

Nishith Desai Associates
Legal & Tax Counseling Worldwide

MUMBAI
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Funds Practice Group

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Our practice in the funds area evolved with the opening up of the Indian markets in 1991. This first phase of liberalization, however, saw limited categories of foreign investors making investments into India. In 1993, for the first time, Foreign Institutional Investors ("FIIs") were permitted to make portfolio investments in Indian companies. We advised the Bombay Fund, the first FII that was set up to make investments in Indian securities, which was managed by BZW. We acted as Indian counsel to the offshore funds that were floated by several Indian mutual funds. We have represented several offshore funds set up by the Unit Trust of India, one of India's largest mutual funds. In 1994, the first few private equity funds were set up in India. We represented the first offshore private equity fund, 'Indocean', which was jointly set up by the George Soros Group and Chemical Ventures Partners (which later on went on to acquire Chase Manhattan Bank). We also represented other funds like HSBC Private Equity India Fund and Walden Nikko India Ventures Co. LDC. The structuring for the first offshore infrastructure fund, AIG Indian Sectoral Equity Fund, making investments in India, was also done by us.

After the advent of private equity funds, the market felt a need for domestic venture capital funds. Securities Exchange Board of India ("SEBI") introduced the SEBI (Venture Capital) Regulations, 1996 for regulating domestic venture capital funds. However, there were several ambiguities and conflicts between different sets of regulations introduced, which required legislative clarification. To address these issues, SEBI set up a committee chaired by K.B. Chandrashekar to recommend amendments to the existing regulations, to which, Nishith Desai, the founder of the firm, was invited to be a member of, given the considerable experience in structuring and setting up of funds..

During this time, foreign private equity/venture capital funds also started making substantial investments in India. In order to encourage and keep up the trend, the SEBI introduced SEBI (Foreign Venture Capital Investor) Regulations, 2000 to promote and monitor foreign venture capital funds investing into Indian companies.

Our funds team comprises multi-skilled professionals including lawyers, chartered accountants and management graduates who blend transactional experience and industry knowledge in developing creative structures for our clients. Our industry knowledge and experience also equips us to give advice on a number of business issues including the hurdle rate, structuring of the carried interest, clawback, sharing of carried interest with employees, co-investment structures, combining dollar-denominated and rupee denominated hurdle

rates in unified structures, etc. Our funds practice is headed by Siddharth Shah and comprises Bijal Ajinkya, Kishore Joshi, Nishchal Joshipura, Vikram Shroff and Parul Jain.

Our focus on international tax and our in-depth understanding of the legal and tax regimes for funds in other jurisdictions has enabled us to be at the cutting edge of structuring offshore and domestic funds. Several Indian investment managers who are looking at raising international funds need to offer tax efficient and regulatory compliant structures to their foreign investors.. that generally seek not only safety and repatriation of their original investments but also a tax-efficient way of receiving the gains earned as well .

Some funds that target both, domestic and offshore investors, offering a unified structure requires careful planning in order for the fund to be able to offer similar terms to all its investors. Our global network with overseas counsel helps us identify appropriate overseas administrators/ counsel who can represent the fund's interests in those jurisdictions.

Selection of the fund vehicle also requires , as the same would have an impact on the investors in the fund particularly in their home jurisdictions. For instance, a majority of U.S. based investors prefer the fund entity to be structured as a limited liability company as this would be treated as a "pass-through" for tax purposes in the U.S. However, most European jurisdictions may not recognize a limited liability company. While deciding on the optimum structure for a fund, varied objectives like limited liability for investors, tax efficiency for the investors and the managers need to be considered. To meet these objectives varied entities such as pass-through trusts, limited liability partnerships, limited liability companies, protected cell companies etc. can be considered.

Offshore funds investing in India would require the presence of investment advisors in India to provide them with deal recommendations, etc. This gives rise to tricky issues relating to the taxation of the offshore fund in India that would depend on whether the Indian advisor is regarded as a "permanent establishment" of the offshore fund in India. In this regard, we have successfully represented several funds before the Indian Authority for Advance Rulings and have obtained landmark rulings for them.

Once a decision has been taken on the optimum structure for the fund, the same has to be carefully incorporated in the fund documents, including the charter documents for the fund entity, the private placement memorandum, the investment management agreement, the investment advisory agreement, etc. In particular, one would need to keep in mind the "permanent establishment" issues while drafting these

documents. The private placement memorandum should also achieve a balance between the risk disclosure requirements and the marketing strategy. We also co-ordinate with overseas counsel to obtain requisite legends, if the fund is being marketed to investors in those jurisdictions.

Upon completion of the fund documents, we also advise the fund on the local registration requirements. Domestic funds may register themselves with SEBI pursuant to which they are required to comply with certain investment restrictions and other prescribed conditions. Domestic funds are also accorded the pass-through status for Indian tax purposes upon the fulfillment of certain conditions. It is not mandatory for offshore funds to register with SEBI. However, there are certain benefits available to offshore funds that register with SEBI as "foreign venture capital investors" such as flexibility in entry and exit pricing, "Qualified Institutional Buyer" status, etc. Further, with respect to funds seeking to participate in the secondary markets, apart from drafting of the information memorandum which is circulated to the investors of such fund, we have also advised and assisted them in obtaining registration as an FII or an FII sub-account. We also advise funds on a day to day basis from an Indian tax and regulatory perspective in relation to execution of "offshore derivative instruments" including "participatory notes".

Considering the global turmoil and also adhering to the fact that India is largely self-reliant, a lot of domestic investment bankers have started floating funds attracting investors to make investments in the listed securities by way of portfolio management schemes under SEBI (Portfolio Managers) Regulations, 1993.

Our commitment to research and understanding of the global trends enables us to constantly bring new concepts such as UCITs, REITs, hedge funds, fund of funds etc. to the Indian fund industry and create structures anticipating future needs of our clients.

Our expertise spreads across various kinds of funds including sector specific funds like technology funds, infrastructure funds, real estate funds, multi-currency funds, debt funds, index-based funds mid-cap funds, regional funds, funds looking at investing in varied stages of a company from seed-stage to late-stage, angel funds, etc.

Select Clients

Private Equity / Venture Capital

2i Capital
 AIG Sectoral Equity Fund
 At India Mauritius Limited
 Chrysalis Capital Partners I, LLC
 eIndia Fund (Infinity II)
 Electra Asian Fund LP.
 Hexagram Venture Fund/Hexagram Fund LLC
 HSBC Private Equity Fund
 Jumpstartup II
 India Auto Ancillary Fund
 India Enterprise Fund
 India Advantage Fund I & II - ICICI ventures
 India Advantage Fund V, VI & VII - ICICI Ventures
 Indocean Fund
 Infinity Fund
 IL&FS Project Development Fund
 IL&FS Pan Asia Project Development Fund
 IL&FS Tara India Fund III, LLC
 J.P. Morgan Horizon Tech. Partners I, LP
 SREI Medium & Small Infrastructure Funds
 Maharashtra Urban Infrastructure Fund
 National Venture Fund for Software
 and Information Technology Industry
 Helion Venture Partners
 NEA-IndoUS Venture Capital
 Sequoia Capital India Investment Holdings
 III
 Opportunite SA
 Yatra Capital
 KSK Energy Venture
 BTS India Private Equity Fund
 Indian Media Fund
 Asian Future Fund
 Yes Food & Agri Business India Fund
 India Lifesciences Fund I
 JM Financial India Fund
 JM Financial India Fund I Limited
 NovaStar
 Small is Beautiful
 TCW-ICICI
 UTI Ventures India Ascent Fund
 Walden Nikko
 Westbridge Capital Partners I & II

Real Estate

India Advantage Fund III & IV - ICICI Ventures
 Kotak Mahindra Realty Fund I, II & III
 India Property Fund – The Chatterjee Group
 Indiareit Fund - I, II & III
 RE Capital India Fund
 Redfort Capital
 Kshitij Fund - Future Group
 Deutsche RREEF
 Prudential-ICICI PMS
 IL&FS India Realty Fund II LLC
 Milestone Fund LLC

Others

SBI Resurgent India Investment Fund
ICICI-India Optima Fund
Arisaig India Fund Limited
AXA Development World Markets
DSP India Opportunities Fund
Franklin Templeton India Offshore Funds
UTI - India Index Fund
UTI - India Access
UTI - India Debt Fund
UTI - India IT Fund
IL&FS - India Discovery Fund
Indo Asean Microcap Fund Ltd.
Indus Fund
ING Group N.V.
Kuvera Fund
Nicholas Applegate
New York Life
New York Life Insurance
Indea Absolute Return Fund
Prudential India Opportunities Fund Limited
Ultra India Fund Limited-Edelweiss
Kotak India Focus Fund
TCG Indiastar Fund
India Max Investment Fund Limited
Sandstone Capital India Fund LP
Quantum Endowment Fund N.V.
Scwhendimann
Q India Equity Fund
TATA India Opportunities Fund
IDFC Infrastructure Opportunities Fund
The India iCapital Fund
Tricolor India Fund
Voyager India Fund LP
Winstar India Funds
Clareville India Capital Fund

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