

# FAQs

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## Setting Up of Offices in India (Liaison Office, Branch Office and Project Office)

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## Contact

For any help or assistance please email us on [conciierge@nishithdesai.com](mailto:conciierge@nishithdesai.com) or visit us at [www.nishithdesai.com](http://www.nishithdesai.com).

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# FAQs for Branch Offices

## 1. What is a Branch Office (BO)?

Branch Office (BO) in relation to a company, means any establishment described as such by the company. Generally, a BO is an extension of a company incorporated outside India. It is engaged in the activity in which the parent company is engaged.

## 2. Which Activities can a BO Undertake in India?

A BO is allowed to undertake only RBI permitted activities; they have been listed as follows:<sup>1</sup>

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

## 3. What are the Eligibility Requirements for Establishing BO in India?

The foreign entity applying for a BO in India should have a financially sound track record. The financial threshold of the applicant entity must be as follows:<sup>2</sup>

Foreign entity must have a profit-making track record during the immediately preceding five financial years in the home country and net worth of not less than USD 100,000 or its equivalent. (*Net worth means the total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance Sheet or Account Statement certified by a Certified Public Accountant or a Registered Accounts Practitioner by whatever name called.*)

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1 Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016 in India by foreign entities, 2016, Annex C.

2 Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Section 4(a).

Exemption: The applicant, which is a subsidiary of another company, and is not financially sound i.e., does not satisfy the above-mentioned financial criteria, can submit a Letter of Comfort (LOC)<sup>3</sup> from its parent/group company. In the LOC, the parent/group company should undertake to provide financial support to the BO and discharge liabilities in case the BO defaults. Additionally, the parent/group company must satisfy the prescribed criteria for net worth and profit.

#### 4. Which Authority shall consider the Applications from Foreign Entities for Establishing BO in India and under which Regulations?

Applications from the foreign entities for establishing BO in India shall be considered by an AD Category-I bank (AD bank) in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016, along with the RBI Master Directions on “Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) in India by foreign entities.

#### 5. What is the Process for Applying for BO in India?

The foreign entity must submit the application for establishing BO in India to a designated AD bank in Form FNC<sup>4</sup> along with the relevant annexures.

The AD bank conducts due diligence in respect of the applicant’s background, satisfies itself with the required standards like the eligibility criteria for establishing BO, antecedents of the promoter, nature and location of activity of the applicant, sources of funds, compliance with the extant KYC norms, etc. Only after the AD bank is satisfied that such standards have been complied with, the details of the proposed approval to be granted along with the Form FNC is sent to the General Manager, RBI (CO Cell, New Delhi).

RBI allots a Unique Identification Number (UIN) to each BO. After receiving the UIN from RBI, the AD bank issues the approval letter to the foreign entity for establishing BO in India. This procedure enables RBI to keep, maintain and upload up-to-date list of all foreign entities which have been granted permission for establishing BO in India, on its website.

3 Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Annex A.

4 Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Annex B.

## 6. Do Foreign Banks and Insurance Companies have to follow the same Procedure for Establishment of BO in India?

No. Foreign banks have to submit applications for establishing BO in India, to the Department of Banking Regulation (DBR), RBI, Central Office, whereas insurance companies have to submit applications for establishing BO in India to the Insurance Regulatory and Development Authority (IRDA).

## 7. What are the Requirements for Opening Bank Account by a BO in India?

BO is allowed to open and maintain a bank account for permitted credits and debits. A BO may approach the AD bank in India to open an account for its operations in India. The permitted Credits and Debits are:

- **Credits:** Credits to the account should represent (i) the funds received from Head Office (i.e. foreign entity) through normal banking channels for meeting the expenses of the office and, (ii) any legitimate receivables arising in the process of its business operations in India.
- **Debits:** Debits to this account shall be for (i) the expenses incurred by the BO and, (ii) towards remittance of profit/winding up proceeds, to its Head Office overseas.

## 8. When and to whom the Annual Activity Certificate (AAC) should be submitted by BO?

Every BO is required to submit AAC to its designated AD bank and also to the Director General of Income Tax (International Taxation), New Delhi (DGIT), as at the end of March 31st, along with the audited financial statements including receipt and payment account on or before September 30 of that year.

## 9. What is the Process Followed by BO for Opening Additional Offices in India?

Requests for establishing additional BOs up to 4 offices (*i.e., one BO in each zone viz; East, West, North and South*) must be submitted to the AD bank in a fresh FNC form along with the justification for the need for additional offices. However, the documents mentioned in form FNC need not be resubmitted, if there are no changes to the documents submitted earlier. Following is to be noted in this regard:

- i) If the number of offices is more than 4 (*i.e., one BO in each zone viz; East, West, North and South*), the applicant will have to justify the need for additional office/s and then it shall require prior approval of RBI for opening such additional offices.
- ii) The applicant may identify one of its offices in India as the Nodal Office. Such Nodal office will have to coordinate the activities of all other offices in India.



## 10. What is the Process Followed for Transfer of Assets of a BO?

To undertake transfer of their assets, the BO shall make an application to the AD bank, which considers the application only if the operational compliances, such as submission of AACs up to the current financial year, with copies endorsed to DGIT; obtaining of PAN from Income Tax Authorities and have got registered with Registrar Of Companies (ROC) under the Companies Act 2013<sup>5</sup>, if necessary, are adhered to. The following is to be noted in this regard:

- i) AD bank allows transfer of assets by way of sale to the JV or WOS only when the foreign entity intends to close its BO operations in India.
- ii) A certificate from the Statutory Auditor is to be submitted, containing details of assets to be transferred, which should include the date of acquisition, original price, depreciation till date, present book value or written down value (WDV) and sale consideration to be obtained. The Statutory Auditor should also confirm that the assets were not re-valued after their initial acquisition. Additionally, the sale consideration should not be more than the book value.
- iii) The assets to be transferred should have been acquired by the BO from inward remittances. Intangible assets such as goodwill, pre-operative expenses cannot be transferred. Further, revenue expenses (such as lease hold improvements) incurred by the BO cannot be capitalised upon and transferred to JV/WOS.
- iv) While permitting transfer of assets, AD bank must ensure payment of all applicable taxes.
- v) Credits to the bank accounts of BO on account of such transfer of assets will be treated as permissible credits.

## 11. What are the Requirements in Case of Remittance of Profit/Surplus by a BO?

BOs are permitted to remit profits outside India, net of applicable Indian taxes, subject to production of certain documents to the satisfaction of the AD bank. The remittance of profits/surplus is effected through the same AD bank, with whom BO is maintaining the account. The required documents are as below:

- a) A certified copy of the audited Balance Sheet and Profit and Loss account for the relevant year.
- b) A Chartered Accountant's certificate certifying:
  - i) the manner of arriving at the remittable profit;
  - ii) that the entire remittable profit has been earned by undertaking the permitted activities; and
  - iii) that the profit does not include any profit on revaluation of the assets of the branch.

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<sup>5</sup> Companies Act, 2013, Section 380.

## 12. What are the Requirements for a BO Shifting to another City within India?

Prior approval of AD bank is required for an existing BO to shift to another city in India. However, no permission is required if the BO is shifted to another place in the same city, subject to the condition that the new address must be intimated to the designated AD bank. Further, changes in the postal address should be intimated to the Foreign Exchange Department, CO Cell, New Delhi by the AD bank at the earliest.

## 13. Can a BO change its Existing Name?

BO must apply to the AD bank to change its name. The AD bank may permit for such change subject to the following:

- i) the foreign entity changes its name without change in ownership.
- ii) the application to this effect is received, along with the board resolution for change of name and documents/certificate from ROC India showing change of name.
- iii) the change in name of the BO must be reported to the Foreign Exchange Department, CO Cell, New Delhi.

Where change in name is requested on account of acquisitions or mergers of foreign entities which involves change in ownership, then the acquired entity or the new entity so formed is required to apply afresh for establishing BO by closing the existing BO. Foreign entities should note that the approvals are given by the RBI/AD bank after detailed scrutiny as per laid down guidelines and FDI policies, and hence the approvals given to one foreign entity is not transferrable to another foreign entity.

## 14. Can BO Donate its Assets in India?

BO can donate its assets like old furniture, vehicles, computers and other office items, to NGOs or other not-for-profit organisations, subject to the approval by the AD bank. The AD bank may permit such donation after satisfying itself about the bonafides of the transaction.

## 15. Can an AD Bank Allow Term Deposit accounts for a BO?

AD bank can allow term deposit account for maximum 6 months period in favour of a BO of a foreign entity. Such a permission is subject to the AD bank's satisfaction that a) the term deposit is out of temporary surplus funds, and b) an undertaking is furnished by the BO that the maturity proceeds of the term deposit will be utilised for its business in India, within 3 months of maturity. However, such facility may not be extended to shipping/airline companies.

## 16. Can a BO Replace its Designated AD Bank?

Yes, BO can replace its designated AD bank subject to the following:

- i) Written consent of both the AD banks (transferee & transferor) for the transfer, and
- ii) The AD bank transferring such account (transferor) must confirm submission of all AACs and absence of any adverse features in conducting the account of the BO.

## 17. What is the Tax Liability of BO in India?

Taxation of income in India is governed by the provisions of the Income-tax Act, 1961 (“ITA”) as amended annually by the Finance Act. The ITA contains separate rules for taxation of residents and non-residents. A resident is taxed on its global income while a non-resident is taxed only in respect of income that accrues or arises or is deemed to accrue or arise or is received or deemed to be received in India. Business income of non-resident enterprises, are generally chargeable to tax in India, if:

- a) for non-resident enterprises which are residents of a country with which India does not share a Double Tax Avoidance Agreement (“DTAA”) – such non-resident constitutes a ‘business connection’ in India as per Section 9 of the ITA (and part of the non-resident’s India sourced income is attributable to such business connection); or
- b) for non-resident enterprises which are residents of countries with which India shares a DTAA -and such non-resident creates a permanent establishment (“PE”) in India (and part of the non-resident’s India sourced income is attributable to such a PE)<sup>6</sup>.

The term PE and its scope is generally understood with reference to DTAA entered into by India. As per Article 5(1) of OECD Model Tax Convention, 2017, the term permanent establishment means a fixed place of business through which the business of an enterprise is wholly or partly carried on. For a BO to constitute a PE, the test laid down in Article 5(1) needs to be satisfied (i.e., if they are carrying business activities of a foreign entity through a fixed place in India). If BO does constitute a PE in India, exclusively such portion of the non-resident’s income which is attributable to the BO’s activities in India – is chargeable to tax at the rate of 35% excluding surcharge and cess (i.e., the rate of income tax applicable to non-residents).

A ‘branch’ is generally included within the definition of PE within Article 5 (to the extent it satisfies the test in sub-article (1)).<sup>7</sup> Generally, a BO is an extension of a profit-making foreign entity in India, which carries out business activities in India.

Hence, to the extent such BO satisfies the test set out within Article 5(1) of the DTAA, such BO should qualify as a PE. In such cases, only such portion of the non-resident’s income which arises due to its PE’s activities in India, may be attributable to such PE (and taxed at their hands).

<sup>6</sup> Article 7(1) of the OECD Model Convention, 2017.

<sup>7</sup> Article 5(2) (b) of the OECD Model Convention, 2017.

## Filing Compliance:

BOs are required to obtain relevant tax registrations (such as Permanent Account Number) to file income tax returns with the income tax authorities.

Further, they are mandatorily required to get a tax audit done under section 44AB of the ITA and submit it by 30th November of the following year if its turnover, total sales, or gross receipts exceeds the prescribed threshold limit of rupees ten crore (approximately USD 11,85,000) (in a FY).

## 18. What is the Process for Closure of a BO in India?

A BO or the applicant entity have to apply for closure of the BO and for allowing remittance of winding up proceeds of such BO, to the designated AD bank. The application must be submitted with the following documents:

- a) Copy of the RBI's/AD bank's approval for establishing the BO;
- b) Auditor's certificate;
- c) Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending against the BO and there is no legal impediment to the remittance;
- d) A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the BO in India;
- e) The designated AD bank has to ensure that the BO had filed the AACs;
- f) Any other document(s), specified by RBI/AD bank while granting approval.

## 19. Do Foreign Banks and Insurance Companies have to follow the same Procedure for Closure of BO?

Foreign banks and insurance companies must obtain permission for closure from the sectoral regulators, i.e. DBR, RBI and IRDA, as the case may be. However, for remittance of the winding up proceeds, they have to apply to the designated AD bank along with a copy of the permission for closure obtained from the sectoral regulator and few other documents, as stated in "Closure of BO"<sup>8</sup>, (FAQ – 18).

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<sup>8</sup> Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Section 10.

# FAQs for Liaison Offices

## 1. What is a Liaison Office (LO)?

A Liaison Office (LO) means a place of business to act as a channel of communication between the principal place of business or Head Office or by whatever name called and entities in India but which does not undertake any commercial /trading/ industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel<sup>1</sup>. To summarize, a LO can undertake only liaison activities i.e. *acting as a channel of communication between head office abroad and parties in India*. It is not allowed to undertake any business activity in India and cannot earn any income in India. The validity period of a LO is 3 years, except when the LO is of a Non-Banking Finance Company (NBFC) or of an entity engaged in construction and development sectors, wherein the validity period is 2 years.

## 2. Which Authority shall consider the Applications from Foreign Entities for Establishing a LO in India and under which Regulations?

Applications from the foreign entities for establishing LO in India shall be considered by an AD bank in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016, along with the RBI Master Directions on “Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) in India by foreign entities.

## 3. What is the Process for Applying for LO in India?

The foreign entity must submit the application for establishing LO in India to a designated AD bank in Form FNC<sup>2</sup> along with the relevant annexures.

The bank conducts due diligence in respect of the applicant’s background, satisfies itself with the required standards like the eligibility criteria for establishing LO, antecedents of the promoter, nature and location of activity of the applicant, sources of funds, compliance with the extant KYC norms, etc. Only after the bank is satisfied that such standards have been complied with, the details of the proposed approval to be granted along with the Form FNC is sent to the General Manager, RBI (CO Cell, New Delhi).

RBI allots a Unique Identification Number (UIN) to each LO. After receiving the UIN from RBI the bank issues the approval letter to the foreign entity for establishing LO in India. This procedure enables RBI to keep, maintain and upload up-to-date list of all foreign entities which have been granted permission for establishing BO/LO in India, on its website

<sup>1</sup> Regulation 2(e) of FEMA (Establishment in India of a BO or LO or PO) Regulations, 2016.

<sup>2</sup> Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Annex B.

#### 4. Do Foreign Banks and Insurance Companies have to follow the same Procedure for Establishment of LO?

No. Foreign banks have to submit applications for establishing LO in India to the Department of Banking Regulation (DBR) and RBI (Central Office), whereas insurance companies have to submit applications for establishing LO in India to the Insurance Regulatory and Development Authority (IRDA).

#### 5. What are the Eligibility Requirements for Establishing LO?

The foreign entity applying for a LO in India should have a financially sound track record. The financial threshold of the entity must be as follows:<sup>3</sup>

For LO: Foreign entity must have a profit-making track record during the immediately preceding three financial years in the home country and net worth of not less than USD 50,000 or its equivalent.

Exemption: The applicant which is a subsidiary of another company and is not financially sound i.e., does not satisfy the above-mentioned financial criteria can submit a Letter of Comfort (LOC)<sup>4</sup> from its parent/ group company. In the LOC the parent/group company should undertake to provide financial support to the LO and discharge liabilities in case the LO defaults. Additionally, the parent/ group company must satisfy the prescribed criteria for net worth and profit.

#### 6. What are the Requirements for Opening Bank Account by a LO in India?

LO is allowed to open and maintain a bank account for permitted credits and debits. A LO may approach the designated AD Bank in India to open an account to receive remittances from its Head Office outside India. LO can have only one bank account at any given time. The permitted Credits and Debits are:

- **Credits:**
  - i) Funds received from Head Office through normal banking channels for meeting the expenses of the office.
  - ii) Refund of security deposits paid from LO's account or directly by the Head Office through normal banking channels.
  - iii) Refund of taxes, duties etc., received from tax authorities, paid from LO's bank account.

<sup>3</sup> Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Section 4(a).

<sup>4</sup> Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Annex A.

- iv) Sale proceeds of assets of the LO.
- Debits: Only for meeting the local expenses of the office.

## 7. When and to whom the Annual Activity Certificate (AAC) should be submitted by LO?

The LO has to submit AAC to its designated AD bank and DGIT, New Delhi as at the end of March 31st, along with the audited financial statements including receipt and payment account on or before September 30 of that year.

## 8. What is the Process Followed by LO for Opening Additional Offices in India?

Requests for establishing additional LOs up to 4 offices (*i.e., one BO in each zone viz; East, West, North and South*) must be submitted to the AD bank in a fresh FNC form. However, the documents mentioned in form FNC need not be resubmitted, if there are no changes to the documents submitted earlier. Following is to be noted in this regard:

- i) If the number of offices is more than 4 (*i.e., one LO in each zone viz; East, West, North and South*), the applicant will have to justify the need for additional office/s and then it shall require prior approval of RBI for opening such additional offices.
- ii) The applicant may identify one of its offices in India as the Nodal Office. Such Nodal office will have to coordinate the activities of all other offices in India.

## 9. What is the Process to be followed by an LO to Request for Extension of Validity Period?

LOs may submit a request for extension of validity period before such period is expired, to the AD bank under whose jurisdiction the LO's nodal office (in case there are multiple LOs of the entity) is located. The designated AD bank may then extend the validity period of LO/s for a period of 3 years from the date of expiry of the original approval or extension (meaning an extension could be granted at least twice), if the application is in order and the applicant has complied with the following conditions:

- i) Submission of AACs for the previous years, and
- ii) The account of the LO maintained with the designated AD bank must be operated in accordance with the terms and conditions stipulated in the approval letter.

Extension is granted as expeditiously as possible and, in any case, not later than one month from the receipt of the request under such intimation to RBI's General Manager (CO Cell, New Delhi) quoting the reference number of the original approval letter and the UIN. Reserve Bank has to immediately update the information on its website.

Generally, the validity period of a LO is of 3 years. However, the validity period of a LO of a Non-Banking Finance Company (NBFC) or of an entity engaged in construction and development sectors (excluding infrastructure development companies) is of 2 years. No further extension of validity period is considered for liaison offices of these specific entities. Upon expiry of the validity period, these offices have to either close down or be converted into a Joint Venture/Wholly Owned Subsidiary in conformity with the extant Foreign Direct Investment policy<sup>5</sup>.

## 10. What is the Process Followed for Transfer of Assets of a LO India?

To undertake transfer of their assets the LO shall make an application to the AD bank, which considers the application only if the operational compliances, such as submission of AACs, up to the current financial year, with copies endorsed to DGIT; have obtained PAN from Income Tax Authorities and have got registered with Registrar Of Companies (ROC) under the Companies Act 2013<sup>6</sup>, if necessary are adhered to. The following is to be noted in this regard:

- i) AD bank allows transfer of assets by way of sale to the JV or WOS only when the foreign entity intends to close its LO operations in India.
- ii) A certificate from the Statutory Auditor is to be submitted, containing details of assets to be transferred, which should include the date of acquisition, original price, depreciation till date, present book value or written down value (WDV) value and sale consideration to be obtained. The Statutory Auditor should also confirm that the assets were not re-valued after their initial acquisition. Additionally, the sale consideration should not be more than the book value in each case.
- iii) The assets to be transferred should have been acquired by the LO from inward remittances. Intangible assets such as good will, pre-operative expenses cannot be transferred. Further, revenue expenses (such as lease hold improvements) incurred by the LO cannot be capitalised upon and transferred to JV/WOS.
- iv) While permitting transfer of assets AD bank must ensure payment of all applicable taxes.
- v) Credits to the bank accounts of LO on account of such transfer of assets will be treated as permissible credits.

## 11. What are the Requirements for a LO Shifting to another City within India?

Prior approval of AD bank is required for an existing LO to shift to another city in India. However, no permission is required if the LO is shifted to another place in the same city subject to the condition that the new address should be intimated to the designated AD bank. Further, changes in the postal address may be intimated to the Foreign Exchange Department, CO Cell, New Delhi by the AD bank at the earliest.

<sup>5</sup> Master Circular on Foreign Investments in India, 2014.

<sup>6</sup> Companies Act, 2013, Section 380.



## 12. Can a LO change its Existing Name?

LO must apply to the AD bank to change its name. The AD bank may permit for such change subject to the following:

- i) the foreign entity changes its name without change in ownership.
- ii) the application to this effect is received, along with the board resolution for change of name and documents/certificate from ROC India showing change of name.
- iii) the change in name of the LO must be reported to the Foreign Exchange Department, CO Cell, New Delhi.

Where change in name is requested on account of acquisitions or mergers of foreign entities which involves change in ownership, then the acquired entity or the new entity so formed is required to apply afresh for establishing LO by closing the existing LO. Foreign entities should note that the approvals are given by the RBI/AD bank after detailed scrutiny as per laid down guidelines and FDI policies and hence the approvals given to one foreign entity is not transferrable to another foreign entity.

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LO can donate its assets like old furniture, vehicles, computers and other office items, to NGOs or other not-for-profit organisations subject to the approval by the AD bank. The AD bank may permit such donation after satisfying itself about the bonafides of the transaction.

## 14. Can an AD Bank Allow Term Deposit Accounts for a LO?

AD bank can allow term deposit account for maximum 6 months period in favour of a LO of a foreign entity. Such a permission is subject to the AD bank's satisfaction that a) the term deposit is out of temporary surplus funds and b) an undertaking is furnished by the LO that the maturity proceeds of the term deposit will be utilised for its business in India within 3 months of maturity. However, such facility may not be extended to shipping/airline companies.

## 15. Can a LO Replace its Designated AD Bank?

Yes, LO can replace its designated AD bank subject to the following:

- i) Written consent of both the AD banks (transferee & transferor) for the transfer, and
- ii) The AD bank transferring such account (transferor) must confirm submission of all AACs and absence of any adverse features in conducting the account of the LO.

## 16. What is the Tax Liability of LO in India?

Taxation of income in India is governed by the provisions of the Income-tax Act, 1961 (“ITA”) as amended annually by the Finance Acts. The ITA contains separate rules for taxation of residents and non-residents. A resident is taxed on its global income while a non-resident is taxed only in respect of income that accrues or arises or is deemed to accrue or arise or is received or deemed to be received in India. Business income of non-resident enterprises, are generally chargeable to tax in India, if:

- a) for non-resident enterprises which are residents of a country with which India does not share a DTAA – such non-resident constitutes a ‘business connection’ in India as per Section 9 of the ITA (and part of the non-resident’s India sourced income is attributable to such business connection); or
- b) for non-resident enterprises which are residents of countries with which India shares a DTAA and-such non-resident creates a permanent establishment (“PE”) in India (and part of the non-resident’s India sourced income is attributable to such a PE)<sup>7</sup>.

The term PE and its scope is generally understood with reference to DTAA entered into by India. As per Article 5(1) of OECD Model Tax Convention, 2017, the term permanent establishment (PE) means a fixed place of business through which the business of an enterprise is wholly or partly carried on. For an LO to constitute a PE, the test laid down in Article 5(1) needs to be satisfied (i.e., if they are carrying business activities of a foreign entity through a fixed place in India). If LO does constitute a PE in India, exclusively such portion of the non-resident’s income which is attributable to the LO’s activities in India – is chargeable to tax at the rate of 35% excluding surcharge and cess (i.e., the rate of income tax applicable to non-residents).

From a regulatory perspective, LOs are not permitted to undertake any business activity (that generates income or contributes to the profits of the foreign entity) in India. To the extent this is met, they should fall outside the scope of a ‘business connection’ under Section 9 of the ITA, or ‘PE’ under the relevant DTAA; and thereby, not be taxable in India.

Further, Article 5 of the OECD Model Convention (2017), and the UN Model Tax Convention (on which most DTAA are based) excludes activities that are ‘preparatory and auxiliary’ in nature, from the scope of PE. The Supreme Court<sup>8</sup> has held that permitted activities required to be carried out by LO, to the extent that they are ‘preparatory or auxiliary’ in nature - should not qualify the LO as a PE of the non-resident.

### Filing Compliance:

As per Rule 114DA of the Income-Tax Rules, 1962, non-residents having a LO in India are required to furnish an annual statement within sixty days from the end of such financial year in Form No. 49C duly verified by a Chartered Accountant. Since LO does not earn any income in India, it has no liability to file returns in India.

<sup>7</sup> Article 7(1) of the OECD Model Convention, 2017.

<sup>8</sup> Union of India vs. U.A.E Exchange Center CIVIL APPEAL NO. 9775 OF 2011.

## 17. What is the Process for Closure of a LO in India?

A LO or the applicant entity have to apply for closure of the LO and for allowing remittance of winding up proceeds of such LO to the designated AD bank. The application must be submitted with the following documents:

- i) Copy of the RBI's/AD bank's approval for establishing the LO;
- ii) Auditor's certificate;
- iii) Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending against the LO and there is no legal impediment to the remittance;
- iv) A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the LO in India;
- v) The designated AD bank has to ensure that the LO had filed the AACs;
- vi) Any other document(s), specified by RBI/AD bank while granting approval.

## 18. Is a LO Established in India allowed to Remit its Profits/Surplus?

LOs are not allowed to undertake any business activity in India and hence, cannot earn any income in India. Thus, no profits are earned to remit i.e., it cannot remit any profits. Additionally, any proceeds gained by winding up of a LO can be remitted as per the provisions of "Closure of LO"<sup>9</sup> (FAQ 36).

## 19. Do Foreign Banks and Insurance Companies have to follow the same Procedure for Closure of LO?

Foreign banks and insurance companies must obtain permission for closure from the sectoral regulators i.e. DBR, RBI and IRDA, respectively. However, for remittance of the winding up proceeds they have to apply to the designated AD bank along with a copy of the permission for closure obtained from the sectoral regulator and few other documents as stated in "Closure of LO"<sup>10</sup>, (FAQ – 36).

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9 Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Section 10.

10 Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Section 10.

# FAQs for Project Offices

## 1. What is a Project Office (PO)?

A Project Office (PO) means a place of business in India to represent the interests of the foreign company executing a project in India but excludes a Liaison Office.<sup>1</sup> PO can be established by a company incorporated outside India to undertake contract-based business in India. For this purpose, the foreign company must secure a contract to execute a project in India from an Indian company. It must secure all the required regulatory clearances. The validity period of a PO is for the tenure of the project. Additionally, the project must be funded in at least one of the following manners:<sup>2</sup>

- i) directly by inward remittance from abroad; or
- ii) by a bilateral or multilateral International Financing Agency, or
- iii) the company/entity in India awarding the contract has been granted Term Loan by a Public Financial Institution or a bank in India for the Project.

## 2. Which Authority shall consider the Applications from Foreign Entities for Establishing a PO in India and under which Regulations?

Applications from the foreign entities for establishing PO in India shall be considered by an AD bank in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016 along with the RBI Master Directions on “Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) in India by foreign entities.

## 3. What is the Process for Applying for PO in India?

The foreign entity must submit the application for establishing PO in India to a designated AD bank in Form FNC<sup>3</sup> along with the relevant annexures.

The bank conducts due diligence in respect of the applicant’s background, satisfies itself with the required standards like the eligibility criteria for establishing PO, antecedents of the promoter, nature and location of activity of the applicant, sources of funds, compliance with the extant KYC norms, etc. Only after the bank is satisfied that such standards have been complied with, the details of the proposed approval to be granted along with the Form FNC is sent to the General Manager, RBI (CO Cell, New Delhi).

No Unique Identification Number (UIN) is allotted to a PO.

<sup>1</sup> Regulation 2(f) of FEMA (Establishment in India of a BO or LO or PO) Regulations, 2016.

<sup>2</sup> Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016 in India by foreign entities, 2016, Section 2(iv).

<sup>3</sup> Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Annex B.

## 4. Is a PO Permitted to open a Bank account?

PO are allowed to open and maintain a bank account for permitted credits and debits.

AD banks can open non-interest bearing foreign currency account for POs in India subject to the following:

- i) The PO must be established in India, with the general / specific permission of RBI It must have the requisite approval from the concerned Project Sanctioning Authority concerned as per the Master Direction<sup>4</sup>.
- ii) The contract governing the project must specifically provide for payment in foreign currency.
- iii) Each PO can open two foreign currency accounts, usually one denominated in USD and the other in home currency of the project awardee (foreign entity), provided both are maintained with the same AD bank.
- iv) The permissible debits and credits to the account are payment of project related expenditure and foreign currency receipts from the Project Sanctioning Authority, remittances from parent/group company abroad or bilateral / multilateral international financing agency, respectively.
- v) The responsibility of ensuring that only the approved debits and credits are allowed in the foreign currency account rests solely with the AD bank. Further, the accounts shall be subject to 100 per cent scrutiny by the Concurrent Auditor of the respective AD bank.
- vi) The foreign currency accounts must be closed at the completion of the project.

## 5. When and to whom the Annual Activity Certificate (AAC) should be submitted by PO?

The PO must submit the AAC only to its designated AD bank. Further, such AAC must be submitted by the PO as at the end of March 31st, along with the audited financial statements including receipt and payment account on or before September 30 of that year.

## 6. Can a PO's Validity Period be Extended in India?

The validity period of a PO is for the tenure of the project, accordingly if the tenure is extended the validity period gets extended.

## 7. What is the Process Followed for Transfer of Assets of a PO in India?

To undertake transfer of their assets the PO shall make an application to the AD bank, which considers the application only if the operational compliances, such as submission of AACs, up to the current financial year, with copies endorsed DGIT; have obtained PAN from Income Tax Authorities and have got registered with

4 Master Direction - Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) in India by foreign entities, 201.

Registrar Of Companies (ROC) under the Companies Act 2013<sup>5</sup>, if necessary are adhered to. The following is to be noted in this regard:

- i) AD bank allows transfer of assets by way of sale to the JV or WOS only when the foreign entity intends to close their PO operations in India.
- ii) A certificate from the Statutory Auditor is to be submitted, containing details of assets to be transferred, which should include the date of acquisition, original price, depreciation till date, present book value or written down value (WDV) and sale consideration to be obtained. The Statutory Auditor should also confirm that the assets were not re-valued after their initial acquisition. Additionally, the sale consideration should not be more than the book value.
- iii) The assets to be transferred should have been acquired by the PO from inward remittances. Intangible assets such as goodwill, pre-operative expenses cannot be transferred.
- iv) While permitting transfer of assets AD bank must ensure payment of all applicable taxes.
- v) Credits to the bank accounts of PO on account of such transfer of assets will be treated as permissible credits.

## 8. How is Remittance of Profits/Surplus Effected in case of a PO?

A PO can request the AD bank for intermittent remittances of profits/surplus while it's winding up or completion of the project is pending. AD bank can permit such remittance if it's satisfied with the bonafides of the transaction, subject to the following:

- i) An Auditors'/Chartered Accountants' Certificate to the effect that sufficient provisions have been made to meet the liabilities in India including Income Tax, etc.
- ii) An undertaking that the remittance will not, in any way, affect the completion of the project in India and that any shortfall of funds for meeting any liability in India will be met by inward remittance from abroad.

## 9. Can PO Donate its Assets in India?

PO can donate its assets like old furniture, vehicles, computers and other office items, to NGOs or other not-for-profit organisations, subject to the approval by the AD bank. The AD bank may permit such donation after satisfying itself about the bonafides of the transaction.

## 10. Can an AD Bank allow Term Deposit Accounts for a PO?

AD bank can allow term deposit account for maximum 6 months period in favour of a PO of a person resident outside.

<sup>5</sup> Companies Act, 2013, Section 380.

Allowance is subject to the bank's satisfaction that a) the term deposit is out of temporary surplus funds and b) an undertaking is furnished by the PO that the maturity proceeds of the term deposit will be utilised for their business in India within 3 months of maturity. However, such facility may not be extended to shipping/airline companies.

## 11. Can a PO Replace its Designated AD Bank?

Yes, PO can replace its designated AD bank subject to the following:

- i) Written consent of both the AD banks (transferee & transferor) for the transfer, and
- ii) The AD bank transferring such account (transferor) must confirm submission of all AACs and absence of any adverse features in conducting the account of the PO.

## 12. What is the Tax Liability of PO in India?

Taxation of income in India is governed by the provisions of the Income-tax Act, 1961 ("ITA") as amended annually by the Finance Acts. The ITA contains separate rules for taxation of residents and non-residents. A resident is taxed on its global income while a non-resident is taxed only in respect of income that accrues or arises or is deemed to accrue or arise or is received or deemed to be received in India. Business income of non-resident enterprises, are generally chargeable to tax in India, if:

- a) for non-resident enterprises which are residents of a country with which India does not share a DTAA – such non-resident constitutes a 'business connection' in India as per Section 9 of the ITA (and part of the non-resident's India sourced income is attributable to such business connection); or
- b) for non-resident enterprises which are residents of countries with which India shares a DTAA and such non-resident creates a permanent establishment ("PE") in India (and part of the non-resident's India sourced income is attributable to such a PE)<sup>6</sup>.

The term PE and its scope is generally understood with reference to Double Tax Avoidance Agreements ("DTAAs") entered into by India. As per Article 5(1) of OECD Model Tax Convention, 2017, the term permanent establishment (PE) means a fixed place of business through which the business of an enterprise is wholly or partly carried on. For a PO to constitute a PE, the test laid down in Article 5(1) needs to be satisfied (i.e., if they are carrying business activities of a foreign entity through a fixed place in India). If PO does constitute a PE in India, exclusively such portion of the non-resident's income which is attributable to the PO's activities in India – is chargeable to tax at the rate of 35% excluding surcharge and cess (i.e., the rate of income tax applicable to non-residents).

In comparison to LO, a PO is usually established to execute a specific project in India i.e., for executing activities of a company (which generally may not be preparatory or auxiliary in nature).

Hence, to the extent such PO satisfies the test set out within Article 5(1) of the DTAA, such PO should qualify as a PE. In such cases, only such portion of the non-resident's income which arises due to its PE's activities in India, may be attributable to such PE (and taxed at their hands).

<sup>6</sup> Article 7(1) of the OECD Model Convention, 2017.

## Filing Compliance:

POs are required obtain relevant tax registrations (such as Permanent Account Number) to file income tax returns with the income tax authorities.

Further, they are mandatorily required to get a tax audit done under section 44AB of the ITA and submit it by 30th November of the following year if its turnover, total sales, or gross receipts exceeds the prescribed threshold limit of rupees ten crore (approximately USD 11,85,000) (in a FY).

## 13. What is the Process for Closure of a PO in India?

A PO or the applicant entity have to send requests/apply for closure of the PO and for allowing remittance of winding up proceeds of such PO to the designated AD bank. The application must be submitted with the following documents:

- a) Copy of the RBI's/AD bank's approval for establishing the PO;
- b) Auditor's certificate;
- c) Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending against the PO and there is no legal impediment to the remittance;
- d) The designated AD bank has to ensure that the PO had filed the AACs;
- e) Any other document(s), specified by RBI/AD bank while granting approval.



## Other General Questions

### 1. In which Scenario(s), Prior Approval of Reserve Bank of India (RBI) is Required for Establishing BO/ LO/ PO?

Applications for establishing BO/ LO/ PO in India from person resident outside India requires prior approval of RBI in certain cases (*as stated below*):

- i) citizen of or registered/incorporated in Pakistan;
- ii) citizen of or registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau and the application is for opening a BO/LO/PO in Jammu and Kashmir, North East region and Andaman and Nicobar Islands;
- iii) principal business falls in the four sectors namely Defence, Telecom, Private Security and Information and Broadcasting. However, RBI's prior approval is not required in case government approval or license/permission by the concerned Ministry/Regulator has already been granted.  
*Exemption: If Ministry of Defence or Service Headquarters or Defence Public Sector Undertakings has awarded a contract or has entered into an agreement with a non-resident applicant, then such applicant does not require a separate reference or approval of GOI for opening a PO.*
- iv) non-Government Organisation (NGO), Non-Profit Organisation, Body/ Agency/ Department of a foreign government.  
*Exemption: If such applicant is engaged, partly or wholly, in any of the activities covered under Foreign Contribution (Regulation) Act, 2010 (FCRA), they shall obtain a certificate<sup>1</sup> of registration under the said Act and permission under FEMA 22(R)<sup>3</sup> of RBI or AD bank is not required.*

### 2. What is the Potential Consequence of Adverse Reporting in AACs and Non-submission of AACs?

The AACs submitted by the BO/LO/PO are scrutinized by the designated AD bank to ensure that the activities undertaken by the BO/LO are carried out in accordance with the terms and conditions of the approval letter. If any adverse findings are noticed by the bank or are reported by the auditor, such findings are immediately reported to RBI's General Manager, (CO Cell, New Delhi), along with the copy of the AAC and their comments thereon.

While it is mandated to submit AAC annual, if BO/LO/PO fails, they are restricted to take certain corporate actions as below:

- i) For transferring their assets, the BO/LO/PO have to make an application to the AD bank, which shall consider such application only if the operational guidelines, including submission of AACs, up to the current financial year and at regular annual intervals with its copies endorsed to DGIT (International Taxation), are complied with;<sup>3</sup>

1 Foreign Contribution (Regulation) Act, 2010 (FCRA), Section 11 & Section 12.

2 Notification No. FEMA 22(R)/2016-RB dated March 31, 2016.; <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10327&Mode=0>.

3 Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Section 11.

## Other General Questions

- ii) For securing extension of the approval's validity period for LO, one of the criteria to be satisfied is submission of AACs for the previous years;<sup>4</sup>
- iii) For changing their existing AD bank, one of the criteria is that the AD bank transferring such account must confirm submission of all AACs and absence of any adverse features in conducting the account of the BO/LO/PO.<sup>5</sup>

### 3. Which Foreign Applicants shall Register with Police Authorities?

Foreign applicants from Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong, Macau or Pakistan desirous of opening BO/LO/PO in India shall have to register with the state police authorities. These applicants shall obtain an approval letter for 'persons' from their respective countries and a copy of such letter shall be marked by the AD bank to the Ministry of Home Affairs (Internal Security Division-I, Government of India, New Delhi) for necessary action and record.

### 4. Post Receipt of UIN from the RBI, what is the Process Followed by BO/LO/PO?

A BO/LO/PO or any other place of business by whatever name they are called, within 30 days of establishment of its place of business in India, are required to register with the Registrar of Company (ROC) by filing form FC-1, for which the following must be attached to such form:<sup>6</sup>

- a) a certified copy of the charter, statutes or memorandum and articles, of the applicant entity or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation thereof in the English language;
- b) a Certified true Copy of the resolution passed by the applicant entity;
- c) the full address of the registered or principal office of the applicant entity;
- d) a list of the directors and secretary of the applicant entity containing such particulars as may be prescribed;
- e) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the BO/LO/PO;
- f) the full address of the office of the BO/LO/PO in India which is deemed to be its principal place of business in India;
- g) particulars of opening and closing of a place of business in India on earlier occasion or occasions;
- h) declaration that none of the directors of the applicant entity or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and

4 Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Section 5(1)(a).

5 Master Direction - Establishment of BO / LO / PO in India by foreign entities, 2016, Section 12(v).

6 Section 380, Companies Act, 2013.

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**Other General Questions**

- i) any other information as may be prescribed as per the Companies (Registration of Foreign Companies) Rules, 2014:<sup>7</sup>
- j) Copy of approval letter from Reserve Bank of India

Further, the BOs/LOs shall obtain Permanent Account Number (PAN) from the Income Tax Authorities on setting up of their office in India and report the same in the AACs. Lastly, BOs / LOs are also required to register under the respective shop and establishment act under the state specific laws.

## 5. Can a Foreign Entity Convert its LO to BO?

A foreign entity can upgrade its LO to BO. An LO whose overseas entity is eligible to open a BO under general permission may upgrade to a BO automatically, as per AD bank's approval and under advice to RBI (FED, CO Cell, Sansad Marg, New Delhi 110 001).<sup>8</sup> It can even continue with its existing (i.e., LO's) PAN and bank accounts provided that the bank account is re-designated as a BO account.<sup>9</sup>

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<sup>7</sup> Rule 3(3), Companies (Registration of Foreign Companies) Rules, 2014.

<sup>8</sup> Liaison/Branch/Project Offices of foreign entities in India, 2016, FAQ Q10.

<sup>9</sup> Liaison/Branch/Project Offices of foreign entities in India, 2016, FAQ Q5.