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1. INTRODUCTION

The idea behind this guide is to introduce the basic aspects relating to mergers and acquisitions as per the current tax and regulatory environment in India.

An overview of available types of legal entities for investment in India are as under:

a. Company

A company is an artificial jurisdictional person having a separate legal entity. It is incorporated and regulated by the provisions of Companies Act, 2013 (CA 2013) and governed by the Ministry of Corporate Affairs. A company is permitted to carry out only those activities that are specified in its memorandum of association. Funding options available for a company inter-alia include equity shares, preference shares, other forms of permitted borrowings (local and overseas as per prescribed norms) or internal accruals. Foreign investments in a company are subject to Foreign Direct Investment (FDI) Regulations. Income of a company is liable to tax as per domestic tax rates. Dividend received from a company is liable to tax in the hands of shareholders.

b. Limited Liability Partnership ("LLP")

A LLP is a form of business entity which provides an ability for individual partners to be shielded from the liabilities created by another partner's business decision or misconduct. LLP is a body corporate existing as a legal person separate from its partners. LLPs are incorporated and regulated by the Limited Liability Partnership Act, 2008 and governed by the Ministry of Corporate Affairs. LLP is permitted to carry out those activities which are agreed between the partners in the LLP Agreement. LLP is generally funded with Partner's capital. FDI are permitted in LLP engaged in activities/ sectors for which 100% FDI is allowed under the automatic route (i.e, without prior approval of the Government or the Reserve Bank of India (RBI)) and there are no sector specific conditions for receiving foreign investment. Profits of an LLP are liable to tax as per domestic tax rates. Such profits after tax in the hands of the LLP, are freely distributable to the partners as share in profit of the LLP and are not liable to any further tax in the hands of the LLP or the partner.

c. Partnership

A partnership firm is created by two or more persons, by entering into an agreement to share the profits of a business carried on by them. The ownership and liability of all partners of the partnership is joint, unlimited and several. Partnerships are created and regulated by Indian Partnership Act, 1932 and are governed by the regional registrar of firms. A partnership agreement forms the constitutive documents of a partnership firm and lays down the manner in which the partners would operate the firm. A partnership firm is generally funded through partner's capital contribution. Any investment by foreign entities is permitted in Indian partnership firms subject to prior approval of RBI. Profits of a partnership firm are liable to tax as per domestic tax rates. Such profits after tax in the hands of the partnership firm, are freely distributable to the partners as share in profit of the partnership firm and are not liable to any further tax in the hands of the partnership firm or the partner.

d. Liaison Office ("LO")

The LO functions as a representative office of a foreign company and it has no separate legal existence in India. An LO can undertake only liaison activities and the role of such offices is thus, limited to representing, promoting export/import, promoting technical/ financial collaborations, and acting as a communication channel. LO can be set up with prior consent of an Authorised Dealer ("AD") banker in a sector in which 100% FDI is allowed. For the remaining sectors, RBI approval may be required. Generally, a LO does not constitute a permanent establishment (PE)/ business connection in India. However, this issue has been a subject matter of litigation and depends on the facts of each case. If an LO is held to be constituting a PE/ business connection in India, then the profits attributable to such PE/business connection in India shall be subject to tax in India.

e. Branch Office ("BO")

BO represents a foreign company in India and is generally not treated as a separate legal entity. The operations of a BO are restricted in India due to limitation under exchange control regulations. The activities permitted for a BO in India are limited to export/import of goods, rendering of professional/ consultancy services, carrying out research work, promoting technical and financial collaborations, acting as a buying/selling agent, rendering services like information technology, development of software, technical support to the products supplied. Accordingly, a BO is generally set up where the activities carried out in India are limited. The BO is permitted to remit surplus revenues to its foreign head office subject to applicable taxes discharged in India. BO is treated as a PE/business connection of the foreign enterprise and profits attributable to such BO are taxed at 40% (plus applicable surcharge and education cess). BO of foreign company can claim only limited tax deductions for general administrative expenses incurred by the BO. These expenses should not exceed 5% of annual income or the actual payment of HO expenses attributable to Indian business, whichever is lower.

f. Project Office ("PO")

A foreign company preferably engaged in one-time turnkey or installation project, generally sets up a PO in India. Such PO does not constitute a separate legal entity in India. Such PO can be set up upon obtaining approval from the AD Banker. A PO is permitted to operate a bank account in India and may remit surplus revenue from the project to the foreign company. Like the LO, if a PO is held to be constituting a PE/ business connection in India then the profits attributable to such PE/ business connection shall be subject to tax in India.

Tax rates in India are subject to change every year. The applicable effective rates of tax for the tax year 2020-21 and proposed for tax year 2021-22 are as under:

Particulars	Taxable income below INR 10 million	Taxable income between INR 10 million to INR 100 million	Taxable income exceeding INR 100 million
Domestic Company - if turnover or gross receipt does not exceed INR 4 billion in the FY 2019-20)	26.00%	27.82%	29.12%
Domestic company - Other cases	31.20%	33.38%	34.94%
Other domestic companies not availing incentives (optional regime)	25.17%	25.17%	25.17%
New manufacturing companies set up and registered on or after 1 October 2019 not availing incentives (optional regime)	17.16%	17.16%	17.16%
LLP/ Partnership firm	31.20%	34.94%	34.94%
Foreign company	41.60%	42.43%	43.68%

Effective tax rate is a basic tax rate plus applicable surcharge and health and education cess (cess) representing an additional levy that is computed on the basic tax and surcharge liability.

2. RECENT DEVELOPMENTS

The following key recent changes to the Indian tax and regulatory framework may affect the mergers and acquisition landscape in India

a. Covid-19 response

The Prime Minister of India announced an economic relief package of INR 20 trillion with the moto of "Atmanirbhar Bharat". This covers a gamut of economic, financial & social measures with a vision of self-reliant India and development of Global Supply Chain originating in India. The Finance minister has also announced certain tax measures like extension of compliance timelines, reduction in the rates of withhold taxes on payments made to residents. The Finance bill, 2021 proposes the following benefits in light of Covid scenario:

- Leave Travel Concession ("LTC") Cash scheme - This scheme provides for exemption in respect of the value of travel concession or assistance received by or due to an employee from his current or former employer for himself and his family, in connection with his proceeding on leave to any place in India. In view of the situation arising out of outbreak of COVID pandemic, it is proposed to provide tax exemption on cash allowance in lieu of LTC.
- With a view to incentivize home buyers and real estate developers, the Finance Bill, 2021 proposed to increase safe harbor limit from 10% to 20% for specified primary sale of residential units. Safe harbor limit pertains to margin of fluctuation allowed between the stamp value of the residential unit and consideration received against the same.

b. Tax on transfer of money or property by a partnership firm/Association of Persons/Body of Individuals to its partners or members

The Finance Bill, 2021, provides that where a partner receives any capital asset or stock-in-trade from a firm in connection with the dissolution or reconstitution of such firm, then it shall be considered as a transfer to the partner. Further, it provides that any profits and gains arising from such deemed transfer of capital asset or stock in trade, by the firm shall be deemed to be the income of the firm.

c. Depreciation on Goodwill

The Finance Bill, 2021, proposes to exclude "Goodwill of a business or profession" from the definition of "block of assets" and from the list of assets eligible for depreciation. Thus, such an amendment could lead to an additional tax burden and increased costs of acquisition. This amendment being retroactive in nature, meaning that depreciation on any past goodwill, or partly claimed in the past, would not be available going forward. However, in case where goodwill is acquired, the consideration paid for acquisition of such goodwill will continue in the tax books as non-depreciable asset, the cost of which will be available as a deduction in computing capital gains on any subsequent transfer of business.

It is also proposed that in a case where the goodwill of a business/ profession forms a part of the block of assets for prior years, and the taxpayer has claimed depreciation, the written down value in such a case will be determined by reducing the below from the actual cost of goodwill -

- Amount of depreciation actually allowed for such goodwill before the year 1987-88, and
- Amount of depreciation that would have been allowable from the year 1987-88 as if the goodwill was the only asset in the relevant block of assets.

d. Chargeability to Equalisation Levy (EL)

The Finance Act , 2016 introduced EL with effect from 1 June 2016, to be levied at 6% on the gross consideration received by non-residents for online advertisement and related services from specified persons. Further, the FA 2020 which came into effect from 1 April 2020 extended the scope of EL to charge a 2% levy on gross consideration received from online sale of goods or provision of services (including facilitation) by a non-resident operator of a digital facility or platform. The Act provided for an exemption from income-tax where the amount was subject to EL i.e, mutual exclusion as well . The Finance Bill, 2021 proposes the below amendments:

- Taxation as royalty or fee for technical services under the income tax law would have priority over EL.
- In order to be regarded as "online sale of goods" and "online provision of services" for e-commerce supply or service, one or more of the following activities need to be undertaken online. These are, namely: a) acceptance of offer for sale; b) placing purchase order; c) acceptance of purchase order; d) payment of consideration or e) supply of goods or provision of services, partly or wholly.
- Consideration received/ receivable for sale of goods and provision of services will be included for computation of gross consideration regardless of whether the e-commerce operator owns the goods or provides the service.

e. Abolition of dividend distribution tax

Earlier, domestic companies paying dividends to its shareholders were required to pay dividend distribution tax (DDT) @20.56% and such dividend was exempt in the hands of the shareholders. Finance Act, 2020 abolished DDT and shifted the taxability of dividends to the classical system wherein the shareholders are taxed on dividend income. New provisions have been introduced to remove the cascading effect of tax on dividend received by holding company from its subsidiary company on payment of dividend to the shareholders of the holding company. Dividends distributed to non-resident shareholders are liable to withholding @ 20% or respective DTAA rate, whichever is more beneficial. Non-resident shareholders may, subject to the domestic laws of their jurisdiction, be eligible to avail credit of taxes withheld on dividend which was a disputed issue under the existing regime. Further, the Finance Bill, 2021 has proposed that dividends paid to Foreign Institutional Investors (FII) from certain securities shall be subject to withholding tax at the rate of 20% or DTAA rate, whichever is lower, subject to the FII furnishing a Tax Residency Certificate to the payer.

f. Overseas listing

Presently, Indian companies are allowed access overseas equity markets only through American depositary receipts ("ADR"), Global depositary receipts ("GDR"), foreign currency convertible bonds and masala bonds on foreign markets. Section 23 of Companies (Amendment) Bill, 2020 provides power to allow listing of shares of companies in permitted stock exchanges. Ministry of Corporate Affairs and SEBI are yet to announce norms for overseas listing. Earlier, SEBI had suggested that only financially stable companies would be allowed to list in the overseas markets.

g. General Anti-Avoidance Rules ("GAAR")

The provisions of GAAR were first introduced in India by Finance Act, 2012. However, after introduction, its applicability was deferred, and finally, it came into force from FY 2017-18. Further, Central Board of Direct Taxation (CBDT) vide circular 7 of 2017 dated 27 January 2017 issued certain clarifications in the form of FAQs for specific questions on provisions of GAAR. One of the key clarifications in the circular was that GAAR will not apply to an arrangement where the Court/National Company Law Tribunal (NCLT) has explicitly and adequately considered the tax implications while sanctioning such arrangement.

h. Long term capital gains (“LTCG”) on transfer of listed shares

The Finance Bill 2021 proposes to exempt the capital gains, arising or received by a non-resident, on account of relocation from the original fund to the resultant fund. In this regard, the meaning of original fund, resultant fund and relocation is specified below. Presently, the LTCG (exceeding INR 0.1 million) arising on transfer of equity shares listed on a recognized stock exchange would be taxed at a concessional rate of 10%, if securities transaction tax (STT) has been paid on both acquisition and transfer in case of equity shares; and on transfer of units of equity-oriented mutual funds or units of business trust (subject to certain exceptions). However, indexation, rebates and certain deductions will not be available on the same. In case of non-residents, the benefit of computation of LTCG in foreign currency shall not be available. The meaning of the terms stated above are as follows:

- **“original fund”** means a fund established or incorporated or registered outside India, which collects funds from its members for investing it for their benefit and fulfills the following conditions, namely:—
  - the fund is not a person resident in India;
  - the fund is a resident of a country or a specified territory with which an agreement referred to in sub-section (1) of section 90 or subsection (1) of section 90A has been entered into; or is established or incorporated or registered in a country or a specified territory as may be notified by the Central Government in this behalf;
  - the fund and its activities are subject to applicable investor protection regulations in the country or specified territory where it is established or incorporated or is a resident; and
  - fulfils such other conditions as may be prescribed;(iv) fulfils such other conditions as may be prescribed;
- **“relocation”** means transfer of assets of the original fund, or its wholly owned special purpose vehicle, to a resultant fund on or before the 31 March 2023, where consideration for such transfer is discharged in the form of share or unit or interest in the resulting fund to
  - the shareholder or unit holder or interest holder of the original fund in the same proportion in which the share or unit or interest was held by such shareholder or unit holder or interest holder in such original fund, in lieu of their shares or units or interests in the original fund.
  - the original fund, in the same proportion as referred to in sub-clause (i), in respect of which the share, or unit or interest is not issued by resultant fund to its shareholder or unit holder or interest holder;
- **“resultant fund”** means a fund established or incorporated in India in the form of a trust or a company or a limited liability partnership, which––
  - has been granted a certificate of registration as a Category I or Category II or Category III Alternative Investment Fund, and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012 made under the Securities and exchange Board of India Act, 1992; or International finance services Centres Authority Act, 2019; and
  - is located in any International Financial Services Centre as referred to in sub-section (1A) of section 80LA;’.

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i. Valuation of unquoted equity shares

Finance Act, 2017 introduced new provisions to provide that where consideration for transfer of shares of a company (other than a quoted share) is less than the FMV of such a share, the FMV determined as per the prescribed rules shall be deemed to be the full value of consideration for computing "capital gains". Further, in July 2017, the CBDT has issued final rules for the determination of FMV of unlisted equity shares for this purpose.

j. Benefits available to International financial service center (IFSC) in India

- **Relaxations in Long Term Capital Gains ("LTCG") and short-term capital gains**– LTCG on transfer of Equity Share in a Company or units of an equity-oriented fund or units of a business trust on which STT is paid, is usually taxable at 10%. However, the LTCG on transfer of the above-mentioned capital asset through a stock exchange located in IFSC is totally exempt even if STT is not paid. Further, short-term capital gains in certain situations, where the transaction is undertaken on a stock exchange situated in IFSC, the concessional rate of 15% will be available on such transaction, even if STT is not paid.
- **Lower minimum alternate tax** - concessional minimum alternate tax regime for a company and certain persons other than a company located in IFSC.
- **Transactions not regarded as transfer** - Any transfer of below capital assets, made by a non-resident on a recognized stock exchange located in any IFSC and where the consideration for such transaction is paid or payable in foreign currency is not considered as a transfer and hence not liable to Capital Gain Tax. These capital assets are as below:
  - bond or Global Depository Receipt
  - rupee denominated bond of an Indian company
  - derivative
  - such other securities as may be notified by the Central Government in this behalf
- **Concessional rate to bonds listed in stock exchanges in IFSC** - The tax shall be withheld @ 5% on interest paid to non-residents, in respect of monies borrowed by it from a source outside India by way of issue of any long-term bond or rupee denominated bond which is listed only on a recognised stock exchange located in any IFSC, on or after the 1st day of April, 2020 but before the 1st day of July, 2023,

Further, the Finance Bill, 2021 proposed the below amendments in respect of IFSC:

- **Relaxations in certain conditions for relocation of eligible fund manager** – The Finance Bill, 2021 proposes to empower the Government to notify certain conditions that shall not apply, or apply with modifications, in case of an eligible investment fund and its eligible fund manager, if such fund manager is located in an IFSC and has commenced its operations on or before March 31, 2024.
- **Exemption to investment division of offshore banking unit** – The proposed amendment provides for exemption to specified funds in case of any income accrued or arisen to, or received by the investment division of offshore banking unit to the extent attributable to it and computed in the prescribed manner.

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- **Exemption to non-resident on transfer of non-deliverable forward contracts and on royalty income by way of lease of an aircraft** – The proposed amendment provides for exemption in the hands of non-residents on any income accrued or arisen to, or received by a non-resident as a result of transfer of non-deliverable forward contracts entered into with an offshore banking unit of IFSC which commenced operations on or before the March 31, 2024 and fulfils prescribed conditions.

Subject to same date of commencement of operations as above, royalty/ interest income by way of lease of an aircraft paid by a unit of an IFSC shall be exempt in the hands of non-residents. In this regard, both the nature of lease shall qualify operating as well as finance lease for the exemption (i.e, income in the form of royalty or interest). Further, an aircraft is defined as "an aircraft or a helicopter, or an engine of an aircraft or a helicopter, or any part thereof".

- **Exemption of capital gains and carry forward and set off of losses, on account of relocation of fund** – A new section is proposed to be inserted which exempt any income of the nature of capital gains, arising or received by a non-resident, which is on account of relocation from the original fund to the resultant fund. This exemption shall be available to Category-III Alternative Investment Fund for only when qualifies as a specified fund, only to the extent of income attributable to units held by non-resident (not being a permanent establishment of a non-resident in India) in such specified fund.

In respect of carry forward and set off of losses, the Indian tax laws provide that benefit of carry forward and set off of loss will be available only if 51% or more of voting power is common in the year in which loss was incurred and the year in which set off is sought. The Finance Bill, 2021 specifies that this restriction pertaining to carry forward and set off of losses will not apply wherein the change in shareholding pattern has taken place on account of relocation between original fund and resultant fund, which are defined as below:

For the meanings of **original fund**, **relocation** and **resultant fund**, please refer to Section 2h.

- **Extension of income-based tax holiday for units located in IFSC** – It is proposed that income arising from transfer of an asset, being an aircraft or aircraft engine which was leased by any unit of the IFSC from its business for which it has been approved for setting up in such a Centre in a Special Economic Zone to a domestic company engaged in the business of operation of aircraft before such transfer shall also be eligible for 100% deduction subject to condition that the unit has commenced operation on or before March 31, 2024.
- **Exemption extended to investment division of offshore banking unit** – The exemption provisions have been extended to income attributable to the investment division of an offshore banking Unit.
- **Taxation of Income from Global Depository Receipts (GDRs) issued by Overseas Depository Bank situated outside India or IFSC** - Where an Indian company distributes dividend in respect of GDRs issued to its employees under an Employees' Stock Option Scheme, the dividend is taxable at a concessional tax rate of 10% in the hands of the employee, provided the employee is a resident in India and GDRs are purchased in foreign currency. The long-term capital gain arising from transfer of such GDRs shall also be taxable at concessional rate of 10%. The Finance Bill, 2021 has amended the definition of GDRs to provide that they can be created by the Overseas Depository Bank in an IFSC as well. Further, GDRs can also be issued against ordinary shares of issuing company, being a company incorporated outside India, if such depository receipt or certificate is listed and traded on any IFSC.

k. Aligning the purpose of entering into DTAAs with Multilateral Instruments ("MLI")

MLI is effectively applicable to certain DTAAs entered by India from April 1, 2020. In order to ensure that the DTAA benefits are not misused, Finance Act amended the purpose of availing DTAA to align it with the purpose of MLI. Accordingly, as per the amended provisions, the Central Government may enter into an agreement with the Government of any country outside India for avoidance of double taxation of income under the Act and under the corresponding law in force in that country. This would be done without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance including through treaty-shopping arrangements and indirect benefits.

l. Alterations in tax treaties

In India, taxpayer has an option to be governed by the provisions of the tax treaty to the extent they are more beneficial. Favorable taxation regime for capital gains under certain tax treaties between India and countries like Mauritius, Singapore and Cyprus have encouraged a lot of foreign investment into India and these countries have always remained a favored destination for making investments in India. However, the Indian tax authorities have time and again, challenged the substance and residential status of investor entities by holding that they were merely made for availing treaty benefits. In this regard, the following treaty amendments which now provide source-based taxation instead of residence-based tax are noteworthy:

i Tax treaty between India and Singapore

As per the amendments to India's tax treaties with Singapore, India shall now have the rights to tax capital gains arising from the alienation of the shares of an Indian company acquired on or after 1 April 2017. In this regard, the following provisions will apply:

- On shares of an Indian Company acquired after 1 April 2017 and transferred between 1 April 2017 and 31 March 2019 - On fulfillment of limitation of benefit clause, the tax rate applicable on such gains shall not exceed 50% of the domestic tax rate in India.
- On shares of an Indian Company acquired after 1 April 2017 and transferred after 1 April 2019 - Gains on such sale would be fully taxable in India.

Investments made in Indian company's shares before 1 April 2017 have been grandfathered and will continue to enjoy the benefits of the erstwhile provisions of the respective tax treaties and will not be subject to capital gains tax in India.

ii Tax treaty between India and Mauritius

With respect to taxability of capital gains, amendments to the provisions the India-Mauritius tax treaty are similar to the abovementioned amendments to India-Singapore tax treaty. Further, in respect of interest payment, the erstwhile provisions of tax treaties did not provide any limit on the levy of tax in India on the interest arising in India and paid to a resident of Mauritius (except banks). However, as per the amended tax treaty between India and Mauritius, interest arising in India and paid to a resident of Mauritius may be taxed in India at the rate of 7.5% of the gross amount of interest if the beneficial owner of the interest is a resident of Mauritius.

iii Tax treaty between India and Cyprus

As per the amended tax treaties, while India shall have the right to tax capital gains arising from transfer of the shares of an Indian company acquired on or after 1 April 2017, investments made before 1 April 2017 have been grandfathered and will continue to enjoy the benefits of the erstwhile provisions of the India-Cyprus tax treaty and not be subject to capital gains tax in India.

iv List of tax treaties entered into/ amended by India recently

India has recently entered into following tax treaty:

- Tax treaties entered into by India - Hong Kong and Marshall Islands
- Amendment in tax treaties - India's tax treaties with Austria, China, Sri-Lanka, Spain, Kenya, Kuwait, Qatar and Morocco

3. SHARE ACQUISITION

a. General Comments

One of the options for acquisition of a business is through acquisition of shares. Share acquisition is probably the most conventional mode of acquiring another business. The target company remains exactly the same, only its ownership changes. Share acquisition would result in taxation in the hands of transferor of shares in the form of capital gains arising on transfer of shares. Further, a deemed gift tax may also be triggered in the hands of the transferee in certain situations. Under this route, step-up in the cost of the underlying business is not possible.

b. Tax attributes

Following are key considerations to be kept in mind before acquiring the shares of a company:

i Carry forward and set off of losses

One of the key considerations to be kept in mind at the time of acquisition through share purchase is the set off and carry forward of losses. In case of closely held companies, losses are restricted from being carried forward and set-off against future profits unless on the last day of the year in which such losses are sought to be set-off, the shares carrying not less than 51 percent of the voting powers are beneficially held by persons who beneficially held shares carrying at least 51 percent of the voting powers on the last day of the year in which such losses were incurred. However, carry forward of unabsorbed depreciation remains unaffected by such change in shareholding.

To incentivize start-ups, Finance Act, 2017, amended the provisions of ITA to allow eligible startups to carry forward their losses of first 7 years indefinitely subject to certain conditions, even if there is a change in more than 49% of the shareholding.

ii Valuation of shares

As discussed above, in case of transfer of shares at a price lower than the FMV, the FMV of the such shares is deemed as the full value of consideration for such transfer. Further, the difference between FMV of shares and the full value of consideration shall be liable to tax in the hands of the transferee as income from other sources. In respect of the above, FMV of shares is to be determined in the prescribed manner. Lastly, where the transfer of shares is undertaken between two associated enterprise ("AE"), the transaction needs to be carried out at arm's length price ("ALP").

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iii Tax clearance

There exists a mechanism for obtaining a tax clearance certificate for transfer of assets/ business subject to certain conditions. In the case of a pending proceeding against the transferor, the tax authorities have the power to claim any tax on account of completion of the proceeding from the transferee where the transfer is made for inadequate consideration.

iv Tax indemnities and warranties

In a share acquisition, the purchaser takes over the target company together with all its related liabilities, including contingent liabilities. Hence, the purchaser generally requires more widespread indemnities and warranties than in the case of an asset acquisition. When significant sums are involved, it is customary for the purchaser to initiate a due diligence exercise.

c. Tax Grouping

Group taxation is not permitted under the Indian tax law.

d. Tax free reorganizations

i Merger and amalgamation of Indian companies

Merging of one company into another company or merging of two or more companies to form a new company requires an NCLT approval. In India, mergers are used extensively to achieve a tax-neutral consolidation of legal entities in the course of corporate reorganizations since they enjoy favorable treatment under ITA and other laws, subject to certain conditions. Indian tax law defines "amalgamation" as a merger of one or more companies into another company or a merger of two or more companies to form a new company such that:

- all the properties and liabilities of the amalgamating companies immediately before the amalgamation become the properties and liabilities of the amalgamated company; and
- shareholders holding at least three-quarters of the shares in the amalgamating companies become shareholders of the amalgamated company (any shares already held by the amalgamated company or its nominees are excluded for purposes of this calculation).

To achieve tax-neutrality for the amalgamating company (or companies) transferring the assets and the shareholders of such amalgamating companies, following additional conditions should be satisfied:

- the amalgamated company should be an Indian company; and
- the entire consideration should comprise of shares in the amalgamated company.

ii Demerger of Indian companies

The transfer of a business undertaking by a transferor company to a transferee company for a consideration in the form of issue of shares of transferee company to the shareholders of the transferor company on a proportionate basis, is regarded as demerger. A demerger of an undertaking also requires approval from the NCLT. Generally, a demerger is taxed under the head capital gains. However, if the following conditions are satisfied, then the demerger would be considered tax neutral and shall be exempt from capital gains tax.

- All the properties and liabilities of the undertaking immediately before the demerger must become the property or liability of the resulting company by virtue of the demerger and such transfer should be at book value;
- In consideration of the demerger, the resulting company must issue its shares to the shareholders of the demerged company on a proportionate basis (except where the resulting company itself a shareholder of the demerged company is);
- Shareholders holding at least 3/4th in value of shares in the demerged company become shareholders of the resulting company by virtue of the demerger. Shares in demerged company already held by the resulting company or its nominee or subsidiary are not considered in calculating 3/4th in value;
- The transfer of the undertaking must be on a going concern basis; and
- The demerger is subject to any additional conditions as notified by the Central Government.

e. Purchase Agreement

Share purchase agreement is a legal contract between a transferor and transferee of shares. Purchase agreement contains the details of specific number of shares and the contract price for such transfer. This agreement serves as an evidence that the transfer of shares has taken place at mutually agreeable terms. This agreement also documents the various terms, conditions, representations and warranties agreed between the transferor and transferee.

f. Taxes on share transfers

i Securities Transaction Tax ("STT")

Transfer of shares through recognized stock exchange is liable to STT. It is imposed at the rate of 0.1% on both purchase and sale of certain listed instruments through a recognized stock exchange in India.

ii Stamp duty

Generally, delivery-based transfer of shares is subject to stamp duty at the rate of 0.015% of the market value of the shares.

iii Income-tax on capital gains

Capital gains arising on account of transfer of equity shares held for more than specified holding period (12 months in case of listed shares and 24 months in case of unlisted shares) would be taxed as long-term capital gains. In all the other cases, capital gains would be treated as short-term capital gains ("STCG"). The provisions of the ITA in respect of taxation of capital gains arising on transfer of shares is summarized as under:

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Nature of capital gains	Category of capital asset	Tax rate for resident	Tax rate for non-resident
LTCG	STT paid on both acquisition and transfer	10% without indexation if the long-term capital gains exceed INR 100,000	10% without the benefit of indexation and foreign exchange fluctuation.
	In any other case	20% with indexation	20% in other cases
STCG	STT paid on both acquisition and transfer	15%	40%
	In any other case	Normal domestic tax rates as applicable to the taxpayer	

iv Income-tax in the hands of the transferee

Where the shares of a company are transferred at a value which is less than the FMV, the excess of the FMV over the sales consideration is liable to tax as income from other sources in the hands of the transferee. Rate of applicable tax would be 30%/25% (excluding surcharge and cess) in case of residents and 40% (excluding surcharge and cess) in case of non-residents.

v Indirect tax

No implications shall arise under goods and services tax (“GST”) on transfer of shares.

g. Applicability of “purchase accounting” to a direct or indirect acquisition of shares

In India, purchase accounting is not applicable in case of direct or indirect acquisition of shares.

h. Advantages of share purchases

Following are the advantages of share purchase:

- Faster execution process, because no court approval is required (except where the open offer code is triggered, or government approval is required);
- Taxable at concessional rates when compared with the other modes of business re-organization;
- Low cost of compliance; and
- GST is not applicable.

i. Disadvantages of share purchase

Following are the disadvantages of share purchase:

- In case of share acquisition, value of intangibles and fair valuation of assets cannot be captured in the books of accounts and amortization expense on account of goodwill is not available;
- In case of acquisition of more than 25% of shares in case of listed companies, compliances under Securities Exchange Board of India (SEBI) Takeover Code is mandatory. This would entail higher transaction cost and time;

- Cost on account of capital gains tax for the sellers;
- In case of physical form of shares, cost on account of stamp duty at the rate of 0.015%;
- No benefit of amortization can be availed in respect of the amount paid in excess of the book value of underlying assets as opposed to the case of asset acquisition. Hence, consideration paid for acquisition of shares is locked-in until such shares are sold;
- Cost on account of compliances and approvals from the government and SEBI; and
- Pricing guidelines of the RBI to apply for valuation purposes in certain cases.

j. Other considerations

- **Mode of discharge of consideration** - Generally, consideration for share acquisition has to be discharged in cash. Discharge of consideration in kind or shares of transferred company, may subject to certain restrictions under CA 2013 and exchange control regulations and needs specific evaluation.
- **Exchange control regulations** - The acquisition and transfer of shares of an Indian Company between a resident and a non-resident or two or more residents is governed by the Indian exchange control regulations. The regulations, inter-alia, provide the permissible limit on investment, the manner of transfer of shares, the minimum/ maximum price at which the shares can be transferred, applicability of pricing guidelines, etc.

4. ASSET ACQUISITION

a. General Comments

Purchase of assets can be achieved either through purchase of a business on going concern basis or purchase of individual assets. Thus, a business could be acquired in either of the following ways:

- **Slump sale** - Slump sale refers to the transfer of one or more undertakings as a result of sale for a lumpsum consideration without assignment of values to the individual assets and liabilities. In case of a slump sale, the entire business is transferred as a going concern.
- **Finance Bill, 2021 Amendment** - The Finance Bill, 2021 proposes to amend the definition of Slump sale to include within its scope all types of transfers, such as sale, exchange, relinquishment of asset etc. thus proposing to tax slump exchange of an undertaking as Slump Sale. Hence, this increases the scope for the levy of tax on slump sale by any means. It also provides that the fair market value of the capital assets (being an undertaking or division transferred by way of slump sale) as on the date of transfer shall be calculated in the prescribed manner. Such FMV shall be deemed to be full value of the consideration received or accruing as a result of transfer of such capital asset. Further, it is also provided that the value of goodwill, which has not been purchased shall be taken as nil for computation.
- **Itemized sale** - An itemized sale typically occurs either where only specific assets are transferred OR where the buyer has an option to pick individual assets.

b. Purchase price allocation

The actual cost of the asset is regarded as its cost for tax purposes. However, this general rule may be subject to some modifications depending on the nature of asset and the transaction.

- **Slump sale** - Allocation of the purchase price by the buyer in case of acquisition through a slump-sale is critical from a tax perspective because the entire business undertaking is transferred as a going concern for a lump-sum consideration. The tax authorities normally accept allocation of the purchase price on a fair value or other reasonable commercial basis. Generally, reports from independent valuations providers are also acceptable.
- **Itemized sale** - The cost paid by the acquirer as agreed upfront may be accepted as the acquisition cost, subject to certain conditions.

c. Tax Attributes

Following are key tax attributes of asset acquisition:

- **Tax losses** – In case of asset acquisition, tax losses are retained by the seller and not transferred to the acquirer.
- **Undertaking specific tax deductions** - Certain tax benefits/deductions available to an undertaking may be available to the acquirer on transfer of whole undertaking on going concern basis as a result of a slump-sale.
- **Succession** – The transferee may be liable to pay any claim raised by the tax authorities for any tax on account of completion of the pending proceeding where the transfer is made for inadequate consideration and without prior clearance from the tax authorities.

d. Purchase agreement

An asset purchase agreement (“APA”) is an agreement between a buyer and a seller that finalizes terms and conditions related to the purchase and sale of a company’s assets. It is important to note in an APA transaction, it is not necessary for the buyer to purchase all of the assets of the company. In fact, it is common for a buyer to exclude certain assets in an APA. Provisions of an APA may include payment of purchase price, monthly installments, liens and encumbrances on the assets, condition precedent for the closing, etc. Defining and controlling behavior is a major objective of the APA. The buyer must represent its authority to purchase the asset. The seller must represent its authority to sell the asset.

e. Depreciation & amortization

- **Goodwill** - In case of slump sale, when the consideration paid is higher than the total FMV/cost of the assets acquired, goodwill shall arise. Such goodwill, being excess of consideration over the value of the assets, arises because of the underlying value of intangible assets. However, no depreciation shall be allowed on such goodwill acquired. Such acquired goodwill would still be recorded in books as a non-depreciable asset, the cost of which will be available as a deduction in computing capital gains on any subsequent sale of business.
- **Depreciation** - Book Depreciation is ignored for tax purposes and tax laws allow depreciation on a “block of assets” basis. All assets of a similar nature are classified under a single block and any additions/deletions are made directly in the block. Depreciation under the ITA is generally computed on reducing-balance basis on the entire block. However, companies engaged in the business of generation and/or distribution of power have the option to claim depreciation on a straight-line basis. In this regard, the Finance Bill, 2021, has proposed to exclude such goodwill from the meaning of “block of assets”.

Further, when the assets are used for more than 180 days in the first year, the entire eligible depreciation for that year is allowed. However, in case where the assets are used for less than 180 days, only 50% of the eligible depreciation would be allowed. Capital allowances are available for certain types of asset, such as assets used in scientific research or other specified businesses, subject to certain conditions.

The tax laws provide for specific depreciation rates for the tangible assets (buildings, machinery, plant or furniture), depending on the nature of asset used in the business. Additional depreciation of 20%/35% is available for new plant and machinery used in manufacturing or production, provided prescribed conditions are met. Depreciation on eligible intangible assets (such as know-how, patents, copyrights, trademarks, licenses and franchises or any similar business or commercial rights) is allowed at 25%.

f. Taxes on transfer of assets

i Stamp duty

Transfer of assets by way of a slump-sale would be subjected to stamp duty based on the amount of consideration received for the transfer or the market value of the property transferred (whichever is higher). Rates of stamp duty are state specific. Generally, rates of stamp duty applicable to immovable property ranges between 5-10% and for movable property range between 3-5%.

ii Income-tax

The income-tax implications under asset sale are as under:

- **Slump sale** – Before the Finance bill, 2021, the excess of sales consideration over the net worth of the transferred undertaking shall be treated as capital gains in the hands of the transferor. Net worth is the aggregate value of the total assets of the undertaking as reduced by the value of liabilities as per books of accounts. In this regard, the manner of computation of aggregate value of total assets is prescribed. If the undertaking is held for more than 36 months, the capital gains shall be considered as LTCG and liable to tax @ 20% (plus surcharge and cess). In case of the contrary, capital gains would be treated as STCG and liable to tax at normal tax rates applicable to the transferor. The Finance Bill, 2021 proposes to tax slump exchange as a slump sale thereby under Section 50B of the Act.
- **Itemised sale** - In case of depreciable assets, capital gains shall be computed on a block of asset basis. The excess of full value of consideration over and above the aggregate of the written down value of the block of assets and expenditure incurred in relation to the transfer will be treated as STCG. In other cases, capital gains tax payable by the seller will depend on the period for which the seller has held each of the assets that are transferred.

iii Indirect taxes

The Goods and Service Tax is made applicable in India from 1 July 2017. Under the GST regime, Services by way of transfer of a going concern, as a whole or an independent part thereof, are exempt from levy of GST. However, in case the transaction does not qualify as a "transfer of going concern" (i.e, qualifies as an itemized sale), GST will be applicable on the rates applicable on the transferred goods.

g. Advantages of asset purchase

Following are the advantages of an asset purchase:

- Unlike share acquisition, there is no need to make an open offer for acquisition (applicable for listed companies);
- Selective acquisition and assumption of assets and liabilities is possible;
- Recognition of value of brand, goodwill and other intangibles and claim of depreciation thereon may be possible;
- No court approval is required and thus, execution process is faster;
- Values of the assets can be restated by the acquirer for accounting and tax purposes subject to certain conditions; and
- Unlike share purchase, tax and other commercial liabilities of the whole entity/ company are not necessarily transferred upon acquisition.

h. Disadvantages of asset purchase

Following are the disadvantages of an asset purchase:

- Applicable stamp duty on asset purchase is higher than other modes of acquisition;
- Levy of GST may apply in an itemized sale of assets. Also, certain amount of input tax credit ("ITC") may require reversal.
- The transaction may not be tax-neutral, unlike certain other modes of acquisition like demerger, amalgamation, etc.
- The process may get delayed due to requirements of approvals from the financial institutions, inter alia, for transfer assets or undertakings; and
- Continuity of incentives, concessions and unabsorbed losses under direct or indirect tax laws may be jeopardized.

5. ACQUISITION VEHICLES

a. General Comments

There are a number of options of possible acquisition vehicles available in India to a foreign purchaser. Implications under the tax and regulatory framework influences the choice of acquisition vehicles of the purchasers.

b. Domestic Acquisition Vehicle

Following are the options of domestic vehicles available for acquisition:

- **Local holding company** – FDI guidelines for downstream investments governs the acquisitions made through an Indian holding company. Generally, indirect foreign investments through Indian companies are not construed as foreign investments where the intermediate Indian holding company is owned and/or controlled by residents of India. Ownership and control of an Indian company is determined on the basis of ownership of more than 50% of the shares along with control of the governing board.

c. Foreign Acquisition Vehicle

- **Foreign parent company** – Subject to FDI guidelines, a foreign-investors can invest in India directly through a foreign parent company.
- **Non-resident intermediate holding company** – To minimize tax leakage in India and avail favorable treaty benefits, an intermediate holding company resident in another territory could be used for investment into India. However, proof of substance in the intermediate holding company's jurisdiction may be required to avoid any implication of GAAR.

d. Partnerships and joint ventures

- **LLPs and partnerships -** Generally, Indian LLPs and partnerships may not be permitted to act as an acquisition vehicle for Indian investments. However, seeking specific approval from RBI in this regard, may be evaluated.
- **Joint venture -** Joint ventures ("JVs") are normally used where specific sectoral caps are applicable under the foreign investment guidelines. In such scenarios, a JV with an Indian partner is set up that will later acquire the Indian target. In planning a JV, the current guidelines for calculating indirect foreign investments should be considered. Additionally, JV are also set-up to create synergies between the intellectual properties/skills of the JV partners.

6. ACQUISITION FINANCING

a. General Comments

An acquisition can be carried out by various modes of finance like debt, equity and hybrid instruments that combines the characteristics of both. The principles underlying these approaches are discussed below.

b. Equity

Equity shares are ordinary shares in the share capital of a company and are entitled to voting rights and dividend rights. Companies in India, as in other jurisdictions, pay their shareholders dividends on their equity shares, usually a percentage of the nominal or face value of the share. For a foreign investor holding an equity interest, payment of dividend on equity shares is a straightforward way of extracting earnings. Dividends received by equity shareholders are taxable in India and the domestic companies distributing such dividend are required to withhold tax on such dividends. Non-resident shareholders may be eligible to claim foreign tax credit of such taxes paid in India subject to tax laws in their home jurisdictions.

c. Debt

Debentures are debt securities issued by a company representing a loan taken by the company with a pre-determined rate of interest. Debentures may either be secured or unsecured. Debentures issued to non-residents are also required to be compulsorily convertible to equity shares. For the purposes of FDI, fully and compulsorily convertible preference shares and debentures are treated at par with equity and need not comply with the guidelines governing external commercial borrowings ("ECB Guidelines"). The ECB Guidelines place a negative list for which the ECB proceeds cannot be utilised. Indian companies and LLPs are permitted to avail ECB, which limits up to USD 750 million per company/ LLP per year in under the automatic route depending on the sectors the companies are doing business. Further, there remain restrictions on minimum average maturity period.

Thin Capitalization provisions have been introduced in India wherein the interest expenditure on certain specified debt is restricted to 30% of the EBIDTA. The balance interest expenditure (which is not allowed as a tax deduction) is allowed to be carried forward for 8 years and claimed against taxable profits, if any, subsequently. The debt in respect of which the thin capitalisation provisions apply include any borrowings from an AE or any third party to which the AE has provided an implicit or explicit guarantee. Also, the aforesaid provisions cover in its ambit, loans, finance lease or funds raised through any other means. These provisions are not applicable if the interest expenditure in respect of these debts does not exceeds INR 10 million. Interest paid on other debts (third party debts, not covered above) shall be allowed as tax deductible expenditure. Further, a debt pushdown structure needs evaluation on a case-to-case basis.

d. Hybrid Instruments

Preference capital is used in some transaction structuring models. Preference capital has preference over equity shares for dividends and repayment of capital, although it does not carry voting rights. An Indian company cannot issue perpetual (non-redeemable) preference shares. The maximum redemption period for preference shares is 20 years. Preference dividends can be only declared out of profits. Dividends on preference shares are not a tax-deductible cost. Preference dividends on fully convertible preference shares can be freely repatriated under the current exchange control regulations. The preference shares may be converted into equity shares, subject to the terms of the issue of the preference shares. On the regulatory front, a foreign investment made through fully compulsorily convertible preference shares is treated the same as equity share capital. Accordingly, all regulatory norms applicable for equity apply to such securities. Other types of preference shares (non-convertible, optionally convertible or partially convertible) are considered as debt and must be issued in conformity with the ECB guidelines discussed above in all aspects. Certain hybrid instruments are proposed to be covered by specific hybrid instruments regulations to be announced. Because of the ECB restrictions, such non-convertible and optionally convertible instruments are not often used for funding acquisitions.

e. Other Instruments

Call/put options are some of the other investment instruments used for acquisition financing. SEBI permits contracts consisting of pre-emption rights, such as options, right of first refusal, and tag-along/drag-along rights, in shareholder or incorporation agreements. Further, RBI has notified that the use of options is subject to certain pricing guidelines that principally do not provide the investor an assured exit price and conditions as to the lock-in period. FDI regulations permit issue of non-convertible/redeemable bonus preference shares or debentures (bonus instrument) to non-resident shareholders under the automatic route. Another possibility is the issuance of convertible debt instruments. Interest on convertible debentures normally is allowed as a deduction for tax purposes. However, like preference shares, all compulsorily convertible debentures are treated same as equity.

f. Earn-outs

Earn-out is a consideration contingent upon the happening of certain events or the achieving of pre-set targets such as meeting a post-transaction earnings goal. Earn-out arrangements are particularly helpful when the target company is an early-stage or high-growth company where value would be better represented by future performance as against historic performance. Business and valuation models containing an earn-out arrangement are prevalent in M&A practice, with investors seeking recourse to the same in cases where promoter involvement is sought to be retained throughout the transition period or to motivate the seller to keep customers and increase productivity even after the acquisition.

As per the provisions of the ITA, income arising on transfer of a capital asset is taxable as capital gains in the year in which such transfer takes place, irrespective of the year of receipt of consideration. In case of earn-outs, the transfer of an asset takes place in a particular year whereas the consideration for such transfer is crystalized in subsequent years. This poses a peculiar challenge in computing the capital gains in the year of transfer. A possible view being adopted is that the entire sale consideration (i.e, maximum amount receivable by the taxpayer) would be subject to capital gains tax in the year of transfer. However, certain judicial rulings have upheld a contrary position that the capital gains arising in case of earn outs should be taxed in the year of receipt of the sale consideration. The issue however remains extremely litigious.

7. COMBINATIONS AND DIVESTITURES

a. Merger and amalgamation of Indian companies

Merging of one company into another company or merging of two or more companies to form a new company requires an NCLT approval. In India, mergers (amalgamations) are infrequently used for acquisition of business, but they are used extensively to achieve a tax-neutral consolidation of legal entities in the course of corporate reorganizations. Amalgamations enjoy favorable treatment under ITA and other laws, subject to certain conditions. The important provisions under Indian laws relating to amalgamation are discussed below.

i Income-tax

Indian tax law defines “amalgamation” as a merger of one or more companies into another company or a merger of two or more companies to form a new company such that:

- all the properties and liabilities of the amalgamating companies immediately before the amalgamation become the properties and liabilities of the amalgamated company; and
- shareholders holding at least three-quarters of the shares in the amalgamating companies become shareholders of the amalgamated company (any shares already held by the amalgamated company or its nominees are excluded for purposes of this calculation).

To achieve tax-neutrality for the amalgamating company (or companies) transferring the assets and the shareholders of such amalgamating companies, following additional conditions should be satisfied:

- the amalgamated company should be an Indian company; and
- the entire consideration should comprise of shares in the amalgamated company.

ii Carry forward and offset of accumulated losses and unabsorbed depreciation

Unabsorbed tax losses, including depreciation of capital assets, of the amalgamating company (or companies) are deemed to be those of the amalgamated company in the year of amalgamation. In effect, the business losses get a fresh lease of life as they may be carried forward for up to 8 years from the year of amalgamation. However, the carry forward is available only where:

- the amalgamating company owns a ship or hotel or is an industrial undertaking (manufacturing or processing of goods, manufacturing of computer software, electricity generation and distribution, telecommunications, mining or construction of ships, aircraft or rail systems); or
- the amalgamating companies are banking companies.

Further, the carry forward of losses on amalgamation is subject to additional conditions under the ITA.

iii Other implications

Other implications of amalgamation include the following:

- In case where a company claiming certain specified business unit/undertaking linked tax deductions is amalgamated, the amalgamated company may not be entitled to such unit/ undertaking linked tax benefits where specifically restricted under the tax law. However, in other cases, unamortized instalments of certain deductions eligible to the amalgamating company (or companies) are allowable for the amalgamated company.
- No step-up in the value of assets acquired on amalgamation is possible for tax purposes. The total depreciation on assets transferred to the amalgamated company in that financial year is apportioned between the amalgamating and amalgamated company in the ratio of the number of days for which the assets were used by each entity during the year.
- In respect of goodwill acquired on business acquisition, Accounting Standard 14 allows amortization of goodwill over a period not exceeding 5 years unless a longer period can be justified. Ind AS 103 requires amortization of goodwill over its useful life if the same is finite. But if the useful life of the goodwill is determined as indefinite, then there shall not be amortization. However, the ITA does not specifically provide whether depreciation shall be allowed on acquired goodwill. However, the Supreme Court has held that goodwill acquired on amalgamation (being difference between cost of assets and consideration paid) is a capital right falling under the category of "any other business or commercial right of a similar nature" in the definition of intangible assets and hence, eligible for depreciation. However, the Finance Bill, 2021 specifically excludes goodwill from the definition of "block of assets", not allowing any depreciation hereafter on such goodwill.
- Amalgamation expenses can be amortized in five equal annual instalments, starting in the year of amalgamation.

iv Indirect tax

There are no GST implications. ITC can be transferred to the transferee company case of sale, merger, demerger, amalgamation, lease or transfer of a business.

v Stamp duty

Stamp duty is levied on the NCLT order effecting amalgamation at the applicable rate. The rate of stamp duty is dependent upon the state where the registered offices of the companies are situated.

b. Demerger of Indian companies

The transfer of a business undertaking by a transferor company to a transferee company for a consideration in the form of issue of shares of transferee company to the shareholders of the transferor company on a proportionate basis, is regarded as demerger. A demerger of an undertaking requires approval from the NCLT. Specific provisions of law with respect to demerger are as under:

i Income-tax

Generally, a demerger is taxed under the head capital gains. However, if the following conditions are satisfied, then the demerger would be considered tax neutral and shall be exempt from capital gains tax.

- All the properties and liabilities of the undertaking immediately before the demerger must become the property or liability of the resulting company by virtue of the demerger and such transfer should be at book value;
- In consideration of the demerger, the resulting company must issue its shares to the shareholders of the demerged company on a proportionate basis (except where the resulting company itself a shareholder of the demerged company is);
- Shareholders holding at least 3/4th in value of shares in the demerged company become shareholders of the resulting company by virtue of the demerger. Shares in demerged company already held by the resulting company or its nominee or subsidiary are not considered in calculating 3/4th in value;
- The transfer of the undertaking must be on a going concern basis; and
- The demerger is subject to any additional conditions as notified by the Central Government.

The Finance Bill, 2021 proposed that any divestment by the Central/State Government which results in reduction of its holding in a public sector company ("PSC") to below 51% shall be regarded as tax neutral demerger and proposes to enable set off and carry forward of loss and allowance of depreciation, subject to certain conditions.

ii Other implications

Other implications of demerger include the following:

- Accumulated losses and unabsorbed depreciation relating to the transferred business undertaking can be carried forward by the resulting company for the balance period.
- If the undertaking of the demerged company was entitled to tax incentive, then the resulting company may claim such incentives for the balance period after demerger.

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- Step up in the value of assets is neither permissible in books of accounts nor for-tax purposes.
- The total depreciation on assets transferred to the resulting company in that financial year is apportioned between the demerged company and the resulting company in the ratio of the number of days for which the assets were used by each entity during the year. Thus, depreciation up to the effective date of transfer is available to the demerged company and depreciation after that date is available to the resulting company.
- Expenses incurred on account of demerger can be amortized in five equal annual instalments, starting in the year of demerger.

iii Indirect tax

There are no GST implication if the entity is transferred as a going concern ITC can be transferred to the transferee company case of sale, merger, demerger, amalgamation, lease or transfer of a business.

iv Stamp duty

Stamp duty is levied on the NCLT order effecting demerger at the applicable rate. The rate of stamp duty is dependent upon the state where the registered offices of the companies are situated.

c. Cross border business re-organizations

i Cross border mergers

Recently, the CA 2013 has notified provisions for cross border merger. As per the said provisions, following cross border mergers are permitted:

- Inbound merger - Foreign company can merge into an Indian company
- Outbound merger - An Indian company can merge into a foreign company in permitted jurisdiction

However, it is pertinent to note that prior approval of RBI is mandatory and only after receiving RBI's approval, an application can be made by the Indian company with the jurisdictional NCLT in respect of the cross-border merger. Also, cross border merger entails a detailed analysis in respect of other tax and regulatory aspects.

ii Amalgamation of foreign companies involving direct/ indirect transfer of shares of Indian company

Amalgamation of two foreign companies involving the transfer of shares of an Indian company or shares of a foreign company deriving its value substantially from shares of an Indian company, is normally tax exempt provided that:

- the amalgamation satisfies the criteria for an amalgamation set out above;
- at least 25% of the shareholders of the amalgamating company remain shareholders in the amalgamated company; and
- such transfer does not attract capital gains tax in the country in which the amalgamating company is incorporated.

iii Demerger of foreign company involving direct/ indirect transfer of shares of Indian company

Demerger involving the transfer of shares of an Indian company or shares of a foreign company deriving its value substantially from shares of an Indian company, is also tax exempt provided that:

- the shareholders holding not less than 3/4 of the shares in the demerged foreign company remain shareholders in the resulting company; and
- such transfer does not attract capital gains in the country in which the demerged foreign company is located.

8. FOREIGN OPERATIONS OF A DOMESTIC TARGET

Foreign Investments by an Indian company are regulated by the RBI guidelines. Broadly, an Indian entity can invest up to 400% of its net worth (as per audited accounts) in joint ventures or wholly owned subsidiaries overseas, although investments exceeding USD 5 million may be subject to certain pricing guidelines.

a. Tax on foreign operations of domestic target in India

In India, taxability is determined based on residential status of the person. In case of tax residents of India, worldwide income earned by such tax resident is liable to tax in India, irrespective of the source of income.

i Residential Status of a Company

Foreign company will be regarded as a tax resident of India, if:

- it is incorporated in India; or
- its Place of Effective Management ("POEM") in that year is in India.

In this regard, POEM been defined to mean "*a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made*". Determination of POEM is dependent on facts and circumstances and a holistic analysis of the principles laid out. CBDT's guidelines issued vide circular no. 6 of 2017 serves as a guidance for determination of POEM in India. As per Circular no. 8 of 2017, the provisions of POEM will not be applicable to a Company having turnover of INR 500 million or less in a financial year.

ii Foreign tax credit

The domestic target entities can avail foreign tax credit (FTC) in respect of taxes paid by them outside India under the tax treaty or income-tax payable under the applicable law of that country. Such FTC can be utilised by the domestic target against their tax liability in respect of tax, surcharge, cess, minimum alternate tax (MAT) and alternate minimum tax payable in India. FTC is available to the taxpayer in the year in which the income corresponding to such foreign tax has been offered to tax in India. Total available FTC shall be aggregate of FTC computed separately for each source of income arising from a particular country as per prescribed rules. The taxpayer is required to furnish certain prescribed documents on or before the due date of filing of return of income to avail the such FTC.

b. CFC Regime

Currently, there are no CFC regulations in India.

c. Foreign branches and partnerships

The income of foreign branches is taxable in India as part of the Indian company's worldwide taxable income. Similarly, the losses of all foreign branches are deductible in computing the worldwide taxable income. In computing the income or loss of a foreign branch, a deduction is generally allowed for all expenses incurred wholly and exclusively for the purpose of the business that are not of a capital or personal nature. Income is taxed whether or not repatriated. If such foreign branch incurs tax in the foreign country, credit is available in India to the extent of the lesser of the foreign tax paid or the Indian tax on the foreign income, either unilaterally or under treaty.

Further, taxability of foreign partnerships in India would be dependent on its tax residential status in India. A partnership firm would be treated as a tax resident in India if control and management of its affairs is not wholly situated outside India.

d. Cash repatriation

Generally, dividend received by an Indian company from a foreign company in which the Indian company holds 26% or more of the equity share capital, is taxable at a concessional rate of 15% (plus surcharge and cess as applicable). In respect of the above dividend, no deduction on account of any expenditure or allowance is allowed.

9. OTHER GENERAL INTERNATIONAL TAX CONSIDERATIONS

a. GAAR

In certain circumstances, the tax authorities are empowered to invoke GAAR and treat an "arrangement" to be an impermissible avoidance agreement (IAA), resulting in denial of the tax benefit under the provisions of the domestic tax law or a tax treaty. An arrangement would be treated as IAA if the main purpose of the arrangement is to avail treaty benefit and such arrangement contains one of the following tainted elements:

- Transaction is not at arms' length price;
- Motive of the transaction is to abuse the tax provisions;
- Transaction lacks commercial substance and is not undertaken for bonafide purpose.

GAAR is not applicable to the following transactions:

- Foreign Institutional Investors (FIIs) who do not avail benefit of tax treaties;
- Non-resident who have invested in such FIIs;
- Transactions where the aggregate tax benefit from an arrangement in relevant FY does not exceed INR 30 million.

If GAAR provisions are invoked, the following consequences shall apply:

- Overriding effect of tax treaty benefits availed by the assessee;
- Disregarding or re-characterising any step in, or a part of or the whole arrangement;
- Disregarding any accommodating party or treating the parties to the arrangement as one and the same person;

- Re-characterising the place of residence or situs of an asset or transaction, reallocating the accrual, receipt or expenditure amongst the parties to the arrangement; and
- Ignoring corporate structure applied by the assessee

With the advent of the GAAR, structuring of transactions is expected to become more vexed. Moreover, the CBDT has clarified that GAAR will not apply to an arrangement where the NCLT has “explicitly and adequately” considered its tax implication. As a result, all future Schemes proposed to be presented to the NCLT may have to be smell tested for GAAR before they are submitted with the NCLT. In view of this, all future structuring options should be examined from the perspective of GAAR and it should be ensured that they have strong commercial rationale supporting the transaction. The taxpayers could also approach the Authority for Advance Rulings for achieving certainty and clarity.

b. Indirect transfer

In the backdrop of the Supreme Court’s decision in the case of Vodafone Holdings and with an intention of protecting the Indian tax base from highly abusive tax planning structures, in 2012, the provisions for taxation of indirect transfer were introduced in the ITA with retrospective applicability from 1 April 1962. As per the said provisions, any income accruing or arising from transfer of the share of, or interest in, a company or entity located outside India that derives directly or indirectly, its value substantially from assets located in India shall be treated as indirect transfer and shall be taxable in India. In this regard, share or interest shall be deemed to derive its value substantially from the assets located in India, if value of assets on the specified date:

- Exceeds INR 100,000,000; and
- Represents at least 50% of the total value of assets owned by the company or entity, as the case may be in India.

For the purpose of valuation of assets, the ITA considers the FMV of assets on the specified date without reduction of liabilities. The specified date shall be either the immediately preceding accounting period end prior to the transfer or the date of transfer. The date of transfer shall be considered as the specified date only where the book value of the assets of the foreign company on the date of transfer exceeds the book value of the assets as at the end of the immediately preceding accounting period by more than 15%. The method for determining the value of assets is prescribed under the Income-tax Rules, 1962. Payments for such transfer of shares are liable to withholding tax. The Indian entity and the transferor entity are required to report the information in respect of indirect transfer in prescribed forms.

c. Country by Country reporting (“CbCR”)

If the total consolidated group revenue of the international group is INR 55 billion or more in the preceding accounting year, then the resident parent entity or the alternative reporting entity is required to file CbCR. Such filing is to be done within a period of 12 months from the end of the reporting accounting year.

Where the Indian entity is a constituent entity (“CE”) being a part of international group, whose parent is a non-resident, in such a case, an Indian entity is required to notify the reporting entity to the tax authorities. The due date for such notification is 2 months before the due of filing of return in India.

If more than 1 CE of the either of the following international group are resident in India, then 1 of the entities has to be designated by the international group as the designated entity to furnish CbCR:

- Where the parent entity is “not obligated” to file CbCR in its home country;

- Where India does not have an agreement for exchange of CbCR with the jurisdiction in which the ultimate parent company or alternate reporting entity is resident;
- Where there has been a systemic failure in a country, and this is intimated by the prescribed authority to the CE.

In absence of a CbCR exchange agreement between India and certain jurisdictions, inbound CEs with their ultimate parent company or alternate reporting entity in such jurisdictions would need to electronically file the CbCR in India within 12 months from the end of a reporting accounting year. In the event of a systemic failure, the timeline is 6 months from the end of the month in which intimation is given of this systemic failure.

d. Master File

Any CE of an international group has to file Part A of the master file. Further, the CE has to file Part B of master file if the following are satisfied:

- Consolidated revenue of such international group as reflected in consolidated financial statements for the accounting year exceeds INR 5 billion; AND
- The aggregate value of international transaction of CE:
  - During the accounting year exceeds INR 500 million; OR
  - In respect of purchase, sale, transfer, lease or use of intangible property during the accounting year exceeds INR 100 million.

The due date of filing master file is date of filing of return of income i.e, 30 November.

10. TRANSFER PRICING

a. International transaction

As per the provisions of ITA, definition of international transaction includes a transaction of business restructuring or reorganisation, entered into by an enterprise with an AE, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date. Thus, any international restructuring transaction should be at ALP and should be reported.

Further, the Finance Bill, 2021 proposes an amendment that, where there is an increase in the book profit of the income of a year due income of past year(s) on account of secondary adjustment or APA entered by the taxpayer, the Assessing Officer shall re-compute the book profit and tax payable of the past years in the prescribed manner.

b. Deemed international transaction

The domestic transfer pricing provisions have been recently amended to widen the scope of international transactions. Accordingly, a transaction with a person other than an AE is also deemed to be an international transaction if there exists a prior agreement in relation to the relevant transaction between such other person and the AE, or the terms of the relevant transaction are determined in substance between such other person and the AE.

c. Post-acquisition

All intercompany transactions (international and certain domestic), including interest on loans, are subject to transfer pricing regulations.

11. POST-ACQUISITION INTEGRATION CONSIDERATIONS

a. Use of hybrid entities

Acquisition entities may have hybrid features which makes their classification difficult. Divergence in approach of classifying such entities may create issue of classification in cross border scenarios. Thus, use of hybrid entities involves issues like entity classification which can have a bearing on the following:

- Determination of residency;
- Eligibility for treaty benefits;
- Nature of income derived by entity/ members and tax treatment thereof; and
- Application of provisions of ITA which are entity specific.

b. Use of hybrid instruments

Some of the hybrid funding options currently under consideration are compulsory convertible preference shares, compulsory convertible debenture ("CCD") and convertible notes. Hybrid instruments that are fully and mandatorily convertible into equity within a specified period are regarded as equity under the FDI policy and hence are eligible to be issued to persons residing outside India. Any hybrid instrument that is not mandatorily convertible into equity is considered debt and governed by external commercial borrowing rules. Use of hybrid entities may have post-integration issues like treatment of the existing CCDs issued by the entities, validity of terms of existing CCDs issued by the erstwhile entities after the re-organisation, etc

c. Principal/Limited Risk Distribution or Similar Structures

A limited risk distributor (LRD) is the distributor in the country of residence which performs limited functions and undertakes limited risks while performing a sales and marketing function. Post-acquisition, a functions assets and risk ("FAR") analysis needs to be undertaken to review the status of existing LRDs.

d. Intellectual property (licensing, transfers, etc.)

Following are some of the issues with respect to intellectual properties (IPs) that need to be kept in mind:

- Aligning IP protection to business objectives like expanding existing coverage through strategic filing programs and contracting coverage where needed;
- Implementing arrangements for appropriate ownership, control, and use of brands to avoid invalidity and tax concerns;
- Managing patent and trademark portfolios to meet objectives (including global maintenance and enforcement strategies)

- Depending upon the scope of the business activities, making a decision as to whether to obtain the record title to IP assets received in a merger or acquisition or to sell its newly acquired IP to a third party and receive a license to use such IPs;
- Further, the parties need to decide as to who will bear the future expenses, like expenses of filing, registration, renewals and maintenance of patents, trademarks etc;
- Entities which create or acquire IP assets have the ability to claim a tax deduction for their costs.

e. Special tax regimes

India has an alternate levy in the form of MAT for companies and LLPs. Generally, the credit of MAT is allowed to be carried forward and set off against the future income-tax liabilities of the companies and LLPs. However, in case of amalgamation, availability of such MAT credit by way of carry forward and set off, is litigious.

12. OECD BEPS CONSIDERATIONS

Organisation for Economic Co-operation and Development's ("OECD") base erosion and profit shifting (BEPS) action plan is gaining significant thrust, and governments all around the world are amending their tax laws to incorporate and reflect some of these guidelines. M&A deals have never been straightforward; however, the intricacies and complexities are only going to increase in a post-BEPS environment, and BEPS is probably going to cause a fundamental overhaul in the M&A and deals landscape. Some specific issues around BEPS and M&A transactions are discussed below:

a. Inheritance of aggressive structures

BEPS may compel business buyers to relook diligence procedures—for instance, detailed processes may need to be carried out to determine if any aggressive tax structures are being inherited as a part of the acquisition. Reputational risk is of paramount significance and this will be increasingly considered in the overall risk assessment. Adequate upfront knowledge of aggressive tax structures and of potential consequences are likely to be factored in the valuation.

b. Tax treaties and substance

Action 6 (treaty abuse) and Action 7 (PE) will become very relevant, especially for private equity players, funds, etc. Increased levels of substance at the fund and holding structure level will be a key factor, the absence of which might restrict access to tax treaties. Companies will need to shed light on how decision-making and management functions are carried out and demonstrate how such structures meet business purpose and commercial rationale tests. This might increase the operational costs of maintaining these structures. Further, a more expansive definition of PE fund management activities could trigger taxable business presence concerns.

c. Hybrid financial instruments

The benefits of deal financing and tax credits may be impacted given Action 2 (hybrid mismatch arrangements) and the narrowing of relief under Action 4 (interest deductions).

d. Operations model planning

Operating models will have to undergo changes based on the place of actual economic activity and value creation. Allocation of profits to various functions in the value chain and ability to claim special incentives (such as patent box or other schemes supporting research and innovation) will need to be given a closer look under Actions 8–10 (TP). Separately, operational policy integration and review of structures post acquisition will be imperative to achieve overall M&A objectives.

e. Overall transparency

Enhanced and complex compliance and reporting obligations will be necessary under Action 13 (country by- country reporting). Processes and technology will need to be put in place to capture detailed data, leading to more management time and costs. In summary, some of the key focus areas for an M&A transaction against the backdrop of BEPS are:

- Detailed tax due diligence procedures will be needed to assess tax risks broadly—for instance, consider reputational risks due to increased focus by media, politicians, etc.
- Impact on existing operations as well as holding or financing structures will need to be re-examined more closely. Operational policy integration of structures post acquisition will also be an important consideration.
- Organizations will need to bear in mind any possible restrictions on hybrid mismatches and interest deductions, including any changes in the target's overall supply chain, as this might impact valuation and tax profile.
- Certainty through advance pricing agreements or mutual agreement procedures may become important—this will give the buyer more comfort. However, aligning transaction deadlines with these processes could pose a challenge.

India became a signatory to MLI in June 2017 and submitted the instrument of ratification with OCED on June 25, 2019. MLI is effectively applicable in India from April 1, 2020. The MLI project aims to ensure that multinationals pay tax in the jurisdiction where economic value is created or added. An MLI is a multilateral treaty that will enable jurisdictions to swiftly modify their bilateral tax treaties to implement measures designed to better address multinational inter-jurisdictional tax avoidance. Treaty measures that will be covered in the MLI include those on hybrid mismatch arrangements, treaty abuse, permanent establishment, and mutual agreement procedures. India has included its 93 tax treaties currently in effect as "covered tax agreements" under the MLI. Few of the countries, however, have chosen not to include their treaty with India as a covered tax agreement.

BEPS and India :

Some of the BEPS recommendations would immediately be applicable, while some require changes that can be implemented via tax treaties , including the multilateral instruments. Some other requires domestic law changes. Tabulated below are the amendments made in Indian tax laws to align it with BEPS.

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Action Plan	Particulars	Amendment made / Action taken	Effective from
Action Plan 1	Tax challenges arising from Digitalisation	In order to address the challenges arising on taxation of digital transactions, India via Finance Act, 2016 introduced 'Equalisation levy @ 6% on the amount of consideration for specified services received or receivable by a non-resident not having PE in India, from a: Resident in India who carries out business or profession; or Non-resident having PE in India As mentioned above, the said EL is extended (at the rate of 2%) to online supply of goods and services by e-commerce operators.	1 June 2016
		The concept of "significant economic presence test" to determine business connection / territorial nexus was introduced under the Indian tax laws	1 April 2018
Action Plan 4	Limitation on interest deductions	Interest limitation rules were introduced India vide Finance Act, 2017. A new section 94B was introduced in the Act, to provide that interest expense paid by an entity to its AE or on a debt implicitly or explicitly guaranteed by the AE shall be restricted to 30% of its EBIDTA or interest paid/payable to AE, whichever is less.	1 April 2017
Action Plan 5	Harmful tax practices	The Finance Act, 2016 introduced Section 115BBF providing a concessional tax regime @ 10% for royalty income from patents to promote in-house research and development and making India a hub for R&D. Such provisions are in line with the nexus approach recommended by BEPS Action 5. For the purpose of this section atleast 75% of R&D expenditure for development of patent should be incurred in India by the eligible assessee for any invention in respect of which patent is granted under Patents Act, 1970	1 April 2016
Action Plan 6	Prevention of tax treaty abuse	GAAR provisions are introduced in the domestic tax laws.	1 April 2017
		India is actively negotiating its existing tax treaties to counter treaty abuse.	Not Applicable
Action Plan 7	Permanent establishment status	The definition of business connection / permanent establishment under the Indian tax laws was aligned with modified DAPE rules as per Action Plan 7.	1 April 2018
Action Plan 13	Country-by-Country reporting	The requirement of filing a Country-by-Country Report, a Master file and a Local file has been introduced in India broadly in line with BEPS Action Plan 13.	1 April 2016
Action Plan 15	Multilateral Instrument	India has ratified MLI on 7 June 2017 and deposited the instrument of ratification on 25 June 2019.	Come in to force 1 October 2019 (Effective from FY 2020-21)

13. ACCOUNTING CONSIDERATION

Accounting norms for companies are governed by the Accounting Standards issued under the Companies Act. Normally, for amalgamations, demergers and restructurings, the Accounting Standards specify the accounting treatment to be adopted for the transaction. The standard prescribes two methods of accounting: merger accounting and acquisition accounting.

- In merger accounting, all the assets and liabilities of the transferor are consolidated at their existing book values.
- Under acquisition accounting, the consideration is allocated among the assets and liabilities acquired (on a fair value basis). Therefore, acquisition accounting may give rise to goodwill, which is normally amortized over 5 years.

The government of India has recently notified International Financial Reporting Standards ("IFRS")-converged Indian Accounting Standards (Ind AS). Under the new Ind AS on amalgamation, all assets and liabilities of the transferor are recorded at their respective fair values. Further, goodwill arising on merger is not amortized; instead it is tested for impairment. The accounting treatment of mergers within a group are separately dealt with under the new Ind AS, which requires all assets and liabilities of the transferor to be recognized at their existing book values only. The new Ind AS are to be implemented in a phased manner. It became applicable to all listed companies and companies with net worth of INR5 billion or more from 1 April 2016, and to companies with net worth of INR 2.5 billion or more from 1 April 2017. Other companies will continue to apply existing accounting standards.

14. OTHER TAX CONSIDERATIONS

a. Tax clearances

In case where any transfer is made for inadequate consideration and any proceeding are pending against the transferor, the tax authorities have the power to claim any tax on account of completion of the proceeding by treating the said transfer as void. The ITA provides mechanism for obtaining a tax clearance certificate for transfer of assets/ business subject to certain conditions.

b. Buy back

Amongst the other options available for a company to provide exit to the shareholders, one of available options is buy back of shares. Buyback of shares provides an investor the ability to extract earnings as capital gains and consequently take advantage of tax treaty benefits. However, buybacks in India has certain restrictions and thus need to be strategically planned. For instance, a company may not, except with a special resolution, buy back more than 25% of its outstanding equity shares in a year. Further, a buyback may be affected only from certain permitted sources.

In terms of taxability, any domestic company proposing to buy back its shares from shareholders is required to pay a buyback tax. Any amount of "distributed income" by a domestic company on buyback of unlisted shares from shareholder is chargeable to additional income-tax @ 20% (plus 12% surcharge and 4% cess). The term "distributed income" has been defined to mean the consideration paid by the company on buy-back of shares as reduced by the amount received by it for issue of such shares, to be determined in the prescribed manner. The amount received on issue of shares has to be determined as per the IT Rules. Some of the methodologies relevant for determining amount received on issue of shares are as under:

- Shares issued by way of subscription

Amount actually received in respect of such share, including any amount actually received as securities premium.

- Where any amount, out of amount received on issue of shares, has been returned to shareholders prior to buyback

Amount received in respect of shares less sum so returned. However, no such deduction is allowed in respect of DDT.

15. MAJOR NON-TAX CONSIDERATIONS

a. Competition Commission of India ("CCI") regulations

If any acquisition exceeds certain financial thresholds and is not within a common group, then such acquisition shall require a prior approval of the CCI. While evaluating an acquisition, CCI would mainly examine if the acquisition would lead to a dominant market position, resulting in an adverse effect on competition in the concerned sector. Under CCI regulations, a business combination that causes or is likely to cause a considerable hostile effect on competition within the relevant market in India shall be void. Any acquisition of control, shares, voting rights or assets, acquisition of control over an enterprise, or merger or amalgamation is regarded as a combination if it meets certain threshold requirements and accordingly requires approval.

b. CA 2013

Acquisition of shares is permissible with prior approval of the audit committee and board of directors. Share sale between related parties may also require prior shareholders' approval. Pursuant to Sections 230 to Section 240 of the CA 2013, schemes of arrangement require approval of the NCLT. Procedurally, any scheme is first approved by the audit committee, the board of directors, stock exchanges (if shares are listed) and then by the shareholders/creditors of the company with a requisite majority (i.e, majority in number and 75% in value of shareholders/creditors voting in person, by proxy or by postal ballot). NCLT will give its final approval to the scheme after considering the observations of the Regional Director, Registrar of Companies, Official Liquidator, income-tax authorities, other regulatory authorities like RBI, stock exchanges, SEBI, CCI, etc. and any other objections filed by any other stakeholder interested in or affected by the scheme.

c. Securities laws

Any acquisition of 25% shares of a listed company by an acquirer would trigger an open offer to the public shareholders. However, under the Takeover Code, a merger or demerger of a listed company usually does not trigger an open offer to the public shareholders. Any merger or demerger involving a listed company would require prior approval of the stock exchanges and SEBI before approaching NCLT.

d. Foreign exchange regulations

Transfer of equity shares are permissible transactions subject to RBI pricing guidelines and permissible sectoral caps. Merger/demerger transaction involving any issuance of shares to a non-resident shareholder of the transferor company does not require prior RBI/government approval, provided that the transferee company does not exceed the foreign exchange sectoral caps and the merger/demerger is approved by the NCLT. Issuance of any instrument other than equity shares/compulsorily convertible preference shares/ compulsorily convertible debentures to the non-resident would require prior RBI approval as they are considered as debt.

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16. APPENDIX I - TAX TREATY RATES

Jurisdiction	Dividends %	Interest %	Royalties %	Footnote Reference
Albania	10	10	10	[A] [B] [C] [D] [E]
Armenia	10	10	10	[A] [B] [C] [D] [E]
Australia	15	15	10 / 15	[A] [B] [C] [D] [E] [J]
Austria	10	10	10	[A] [B] [C] [D] [E]
Bangladesh	10 / 15	10	10	[A] [B] [C] [D] [E]
Belarus	10 / 15	10	15	[A] [B] [C] [D] [E]
Belgium	15	10 / 15	10	[A] [B] [C] [D] [E] [F] [G]
Bhutan	10	10	10	[A] [B] [C] [D] [E]
Botswana	7.5 / 10	10	10	[A] [B] [C] [D] [E]
Brazil	15	15	25 / 15	[A] [B] [C] [D] [E] [H]
Bulgaria	15	15	15 / 20	[A] [B] [C] [D] [E]
Canada	15 / 2	15	10 / 15	[A] [B] [C] [D] [E] [J]
China (People's Republic of China)	10	10	10	[A] [B] [C] [D] [E]
Chinese Taipei (Taiwan)	12.50	10	10	[A] [B] [C] [D] [E]
Colombia	5	10	10	[A] [B] [C] [D] [E]
Croatia	5 / 15	10	10	[A] [B] [C] [D] [E]
Cyprus	10	10	10	[A] [B] [C] [D] [E]
Czech Republic	10	10	10	[A] [B] [C] [D] [E]
Denmark	15 / 25	10 / 15	20	[A] [B] [C] [D] [E]
Estonia	10	10	10	[A] [B] [C] [D] [E]
Ethiopia	7.50	10	10	[A] [B] [C] [D] [E]
Fiji	5	10	10	[A] [B] [C] [D] [E]
Finland	10	10	10	[A] [B] [C] [D] [E] [G]
France	10	10 / 15	20	[A] [B] [C] [D] [E] [F] [G]
Georgia	10	10	10	[A] [B] [C] [D] [E]
Germany	10	10	10	[A] [B] [C] [D] [E]
Hong Kong	5	10	10	[A] [B] [C] [D] [E]
Hungary	10	10	10	[A] [B] [C] [D] [E] [F]

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Jurisdiction	Dividends %	Interest %	Royalties %	Footnote Reference
Iceland	10	10	10	[A] [B] [C] [D] [E]
Indonesia	10	10	10	[A] [B] [C] [D] [E]
Ireland	10	10	10	[A] [B] [C] [D] [E]
Israel	10	10	10	[A] [B] [C] [D] [E]
Italy	15 / 25	15	20	[A] [B] [C] [D] [E]
Japan	10	10	10	[A] [B] [C] [D] [E]
Jordan	10	10	20	[A] [B] [C] [D] [E]
Kazakhstan	10	10	10	[A] [B] [C] [D] [E] [F]
Kenya	10	10	10	[A] [B] [C] [D] [E]
Korea	15	10	10	[A] [B] [C] [D] [E]
Kuwait	10	10	10	[A] [B] [C] [D] [E]
Kyrgyz Republic	10	10	15	[A] [B] [C] [D] [E]
Latvia	10	10	10	[A] [B] [C] [D] [E]
Lithuania	5 / 15	10	10	[A] [B] [C] [D] [E]
Luxembourg	10	10	10	[A] [B] [C] [D] [E]
Macedonia	10	10	10	[A] [B] [C] [D] [E]
Malaysia	5	10	10	[A] [B] [C] [D] [E]
Malta	10	10	10	[A] [B] [C] [D] [E]
Mauritius	5 / 15	7.5	15	[A] [B] [C] [D] [E] [I]
Mexico	10	10	10	[A] [B] [C] [D] [E]
Mongolia	15	15	15	[A] [B] [C] [D] [E]
Montenegro	5 / 15	10	10	[A] [B] [C] [D] [E]
Morocco	10	10	10	[A] [B] [C] [D] [E]
Mozambique	7.50	10	10	[A] [B] [C] [D] [E]
Myanmar	5	10	10	[A] [B] [C] [D] [E]
Namibia	10	10	10	[A] [B] [C] [D] [E]
Nepal	5 / 10	10	15	[A] [B] [C] [D] [E] [F]
Netherlands	10	10	10	[A] [B] [C] [D] [E] [F] [G]
New Zealand	15	10	10	[A] [B] [C] [D] [E]

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Jurisdiction	Dividends %	Interest %	Royalties %	Footnote Reference
Norway	10	10	10	[A] [B] [C] [D] [E]
Oman	10 / 12.5	10	15	[A] [B] [C] [D] [E]
Philippines	15 / 20	10 / 15	15	[A] [B] [C] [D] [E]
Poland	10	10	15	[A] [B] [C] [D] [E]
Portugal	10 / 15	10	10	[A] [B] [C] [D] [E]
Qatar	5 / 10	10	10	[A] [B] [C] [D] [E]
Romania	10	10	10	[A] [B] [C] [D] [E]
Russian Federation	10	10	10	[A] [B] [C] [D] [E]
Saudi Arabia	5	10	10	[A] [B] [C] [D] [E]
Serbia	5 / 15	10	10	[A] [B] [C] [D] [E]
Singapore	10 / 15	10 / 15	10	[A] [B] [C] [D] [E]
Slovenia	5 / 15	10	10	[A] [B] [C] [D] [E]
South Africa	10	10	10	[A] [B] [C] [D] [E]
Spain	15	15	10 / 20	[A] [B] [C] [D] [E] [F]
Sri Lanka	7.50	10	10	[A] [B] [C] [D] [E]
Sudan	10	10	10	[A] [B] [C] [D] [E]
Sweden	10	10	10	[A] [B] [C] [D] [E] [F]
Switzerland	10	10	10	[A] [B] [C] [D] [E] [F]
Syria	5 / 10	10	10	[A] [B] [C] [D] [E]
Tajikistan	5 / 10	10	10	[A] [B] [C] [D] [E]
Tanzania	5 / 10	10	10	[A] [B] [C] [D] [E]
Thailand	10	15	10	[A] [B] [C] [D] [E]
Trinidad & Tobago	10	10	10	[A] [B] [C] [D] [E]
Turkey	15	10 / 15	15	[A] [B] [C] [D] [E]
Turkmenistan	10	10	10	[A] [B] [C] [D] [E]
Uganda	10	10	10	[A] [B] [C] [D] [E]
Ukraine	10 / 15	10	10	[A] [B] [C] [D] [E]
United Arab Emirates	10	5 / 12.5	10	[A] [B] [C] [D] [E]
United Kingdom	10 / 15	10 / 15	10 / 15	[A] [B] [C] [D] [E] [J]

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Jurisdiction	Dividends %	Interest %	Royalties %	Footnote Reference
United States	15 / 25	10 / 15	10 / 15	[A] [B] [C] [D] [E] [J]
Uruguay	5	10	10	[A] [B] [C] [D] [E]
Uzbekistan	10	10	10	[A] [B] [C] [D] [E]
Vietnam	10	10	10	[A] [B] [C] [D] [E]
Zambia	5 / 15	10	10	[A] [B] [C] [D] [E]

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Footnotes:	
[A]	Dividend - Finance Act, 2020 abolished dividend distribution tax. Dividends are now liable to tax in the hands of the shareholders and non-resident shareholders are eligible to pay tax at beneficial tax rate under the tax treaty and also avail foreign tax credit subject to domestic laws in their home jurisdiction
[B]	Interest - If the relevant tax treaty provides for unlimited taxation rights for the source country on interest income, then the rate of tax is considered as 20%. Under the Indian tax laws, withholding tax rate of 20% (applicable surcharge and cess) applies with respect to interest on monies borrowed or debts incurred in foreign currency by an Indian concern or the government. Reduced rate of 5% (applicable surcharge and cess) applies where the interest paid by business trusts. In case of Kenya, withholding tax rate of 10% is applicable on interest. In other cases, depending on whether the recipient is a corporate entity, a tax rate of 30%/ 40% (plus applicable surcharge and cess) applies.
[C]	Interest - Reduced rate of 0% to 10% generally applies under a tax treaty if interest payments are made to local authorities, political subdivisions, the government, banks, financial institutions or similar organizations or the lender holds a certain threshold of capital in the borrower. Specific clause of the treat needs to be evaluated in this regard.
[D]	Royalty - Under the Indian tax laws, if the relevant tax treaty provides for unlimited taxation rights for the source country on royalty income and if the payment is made by the government of India or an Indian concern, then the rate of tax is considered as 10% (plus surcharge and cess). In case of Kenya, withholding tax rate of 10% is applicable on royalties. In other cases, depending on whether the recipient is a corporate entity, a tax rate of 30%/ 40% (plus applicable surcharge and cess) applies.
[E]	Royalty - The above rates on royalties are applicable to royalties other than those effectively connected with a PE in India. Further, in some of the tax treaties like UK, US, Spain, Canada and Australia, a separate rate of 10% is specified for equipment royalties. Similarly, in case of Bulgaria, rate of 15% is applicable to copyright royalties other than cinematographic films or films and tapes used for radio or television broadcasting.
[F]	Most favoured nation clause - The scope of the definition of royalties/interest may be restricted and/or a reduced rate of tax may be available under the most-favoured-nation (MFN) clause.
[G]	MFN clause - In case of notification issued by the government of India giving effect to the MFN clauses in these tax treaties, reduced rate applies
[H]	Royalties - In case of trademark royalties, rate of tax is 25%.
[I]	Interest - The protocol provides for a withholding tax rate of 7.5% on interest and 15% on royalties.
[J]	Royalty - In the first five years in which this treaty is in effect, if the payer of royalties is the government of the contracting state, a political subdivision or a public sector company, the rate of tax is 15% and in case of other payers, tax rate is 20%. For subsequent years, a 15% rate applies in all cases.

17. APPENDIX II - GENERAL CORPORATE ENTITY TAX DUE DILIGENCE REQUESTS

No.	Category	Sub-Category	Description of Request
1	Tax Due Diligence	General	Copy of the Annual Report or the Balance Sheet along-with the notes to accounts and audited financial statements for last 3 years
2	Tax Due Diligence	General	Management financial statements for current year and the detailed trial balance associated with the financial statements
3	Tax Due Diligence	General	Copies of major service agreements, loan agreements, if any
4	Tax Due Diligence	Direct tax	Copy of income tax returns for last 3 years including revised returns, computation of total income along with notes to computation and form 26AS
5	Tax Due Diligence	Direct tax	Computation of deferred tax liability and other enclosures except for the TDS certificates) and provisional tax computation for current year
6	Tax Due Diligence	Direct tax	Tax audit reports along with annexures for last 3 years
7	Tax Due Diligence	Direct tax	Transfer pricing accountant's reports along with the transfer pricing documentation for last 3 years.
8	Tax Due Diligence	Direct tax	Tax status of the Company/ assessment status chart
9	Tax Due Diligence	Direct tax	Copies of the assessment orders/ transfer pricing orders for the latest 3 years along with the notice for demand, notices for initiation of penalty proceedings
10	Tax Due Diligence	Direct tax	Details of historical tax positions taken by the company
11	Tax Due Diligence	Direct tax	Details of any Income tax incentives (Section 10AA, 80IA, etc.)/ concessions / exemptions, if any, availed by the Company from Central and State governments
12	Tax Due Diligence	Direct tax	Analysis of past losses and the impact of change in shareholding on such losses
14	Tax Due Diligence	Direct tax	Analysis of loans advanced to shareholders and allied entities and possibility of deemed dividend
18	Tax Due Diligence	Direct tax	Details of underreported tax liabilities, if any
19	Tax Due Diligence	Direct tax	Representation made by the seller at the time of pre-deal negotiation;
20	Tax Due Diligence	Direct tax	Sample checks of withholding tax compliances help in identifying inconsistencies in withholding tax filings/ compliances of the target company
21	Tax Due Diligence	Direct tax	Recoverability of tax refunds/credits like MAT credit, etc
22	Tax Due Diligence	GST	Details with respect to GST and other historical indirect tax regime like service tax, value added tax, excise duty, custom duty, etc.

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