs. 1,00,000. No penalty shall be levied in case of failure to file TDS/TCS return in case the taxpayer proves that after paying tax deducted /collected at source along with the interest and late filing fees, he has furnished the TDS/TCS return before the expiry of one year from the due date of furnishing such return.
- **Issue certificate** to the person whose tax is deducted. Non-furnishing of the certificate will result in penalty of Rs. 500 per day of the continuing failure. However, the amount of penalty cannot exceed the tax deductible or collectible at source.

[Section 203, Section 206, section 206C, Section 207, section 234B and Section 234C of the Income-tax Act, 1961]

49. Are any other annual/periodic compliances required under the GST laws? If yes, what are the consequences of non-compliance?

Every registered taxpayer is required to file its return on monthly/quarterly basis within the due dates. Further, such person is also required to file an annual return (Form GSTR-9) and reconciliation statement (GSTR-9C) if its turnover exceeds the prescribed limit.

In case of delay, the registered person shall be liable to pay late fees which is applicable to each return. Further, non-filing of periodic returns for a specific tax period would result in non-furnishing of returns for further period.

Closure of PO

50. Whether any regulatory approval or FEMA required for closure of an PO in India? If yes, what are the documentation requirements and how long does it take to get such approval?

Yes, a request for closure of the PO has to be submitted to the AD Bank along with the following documents:

- a) Auditor's certificate:
 - i. indicating how the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant and the manner of disposal of assets;
 - ii. confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc. of the office have been either fully met or adequately provided for; and
 - iii. confirming that no income accruing from sources outside India (including proceeds of exports) has remained unrepatriated to India.
- b) Confirmation from the applicant/parent company that no legal proceedings are pending against the PO in any Court in India and there is no legal impediment to the remittance.

The AD Bank must ensure that the PO had filed their respective AACs.

There is no time limit prescribed under the RBI guidelines to get the approval for the closure of PO. Generally, basis experience, it would take 4 to 6 weeks from the filing of a complete set of documents to receive the approval for closure.

The AD Bank will carry out its diligence and seek clarifications, if necessary. Post this, the AD Bank will proceed with the closure of the bank account and the PO.

51. Whether any approval required from Income tax authorities for closure of PO in India? If yes, what are the documentation requirements and how long does it take to get such approval?

While there is no appropriate procedure, PO is required to surrender the PAN & TAN, close all on-going litigation, pay due taxes etc.

52. Whether any approval required from GST authorities for closure of PO in India? If yes, what are the documentation requirements and how long does it take to get such approval?

In the event of closure of PO, it shall be required to surrender its GST registration. There is a process for surrender of GST registration, which needs to be complied with. It includes filing of final return, filing application for cancellation of registration and subsequently, approval by the GST officer. Normally, it takes around 30-45 days (unless any clarification is sought from the taxpayer) to get the order of cancellation of GST registration.

53. Whether any approval required from ROC for closure of PO in India? If yes, what are the documentation requirements and how long does it take to get such approval?

54. Can a PO be closed if there is ongoing tax litigation in India?

No, a PO cannot be closed if there is an ongoing tax litigation in India.

55. Whether transfer of assets on closure of PO permitted?

Transfer of assets may be permitted by the AD Bank within the overall ambit of the guidelines.

56. How can the surplus on closure be remitted?

Refer Q43.

57. Are there any tax implications on remittance of surplus on closure?

In case, the surplus profit is already offered to tax, there should not be any further tax consequence. However, the PO needs to file form 15CA after obtaining form 15CB.

Reference

- Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016 (Amended up to January 21, 2019)
- Master Direction on Establishment of Branch Office (BO)/ Liaison Office (LO)/ Project Office (PO) or any other place of business in India by foreign entities (updated as on 18 May 2021)