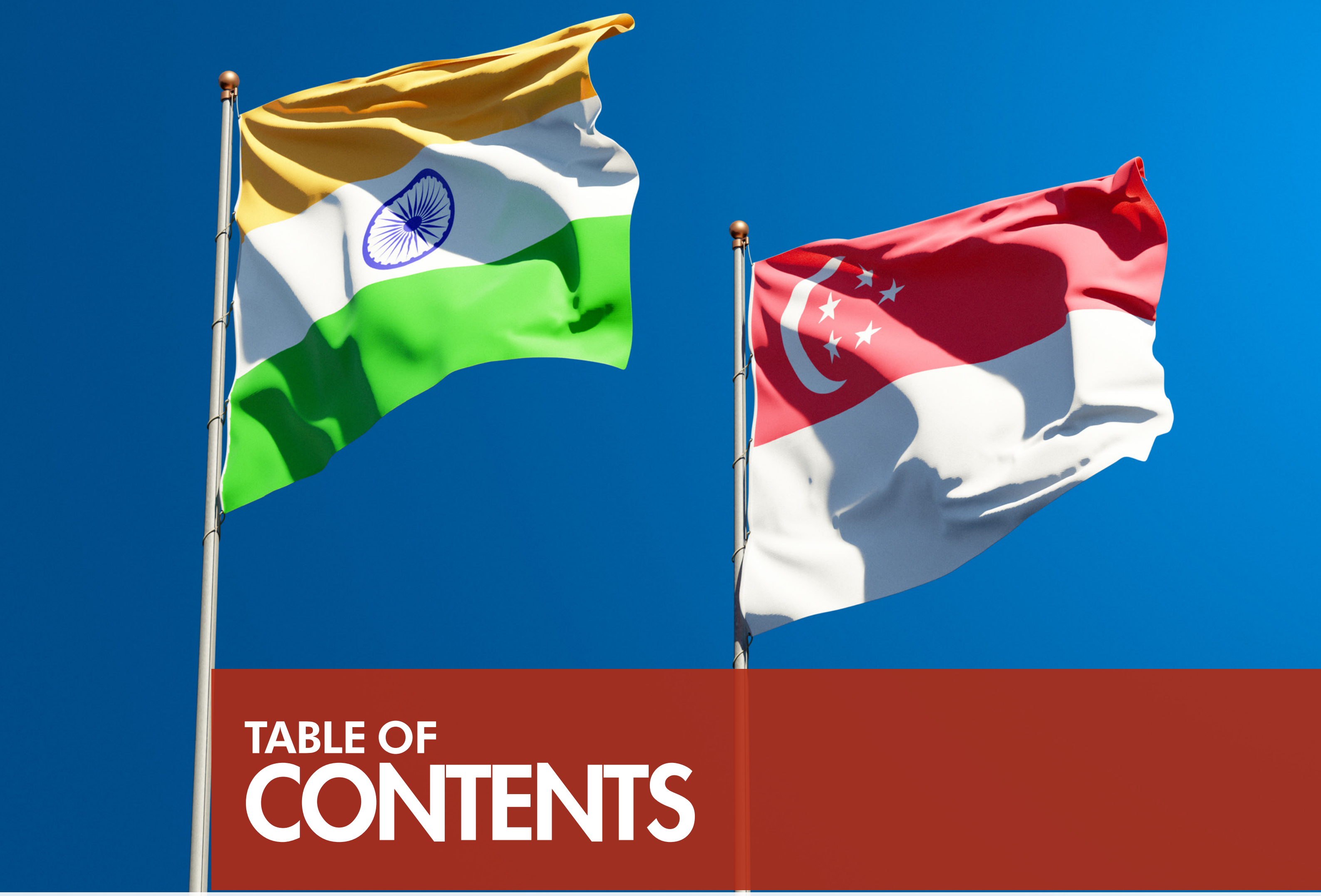
DOING BUSINESS IN INDIA

BRIEF OVERVIEW OF TAX AND REGULATORY ASPECTS

(WITH SPECIAL EMPHASIS ON THE INDIA-SINGAPORE CORRIDOR)

DECEMBER 2020



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A. INTRODUCTION

The manufacturing sector has emerged as one of the sectors in India with high growth. The ambitious "Make in India" program launched by the Hon'ble Prime Minister, Shri Narendra Modi, has played a pivotal role in this regard and has significantly helped not only in placing India on the world map as a manufacturing hub but also in providing global recognition to India's growth story.

According to the United Nations Conference on Trade and Development ("UNCTAD"), India ranked among the top 10 recipients of Foreign Direct Investment ("FDI") in South Asia in 2019, attracting US$ 49 billion - a 16% increase from the previous year.

Cumulative FDI in India's manufacturing sector reaching US$ 88.45 billion during April 2000 to March 2020 is a manifestation of the increasing attractiveness of India as destination for foreign investments. Furthermore, with its increasing liberalisation and business friendly environment, India has jumped 79 positions to rank 63rd in the 'Ease of Doing Business index' as per the World Bank's Ease of Doing Business Ranking, 2020. In accordance with the latest data released by the Government, the FDI inflows have gone up by almost 15% during the first half of the current year with Singapore topping the list. In terms of numbers, the data shows that despite the pandemic, FDI inflows in India have topped US$ 30 billion during April-September compared to US$ 26 billion in the corresponding period of the last year.

B. REGULATORY FRAMEWORK

A non-resident wanting to set up business operations in India need to comply with India's foreign exchange regulations including the regulations governing FDI.

FDI up to 100% is permitted in most of the sectors (including the manufacturing sector) under the "automatic route" (i.e. without any approval from the Government of India). There are only a few sectors that are not open to private sector or FDI such as atomic energy, railway operations, gambling and betting, real estate business[1], manufacturing of cigars, tobacco, etc. Furthermore, sectors such as banking, civil aviation, insurance, retail, print and digital media, etc. are partially under the automatic route and partially under the approval route depending upon the sectoral caps as applicable to each activity.

Investments in and acquisitions of Indian companies by non-resident persons are largely governed by the provisions of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 as well as the provisions of annual Consolidated Foreign Direct Investment Policy Circular ("FDI Policy") issued by the Department for Promotion of Industry and Internal Trade ("DPIIT") in the Ministry of Commerce and Industry, Government of India.

As mentioned, FDI in India can be made via two routes: (i) the automatic route and (ii) the approval route

- **Automatic route**: Most of the industry sectors fall under automatic route under which no prior approval from the Government is required to set-up business operations in India. The Indian company simply needs to notify the Reserve Bank of India ("RBI") regarding the foreign investment and submit certain prescribed documents. FDI is also permitted under the automatic route in Limited Liability Partnerships ("LLPs") that operate in sectors where 100% FDI is allowed under the automatic route and where there are no FDI linked performance conditions.

- **Approval route:** Proposed investments into India which do not fall within the automatic route must be submitted to the DPIIT for prior approval. These include sectors such as print media, multi-brand retail trading, brownfield pharmaceuticals, etc. where the proposed FDI is envisaged to be more than the permitted sectoral cap allowed under the automatic route.

[1]Real estate business does not include development of townships, construction of residential/ commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014

C. MODES OF BUSINESS PRESENCE IN INDIA

Every foreign investor planning to enter India should select an appropriate form of business presence, keeping in mind the business objective of its parent foreign entity in India. The right selection is likely to go a long way to ensure efficiency (from an operational/ legal/regulatory/tax perspective) and would also help to ensure that the business can be financed and run efficiently.

Typically, the following options are available to a non-resident to set-up business operations in India:

- **Liaison office**
- **Branch office**
- **Project office**
- **Company**
- **Limited Liability Partnerships ('LLPs')**

Liaison office: It acts as a representative of the parent foreign company in India. However, it is important to note that the liaison office is not permitted to carry out any commercial activities in India and it must maintain itself from remittances from the parent foreign company. It generally acts as a communication channel between the Indian customers and the foreign parent company / head office. The setting up of a liaison office in a sector where 100% FDI is allowed under the automatic route requires prior approval of the bankers.

Branch office: Unlike a liaison office, a branch office of the foreign entity in India is permitted to carry on certain limited commercial activities. It typically represents the foreign parent company in India and acts as its buying or selling agent in India. However, it is important to note that the branch office cannot carry out any manufacturing, retail or processing activities. A branch office is considered as an extension of the foreign company in India and hence taxable at a higher tax rate of 40% (plus surcharge and cess) as applicable to the foreign company. A branch office is permitted to remit surplus revenues to its foreign parent company subject to applicable taxes. The setting up of a branch office is generally preferred by entities who wish to undertake research and development activities in India. The setting up of a branch office also requires prior approval of the bankers for sectors in which 100% FDI is allowed under the automatic route.

Project office: This is largely similar to a branch office and is generally preferred by companies engaged in one-time turnkey or installation projects in India.

Company: The parent foreign entity can set up a wholly owned subsidiary / company in India to engage in business activities permitted under the FDI regulations. A company is treated as a separate legal entity and requires atleast 2 shareholders (in case of private limited company) and 7 shareholders (in case of public limited company). In addition, minimum of two directors are required out of whom one director must be an Indian resident.

Limited Liability Partnership ("LLP"): The LLP is structured as a hybrid entity with advantages of a company (since it is a separate legal entity distinct from its partners and enjoys perpetual succession), and at the same time enjoys the operational flexibility of a partnership structure. Atleast 2 designated partners are required in an LLP, out of whom, one partner needs to be an Indian resident. As mentioned, FDI is permitted under the automatic route in LLPs that operate in sectors where 100% FDI is allowed under the automatic route and where there are no FDI linked performance conditions.

However, as far as the manufacturing sector is concerned, the business operations in India are largely carried out through a company structure (and in few cases through an LLP). The major advantage that an LLP hitherto used to score over a company was that the distribution of profits by an LLP to the partners was not subjected to any tax (unlike in case of a company) which resulted in overall tax efficiencies in an LLP structure. However, with the corporate tax rate for new manufacturing companies being reduced to as low as 17% (discussed in ensuing paragraphs) and the abolishment of Dividend Distribution Tax in the hands of the company, the company structure should score well over an LLP considering the overall cash flow efficiencies (of course this is subject to detailed cost-benefit analysis as applicable to each set of facts).

The key features of a company vis-à-vis an LLP structure are tabulated below:

	Company	LLP
Income-tax		
Applicable income-tax rates	• 17.16% (for newly setup manufacturing companies), subject to fulfillment of certain conditions) • 25.17% (for existing companies not claiming any tax incentives) 34.95% (for existing companies claiming tax incentives)	34.95%
Thin Capitalisation	Thin capitalisation norms applicable.	Thin capitalisation norms not applicable
Companies Act[2]/LLP Act[3]		
Layers of investment companies and inter corporate loans	Restrictions on layers of investment companies and inter corporate loans	No such restrictions
Meetings	Requirement for conducting board meetings and annual general meetings	No such requirement
Layers of investment companies and inter corporate loans	Restrictions on layers of investment companies and inter corporate loans	No such restrictions
Corporate Social Responsibility ("CSR")	2% of average net profits of 3 preceding years to be spent on CSR	Not applicable
FEMA		
Permitted activities	Activities specified in the charter documents subject to FDI guidelines	Activities specified in the LLP agreement subject to FDI guidelines
Access to borrowed funds from abroad	Company eligible to obtain borrowings from eligible lenders subject to applicable Exchange Control Regulations	LLP not permitted to borrow funds from abroad
Indirect taxes		
Indirect taxes	Indirect tax implications shall be equally applicable to a Company or LLP	
Exit and cash repatriation		
Repatriation of accumulated profits	No statutory approval required. Repatriation in the form of dividends taxable in India in the hands of the shareholders.	No statutory approval required. Repatriation of share of profit tax exempt in India in the hands of partners.
Ease of exit	Moderate. Exit can be through sale of shares or through the process of liquidation.	Comparatively easier. Exit can be through sale of interest or dissolution of an LLP.

[2] *Companies Act, 2013 is an Act of the Parliament of India on Indian company law which regulates incorporation of companies, responsibilities of a company and its directors, dissolution of a company etc.*

[3] *Limited Liability Partnership Act, 2008 is an Act of the Parliament of India to introduce the incorporation of LLPs, responsibilities of the LLP and its partners, winding up of LLP etc*

D. FUNDING BUSINESS OPERATIONS IN INDIA

The Indian company[4] can be funded through a variety of options as under:

- **Equity capital**
- **Fully and compulsorily convertible preference shares and compulsorily convertible debentures**
- **External Commercial Borrowings ("ECBs")**

Equity capital: Issuance of equity shares is the commonly used avenue to infuse capital in an Indian company. The equity shares that are envisaged to be issued to a foreign resident need to be in compliance with the sectoral caps and the relevant FDI guidelines (including pricing guidelines, etc). The equity shareholder acquires voting rights in the company in proportion to the shareholding. The returns on investment can be enjoyed by the equity shareholder through dividend pay-outs, capital appreciation, buyback of shares, capital reduction, etc (discussed in the ensuing paragraphs). Equity shares are generally freely transferrable subject to sector-specific lock-in restrictions, if any.

Fully and compulsorily convertible preference shares and debentures: Compulsorily convertible instruments (preference shares, debentures, etc.) are treated as "equity" under the FDI policy. The preference shareholders are entitled to a preferential right over equity shareholders with respect to dividend and repayment of capital. The conversion formula and the price at which preference shares would be converted into equity shares needs to be determined upfront at the time of issuance. Non-convertible or optionally convertible instruments are treated as ECBs and need to be in conformity with the ECB guidelines.

External Commercial Borrowings ("ECBs"): These are commercial loans that encompass bank loans, loans from foreign equity shareholder, buyers' credit, suppliers' credit, INR denominated bonds, etc. The framework governing ECBs has been relaxed considerably in the recent past in terms of eligibility to borrow, recognised lenders, end-use restrictions, etc. Under the current framework, ECBs should conform to parameters such as minimum maturity period, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The framework of raising loans through ECBs comprises of the following two options:

(a) Foreign currency denominated ECBs

(b) Indian rupee denominated ECBs

The minimum average maturity period for an ECB is three years except for certain specified categories of ECBs (such as ECBs raised for working capital purposes or general corporate purpose, ECB raised by manufacturing companies, etc.), where the average maturity period can range between 1 year to 10 years.

[4]An Indian LLP can be funded only through capital contribution from its partners and is subject to conditions under the FDI policy. LLPs are currently not permitted to raise funds through ECBs.

E. CORPORATE TAX REGIME IN INDIA

(i) Tax rates and incentives available to manufacturing sector

Direct taxes in India are governed by the provisions of the Income-tax Act, 1961 ("the Act"), the provisions of which are amended annually by the Central Government. The tax is levied for a 12-month period commencing on 1st April and ending on 31st March. A domestic Indian company is regarded as a "resident" of India and is subjected to taxation on its worldwide income. The Government of India has introduced a slew of measures to support to the Make-in-India initiative and bolster foreign investment (especially in the manufacturing sector) that have significantly reduced the corporate tax rates across the board.

A snapshot of the corporate tax rates in India and their salient features is discussed below:

Section	Applicability*	Tax rate**	Key conditions
Section 115BA	Domestic manufacturing companies (set up on or after March 1, 2016)	29.12%	• Not entitled to claim other deductions / incentives available under the Act including the losses of earlier years pertaining to such deductions / incentives • Company will also be governed by the applicable provisions of Minimum Alternate Tax ("MAT")[5]
Section 115BAA	All domestic companies	25.17%	• Not entitled to claim other specified deductions / incentives available under the Act including the losses of earlier years pertaining to such deductions / incentives • Provisions of MAT will not be applicable for companies opting for tax under this regime
Section 115BAB	New manufacturing companies (set up and registered on or after October 1, 2019)	17.16%	• Manufacturing activities (certain specified business excluded[6]) should commence by March 31, 2023 • Option to be governed by these provisions cannot be changed subsequently • Company shall not be entitled to claim other deductions / incentives available under the Act • Concessional tax rate not applicable for income that is not derived from or incidental to manufacturing activities and will be taxable at the rate of 25.17% without deduction for any expenditure or allowance • Provisions of MAT not applicable for companies opting for tax under this regime.

[5]MAT is an alternate tax to be paid by companies in India in case their income-tax liability according to normal provisions of the Act is less than 15% of their book profits. The amount of tax paid by a company under MAT in any year is available for set off and credit against the tax liability of a company in subsequent years against its normal tax liability. Such credit can to be carried forward for set off for a period of 15 years.

[6]These businesses include development of computer software, mining, bottling of gas into cylinder, conversion of marble blocks or similar items into slabs, printing of books or production of cinematographic film and any other business which may be notified. These businesses are excluded from the purview of concessional tax regime as they may not be regarded as meeting the test "manufacture" or "production" as understood in common parlance.

Section	Applicability*	Tax rate**	Key conditions
Existing regime (applicable in case a company does not opt for any of the regimes above)	Domestic companies where turnover did not exceed INR 4000 mn in FY 2018-19	29.12%	• All deductions / incentives under the Act are available • Provisions of MAT to apply
	Domestic companies where turnover exceeded IRN 4000 mn in FY 2018-19	34.94%	

**Subject to fulfillment of specified conditions*
*** Includes the highest rates of surcharge and cess*

It is pertinent to note that the income of an LLP is taxable at the rate of 34.94%. The concessional tax regime (as tabulated above) for manufacturing activities is applicable only to a company and does not apply to an LLP.

(ii) Salient features of India-Singapore Tax Treaty

Nature of income	Taxability
Royalty	Taxable at 10% in India
Fees for technical services[7]	Taxable at 10% in India
Dividend	Taxable at 10% (if the shareholder holds atleast 25% stake in Indian company); otherwise taxable at 15%
Capital gains	• Not taxable in India if shares in Indian company are acquired before 1 April 2017 • Taxable in India if shares in Indian company are acquired on or after April 1, 2017.

However, it is important to note that the availability of tax treaty benefits is subject to the satisfaction of various anti-abuse measures that are enshrined in the domestic tax laws as well as the tax treaty. For instance, the recipient must be a 'beneficial owner' of the income in order to be eligible for a lower tax rate. Also, the Principal Purpose Test ("PPT")[8] pursuant to the enactment of the Multilateral Convention would need to be satisfied. Lastly, it must also be ensured that the arrangement or transaction is not hit by the provisions of the domestic General Anti-Avoidance Rule ("GAAR").

(iii) General Anti-Avoidance Rule

The Act contains anti-avoidance provisions in the form of GAAR, which provides extensive powers to the tax authority to declare an arrangement entered by a taxpayer to be an Impermissible Avoidance Arrangement ("IAA"). If the arrangement is declared as an IAA, the consequences include denial of tax benefit either under the provisions of the Act or the applicable tax treaty. The provisions can be invoked for any step in or part of an arrangement entered, and the arrangement or step may be declared an IAA. However, the provisions of GAAR only apply if the "main purpose" of the arrangement or the step

[7]The definition of "fees for technical services" is quite narrow in the Tax Treaty as compared to the Act.
[8] As per the PPT, the treaty benefits can be denied if obtaining such benefit was one of the principal purposes of an arrangement or transaction unless such benefit is in accordance with the object and purpose of the treaty.

is to obtain a tax benefit. Therefore, what constitutes "main purpose" so as to attract the provisions of GAAR would depend upon the facts and circumstances of each case.

(iv) Transfer pricing

The transfer pricing provisions in India are largely in line with the guidelines issued by the OECD. Transfer pricing provisions require that any international transaction or specified domestic transaction between related parties should be undertaken at an arm's length price. As per the tax laws, robust transfer pricing documentation needs to be maintained and furnished to the tax authorities which is in line with the international best practices and the recommendations of OECD in BEPS Action Plan 13. The documentation comprises of transfer pricing study, a report from an accountant, maintenance of the master file / local file and country-by-country ("CbC") reporting.

(v) Thin capitalisation rules

These rules limit the amount of deductible interest expenditure (in respect

of amount lent by a non-resident related party or a third-party debt guaranteed by a related party) to 30% of Earnings before Interest Tax, Depreciation and Amortisation ("EBITDA"). Excess interest, if any, is allowed to be carried forward up to eight successive years.

(vi) Withholding tax obligations

As per the Act, an Indian company making payments to residents and non-residents need to withhold tax at source. Some of the payments that require the withholding of tax at source are as follows:

- Salaries
- Interest
- Dividend
- Rent
- Contractual payments
- Commission / Brokerage
- Fees for professional / technical services

In case of payments made to non-residents, tax is required to be deducted / withheld only when the payment is chargeable to tax in India.

Failure to comply with withholding tax obligations could lead to disallowance of expenditure along with recovery of taxes with interest and penal consequences.

(vii) Compliance requirements

Compliance requirements under the Act can be categorized under the following categories:

- Deduction and payment of tax at source to the Government treasury
- Payment of corporate advance taxes and self-assessment taxes
- Filing of withholding tax statements in respect of taxes deducted at source
- Filing of statutory reports such as tax audit report, transfer pricing study report, etc.
- Filing of corporate income-tax return
- Compliance with assessment notices

There are various due dates prescribed under the Act for each of the above compliances. Apart from the above, there may be other deduction / incentive linked specific compliances that may be required to be fulfilled in case of companies availing such incentives.

F. CASH / PROFIT REPATRIATION FROM INDIA

Foreign investment in India is generally allowed to be repatriated along with capital appreciation after payment of applicable taxes, if any. The typical modes of cash / profit repatriation are discussed in brief below:

(a) Dividend to shareholders: The profits earned by an Indian company can be repatriated by way of dividends to the non-resident shareholders. No prior approval of the Government is required for the same. The dividend income is taxable at 20% (plus applicable surcharge and cess) in the hands of non-residents subject to beneficial tax rates as provided for in the tax treaty. For example, the India-Singapore tax treaty provides for a tax rate of 10% on dividend income subject to satisfaction of anti-abuse conditions as aforementioned (GAAR, PPT, etc).

(b) Buy-back of shares: An Indian company can also buy-back its own shares and repatriate monies to its shareholders. The buy-back is restricted to 25% of share capital and free reserves in any given year and is subject to satisfaction of certain conditions. The Indian company is liable to pay buy-back tax at approximately 23% on the consideration paid minus the amount received on issuance of shares. The income arising to the shareholder on buy-back of shares is tax exempt in India. However, it is important to note that the buy-back price is subject to the pricing guidelines as per the FDI policy.

(c) Royalties and service fee pay-outs: An Indian company can make payments to foreign entities for royalties (including for technical knowhow, license, etc) and fees for technical services. The payment would need to be on an arm's length basis as per the transfer pricing regulations. These are taxable at 10% as per the India-Singapore Tax Treaty.

(d) Interest payments: The payment of interest to a parent company on the debt infused into India is allowed provided that it is in conformity with the Indian transfer pricing regulations. Also, any interest in excess of 30% of the EBIDTA will be subject to the thin capitalisation rules as discussed above.

(e) Capital reduction: This is a process whereby the capital is returned to the shareholders. The same is regulated by the National Company Law Tribunal ("NCLT") and is subject to the conditions prescribed in the FDI guidelines. The consideration paid to the shareholders (to the extent of accumulated profits) pursuant to capital reduction is regarded as "dividend" and will be taxable in the hands of the shareholders in accordance with the applicable tax rates. Any amount that is distributed over and above the accumulated profits is treated as capital gains in the hands of the shareholders.

G. INDIRECT TAXES

The manufacturing sector has been the focus of the Indian Government during the launch of the Make in India initiative and Atmanirbhar Bharat Abhiyaan, which are intended to provide a boost to home grown industries. This has led to some product specific incentive schemes along with the increase on the duties on imports of raw material to provide a level playing field to the production houses in India.

The Goods and Service Tax ('GST') introduced in 2017, is a nationwide measure to consolidate indirect taxes and to reduce the cascading effect of taxes by allowing seamless credits.

Benefits arising from the introduction of GST

- Effective reduction in the overall rates of taxes – Under the pre-GST regime ('erstwhile regime'), different taxes were levied on the same goods at various stages of supply chain. The excise duty law, pinned the liability on the event of 'manufacture', where the goods on clearance from the factory were subjected to an effective Central Excise duty of around 12.5% along with Value Added Tax ('VAT') [ranging from 5% - 15%] levied on the incidence of sale along with various other state level levies such as entry tax, local body taxes and octroi. These taxes were not fungible and therefore were added to the overall effective tax rate.
- GST subsumed all these taxes, allowed for the complete fungibility of credits and rationalized the standard rate of tax to 18% for most goods, thereby substantially reducing the tax burden on business and the ultimate customers.

Particulars	Normal duty for a manufacturer under Erstwhile regime	Lower VAT rate of 5%	Area based benefit along with lower vat rate of 1%	Normal duty for a manufacturer under GST @ 18%	Normal duty for a manufacturer under GST @ 18%
Basic value of import	100	100	100	100	100
Customs duty [non-creditable taxes]	10.71	10.71	29.44	11	10.71
Landed costs	110.71	110.71	129.44	111.00	110.71
Manufacturing costs + profit	25.00	25.00	25	25	25
Sale price of final product	135.71	135.71	154.44	136.00	135.71
Excise duty on final product cost / GST	16.96	16.96	0.00	24.48	24.43
VAT on final product cost	22.90	7.63	1.54	0.00	0.00
Total	175.57	160.31	155.99	160.48	160.14
Total tax in the transaction	50.57	35.31	30.99	35.48	35.14
Tax in %	37.27%	26.02%	20.06%	26.09%	25.89%

- On sale price, however margin assumed NIL for calculation purposes
- Entry tax / octroi costs have been ignored for computation under the Erstwhile regime
- Compensation cess has been ignored for computation under the GST regime
- CVD [duty in lieu of excise under the erstwhile regime] and IGST [paid under the GST regime] paid at the time of imports are available as set-off

GST Exemptions / Concessions – The following illustrative categories of goods enjoy exemption [NIL] or a concessional rate [5%] benefits under GST:

- Scientific and technical equipments supplied to public funded research institutions.
- Specified petroleum operations
- Dairy products
- Sea food / meat / live trees and plants / vegetables and fruits / agricultural produce
- Salt and items of earth and stone / ores and concentrates
- Drugs and medicine
- Fertilisers
- Building materials
- Electrical energy
- Printed books
- Fabric
- Agricultural implements / handloom machinery
- Passenger baggage
- Aircraft engines
- Aircrafts [other than for personal use], vessels for transport for goods and person
- Sustainable / renewal energy devices
- Electrically operated vehicles and their chargers and charging stations
- Carriages for disabled persons
- Parts for manufacturing of hearing aid / other specified medical devices

Uniformity in tax rates – With the motto of one nation one tax, GST has introduced a uniform rate of tax across the country, thereby bringing about predictability in business and simplification of supply chain by enabling business to plan the distribution network and consolidating depots / warehouses.

Fungibility of tax credits – Under the erstwhile regime no set off was available of excise duty credits against VAT output liability and vice versa. A single tax regime erased this credit blockage and has instituted a system of credit fungibility between taxes paid within a State. This factor also enables the reduction of total procurement cost.

Hassle free movement of goods – Though the system of waybill continues, abolition of check post concept in GST has resulted in the faster movement of goods and consequently a substantial reduction in transport cost.

Refund of unutilized credits for exporters – A person making zero rated supplies (export of goods and services) under GST shall be eligible to claim refund of the unutilised credit in proportion to the export turnover achieved by the exporter.

Area Based Incentives Scheme

The Department of Industrial Promotion and Policy (DIPP) in 2017 notified a scheme to extend budgetary support to manufacturing units operating in the backward areas, which were availing central excise benefits under the erstwhile area-based exemption notifications. This scheme has been approved for the period from 1 July 2017 to 31 March 2027 for such industrial units located in aforesaid states that availed the benefit of Central Excise exemption before the GST regime came into force.

The Indian Government has decided that there will be no new area based exemptions in GST. However, specific State Governments have announced tax exemptions and benefits by way of refund for setting up specific unit in the State. Some of the key State policy announcements[6] are summarized below:

- Subsidy / refund / reimbursement of the State Goods and Service Tax ('SGST') paid in the State;
- Power subsidies, interest subsidies, stamp duty exemption, electricity duty exemption;

[7] The State Government of Maharashtra, Gujarat, Andhra Pradesh and Madhya Pradesh have released policy documents / resolution for their respective State benefits

- Policies that aim to promote and empower start-ups, especially in the field of Artificial intelligence, IT enables Services ('ITeS'), manufacturing including Electronics System Development and Maintenance (ESDM) etc.

Most of the state policies are specific to sectors, products or have specific eligibility criterions. Further, the incentives offered are subject to conditions and in some case the aggregate benefit under the scheme has an upper limit

Export Linked Incentives for Manufacturers[8]

Duty Exemption / Remission Scheme – The Foreign Trade Policy ('Policy') extends scheme in the nature of Advance Authorization and Duty Free Import Authorization Scheme that allow duty free import of inputs used in the manufacture of exports final goods on the satisfaction of the prescribed value addition norm. The Policy permits duty drawback that provides refund to the exporters of the import duties paid on the inputs used in the exported goods. Rebate on state and central taxes and levies ('RoSCTL'), is an incentive targeted for garment exporters in the form of Duty Credit Scrips.

Export promotion Capital Goods Scheme ('EPCG') – with the intent to enhance production quality the EPCG Scheme permits the duty-free import of capital goods to be used for the production of exported goods.

Export Oriented Units ('EOUs') / Special Economic Zone ('SEZs') – Import of duty-free goods by SEZs, EOUs, Electronics Hardware Technology Parks (EHTPs) and Bio-Technology Parks (BTPs) for production of export goods.

Merchandise Exports from India ('MEIS') - Entitlement of duty scrips at rates ranging from 2% to 5% of FOB value of export of goods. The rates are linked to export products and export market.

Category A [Traditional markets]	Category B [Emerging & Focus Markets]	Category C [Other markets]
Europe / UK	Africa	Countries not mentioned in Categories A & B
Canada	Latin America & Mexico	
USA	China / ASEAN / Japan/ South Korea / Taiwan	
	Turkey & West Asian Countries	
	CIS Countries	

The Scheme is likely to be discontinued from 1 April 2021.

Remission of Duties or Taxes on Export Products ('RoDTEP') – The scheme intends to replace the MEIS Scheme. The Scheme seeks to reimburse local taxes borne by the exporters in percentage of the Freight on Board value of exports. The rates under the scheme are yet to be notified.

[8] EOU / EHTP / BTP Schemes, EPCG Scheme, SEZ Scheme, certain Duty-Free Imports under Notification No. 50/2017 ('DFIS') and MEIS have been ruled by the WTO to be contradictory to the prohibitions under the Agreement on Subsidies and Countervailing Measures. India has filed an appeal against the ruling. Until the final determination of the issue status quo likely to be maintained.

H. PRODUCTION LINKED INCENTIVE SCHEME

In order to give further boost to the Indian manufacturing sector, the Government announced the Production Linked Incentive Scheme ('PLI Scheme') earlier this year. The PLI Scheme, initially announced only for large scale electronics manufacturing, has now been extended to 10 other sectors .

Whilst the detailed contours of the scheme are not yet known, it appears that the scheme envisages a subsidy / cash incentive to be given to the sectors and will be in the form of a direct payment attributable to the goods manufactured in India. For example, electronic manufacturing companies will get an incentive of 4% to 6% on incremental sales (over base year) of goods manufactured in India and covered under target segments over a period of next 5 years subsequent to the base year.

Thus, it is an outcome and output oriented schemes where incentives will be paid only if manufacturing is done in India.

The PLI scheme is another step in the right direction of encouraging investments in manufacturing and promoting exports. It is anticipated that apart from providing boost to the R&D activities in India, the Scheme will attract significant foreign investment in core manufacturing and cutting-edge technology which will only enhance India's image as a viable global manufacturing hub.

[9] *Automobiles and auto components, pharmaceutical drugs, advanced chemistry cells, capital goods, technology products, textile products, white goods, food products, telecom and speciality steel*

I. EXIT STRATEGY

The exit route from India will need to be determined based on the manner in which investments are made into India (i.e. equity, preference shares, debt instruments, etc). The exit can be through sale of shares or liquidation of the company. A direct transfer of shares of an Indian company will be subjected to capital gains tax in India. However, it is pertinent to note that gains arising from transfer of instruments other than shares (example, debentures or other debt instruments) are not taxable in India as per the beneficial provisions of the India-Singapore Tax Treaty (subject of course to satisfaction of anti-abuse provisions in terms of PPT and GAAR).

Non-residents are also taxed on capital gains arising from the transfer of shares of a foreign company at an overseas level provided that the shares of the foreign company derive their value "substantially" from assets located in India. A share is regarded to derive its value *substantially* from India when the fair market value ("FMV") of the Indian assets on a specified date exceeds INR 100 million and represents at least 50% of the value of all assets owned by the foreign company. These provisions are commonly referred to as "indirect transfer" provisions. It is important to note that the gains arising on account of indirect transfer of shares are arguably not taxable as per the India-Singapore Tax Treaty.

J. CORPORATE INSOLVENCY REGIME IN INDIA

India overhauled its corporate insolvency regime by enacting landmark legislation "The Insolvency and Bankruptcy Code, 2016" ('IBC'). IBC provides for a single consolidated code for a time-bound insolvency resolution of stressed business. The law also provides for a liquidation process which could be triggered voluntarily or also in a situation where the insolvency resolution is not successful. The enactment of IBC has contributed to the improvement in ease of doing business rankings where on the parameter of "resolving insolvency" India's ranking has improved to 52 in 2020 compared from the rank of 137 in 2018.

IBC, inter alia, contains enabling framework for insolvency resolution of corporates. The law now also provides an enabling framework for insolvency resolution of certain specified financial services providers subject to the oversight of the relevant sectoral regulator. This regime has brought a paradigm shift in the way in which insolvency proceedings are conducted in India. This is because of its emphasis on 'cash flow approach' i.e. resolution proceedings can be initiated as soon as there is a default in payment. The law provides for a 'Creditor in Control' regime with a strict 'time-bound' resolution process which enables maximization of recovery for creditors. A clear priority of distribution has also been provided where secured financial creditors rank highest while the dues of other unsecured creditors and government dues rank lower.

If a person i.e. a financial creditor and/or operational creditor has a right to payment (including a right arising from a breach of contract) then such a person is said to have a claim against the corporate debtor. If the corporate debtor fails to pay the debt (subject to a specified threshold) in respect of a claim (whether to the financial or operational creditor) when such debt has become due and payable, then a default is said to have occurred and an application can be made to National Company Law Tribunal ('NCLT') to initiate Corporate Insolvency Resolution Process ('CIRP'). CIRP process begins only when NCLT admits the application.

If the application is admitted, then NCLT declares a moratorium i.e. a prohibition on the institution of suits/ continuation of pending suits/ transfer of assets of corporate debtor/ recovery of any property till the completion of CIRP. IBC provides for a constitution of a Committee of Creditors ('CoC') which typically comprises of all the financial creditors of the corporate debtor. CoC can appoint a Resolution Professional (RP) of its choice. RP is tasked with the duty of conducting the CIRP as well as the management of the Corporate Debtor. RP is also responsible for inviting a resolution plan from the potential bidders which are then submitted for approval by CoC. Once CoC approves a Resolution Plan thereafter it is submitted for the approval of NCLT. It may be noted that certain conditions will need to be fulfilled for being regarded as an eligible bidder under the IBC (E.g., Under certain circumstances erstwhile Promoters of the Corporate Debtor are not considered eligible to submit a Resolution Plan).

If the Resolution Plan is approved by NCLT, then the same is binding on the corporate debtor, employees, shareholders, creditors, guarantors and other stakeholders including Central Government, State Governments and Local Authorities. If the resolution plan is not approved or no resolution plan is received, then NCLT has the power to order the liquidation of the corporate debtor. As mentioned earlier, the CIRP process is required to be completed in a time-bound manner within 180 days. NCLT could extend this time-limit by a further 90 days. However, in aggregate resolution process needs to be completed within a total of 330 days including time taken for litigation and judicial processes.

K. KEY LABOUR / EMPLOYMENT LAWS

A non-resident wanting to set up manufacturing operations in India would be required to comply with labour laws that govern almost all aspects of employment such as payment of wages, employee benefits such as gratuity and pension, working conditions, employee relations etc. Some key labour legislations specific to the manufacturing sector are discussed in the brief below:

Laws relating to Industrial Relations

In order to minimize conflict between labour and management and to ensure economic and social justice, industrial relations are largely governed by (a) the *Industrial Disputes Act, 1947* which covers lay-offs, retrenchment of workers, strikes and lock-outs, compensation in case of closure, etc., (b) the *Trade Unions Act, 1926* which provides for registration of a trade union and the regulates the functioning of such registered trade union and (c) the *Industrial employment (Standing Orders) Act, 1946* which is generally applicable to every industrial establishment wherein 100 or more workmen are employed (subject to specific state rules or threshold) and requires employers to define conditions of employment, such as classification of workmen, manner of intimating wage rates, working hours, leave periods, recruitment, and inquiries for misconduct, etc.

Laws relating to Wages

The wage payable to workers in the manufacturing sector are broadly governed by three legislations: *(a) The Payment of Wages Act, 1936* which regulates the mode of payment and deductions to the wage; (b) the *Minimum Wages Act, 1948* which provide the minimum limit of wages payable and (c) the *Payment of Bonus Act, 1965* which prescribe the payment of statutory bonus, is applicable to every establishment in which 20 or more persons are employed and to all employees drawing a remuneration of less than Rs 21,000.

Laws relating to Social Security

Regulatory framework for social security benefits to employees in the manufacturing sector is broadly covered by enactments such as (a) *the Employees Provident Fund and Miscellaneous Provisions Act, 1952*, which mandates both the employer and employee to contribute 12% of an employee's 'basic wages' to the Employees Provident Fund; (b) the *Employees State Insurance Act, 1948* which empower employees drawing wages less than Rs 21,000 per month, to receive medical relief, cash benefits, pension to dependants of deceased workers et cetera; and (c) the *Payment of Gratuity Act, 1972* which enforces the payment of "gratuity", a reward for long service, as a statutory retiral benefit to every employee, who has completed continuous service of five years or more, irrespective of his wages, to receive gratuity upon termination of her/his employment, on account of (i) superannuation; or (ii) retirement; or (iii) death or disablement due to accident or disease.

New Labour law amendments in India

With a view facilitate the ease of doing business in India, the Government of India had decided to consolidate 29 central labour laws into 4 labour codes. However, the provisions of the same are yet to be notified. The key highlights of the codes are:

The Code on Wages, 2019: subsumes 4 laws, proposed introduction of a national floor wage and prescribes minimum wages till date below which state governments shall not prescribe wages

The Code on Social Security, 2020: subsumes 9 laws relating to social security benefits such as gratuity, provident fund and insurance. The code would also apply to the unorganised sector, gig workers (persons who earns out of activities which fall outside of the employer-employee relationship) and platform workers who undertakes work through online platforms for providing services outside the employer-employee relationship.

The Occupational Safety, Health and Working Conditions Code, 2020: subsumes 13 laws and regulates health, safety and working conditions. It also attempts to promote gender equality by allowing women workers to work at night subject to obtaining their consent.

The Industrial Relations Code, 2020: subsumes 3 important legislations and mandates large industrial establishments could have more than one trade union to protect interests of workmen. It also lays down a statutory framework for fixed-term employment. Businesses will also have to pay gratuity to such employees if the fixed contract is for a duration of one year.

I. DHRUVA PARTNERS

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Dinesh winner of "Asia Tax Practice Leader of the Year- 2020", is a stalwart in the industry and has over the decades been recognised by his peers as amongst the top tax advisors in India. His ability to relate the business strategies of clients to the tax and regulatory environment has been recognised as unique and has played a critical role in developing solutions for clients.

Prior to founding Dhruva, he held a series of leadership positions across several large professional service organisations in India. He was the Deputy CEO of KPMG India, Chairman of KPMG's tax practice, Deputy CEO of RSM & Co and Head Tax and Regulatory at PricewaterhouseCoopers (PwC)

He is a member of the National Executive Committee of FICCI and is the former Chairman of its Taxation Committee. Dinesh is currently a mentor to the Taxation Committee of FICCI. He has also worked with the Government of India on several policy committees. He was a member of the Rangachary Committee constituted by the Prime Minister of India to deal with tax reforms in the IT/ITES sector and for evolving Safe Harbour Rules.

About Dhruva Advisors

Dhruva Advisors LLP is a tax and regulatory services firm, working with some of the largest multinational and Indian corporate groups. Its brings a unique blend of experience, having worked for the largest investors in India, advising on the largest transactions and on several of the largest litigation cases in the tax space. We also work closely with the Government on policy issues and with our clients on advocacy matters.

Key differentiators:

- Strategic approach to complex problems
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- Strong track record of designing and implementing pioneering solutions
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We believe in thinking out of the box, handholding our clients in implementing complex solutions and working towards achieving results. We have offices in Mumbai, Ahmedabad, Bengaluru, Delhi, Pune, Kolkata, Singapore and Dubai. We advise clients across multiple sectors including financial services, IT and IT-enabled services (ITES), real estate and infrastructure, telecommunications, oil and gas, pharmaceuticals, chemicals, consumer goods, power, as well as media and entertainment.

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- Dhruva Advisors has been consistently recognised as the “India Tax Firm of the Year” at the ITR Asia Tax Awards in 2017, 2018, 2019 and 2020
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- Dhruva Advisors has been recognised as the “Best Newcomer Firm of the Year” at the ITR Asia Tax Awards 2016.
- Dhruva Advisors has been consistently recognised as a Tier 1 Firm in India’s ‘General Corporate Tax’ and ‘Indirect Tax’ ranking tables as a part of ITR’s World Tax Guide. The firm is also listed as a Tier 1 firm for India’s ‘Transfer Pricing’ ranking table in ITR’s World Transfer Pricing guide.

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