



The Institute of Chartered Accountants of India

National Conference on International Taxation

INBOUND AND OUTBOUND INVESTMENTS STRUCTURING, FEMA AND INTERNATIONAL TAX PERSPECTIVE

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Bangalore

A dark, moody photograph of a business meeting. In the foreground, a pair of black-rimmed glasses and a black pen rest on a document featuring blue bar charts and line graphs. To the left, a clear glass of water sits on the table. In the background, two men in suits are seated at the table, their hands holding pens as they appear to be in discussion. The overall atmosphere is professional and focused.

FEMA – Inbound Investment - Overview

Inbound Investment Overview

- Foreign Direct Investment (FDI) has been a major non-debt financial resource for the economic development of India.
- Foreign companies invest in India to take advantage of relatively lower wages, special investment privileges like tax exemptions, etc. For a country where foreign investment is being made, it also means achieving technical know-how and generating employment.
- The Indian Government's favourable policy regime and robust business environment has ensured that foreign capital keeps flowing into the country. The Government has taken many initiatives in recent years such as relaxing FDI norms across sectors such as defence, PSU oil refineries, telecom, power exchanges, and stock exchanges, among others
- Investment climate and ease of doing business in India has improved considerably since the opening up of the economy in 1991. India has moved up the World Bank's 'ease of doing business' rankings – from 142nd place in 2014 to 63rd place in 2020
- According to the Department for Promotion of Industry and Internal Trade (DPIIT), FDI equity inflow in India stood at *US\$ 529.63 billion between April 2000 and March 2021*, indicating that the government's efforts to improve ease of doing business and relaxing FDI norms have yielded results.
- FDI into India
 - USD 83.57 Billion in FY22
 - USD 22 Billion – i.e., 27% of above from Singapore
- FDI into Karnataka
 - USD 31 Billion in FY22(i.e., 38% of total FDI)
 - FY22 – USD 8 Billion from Singapore(approx.)

FEMA – Inbound Investment - FDI Overview

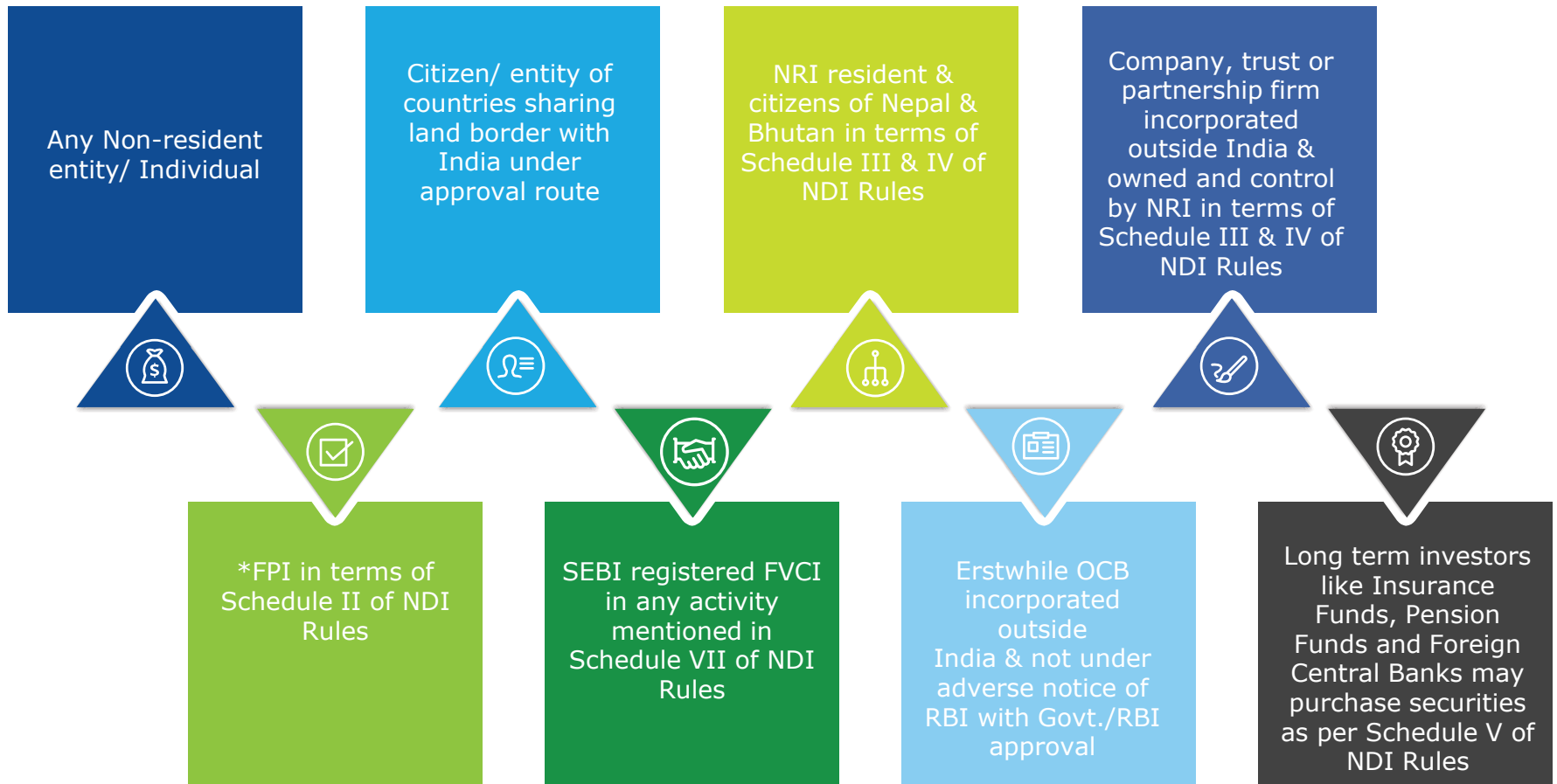
Foreign Direct Investment

When a foreign country makes investment in a business situated in the country it leads to FDI.

Automatic Route	Approval Route	Prohibited Sectors
<ul style="list-style-type: none">• Under the Automatic Route, the non-resident investor or the Indian company does not require any approval from Government of India for the investment.• Permitted for most sectors• No prior approval required only post investment filing• Remittance through normal banking channels• Subject to applicable laws or regulations, security and other conditionalities• Sectors include: IT/ITes, Service sector, Infrastructure, trading (subject to conditionalities), Manufacturing etc.	<ul style="list-style-type: none">• Under the Government route, prior to investment, approval from Government of India is required.• Sectors which do not fall under automatic route• Require prior specific approval subject to FDI limits from concerned ministries alongwith Department of Industrial Policy and Promotion ('DPIIT')• Defence, Broadcasting, Print Media, Civil Aviation, Satellites, Telecom, Small Arms, Private Security Agencies, MBRT, unregulated financial services, Banking, Pharmaceutical etc.	<ul style="list-style-type: none">• Betting, Gambling & Lottery• Chit funds & Nidhi company• Real estate (except construction development and REITs)• Tobacco products• Trading in Transferable Development Rights• Atomic Energy and Railway Operations (other than permitted activities)

Note: Investment by Non-resident entity of a country, which shares land border with India or where the beneficial ownership of an investment into India is situated in or is a citizen of any aforesaid countries, can invest only under the Government route

Eligible Investor



**Investment under the Portfolio Investment Scheme which limits the individual holding of FPI below 10% of the capital of the company and the aggregate limit for FPI investment upto sectoral caps applicable to the Indian company. The aggregate limit can be decreased subject to approval of Board/ Shareholder*

Eligible Investee Entities & Type of Instrument

Eligible Investee Entities

- ✓ Indian companies as per sectoral cap;
- ✓ Partnership Firm/ Proprietary Concern by *NRI/PIO on non repatriation basis;
- ✓ Partnership Firm/Proprietary Concern on repatriable basis subject to approval of Government of India;
- ✓ Startup companies can issue equity/ equity linked instruments or debt instruments or convertible notes;
- ✓ LLPs in sectors wherein FDI is 100% allowed through automatic route & no FDI linked performance condition; and
- ✓ SEBI registered Trust and 'Investment Vehicle' (REIT/INVIT/AIF) by VCF.

Type of Instrument for FDI

- ✓ Equity shares (including partly paid-min.25% upfront-balance 18 months),
- ✓ Share warrants – 18 months;
- ✓ Fully compulsory and mandatorily convertible debentures;
- ✓ Fully compulsory and mandatorily preference shares issued by an Indian company
- ✓ Convertible Notes by Start Ups
- ✓ Capital Contribution in LLP
- ✓ Depositary Receipts / Foreign Currency Convertible Bond
- ✓ Sponsored ADR/ GDRs

**As per Consolidated FDI Policy, 2020, NRIs may seek prior permission of Reserve Bank for investment in sole proprietorship concerns / partnership firms with repatriation option.*

Pricing of Instrument

Fresh Issue

- **Unlisted**
Not less than FV of shares arrived by CA/MB based on IAP on ALB
Non applicability of Pricing norms on MOA subscription shares.
Only Face Value

Preferential /Right Issue

- **Unlisted**
Not less than FV of shares arrived by CA/SEBI registered MB/Cost Accountant based on IAP on ALB

Transfer of Shares

Transfer R to NR

- **Unlisted**
Not less than FV of shares arrived by CA/SEBI registered MB/Cost Accountant based on IAP on ALB

Transfer NR to R

- **Unlisted** Not to exceed FV of shares arrived by CA/SEBI registered MB/Cost Accountant based on IAP on ALB

FDI in LLP

Eligibility Criteria:- LLP is operating in sector where 100% FDI is permitted without any performance linked conditions.

Conversion of Company into LLP:- A company having foreign investment can be converted into a LLP under the automatic route only if it is engaged in a sector where foreign investment up to 100% is permitted under automatic route and there are no FDI linked performance conditions.

Pricing:- FDI in a LLP either by way of capital contribution or by way of acquisition / transfer of profit shares, would have to be more than or equal to the fair price as per any internationally accepted / adopted as per market practice and a valuation certificate is issued by CA/Cost Accountant.

Mode of Payment:- by way of inward remittance through normal banking channels; or by debit to NRE/FCNR(B) account of the person concerned, maintained with an AD Category-I bank.

Exit Options

Transfer of Shares

- Transfer of shares from Non-Resident to Resident or vice-versa shall be in compliance with the FEMA Regulations and adherence to the Pricing guidelines issued by Reserve Bank of India.
- Valuation of shares to be as per internationally accepted pricing methodology.
- Reporting for transfer of equity shares to be done in Form FC-TRS within 60 days with the AD Bank.
- In case, the sector is under approval route, application shall be filed with DPIIT and the concerned ministry.

Initial Public Offerings (IPO) is one of the preferred option when it comes to startup

Winding Up

- Winding up of companies shall be as per the regulations prescribed under Foreign Exchange Management Act.
- A certificate from the Auditor shall be furnished stating that all the liabilities in India have been fully paid or adequately provided for;
- A No Objection Certificate (NOC) shall also be taken from the Income Tax Authorities for the amount being remitted;
- A certificate from the auditor shall be furnished stating that there are no legal proceedings pending in any Court in India against the applicant or the company.

Project based / Loss making / business reasons

Merger

- Application to be filed with NCLT for seeking prior approval;
- Valuation of instruments shall be as per internationally accepted pricing methodology;
- Form Fc-GPR shall be filed with the AD Bank within 30 days from the date of issuance of shares;
- In case of government/ approval route, application to be filed with the concerned ministry for seeking approval.
- Issue of shares on merger to be compliant with sectoral caps or Investment limit.

Startup / Strategic reasons / business Challenges

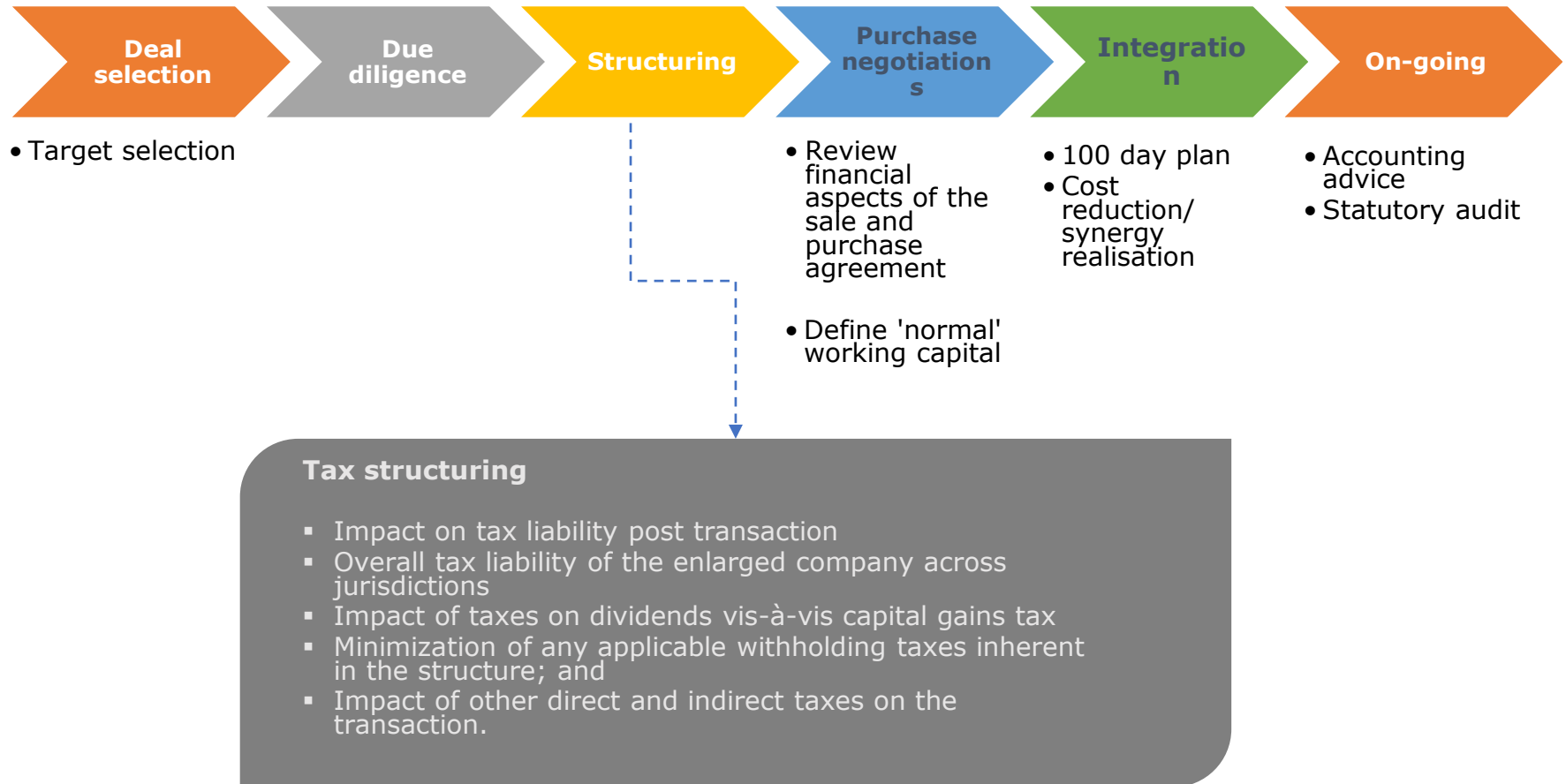
Key Reporting

S. No	Form	Particulars
1.	FC-GPR	<ul style="list-style-type: none">• Reporting of issuance of equity instruments where such instruments are reckoned as FDI;• Reporting to be made within 30 days of issuance of equity instrument.
2.	FLA	<ul style="list-style-type: none">• An Indian company/LLP which has received FDI in the previous year(s) including the current year, shall submit form FLA to the Reserve Bank on or before the 15th day of July of each year.
3.	FC-TRS	<ul style="list-style-type: none">• Form FCTRS shall be filed within sixty days of transfer of equity instruments or receipt/ remittance of funds whichever is earlier
4.	ESOP	<ul style="list-style-type: none">• Filing of Form ESOP within 30 days of issuance of ESOP
5.	LLP (I)	<ul style="list-style-type: none">• LLP to submit Form LLP (I) within 30 days of receipt of consideration for capital contribution and acquisition of profits
6.	LLP (II)	<ul style="list-style-type: none">• Disinvestment/ transfer of capital contribution or profit share between a PRI and PROI (or vice versa) shall be filed within 60 days from the date of receipt of funds.
7.	Downstream Investment	<ul style="list-style-type: none">• Form DI: An Indian entity or an investment Vehicle making downstream investment in another Indian entity which is considered as indirect foreign investment for the investee Indian entity in terms of Rule 22 shall file Form DI with the RBI within 30 days from the date of allotment of equity instruments.

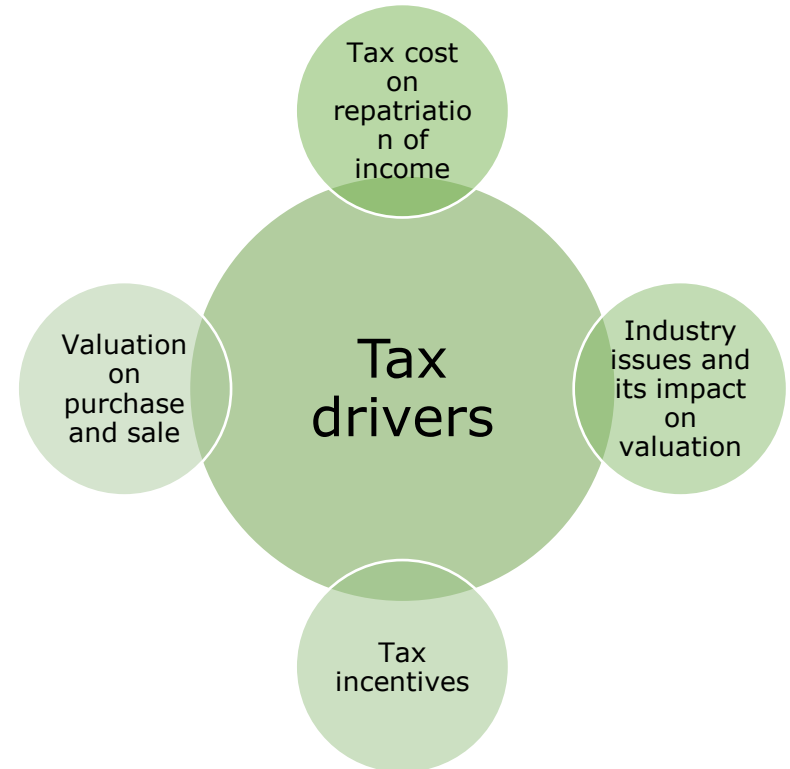
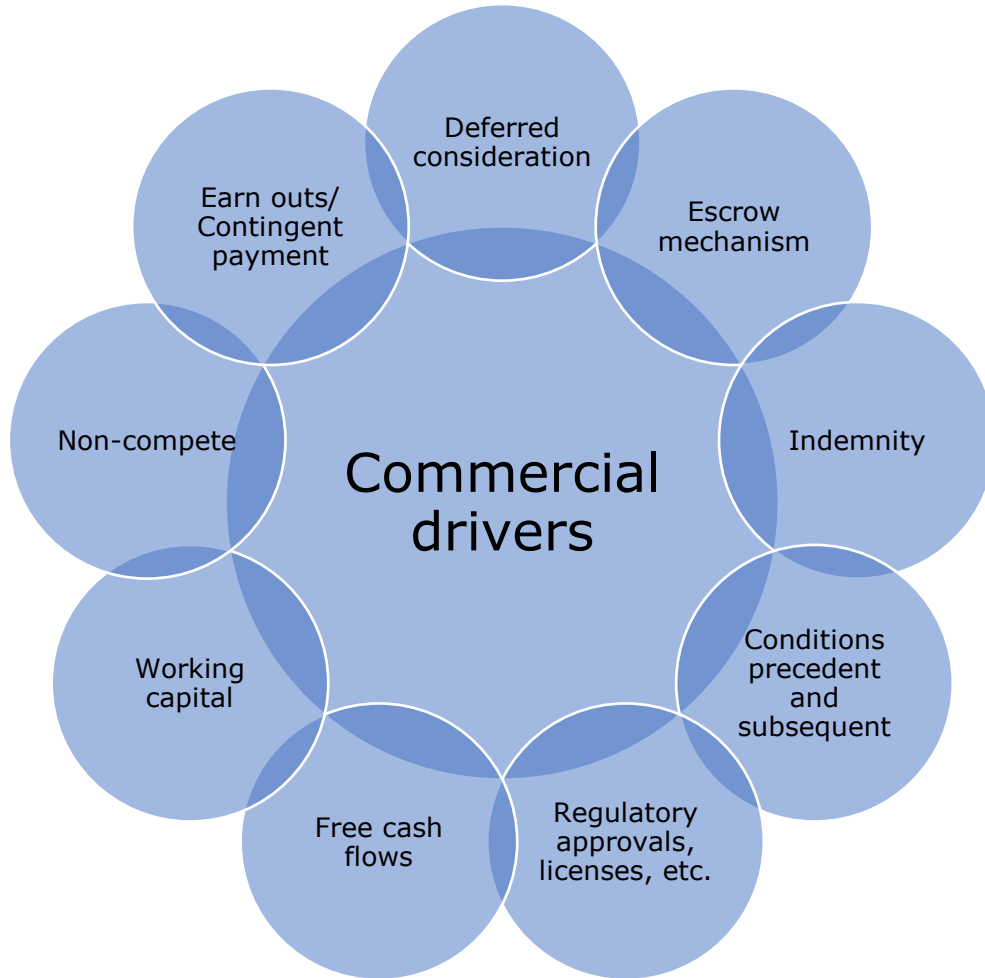
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Tax – Inbound Investment - Overview

Typical transaction lifecycle



Investment in India – Key drivers



Preferable Exit route in the current scenario

Tax aspects of preferable exit route:

- 1. Applicability of General Anti Avoidance Rules ('GAAR'):** tax department has the ability to bring any income generating from arrangement or transactions made specifically to avoid taxes and it contains any of the following tainted elements - not at arm's length, results in misuse or abuse of provisions of tax laws, lacks commercial substance, is carried out in a manner not ordinarily employed for bona fide purposes. These rules are applicable from 01 April 2017.
- 2. Amendments in tax treaties:** Indian Government has made amendments to its tax treaties entered with Mauritius, Singapore and Cyprus. These amendments have major impact on exit of investments made from these countries.
- 3. Lower capital gain tax rate for non-residents:** 10% rate on capital gains made applicable for non-residents in case of shares of closely held companies on long term capital gains
- 4. Tax withholding on secondary transactions:** Payment of purchase consideration to non-resident seller attracts withholding tax under the IT Act. Treaty ineligibility of seller – Buyer could be liable for failure to withhold tax with interest and penalty as 'assessee in default'.
- 5. Applicability of indirect transfer provisions on exits**
- 6. Section 56(2)(x) –** Transactions involving share transfers at a value lower than fair market value will be taxed. These amendments should be kept in mind while investor is looking for an exit.
- 7. Negotiations in exit transactions:** Generally exit transactions are negotiated between the buyer and seller - nil withholding certificate, tax escrow, tax insurance, tax opinions and specific tax indemnities.
- 8. NOC from tax authorities (under section 281 of the IT Act)**
- 9. Taxability on convertible instruments - CCPS**



Case study - Multiple shareholders:

Facts:

- Company A and Company B are operating in same industry.
- Company A proposes to acquire Company B.
- Due Diligence on Company B done and various issues noticed
- Company A has got funding from reputed PEs.
- Company B has raised money from local market, friends & relatives (including residents and non residents).
- In the process of raising money, Company B has gone through multiple rounds of share issue (there are >25 shareholders in Company B).

Potential issues:

- Company A (and its PE investors) do not agree take >25 shareholders in its cap table.
- Consent of shareholders of Company B for the transaction. As there are multiple shareholders it would be difficult for them to come to common consensus.
- Quick implementation of the option – court approved merger etc is time consuming
- Sorting out due diligence issues

Key takeaways:

- Problems faced by Company B by having multiple shareholders in its cap table
- Shareholder's agreement to be drafted carefully by keeping in mind the future consequences
- Structuring the transaction

What can CA's offer to do

- Analysis on optimal ownership/jurisdiction for an investment in India
- Entity structuring for selecting an optimal entry vehicle such as a branch, subsidiary, LLP, joint venture
- Capital structuring in the backdrop of foreign exchange policies keeping repatriation needs in mind
- Regulatory filings/obtaining necessary regulatory approvals including those from the Reserve Bank of India, Foreign Investment Promotion Board, Government of India and other regulatory authorities
- Review of shareholders, joint venture and other relevant business agreements from a tax and regulatory perspective
- Repatriation strategies for investments
- Target due diligence for inbound investments into an existing company in India

A dark, semi-transparent background image showing a business meeting. In the foreground, a pair of glasses and a pen rest on a document featuring a bar chart. In the background, two people in business attire are seated at a table, with a laptop and a glass of water visible. The overall tone is professional and corporate.

FEMA – Outbound Investment - Overview

Outbound Investment Overview (1/2)

Introduction

- Outbound investment from India have undergone a considerable change, not only in terms of magnitude but also in terms of geographical spread and sectorial composition.
- There has been a perceptible shift in Overseas Investment Destination (OID) in last decade or so. While in the first half, overseas investments were directed to resource rich countries such as Australia, UAE, and Sudan, in the latter half, OID was channelled into countries providing higher tax benefits such as Mauritius, Singapore, British Virgin Islands, and the Netherlands.
- Indian firms invest in foreign shores primarily through mergers and acquisition (M&A). With rising M&A activity, companies will get direct access to newer and more extensive markets and better technologies, which would enable them to increase their customer base and achieve a global reach.

Market size

- According to the Reserve Bank of India (RBI), India's outward foreign direct investments in equity, loan and guaranteed issue stood at US\$ 3.77 billion in May 2021 vs. US\$ 3.43 billion in April 2021.

Investments/Developments

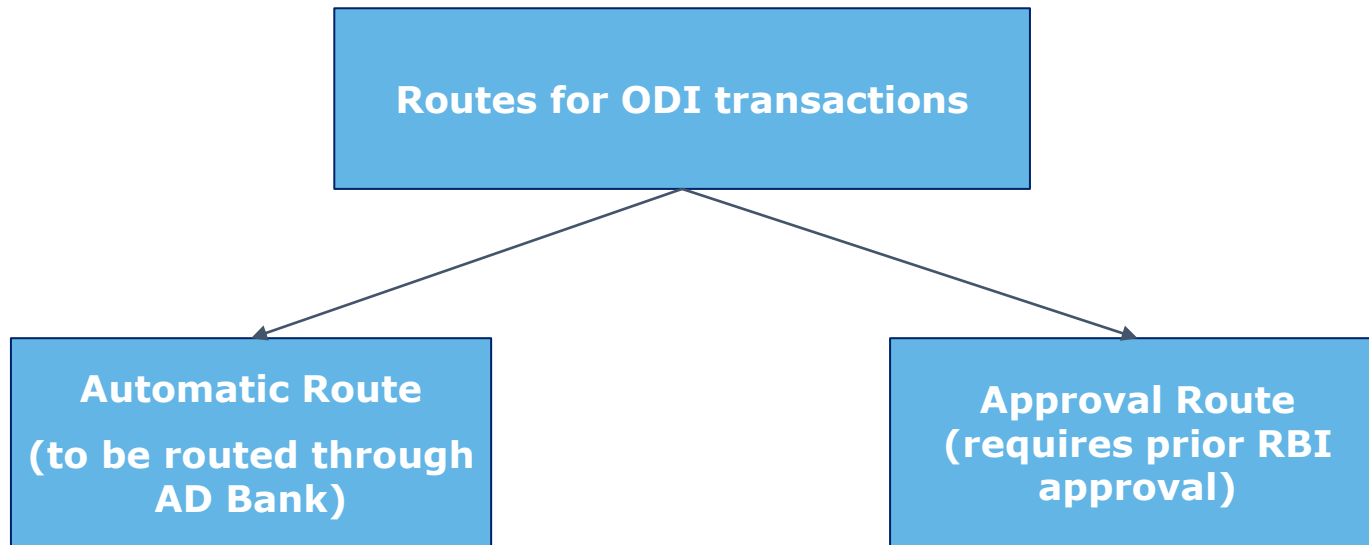
Some of the major overseas investments by Indian companies were:

- In April 2021, India Inc.'s foreign investments stood at US\$ 2.51 billion, registering a 2X YoY growth. Of the total investments, loans accounted for US\$ 1.75 billion, equity capital accounted for US\$ 421.42 million and issuance of guarantees stood at US\$ 333.11 million.
- In March 2021, Indian companies made an investment of >US\$ 1.99 billion in their overseas projects.

Outbound Investment Overview (2/2)

- The major investments are as follows:
 - Tata Steel invested US\$ 1 billion in a wholly owned subsidiary in Singapore.
 - Interglobe Enterprises Pvt. Ltd. invested US\$ 145.61 million in a joint venture based in the UK.
 - Reliance Industrial Investments & Holdings Ltd. invested US\$ 78.52 million in a wholly owned unit in the UK.
 - Reliance Industries, along with Reliance Brands, invested funds worth US\$ 91.56 million in various joint ventures and wholly owned subsidiaries based in the UK, the UAE, Singapore and the US.
 - Varroc Engineering invested US\$ 65.5 million in a wholly owned unit in the Netherlands
 - Motherson Sumi Systems invested US\$ 41.70 million in a wholly owned company in the UAE.
- In May 2021, the Serum Institute of India announced plan to invest GBP 240 million (US\$ 332.38 million) in the UK to expand its vaccine business and open a new sales office.
- In May 2021, Reliance Jio Infocomm announced that it is deploying submarine cable systems, connecting India to Singapore and beyond, to meet the rising data demand.
- In June 2021, Export-Import Bank of India (Exim Bank) announced that it extended a line of credit worth US\$ 100 million to the Sri Lankan government to fund projects pertaining to solar energy.
- In June 2021, India launched a new trilateral partnership with Italy and Japan for Indo-Pacific stability.

Routes for outbound transactions



Prohibited investments

'Real estate' (as defined) and dealing in financial products linked to Indian Rupee

- **Direct investment outside India:** Means investment by way of contribution to the capital or subscription to the Memorandum of Association of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, but does not include portfolio investment.
- **Financial Commitment:** Means the amount of direct investment by way of contribution to equity, loan and 100% of the amount of guarantees and 50% of the performance guarantees issued by an Indian Party to or on behalf of its overseas JV Company or WOS.
- **Net worth:** Means paid-up capital and free reserves

Investments under Automatic Route (1/2)

- Indian Party is permitted to make financial commitment (FC) in a JV/ WOS abroad **up to 400% of its net worth (as per the last audited balance sheet)** for any *bona fide* business activity.
- Any **FC exceeding USD 1 (one) billion (or its equivalent) in a FY would require prior RBI approval** even when the total FC of the Indian Party is within the eligible limit under the automatic route.
- Indian Party / entity **may extend loan / guarantee only to an overseas JV / WOS in which it has equity participation.**
- **Indian entity should not be on the RBI's Exporters caution list** / list of defaulters or under investigation by any investigation / enforcement agency or regulatory body.
- All transactions relating to a JV / WOS should be **routed through one branch of an AD bank** to be designated by the Indian entity.
- **Valuation norms** - In case of partial / full acquisition of an existing foreign company:
 - Where the investment is more than USD 5 million, valuation of the shares of the company shall be made by a Category I Merchant Banker registered with SEBI or an Investment Banker / Merchant Banker outside India registered with the appropriate regulatory authority in the host country; and,
 - In all other cases by a Chartered Accountant or a Certified Public Accountant.
- In cases of investment by way of **swap of shares**, in all cases irrespective of the amount, valuation of the shares will have to be done by a Category I Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country. Government approval is case specific.

Investments under Automatic Route (2/2)

- Investments / financial commitments by an Indian Party are **not permitted in an overseas entity located in the countries identified by the Financial Action Task Force (FATF)** as 'non-co-operative countries and territories'.
- Investments (or FC) in JV/WOS abroad by Indian Parties through the medium of a Special Purpose Vehicle (SPV) are also permitted under the Automatic Route subject to fulfillment of the stipulated conditions
- Prior RBI approval would be for cases of outbound investment not covered under automatic route.
- For this purpose, application together with necessary documents should be submitted in Form ODI through AD bank.
- RBI would, inter alia, take into account the following factors while considering such applications:-
 - Prima facie viability of the JV / WOS outside India;
 - Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment);
 - Financial position and business track record of the Indian Party and the foreign entity; and
 - Expertise and experience of the Indian Party in the same or related line of activity as of the JV / WOS outside India.

Investment by Resident Individuals

- Investment in overseas JV / WOS only by way of equity / compulsorily convertible preference shares
- JV / WOS to be engaged in bona fide business activities except real estate / banking / financial services
- ODI in 'non-co-operative countries and territories' as per FATF not permitted
- Resident individual not to be on RBI caution / defaulters list
- Limit of investment in JV / WOS as per LRS limit (currently USD 250,000 per annum)
- Valuation /Reporting and Post investment obligations same as applicable to ODI by Indian Companies

Round-tripping

- As per the FAQs on ODI, Indian Parties are not permitted to set up Indian subsidiary(ies) through its foreign WOS or JV, nor do the provisions permit an IP to acquire a WOS or invest in JV that already has direct/indirect investment in India under the automatic route.
- In such cases, IPs can approach RBI for prior approval through their AD Banks which will be considered on a case to case basis, depending on the merits of the case.
- Idea is to ensure unaccounted funds parked abroad and money remitted overseas do not return as investment in India to check the round-tripping of money.
- Recent news reports suggest that RBI is looking into:
 - Several companies that received investment from foreign subsidiaries or affiliates
 - Notices have been issued to some individuals who invested in Indian firms via overseas investment arm

Disinvestment in JV / WOS - Transfer of shares

Automatic route available to the Indian entities to transfer its shareholding complying with the following conditions:

- Sale does not result in any write off of the investment made.
- In case of unlisted JV / WOS - If the shares are disinvested by a private arrangement, the share price is not less than the value certified by a Chartered Accountant/ Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of the JV/WOS.
- Indian Party does not have any outstanding dues by way of dividend, technical know-how fees, royalty, consultancy, commission or other entitlements and/or export proceeds from the JV or WOS.
- Overseas concern has been in operation for at least one full year and the APR with audited accounts for that year has been submitted to RBI.
- Indian party is not under investigation by CBI/DoE/SEBI/IRDA or any other regulatory authority in India.
- Sale proceeds to be repatriated to India immediately on receipt thereof and in any case not later than 90 days from the date of sale of the shares / securities and details of the disinvestment to be submitted through the designated AD bank within 30 days from the date of disinvestment.

Disinvestment in JV / WOS – Transfer of shares involving write off of investment

Indian Party may disinvest, without prior RBI approval in any of the following cases where the amount repatriated after disinvestment is less than the original amount invested:

- In case where the JV / WOS is listed on the overseas stock exchange.
- In cases where the Indian Party is listed on a stock exchange in India and has a net worth of not less than INR 100 crore.
- Where the Indian Party is an unlisted company and the investment (or FC) in the overseas venture does not exceed USD 10 million.
- Where the Indian Party is a listed company with net worth of less than INR 100 crore but investment (or FC) in an overseas JV / WOS does not exceed USD 10 million.

Such disinvestments shall also be subject to conditions for transfer of shares.

Indian Party which does not satisfy the above conditions for undertaking any disinvestment in its JV / WOS abroad, shall have to apply to RBI for prior permission.

Obligation of Indian Party

- Intimate RBI within 30 days of any post investment changes / setting up of downstream company / change in shareholding pattern.
- Receive share certificates with 6 months from the date of remittance .
- Repatriate to India all dues receivable from foreign entity like dividend, royalty, technical fee etc. within 60 days of their falling due.
- Sale proceeds on account of transfer of shares of the overseas JV / WOS needs to be repatriated to India within 90 days.
- Submit to RBI, through the designated AD Bank, every year on or before 31 December, an Annual Performance Report (APR) in Part II of Form ODI in respect of each JV or WOS outside India, based on the audited annual accounts of the JV / WOS for the preceding year, unless specifically exempted by RBI.
- File Annual Return on Foreign Liabilities and Assets (FLA) with RBI by 15 July of every year.

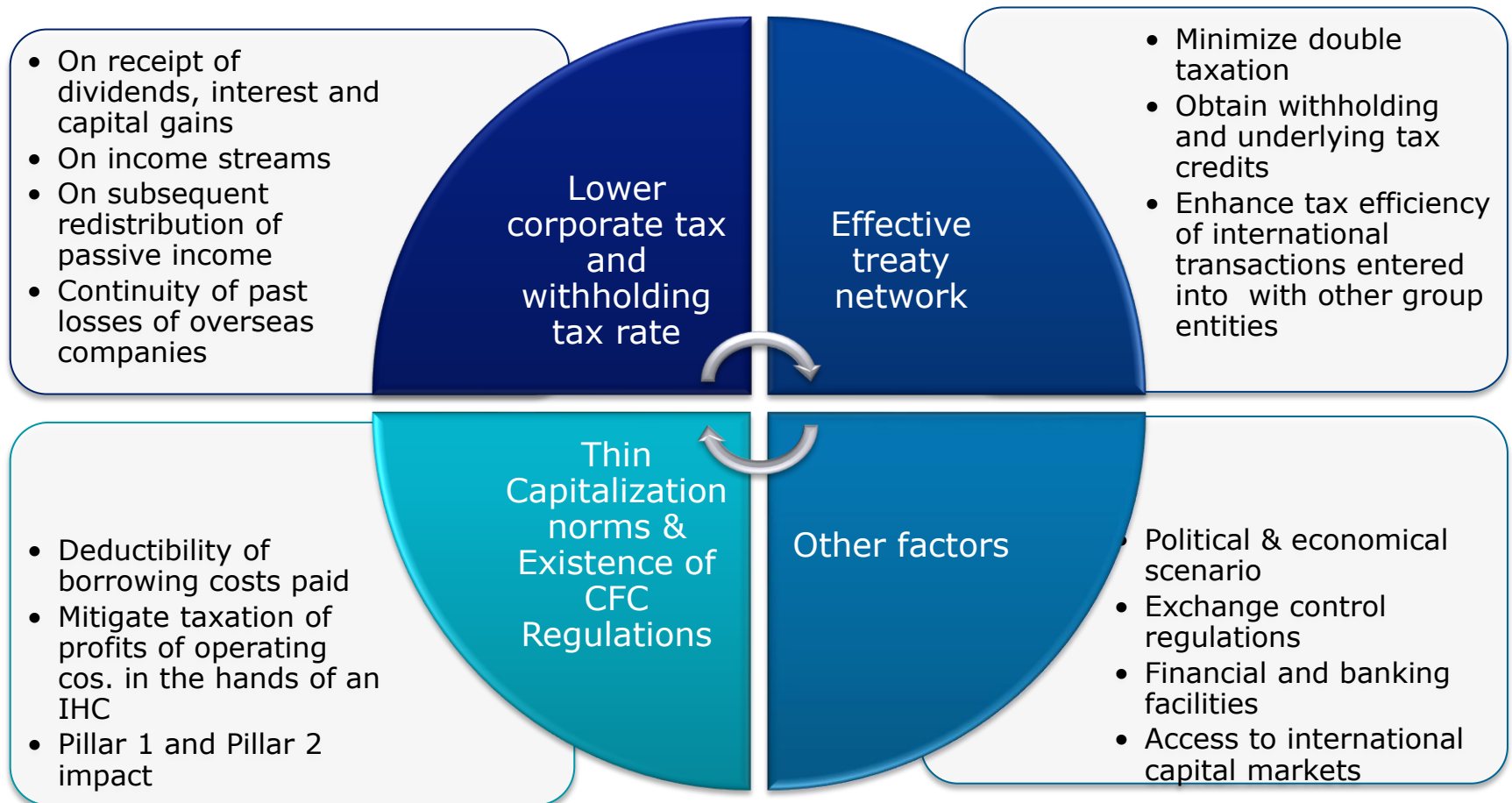
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Tax – Outbound Investment - Overview

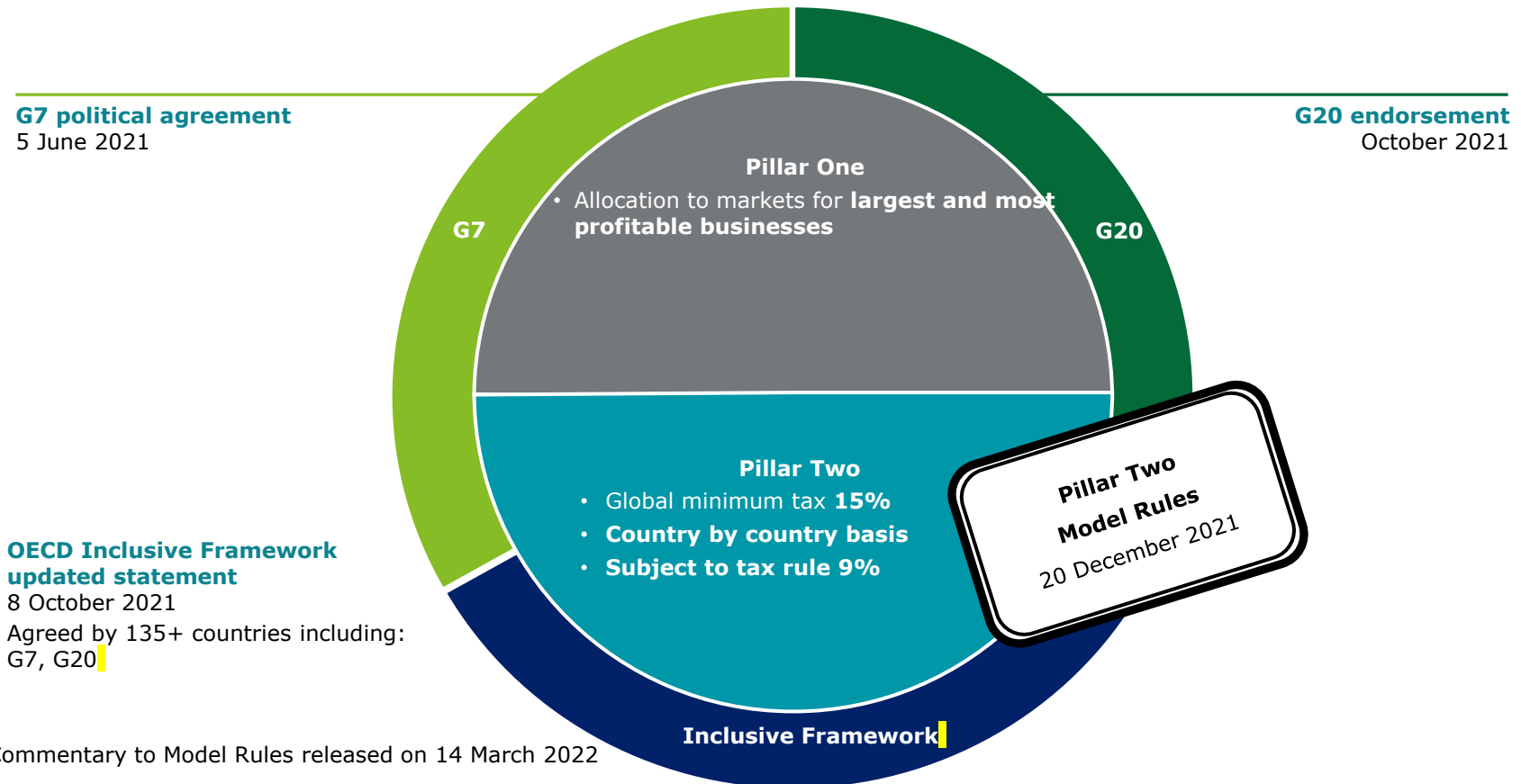
Direct investment vs investment through an IHC

Direct investment	Investment through an IHC
<ul style="list-style-type: none">• No cost in relation to operation of IHCs• Results in simpler structure• Higher compliance requirement with Indian exchange control regulations• Exit could be relatively inefficient from a tax perspective	<ul style="list-style-type: none">• Profits can be retained in IHC outside India for future investments/ other business purposes• IHC can have easier access to debt and equity capital from international capital markets• Flexibility in introducing strategic partners at IHC level & carrying out overseas listing of overseas businesses• If IHC transfers shares held in overseas operating subsidiary company capital gains arising on sale could be retained at IHC without any tax cost in India and IHC• Future merger of the IHC into India, may be effective method of cash repatriation in India.

Key Considerations for identifying IHC jurisdictions



Pillar One and Two: OECD proposals to address the tax challenges of the digitalisation of the economy



Case Study

Facts:

- Company A wants to invest overseas in South East Asia and Middle east

Potential issues:

- Company A is exploring options whether to directly invest or invest through IHC

Key takeaways:

- Company A can explore investing through Mauritius for middle east and through Singapore for South East Asia

Tax attributes	Mauritius	Singapore
Corporate tax rate	15%	17%
Capital gains tax	0%	0%
Withholding tax as per domestic laws:		
i) Dividend	0%	0%
ii) Interest	15%	15%
iii) Royalty	15%	10%
Outbound merger	Allowed	Not allowed
VAT/GST*	15%	7%
Other attributes	Underlying tax credit on dividend income available in India under India- Mauritius tax treaty	Singapore has a good treaty network with South-East Asian countries

What can CA's offer to do

- Entity structuring, capital structuring and regulatory approval processes in the selected jurisdiction
 - Evaluation of making outbound investments through an SPV structure such that the SPV can accumulate dividends from investments and be used for subsequent investments. i.e., and money need not be repatriated to India every time and regulatory approval/ filing requirements can be mitigated
- Evaluation of possible jurisdiction which will ensure regulatory flexibility and tax neutrality for offshore investors.
- Evaluation of the nature of the Investment Fund such as company, limited liability partnership, trust. Similarly, nature of related Fund entities such as Investment Manager, Investment Advisor, etc.
- Determination of the shareholding patterns and capital structure for repatriation of investment proceeds to the investors in tax efficient manner.
- POEM and PE analysis under the IT Act.
- Finalizing/review of shareholders, joint venture and other relevant business agreements from a tax and regulatory perspective
- Identifying and enhancing tax and fiscal incentives, including obtaining tax rulings in the selected jurisdiction
- Obtaining approvals from the Reserve Bank of India/regulators that may be required in the matter.
- Use of Double Tax Avoidance Agreements (DTAAs) vs Income tax Act



QUESTIONS