HFI

ROADMAP TO SUCCESSFUL ENERGY VENTURES IN INDIA:- ESTABLISHING BUSINESS PRESENCE IN INDIA

INDVI - INDIA VENTURES INITIATIVE
In collaboration with Mukund Puranik

Metwand Chambers, Advocates, Thane (West),
Mumbai Metropolitan Region, India

HUGH FRASER INTERNATIONAL LINES UP NEW ALLIANCE FOR INDIA ENERGY VENTURES

HFI has announced a major push to support clients on energy ventures in the burgeoning India market. A new legal network alliance partnership has been announced with **Mukund Puranik**, ex counsel with Reliance Industries, who is based in Mumbai.

The International Energy Agency's India Energy Outlook 2021 special report highlights the wide range of energy-related opportunities emerging right across the energy spectrum from the pressures to increase domestic gas production to offset energy export costs and the net zero investments needed in solar, wind, carbon capture, battery storage, electrification of transport, energy efficiency and hydrogen.

India is clearly recognised as a net zero battleground with major increases in projected emissions potentially offsetting emissions reductions in western Europe unless net zero plans are implemented without delay.

HUGH FRASER INTERNATIONAL (HFI)

HFI is a specialist professional services firm led by Hugh Fraser, a Scottish corporate/energy lawyer and member of the Scottish Development International GlobalScot international trade ambassador network.

We support clients to establish, expand and divest their businesses through strategic, value-added consulting and legal services, combining specialist know-how, connections, local partners and execution expertise.

Our focus is on ventures which combine advanced energy technology and know-how with opportunities in the Middle East, East Mediterranean/North Africa, Caspian/Central Asia, East Africa and India regional zones including new in-country businesses, joint ventures and acquisitions.

Our clients are principally private equity-backed companies driving the energy transition and we are recognised as a trusted, market-leading boutique practice with a proven track record of over 20 years of driving international ventures.

Our **INDIA VENTURES INITIATIVE (INDVI)** targets the key global energy transition "battleground" – recognised in the International Energy Agency's India Energy Outlook 2021 - as we look towards the world in 2050. India's population, energy demand and CO2 emissions are set to increase dramatically over the next generation and with that scenario brings huge challenges.

It also brings huge net zero opportunities in solar, wind, carbon capture linked to power generation and industrial facilities, battery storage, electrification of vehicles and trains, robust electricity distribution grids, domestic natural gas production, energy efficiency, green hydrogen and electrolysers, and blue hydrogen.

Our INDVI supports all aspects in the planning, funding, implementation, acquisition and divestment of energy ventures for India including energy and environmental laws and policies, foreign investment laws, business licensing and registration, joint ventures, taxation, employment laws, intellectual property licensing and protection, investment and financing agreements, land acquisition and development for energy projects, procurement and vendor registration policies and legal compliance.

Mukund Puranik is a corporate, commercial and projects lawyer with 24 years of experience in advising on varied corporate, commercial and project transactional and dispute resolution matters.

He is a science graduate with a major in chemistry, botany, and agricultural microbiology and plant pathology from Marathwada University, Aurangabad, Maharashtra, India as well as a law graduate from Pune University. Later he did his Masters in Law in corporate and commercial laws from Pune University.

Initially, he worked in the chambers of leading senior advocate and designated senior advocates Mr S.K Jain in Pune District Court for a year and Mr Shekhar Naphade in Bombay High Court for about three years. During the foregoing periods, he had assisted on various commercial and civil litigation matters. Later, he worked in leading law firms of India which among others include Singhania & Co, Khaitan & Co and Amarchand Mangaldas Suresh A Shroff & Co. He had advised Reliance Industries in connection with its Hydrocarbon and Real estate Projects. He is proprietor of Metwand Chambers, Advocates having his offices in Thane (West), Mumbai Metropolitan Region.

Transactions he had advised include foreign direct investment into India, cross-border and domestic acquisitions, post-acquisition mergers, joint ventures and joint venture exits, corporate, project and structured finance, technology licensing, software licensing and maintenance, design and engineering, plant and plant and equipment purchase, catalyst supply, Engineering, Procurement & Construction (EPC), Engineering, Procurement & Construction Management (EPCM), Project Management and commercial contracts such as outsourcing, agency, licensing, distribution and franchising.

He had represented project proponents and strategic businesses, investors, lenders and other project participants in a broad range of sectors including Refinery and Petrochemicals, Chemicals, Steel and Mining, Energy (Thermal, Nuclear, and Renewable) and Infrastructure and PPP Projects such as Roads and Highway and Mixed-Use Real Estate Development. He has also represented clients in dispute resolutions, including international commercial arbitrations.

He has drafted, advised and negotiated a wide array of procurement contracts with who's who of the world in hydrocarbon industry from Asia, Europe and the Americas for major and minor capex projects, revamp projects and operations and maintenance in the last decade. He thus has substantial experience in advising, structuring and negotiating private procurement contracts for downstream hydrocarbon projects as well as operation and maintenance contracts for refinery and petrochemical plants.

Overall, he has transactional as well as dispute resolution experience and both these experiences help him provide clients with optimal solutions in representing transactional and dispute resolution matters.

INTRODUCTION TO ESTABLISHING BUSINESS PRESENCE IN INDIA

India presents a huge market opportunity for companies' carrying businesses in their home countries for doing business in India for more than one reason. India's population is 1.38 billion, the world's second-largest after China and is expected to surpass China's population by 2027.

India's demographic profile is also attractive in that sixty-five per cent (65%) of her population is under the age of thirty-five and fifty-five per cent (50%) under the age of twenty-five. India produces a good number of young engineers whether civil, chemical, mechanical, instrumentation, electronics, information technology, telecommunications, science graduates and postgraduates, accounting and finance, business management and law graduates. Many Indians study in reputable universities outside India and come back. Thus, India provides a huge skilled workforce that speaks English despite not being native English speakers.

The population and demographic profile drive the demand and supply for products and services in India, including the need for the development of every kind of infrastructure needed to cater to this demand. Infrastructure development itself presents huge opportunities for investors in the infrastructure industry.

India has been promoting manufacturing under various schemes which presents India as a low-cost manufacturing destination for companies resident outside India to not only meet the demand for their products in the markets in India but also demands in the global market.

INTRODUCTION TO INVESTMENT ROUTES

Investments in India by a person resident outside India primarily fall into three routes. First, the most popular route is the foreign direct investment (FDI); second, the foreign portfolio investment (FPI); and third, the foreign venture capital investment (FVCI).

In this article, we will focus generally on the business models available to persons resident outside India (other than the non-resident Indians (NRI)) under the current legal regime in India who intend to establish a business presence in India. We have at present carved out investments by NRIs in India. Also, the legal and regulatory requirements outlined are not complete, and we urge the audience to seek an independent legal advice.

What business model is suitable for a person resident outside India, essentially foreign companies incorporated outside India in a shorter or longer-term should primarily be governed by its globalisation strategy and the potential business opportunities presented to it by the Indian market.

Taxation also presents one of the important considerations in selecting a tax-effective business model.

A company resident outside India can set up a business presence in one or more of the following manners:

1. LIAISON OFFICE

Liaison office is a representative office of a company resident outside India. A Liaison office is permitted to undertake only certain specified activities excluding any profit-making activity of a commercial nature, trading or industrial activity. The permitted activities, among other include business development (such as promotion of exports or imports from its head office, parent or a group company) and to act as a communication channel between its head office, parent or a group company and its Indian office.

A company resident outside India wishing to establish a Liaison office must meet certain criteria such as a three-year profitability track record and net worth not less than US$ 50,000. Because a Liaison office cannot undertake profit-making activities, its head office or parent company needs to fund all the cost and expenses for its maintenance.

A Liaison Office cannot purchase immovable property in India for carrying out the permitted activity. It must have to essentially lease office premises.

Generally, an application for setting up Liaison Office to an Authorized Dealer Category-I Bank ("ADC-1 Bank") licensed as such by Reserve Bank of India (RBI) along with certain specified documents if the principal business of the applicant company falls under sectors where one hundred percent FDI is permitted under the automatic route. However, if principal business of the applicant company falls under sectors where one hundred percent FDI is not permitted under the automatic rout, then the applications are considered by RBI in consultation with the Ministry of Finance, Government of India.

RBI is India's central bank, debt market regulator, banking regulator, payment and settlement systems regulator as well regulator of Indian and foreign currencies and foreign currency exchange controls. In certain specified cases an application for prior approval of RBI is required for setting up a Liaison Office.

The approval is granted for a period of two to three years. A unique identification number (UIN) and approval letter is issued on grant of approval. The Liaison Office must be opened within six months of approval and must be notified to RBI else the approval granted lapses. Before the expiration of the validity period, the renewal of the approval will have to applied for. A Liaison Office being an office of a company resident outside India, is required to be registered as a foreign company with the Registrar of Companies at New Delhi within thirty days of its establishment.

A Liaison Office is permitted to open only one bank account with ADC-1 Bank of its choice.

A Liaison Office is not required to pay any income taxes as it is not required to carry on profit-making business or commercial activities.

Prior approval of RBI or ADC-1 Bank to the extent of delegation of powers by RBI to ADC-1 Bank and ROC is required for closing the Liaison Office.

2. BRANCH OFFICE

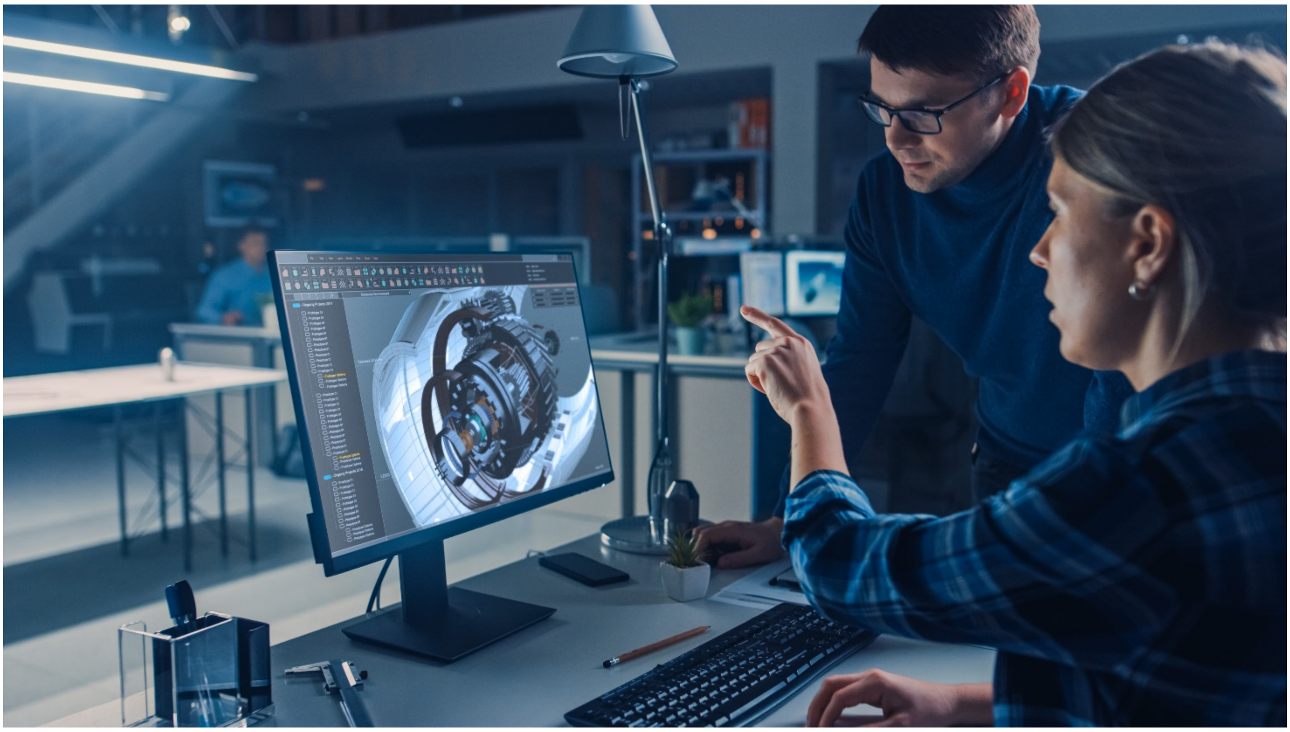
A company resident outside India can set up a branch office in India to undertake business activities such as exports or imports of goods, representing parent company and acting as a buying and selling agent in India, rendering professional consultancy services (other than legal services), carrying out research work in which the parent company is engaged, promoting technical and financial collaborations between parent or group companies and Indian companies, rendering information technology (IT) services and software development in India, rendering technical support to product supplied by parent or group companies. Thus, ordinarily a Branch Office cannot undertake manufacturing activity in India.

A company resident outside India wishing to establish a branch office must meet certain criteria such as a three-year profitability track record and net worth not less than US$ 100,000.

A Branch Office can purchase immovable property for carrying out the permitted activity. A Branch Office therefore has an option to purchase or lease immovable property for carrying out the permitted activity.

Generally, an application for setting up a Branch Office must be made to an ADC-1 Bank licensed as such by RBI along with certain specified documents if the principal business of the applicant company falls under sectors where one hundred percent FDI is permitted under the automatic route. However, if principal business of the applicant company falls under sectors where one hundred percent FDI is not permitted under the automatic route, then the applications are considered by RBI in consultation with the Ministry of Finance, Government of India.

In certain specified cases an application for prior approval of RBI is required for setting up a Branch Office. An Indian branch of a foreign banking company or an insurance company does not need separate approval under the exchange control laws because such companies must have to apply for and obtain a license under the banking and insurance laws from the respective banking and insurance regulators.



Similarly, under a special dispensation and subject to compliance with certain conditions, a company resident outside India can set up a Branch Office in the notified special economic zones (SEZ) for undertaking manufacturing and services without approval of RBI. A Branch Office will have to be located in a notified SEZ and will not permitted to carry on any business activity outside the SEZ. SEZs are created to promote exports from India and attract foreign investment by offering various incentives, including indirect tax incentives to processing units within SEZs such as customs duty exemption, zero rated goods and services tax, among others.

The approval is granted for a period of two to three years. Before the expiration of the validity period, the renewal of the approval will have to be applied for. A Branch Office being an office of a company resident outside India, is required to be registered as a foreign company with the Registrar of Companies at New Delhi within thirty days of its establishment. A unique identification number (UIN) and approval letter is issued on grant of approval. The Branch Office must be opened within six months of approval and must be notified to RBI else the approval granted lapses.

A Branch Office is permitted to open bank account with ADC-1 Bank of its choice only for its business operations in India.

A Branch Office is required to pay income taxes on the income earned in India at the rate of forty per cent.

Certain compliances as well as prior approval of RBI (or ADC-1 Bank to the extent of delegation of powers by RBI to it) and ROC is required for closing the Branch Office.

3. PROJECT OFFICE

A company resident outside India may set up a project office in India provided it has secured from an Indian company a contract to execute a project in India and satisfies certain additional conditions.

The project office must be funded directly from direct remittances from its head office or by a bilateral or multilateral international financing agency, or the project has been cleared by an appropriate authority in India, or company in India awarding the contract to the company resident outside India has been granted a term loan by a bank or public financial institution for the project. The approval is granted for the duration of the project. A unique identification number (UIN) and approval letter is issued on grant of approval.

A Project Office is permitted to open non-interest bearing foreign currency bank accounts one denominated in United State Dollars and one of the currency in which such foreign company having Project Office in India is incorporated with ADC-1 Bank of its choice only for the project related debits and credits.

Before the expiration of the validity period, the renewal of the approval will have to be applied for.

A Project Office being an office of a company resident outside India, is required to be registered as a foreign company with the Registrar of Companies at New Delhi within thirty days of its establishment.

A Project Office is required to pay income taxes on the income earned in India at the rate of forty per cent. A Project Office can send post-tax profits earned in India to its head office upon completing certain procedural requirements.

Certain compliances as well as prior approval of RBI (or ADC-1 Bank to the extent of delegation of powers by RBI to it) and ROC is required for closing the Project Office.

4. WHOLLY OWNED SUBSIDIARY

A company resident outside India can incorporate a wholly owned subsidiary (WOS) in all those industrial sectors where foreign direct investment in India is permitted up to one hundred per cent either under the approval route or the automatic route. In cases where prior approval is required for foreign direct investment, the incorporation of the company and the actual investment of course would occur after the grant of prior approval.

The WOS can be incorporated either as a private company or public company limited by shares. A private company can be incorporated with two subscribers to a memorandum and articles of association and two directors out of which one director needs to be resident director. A private company cannot have more than two hundred members (shareholders). A public company be incorporated with seven subscribers to a memorandum and articles of association and a minimum of three directors out of which one director needs to be a resident director. A resident director is a director who has been resident in India – that is stayed in India for a period of 182 days in the previous financial year.

The WOS is required to pay income taxes on the income earned not only in India but on a global basis at the applicable rate of tax depending on certain criteria. The minimum corporate tax rate for an Indian company is fifteen per cent and a maximum of thirty per cent. Thus, the applicable corporate tax rate that may be applied is that specified corporate tax rate that falls between the minimum and maximum corporate tax rate band. A WOS can send the post-tax profits earned in India to its head office upon complying with certain procedural requirements.

The company resident outside India owning about one hundred per cent shareholding in the WOS can either sell the shares of the WOS or wind up the WOS as per the provisions of winding up of a company under the Indian company law statute.

A company can set up manufacturing facilities (Unit) within the SEZ for exports as well as outside the SEZ or Domestic Tariff Area for the Indian markets.

5. ACQUISITION OF AN INDIAN COMPANY

A company resident outside India can also directly acquire one hundred per cent shares of an existing Indian company. This alternative may require the foreign company to undertake due diligence, business, financial and legal.

If the Indian company is a listed company, then additional requirements, such as an open offer under the takeover code will have to be made. Approval of the Competition Commission of India (CCI) under the competition law may be triggered if any direct or indirect acquisition of assets, control, shares or voting rights of an enterprise (as defined in the competition law), or a merger or amalgamation of an enterprise exceeds certain financial thresholds prescribed under the competition law.

The taxation of income of the target Indian company proposed to be acquired and remittance of post-tax profits to shareholders would be similar to that of a WOS.

6. INCORPORATED JOINT VENTURE

A company resident outside Indian can also enter into a joint venture with an Indian company and form a new joint venture company (Greenfield JV).

Alternatively, a company resident outside India can also enter into a joint venture with the shareholders of an existing Indian company to carry on the business of the existing Indian company in a new joint venture (Brownfield JV).

The terms of the joint venture agreement (or shareholders agreement) need to be incorporated in the articles of association. The joint venture alternative may trigger compliances that are similar to that applicable to an acquisition of an Indian company.

7. INCORPORATING LIMITED LIABILITY PARTNERSHIP (LLP)

A company resident outside India can incorporate LLP for carrying any of those industrial sectors where foreign direct investment in India is permitted up to one hundred per cent either under the approval route or the automatic route.

In cases where prior approval is required for FDI, the incorporation of the LLP and the actual investment of course would occur after the grant of prior approval.

The LLP is required to pay income taxes on the income earned not only in India but on a global basis either at thirty per cent or eighteen per cent alternate minimum tax on its book profits. An LLP can send the post-tax profits earned in India to its partners outside India (i.e., a company resident outside India) upon complying with certain procedural requirements.

The foreign company owing about one hundred per cent of the capital of the LLP either can sell the interest in the capital or wind up the LLP as per the provisions of winding up of an LLP under the Indian LLP law statute.