Nishith Desai Associates

LEGAL AND TAX COUNSELING WORLDWIDE

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Doing Business in India

Considerations From a Germany-India Tax Perspective

August 2018

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1. German - India Relations: Background

India and Germany have enjoyed long-standing historic and cultural ties due to strong shared values of democracy, rule of law, pluralism, tradition and culture. Germany is India's biggest trading partner in Europe and the second largest technology partner.[1]

The relations between India and Germany date back to the early 16th century when German trading companies from Augsburg and Nuremberg started operating in India.[2] The depth of the Indo-German relations is reflected in the fact that Werner Von Siemens, founder of Siemens, personally supervised the laying of telegraph line between Kolkata and London, which was completed in 1870.[3] Further, the first wholly - owned subsidiary of Bayer in Asia "Farbenfabriken Bayer and Co. Ltd." was set-up in Mumbai as far back as 1896. [4] Since then, there has been a continuous advancement in trade and investment flow between the two countries.

Foreign direct investment (FDI) from Germany into India has significantly increased since 2005. The cumulative FDI inflows from Germany into India in the period from April 2000 to March 2017 has been USD 10.71 billion.[5] Industries which have attracted the highest inflow from Germany include services, IT & telecommunications, real estate, automobile, energy & chemicals. Major German automobile giants such as BMW, Mercedes, Daimler, Audi, Volkswagen and Porsche have set up manufacturing and assembly units in India. Other German companies that have made significant investments into India include Siemens, Bosch, Bayer, SAP, Deutsche Bank, Kion Group, Linde AG and others. Further, the recently launched Make in India Mittelstand (**"MIIM"**) program has mobilized nearly 830 million Euros from German SMEs.[6] The program is currently facilitating 113 German SMEs in respect of their entry into India.

Similarly, Indian companies too have been making significant investments in Germany. In the last few years, Indian corporates have invested over USD 7 billion in Germany.[7] Sectors such as IT, automotive, pharma and biotech have received the majority of the Indian investments.[8] Some well-known Indian family run companies such as Ranbaxy, Hinduja Group, Biocon, Hexaware Technologies, Dr. Reddy's Laboratories, Reliance, Kalyani Steels, Endurance Technologies, PCM Group, Bharat Forge, Mahindra & Mahindra, etc. have established presence in Germany. Further, some well-known Indian software companies such as Infosys, Wipro and TCS have set up operations in Germany as well.[9] There are more than 1600 Indo-German collaborations and over 600 Indo-German joint ventures in operation, and about 200 Indian companies operate in Germany.[10]

The German economy's success is largely defined by the role played by the Mittelstand companies, which specialize in their niche product offering, invests into research and development, and are family owned. This last characteristic of Mittelstand companies is what strikes a common chord with Indian companies who are family owned deeply valuing the culture and traditions along with their conservative approach towards borrowing. Thus, the commonality of philosophy and the complementary nature of offerings which Mittelstand and the Indian companies share, such as Mittelstand companies bring in their

1. Reference to Ministry of External Affairs briefing note, available at: http://www.mea.gov.in/Portal/ForeignRelation/Germany-January-2012.pdf
2. India-Germany bilateral relations, available at: http://www.ficci.com/international/75179/Project_docs/India-Germany-Bilateral-Relations-21-12-12.pdf
3. India-Germany Relations, Ministry of External Affairs, Government of India available at: http://www.mea.gov.in/Portal/ForeignRelation/Germany.pdf
4. Ibid
5. https://www.indianembassy.de/relationpages.php?id=37
6. http://www.makeinindiamittelstand.de/
7. https://www.indianembassy.de/relationpages.php?id=37
8. Ibid
9. Supra 7
10. Supra 7

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specialized technology and Indian companies bring in their local market expertise to provide for a great opportunity for mutual co-operation.

A number of bilateral agreements and institutional arrangements have been executed between India and Germany. Listed below are some of the key agreements:

- Income and Capital Tax treaty entered on June 19, 1995 which became effective on January 01 1997 (for Germany) and on April 01, 1997 (for India);
- Social Security treaty entered on October 12, 2011, became effective on May 01, 2017.
- MoU entered into on October 5, 2015 for setting up a fast-track system in India for German companies investing in India. In this regard a fast-track system for German companies has been set up in Department of Industrial Policy & Promotion (DIPP), as agreed between the two sides at the 3rd Inter-Governmental Consultations. Further, the MIIM program, an investment facilitation programme was also launched by Embassy of India in September 2015 to facilitate investments by German Mittelstand companies. The MIIM Program is being run with support of DIPP and other Central and State agencies.

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2. German - India Tax Treaty: Special Considerations

I. Residency

Issues have arisen when tax treaty benefits are claimed by hybrid entities.

Benefits under the German-India tax treaty are available to residents liable to tax in Germany. The Indian tax authorities sought to deny treaty benefits to a German Kommandit Gesellschaft (KG) or limited partnership on the basis that it was a transparent entity. However in DIT v. Chiron Bhering [11], the Bombay High Court noted that although a German limited general partnership does not pay income tax, it is subject to Gewerbesteuer or trade tax which is specifically covered under the German-India tax treaty. On this basis, it was held that the German KG cannot be denied treaty benefits.

In contrast, the Authority for Advance Ruling held that a Swiss general partnership (Schellenberg Wittmer [12]) is not entitled to treaty benefits since it is a fiscally transparent entity. It was further held that the Swiss resident partners of the partnership could also not take advantage of the treaty since they were not direct recipients of the income, and because the Swiss-India treaty does not recognize partnerships.

Another issue that arises is when an entity is treated as a tax resident under the laws of both countries. Tax residence in a particular jurisdiction generally attracts taxation of the worldwide income of the individual / entity concerned in that jurisdiction. The India-Germany tax treaty provides a tie-breaker rule to address situations where an entity is a resident of both countries under their domestic laws, i.e., the entity will be treated as a resident of the jurisdiction where its place of effective management (**"POEM"**) is situated.

These tie-breaker rules in the India-Germany tax treaty becomes important in light of the amendment introduced in 2015 in India with respect to criteria for determination of tax residence of companies incorporated outside India. Prior to this amendment, i.e., up to financial year 2015-16, a company incorporated outside India qualified as an Indian tax resident in a financial year (April 1 to March 31) only if the entire control and management of its affairs was located in India during that financial year. From financial year 2016-17 onwards, a foreign company qualifies as tax resident in India if its POEM in the relevant financial year is in India.

The Indian domestic law and the India-Germany tax treaty (in the context of the tie-breaker rule) prescribe the same criteria (i.e., POEM) for determining tax residence of companies. However, it is important to note that the jurisprudence which has evolved globally for determining where POEM of a company is situated while being retained in the India-Germany tax treaty, is somewhat different as compared to the guidelines issued by the Indian government in January 2017 for determination of POEM under domestic law. Having said that, the government has incorporated certain points of feedback from market participants and the final guidelines issued in January 2017 essentially prescribe the following:

a. Foreign companies carrying on an Active Business Outside India (**"ABOI"**) benefit from a presumption that their POEM is outside India (provided a majority of the board meetings of such company takes place outside India, and the board actively exercises its power of management). A foreign company is said to be engaged in ABOI only if (i) less than 50% of its employees are situated in India; and (ii) less than 50% of its assets are situated in India; and (iii) less than 50% of its employees are situated in India; and (iv) payroll expenses incurred on such employees comprise less than 50% of its total payroll expenses (**"ABOI Test"**).

11. TS-12-HC-2013 (BOM)

12. [2012] 210 TAXMAN 319 (AAR)

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b. Foreign companies that do not meet the ABOI test are subject to a two-step test to determine POEM. Step 1 involves the identification of the persons who make the key commercial or management decisions of such company, while step 2 involves determining the place where such decisions are made.

c. The final guidelines for determination of POEM also highlight that the approach for determination of POEM is that of substance over form and depends on the facts of each case. Accordingly, no single guiding principle will be decisive and various factors will have to be taken into consideration to determine whether a foreign company has a POEM in India.

d. Certain administrative safeguards have also been included in the POEM final guidelines to ensure that senior revenue officers have to be consulted before initiating an inquiry into the POEM of the entity. Further, the assessing officer is required to consult a collegium of senior officers before holding that the POEM of a non-resident is in India.

Further, the Central Board of Direct Taxes (**"CBDT"**) has however clarified that provisions relating to POEM would not apply to companies having turnover or gross receipts less than INR 500 million during a financial year.

II. Permanent Establishment (PE) Risks

German companies having a PE in India would be taxed to the extent of income attributable to such PE. It is necessary to take into account specific PE related tax exposure in the German-India context.

A PE may be constituted if a German enterprise has a fixed base, office, branch, factory, workshop, etc. in India. A construction PE may be constituted if the work carried on at a building or construction site, installation or assembly project or supervisory activities in connection therewith continue for a period of more than 6 months. A German enterprise is also deemed to have a PE in India if it provides services or facilities in connection with, or supplies plant and machinery on hire used for or to be used in the prospecting for or extraction or exploitation of mineral oils in India.

In the early case of CIT v. Visakhapatnam Port Trust [13], the Andhra Pradesh High Court held that mere supply of a plant by a German company whose assembly and erection are undertaken by purchaser under supervision of engineer deputed by supplier does not result in a PE in India. However, the Delhi Tribunal in the case of Steel Authority of India Ltd. v. ACIT [14] held that a building site or construction, installation or assembly project need not be that of the taxpayer and supervisory activities carried out in connection therewith becomes a PE of the taxpayer if they continue for a period exceeding 6 months. Therefore, even if the installation or assembly project does not belong to the taxpayer, the fact that he has been providing supervisory services for installation purposes for a period exceeding six months would make it a PE.

A dependent agent in India of the German enterprise would be treated as a PE if the agent negotiates and concludes contracts, maintains a stock of goods for delivery or habitually secures orders on behalf of the German enterprise.

The Protocol to the treaty clarifies that any direct and independent supply of equipment or machinery from the German head office should not be attributable to profits arising from the building site, construction, assembly or installation project in India. Income derived by a German enterprise from planning, project, construction or research activities as well as income from technical services exercised in India in connection with a PE situated in India, shall not be attributed to that PE.

Recently, the Income Tax Appellate Tribunal in Mumbai passed an order in the matter of Rheinbraun Engineering Und Wasser GmbH

13. 1983 144 ITR 146 AP

14. (2006) 10 SOT 351 (Del)

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v. DDIT [15]. The case involved a question under Article 5(2) of the India-Germany tax treaty. The taxpayer company was a tax resident of Germany, and was engaged in the business of providing consultancy services relating to mining and exploration of natural resources.

During the assessment year in question, the taxpayer had provided services to certain Indian customers and the company's employees had visited India in respect of these. The Indian revenue authorities argued that the presence of the employees of the taxpayer constituted a permanent establishment for the company in India.

As per the provisions of Article 5(2) of the treaty, the term "permanent establishment" includes a building site or construction, installation or assembly project or supervisory activities in connection therewith where such site, project or activities continue for longer than six months.

The Mumbai tribunal rejected the claim of the revenue authorities by stating that while evaluating whether the supervisors had spent more than 6 (six) months in India, the actual number of days spent in India as opposed to the duration of the contract.

Recently, new set of tax challenges arose with such evolving models. There have been difficulties in determining where the income generated should be taxed particularly with respect to nexus, characterization, valuation of data and user contribution with increasing digitalization of businesses. To that end the Government has introduced the Significant Economic Presence (**"SEP"**) test to determine taxable nexus with India. While SEP would need to be brought into the DTAA through another Multilateral Instrument (**"MLI"**), the Indian Government continues to push for the expansion of the PE concept through the Base Erosion and Profit Shifting Project.

As a consequence of the MLI, there has been a significant expansion in the scope of the definition of PE and taxable nexus. However, India is looking to expand it further and not only with respect to digital transaction or businesses since it has introduced SEP and not a digital economic presence test, which would therefore apply to all transaction above a certain value or systematic involvement with users or consumers in India.

III. Taxation of Capital Gains

Gains arising to a German resident from the sale of shares of an Indian company would be taxable in India. The treaty does not provide any relief in this regard.

Capital gains are categorized as short term and long term depending upon the time for which they are held. Gains from listed shares which are held for a period of more than 12 months are categorized as long term gains. Accordingly, gains from listed shares which are held for less than 12 months are categorized as short term gains In case of unlisted shares, they would be treated as long term only when they are held for more than 24 months.

If the holding period for unlisted shares is lesser than 24 months, then it is in the nature of short term gains. The Finance Act, 2016 had reduced the holding period from 36 months to 24 months for such gains to be treated as long term gains.

Long term capital gains arising out sale of listed shares on the stock exchange are subject to a beneficial tax rate of 10% where such gains exceed INR 100,000 (1,235 Euros approx.). provided that securities transaction tax (STT) is paid both at the time of acquisition and sale of shares. Further, the government also came out with a notification specifying certain transactions that would not be subject to the condition of STT having being paid at the time of acquisition and sale of shares to avail the beneficial 10% capital gains tax rate. Long term capital gains from transfer of listed shares off the floor of the stock exchange are taxable at the rate of 20% in case of non- resident individuals or companies (with benefit of adjustment for foreign exchange fluctuation).

In case of non-residents, long term gains arising from the sale of unlisted shares are taxed at

15. ITA No. 2353/Mum/2006, order dated March 4, 2016.

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the rate of 20% in case of unlisted shares of public companies (with benefit of adjustment for foreign exchange fluctuation) and at 10% in case of unlisted shares of private companies (without benefit of adjustment for foreign exchange fluctuation). The Finance Act, 2016 harmonized the position on long term gains on sale of unlisted shares of private companies by taxing such gains at 10% (without benefit of adjustment for foreign exchange fluctuation) in all cases.

Short term capital gains arising (including to a non-resident) out of sale of listed shares on the stock exchange are taxed at the rate of 15%, while such gains arising to a non-resident company from sale of unlisted shares or sale of listed shares off the floor of the stock exchange is 40%.

In this context, it is interesting to note that the Authority for Advance Ruling in the case of In Re, RST [16] held that even in a case where a German company was holding 99.99% of the shares of a subsidiary in India, the Indian company could not be regarded as a wholly-owned subsidiary of the German company and therefore the capital gains tax relief which was allowed under Section 47(iv) (for parent-subsidiary transfers) of the Income Tax Act, 1961 (ITA) could not be applied.

Further, pursuant to the Vodafone case in 2012[17] transfer of shares of a German entity that holds Indian assets or more specifically shares in an Indian company or interest in an Indian LLP would also be subject to capital gains tax in India. The German entity whose shares are being transferred should derive more than 50% of its value from underlying shares or assets in India and such value would be calculated as per the prescribed rules which mandates looking at the total asset value and discounting the debt. This would be an issue in the event of reorganizations or share acquisitions at the time of exit at the German company level or even at the holding company level in the event the German company is a subsidiary, so long as value is derived from assets in India.

IV. Taxation of Interest, Royalty and Fees for Technical Services (FTS)

Interest, royalties and FTS arising in India and paid to a Germany resident may be taxed in Germany. However, if the German resident is the beneficial owner of the interest, royalties or FTS, the tax so charged shall not exceed 10% of the gross amount that is paid. The domestic withholding tax rate can be as high as 40% on interest and 10% (on a gross basis) for royalties and FTS.

Interest covers income from debt-claims of every kind. Royalties is defined to mean consideration for the right to use any copyright of literary, artistic or scientific work, including cinematograph films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.The definition of royalty is more restricted than under Indian domestic law which has been recently subject to certain retroactive amendments. FTS refers to payments of any amount in consideration for the services of managerial, technical or consultancy nature, including the provision of services by technical or other personnel respectively.

The Mumbai Tribunal in the case of Siemens Ltd. v CIT[18] held that payments made to laboratories, for conducting certain tests by using highly sophisticated technology without using human intervention for the purpose of certification does not fall within the meaning of FTS under Section 9(1)(vii) of the ITA.

Further, the Ahmedabad Tribunal, in the recent case (2017) of *Oncology Services India Pvt. Ltd. v. ADIT*[19], ruled that certain payments made by an Indian entity to a German entity constituted royalty. The services for which the payments were held to be royalty under the India – Germany DTAA were sharing of Standard

16. [2012] 348 ITR 368 (AAR)
17. (2012) 6 SCC 613
18. [2013] 30 taxmann.com 200 (Mum)
19. ITA No. 2990/Ahd/2013.

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Operating Procedures (SOPs), access to database, email server, hardware/ software along with the right to use the name, brand, logo and website.

V. Operation of Pool, Joint Business or an International Operating Agency

Under Article 8(4) of the German-India tax treaty, profits from operations of ships or aircrafts in international traffic shall be taxable only in the State which the entity in question has its place of effective management. The benefit of this provision was revalidated by the High Court of Delhi in a case involving Lufthansa Airlines.[20]

In the aforementioned matter, the taxpayer was a member of the "International Airlines Technical Pool" (**"IATP"**). As an IATP member, it extended certain minimum technical facilities to other IATP member airlines at New Delhi. For these services, the taxpayer company did not receive any amounts from these airlines, but it received notional credits through IATP's internal clearing house mechanism.

While the taxpayer company sought to claim benefits under Article 8(4) of the German-India tax treaty, the Indian revenue authorities claimed that the taxpayer's income from service was taxable in India as business profits attributable to its branch office.

When the dispute reached the level of the High Court, the tax authorities contended that the term "pool" has not been defined under treaty. The revenue authorities claimed that the term "pool" referred to reciprocity between two members of the pool for extending / obtaining facilities. In such a scenario, the parties who are members of the pool had to provide facilities to each other. In the present scenario, the taxpayer company had provided the facilities to other airlines only with the objective of generating revenue from spare capacity.

On the other hand, the taxpayer claimed that it had entered into separate agreements with various IATP members for extending and availing services. On the basis of this the High Court concluded that the taxpayer formed part of a pooling arrangement and the services were rendered in furtherance of the same. Therefore, the income earned by Lufthansa was held to be not subject to tax in India.

VI. Relief from Double Taxation

Under the German-India DTAA, an exemption should be allowed in Germany for any income that arises in India which may be taxed in India in accordance with the treaty. With respect to dividends, the exemption applies only if the German company holds at least 10% of the share capital of the Indian company. Other income not covered by the exemption is subject to available foreign tax credit with respect to taxes paid in India.

VII. Exchange of Information

With a view to curb tax evasion and money laundering, India has been actively entering into arrangements for exchange of information with other countries. The German-India tax treaty also provides a framework for exchange of information between the two Governments. In Ram Jethmalani & Ors. vs Union of India (Civil Writ Petition No. 176 of 2009) the Indian Supreme Court noted that while there is a requirement for confidentiality, the German-India tax treaty permitted disclosure of information in Court proceedings. The Government was accordingly directed to reveal details of accused individuals with Liechtenstein bank accounts, the details of which were shared by the German Government.

20. ITA 610/2004 (decision dated January 25, 2017).

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VIII. German – India: Bilateral Investment Promotion and Protection Agreement

Bilateral investment promotion and protection agreements (BIPAs) are agreements between two States for the reciprocal encouragement, promotion and protection of investments in each other's territories by individuals and companies situated in either State.

India entered into a BIPA with Germany on July 10, 1995 which came into force July 13, 1998. The India-Germany BIPA stated that investments and investors would be provided "all times fair and equitable treatment and full protection and security". BIPA provides legal basis for enforcing the rights of the investors of both the countries and provides for fair and equitable treatment, full and constant legal security and dispute resolution through international mechanism.

However, the BIPAs withcertain European countries, including Germany, Spain and Italy have been terminated.

The termination of the BIPA did not have an impact of the existing investments by German investors as the BIPA provides that such investments shall be protected for a period of 15 years from the date of termination of the treaty.

IX. Multilateral Instrument

On June 7, 2017, 68 developed and developing countries signed the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting", otherwise referred to as the Multilateral Instrument (**"MLI"**), to modify a large number of bilateral tax treaties entered into by over 68 countries. After the first signing ceremony, four more countries, viz., Cameroon, Curacao, Mauritius and Nigeria signed the MLI. On January 24, 2018, during the second signing ceremony, six more jurisdictions, viz., Barbados, Côte d'Ivoire, Jamaica, Malaysia, Panama and Tunisia signed the MLI, taking the total signatories to 78. Additionally, four other jurisdictions, viz., Algeria, Kazakhstan, Oman and Swaziland have expressed their intent to sign the MLI in the near future. The signing of the MLI represents the dawn of a new era with respect to the taxation of cross-border businesses. It's entry into effect will have a significant impact for Indian businesses with cross-border operations and foreign investors keen on investing in India.

Presently, the signatories to the MLI include the United Kingdom, Canada, Germany, India, Italy, Russia and Mauritius. This has resulted in over 1100 treaties being potentially subject to change. At the same time, significant jurisdictions such as the United States, and Brazil have not signed the MLI. Furthermore, significant treaty partners that account for a substantial amount of investments into India, such as Germany and Mauritius, while having signed the MLI, have not notified it as being applicable to their tax treaties with India, e.g., the India – Germany Double Tax Avoidance Agreement and the India-Mauritius Double Tax Avoidance Arrangement.

On March 22, 2018, Slovenia deposited its instrument of ratification with the Depositary, acceptance or approval of MLI, as the fifth jurisdiction to do so. Pursuant to the same, MLI has come into force on the first day of the month following the expiration of a period of 3 calendar months beginning on the date of deposit of the first instrument of ratification, acceptance or approval, i.e. on July 1, 2018. The four other countries which have deposited their instruments are the Republic of Austria (22 September 2017), the Isle of Man (19 October 2017), Jersey (15 December 2017), and Poland (23 January 2018). These five jurisdictions confirmed their MLI positions without making any changes, however, Slovenia, in the ratification instrument, removed its tax treaty with Germany from the list of CTAs.UK deposited its instrument of ratification on June 29, 2018.

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3. Quick Guide for Investing into India

Particulars	India
Legal system (civil / common)	Common law system
Constitution	The Constitution of India came in effect on January 26, 1950 upon India's independence in 1947. It provides for India to be a sovereign socialist secular democratic republic with a federal-system of government towards the centre.
Key Agreements or Treaties with Germany	▪ Income and Capital Tax treaty entered on June 19, 1995 which became effective on January 01 1997 (for Germany) and on April 01, 1997 (for India); ▪ Social Security treaty entered on October 12, 2011, became effective on May 01, 2017; ▪ MoU entered into on October 5, 2015 for setting up a fast-track system in India for German companies investing in India.
Economic relation (trade) with Germany	Bilateral trade in 2016 was valued at USD 17.42 billion. Germany is India's largest trading partner in Europe. Germany and India hold an Inter-Governmental Consultation every two years (IGC) to discuss and broaden areas of cooperation.
Economic relation (Inbound Investment) with Germany	Germany's total FDI in India from April 2000 until March 2017 amounted to USD 9.69 billion. Germany is the 7th largest foreign direct investor in India since January 2000.
Significant investment from Germany	There are more than 1600 Indo-German collaborations and over 600 Indo-German joint ventures in operation. Some recent investments from German Mittelstand have been the following: ▪ **April 2017:** Murrelektronik GmbH establishes subsidiary in India. ▪ **November 2016:** Verbio announces straw bio methane plant in India. ▪ **September 2016:** Kuhme establishes plant in Pune, India. ▪ **September 2016:** Uniper forms joint venture with India Power Corp. Ltd. ▪ **August 2016:** Senvion acquires Kenersys India.
Opportunities for German companies	Opportunities in sectors such as auto and auto-components, smart cities project, medical device, manufacturing and industrial sectors, such as Chemicals, renewable energy, environment, infrastructure and mobility.
TAXATION	
Sources of Tax laws in India	▪ Income tax in India is levied under the Income Tax Act, 1961 (**"ITA"**); ▪ Double Taxation Avoidance Agreements with more than 80 countries; ▪ A new Goods and Services Tax (GST) regime became effective from July 01, 2017 has been put in place for collection of indirect taxes (manufacturing, consumption, value-added taxes etc.). This is administered by a central body, namely Central Board of Indirect Taxes and Customs (CBIC).

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Federal or state level	Income tax is levied at the Federal level. With the new GST regime majority of the indirect taxes are also levied at Federal level.
Domestic Tax rates	▪ **Individual** – Progressive tax rate, effective top tax rate of 35.54% ▪ **Domestic companies** – 30% general corporate tax rate 25% if turnover is less than INR 2.5 billion 25% for qualified manufacturing/research companies; 10% if patent is developed and registered in India; Surcharge of 7% where total income exceeds INR 10 million and 12% where total income exceeds INR 100 million (surcharge is 5% and 10% respectively prior to assessment year 2016/17) 4% Health and Education Cess levied on income tax payable ▪ **Foreign Companies** – 40% Surcharge of 2% where total income exceeds INR 10 million and 5% where total income exceeds INR 100 million 4% Health and Education Cess levied on income tax payable
Tax rates under India – Germany DTAA	Capital Gains (depending on period of holding, security and type of company) ▪ Long term capital gains in case of shares of unlisted company - 10 / 20% (excluding applicable surcharge and cess) ▪ Long term capital gains in case of equity shares where securities transaction tax is levied (subject to certain exceptions) – 10%. ▪ Short term capital gains in case of shares of unlisted company – normal tax rates ▪ Short term capital gains in case of certain securities where securities transaction tax is levied – 15% ▪ Dividend – 20.55% effective rate of dividend distribution tax ▪ Interest – 10% (excluding applicable surcharge and cess) ▪ Royalties / Fees for technical services - 10% (excluding applicable surcharge and cess)
Loss carry forward	8 years, subject to ownership continuity test.
Alternate minimum tax	Yes, alternative minimum tax of 18.5% plus applicable surcharge and cess is imposed on the adjusted book profits of corporations whose tax liability is less than 18.5% of their book profits.
Controlled Foreign Corporation	No
General Anti Avoidance Rules (GAAR)	Yes applicable from April 1, 2017.
Thin capitalisation	Yes, the Finance Act 2017 introduced provisions dealing with thin capitalization provision.
Disclosure of foreign assets - Voluntary or Amnesty scheme	No more effective. Last scheme was available until September 30, 2016. Disclosure for foreign asset is required to be made in the annual tax return.
Recognises concept of trust or foundation	India being a common law country recognises the concept of trust under the Indian Trusts Act, 1882.
Inheritance or Gift tax	No
Wealth tax	No

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Any special taxes?	▪ Tax on dividends in the hands of shareholders - Yes, 10% additional tax on dividends received by resident individual, HUF, if the dividends exceed INR 1 million. ▪ Stamp duty – Yes, applied at Federal or State level depending on nature of document/ transaction. ▪ Distribution tax on buyback – Yes, 20% (excluding applicable surcharge and cess) on the difference of buy-back consideration and issue price of shares. ▪ Equalisation Levy – Yes, 6% tax on consideration in excess of INR 10 million for online advertising revenues earned by non- residents from India introduced by Finance Act 2016.
CORPORATE	
Main Governing law for corporates	Companies in India are regulated under Companies Act, 2013.
Federal or state level	Administered at Federal level
Type of entities available	Company (private, public, one-person company); Limited liability partnerships; Partnership; Cooperative; Joint Hindu Family; Sole proprietorship; Representative (Liaison) office; Branch of a foreign corporation with Reserve Bank of India approval; Project office.
Form of entity commonly used	Company especially private limited company has been the preferred form for doing business in India. In certain instances, undertaking business through LLPs in India is being preferred by foreign investors because of recent liberalisation of LLPs being now eligible to have foreign interest-holders.
Board structure	Single-board structure with prescribed corporate governance norms.
Requirement of resident director / shareholder	Yes, mandatory requirement of one resident director in case of a company.
Type of instruments	Equity shares/fully, compulsorily and mandatorily convertible debentures/ fully, compulsorily and mandatorily convertible preference shares of an Indian company.
Are Indian companies allowed to merge with foreign companies?	Yes effective from April 13, 2017.
Are there exchange control laws?	Yes, exchange control is regulated under the Foreign Exchange Management Act 1999 (FEMA). The central bank is the Reserve Bank of India (RBI). The Indian rupee is fully convertible for current account transactions, subject to a negative list of transactions that are prohibited or which require prior approval. Capital account transactions can be undertaken only to the extent permitted. Foreign debt is regulated and can be availed after meeting prescribed norms. Remittances of up to USD 250,000 per financial year (April-March) by a resident individual are allowed for any permitted current account or capital account transactions or a combination of both.

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Any requirement to obtain approval for foreign investment?	Investments can be made by non-residents under the Automatic Route or the Government Route. Under the Automatic Route, the non-resident investor or the Indian company does not require any approval from Government of India for the investment. Under the Government Route, prior approval of the Government of India is required. Proposals for foreign investment under Government route, are considered by nodal Administrative Ministry/Department for a given sector. Foreign investment is permitted in most sectors without any approval subject to a few specified sectoral ceilings and prohibitions.
Restriction on repatriation of profits or buy back of capital?	No subject to payment of taxes.
Corporate immigration and Emigration	No provisions for corporate emigration.
DISPUTE RESOLUTION	
Court system	Indian court system is multi-tier structure. At the top of the hierarchy lies the Supreme Court of India which is the highest constitutional court, appellate court and adjudicates appeals from the state High Courts. The High Courts for each of the states (or union territory) are the principal civil courts of original jurisdiction in the state (or union territory), an appellate court for criminal matters and a constitutional court. The District and Sessions Courts are typically courts of first instance for civil and criminal matters. In addition to the above there are various specialised courts and tribunals specially empowered to hear matters in relation to specific subject-matters.
Are court orders from Germany enforceable in India?	No
Are arbitral awards from Germany enforceable in India?	Yes
MISCELLANOUS	
Is it easy to terminate employment?	Termination of services of blue-collared employees may be difficult in India due to extensive protections under various laws.
Can non-resident acquire real estate?	Generally, foreigners are not permitted to acquire immovable property except in certain cases, where the property is required for the business of the Indian branch, office or subsidiary of the foreign entity (excluding a liaison office).

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About NDA

At Nishith Desai Associates, we have earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium *Aligunjan*, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bangalore, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

As an active participant in shaping India's regulatory environment, we at NDA, have the expertise and more importantly – the VISION – to navigate its complexities. Our ongoing endeavors in conducting and facilitating original research in emerging areas of law has helped us develop unparalleled proficiency to anticipate legal obstacles, mitigate potential risks and identify new opportunities for our clients on a global scale. Simply put, for conglomerates looking to conduct business in the subcontinent, NDA takes the uncertainty out of new frontiers.

As a firm of doyens, we pride ourselves in working with select clients within select verticals on complex matters. Our forte lies in providing innovative and strategic advice in futuristic areas of law such as those relating to Blockchain and virtual currencies, Internet of Things (IOT), Aviation, Artificial Intelligence, Privatization of Outer Space, Drones, Robotics, Virtual Reality, Ed-Tech, Med-Tech & Medical Devices and Nanotechnology with our key clientele comprising of marquee Fortune 500 corporations.

The firm has been consistently ranked as one of the Most Innovative Law Firms, across the globe. In fact, NDA has been the proud recipient of the Financial Times – RSG award 4 times in a row, (2014-2017) as the **Most Innovative Indian Law Firm.**

We are a trust based, non-hierarchical, democratic organization that leverages research and knowledge to deliver extraordinary value to our clients. Datum, our unique employer proposition has been developed into a global case study, aptly titled 'Management by Trust in a Democratic Enterprise,' published by John Wiley & Sons, USA.

A brief chronicle our firm's global acclaim for its achievements and prowess through the years -

- **AsiaLaw 2019:** Ranked 'Outstanding' for Technology, Labour & Employment, Private Equity, Regulatory and Tax
- **RSG-Financial Times:** India's Most Innovative Law Firm (2014-2017)
- **Merger Market 2018:** Fastest growing M&A Law Firm
- **IFLR 1000 (International Financial Review - a Euromoney Publication):** Tier 1 for TMT, Private Equity
- **IFLR:** Indian Firm of the Year (2010-2013)
- **Legal 500 2018:** Tier 1 for Disputes, International Taxation, Investment Funds, Labour & Employment, TMT
- **Legal 500 (2011, 2012, 2013, 2014):** No. 1 for International Tax, Investment Funds and TMT

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- **Chambers and Partners Asia Pacific (2017 – 2018):** Tier 1 for Labour & Employment, Tax, TMT
- **IDEX Legal Awards 2015:** Nishith Desai Associates won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm"

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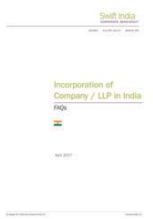

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Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparallel mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical eco-system that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at

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