

# Setting up presence in the country- Branch Office (BO)

## Setting up

### 1. Who can set up a BO in India?

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

### 2. Who grants approval to set up a BO? What are the conditions to be fulfilled?

An BO can be established in India as per the regulatory framework of RBI. Accordingly, a foreign entity may approach Authorised Dealer Bank ('AD Bank') with a request subject to meeting certain conditions:

- a profit-making track record during the immediately preceding five financial years in the home country; and
- net worth of more than USD 1,00,000 or its equivalent.

Where such conditions are not met then the applicant entity will have to furnish a Letter of Comfort (LOC) from its parent/ group company, which satisfies the prescribed criteria for net worth and profit.

Generally, setting up a BO requires approval from 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 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 BO 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. What are the permissible / impermissible activities for a BO?

The permissible activities of a BO are as follows:

- i. Export/import of goods.
- ii. Rendering professional or consultancy services (other than practice of legal profession in any matter).
- iii. Carrying out research work in which the parent company is engaged.
- iv. Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
- v. Representing the parent company in India and acting as buying/ selling agent in India.
- vi. Rendering services in Information Technology and development of software in India.
- vii. Rendering technical support to the products supplied by parent/group companies.
- viii. Representing a foreign airline/shipping company.

Normally, the BO should be engaged in the activity in which the parent company is engaged.

An BO cannot practice any legal profession in India.

4. Can a foreign company open more than one BO in India?

There is no restriction on maximum number of BO that foreign entity can set up in India.

5. What is the time-limit to grant approval for setting up of a BO in India by the regulatory authorities?

No time-limit has been specified for granting approval by AD Bank / RBI for setting up BO in India. Based on experience, such applications may take up to 4 to 6 weeks from the time a duly completed application is filed.

6. For how many years is the approval valid?

There is no defined period of validity of approval as per RBI regulations. It would depend on the facts of each case.

7. What are the documents to be submitted with along with application seeking approval?

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

- a. 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].

- b. Audited Balance sheet of the applicant company for the last three years
- c. Banker's Report from the banker in the host country / country of registration stating the length of banking relations with that bank.
- d. Board Resolution passed by the foreign entity for the set up of an BO in India.
- e. Power of Attorney in favour of authorised signatory in India.

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

8. Who is authorized to file such application?

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

9. Are there any timelines for filing the application?

As such, no specific timeline is prescribed for the application with the RBI. However, BO can commence its operations only after receiving appropriate communication from the AD Bank in this regard.

10. 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.

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

Yes, it would depend upon the terms of the initial approval letter. The BO approval may be extended after seeking approval from RBI through AD Bank.

12. What are the conditions to be fulfilled before filing an application for extension of BO in India?

Refer Q 11.

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

The BO shall be opened within six months from the date of the approval letter.

14. Is it mandatory to intimate AD bank post setting up of BO in India?

An applicant that has received a permission for setting up of a BO shall inform the AD bank as to the date on which the BO has been set up.

15. What happens if BO is not opened within stipulated timelines?

The approval lapses if BO is not opened within stipulated timelines.

16. In case initial time-limit for opening of BO has expired, what are the conditions for obtaining an extension?

In cases where the non-resident entity is not able to open the office within the stipulated time frame due to reasons beyond its control, the AD bank may consider granting extension of time for a further period of six months for setting up the office. Any further extension of time shall require the prior approval of RBI.

17. Which application is required to be filed with ROC?

18. Is it mandatory to obtain PAN/TAN?

Yes, PAN and TAN are necessary to remain compliant with the tax provisions applicable to a branch office in India.

### Post setting up formalities

19. Is it mandatory for a BO to open a bank account in India?

A BO may open a bank account with an AD Bank in India to receive remittances from its Head Office (HO) and legitimate dues and incur operating expenses.

20. Can a BO open two or more bank accounts in India?

It may be possible to open more than one bank account with the prior permission of the RBI.

21. What are the permissible debits/credits in the bank account of an BO?

The permissible credits are as follows:

- i. funds received from Head Office for meeting the expenses of the office
- ii. legitimate receivables arising during the course of its business operations.

The permissible debits are as follows:

- i. expenses incurred by the BO
- ii. remittance of profit/winding up proceeds.

22. Is it mandatory to apply for GST registration in India?

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

Accordingly, BOs, if engaged in supply of goods/services, are required to obtain registration once they cross the threshold of obtaining registration.

However, GST laws provides an exemption which prescribes that the services supplied by an establishment of a person in India to any of his establishment outside India, shall be exempted from GST. Head Office and its branch office may be treated as two establishments of same person, accordingly, any supply of services between HO and BO may be exempted from levy of tax.

Therefore, if the services of BO qualifies as exempted and BO are not involved in any other supplies, then they are not required to take registration.

However, if BO engages itself in any supply of goods and/or services other than to its establishment outside India, then it shall be required to obtain registration (subject to other prescribed conditions)

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

### Operating in India

23. What are the documents required to be submitted with the authorities in case of change in details/facts in the documents submitted at the time of registration?

The documents supporting the change in details/facts are to be submitted with the AD Bank/RBI.

24. What is the time limit to intimate the authorities regarding the above changes?

No specific time limit has been prescribed. It should be intimated as soon as the changes are done.

25. 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 BO during the year are as per the RBI approval letter. It is required to be obtained in the prescribed format from the auditor.

The BO needs to submit AAC each year to the AD Bank as well as Director General of Income Tax (International Taxation), New Delhi.

26. 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 BO as per relevant FEMA provisions.

27. Which Annual Statement is required to be filed with the regulatory authorities?

An AAC needs to be filed annually as discussed in Q25 and Q26 above.

28. Which BOs require registration with State Police Authorities?

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

29. How are the operations of an BO funded?

The operations of a BO are funded by remittances from HO and legitimate dues received in India.

30. What is the process for remittance of funds to HO?

The BO would be required to submit the following documents to the AD Bank for remittance of funds to HO:

- a. A certified copy of the latest audited Financial statements
- b. A Chartered Accountant's certificate certifying
  - I. the manner of arriving at the remittable profit;
  - II. that the entire remittable profit has been earned by undertaking the permitted activities; and
  - III. that the profit does not include any profit on revaluation of the assets of the branch.

The AD Bank, post verification of documents, would permit the remittance of funds to HO.

31. Is it permissible to make intermittent remittances? What are the conditions?

Yes, refer Q. 30.

32. Does a BO create PE of the foreign entity in India? 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. BO is a fixed place of business of the foreign entity in India, thus, it is likely to create a fixed place PE in India. However, if the BO is carrying out only the activities that are preparatory or auxiliary in nature, then such BO 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.

33. Is the BO required to file its tax return in India? What are the consequences of non-filing of 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 BO 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 BO 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]

34. Is tax withholding applicable on payments 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, BO 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]

35. What are the penal/prosecution provisions for non-compliance of tax withholding in India?

Non-compliance of tax withholding in India may attract penal consequence as below:

- Penalty equivalent to 100% of the taxes not deducted as per the Act,
- Interest at the rate of 1% per month under the Act,
- Disallowance of expenses under the Act, and
- the BO or the principal officer of the BO shall be deemed to be assessee in default under the Act and shall be prosecuted accordingly.

[Section 40(a)(i), section 271C, and section 201 (1A) of the Income-tax Act, 1961]

36. Is compounding of prosecution proceedings possible? –

Prosecution proceedings can be compounded by the Principal Chief Commissioner or Chief Commissioner or a Principal Director General or Director General.

[Section 279(2) of the Income-tax Act, 1961]

37. Are there any other annual/periodic compliances required under the income tax laws? –

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

- To pay advance tax if the tax payable during that year is Rs. 10,000 or more.
- Collect tax at source and deduct tax at source under various provisions of the Act.
- File TDS/TCS returns
- Issue certificate to the person whose tax is deducted.

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

38. What are the consequences of non-compliance?

Non-compliance attracts penalty under various provisions of the tax law.

39. Are any other annual/periodic compliances required under the GST laws?

As per the GST law, every registered taxpayer is required to file its return on monthly/quarterly basis on or before 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.

Therefore, if it is evaluated that BOs are required to take registration, then they have to comply with the above periodical compliances.

40. Are there any GST implications on account of secondment of employees by HO to BO?

In GST laws, any supply between related persons is chargeable to GST even if made without consideration. Further, GST law also prescribes that where a person has any establishment in India and other establishment outside India, then both such establishments shall be treated as establishment of distinct persons.

Therefore, for the purpose of levy of GST, both the establishments (BO and HO) shall be treated as distinct person and any supply of services by overseas HO and received by Indian BO (including secondment by overseas HO to Indian BO) shall be chargeable to GST.

However, it may be noted that tax implications on BOs is a grey area due to the divergent views, each of the case has to be analysed basis the specific facts of the case and relevant statutory provisions.

#### 41. What are the consequences of non-compliance under GST laws?

In GST laws, there are difference types of penal consequences for different types of non-compliances. For example, late filing of periodical GST return is liable for a penalty of INR 100 per day. Non-filing of returns may lead to cancellation of GST registration. In addition to this, a general penalty of INR 50,000 has been prescribed for various offences. For serious offences, penal consequences may go upto prosecution as well.

#### 42. Under what circumstances transfer pricing provisions are applicable to HO and BO?

Generally, BO is not distinct from HO. Hence, any transaction between HO and BO will be considered as transaction with self. Accordingly, transfer pricing provisions should not apply. However, basis the definition of 'enterprise' as per section 92F(iii), a 'person' includes a 'PE of a person'.

Accordingly, BO can be hypothetically treated as independent entity to compute profits attributable to such BO.

In cases where BO and HO are treated as independent entities, BO derives its residential status from its HO i.e. Indian BO of Foreign Company shall be considered as non-resident as HO is non-resident in India and transfer pricing provisions can apply.

#### 43. What are the compliances to be undertaken in case transfer pricing provisions are applicable?

For a BO to whom transfer pricing provisions are applicable, following compliances are to be undertaken:

1. 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.
2. 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]

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

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

## Closure of BO

45. What is the regulatory procedure for closure of a BO in India?

A request for closure of the BO has to be submitted to the AD Bank of the BO along with the requisite documents.

46. What are the documentation requirements and how long does it take to get such approval?

The application for closure of BO must be accompanied with the following documents:

- a) Copy of the RBI's approval for establishing the BO.
- b) Auditor's certificate:
  - i. indicating how the remit table 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.
- c) Confirmation from the applicant/parent company that no legal proceedings are pending against the BO in any Court in India and there is no legal impediment to the remittance.
- d) A report from the ROC regarding compliance with the provisions of the Companies Act, 2013.

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

There is no time limit prescribed under the RBI guidelines to get the approval for closure of BO. Generally, basis past experience, it would take 4 to 6 weeks from filing of 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 closure of the bank account and the BO.

47. What is the procedural requirement before income-tax authorities for closure of BO in India?

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

48. What are the documentation requirements and how long does it take to get such approval?

Application for surrender of PAN/TAN needs to be filed. No such timeline has been prescribed. However, in order to avoid any non-compliance, the same needs to be closed at the earliest possible.

49. What is the procedural requirement before GST authorities for closure of BO in India?

Broadly, BOs are not required to obtain registration under GST laws if they are not involved in any supply of goods/services, therefore, the question of seeking approvals on closure does not arise.

However, in case it is evaluated that BOs are required to take registration and discharge applicable GST liabilities, then all the formalities which are applicable to a normal registered taxpayer, will squarely apply to LO as well (including filing of application of cancellation of registration and filing of Final Returns)

50. What are the documentation requirements and how long does it take to get such approval?

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

52. Can a BO be closed if there is ongoing tax litigation in India?

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

53. Whether transfer of assets on closure of BO permitted?

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

54. How can the surplus on closure be remitted?

Surplus on closure of BO can be remitted post receipt of approval from AD bank.

55. 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 BO 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)