

Doing business in India

Establishing a business presence



Australian Government
Australian Trade Commission



Introduction

As trade and investment between Australia and India continues to grow, India is emerging as a significant export market for Australian companies.

Companies doing business with India may wish to establish of a formal presence in the market. As with any international market, Australian companies intending to establish an on-the-ground presence in India should ensure that an appropriate business structure is put in place that complies with Indian and Australian regulations.

This brief provides initial information about setting up a business presence in India, including presenting a range of issues you may wish to consider.

Establishing a business presence in India requires the completion of a set of legal processes. The steps involved depend on the form and nature of the business and the structure chosen. Before commencing business activities in India, it is recommended that organisations seek legal and taxation advice, and obtain information on local market conditions that may impact on the setting up a business in India.

Prospective investors should consider the range of laws and policies covering foreign investment, taxation, accounting and employment law and also understand the commercial and corporate legal system in India. Since the economic liberalisation process began in India in the 1990s, the process of setting up businesses and incorporation of entities has become more transparent and organised.

Australian companies considering setting up a business in India are advised to:

- adopt an appropriate legal and tax structure from inception
- use a qualified legal and tax firm with a presence in India to review all contracts
- conduct a legal, financial and technical due diligence on any potential partner to minimise risk
- seek legal advice on protecting their intellectual property. There could be potential violations of intellectual property and copyrights.
- allow adequate time for finalising partners. Companies in India prefer to establish a strong relationship before finalising a deal.
- be prepared for tough negotiations and to work through any legal issues. Be firm, polite, and creative, but be prepared to say no, if the situation demands.

Options for establishing a business presence in India

1. Unincorporated entities

a. Establishing an office of a foreign company in India

Investments into and out of India are governed by exchange control regulations, under the authority of the Reserve Bank of India (RBI), the country's central bank and exchange control authority. Within these regulations, a foreign company may establish a place of business in India through:

- Liaison Office/Representative Office
- Branch Office
- Project Office.

	Liaison office	Project office	Branch office
Definition	Representation office for liaison between the principal place of business or head office and entities in India. No commercial activity can be done through the office.	Offices set up to execute specific projects in India. Such offices cannot undertake or carry on any activity other than the activity relating and incidental to execution of the project. Project Offices may remit outside India the surplus of the project on its completion.	Foreign companies engaged in manufacturing and trading activities abroad are allowed to set up Branch Offices in India. The office may remit outside India profit of the branch, net of applicable Indian taxes and subject to local guidelines.
Approval	RBI approval required.	There is a general permission to set up a project office, subject to satisfaction of the prescribed conditions. RBI approval required	RBI approval required.
Permitted Activities	Representation, promotion, acting as communication channel	Project related work only	Export/import, professional consulting services, research work, trading, rendering technical support and services, airline/shipping services
Suitable for	Market knowledge, building customer network	Project execution	Extensive marketing and distribution, deeper customer engagement Substantial potential business.

b. Partnership Firm / Proprietary Concern

A Non-Resident Indian (“NRI”) or a Person of Indian Origin (“PIO”) residing outside India can invest in the capital of a partnership firm or a proprietary concern in India on a non-repatriation basis. Investments with repatriation option are permitted with the prior permission of the RBI. An NRI or PIO is not allowed to invest in a firm or proprietorship concern engaged in any agricultural/plantation activity or real estate business or print media. A person resident outside India other than NRIs/PIO may make an application and seek prior approval of Reserve Bank for making investment in the capital of a firm or a proprietorship concern or any association of persons in India. The application will be decided in consultation with the Government of India.

2. Incorporated Indian entities

Subject to the Indian Foreign Direct Investment (FDI) policy, a prospective foreign investor can consider the following options for setting up an incorporated Indian entity:

- Indian Limited Liability Company
- Limited Liability Partnership (“LLP”).

a. Indian Limited Liability Company

An Indian limited liability company can be set-up as a Wholly Owned Subsidiary (“WOS”) or as a Joint Venture Company (“JVC”)

Wholly Owned Subsidiary - A prospective foreign investor can set up a private/public limited WOS company under the (Indian) Companies Act, 1956.

For incorporation, an application has to be filed with the Registrar of Companies. On registration and incorporation as an Indian company, it is subject to Indian laws and regulations as applicable to other domestic Indian companies.

For more information visit *The Ministry of Company Affairs* within the *Ministry of Finance* - <http://mca.nic.in>

Joint Venture Company - A prospective foreign investor can set up a private/ public limited company under the (Indian) Companies Act, 1956 as a joint venture with a local Indian partner.

b. Limited Liability Partnership

As a Limited Liability Partnership, subject to Indian investment regulations, a prospective foreign investor can commence operations in India by incorporating a LLP under the Limited Liability Partnership Act, 2008. A LLP is a corporate structure that combines the flexibility of a partnership and the advantages of limited liability of a company at a low compliance cost. It is an alternative corporate business vehicle that provides the benefits of limited liability of a company, but allows its members the flexibility of organising their internal management on the basis of a mutually arrived agreement, as is the case in a partnership firm.

3. Investment in Indian companies

Foreign entities with long term business objectives in mind (both manufacturing and services sector), often choose to establish their presence through the WOS or a JVC route as it provides longevity, flexibility and a stronger legal foundation to do business in India.

Also, investments by non-residents are permitted in the capital of a resident entity in certain sectors/activity with entry conditions. Such conditions may include norms for minimum capitalisation, lock-in period, etc.

The following regulatory routes for investment in Indian companies are available under the FDI Policy:

a. Automatic Route

Foreign Direct Investment (FDI) in sectors/activities which are permitted under 'Automatic Route' does not require any prior approval either by the Government of India or the RBI.

FDI under the current framework is generally permitted under the 'Automatic Route' in most of the industrial and services sectors, with the exception of certain 'prohibited' sectors such as atomic energy, lottery business, gambling, etc. and is restricted to a sectoral cap in certain other sectors/ activities such as Air transport services, ground handling services under Civil Aviation sector and many more.

Also in many sectors/activities, FDI is permitted up to 100% on the automatic route, subject to applicable laws/regulations; security and other conditionalities.

b. Government Route

Those investments that do not fall within the purview of 'Automatic Route' and under the 'prohibited' sector fall within the ambit of 'Government Route' and require Indian Government permission. For example, investments within the, defence sector, private security agencies, telecom services, single brand product retail trading etc. are restricted and capped and require a prior Government approval of the Foreign Investment Promotion Board. Further, foreign investment in such Indian companies is permitted only up to the equity caps as prescribed under the FDI Policy.

Details of the FDI policy, sector equity caps and procedures can be obtained from the *Department of Industrial Policy and Promotion*, Government of India at <http://www.dipp.nic.in>

4. Foreign technical collaboration

Foreign technical collaborations are generally permitted, with the exception of a few sectors. Payments for royalty, lump sum fee for transfer of technology and payments for use of trademark/brand name in terms of the foreign technology collaboration agreement entered by the Indian company with its foreign partners is permitted without any limits.

5. Repatriation of profits outside India

Foreign capital invested in India is generally allowed to be repatriated along with capital appreciation, if any, after payment of taxes due on them, provided the investment was made on a repatriable basis. The repatriation is, however, subject to any lock-in conditions that may be applicable on the industry sector under the foreign direct investment control regulations.

The Reserve Bank of India (RBI)'s notification is available at <http://www.rbi.org.in/scripts/FAQView.aspx?Id=26>

Repatriation of dividends

Dividends - Profits and dividends earned in India are repatriable after the payment of taxes due on them. No permission of RBI is necessary for the remittance. Authorised dealers have been delegated the powers to remit dividends. In a limited list of 22 consumer goods industries, repatriation of dividends is subject to a requirement of dividend balancing against export earnings for a period of seven years from commencement of production. Balancing is not required beyond this period.

As per the provisions of section 115O of the Income Tax of India Act, any amount declared, distributed or paid by way of dividend is subject to Dividend distribution tax ('DDT'). DDT is neither a withholding tax on dividend income nor a tax on the profits of the company from which dividend is declared. Tax credit and / or tax relief is not applicable for Dividend distribution tax and for repatriation of dividends.

Australia and India have a Double Taxation Avoidance Agreement (DTAA) - a treaty for avoidance of double taxation.

Dividend distributions are subjected to dividend distribution tax at an effective rate of 16.995 per cent and also subject to the provisions of the Article X of the DTAA.

Further the dividend income received u/s 115O as stated above is exempt in the hands of the recipient as per the provisions of section 10(34) of the Indian Income Tax Act.

Profits earned by the LLP in India are taxed at the applicable rate, however, profits are repatriable without any further taxes like Dividend Distribution Tax.

Other remittances - No prior approval is required to remit profits earned by Indian branches and project offices of foreign companies to their head offices outside the country. Remittances from the winding-up proceeds of a branch of a foreign company in India are permitted, subject to prescribed procedure and submission of all required documents with the authorised bank. However, all remittances are subject to deduction of applicable taxes.

In addition, sundry remittances are allowed for certain items, including gifts, repair charges for imported machinery, maintenance and legal expenses, subject to prescribed limits and regulations.

6. Licensing

Licensing is the permission for an organisation or an individual to utilise intellectual property rights: a patent, trademark, trade secret, or copyright. Different types of license used in India include:

- Non-Exclusive License
- Exclusive License
- Patent License
- Trademark License
- Franchise License.

7. Taxation in India

India is moving towards reforming its tax policies and systems to facilitate globalisation of economic activities.

The corporate tax rate for foreign companies setting up branch office or project office is 40 per cent plus 3 per cent surcharge. An additional surcharge is levied on 40 per cent at rate of 2 per cent and 5 per cent if net income exceeds INR 10 million and 100 million respectively. The net tax rate may be lower than this on account of various deductions and exemptions available under the tax laws. Tax holidays are available in Special Economic Zones (SEZ), set up to make industry globally competitive. Some infrastructure sector projects enjoy special tax treatment.

Firms having foreign investment (whether set up as Partnership Firm / Proprietary Concern/ LLP) are taxed at rate of 30 per cent plus surcharge of 3 per cent. An additional surcharge is levied on 30 per cent at rate of 10 per cent if the net income exceeds INR 10 million.

Indian companies having foreign investment (whether set up as WOS or JVC) are taxed at rate of 30 per cent plus surcharge of 3 per cent. An additional surcharge is levied on 30 per cent at rate of 5 per cent and 10 per cent in case the net income exceeds INR 10 million and 100 million respectively. Further, distribution of dividend by an Indian company would also attract dividend distribution tax.

For information on taxes in India, contact: *Ministry of Finance*, Government of India, North Block, New Delhi-110001 through their website <http://finmin.nic.in/topics/taxation/index.html> and the income tax website at <http://law.incometaxindia.gov.in/DIT/intfccont.aspx>

Also please note that Foreign Investment in India is also subject to Transfer Pricing Policy.

Further information

The following are some of the government and industry bodies able to provide additional information on doing business in India.

Contact the Australian Trade Commission (Austrade) for advice on doing business in India. Austrade has eleven offices across India and a team of specialist trade advisers in Australia. A range of country and market information can be found by at www.austrade.gov.au/Export/Export-Markets/Countries/India/Market-profile.

Austrade can also assist with referrals to legal and taxation firms in Australia and India.

austrade.gov.au

Government and industry associations

Secretariat for Industrial Assistance (SIA)

Department of Industrial Policy and Promotion
Ministry of Commerce and Industry
Udyog Bhavan, New Delhi 110011
T: +91 11 2301 1983
F: +91 11 2301 1034
E: dipp_sia@ub.nic.in

Department of Industrial Policy and Promotion

Joint Secretary
Secretariat for Industrial Assistance (SIA)
Ministry of commerce & Industry
Udyog Bhavan, New Delhi 110011
T: +91 11 2301 1983
F: +91 11 2301 1034
E: sia_dipp@ub.nic.in
W: <http://dipp.nic.in>

Reserve Bank of India (RBI)

Foreign Investment Division
Shaheed Bhagat Singh Road
Mumbai-400 001
T: + 91 22 2266 1603
F: + 91 22 2266 5330
W: <http://www.rbi.org.in>

Registrar of Companies

Department of Company Affairs
Ministry of Finance
'B' Block, IInd Floor, Paryavaran Bhawan
C.G.O. Complex, New Delhi-110 003
T: +91 11 2436 2708
W: <http://dca.nic.in>

Invest India, Government of India - www.investindia.gov.in

Business Portal, Government of India - www.business.gov.in

Reserve Bank of India [RBI] guidelines on Foreign Investments in India - www.rbi.org.in/scripts/FAQView.aspx?Id=26

Ernst & Young 2012 Guide on Doing Business in India - www.ey.com/IN/en/Services/Tax/Doing-Business-in-India-2012---Overview

Australia – India Double Taxation Avoidance Treaty – http://law.incometaxindia.gov.in/Directtaxlaws/cbdt/dta/A1_Australia.htm

Australia India Business Council - www.aibc.org.au

The Australian Trade Commission

The Australian Trade Commission – Austrade – is the Australian Government’s trade, investment and education promotion agency.

Through a global network of offices, Austrade assists Australian companies to grow their international business, attracts productive foreign direct investment into Australia and promotes Australia’s education sector internationally.

Austrade provides information and advice that can help Australian companies reduce the time, cost and risk of exporting. We also provide a range of services to Australian exporters looking to expand their business in growth and emerging markets, including:

- information and advice on doing business in international markets
- help with overseas market selection
- identification of relevant overseas contacts
- assistance with market entry and expansion
- identification and follow-up of specific international business opportunities.

We also administer the Export Market Development Grant (EMDG) scheme – the Australian Government’s financial assistance program for aspiring and current exporters.

W www.austrade.gov.au E info@austrade.gov.au T 13 28 78 (within Australia)

DISCLAIMER

This report has been prepared as a general overview. It is not intended to provide an exhaustive coverage of the topic. The information is made available on the understanding that the Australian Trade Commission (Austrade) is not providing professional advice. Therefore, while all care has been taken in the preparation of this report, Austrade does not accept responsibility for any losses suffered by persons relying on the information contained in this report or arising from any error or omission in the report. Any person relying on this information does so entirely at their own discretion and Austrade strongly recommends the reader obtain independent professional advice prior to acting on this information. Austrade assumes no responsibility for any company, product or service mentioned in this document, for any materials provided in relation to such products, nor for any act or omission of any business connected with such products.

©Commonwealth of Australia 2013

Publication date: October 2013