



Doing business in India from a tax and regulatory perspective

The Dbriefs Corporate Income Tax series

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27 June 2023

Agenda

- Introduction
- Angel taxation – update
- Production linked incentives and make in India
- Royalty versus equalisation levy
- Treaty benefit claim
- Upcoming developments
- Questions and answers

Introduction

Indian economy – select attributes

- 5th largest economy – US\$ 3.5 trillion
- FDI – US\$ 46 bn (FY 2022-2023)
- 6-6.5% expected growth rate FY 23
- Reserves – US\$ 595.1 bn (Jun 23)
- Largest populated country – 1.43 bn
- 2nd largest working population – 522 mn with median age of 29 years

- Tax to GDP ratio @11.7% and climbing
- 100% electronic filing of all taxes
- YoY growth in GST @12% and direct taxes @10.5%
- Still only ~6% of individuals pay income tax

- G20 Presidency
- Make in India
- India stack
- FTAs and FTP

Angel tax provisions

Applicable on non-resident investments

- **What has changed?**

Anti-avoidance provisions now applicable to NR investors for investment in shares of Indian company

- **Why is it important?**

Premium received on shares could be taxed as income in hands of Indian company

- **What can you do?**

Review new fund raises and ensure that valuations are robust and do not trigger anti-avoidance rule

- **Position till 31 March 2023**

- As an anti-abuse measure, the intent was to target generation and circulation of unaccounted money of resident investors funneled into a domestic closely held company by way of security premium
- The law taxed excess of consideration over Fair Market Value (FMV) in the hands of domestic company

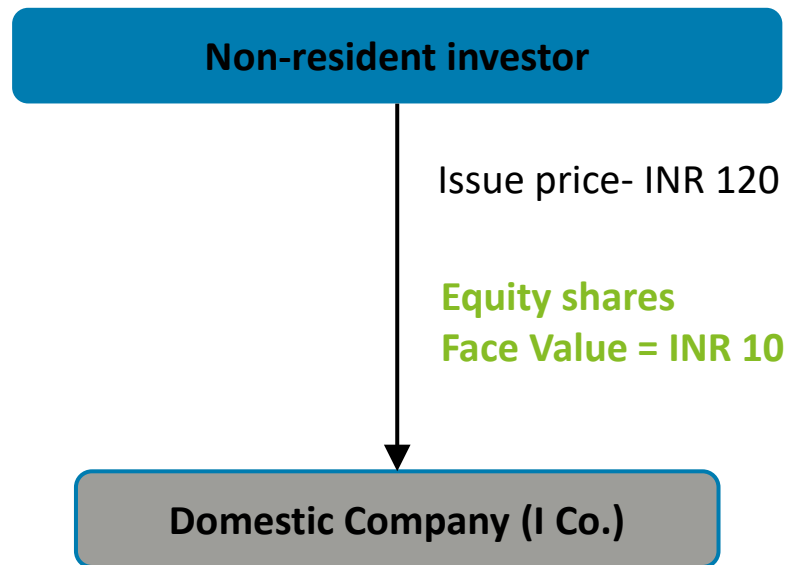
- **Position from 1 April 2023**

- The existing law amended and include cases of issuance of shares to non-resident investors as well
- Premium received by a closely held company for the issue of shares (in excess of FMV) from non-residents to be taxed in the hands of the domestic company
- Where transaction of subscribing to share capital in excess of FMV is between associated enterprises, whether transfer pricing provisions will trigger-implications?

Angel tax provisions

Applicable on non-resident investments

Impact of the amendment



Tax implications on issuance of shares by I Co.

Particulars	Shares issued at a premium	
	Pre-amendment	Post amendment
FMV* (a)	10	10
Consideration received by I Co. (b)	120	120
Taxable income in the hands of I Co. [(b) – (a)]	No income	110
Taxability @25.17%	–	28

* Fair market value (FMV) assumed as INR 10 which has been defined

Angel tax provisions

Applicable on non-resident investments

- **What has changed?**

Certain investors
companies excluded

- **What it means for other investors?**

No exemption in
respect of investments
made by private equity
or foreign companies

- **What can you do?**

Exempted entities to
also review whether
investment from their
country considered for
exclusion

- **Certain investor company excluded from ambit of angel tax provisions***

- Government and government related investors or multilateral organizations or agencies including entities controlled by the government or where direct or indirect ownership of the government is 75% or more
- Banks or entities involved in insurance business where such entity is subject to applicable regulations in the country where it is established or incorporated or is a resident
- Any of the following entities, which is a resident of any country as specified*, and such entity is subject to applicable regulations in the country where it is established or incorporated or is a resident
 - (a) Entities registered with securities and exchange board of India as category-I foreign portfolio investors
 - (b) Endowment funds associated with a university, hospitals or charities
 - (c) Pension funds created or established under the law of the foreign country or specified territory
 - (d) Broad based pooled investment vehicle or fund where the number of investors are more than 50 and such fund is not a hedge fund or a fund which employs diverse or complex trading strategies

*CBDT Notification No. 29/2023 dated 24 May 2023

*21 countries: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Iceland, Israel, Italy, Japan, Korea, New Zealand, Norway, Russia, Spain, Sweden, United Kingdom, and United States

Angel tax provisions

Amended proposed in Rule 11UA for public comments

- **What has changed?**

Draft rules proposed for other investors

- **Why is it important?**

Proposed to include additional valuation methodology and safe harbor threshold

- **What can you do?**

To review and ensure compliances with the same

- **Current rules**

- Currently two methods of valuation are specified

- Net asset value method; or

- Value determined by Merchant banker as per discounted cash flow method

- **Proposed rules**

- Additional 5 valuation methods that can be determined by Merchant banker for non-resident investor has been proposed

- 90-day window for merchant banker valuation report

- Safe harbor tolerance of 10% limit proposed

Polling question 1

Do you envisage injecting fresh capital into your existing operations in India during this financial year?

- Yes
- No
- Maybe
- Don't know/not applicable

Make in India 2.0 – Vocal for local and integrating for a resilient supply chain

PLI – Cash incentive scheme

IT Hardware PLI 2.0

Objectives

- Make Indian manufacturing globally competitive
- Enhance global value chain participation
- Incentivize value addition in India

Key features

- WTO compliant
- Incentives 2-15% of incremental sales
- No forex earning condition
- No minimum operation period requirement
- Additional incentives continue

Already concluded for 14 sectors

Products covered: Laptops, tablets, all-in-one personal computers, Servers, ultra-small form factor devices

Opened wef June 1 2023

Objective

- Boost domestic manufacturing
- GVC

Incentives

- 4-8% over 6 yrs, on incremental sales
- Additional incentives for locally procured sub-assemblies

PLI 2.0

Target segment

- Global manufacturers
- Domestic manufacturers
- Existing PLI applicants

Other aspects

- Outlay – USD 2.05 billion
- Capped based on applicant company status (global/ domestic/ hybrid)
- Option to choose start date as 1 April 2024 or 2025

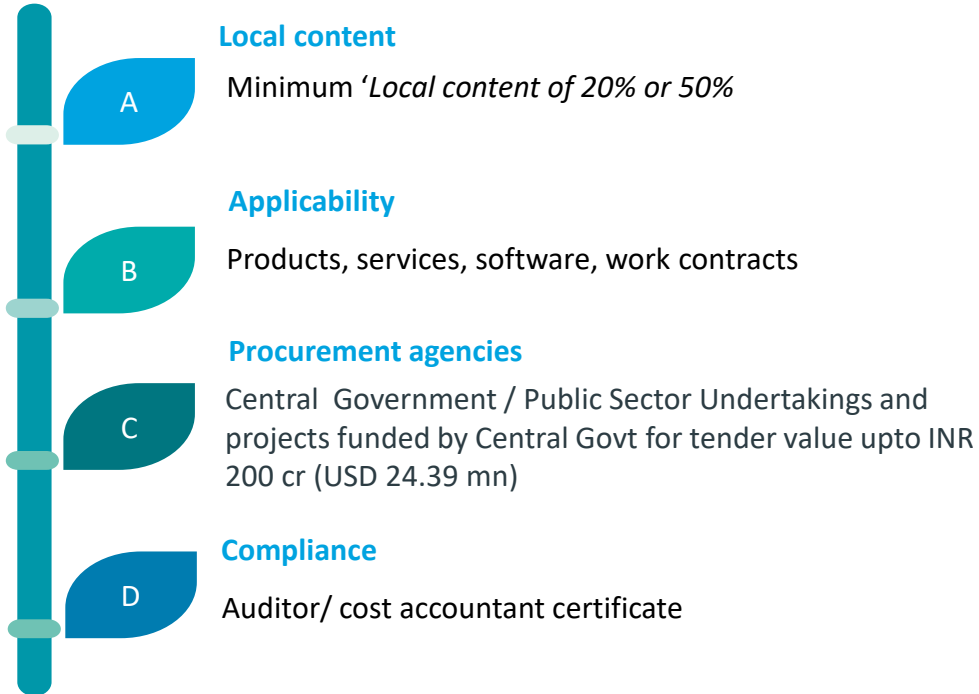
Eligibility criteria

Applicant	Expected investment threshold
Global companies	INR 500 Cr (US\$ 61 million)
Hybrid (new category)	INR 250 Cr (US\$ 30 million)
Domestic companies	INR 20 Cr (US\$ 2.4 million)

Expected PLIs in 5-6 categories

Make in India 2.0 – Public procurement (make in India) order

What does it state?



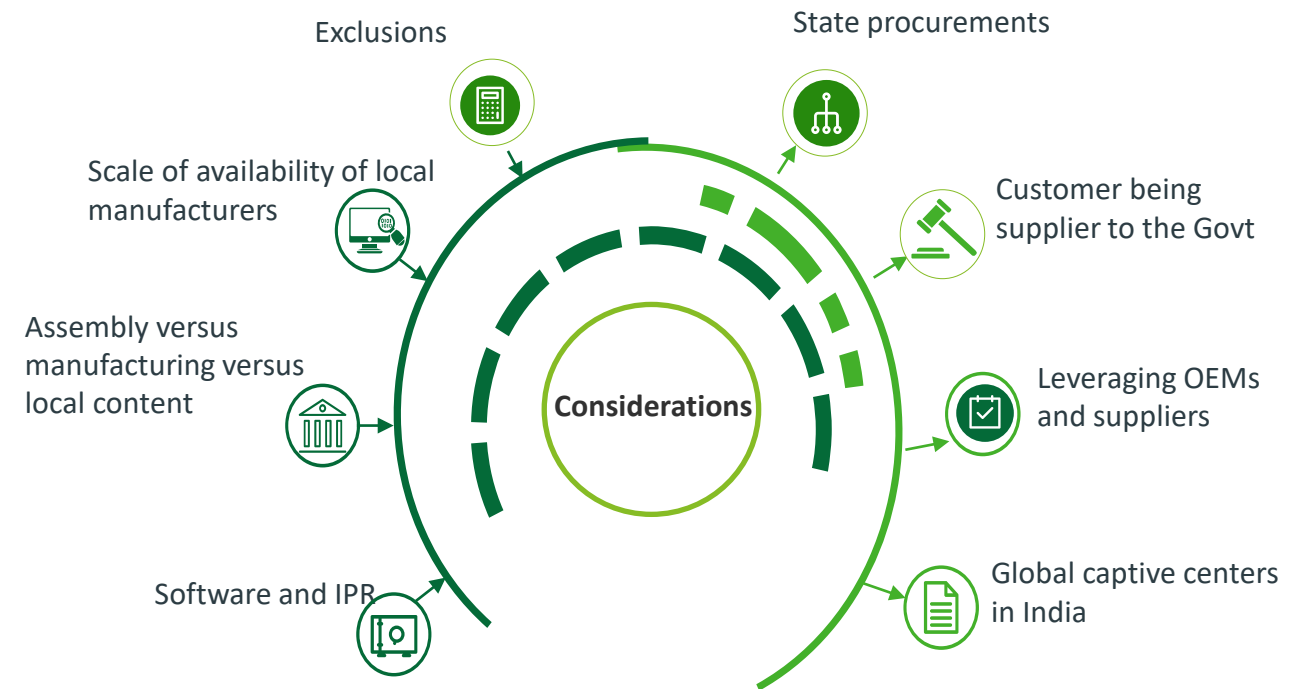
Classification

Class-I local supplier	Local content equal to or more than 50%	100% if L1 or match L1 (if no split), else 50% (split)
Class-II local supplier	Local content more than 20%, but less than 50%	Class I not there
Non-local supplier	Local content less than or equal to 20%	Not eligible, unless GTE

Recent developments

- Ministry of Mines 2023 Order increasing scope of items
- Registration for bordering country companies in **sensitive sectors** involved in **transfer of technology**
- **Restrictive and discriminatory** practices flagged in procurement

Some considerations



Ease of doing business – Simpler compliances and integration with infrastructure

Compliances

- EoDB measures – repeal, reduce, decriminalize
- National Single Window System
- New Foreign Trade Policy – emphasis on ecommerce exports, export hubs

Fiscal

- Lower corporate tax rates
- FTP – RODTEP and Duty remissions

Infrastructure

- Public Goods Infrastructure
- Gati Shakti
- National Logistics Policy implementation roadmap
- India stack

Taxation of software receipts

Royalty versus equalization levy

- **What has changed?**
Legal position on copyright royalties for software clarified
- **Why is it important?**
While legal position now clear, tax department often audits and challenges the treatment. Further equalization levy (EQL) in India could apply
- **What can you do?**
Review software receipts or enterprise license arrangements

Held that regardless of the terminology of “licensing” mentioned in End-User License Agreements (EULAs), it is settled law that the real nature of transaction must be looked at, by reading the agreement as a whole

Distributors

The distributor is only granted a non-exclusive and non transferrable license to resell computer software where no copyright is transferred to the distributor. The distributor does not have the right to sub-license or reverse engineer/modify nor does the distributor have the right to use the product at all. The consideration paid by the distributor to the non-resident manufacturer is in effect the price of a copy of the computer program as goods

End user

The end user can only use the computer program by installing it in the computer hardware and cannot reproduce the same for sale or transfer. The license granted vide the EULA is not a license in terms of section 30 of the Indian Copyright Act, 1957 but is a license which imposes restrictions or conditions for the use of the computer software

Taxation of software receipts

Royalty versus equalization levy

Equalization levy

- Applicability of EQL on digital transactions
- Scope expanded to levy EQL @ 2% on consideration of USD 250K or more, by an e-commerce operator from e-commerce supply or services to residents and non-residents (in specified cases)
- EQL to be discharged by NR e-commerce operator
- EQL applicable till the implementation of BEPS Pillar one – (most likely until 2024?)
- Transactions outside the purview of Royalty/FTS could be subject to EQL
- Applicability of EQL on licenses - onetime/perpetual, subscription models, intra-group transactions viz., cross charge for IT, and HR etc.

Non-treaty rate on royalty/FTS enhanced

Treaty benefit claims

- **What has changed?**

The domestic rate of 10% has been enhanced to 20% (excl. surcharge and cess)

- **Why is it important?**

Rate higher than most treaties and hence treaty claim now necessary in most cases

- **What can you do?**

Ensure treaty claim at lower rate is secure and can be claimed

- **Impact**

- Payer to withhold tax @ 20% (plus applicable surcharge and cess) subject to any treaty relief claim. Treaty relief for lower rate may be considered subject to satisfaction of the following

- Satisfying treaty conditions – tax residence, beneficial ownership
- Submission of TRC/Form 10F
- Non-applicability of anti-avoidance rules

- **Next steps**

- Income till 31 March 2023 to be taxed @ 10% (plus surcharge and cess) under the domestic tax law. Post 1 April 2023

- Eligibility to claim treaty benefit may be examined
- Payers may seek further details and/or declaration for granting treaty relief
- Compliances required under the domestic tax law will need to be evaluated such as filing of tax return, etc.

Non-resident – claiming treaty benefits

Electronic filing of Form 10F

- **What has changed?**
Treaty benefits to be reported
- **Why is it important?**
Requirement to do additional filing to place treaty benefit claim on record. New requirements to file electronically
- **What can you do?**
Review India treaty benefit claim

Section 90(4) requires a non-resident to obtain a Tax Residency Certificate (TRC) in order to claim tax treaty benefit

Further, section 90(5) read with Rule 21AB requires the assessee to provide information and documents as stated in sub-rule (1). Section 90(4) read conjointly with 90(5) may be interpreted to mean that the treaty claim will not be allowed unless Form 10F is filed, in cases where TRC does not contain the information covered in Rule 21AB(1)

Important – situations without a Permanent Account Number (PAN)

If a person is not required to obtain PAN as per the provisions of section 139A, the treaty benefit may be granted by the deductor basis the physical copy of a valid TRC (Tax Residency Certificate) and Form 10F. A declaration should be obtained from the assessee that an electronically filed Form 10F cannot be provided if the assessee does not have a PAN

Non-resident – claiming treaty benefits

Electronic filing of form 10F

Provisions under the domestic tax laws

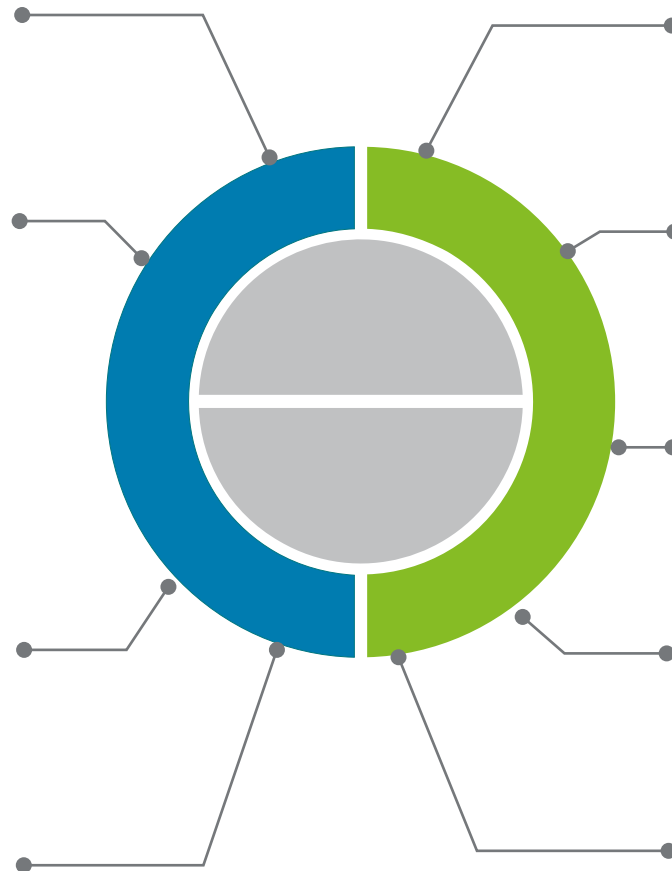
Indian tax laws require a non-resident to obtain Tax Residency Certificate (TRC) to avail the tax treaty benefit

A non-resident is required to provide certain prescribed information by filing Form 10F where TRC does not capture the prescribed details

Recent updates

Form 10F to be filed electronically

Exemption provided to non-resident taxpayers who do not have Permanent Account Number (PAN), from electronically filing Form 10F till 30 September 2023 only. Therefore, physical Form 10F will be accepted till 30 September 2023



Points to note

Mandatory to electronically file Form 10F for claiming treaty benefit. Income-tax portal provides for electronic filing facility for FY 2021-22 onwards.

Tax Authorities may deny benefit claimed in the tax return if Form 10F has not been filed electronically after 30 September 2023

Advisable for non-residents earning income from India and claiming treaty benefits to file Form 10F on or before the due date of filing the tax return; if not then immediately thereafter

Payer to take note of whether the payee has furnished Form 10F before the date when the payer is required to withhold the taxes in case payee is availing treaty benefit

Where a non-resident has a significant economic presence in India but is not subject to tax in India based on the provisions of the tax treaty, then in this case the non-resident is required to file Form 10F along with TRC and other documents to avail tax treaty benefits

Polling question 2

Do you have foreign entities in India that have transactions but no PAN registrations?

- We do not find the need to register as they are not taxable in India
- We are uncertain about the need to register
- We have already registered – nothing further to be done
- Don't know/not applicable

Recent regulatory developments

Intermediary guidelines



- Applicable to all Intermediaries
- Significant social media and online publishers of news and current affairs
- Resident employees, physical office address, grievance redressal and content takedown requirement

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• Additions

- Online games and intermediaries dealing with real money games
- Meity's licensed self-regulatory body
- Appoint resident employees, physical office address in India, grievance redressal

Competition Amendments

• Competition (Amendment) Bill, 2023

- Computation mechanism of deal values
- Standard of "control" diluted
- IPR exemption – abuse of dominance
- Settlement and commitment mechanism

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• Expected digital competition Act

- Expected to be tabled in parliament by December 2023
- Ex-ante framework expected
- Aims to address issues on deep discounting, monopolization, and anti-competitive practices

Space Policy, 2023



- Private sector allowed in space sector - build satellites, rockets, launch vehicles and data collection and dissemination
- Governing guidelines/regulations by IN-SPACE
- New Space India Limited – commercialising technologies and platforms created through public expenditure

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- Detailed framework expected shortly

Recent regulatory developments – Financial services and technology

IRDAI Information and Cybersecurity Guidelines



- Detailed **responsibility matrix**
- **Acceptable usage policy**
- **Data Classification** - Public', 'Internal', 'Restricted' or 'Confidential'. Call out PII data explicitly
- **Security breaches** to be notified within 6 hours
- **SLAs with third parties aligned with** international standards
- **Remote working** guidelines drawn out
- Aligned with IT Rules, 2021

RBI MD on Outsourcing of IT Services

- Effective 1st October 2023
- Group entities allowed with arm's length condition
- **Risk-based** approach for contractors
- **Detailed RMP** to be built and **breach to be notified** within 6 hours
- **BC/DR measures** – emergency, liquidation cases
- **Regular audits**
- **Cross border companies** allowed with conditions
- Detailing **CSP chapter**

Technology laws on the anvil

- Digital India Act 2023 – first draft expected to be released by June end
- Digital Personal Data Protection Bill – expected to be tabled in monsoon session
- Telecom Bill – amend Telegraph Act and regulate OTT communications
- Adjudication – cross border and compliances

Question and answers

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