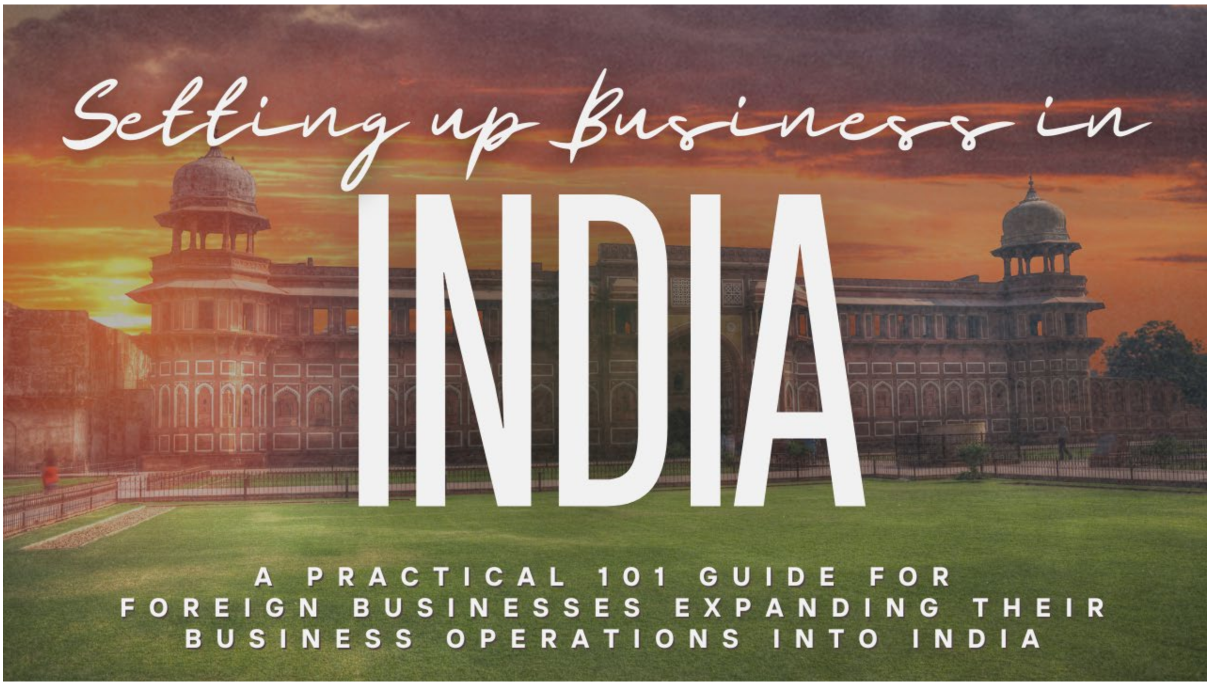


A Practical Guide for Foreign Businesses to set up operations in India

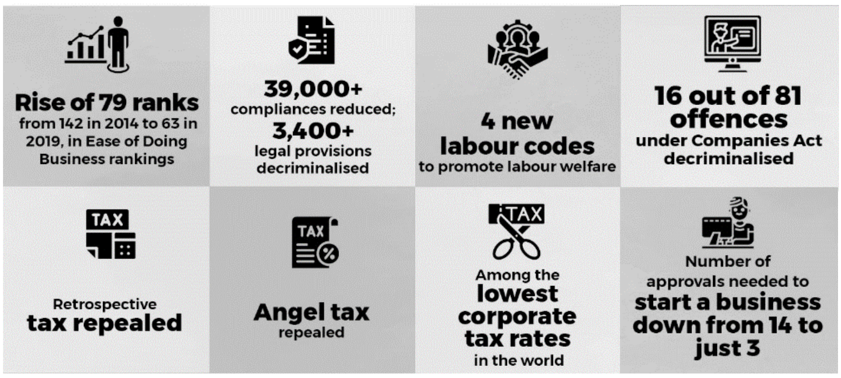
Context

In this comprehensive and very practical guide, we provide invaluable insights for foreign businesses considering the establishment of operations in India. While theory holds its significance, our expertise, garnered over several years, is woven into the practical aspects of decision-making and budgeting for your Indian business venture.

India witnessed an increase in its GDP even at the time of the Covid crisis proving it to be one of the most resilient countries in the world

It is Easier than you think!

Historically, India has not been an easy market to do business in. However, in the recent times, India has undertaken various reforms to ease the process of setting up and doing business in the country. Engaging with the right professional is critical to you ease your way into the country.



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Making the Decision – All you need to Know

Selecting the Type of Legal entity

In most cases, the best-fit structure to set up a business in India by Foreign Nationals/entities is through incorporation of a Private Limited Company. This is a separate legal entity limited by the paid-up share capital.

An alternative option would be establishing a foreign branch, but it is relatively less common due to the permitted activities being restrictive and unlimited liability which extends to the foreign parent entity.

According to FEMA guidelines, Foreign Direct Investment (FDI) is not allowed in case of Proprietorship, Partnership Firm and One Person Company. Though investment in LLP's (Limited Liability Partnerships) is allowed, it requires prior approval of the RBI.

Which Indian State (there are 28!) to set up in?

India, though has a federal structure of Government, operates under the principle of One Nation – One Tax. Corporate tax and GST (~VAT) rates and related compliances are uniform across all its states. There may be minor differences in compliances, primarily related to employees but these differences are generally inconsequential in influencing your decision. Your choice of incorporation state should primarily be guided by the location where you anticipate the majority of your operational activities to take place.

What are the primary requirements to establish a private limited company in India?

The bare minimum necessities include:

1) 2 shareholders or members (in most cases, the foreign entity and one nominee shareholder). There is no condition for residential status of shareholders. Can be either individuals or companies, including foreign companies.
2) 2 Directors (individuals – one mandatorily resident in India) – A good practice is to have three, one resident and two non-resident representatives of the parent entity
3) An office address in India which will be its registered office (can be a rented space) – This has to be in the state in which it is intended to be registered

What should the expectation be on the timelines involved?

On an average, the registration gets done within 30-45 days considering prompt provision of required documentation. Practically, will depend on the submission of relevant documents and might take up to 60-75 days from initiation of the process up to commencement of operations including opening up of the bank account.

The entire process is digital and does not require courier of any documents or in-person travel of any concerned persons. However physical documents may be required by the banker for opening of bank account.

Is there a minimum capital requirement?

There is no bar on the minimum capital requirement to incorporate a private limited company. However, it’s important to note that a reasonable nominal amount, usually practical enough to transfer through banking channels, is invested at the time of incorporation. It can later be enhanced at any point on need basis.

What are the costs involved in setting up a subsidiary in India?

The costs involved in setting up a foreign subsidiary company in India can include the costs of obtaining licenses and permits, registering the company with the Registrar of Companies, and ensuring compliance with all relevant laws and regulations. Other costs may include legal and financial fees, as well as the costs of setting up infrastructure and operations in India. The costs will vary depending on the size and complexity of the company, and it is recommended that foreign subsidiary companies seek the guidance of professionals to help estimate these costs.

A snapshot of the Regulatory environment and Recurring compliances

At the outset, the compliance framework might seem overwhelming but all compliances are digitised and with the guidance from the right professional, it will be seamless. Cost of non-compliance could be high, so ensure that the Indian entity is fully complaint at every point.

Corporate Compliances (Companies Act, 2013)	Direct Taxes (Income Tax Act, 1961)	Indirect Taxes (Goods and Services Tax, 2016)	Foreign Exchange Management Act (FEMA)	Other Compliances
Annual Audit of Financial Statements	Annual Tax Returns Filing	Monthly/ Quarterly GST Returns	Annual FLA Return	Employees Related (PF, ESI, PT)
Maintenance of Secretarial Records and Filing of Annual Returns	Tax Audit beyond the prescribed limit	Annual GST return beyond a prescribed limit		Industry-specific compliances
	TDS/ witholding tax Returns			
	Transfer Pricing Documentation and Certification			

What are the consequences of non-compliance in India?

The consequences of non-compliance for foreign subsidiary companies in India can be severe, including penalties, fines, and legal action by the authorities. Non-compliance can also lead to reputational damage, financial losses, and disruption of business operations. It can affect the ability of setting up a company in India, as well as its relationships with customers, suppliers, and other stakeholders.

Understanding the Process of Incorporation

Procedure of Subsidiary Company Registration in India:

04

Declaration for Commencement of Business

- After opening the bank account, transfer of the share capital and other necessary procedures, a certificate of commencement of business will be obtained from MCA
- In the meantime, all other business registrations are obtained.

03

Filing for Incorporation

- All documents collated are attached in an exhaustive application to the Ministry of Corporate Affairs (MCA).
- On satisfaction, Certificate of Incorporation is granted

02

Preparation of all the Documents Required

- The Charter documents of the intended entity (MoA & AoA) and other documents and declarations duly executed by the proposed directors and shareholders will be collated by the foreign company.

01

Name Reservation

- An application will be made for reservation of the proposed name and objects of the company as approved through a resolution passed by the foreign company's Board
- In case of a subsidiary company, it is permissible to use the same name as that of the parent company with the addition of the word "India" to it. The name is approved, provided the same is not identical to existing entities or considered undesirable by law

Documents Required for Subsidiary Company Registration in India

For Indian Resident Director: Photograph, Copy of PAN Card, Copy of Aadhar Card, Copy of Passport/ Voter ID/Driving License, Bank Statement/Electricity/Telephone bill in their address – not older than 2 months.

For Foreign Directors/Shareholders and Authorized Representative of Foreign Company: Photograph, Copy of Passport, Copy of Driving License, Bank Statement/Electricity/Telephone bill in the country of residence – not older than two months.

For Indian Company: Address Proof of Proposed Place of Business (Rental Agreement of Registered Office), Utility Bill (Electricity, Telephone etc.) for the premises – not older than 2 months, NOC for use of premises as Registered Office.

For Indian Witnesses: Copy of PAN Card and Aadhaar Card

For Foreign Holding Company: Copies of Certificate of Incorporation, Memorandum of Association and Articles of Association.

List of Incorporation documents to be executed:

1) Memorandum of Association
2) Articles of Association
3) Declaration by Directors in form DIR 2
4) Declaration of Shareholders and Authorized Representative in Form INC 9 & INC 10
5) PAN Undertaking from foreign company and directors
6) Projected Income and Expenditure Statement
7) Notice of Interest by Directors

Attestation of the Documents:

Indian Nationals - Self-attestation will suffice.

Foreign Nationals -

- If the documents are signed outside India, then the same have to be notarized by a public notary of the residence country and consularized or apostilled by the competent authority, as the case may be.
- If the documents are signed in India, then copy of Visa and stamped passport, proving his/her presence in India at the time of signing is required.
- If the subscriber is a foreign entity, then the Incorporation documents should be signed by the representative of the foreign entity. An Authorization Letter duly stating the name of the Authorized Person and the number of shares subscribed should be notarized, consularized or apostilled, as the case may be in the home country of the subscriber company.

Post Subsidiary Incorporation Compliance:

Bank account: The first step once the company is incorporated, is to open a Bank (current) account in the name of the company for transactions. Choose the bank that you want to open the account with and submit the documents like certificate of the incorporation, MOA, AOA, BOD, Copy of the PAN allotment letter, Utility Bill, additional documents as required by the bank with regard to Foreign Nationals or Holding Company, along with a resolution passed by the Board authorising the users of the bank account.

Transfer of initial share capital: The amount towards the initial share capital has to be transferred from the bank account of the foreign holding company to the newly opened bank account. Related compliances need to be taken care of with the MCA

Allotment of shares: The company has to allot shares within 180 days from the date of receiving funds.

On allotment of shares: The company has to report in specified form (FC-GPR) to the RBI, within 30 days from the date of issue of shares along with:

- A Certificate from the Company Secretary certifying that the company has complied with the procedure for issue of shares as laid down under the Foreign Direct Investment (FDI) Scheme, and,
- A certificate from a Chartered Accountant indicating the manner of arriving at the price of the shares issued to the foreign investors.

Declaration of Commencement of business:

After satisfactory completion of all required regulatory procedures and registrations, the company can obtain the certificate of commencement of business from MCA. The company is now ready to operate its business in India!

Note: The process of incorporation can seem overwhelming, but with the right guidance and preparation, it can be a successful and rewarding endeavour.