



Setting up of Liaison office / Branch office / Project office in India

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Setting up of Office in India

Overview

Governing Provisions for Establishing LO/BO/PO in India by Foreign Entities

FEMA
Notification No.
22(R)/RB-2016
dated March 31,
2016 amended
from time to time

FED Master
Direction No.
10/2015-16 –
Establishing of
LO/BO/PO of
foreign entities in
India updated as
on 10/05/2018

FAQs on
LO/BO/PO of
foreign entities in
India as on
26/12/2016

As per section 2(v)(iii) of FEMA, 1999, an office, branch or agency owned or controlled by a person resident outside India will be treated as a person resident in India.

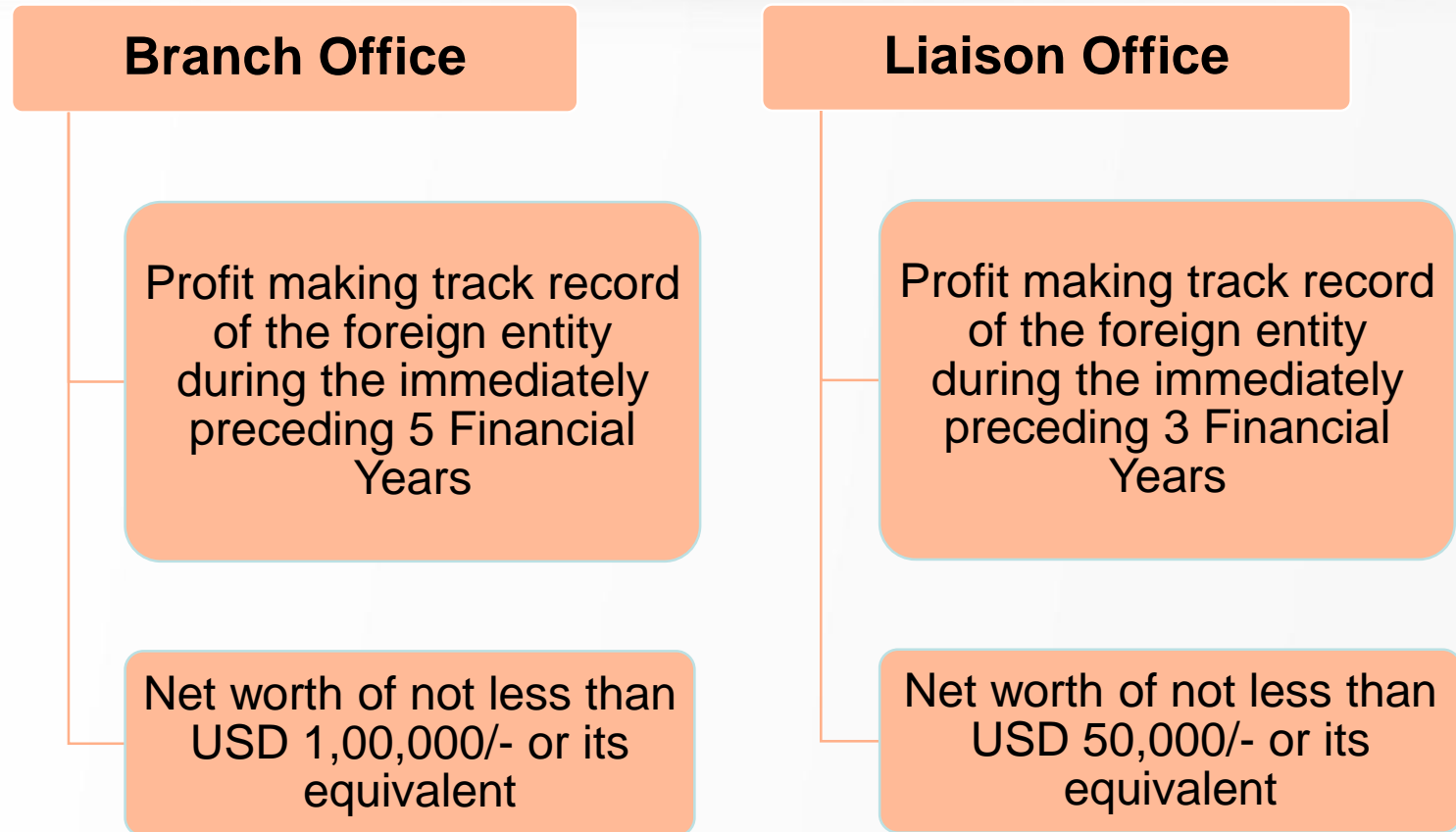


Setting Up Procedures

Establishment of LO/BO/PO – General permission

- Foreign Insurance companies prior approval → IRDA
- Foreign Banks prior approval → DBOD
- BO in SEZ to undertake manufacturing and service activities no approval required provided →
 - ✓ such BOs are functioning in those sectors where 100% FDI is permitted;
 - ✓ such BOs comply with Chapter XXII of the Companies Act, 2013; and
 - ✓ such BOs function on a stand-alone basis (viz. no business activity / transaction to be allowed outside SEZ)

Eligibility Criteria for setting up BO/LO



- *Provided that a person resident outside India that is not financially sound and are subsidiaries of other companies may submit a Letter of Comfort from their parent company subject to the condition that the parent company satisfies the prescribed criterion for net worth and profit.*

Establishment of LO/BO/PO – Approval by AD

➤ To set up LO & BO:

- Prior approval → AD Bank (Form FNC)

➤ To set up PO:

- Prior approval → AD Bank (Form FNC) provided:
 - ❖ Foreign company has secured a contract from an Indian company to execute a project in India; *and*
 - I. the project is funded directly by inward remittance from abroad; or
 - II. the project is funded by a bilateral or multilateral International Financing Agency; or
 - III. the project has been cleared by an appropriate authority; or
 - IV. a company or entity in India awarding the contract has been granted term loan by a Public Financial Institution or a bank in India for the Project.
 - ❖ Foreign company has been awarded a contract for a project by a Government authority / PSU

Establishment of LO/BO/PO – Prior RBI Approval

In the following cases for setting up of LO/BO/PO in India, prior approval of RBI is required:

- ❖ **Nation Specific:** Applicant is a citizen of or is registered/incorporated in Pakistan.
- ❖ **Region Specific:** Applicant is a citizen of or is registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau **and** the application is for opening a LO/BO/PO in Jammu and Kashmir, North East region and Andaman and Nicobar Islands.
- ❖ **Sector Specific:** The principal business of the applicant falls in the four sectors namely Defence, Telecom, Private Security and Information and Broadcasting.
- ❖ **Organizational Specific:** The applicant is a Non-Government Organization, Non-Profit Organization, Body/ Agency/ Department of a foreign government.

Validity & Extension for LO/BO/PO

Liaison Office

- **Validity:** For NBFC/Construction and Development Sectors - 2 Years and for others - 3 Years
- **Extension:** No extension for NBFC/Construction & Development Sectors but for other sectors - 3 Years

Branch Office

- No such validity

Project Office

- **Validity:** Till end of tenure of the project

Registration with State Police Authorities

- ❖ Applicants from Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong, Kong, Macau and Pakistan shall have to register with the State Police authorities.
- ❖ **Copy of approval letter** for persons from these countries shall be marked by the AD Category I bank to the Ministry of Home Affairs, Internal Security Division – I, Government of India, New Delhi for necessary action and record.
- ❖ *All other countries are exempted* from registering with the State Police authorities.





Permissible Activities

Permitted activities - BO

- Export/Import of goods
- Rendering Professional / Consultancy Services
- Research work in which parent company is engaged
- Promoting Technical/ Financial Collaborations
- Acting as an buying / selling agent in India
- Rendering IT & Software development services
- Representing a Foreign Airline/ Shipping Company
- Rendering technical support to products supplied by parent / group companies



Permitted activities - LO & PO

Liaison Office :

- Representing Parent/ Group Company
- Promoting Export & Import from / to India
- Promoting Technical/ Financial Collaborations between Parent/ Group Companies & Companies in India
- Acting as communication channel between Parent Company & Indian Company.

Project Office :

- Execute a contract / project in India and activities relating to execution of project



Operational Procedures

Acquisition of Property for Operations of LO/BO/PO

- ❖ The **BO /PO** of a foreign entity, **excluding an LO**, are permitted to acquire property for their own use and to carry out permitted/incidental activities *but not for leasing or renting out the property*.
- ❖ However, entities from Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran, Nepal, Bhutan, China, Hong Kong and Macau **require prior approval of the Reserve Bank** to acquire immovable property in India for a BO/PO.
- ❖ BOs/LOs/POs have *general permission* to carry out permitted/ incidental activities from leased property subject to lease period not exceeding five years.



Additional Offices and Activities-BO/LO

- Application in **fresh Form FNC** to be made to AD bank for establishing **additional office by BO/LO**. However, the documents to Form FNC need not be resubmitted, if there are no changes to the documents already submitted earlier.
- The applicant needs to identify one of its offices in India as the **Nodal Office**, which will co-ordinate the activities of all of its offices in India.
- Whenever the existing BO/LO is **shifting to another city in India**, prior approval from the AD bank is required. However, no permission is required if the BO/LO is shifted to another place in the **same city** subject to the condition that the new address is intimated to the designated AD bank.
- If the **number of offices exceeds 4** (i.e. one BO / LO in each zone viz; East, West, North and South), the applicant has to justify the need for additional office/s and it shall require prior approval of RBI.
- Application for **additional activities** over and above permitted activities to be made to RBI through AD bank.

Opening of a Bank A/c – LO/BO/PO

- An LO / BO / PO (except Pakistan Entity for PO) may approach the designated AD Category I Bank in India to open an account for permitted transactions.
- If an LO/BO wants to open **more than one account** it has to obtain prior permission of the Reserve Bank through its AD Category I bank justifying the reason for additional account. **(FAQ No. 2)**
- BO/PO/LO can have one more account with **another AD bank (Agency bank for tax payment) for statutory payments** when the AD with whom the account is maintained is not the agency bank. **(FAQ No. 19)**
- Each BO/ LO/PO are required to **transact through one designated AD Category-I** bank only who shall be responsible for the due diligence and KYC norms of the BO/LO/PO. BO /LO/PO, present in multiple locations, are required to transact through their designated AD. However, the AD of the nodal office is required to comply with all the reporting norms.

Permissible credits in Bank A/C- LO

Liaison Office:

The permitted Credits and Debits to the account shall be:

a. Credits:

- Funds received from Head Office through normal banking channels for meeting the expenses of the office.
- Refund of security deposits paid from LO's account or directly by the Head Office through normal banking channels.
- Refund of taxes, duties etc., received from tax authorities, paid from LO's bank account.
- Sale proceeds of assets of the LO.

b. Debits: Only for meeting the local expenses of the office.



Permissible credits in Bank A/C- PO/BO

Branch Office:

Credit: Funds received from Head Office through normal banking channels for meeting the expenses of the office and any legitimate receivables arising in the process of its business operations. Sale proceeds of assets of BO.

Debit: Expenses incurred by the BO and towards remittance of profit/winding up proceeds.

Project Office:

The credits to the account should represent the funds received from head office through normal banking channels for meeting the expenses of the office and/or the rupee amounts receivable if any, under the contract and no other amount should be credited without prior permission of the Reserve Bank.

The debits to the account could be raised only for meeting the local expenses of the office and intermittent remittances pending winding up/completion of the project.

Opening of a FC Bank A/c – PO

AD Category – I banks can open **non-interest bearing foreign currency account** for POs in India subject to the conditions prescribed below:

- a) The PO has been established in India with the general / specific permission of Reserve Bank of India.
- b) The contract governing the project specifically provides for payment in foreign currency.**
- c) Each PO can open two foreign currency accounts (one in USD & other in home currency) provided both are maintained with the same AD Category–I bank.
- d) The permissible debits to the account shall be payment of project related expenditure and credits shall be foreign currency receipts.
- e) The responsibility of ensuring that only the approved debits and credits are allowed in the foreign currency account shall rest solely with the AD Category–I bank.
- f) The foreign currency accounts have to be closed at the completion of the project.

Submission of Annual Activity Certificate

For LO/BO:

- AAC needs to be submitted to AD Bank on or before 30/09 for y/e 31/03 along with audited financial statements including receipt and payment account
- In case the annual accounts of LO/BO are finalized with reference to a date other than 31/03, then AAC needs to be submitted within 6 months from ends of closure of books
- AAC also needs to be filed with DGIT (Intl Tax), New Delhi
- If auditor reports any adverse findings or AD notices that activities undertaken by the BO/LO are not in accordance with the terms and conditions of the approval given, then AD will report to RBI with its comments

For PO:

- AAC needs to be submitted to AD bank only. No need to submit AAC to DGIT(Intl Tax), New Delhi
- Certificate would show project status and would certify that the accounts of the project office have been audited and the activities undertaken are in conformity with the general/ specific permission given by the Reserve Bank



Transfer of Assets

Transfer of Assets of PO/BO/LO

- Permission from AD Category-I bank for transfer of assets only to BOs/LOs/POs who are adhering to the operational guidelines such as -
 - submission of AACs (up to the current financial year) at regular annual intervals with copies endorsed to DGIT (International Taxation);
 - have obtained PAN from IT Authorities and
 - have got registered with ROC under the Companies Act 2013, if necessary.

- Transfer of assets by way of sale to the JV/WOS be allowed by AD Bank only when the non-resident entity intends to close their BO/LO/PO operations in India.

- The assets should have been acquired by the BO/LO/PO from inward remittances and no intangible assets should be included.

Transfer of Assets of PO/BO/LO

- A certificate is to be submitted from the Statutory Auditor indicating the date of acquisition, original price, depreciation till date, present book value or written down value and sale consideration to be obtained.
- Statutory Auditor should also confirm that the assets were not re-valued after their initial acquisition. The sale consideration should not be more than the book value in each case.
- AD Bank must ensure payment of all applicable taxes before permitting transfer of assets.
- Credits to the bank accounts of BO/LO/PO on account of such transfer of assets will be treated as permissible credits.
- Donation by BO/LO/PO of old furniture, vehicles, computers and other office items etc. to NGOs or other not-for-profit organizations can be permitted by the AD Banks after satisfying itself about the bonafide of the transaction.



Winding up

Winding Up of LO/BO/PO

- ❖ **Application for closure** of the LO/BO/PO and allowing the remittance of winding up proceeds of LO/BO/PO to be submitted to **AD bank** along with following documents:
 - ✓ *Copy of the Reserve Bank's/AD Category-I bank's approval* for establishing BO/ LO/ PO
 - ✓ *Auditor's certificate* to confirm :
 - manner in which the remittable amount has been arrived and supported by a statement of assets and liabilities. Also, indicating the manner of disposal of assets
 - that all liabilities in India have been either fully met or adequately provided
 - that no income accruing from sources outside India (including proceeds of exports) has remained unrepatriated to India
 - ✓ Confirmation from applicant/parent company that *no legal proceedings* in any Court in India are pending against the BO / LO/ PO
 - ✓ *A report from the ROC* regarding compliance with the provisions of Companies Act, 2013, wherever applicable
 - ✓ *Any other document/s*, specified by Reserve Bank of India/AD Category-I bank while granting approval



Remittance of Profit

Remittance of profit or surplus - BO

Branch office may remit profit of the branch net of applicable Indian taxes, outside India, on the submission of the following documents to the satisfaction of the AD Bank:

- A certified copy of the Audited Balance Sheet and Profit and Loss Account for the relevant year
- A Chartered Accountant's certificate certifying:
 - (1) the manner of arriving at the remittable profit;
 - (2) that the entire remittable profit has been earned by undertaking the permitted activities; and
 - (3) that the profit does not include any profit on revaluation of the assets of the branch

Remittance of profit or surplus - PO

AD Bank may permit **intermittent remittances** by project offices pending winding up/completion of the project subject to bonafide of the transaction and submission of the following:

- certified copies of the final audited project accounts
- the statutory auditor's certificate showing the manner of arriving at the remittable surplus; and
- an undertaking from the project office that the remittance will not, in any way, affect the completion of the project in India



Do's and Don'ts

Do's and Don'ts for LO

- ❖ LO can be upgraded to BO under AD approval if overseas entity is eligible to open the BO under the advice of Reserve Bank. **(FAQ No.10)**
- ❖ The existing PAN and bank accounts can be continued when an LO is permitted to upgrade into a BO provided the bank account is re-designated as a BO account. **(FAQ No.5)**
- ❖ Change in the Top Management or CEO/MD/CMD etc. of the LO **does not require prior approval** from the Reserve Bank/AD Category-I bank. However, AD Category-I bank should be intimated about the same
- ❖ LO 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
- ❖ LO cannot undertake any activities directly or indirectly except the permissible activities specified
- ❖ LO can open only one bank account

Do's and Don'ts for BO

- ❖ A subsidiary of Indian company abroad cannot open a BO in India. **(FAQ No.15)**
- ❖ A BO cannot open a Foreign Currency account for doing normal business transactions. **(FAQ No.18)**
- ❖ Letter of Credit (LC) can be opened for BO in India for export/import of goods. **(FAQ No.21)**
- ❖ A BO is required to register with the Registrar of Companies **(ROCs)** once it establishes a place of business in India if such registration is required under the Companies Act, 2013
- ❖ Can place funds in **FD for a period not exceeding 6 months** provided the bank is satisfied that the term deposit is out of temporary surplus funds and the BO furnishes an undertaking that the maturity proceeds of the term deposit will be utilised for their business in India within 3 months of maturity
- ❖ Income earned from parties abroad to be repatriated to India

Do's and Don'ts for PO

- ❖ Local Letter of Credit (LC) can be opened by PO for purchase of goods locally in India (local purchase of goods to execute a project). **(FAQ No. 21)**
- ❖ Each PO can open two foreign currency accounts, usually one denominated in USD and other in home currency of the project awardee, **provided both are maintained with the same AD Category-I bank**
- ❖ PO have general permission to carry out permitted/ incidental activities from leased property **subject to lease period not exceeding five years**
- ❖ Credit facility can be provided to PO in foreign currency. The AD Bank should ensure compliance to the extant instructions issued by the Department of Banking Regulation. **(FAQ No.6)**
- ❖ There is no specific requirement for AD Banks to obtain UIN from RBI for PO. **(FAQ No.12)**



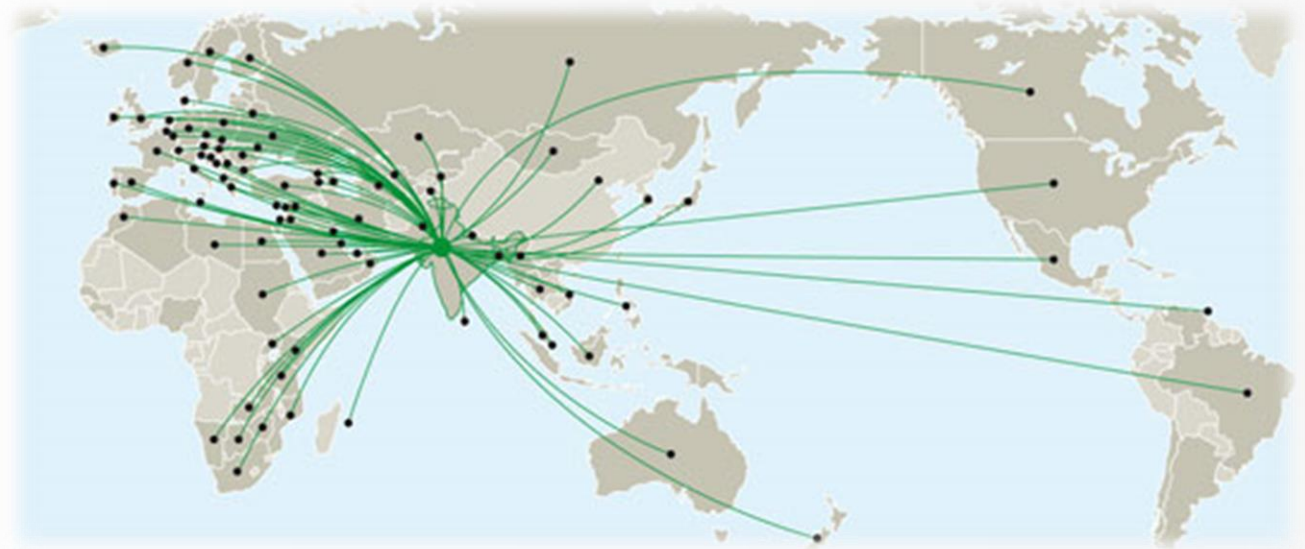
Comparison – Regulatory aspects

LO/BO/PO – Regulatory Aspects

Basis	Project Office (PO)	Branch Office (BO)	Liaison Office (LO)
Regulatory Approvals (FEMA)	<ul style="list-style-type: none"> • Application in Form FNC to establish PO 	<ul style="list-style-type: none"> • Application in Form FNC to be made to obtain permission to establish BO • UIN allotted by RBI 	<ul style="list-style-type: none"> • Application in Form FNC to be made to obtain permission to establish LO • UIN allotted by RBI • File for extension after completion of 3 years
Company Law Registration	<ul style="list-style-type: none"> • Application in prescribed form to be made to ROC in 30 days of the establishment • ROC shall issue 'Certificate of Establishment of place of Business in India' 		
Income Tax Act, 1961	<ul style="list-style-type: none"> • Tax registrations for PO/ BO/ LO – PAN and TAN • In respect of deployed employees – PAN 		
Indirect Tax Registrations	<ul style="list-style-type: none"> • GST (If Applicable) • Customs registration (If Applicable) 		
Other allied Registrations	<ul style="list-style-type: none"> • Registration under Employees Provident Fund Account • Shop and Establishment registration 		

LO/BO/PO – Regulatory Aspects

Basis	Project Office (PO)	Branch Office (BO)	Liaison Office (LO)
Compliance Requirements	<p>RBI → Annual Activity Certificates (AAC) to be filed within six months from the end of the financial year</p> <p>Companies Act → Annual Filing of Audited Accounts</p> <p>Indirect Taxes → Filing of Periodical Tax returns wherever required</p>		
Basis of Taxation	<ul style="list-style-type: none"> • Taxable presence • Taxed on income pertaining to Indian Operations • Taxed as Foreign company 		<ul style="list-style-type: none"> • Non-taxable presence • Not permitted to carry out business/ commercial activities in India
Income Tax Compliances	<ul style="list-style-type: none"> • Income Tax Return to be filed • Transfer Pricing Audit report in Form 3CEB • TDS / WHT compliances in prescribed form • Copy of the AAC (filed with RBI) to be filed with Income Tax Authorities by BO 		<ul style="list-style-type: none"> • Form 49C filed electronically with Digital Signature • Copy of the AAC (filed with RBI) to be filed with Income Tax Authorities • TDS / WHT Compliances in prescribed form



Setting up of Office outside India

Overview

Governing Provisions / Guidelines for setting up office outside India by Indian Entities

FEMA Notification No. 10(R)/RB-2015 dated January 21, 2016 amended from time to time

FED Master Direction No. 16/2015-16 – Export of Goods and services updated as on 12/01/2018

As per section 2(v)(iv) of FEMA, 1999, an office, branch or agency outside India owned or controlled by a person resident in India will be treated as a person resident in India.

Guidelines for setting-up office outside India

- A **firm** or a **company** or a **body corporate** registered or incorporated in India can open, hold and maintain in the name of its office (*trading or non-trading*) or its branch set up outside India or its representative posted outside India, a foreign currency account with a bank outside India by making remittances from India for the purpose of normal business operations of the office/ branch or representative.
- Overseas branch / office should be set up / representative should be posted overseas **only for conducting normal business activities of the Indian entity**
- **Limits for remittances** (Can be mitigated if remittances made from EEFC a/c) :
 - Initial expenses for set-up: 15% of average annual sales/ income or turnover of the Indian entity during the last two financial years **or** up to 25 per cent of the net worth, whichever is higher,
 - Recurring expenses: 10% of average annual sales/ income or turnover during the last financial year

Do's and Don'ts for Overseas office

- Capital account transaction restrictions need to be borne in mind while transacting with persons resident outside India
- Purchase of acquisition of office equipment and other assets required for normal business operations of the overseas branch/ office/ representative is not deemed as a capital account transaction. However, Acquisition of immovable property for business and residential purpose of its staff is allowed only by an Indian company for its overseas office. LLP cannot acquire immovable property other than by lease not exceeding 5 years.
- Overseas office (trading / non-trading) / branch / representative should not create any financial liabilities, contingent or otherwise, for the head office in India
- Overseas office cannot not invest surplus funds abroad without prior approval of RBI
- All surplus funds needs to be repatriated to India

Other regulatory considerations

- Overseas office may constitute PE depending upon its activities
- Transfer Pricing is not applicable under Indian tax law for transactions between Indian HO and overseas office
- WHT compliance needs to be adhered to under Indian tax law
- Immediate taxation of branch profits in India
- Prevalence of Branch remittance tax in certain countries
- HO expenses deduction limits under certain countries' tax laws
- Liability of overseas office may devolve upon Indian HO in case of litigation



Case Studies

Case Study - I

Facts: ABC Inc. has set-up LO in India during the year 2016. Due to demonetization in Nov. 2016, LO did not have enough petty cash on hand for meeting travel expenses in November and December 2016. LO instructed its employees to incur official expenses through their personal credit cards which would be later reimbursed by LO. Expenses incurred by its employees during Nov. and Dec. 2016 were reimbursed by LO along with salary of respective months.

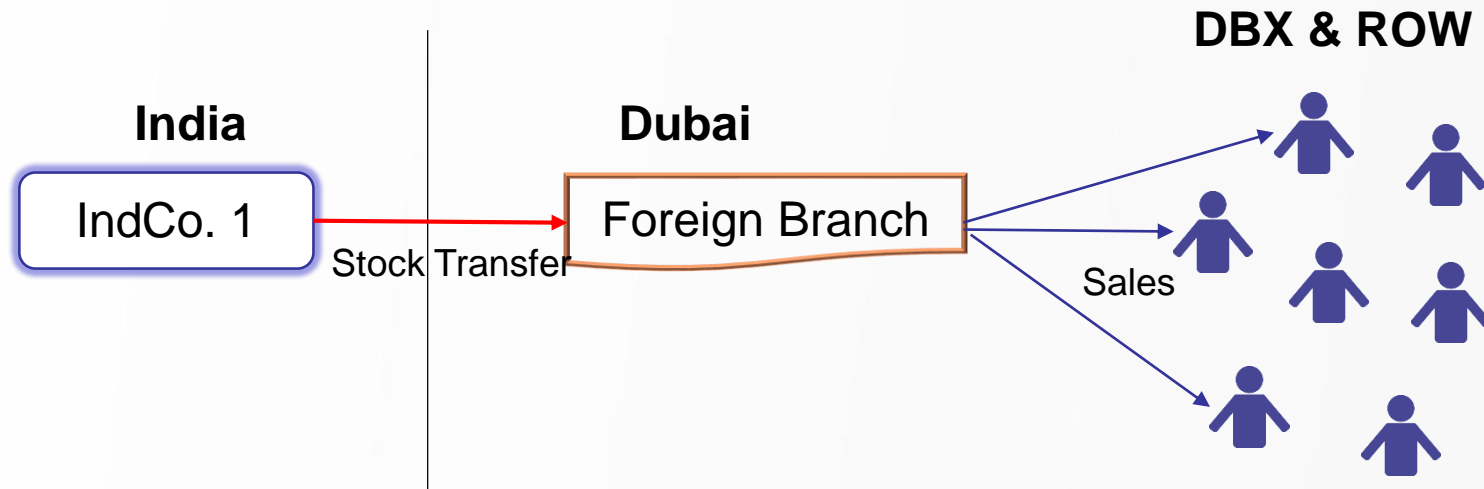


Issue: Is LO allowed to reimburse its employees for incurrence of such official expenditure?



Case Study - II

Facts: Indian Company intends to open its first branch in Dubai for carrying on indenting activity outside India.



Question: Would 'export' of goods be considered when Indian Company transfers stock to branch *or* when branch actually effects a sale as an indenting agent?

Case Study - III

Facts: XYZ Pte. Ltd. wants to open a branch in India to carry on local B2B trading activity in India. XYZ Pte. Ltd. has been advised that retail trading activity is not permitted under FEMA 22(R)/2016. However, it contends that its activity is B2B in nature and not B2C.



Issue: Would XYZ Pte. Ltd. be allowed to open a branch to carry out such activity? What if goods were purchased from SEZ unit in India and sold to DTA unit?



Thank you



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