LEGALITIES FOR A FOREIGN COMPANY IN INDIA

Foreign Company according to the Companies Act 2013 is defined as any company or body corporate incorporated outside India, which has a place of business in India whether by itself or through an agent, physically or by electronic medium; and, conducts any business activity in India in any other manner. However there is a slight change in the definition of a foreign company for the purpose of Merger, i.e. Foreign Company means any company or body corporate incorporated outside India having a place of business in India or not.

India being the fastest growing economy in the world provides many opportunities to foreign companies to grow and develop their business. The foreign investments in India are governed by the rules and policies of FDI, FEMA, RBI and Companies Act 2013. In order to establish its business any foreign entity has the following options:

· Joint Venture with an Indian Company

· Wholly owned subsidiary company

· Liaison Office

· Project Office

· Branch Office

· Limited Liability Partnerships (LLPs)

Joint Venture: Joint ventures are the most preferred practice of foreign corporate entities to undertake business in India. A joint venture can be done with any of the business units available in India. A joint venture is a new enterprise where two or more units come together to achieve a commercial objective. The joint venture is done for a specific business purpose and for a limited time period. To undertake business activities in India, a foreign company can invest equity in Indian company through a joint venture agreement. In a joint venture both the parties exercise control over the new enterprise and share revenues, expenses and assets. Joint venture is considered best medium to enter sectors where 100 percent FDI is not allowed in India.

A joint venture offers a low risk option for companies wanting to enter into Indian market. There are no separate laws for joint venture in India, laws governing Indian company applies equally to joint venture.

The main advantages for any foreign entity to invest in India is that they get an established distribution/marketing setup of the Indian partner, available financial resource of Indian partner and established contacts of the Indian partner which helps to smoothen up the process of setting up their operations. Some of the famous joint ventures that took place were between Hero and Honda, TVS and Suzuki.

Wholly Owned Subsidiary Company: wholly owned subsidiary is a company in which a foreign entity makes 100 percent FDI in India through automatic route. This is considered as the easiest and the preferred route by the foreign entities for establishment of their business in India. A wholly owned subsidiary company can be formed as a private limited or public limited company. A wholly owned company has more flexibility to conduct business in India as compared to liaison office or branch office. In these companies funding can be done via equity, debt and internal accruals. Indian transfer pricing regulations apply on such companies. They are governed by the companies act, 2013. They are treated as domestic company and are eligible for all exemptions, deductions benefits as applicable to any other Indian company.

Liaison Office: Liaison office means a business office which acts as a channel of communication between the head office (outside India) and parties in India. A liaison office can not undertake any commercial activities and cannot earn any income in India. The expenses of this office is entirely met by its parent company outside India through inward remittances received in convertible foreign exchanges. The main role of such offices is limited to collecting information about possible market opportunities and providing information about the company and its products to the Indian customers, promoting import export from/to India. The liaison offices are setup under the jurisdiction of RBI. The companies seeking to establish liaison office in India are not allowed to acquire immovable property in India however they can take any property on lease for a period not exceeding five years. The permission for establishment of a liaison office is given for Three years initially and it can be renewed thereafter. These offices are not permitted to involve into activities such as entering into any contracts with Indian residents, borrowing funds, trading, etc.

Project Office: Project offices are temporary project or site offices which are setup by foreign companies to execute specific projects in India. Project offices can be setup by the foreign companies which are awarded any contract by an Indian company. They are setup by the permission of RBI on specified conditions. Project offices are not allowed to undertake any work other than the work related to the project for which they are established. There are certain conditions prescribed by RBI which are required to be fulfilled for setting up of project offices. These are:

i. The project should be funded directly by inward remittance from abroad.

ii. The project is funded by bilateral or multilateral international financing agency.

iii. The project should be cleared by appropriate authority.

iv. The company in India awarding the contract has been granted a term loan by a Public Financial Institution or a bank in India for the project.

If any of the above conditions are not met, then in such case the foreign company has to approach RBI for approval. The project office can repatriate profits earned by it after completing the project once it clears all the payment of taxes in India and fulfils all other conditions. A project office is treated as an extension of a foreign company in India and taxed at the rate applicable to foreign companies.

Branch Office: Branch office is an extension of a foreign company involved in business of trading or manufacturing. Any company incorporated outside India engaged in business of trading or manufacturing is permitted to open a branch office in India on basis of specific approval from RBI. The functions of branch office is much wider as compared to those of a liaison office. There are several activities which a branch office is permitted to do, they are:

i. Export or Import of goods.

ii. Providing professional or consultancy services.

iii. Researching in the areas in which its parent company is engaged.

iv. Promoting technical and financial collaborations between Indian companies and its parent company or overseas group company.

v. Acting as buying/selling agent of its parent company in India.

vi. Providing technical support for the products supplied by its foreign company.

vii. Rendering services in developing software and information technology in India.

There are some activities which branch offices are not allowed to undertake like, retail trading activities of any nature, manufacturing activities whether directly or indirectly. However foreign companies are given permission by RBI to undertake manufacturing and service activities through branch offices in India's Special Economic Zones (SEZs). A branch office is considered suitable for foreign companies which are interested in setup of temporary office in India and do not have long term plans for operation in India.

Limited Liability Partnerships (LLPs): Limited Liability Partnerships have been allowed 100 percent FDI through automatic route in the recent reforms of FDI making it easier for foreign entities to develop their business in India. Prior to changes in FDI policies the investment in LLPs required government approval which made LLP incorporation by foreign entities a long, difficult & expensive process which therefore was not considered as a good option for establishing business in India but after the latest relaxations in the FDI rules any foreign national or entity can easily register and establish a small business in India.

Based on above description of all the forms in which any foreign entity can establish its business we can conclude that joint ventures, wholly owned subsidiaries & LLPs are the forms of creating a new entity in India through which any foreign company can invest and setup its business here whereas the liaison, branch and project offices are the means through which an already setup brand on the foreign lands can establish it in India also. As the recent policies have been changed by RBI and reforms have been brought up in the FDI policies by allowing more foreign investments through automatic route instead of government route where time and energy of the investors was wasted it is surely going to give a boost to developing Indian economy luring more foreign entities to establish their business in India creating more employments and enhancing their incomes.

REQUIREMENTS UNDER COMPANIES ACT

The Companies Act, amongst other provisions, lays down the detailed provisions regarding qualification, appointment, remuneration removal, retirement of directors, conducting board and shareholders meetings, passing of resolutions, related party transactions, the maintenance of books of accounts and the preparation and presentation of annual accounts (matters to be reported upon in the annual reports of the companies), periodical filing of forms with the Registrar of Companies, etc.

Once all the legal formalities required for incorporation are completed and the certificate of incorporation is issued to the company, the company is recognised as a separate legal entity in the eyes of law, distinct from its members who have incorporated such entity.

Whether the company is a private company or a public company, several things are required to be done post incorporation. There are matters which are required to be undertaken in the first Board meeting immediately post incorporation, and then there is work which is required to be done on regular and periodical basis.

A company does its business through directors who are responsible to ensure the above compliances.

As soon as the company is incorporated, but no later than 30 days, a director should call for the first board meeting by issue of notice (together with the agenda) of the meeting at least seven days before the meeting. A number of matters then need to be resolved upon in this first board meeting.

The company must also have the name board outside the registered office address, with its name, registered office address, Company Identification Number, e-mail ID, and phone number (which are mandatory now), website address and fax number, if any, stated on it. These details are also required to be printed on all business letters, bill-heads, and all other official publications.

If PAN has not been applied for along with the incorporation, then immediately after incorporation, the company must apply for PAN and TAN.

The company has to convene regular board meetings in the calendar year and prepare the minutes of the meeting of the Board of Directors and the shareholders meeting, and the same has to be maintained as a permanent document till the life time of the company. Within 30 days from the meeting, the minutes have to be prepared, duly signed, and maintained in a minute's binder. Like the same way on allotment of shares, the company has to issue share certificates to those who have been allotted shares and the company has to maintain members register and share allotment register.

A company is required to file its balance sheet, profit and loss account, auditor's report, and annual return every financial year before the due date, with the Registrar of Companies.

In addition to that, there are several instances wherein the company has to intimate the concerned Registrar of Companies, on the timely basis, about the appointments of directors, removal and certain other changes in the prescribed manner.

The Companies Act has also introduced the CSR (Corporate Social Responsibility) provisions where the corporate entities are obligated to undertake certain philanthropic activities. All companies which satisfy the CSR criteria will have to undertake CSR activities during the given financial year.

The above compliance requirements under the Companies Act, which a company must comply, are not a comprehensive list. Some companies may also require registration for service tax, VAT, professional tax, shops, and establishment. It is pertinent to note that the responsibility of compliance is not a one-time affair, but in fact a continuous process.

REQUIREMENTS UNDER THE LABOR AND EMPLOYMENT LEGISLATION

Next, businesses with production lines, factories, would also have to consider and comply with a host of statutes such as the Employees' State Insurance Act, 1948; the Maternity Benefits Act, 1961; the Industrial Disputes Act, 1948; The Contract Labor (Regulation and Abolition) Act, 1970; the Trade Union Act, 1926; the Equal Remuneration Act, 1976; the Payment of Gratuity Act, 1972; the Workmen's Compensation Act, 1923' the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, etc.

The above statutes govern issues such as working time and conditions of employment of workers, minimum wages and remuneration, rights and obligations of the trade unions, insurance of the employees, maternity benefits, employment retrenchment, payment of gratuity/provident fund, payment of bonus, regulations of the contract labor and such other issues concerning the employees.

The company should ensure that proper compliances of these various statues vis-à-vis its employees are in place and the employee policies are formulated accordingly.

REQUIREMENTS UNDER THE ENVIRONMENTAL LAW

Environmental and pollution control matters are governed by various statutes such as the Environment (Protection) Act, 1986; the Water (Prevention and Control of Pollution) Act, 1974; the Air (Prevention and Control of Pollution) Act, 1981; Hazardous Wastes (Management, Handling and Trans boundary Movement) Rules, 2008; the Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989; the Indian Forest Act, 1927; the Forest (Conservation) Act, 1980; the National Environment Tribunal Act, 1995; the Public Liability Insurance Act, 1991, etc. A company is required to comply with the provisions of these environmental laws to the extent specifically applicable to the business operations of such company. Consequences of non-compliance with the relevant provisions of any such statutes and rules framed there under are provided in the respective statutes.

TAX AND STAMP DUTY

India has a federal tax structure and taxes are levied by the Central Government, the State Governments, and the local regulatory authorities. These taxes are broadly in the nature of (i) Direct Tax (which includes income tax, wealth tax, dividend distribution tax, minimum alternate tax (MAT), share buy-back tax), (ii) Indirect Tax (which includes VAT/CST, Service Tax, Excise Duty, Customs Duty, Entry Tax, R&D Cess), and (iii) Levies on transaction (which includes stamp duty, securities transaction tax, and commodity transaction tax).

All the Indian companies are subjected to payment of tax and stamp duty for their business transactions undertaken during the course of any financial year and on the income generated from such operations. Non-payment (inadequate and/or untimely payment) of tax and stamp duty may attract moderate to heavy penalty, cause enforceability issue of the document and, in some cases, impounding of the documents by the authority.

OVERVIEW OF COMPLIANCE REQUIREMENTS UNDER FOREIGN EXCHANGE LAWS

An offshore business which has a direct Indian operation in India (and is not operating through an agent) will be treated as one of Liaison Office (LO), Branch Office (BO) or Project Office (PO), for which Reserve Bank of India (**RBI**) under provisions of the Foreign Exchange Management Act (**FEMA**) 1999.

Compliance requirements under FEMA are mentioned below:

1.After establishment, all new entities setting up LO/BO/PO shall submit a report containing information, as per format within five working days of the LO/BO becoming functional to the Director General of Police (DGP) of the state concerned in which LO/BO has established its office.

2. Branch Offices / Liaison Offices have to file Annual Activity Certificates (AAC) from Chartered Accountants, at the end of March 31, along with the audited Balance Sheet on or before September 30 of that year.AAC certifies that the company is undertaking only those activities which are permitted by the Reserve bank.