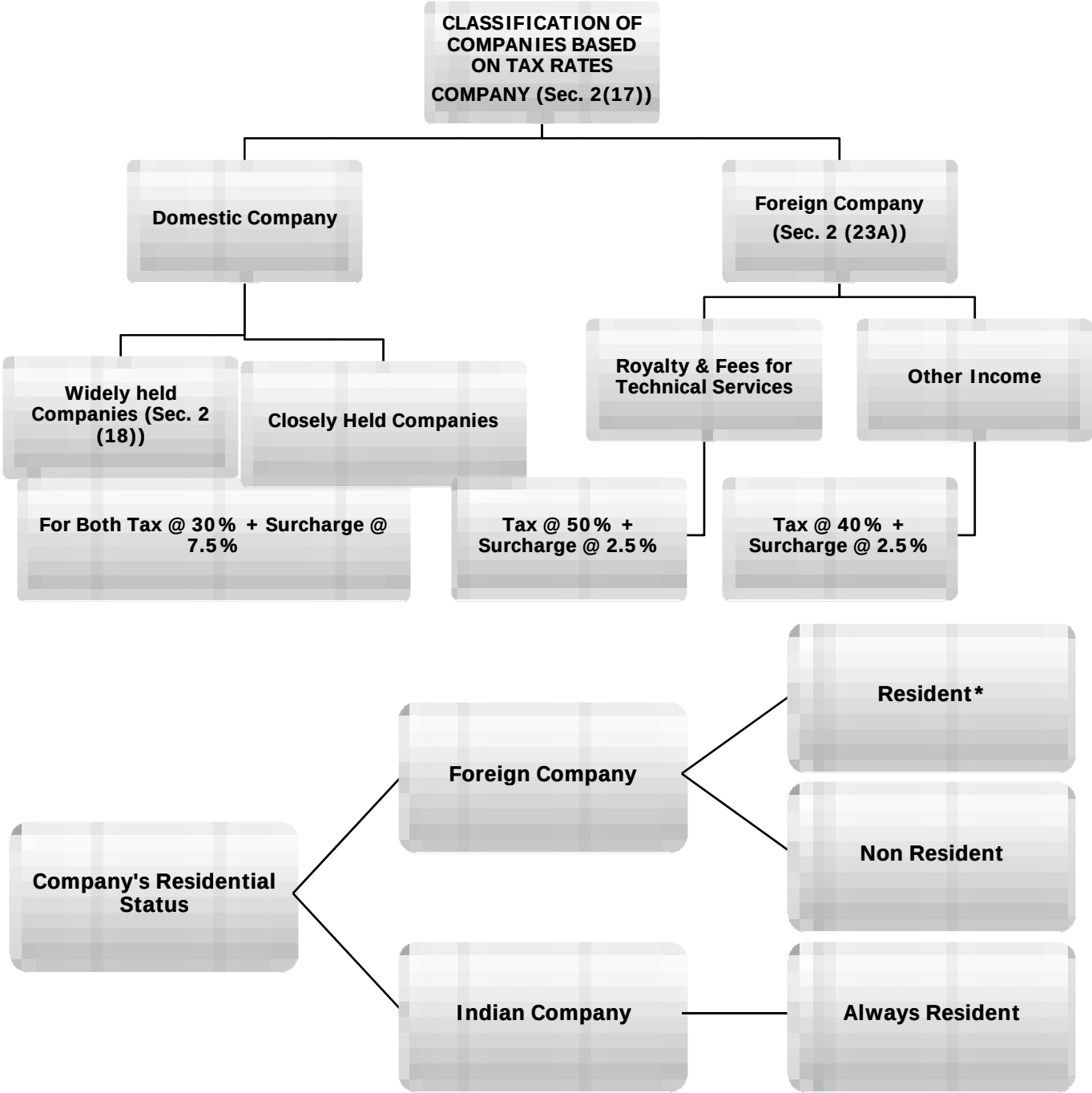


WRITE UP ON FOREIGN COMPANIES IN INDIA:

TAXATION OF FOREIGN COMPANIES

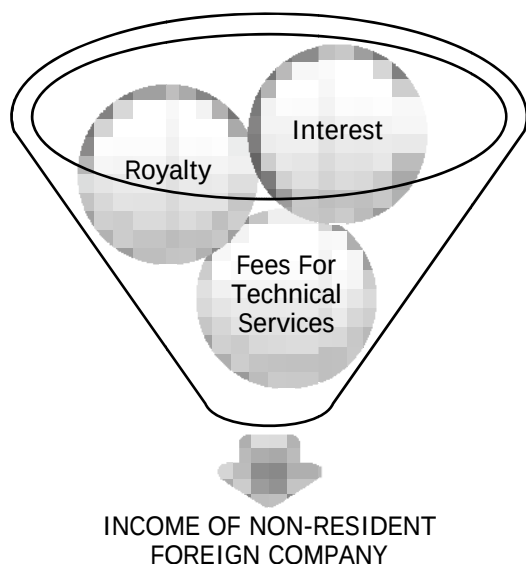


*** Conditions for Residential Status**

ENTIRE CONTROL OF MANAGEMENT OF ITS AFFAIRS IS IN INDIA

MEANING: WHERE THE BOARD MEETING OF THE COMPANY IS HELD. Say if all Board Meeting of the Company Held in India then such Company is treated as Resident.

SUPER THREE ✕ INCOME DEEMED TO ACCRUE / ARISE IN INDIA FOR A NON-RESIDENT FOREIGN COMPANY



WHETHER OR NOT THE NON-RESIDENT HAS A
RESIDENCE OR
PLACE OF BUSINESS OR
BUSINESS CONNECTION IN INDIA.

All such income shall be added to the Total
Income of the Non-Resident.

HEAD OFFICE EXPENDITURE: SECTION 44C

✕ Restriction to Non-Resident Foreign Company with respect to Head office expenses deductible while computing Total Income from the Business Carried on India.

✎ Limits Prescribed are

- ✎ 5 % of Adjusted Total income or
- ✎ Head Office Expenses

✕ What is Head Office Expenses?

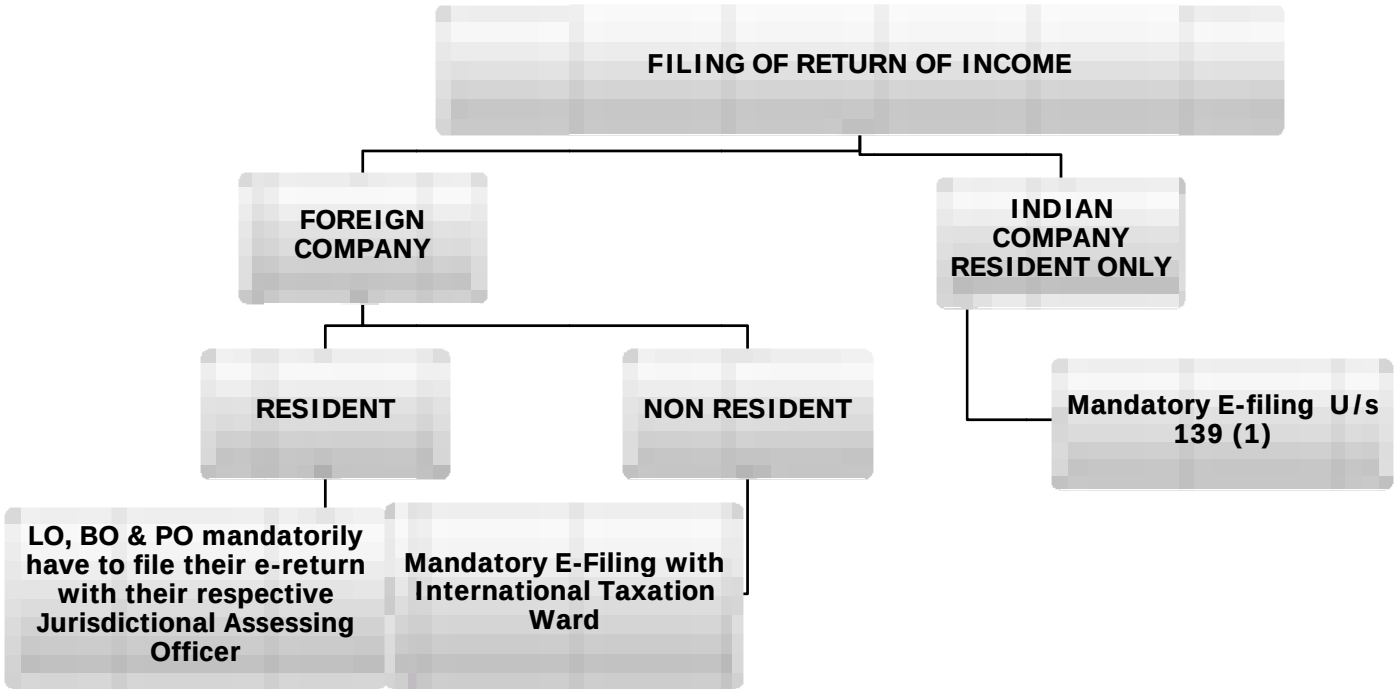
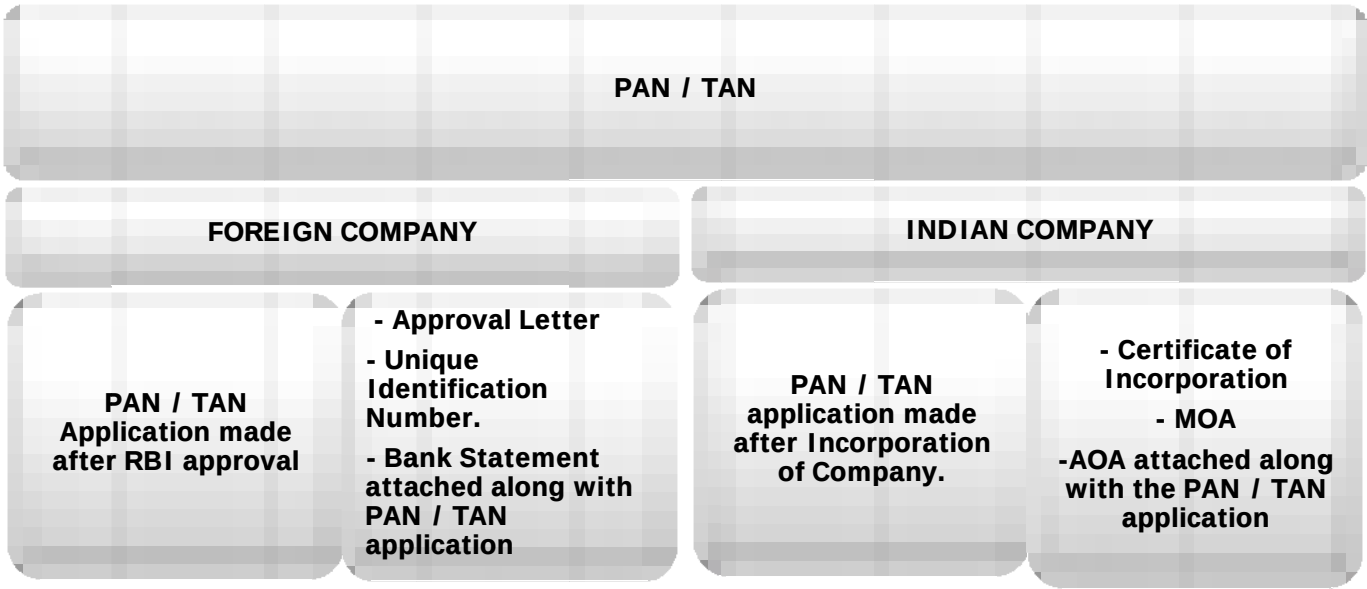
- ✎ Rents, Repairs, Insurance in respect of any premises outside India used for Business / Profession.
- ✎ Salary, Wages, Annuity, Bonus or profit in lieu of salary to any employee managing the affairs of the office in India.
- ✎ Travelling Expenses.

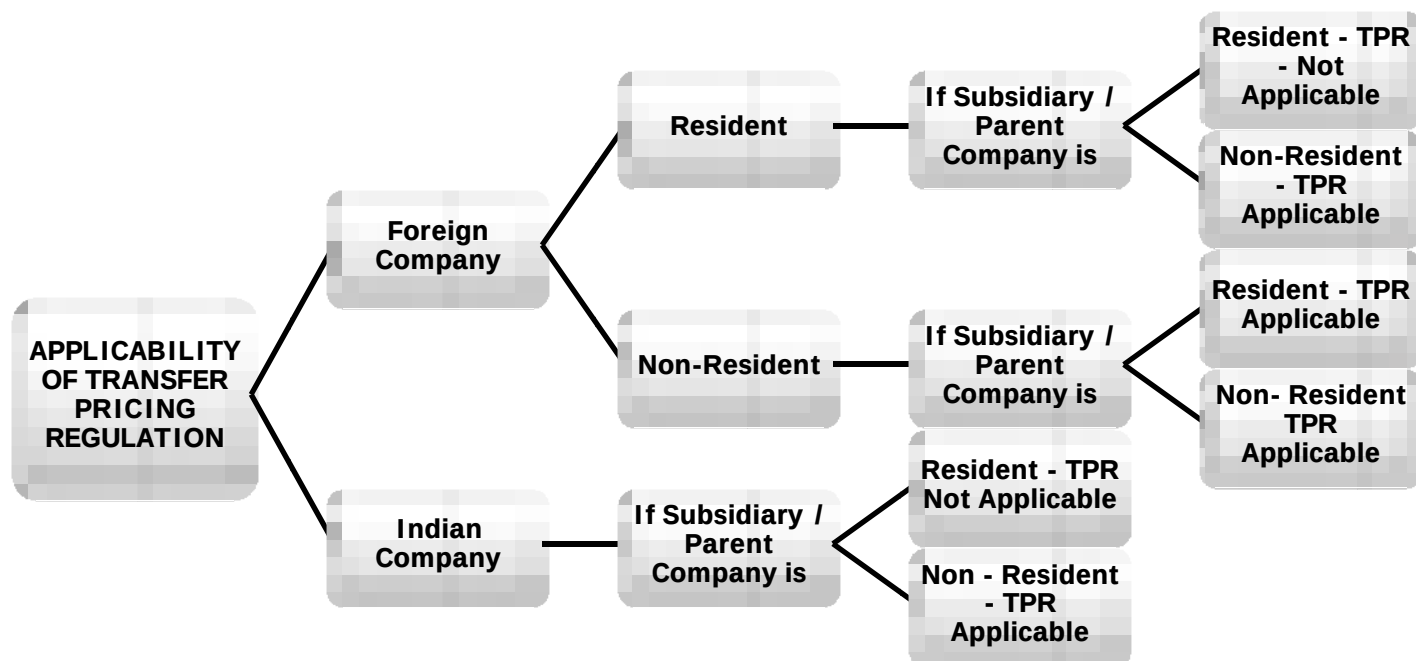
✕ What is Adjusted Total Income?

- ✎ Total Income of the Foreign Company (NR) before giving effect to Section 32, 72 & 74 A.

Note: This Restriction is not applicable for Foreign Companies resident in India.

TAXATION OF FOREIGN COMPANIES





TAX EVASION A CHECK

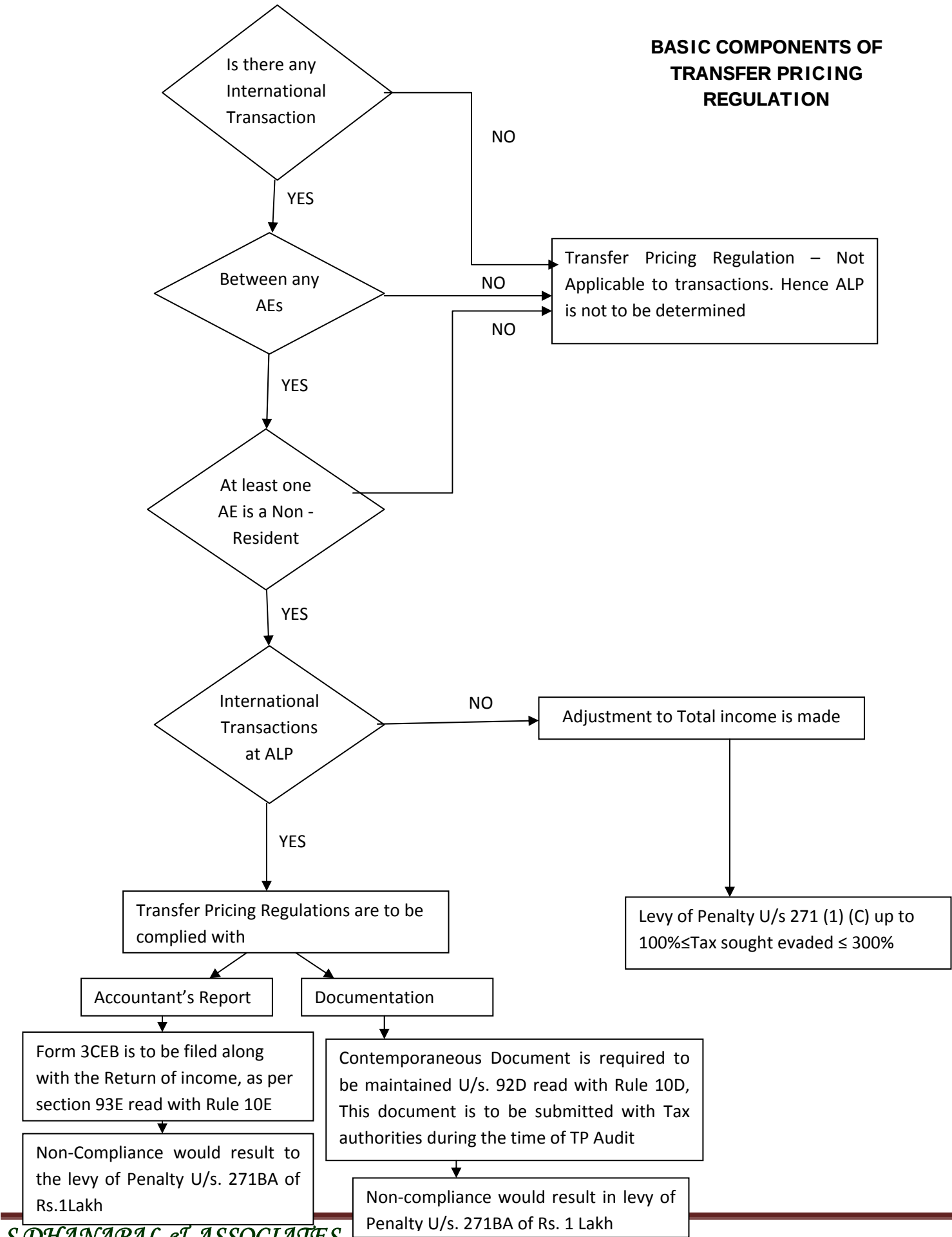
- ✧ A Comprehensive Transfer Pricing Regulation (TPR) was introduced in Finance Act, 2001 to address the shortcomings of the existing legislative framework in dealing with shifting of profits from India by manipulation of the prices of intra-group transactions.
- ✧ TPR is applicable only to Project office and Branch office of a Foreign Company.
- ✧ Residential Status is material for one of the entity (i.e. parent company or subsidiary foreign company).

DIVIDEND FROM (FOREIGN COMPANY) NON-RESIDENT COMPANIES

FOREIGN-SOURCE DIVIDENDS

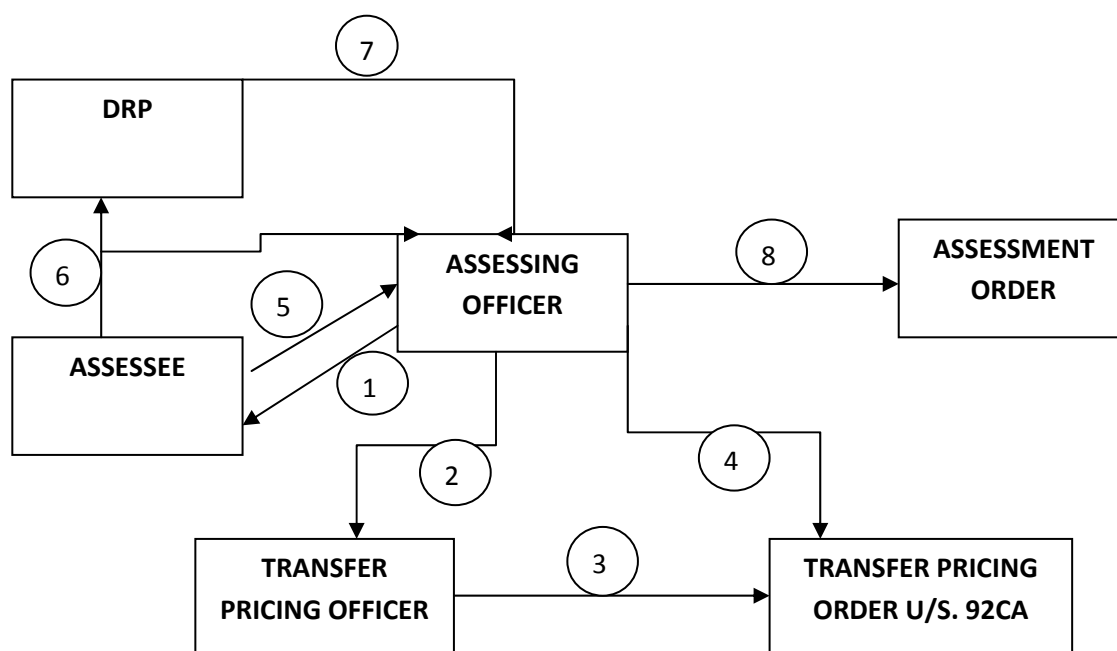
- ** When Non-resident Company declares dividends outside India, then non-resident shareholders of such company would not have to pay any tax in India on their Individual Income even though the dividends would have been declared out of profits made by the Company in India
- ** As per Union Budget 2011 – 2012 – It is presented that 15% Dividend to be paid by the companies from Foreign Units of the Company.
- ** Foreign dividends received by an Indian company currently are taxed at a rate of 30% (plus the applicable surcharge and cess).
- ** To encourage Indian companies to repatriate funds, it is proposed that where the total income of an Indian company includes any dividend declared, distributed or paid by a foreign subsidiary company, the dividends will be taxed at 15% (plus the applicable surcharge and cess) on a gross basis.
- ** No deduction in respect of any expenditure or allowance will be allowed in.

**BASIC COMPONENTS OF
TRANSFER PRICING
REGULATION**



Transfer Pricing Audit Process:

- 🔥 The Assessing Officer makes the reference, if he considers it necessary and expedient so to do to the TPO after obtaining due approval from the CIT {sec.92CA}
- 🔥 The reference mechanism is put in place by the CBDT through the issue of an Instruction No: 3 of 2003, dated 20/05/2003.
- 🔥 The Assessing Officer is required to issue a notice for selecting a case for normal assessment within 6 months from end of the Financial Year in which the return is furnished. Practically the Assessing Officer also refers the case to the TPO within the above time-limit.

TRANSFER PRICING AUDIT PROCESS

1. Return of Income and Form 3CEB Filing by the Assessee.
2. Reference to TPO – If International Transaction > 5 Crores (CIT Approval for > Rs. 15 Crores).
3. Send Notice to Assessee / Taxpayer.
 - a. Hearing
 - b. Documentation Analysis
 - c. No Site Visits / No Interviews.
4. Issue of Transfer Pricing Order U/s. 92CA by TPO to AO.
5. Service of Draft Order to Assessee by AO.
6. Reference to dispute Resolutions Panel by Assessee and giving objections to the Draft Order.
7. Binding Instructions / directions issued by DRP to AO.
8. Passing of Assessment Order.

THE DUE DATES FOR PAYMENT OF ADVANCE TAX AND THE AMOUNTS PAYABLE ARE:

Due Date	Amount Payable
On or before 15th June	Not less than 15 % of advance tax
On or before 15th September	Not less than 45 % of advance tax less earlier installment
On or before 15th December	Not less than 75 % of advance tax less earlier installments
On or before 15th March	Whole of advance tax less earlier installments

In case of non-payment of specified percentages of advance tax by specified dates, interest @ 1 % per month or part thereof is payable on the shortfall.

The unpaid balance of tax is payable before filing the return of income with interest thereon @ 1% per month. Further, interest @ 1% per month or part thereof is payable on such balance tax, if the return is not filed within the specified time.

Rates of Tax

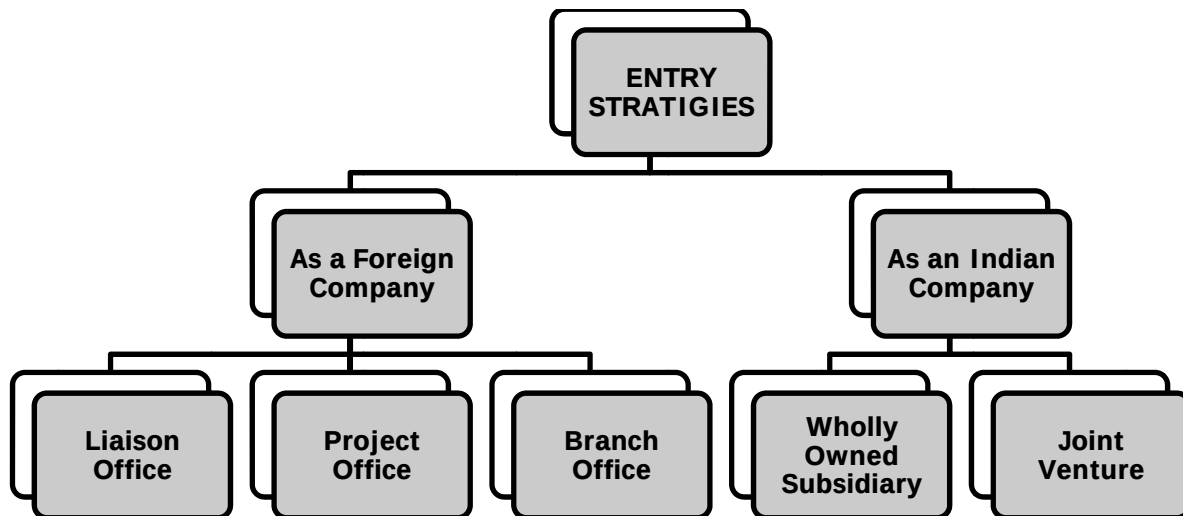
The rates of tax are inclusive of surcharge of 2.5% and 3% education cess thereon, as such the tax rates given are effective tax rates.

The corporate tax year is the year ending 31 March and the income of the same is taxed in the assessment year commencing on the succeeding 1 April. The rates of tax for the assessment year 2011-12 (financial year 2010-11) in respect of taxable income (other than long term capital gains) are:

Entity	Effective Tax Rates	
	Companies having total income above Rs. 10,000,000 (US\$ 213,000)	Companies having total income up to Rs. 10,000,000 (US\$ 213,000)
Domestic Company	33.2175 %	30.90 %
Foreign Company	42.23 %	41.20 %

MEANING OF A FOREIGN COMPANY

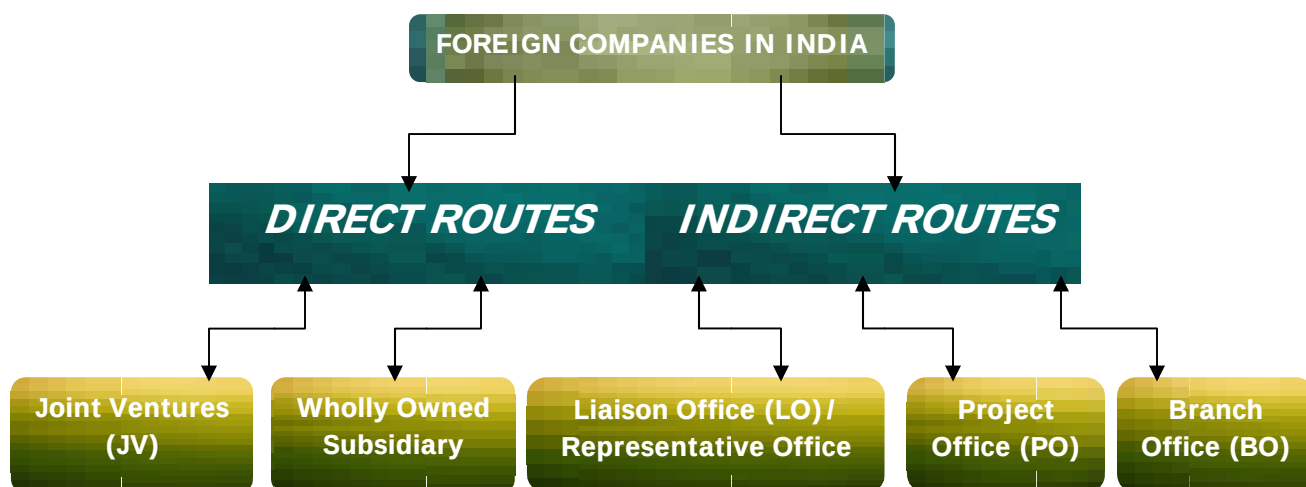
According to the Income Tax Act, 1961, a foreign company is that company, which is not a domestic company. Before that it should be understood what is a domestic company, a domestic company means an Indian Company or any other company which is liable to tax under the Income Tax Act, 1961 and which has made the prescribed arrangements for declaration and payment within India, of Dividends (including dividends on preference shares) payable out of such income. This condition, regarding the arrangements to be made for declaration and payment of dividend in India is required to be fulfilled only by companies other than Indian companies.



Note: => All Private Limited Companies are closely held companies.

=> All Public Limited Companies are widely held companies.

FOREIGN COMPANIES CAN VENTURE INTO INDIA IN FOLLOWING ROUTES:-



FOREIGN COMPANIES IN DIRECT ROUTES:



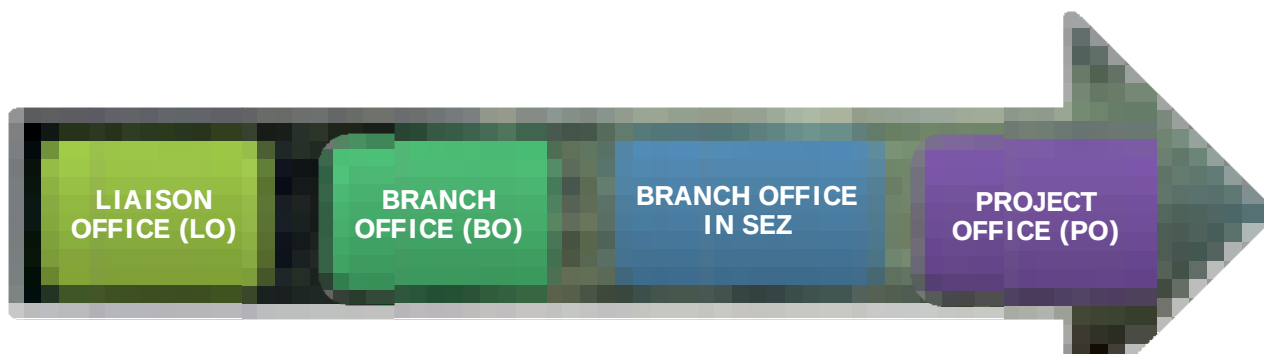
The foreign equity participation in such Indian companies can be up to 100% in terms of both shareholding percentage and foreign capital investment; depending on the equity caps and sectoral limits as prescribed under the FDI Policy on the business activity to be carried out by such company in India and depending upon the requirements of the investor.

JOINT VENTURES (JV)

- o Most foreign investors opt for this form of a company as it allows the Foreign Investor and the Indian partner to do what each does best - the foreign partner brings in technology, systems and products and the Indian partner takes care of Human resources, marketing, legal and tax issues.
- o Establishing a joint venture in India has the advantage of having the financial resources and established contacts of the Indian partners, therefore in general the setting up of the company in the market becomes relatively easier.
- o Moreover there are no separate laws for joint ventures in India.
- o The companies incorporated in India are treated as domestic companies and therefore they would be taxed at the rate of 33.66%.
- o The foreign partner however would have to pay tax under different heads such as royalty, technical fees, interest.

100 % WHOLLY OWNED SUBSIDIARY

- ❖ A foreign company can opt for 100% wholly owned subsidiary in the form of a private company in India.
- ❖ For tax purposes, this subsidiary company is treated as a domestic company and is taxed at the rate of 33.66%.
- ❖ A foreign company can invest up to 100% in shares of an Indian company in those cases where 100% foreign direct investment is permitted under the FDI policy.
- ❖ Where Government has put a sectoral cap on investment, a wholly owned subsidiary can be set up only after approval from Government of India.
- ❖ In case the parent company wishes to take some of the profit earned in India by the subsidiary company, then the parent company can do so by way of dividend.
- ❖ Earlier dividend tax at a rate of 15% was applicable but from 2003 dividend tax is not applicable.

FOREIGN COMPANIES IN INDIRECT ROUTES:**LIAISON OFFICE (LO)**

- ⇒ **ROLE** – Promote business of the Foreign Company in India.
- ⇒ **SCOPE** – Allowed to carry only limited operations.
- ⇒ **APPROVAL** – Prior approval of Reserve Bank of India (RBI).
- ⇒ **RESTRICTIONS** - Cannot carry out any Business activity, Hence there won't be any taxable profits.
- ⇒ **TAXATION** - The activities of a foreign company through its liaison office in India does not become taxable in India, provided crucial board decisions are not made in India. However, if in contravention of approvals and rules, the taxable profits are earned by the liaison office, the rate of tax would be 40% (plus Surcharge and Education Cess) i.e. rate applicable to a foreign company.

BRANCH OFFICE (BO)

- ✕ **ROLE** – To Carry out the Business activities of the Foreign Company in India.
- ✕ **APPROVAL** – Branch office needs two fold approval i.e. Foreign Exchange Department of Reserve Bank of India and then Registrar of Companies, Ministry of Corporate Affairs.
- ✕ **RESTRICTIONS** – Branch Office is subject to Transfer Pricing regulations with respect to transactions with the parent company and other associated enterprises outside India.
- ✕ **ADVANTAGES** - Branch Offices established with the approval of RBI may remit outside India profit of the branch, net of applicable taxes and subject to the RBI guidelines.

PROJECT OFFICE (PO)

- ✕ **ROLE** – To set up a Temporary project office in India.
- ✕ **SCOPE** – To execute specific projects and carry out necessary activities relating to such projects.
- ✕ **APPROVAL** – The Government of India has granted general permission to set up project office in India with Specific Conditions.
- ✕ **RESTRICTIONS** – The Company cannot carry out any other business activities other than the specified project.
- ✕ **TAXATION** – Once the Project is completed, the Project office may remit outside India the surplus of the project, after meeting the tax liabilities.

BRANCH OFFICE IN SEZ

APPROVAL - Approval of the Reserve Bank is not required to establish a branch/unit in Special Economic Zones for undertaking manufacturing and service activities, subject to compliance of the following conditions
Units are functioning in those sectors where 100 per cent FDI is permitted;

COMPLIANCE - Comply with part XI of the Companies Act, 1956 (Section 592 to 602);

FUNCTION - Function on a stand-alone basis. (Stand Alone means such branch offices would be isolated and restricted to the Special Economic Zone alone and

RESTRICTIONS - No business activity/transaction will be allowed outside the Special Economic Zones in India, which includes branches/subsidiaries of its parent office in India)

Permitted Activities - Branch Office (BO)

Export or Import of Goods.	Professional or consultancy services relating to Parent Company Business.	Carry on any Research work in which the parent company is affianced.	To Promote Technical or Financial Collaborations between Indian Company and Parent Company.	Representing Parent Company in India. i.e. to act as buying / selling agent in India.	To render services relating to Information Technology and development softwares in India.	To provide Technical Support in products supplied by the parent company.
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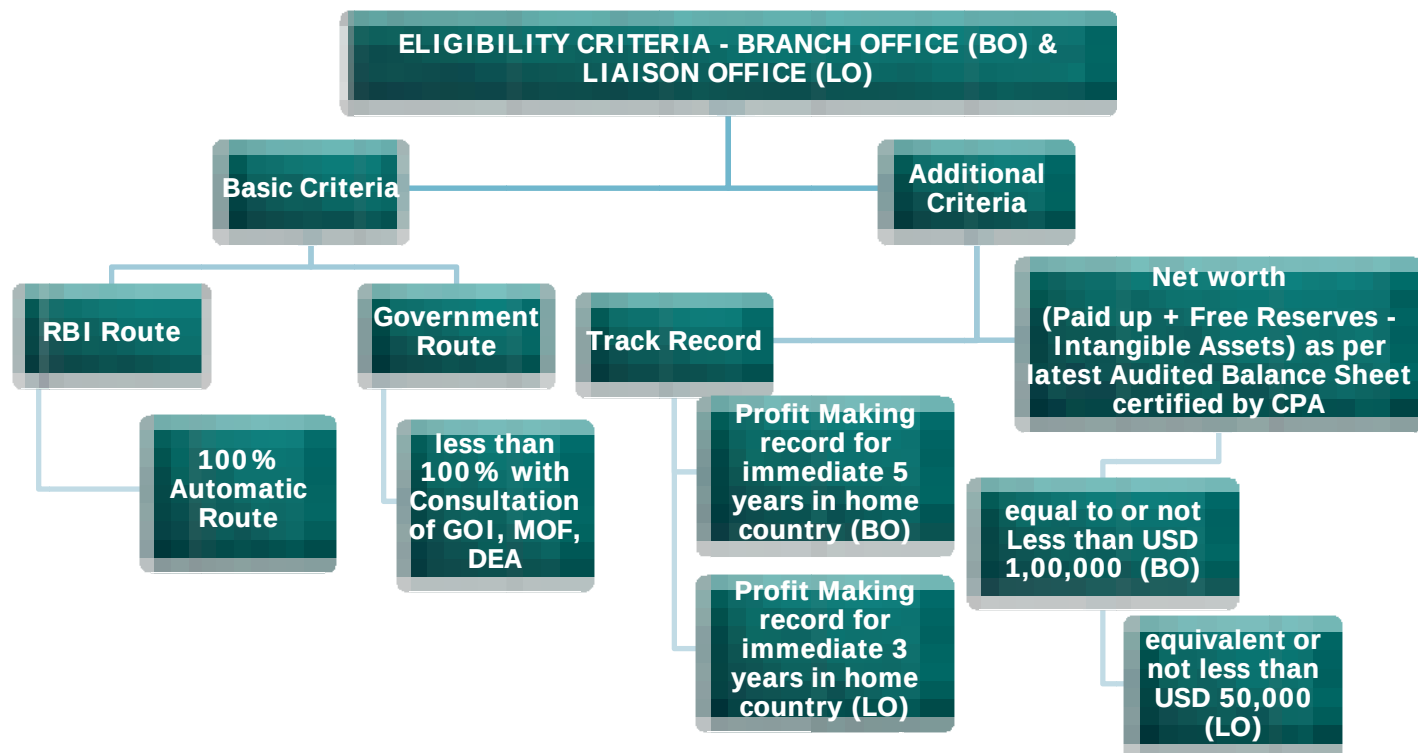
Permitted Activities - Liaison Office (LO)

To Represent in India, the parent company / group companies.

To Promote export or import from or to India

Thrive in Promoting technical / financial collaborations between parent / group companies and companies in India.

To act as a communication channel between the parent company and Indian companies.



APPLICATION AND DOCUMENTATION

Applications in Form FNC (Annex-C), duly completed in all respects and signed by the authorized signatory of the foreign entity in the home country

Submit along with Letter of Comfort, wherever applicable (Annex D), to the designated AD Category - I bank for onward transmission to the Reserve Bank

Forward the same along with their comments and recommendations and the required documents (Item (vii) of Form FNC).

NON PERMITTED AREAS



DOCUMENTS TO BE SUBMITTED TO THE RBI FOR PERMISSION TO SET UP A LIAISON OFFICE

Three copies of Form FNC1 obtained from the RBI need to be signed, sealed and delivered back to the RBI

English version of the certificate of incorporation / Registration or Memorandum & Articles of Association attested by Indian Embassy/ Notary Public in the country of Registration

Latest Audited Balance Sheet of the applicant entity

Letter from the Director / CEO of the Company to the Reserve Bank of India stating its intention to set up a Liaison office in India. (English) (On the Company letterhead).

Bankers report from the Company's banker showing the number of years the company has had banking relations with the bank

Letter of authority from the parent company in favor of the local representative

Details of activities / services proposed to be undertaken / rendered by the proposed Liaison office in India

Residence proof and passport copies of the authorized personnel.

A covering letter to open the bank account in India

Once the above documents are duly notarized, signed and submitted to the RBI, the apex board will send the relevant papers to the ministry of external affairs, ministry of finance and the Home ministry for their approval. Once permission to establish a liaison office is granted by these three ministries, an approval letter will be sent to the company, allowing the foreign entity to operate as a Liaison Office in India.

COMMON ADVANTAGES OF BRANCH OFFICE/ LIAISON OFFICE / PROJECT OFFICE

▪ EASY OPERATIONS

▪ LESS FORMALITIES

▪ SIMPLE CLOSURE PROCESS

REMITTANCE OF PROFITS EARNED

A project office may remit outside India the surplus of project office after its completion net of applicable Indian taxes on production of the following documents to authorized dealer

Certified copy of final audited project accounts

A chartered accountants certificate showing the manner of arriving the remittable surplus

Income tax assessment order or documentary evidence showing the payment of income tax

A certificate from Auditor of Project Office stating that no statutory liability in respect of project is pending and applicable taxes

Inter-Project transfer of funds requires prior permission of the concerned Regional Office of the Reserve Bank under whose jurisdiction the Project Office is situated.

AD can permit intermittent remittances by Project Offices pending winding up / completion of the project provided they are satisfied with the bonafides of the transaction, subject to the following

INTERMITTENT REMITTANCES BY PROJECT OFFICES IN INDIA

An undertaking from the Project Office that the remittance will not, in any way, affect the completion of the Project in India and that any shortfall of funds for meeting any liability in India will be met by inward remittance from abroad

The Project Office submits an Auditors' / Chartered Accountants' Certificate to the effect that sufficient provisions have been made to meet the liabilities in India including Income Tax, etc.

EXTENSION OF LIAISON OFFICES

Requests for extension of Liaison Offices (other than those from entities in the Insurance sector, NBFCs and Construction and Development sectors) may be submitted to the concerned AD Category - I bank under whose jurisdiction the Liaison Office / Nodal Office is located before the expiry of the validity of the approval.

Applications from insurance companies will continue to be directly received and examined by the Insurance Regulatory and Development Authority (IRDA), as hitherto.

No extension would be considered for LOs of entities who are NBFCs and those engaged in Construction and Development sectors. Upon expiry of the validity period, these entities have to either close down or be converted into a full-fledged Joint Venture (JV) /Wholly Owned Subsidiary (WOS), in conformity of the extant FDI policy.

WINDING UP OF BRANCH / LIAISON OFFICES

- Requests for winding up of Branch / Liaison Office(s) may be submitted to the AD Category - I bank designated by their Nodal Office.
- The application for winding up may be submitted along with the following documents:
 - A Chartered Accountant's certificate:
 - i) indicating the manner in which the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets;
 - ii) confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc. of the office have been either fully met or adequately provided for;
 - iii) confirming that no proceeds accruing from sources outside India has remained un-repatriated to India.
 - No-objection / Tax Clearance Certificate from Income-Tax authority for the remittance or an undertaking from the applicant and a certificate from the Chartered Accountant as mentioned in AP (DIR Series) Circular No. 56 dated November 26, 2002.
 - Confirmation from the parent entity that no legal proceedings in any Court in India are pending against the Branch / Liaison Office and there is no legal impediment to the remittance.

COMPARISON BETWEEN LIAISON, BRANCH AND PROJECT OFFICE

Sl. No.	PARTICULARS	LIAISON OFFICE (LO)	BRANCH OFFICE (BO)	PROJECT OFFICE (PO)
1.	Setting-up Requirements'	Prior approval of RBI	Prior approval of RBI	No prior approval from RBI subject to certain conditions, except intimation to RBI within 2 months
2.	Permitted Activities	Only information collection, market survey, communication activity, etc., permitted.	8 (Eight) Activities permitted by RBI for BO. Local manufacturing and retail trading are not permitted.	PO can only execute projects
3.	Funding for local operations	Local expenses can be met only out of inward remittances.	Local expenses can be met through inward remittances or from local earnings	Expenses can be met through inward remittances or from local earnings.
4.	Permanent Establishment	Not regarded as PE in India under DTAA and Domestic tax/laws subject to liaison activities only.	Regarded as PE in India of the Foreign Company.	Regarded as PE in India of the Foreign Company
5.	Operating Time Limit	LO shall be opened for the period of three years and further renewal can be obtained through AD.	BO generally does not have any time limit for carrying in business.	PO has time limit as per Contract agreement.
6.	Compliance requirements under Income Tax Act	Requirement to file return of income. Not liable for IT as no income or revenue earned.	Required to file return of income in respect of BO operations. Effective tax rate 42.23% on profits. No further tax on repatriation.	Required to file Return on Income in respect of PO operations. Effective tax rate 42.23% on profits. No further tax on repatriation.
7.	Acquisition of Immovable Property	Can acquire immovable property only on lease not exceeding 5 years	Can acquire immovable property on ownership/lease.	Can invest in immovable property without prior approval, subject to certain conditions.
8.	Transfer Pricing Regulations	Not Applicable	Applicable	Applicable
9.	Intermittent Remittances	Not Applicable	Not Applicable	Permitted by AD if Auditors certificate and a undertaking is given

FOREIGN COMPANIES

According to section 591 foreign companies are the:

(a) Companies incorporated outside India which, after the commencement of this Act, establish a place of business within India; and

(b) Companies incorporated outside India which have, before the commencement of this Act, established a place of business within India and continue to have an established place of business within India at the commencement of this Act.

A place of business means premises where there is a physical or visible indication that the company may be contacted there.

REGISTRATION OF CHARGES – SECTION 600

Within "30 days" of Creation of Charge it has to be registered with the Principal registrar as well as the registrar of the state in which the Principal place of Business is situated

This is in respect of charge on properties in India which are created by a foreign company "after 15th January, 1937"

Charges on the properties in India which is acquired by any foreign company after 15th June, 1937

Where the charge is created or the completion of the acquisition of the property which takes place outside India, 30 days after the day on which, the instrument creating or evidencing the charge or copy thereof could, in due course of post and if dispatched with due diligence, have been received in India shall be the time available to file the charge with the Registrar

A foreign company is also under an obligation to provide inspection and copies of trust deed recording the creation of a charge for securing any issue of debentures to the debenture holders.

WINDING UP OF FOREIGN COMPANIES - SECTION 582 (b)

- The provisions of part X of the act, dealing with the winding up of unregistered companies, shall apply to the foreign companies [1985 (58) Comp Case 285].
- Section 584 of the companies act, 1956 provides that where a body corporate incorporated outside India which has been carrying on business in India,
- Ceases to carrying on business in India,
- It may be wound up as an unregistered company
- Notwithstanding that the body corporate has been dissolved or
- Otherwise ceased to exist as such under or
- By virtue of the laws of the country under which it was incorporated.
- Such winding up can only be made through the court.
- Where a foreign company ceases to carry on business in India or
- Its substratum is gone or it carries on ultra virus business,
- It may be wound up under the just and equitable ground.

PROFESSIONAL LIFE

ENDLESS POSSIBILITIES WITH
BORDERLESS SUCCESSES

Post your reflections to

S.Dhanapal
Managing partner
S DHANAPAL & ASSOCIATES
Practising Company Secretaries
3rd Floor, Victory Towers,
Old No.724/725, New No.486,
Poonamallee High Road,
(Opp to Pachaippa's College),
Aminjikarai, Chennai- 600 029.
Ph.No. 044 - 4553 0256 / 57
Direct Ph: 044-42652127
Cell No. 96770 22712
Email Id. csdhanapal@gmail.com