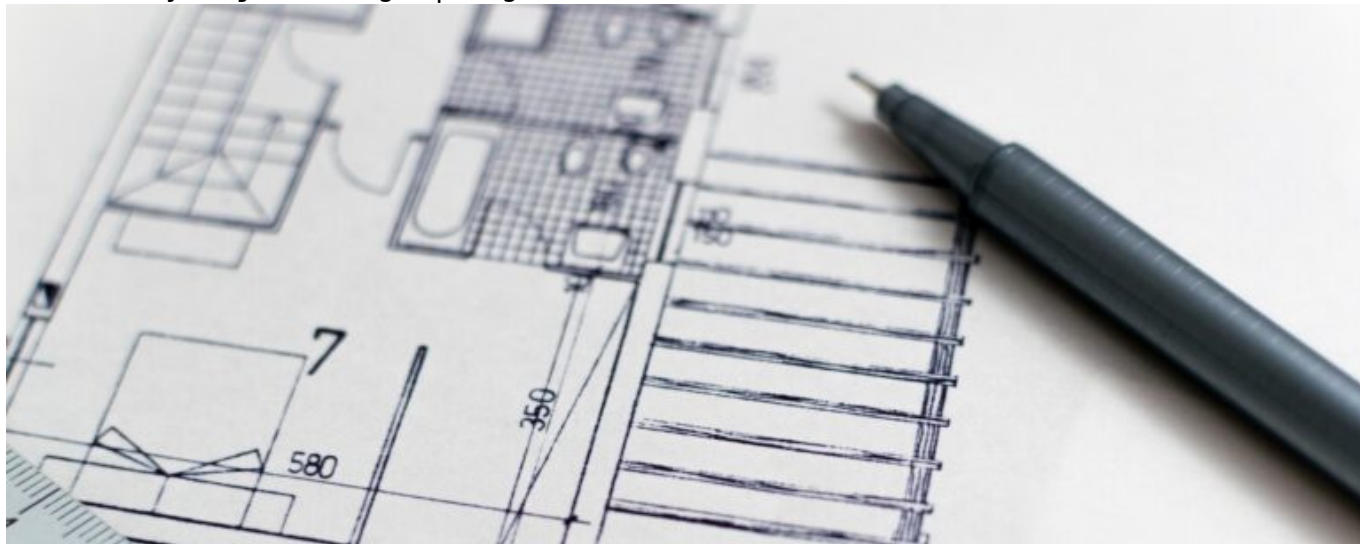


Guide To Setting Up A Branch Office In India

written by Rajdev Singh | August 3, 2021



Expanding a business in a new jurisdiction is always a step that comes with all sorts of challenges and decisions. One of the most crucial points to consider when expanding is the setting up of a branch office in a new jurisdiction – doing so provides the company with an opportunity to explore and analyse the market before risking further expansion. This article attempts to address some major Frequently Asked Questions (FAQs) regarding the setting up of branch office in India which you ought to look at if you are considering growing your business.

Q 1: How does Indian law define a branch office?

A 'branch office' is defined under Section 2(14) of the Companies Act 2013 and Regulation 2(d) of Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations 2016^[1] ["Regulations"] as *"an establishment described as such by the company"*.

The scope of activities permitted to a branch office in India are mentioned under Schedule I^[2] of the Regulations as:

1. Export/import of goods;
2. Rendering professional or consultancy services;
3. Carrying out research work in which the parent company is engaged;
4. Promoting technical or financial collaborations between Indian companies and the parent or overseas group companies;
5. Representing the parent company in India and acting as buying/selling agent in India;
6. Rendering services in Information Technology and development of software in India;
7. Rendering technical support to the products supplied by parent/group companies;
8. Representing a foreign airline/shipping company.

Q 2. Who can open a branch office in India?

Regulation 4(a) provides that a resident outside India is permitted to establish a branch office in India only when the company has:

1. A profit-making track record for the preceding five financial years in its home country, and
2. A net worth^[3] of not less than USD 100,000.

In cases where a resident outside India is not financially sound and is a

subsidiary of a company, the parent company can submit a Letter of Comfort[4] to the Authorised Dealer (AD) Category-I bank for establishing a branch office in India on its behalf, provided the parent company fulfils the above-mentioned criteria.

Q 3: What is the general registration process for establishing a branch office in India?

1. Application to AD Category-I bank

- An AD Category-I bank is the bank with which the foreign entity intends to continue its banking relations.
- Any firm/body corporate/association of individuals registered outside India has to fill form FNC[5] and submit it to an AD Category-I bank along with the documents mentioned in the declaration.
- The bank conducts due diligence and considers various aspects, including but not limited to, sources of funds, nature of the activity, compliance with KYC norms, etc.
- Once satisfied, the bank grants approval to establish a branch office.
- The bank may also formulate policy for the approval system in accordance with FEMA Directions and Regulations.

2. Issuance of Unique Identification Number (UIN) from RBI[6]

- The AD Category-I bank further submits a copy of the form and details of approval to be granted to the General Manager, Foreign Exchange Department, Central Office Cell, Reserve Bank of India, New Delhi Regional Office, 6, Parliament Street (Sansad Marg), New Delhi-110 001, India to obtain a UIN for the applicant.
- Once satisfied, RBI issues a UIN.
- Once a UIN is received, the bank issues an approval letter to the applicant. The purpose is to maintain a record by RBI on its website. Thus, RBI's approval is sought through AD Category-I banks.

3. Registration of branch office in India with the Registrar of Companies (ROC)[6]

- The branch office shall submit the e-form FC-1 along with the documents required under Section 380[7] of Companies Act, 2013 to the Registrar within 30 days of the establishment of a place of business.
- On successful submission, a challan depicting payment of fees and SRN is generated which can be used for future interaction with the Ministry of Corporate Affairs (MCA).
- An acknowledgement email is sent to the company's email id once the e-form is completely processed.
- A system-generated Certificate for the establishment of business in India and a Foreign Company Registration Number (FCRN) is issued.

4. Obtainment of PAN and opening a bank account for the branch office

- A Permanent Account Number (PAN) shall be obtained by every branch office from the Income Tax Authorities.
- The branch office may approach AD Category-I bank to open a bank account.

Q 4: Under what circumstances permissions from AD Category-I bank and UIN from RBI are not required?

As per an RBI Master Circular dated March 16th 2016[8] and Regulation 3 of the Regulations 2016, permissions from AD Category-I bank and UIN from RBI i.e., approvals from RBI to open a branch office are not required in the following three cases:

- Banking company resident outside India planning to open a branch office and

has already obtained approvals under Banking Regulation Act 1949.

- Insurance company resident outside India planning to open a branch office and has already obtained approvals from the Insurance Regulatory and Development Authority (IRDAI).
- Company resident outside India planning to establish a branch office in Special Economic Zone (SEZ) to carry out service and manufacturing activities provided FDI in the sector in which it will function is permitted; such an office complies with Chapter XXII of the Companies Act 2013 and it functions on a stand-alone basis.

Q 5: In what special cases is the approval of either the Indian government or police authorities required?

A. Central Government

As per an RBI Master Circular dated March 16th 2016[9] and Regulation 5 of the Regulation 2016, the AD Category-I bank has to further submit the application from a resident outside India along with other required documents to RBI for prior approval, and RBI processes the application in consultation with the Government of India in the following cases when:

1. The applicant is a citizen either of Pakistan or an entity incorporated/registered in Pakistan;
2. The applicant is a citizen of, or an entity incorporated/registered in Afghanistan, Bangladesh, China, Hong Kong, Iran, Macau, or Sri Lanka and if the branch office is to be established in Andaman and Nicobar Islands, Jammu & Kashmir, and the North East region;
3. The main business of the office falls within the Defence, Telecom, Private Security and Information and Broadcasting sectors provided prior Government approval or permission/license from the Concerned Ministry/Regulator has not been granted; and
4. The applicant is a Non-Profit Organisation; Non-Government Organisation (NGO); Agent/Body/Department of a foreign government.

B. Police Authorities

Approval of police authorities is required if the applicant is a citizen of or an entity incorporated/registered in Afghanistan, Bangladesh, China, Hong Kong, Iran, Macau, Pakistan, or Sri Lanka.[10] Post the approval, a copy must be submitted to the Ministry of Home Affairs, Internal Security Division-I, Government of India, New Delhi.

Q 6: What is the period of time required to establish a branch office?

Post the grant of approval, the applicant has to give information about the date of establishment to the AD Category-I bank which shall, in turn, update RBI on the same. The Branch Office needs to be opened within six months from the date of the approval letter; if it is not opened within the prescribed time, the approval of the establishment shall be cancelled.

The resident outside India can seek an extension of six months from the AD Category-I bank if the reason for not opening the office within the prescribed time period was beyond their control. Further extension can be sought with prior approval of RBI.

Q 7: What are the annual compliances required after the establishment of a branch office in India?

- Annual Activity Certificate (AAC)[11], a certificate certifying that the company undertook only permitted activities during the year, along with audited financial statements must be submitted to the AD Category-I bank and the Director-General of Income Tax (International Taxation), New Delhi by the

concerned branch office at the end of every financial year.

- The concerned bank scrutinizes the AAC and ensures that the office has been operating within terms and conditions of the approval. In case the bank finds any adverse activity, it reports to the General Manager, RBI, CO Cell, New Delhi along with its' comments on the ACC copy.
- Comply with Section 128[12] of the Companies Act which requires that proper books of accounts and financial statements be kept by the company.
- Rule 3 of the Companies (Corporate Social Responsibility Policy) Rules 2014 provides that any foreign company as per Section 2(42)[13] of the Companies Act 2013 having a branch office in India shall comply with Section 135[14] i.e., constitute a Corporate Social Responsibility (CSR) Board – provided the company has a net worth of rupees 500 crores or more, or net profit of rupees 500 crores or more, or turnover of rupees one thousand crores or more, in the immediately preceding financial year.
- As per Section 381[15] of the Companies Act 2013 and Rules 4, 5 and 6 of Companies (Registration of Foreign Companies) Rules 2014[16], the branch office shall file balance sheet, profit and loss account and any other document mentioned under the provisions with ROC.
- Any significant change, for instance, change in directors, change in the constitution of the foreign company, etc. shall be notified to the RBI and ROC by filing form FC-2.

Q 8: Can a branch office in India remit profits or surplus?

Yes, the branch office can remit its profit outside India subject to applicable Indian taxes and to the satisfaction of the AD Category-I bank by providing the following documents to such bank:

1. A certified copy of the Profit and Loss account and Balance Sheet for the year;
2. A certificate by a Chartered Accountant certifying the manner of finalizing the remittable profits (earned only through permitted activities) and is not inclusive of profits on revaluation of the branch's assets.

Endnote

A common question on whether the Companies Act 2013 applies to a branch office in India can be answered by interpreting the language of Section 379[17] of the Companies Act 2013 which provides that a foreign company has to comply with the provisions of Chapter XXII and the rest of the Act as prescribed when more than fifty per cent of its paid-up share capital is held by one or more citizens of India or companies or body corporates incorporated in India. Punishment for non-compliance or contravention to Chapter XXII is provided under Section 392[18] of the Companies Act 2013.

It is essential to note that the liabilities of a branch office in India extend to its parent company since it is not a separate legal entity and is an extension of the parent company. Thus, the parent company's assets can be attached in case the liabilities exceed the value of assets of the branch office. However, the authors do find gaps in the present acts, regulations, rules, and associated notices as there is a deficiency of expressly detailed provisions regarding the liability of a branch office in India.

- [1] https://www.rbi.org.in/scripts/BS_FemaNotifications.aspx?Id=10327
- [2] https://rbidocs.rbi.org.in/rdocs/content/pdfs/22RNT04042016_AN2.pdf
- [3] Total paid-up capital, free reserves, and less intangible assets as per audited balance sheet or account statement certified by a Certified Public Accountant or any Registered Accounts Practitioner

- [4] https://rbidocs.rbi.org.in/rdocs/content/pdfs/22RNT04042016_AN1.pdf
- [5] https://rbidocs.rbi.org.in/rdocs/content/pdfs/22RNT04042016_AN3.pdf
- [6] https://www.mca.gov.in/MCA21/dca/help/instructionkit/NCA/Form_FC-1_help.pdf (pg. 3)
- [7] <http://ebook.mca.gov.in/Actpagedisplay.aspx?PAGENAME=17819>
- [8] https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=10404
- [9] *ibid*
- [10] <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/13MDRD77DCF42C4E64B6C9A83C24EF5D4E188.PDF> (pg. 47)
- [11] <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/13MDRD77DCF42C4E64B6C9A83C24EF5D4E188.PDF> (pg. 45)
- [12] <http://ebook.mca.gov.in/Actpagedisplay.aspx?PAGENAME=17511>
- [13] <http://ebook.mca.gov.in/Actpagedisplay.aspx?PAGENAME=17381>
- [14] <http://ebook.mca.gov.in/Actpagedisplay.aspx?PAGENAME=17518>
- [15] <http://ebook.mca.gov.in/Actpagedisplay.aspx?PAGENAME=17820>
- [16] <http://ebook.mca.gov.in/Default.aspx?page=rules>
- [17] <http://ebook.mca.gov.in/default.aspx>
- [18] <http://ebook.mca.gov.in/default.aspx>

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