Establishment of place of business in and outside India

September 02, 2023

Establishment of place of business by foreign entities in India

Applicable Regulations

01 Foreign Exchange Management Act, 1999 – Section 6(6)

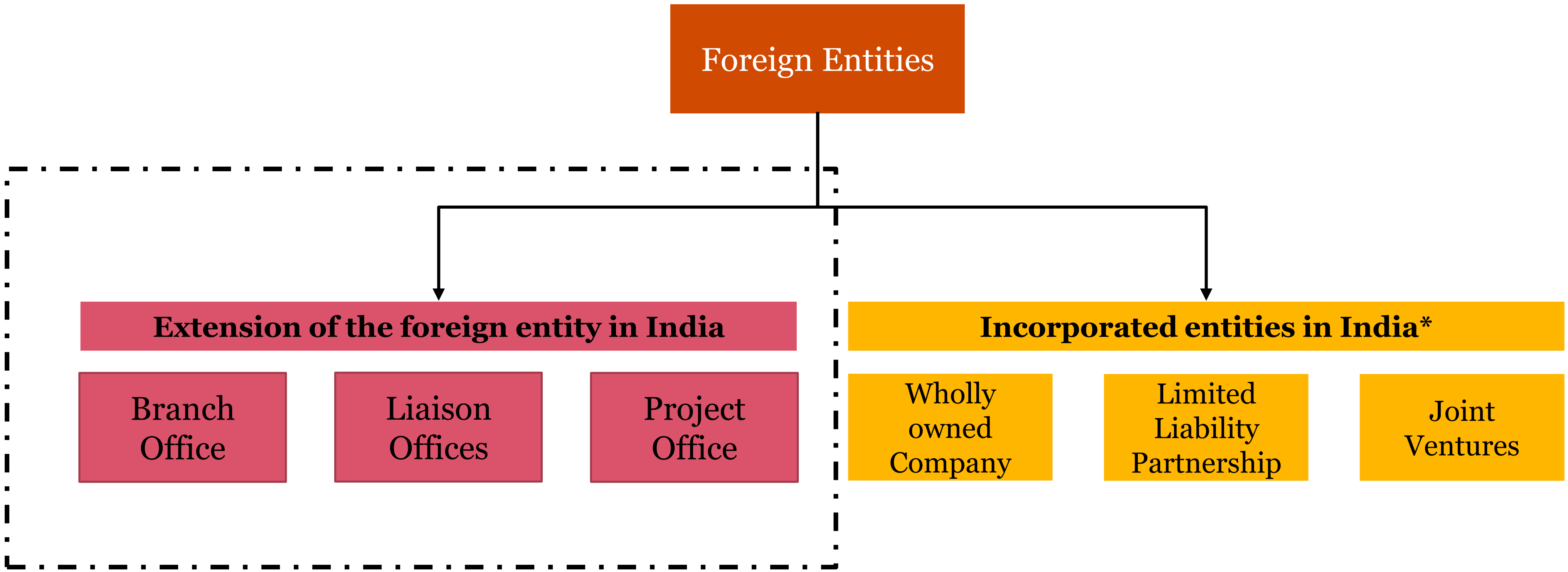
02 Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016

03 Master Direction issued by the Reserve Bank of India ('RBI') on establishment of Branch Office ('BO') / Liaison Office ('LO') / Project Office ('PO') or any other place of business in India by foreign entities

04 Circulars, FAQs and clarifications issued by RBI

Types of Offices

Types of Offices



**Incorporated entities in India are not covered under this presentation.*

Types of Offices (Contd.,)

Types of Offices		
Branch Office (‘BO’)	Liaison Office (‘LO’)	Project Office (‘PO’)
BO in relation to a company, means any establishment described as such by the company.	LO means a place of business to act as a channel of communication between the principal place of business or Head Office (‘HO’) 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.	PO means a place of business in India to represent the interests of the foreign company executing a project in India but excludes a LO. Further, a 'Site Office' means a sub-office of the PO established at the site of a project but does not include a LO.

Permitted Activities

Permitted Activities

Branch Office ('BO')

Typically, the BO should be engaged in the activity in which the parent company is engaged. The permitted activities for the BO are as under:

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

Liaison Office ('LO')

The permitted activities for the LO are as under:

- ✓ Representing the parent company / group companies in India.
- ✓ Promoting export / import from / to India.
- ✓ Promoting technical / financial collaborations between parent / group companies and companies in India.
- ✓ Acting as a communication channel between the parent company and Indian companies.

Project Office ('PO')

The permitted activities for the PO are as under:

- ✓ Activities specified in the contract awarded by the Indian company to the foreign entity for setting up of the PO in India.

BOis permitted to undertake manufacturing activities as a standalone BO in SEZ
BO/ PO is permitted to acquire property for the purpose of its office/ operations in India

General Criteria

Financial Track Record

Financial Track Record*

For a BO – a profit making track record during the immediately preceding five Financial Years ('FY') in the home country and net worth of not less than USD 100,000 or its equivalent.

For a LO – a profit making track record during the immediately preceding three FY in the home country and net worth of not less than USD 50,000 or its equivalent.

For PO

The project is funded directly by inward remittance from abroad, bilateral or multilateral International Financing Agency; cleared by an appropriate authority;
or
a company or entity in India awarding the contract has been granted term loan by a Public Financial Institution or a bank in India

General Criteria (Contd.,)

Route for setting up BO, LO, PO in India	
Automatic Route	• Powers delegated by the RBI to Authorised Dealer-Banks ('AD-Bank') to allow foreign entity to set up a BO, LO, PO • Principal business of foreign entity falling under automatic route with 100% Foreign Direct Investment ('FDI') permitted • Foreign entity should not be engaged in any sensitive sector
Approval Route	The AD-Banks to refer the matter to RBI for a specific approval in the following cases: • Applicant is a citizen of or is registered / incorporated in Pakistan; • Applicant is a citizen of or is registered / incorporated in a country sharing land border with India including Afghanistan, Iran, 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; • Applicant's Principal business falls Defence, Telecom, Private Security and Information and Broadcasting – no approval required where Government approval has already been sought • Applicant is a Non-Government Organisation ('NGO'), Non-Profit Organisation, Body / Agency / Department of a foreign government. • Specifically for POs – if the PO is being set up pursuant to a sub-contract arrangement.

Setting up BO, LO, PO in India

Foreign entity would be required to obtain approval of Board of Director's to set up either a BO, LO or PO in India

Submission of Form FNC along with the relevant annexures with the concerned AD-Bank

Post review of the documents, if required, the AD-Bank may request for additional information / documents

Preparation of Form FNC along with relevant annexures

The AD-Bank to review and submit Form FNC and relevant annexures with RBI, if required

Automatic route – AD-Bank to issue approval to the foreign entity

Approval route – RBI to issue letter to the foreign entity

Opening of bank account by BO, LO, PO in India

BO

BO may open an account for permitted credits and debits:

- ✓ Credits of funds received from foreign parent company for meeting the expenses of the office and any legitimate receivables arising in the process of its business operations.
- ✓ Debits for the expenses incurred by the BO and towards remittance of profit / winding up proceeds.

LO

LO may open an account to receive remittances from its foreign parent company (Not permitted to maintain more than one account). The permitted credits and debits:

- ✓ Credits - Funds received from its foreign parent company for meeting expenses, refund of security deposits paid locally or directly by the foreign parent company, refund of taxes, duties etc., received from tax authorities, paid from LO's bank account and sale proceeds of assets
- ✓ Debits - Only for meeting the local expenses of the LO.

PO

PO may open two foreign currency accounts usually one denominated in USD and other in the home currency of the project awardee provided both are maintained with the same AD-Bank. Permitted credits and debits as under:

- ✓ Credits of foreign currency receipts from the Project Sanctioning Authority and remittances from parent / group company abroad or bilateral / multilateral international financing agency.
- ✓ Debits - the permissible debits to the account shall be payment of project related expenditure.

Validity of BO, LO and PO

Validity of BO	• Depending upon the validity period granted by the AD-Bank / RBI in its approval letter, if any. *(Extension is permitted subject to obtaining permission from the AD-Bank / RBI.)*
Validity of LO	• Generally – three years. • For Non-Banking Finance Companies ('NBFCs') and entities engaged in construction and development sectors – 2 years. *(Extension is permitted subject to obtaining permission from the AD-Bank / RBI.)*
Validity of PO	• The validity period of the PO is for the tenure of the project. *(Extension is permitted subject to obtaining permission from the AD-Bank RBI.)*

Additional offices and activities

Additional office BO and LO	• No. of offices exceeds four (i.e., one BO / LO in each zone viz; East, West, North and South), would require prior approval of RBI for setting up additional office. • One of its offices in India to be identified as its nodal office. • Prior approval of RBI would be required for shifting of the existing BO / LO to another city in India. However, no permission is required if the LO / BO is shifted to another place in the same city.
Additional office PO	• PO can have additional office in the form of a site office i.e., a sub-office of the PO established at the site of a project but does not include a LO.
Additional activities	• In order to undertake activities permitted by RBI, prior approval from AD-Bank / RBI may be required to undertake additional activities by BO, LO, PO.

Remittance of profit / surplus

Remittance by BO	• Permitted to remit the profit / surplus of the BO outside India, subject to AD-Bank's prior approval.
Remittance by PO	• The AD-Bank can permit intermittent remittances by PO pending winding up / completion of the project, on case-to-case basis.

LO is not permitted to earn profit

Other points for consideration

Compliances with AD-Bank / RBI / DGIT

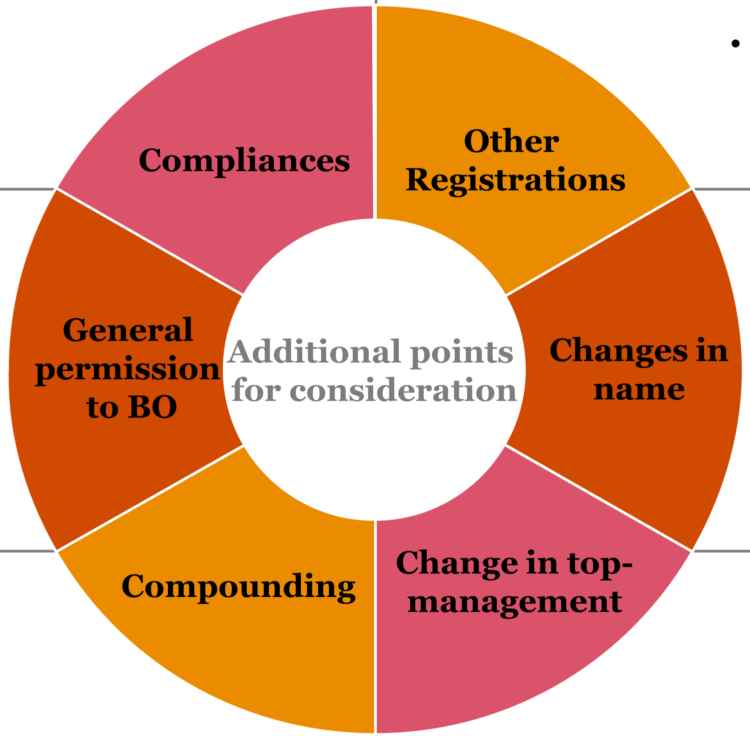
- BO, LO is required to submit Annual Activity Certificate (‘AAC’) with the AD-Bank / RBI / DGIT on annual basis along with the audited financial.
- PO is required to submit the AAC only with the AD-Bank.
- The said compliance is done on annual basis by 30th Sep or within 6 months of closure of financial year

General permission to BO

- Foreign entity is permitted to establish BO in the Special Economic Zones (‘SEZs’) to undertake manufacturing and service activities, subject to certain conditions.
- One of the key condition is BO should be functioning in a sector wherein 100 % FDI is permitted.

Compounding

- BO, LO, PO can regularise the non-compliance of the regulations before the Compounding Cell of the RBI on sou-moto basis.
- AD-Bank / RBI can instruct the BO, LO, PO to approach the Compounding Cell of the RBI for regularisation of non-compliance of the regulations.
- Compounding Cell of the RBI may levy penalty



Other Registrations

- The foreign entity is required to obtain registration from the Registrar of Companies within 30 days of obtaining approval for setting up BO, LO, PO in India from AD-Bank / RBI.
- Entities from Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong, Macau or Pakistan register with DGIP in Delhi and each concerned state where office is established

Changes in name

- Permission required for change in the name of the existing BO, LO only if the foreign entity changes its name without change in ownership.
- Change in name on account of acquisitions/mergers of foreign entities involving change in ownership, the acquired entity or new entity is required to apply afresh by closing the existing entity.

Change in top-management

- Change in the top management or CEO / MD / CMD etc., of the BO, LO does not require prior approval from the RBI, however, the AD-Bank should be intimated about the same.

Applicable Regulations under Companies Act, 2013

01 Companies Act, 2013

02 Companies (Registration of Foreign Companies) Rules, 2014

03 Circulars and clarifications issued by RBI

Obtaining registration from Registrar of Companies

Foreign entity would be required to obtain approval of Board of Director's to set up either a Bo or a LO or a PO in India

Submission of e-Form FNC 1, along with the relevant annexures with RoC (payment of statutory fee

Post review of the documents, if required, the RoC may request for additional information / documents

Preparation of e-Form 1 along with relevant annexures

The RoC to review the e-Form FC-1 and raise queries

Issue of Certificate of Establishment of Place of Business in India by RoC

For RoC registration, an authorized representative is required to be appointed in India
Should be a person resident in India as per Companies Act provisions

Closure of BO, LO, PO

Step 1 - Transfer of assets of BO, LO, PO

Automatic Route

- Powers delegated by RBI to AD-Bank to transfer of assets of the BO, LO, PO by way of sale to JV or WoS or to a resident 3rd party where foreign entity intends to close BO, LO, PO operations in India

Approval Route

- Prior approval from the RBI will be required in the following cases:

  ✓ Transfer of assets prior to closure of BO, LO, PO;
  ✓ Transfer of liabilities along with assets of BO, LO, PO;
  ✓ In case the BO, LO, PO are not meeting the conditions prescribed under the regulations issued by RBI; and
  ✓ Any other specific reason which may vary from case-to-case basis.

Approval Process → Application to be submitted with the AD-Bank for transfer of assets → AD-Bank to review the documents and raise queries, if required → If the AD-Bank is satisfied with the facts of the case, an approval will be issued without referring the matter to the RBI

Closure of BO, LO, PO (Contd.,)

Step 2 – Closure of BO, LO, PO

Automatic Route

- Closure of BO, LO, PO voluntarily where foreign entity intends to close BO, LO, PO operations in India

Approval Route

- BO, LO, PO intending to close their business operations in India would require prior approval from the RBI in the following cases:

  ✓ BO, LO, PO are active but has not applied for extension upon expiration of their validity;
  ✓ BO, LO, PO is inactive for many years;
  ✓ BO, LO, PO has not been complying with the conditions prescribed under the regulations issued by RBI;
  ✓ Any other specific reason which may vary from case-to-case basis.

Closure process → Certificate of closure from RoC → Application to be submitted with the AD-Bank for closure of BO, LO, PO → AD-Bank to review the documents and raise queries, if required → If the AD-Bank is satisfied with the facts of the case, an approval will be issued without referring the matter to the RBI

Establishment of place of business outside India by Indian entities

Applicable Regulations

01 Foreign Exchange Management Act, 1999

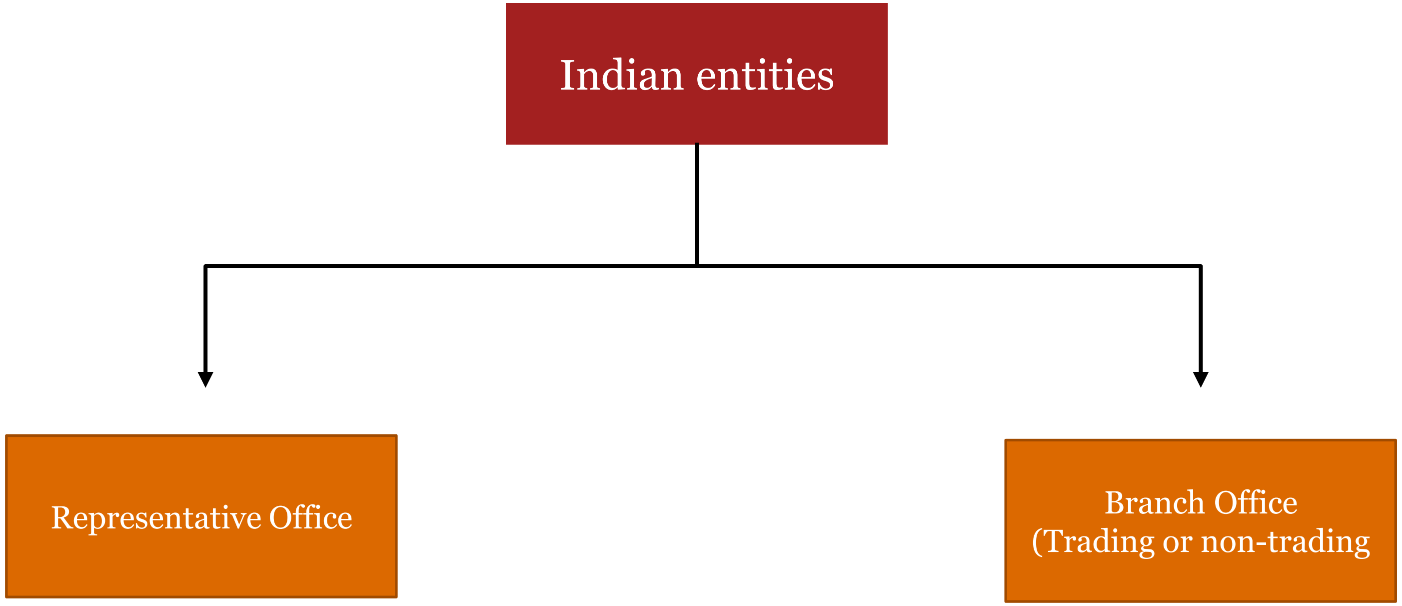
02 Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2015

03 Master Direction issued by the RBI on Deposits and Accounts

04 Circulars, notifications, FAQs and clarifications issued by RBI

Types of Offices

Types of Offices



Key conditions for maintaining office outside India

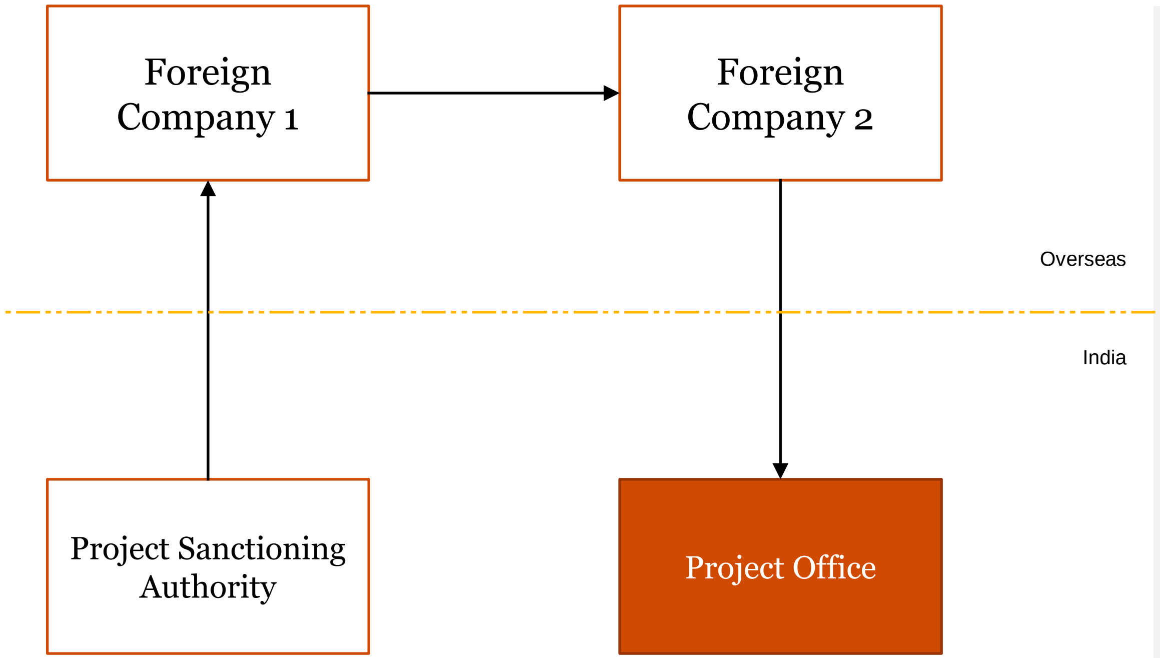
Activities	• The overseas office / branch or representative office for conducting normal business activities of the Indian entity • Office equipment and other assets for normal business operations can be acquired • Office space can be acquired on lease basis for period not exceeding 5 years
Bank account can be opened for representative or branch office outside India	• Remittances to meet initial expenses - 15 % of the average annual sales / income or turnover of the Indian entity during the last 2 financial years or up to 25 % of the net worth, whichever is higher • Remittances to meet recurring expenses - 10 % of such average annual sales / income or turnover during the last financial year • Limits not applicable where remittance is made out of EEFC account or remittance by a EOU, EPZ or STPI • Account to be closed where office is not set up or representative is not appointed within 6 months or within 1 month of closure of BO or

Overseas branch/ office is required to remit surplus back to India

Timelines of 60 days post closure of accounts

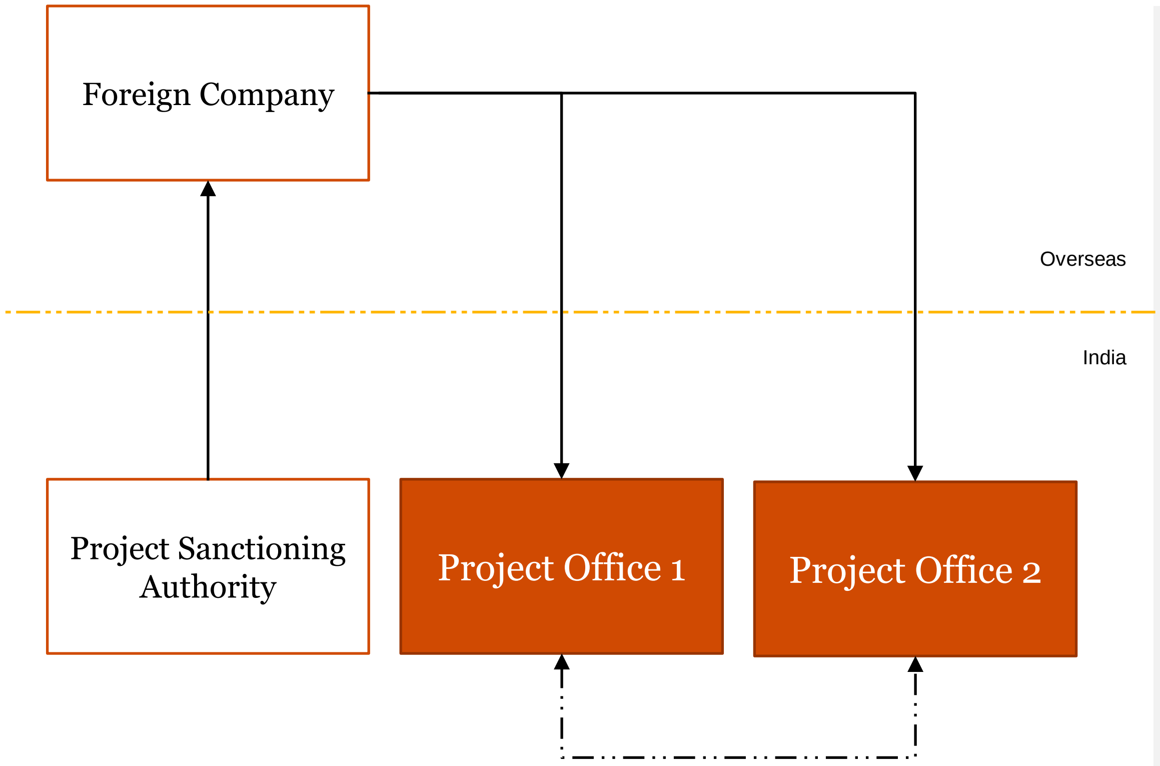
Relevant Case Studies

Case Study No. 1 – Sub-contract arrangement



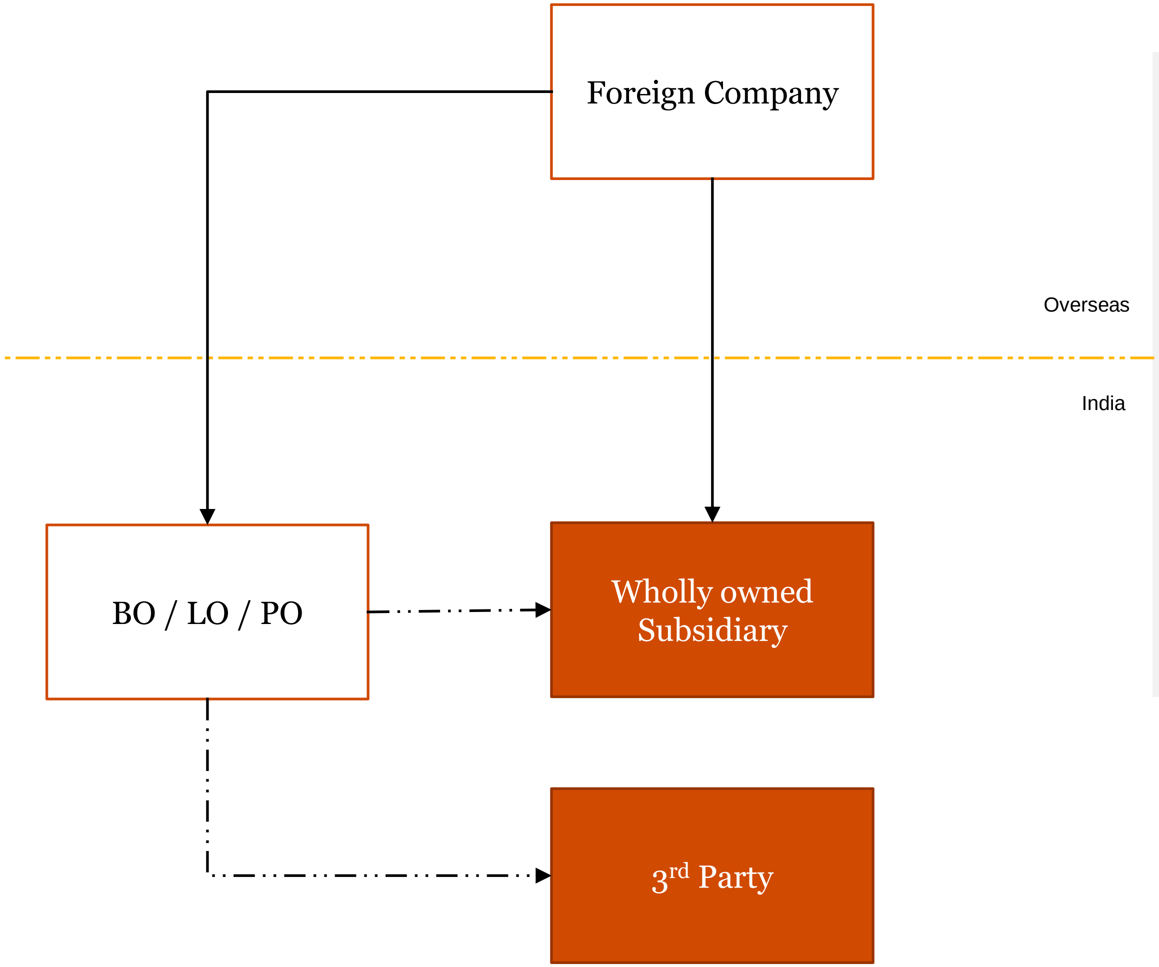
- The Project Sanctioning Authority ('PSA') awarded a contract to the Foreign Company 1, and in turn, Foreign Company No. 1 awarded a sub-contract to Foreign Company 2.
- Pursuant to the sub-contract arrangement between Foreign Company 1 and Foreign Company 2, a PO will be set up in India by the Foreign Company 2 for the execution of the said contract.
- Since the Foreign Company 2 is not being awarded a contract by an Indian company, prior approval from the RBI would be required for setting up a PO in India.
- The requirement of obtaining approval should be dispensed off as the PSA is ultimately an Indian company and there is no change in the scope of services of the contract.

Case Study No. 2 – Utilisation of Input Tax Credit (‘ITC’) between POs



- Pursuant to the two separate contracts awarded by PSA to the Foreign Company, two separate POs are set-up by the Foreign Company in India.
- However, GST Authorities issues only one GST registration no. at the entity level and not at the PO level.
- Therefore, Project Office 1 is not able utilize the ITC available with the Project Office 2 and is required to discharge is tax liability in cash.
- However, the same maybe permitted post obtaining approval from the RBI for allowing the POs to use its ITC for discharging its liability by utilizing ITC available with both the POs.

Case Study No. 3 – Transfer of assets and liabilities by a BO

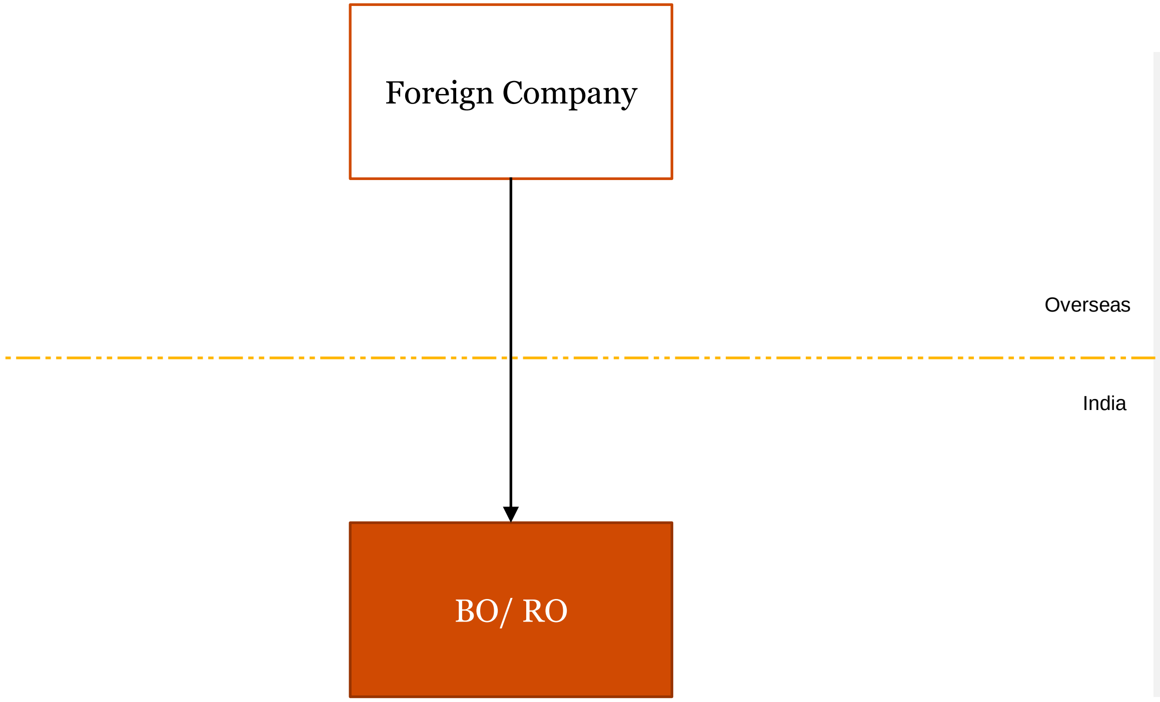


- <u>Transfer of assets during closure</u> - Permitted under the automatic route to transfer assets to the Wholly owned Subsidiary ('WoS') or to a resident 3rd party.

- <u>Transfer of assets before closure</u> – Prior approval from the RBI is required for transfer of assets to the WoS or the 3rd party before the closure.

- <u>Transfer of liabilities before or during the closure</u> – Prior RBI approval is required.

Case Study No. 4 – RBI approval for excess remittance from India towards overseas office



- Remittances were made in excess of the prescribed limits by the India entity
- RBI approval was sought post facto for making remittance in excess of limits prescribed
- Indian entity had to submit details of turnover of branch office, start of operations, extent of operations, employee details etc.

Thank you