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The International Comparative Legal Guide to:

Private Client 2014

3rd Edition

A practical cross-border insight into private client work

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EDITORIAL

Welcome to the third edition of *The International Comparative Legal Guide to: Private Client*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of private client work.

It is divided into two main sections:

Eight general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting private client work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in private client laws and regulations in 29 jurisdictions.

All chapters are written by leading private client lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Owen Clutton and Jonathan Conder of Macfarlanes LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Pre-entry Tax Planning

1.1 In India, what pre-entry estate and gift tax planning can be undertaken?

India does not impose an estate or gift tax. That said, there is an income tax on the recipient who receives money or other property for nil or inadequate consideration. The timing and purpose/manner of gifting may help make use of specific exemptions provided from such income tax. Income tax is not imposed where transfer is between relatives (as defined statutorily), on marriage, under a will or by inheritance, in contemplation of death of the payer. Transfer of capital assets under a gift, will or irrevocable trust or a distribution of capital assets in a partial or total partition of a Hindu Undivided Family (HUF) is not considered a transfer for the purposes of imposition of income tax on capital gains.

1.2 In India, what pre-entry income tax planning can be undertaken?

A non-resident who wishes to take up Indian residence has a period of 2 years from his return to India to protect his worldwide income from being taxed in India. Non-resident Indians (NRIs, which includes persons of Indian origin (PIOs)) specifically have been permitted concessional tax rates on investment income from specified assets acquired out of convertible foreign exchange. The NRI can opt to be taxed under the beneficial provisions even after becoming a resident but until the conversion of such assets into money or another asset.

1.3 In India, can pre-entry planning be undertaken for any other taxes?

Assets and debts located outside India of non-residents and resident but not ordinarily resident persons (individuals and HUFs) are exempt from wealth tax. Where NRIs return to India with the intention of permanently residing in India, money and other assets brought back in are exempt from wealth tax. The exemption also extends to assets purchased from such money within 1 year preceding the return and at any time thereafter. However, this exemption is available only for up to 7 years after the return.

2 Connection Factors

2.1 To what extent is domicile relevant in determining liability to taxation in India?

Domicile is not relevant.

2.2 If domicile is relevant, how is it defined for taxation purposes?

This is not applicable.

2.3 To what extent is residence relevant in determining liability to taxation in India?

Income tax

The Income Tax Act, 1961 (ITA) imposes income tax on the basis of residence. Residents are taxed on worldwide income, non-residents are taxed on India-sourced income (i.e. income which is received, accrues or arises in India or is deemed statutorily to be received, to accrue or to arise in India). An intermediate category of 'resident but not ordinarily resident' (RNOR) exists where individuals are taxed like residents with the difference that income which accrues or arises outside India is included only to the extent it is derived from a business controlled in or a profession set up in India.

Wealth tax

Value of assets and debts located outside India is not included for the purposes of wealth tax for: (i) an individual who is not a citizen of India or an individual or a Hindu Undivided Family (HUF) not resident in India or which is an RNOR; and (ii) a company not resident in India. Under the Wealth Tax Act, 1957, residence is determined as per the definition in the ITA. Location of assets is determined under the rules issued by the Revenue.

2.4 If residence is relevant, how is it defined for taxation purposes?

Individuals

An individual is a resident if: (i) he is present in India for 182 days or more in a financial year; or (ii) he is present for 60 days or more in a financial year and 365 days or more during 4 years immediately preceding that financial year. The '60 days' in criterion (ii) is replaced with '182 days' if the individual is an Indian citizen or a Person of Indian Origin (PIO) residing abroad who comes on a 'visit' to India during the previous year.

An individual is a 'resident but not ordinary resident' if he is a non-resident in 9 out of the 10 years preceding the relevant previous year, or he is present in India for 729 days or less during the 7 years preceding the relevant previous year.

An individual is a non-resident in every other case.

Companies

A company is a resident if: (i) it is formed and registered under the Companies Act, 1956; or (ii) its control and management are wholly situated within India for the concerned financial year.

Other entities

Other entities are considered resident if even a part of their control and management is situated within India.

2.5 To what extent is nationality relevant in determining liability to taxation in India?

Nationality is not relevant.

2.6 If nationality is relevant, how is it defined for taxation purposes?

This is not applicable.

3 General Taxation Regime

3.1 What gift or estate taxes apply that are relevant to persons becoming established in India?

India does not impose gift or estate taxes. Income tax is imposed on any sum of money or other property received for nil or inadequate consideration where the aggregate value of the amount received is above the specified threshold.

3.2 How and to what extent are persons who become established in India liable to income tax?

See question 2.3 above.

3.3 What other direct taxes (if any) apply to persons who become established in India?

See question 2.3 above. Stamp duty is levied on documents effecting specified transfers/conveyances. Depending on the nature of the conveyance, the stamp duty may either take the form of a fixed duty or be a percentage of the property value, under the relevant state law. Stamp duty is usually payable by the person executing the document, unless the document specifies otherwise.

3.4 What indirect taxes (sales taxes/VAT and customs & excise duties) apply to persons becoming established in India?

Central Sales Tax (CST) at 2% is levied on inter-state trade, while sales tax (at different rates imposed by each state) is imposed on intra-state trade. Excise duty is levied on the production or manufacture of goods in India and rates vary depending on the goods involved. VAT is a state-specific levy that allows for input tax credit. It has two basic rates of 5% and 14.5%. Customs duty (ranging from 12.5% to 100%) is imposed on import of goods and specified exports. It consists of a basic customs duty, a countervailing duty instead of excise duty and an additional customs duty instead of state and local taxes.

Service tax at 12.36% is imposed on services other than those specified in the negative list. Taxability of a service depends on the place of its provisions, as determined under the rules provided. Service tax is usually paid by the service provider but passed on to the consumer. Under the reverse charge mechanism applicable to specified services, the service recipient is held responsible to pay this tax.

India is proposing to implement a Goods and Services Tax but the proposal is pending Parliamentary approval.

3.5 Are there any anti-avoidance taxation provisions that apply to the offshore arrangements of persons who have become established in India?

India does not impose CFC or thin capitalisation rules presently but proposes to introduce them under the draft Direct Taxes Code Bill ('DTC'; the bill is pending Parliamentary approval). Under transfer pricing rules, income arising from an international transaction must be carried out at arm's length. The ITA specifies the mode of computing the arm's length price and taxpayers must submit an accountant's report along with the tax return. Where income from an asset is transferred without transferring the asset, the income is taxable in the hands of the transferor. Income of a revocable trust is chargeable to tax in the hands of the settlor (also see question 6.2). In certain situations, the income of a spouse or a minor is clubbed with that of the other spouse or parent respectively.

3.6 Is there any general anti-avoidance or anti-abuse rule to counteract tax advantages?

India enacted a statutory GAAR in 2012 to take effect from financial year 2015-16. The GAAR grants wide powers to the Revenue to tax 'impermissible avoidance arrangements' which has been defined to mean "*an arrangement, the main purpose of which is to obtain a tax benefit, and it—*

(a) creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;

(b) results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;

(c) lacks commercial substance or is deemed to lack commercial substance ..., in whole or in part; or

(d) is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for bona fide purposes."

The Revenue has powers to disregard intermediate steps in a transaction, reallocate income and expenditure between parties, treat debt as equity and *vice versa*. The GAAR may also be used to override benefits provided under a tax treaty. Further clarification is awaited on concepts such as lack of commercial substance, substantial commercial purpose, *bona fide* objects, abuse and misuse of law. The GAAR shall not be applicable to any arrangement where the tax benefit arising to all parties to the arrangement does not exceed INR 30 million in the relevant financial year.

4 Taxation Issues on Inward Investment

4.1 What liabilities are there to direct taxes on the remittance of assets or funds into India?

A resident is taxed on income received, accrued or arising in India, accrued or arising outside India or deemed to be received, to have accrued or to arise in India. Foreign sourced dividends are taxable at 15% where the Indian entity holds at least 26% of the nominal equity share of the foreign company. The Revenue has initiated transfer pricing scrutiny on intra-group share subscriptions on the ground that shares were issued at less than market price. In the context of an outbound transaction, a recent Tribunal ruling has held that investments in share capital outside India were in the nature of capital investments, did not give rise to chargeable income and would not attract transfer pricing regulations.

4.2 What taxes are there on the importation of assets into India, including excise taxes?

See question 3.4 above.

4.3 Are there any particular tax issues in relation to the purchase of residential properties?

Where an individual or HUF receives any immoveable property without consideration, the stamp duty value of which exceeds INR 50,000, the stamp duty value of such property is chargeable to income tax. Alternatively, if immoveable property is received for a consideration which is less than the stamp duty value of the property by an amount exceeding INR 50,000, the stamp duty value of such property as exceeds such consideration is chargeable to income tax. Where the consideration received or accruing as a result of the purchase of residential property is less than the value adopted, assessed or assessable by the stamp valuation authority for the purpose of payment of stamp duty on such transfer, the value so adopted, assessed or assessable is deemed to be the full value of the consideration received or accruing as a result of such transfer, for the purpose of computing capital gains in the hands of the seller.

Roll-over relief may be obtained on capital gains derived by an individual or an HUF from the sale of residential property.

Purchasers of non-agricultural immoveable property worth over INR 5 million must withhold tax at 1% of the consideration payable to a resident transferor.

Some states impose Value Added Tax on real estate transactions.

5 Succession Planning

5.1 What are the relevant private international law (conflict of law) rules on succession and wills, including tests of essential validity and formal validity in India?

For both testamentary and intestate succession, the applicable rule depends on the nature of the property. Moveable property of the deceased devolves according to the laws of the domicile of the deceased, while immoveable property devolves according to the laws of the place where the immoveable property is situated.

5.2 Are there particular rules that apply to real estate held in India or elsewhere?

See question 5.1. In addition, exchange control rules restrict acquisition, transfer and holding of real estate. Non-resident Indians (including persons of Indian origin (PIOs)):

- may personally acquire residential/commercial property through purchase, gift or inheritance;
- may acquire agricultural property, plantations and farm houses only through inheritance; and
- are permitted to invest in shares and convertible debentures on a stock exchange of a real estate developer entity (subject to investment caps) and may purchase unlisted securities on a repatriation basis (subject to conditions on minimum capitalisation, lock-in etc.) and on a non-repatriation basis (without any limit or prior permission).
- Residential/commercial property may be sold or gifted to an Indian resident, to other NRIs or PIOs, with the additional condition that a sale between PIOs requires prior RBI permission. Where NRIs/PIOs own/hold agricultural property, plantations or farm houses, such property may be sold or gifted only to a person resident in India who is also a citizen of India.

Non-resident foreign nationals:

- are not permitted to acquire personally (through purchase or gift, whether singly or jointly with an NRI/PIO) residential or commercial property or agricultural property, plantations and farm houses;
- are permitted to inherit residential or commercial property or agricultural property, plantations and farm houses. Where a foreign national, NRI or PIO inherits immoveable property (of any nature) from a person resident outside India, prior regulatory approval is required and the bequeathor must have acquired such property in accordance with the provisions of foreign exchange law in force at the time of acquisition; and
- are also permitted to acquire residential property through lease for up to 5 years without prior regulatory approval.
- A foreign national resident in India who is a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan ('Restricted Countries') would require prior approval of the Reserve Bank if such person intends to acquire Indian immoveable property.
- Foreign Nationals, including those from Restricted Countries, are permitted to sell or gift residential/commercial property only to an Indian resident, an NRI or a PIO and with prior RBI approval. Such approval would also be required to sell agricultural land/plantation property/farm houses in India.

6 Trusts and Foundations

6.1 Are trusts recognised in India?

Yes. Family (private) trusts may be set up either during a person's lifetime or under a will, either orally or by a written instrument. Where the subject matter of the trust is immoveable property, the trust must be declared by a registered written instrument. A trust may be set up in the following forms:

i. Revocable: A trust that can be revoked (cancelled) by its settlor at any time during his life;

ii. Irrevocable: A trust that will not come to an end until the term/object of the trust has been fulfilled;

iii. Discretionary: A trust where the trustee has the discretion to decide, from time to time, who (if anyone) among the beneficiaries is to benefit from the trust, and to what extent;

iv. Determinate: A trust where the entitlement of the beneficiaries is fixed by the settlor at the time of settlement or by way of a formula, the trustees having little or no discretion; or

v. Combination trusts, *viz* of: (i)-(iii)/(iv) or (ii)-(iii)/(iv) above.

6.2 If trusts are recognised in India, how are they taxed in India?

Under the ITA, a trust is not a separate taxable unit. Different types of trust are taxed in the following ways:

Revocable trust: Income is chargeable to tax in the hands of the settlor. If there are joint settlors to a revocable trust, the income of the trust will be taxed in the hands of each settlor to the extent of assets settled by them in the trust. For taxation purposes, a trust is considered revocable where the transfer contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor or it in any way gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets.

Irrevocable determinate (specific) trust: Since the beneficiaries are identifiable and their shares are determinate, a trustee may be assessed as a representative assessee. Tax is levied and recovered from the trustee in a like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him (i.e. the beneficiary). The tax authorities can alternatively raise an assessment on the beneficiaries directly, but in no case can tax be collected twice.

Irrevocable discretionary trust: Since the beneficiaries and/or their shares are not determined, the trustee is charged at the maximum marginal rate (i.e. 30%). In case of an offshore discretionary trust with both resident and non-resident beneficiaries, a trustee should not be subject to Indian taxes. However, if all beneficiaries of such trust are Indian residents, the trustee may be regarded as the representative assessee of the beneficiaries and be subject to Indian taxes (on behalf of the beneficiaries) at the maximum marginal rate.

Business trusts: If all the income earned by a trust includes profits and gains of business, the trust may be considered a business trust and shall be taxed on the whole of the income at the maximum marginal rate (30%).

Public charitable trusts: Income derived from property held under a registered trust wholly for charitable or religious purposes is tax-exempt (subject to meeting specified conditions).

6.3 If trusts are recognised, how are trusts affected by succession and forced heirship rules in India?

India does not have forced heirship rules except under customary Muslim law. Muslims are permitted to dispose only one-third of their estate under a will unless all heirs agree otherwise before the testator's death (under Shia law) or after the testator's death (under Sunni and Shia law). Sharia-compliant trusts may be used to sidestep the limitation on testamentary disposition unless the settlement is made in anticipation of death. The Hindu Succession Act, 1956 (for Hindus which includes Buddhists, Sikhs and Jains) and the Indian Succession Act, 1925 (for Christians, Parsis and others) provide for distribution rules on intestate succession. However, these should not apply where assets have been validly transferred to a trust during the settlor's lifetime. Under Indian law, the trustee is both the legal and beneficial owner of the trust property. The 'beneficial interest' or 'interest' of the beneficiary is the right against the trustee as owner of the trust property.

6.4 Are foundations recognised in India?

No, they are not.

6.5 If foundations are recognised, how are they taxed in India?

This is not applicable.

6.6 If foundations are recognised, how are foundations affected by succession and forced heirship rules in India?

This is not applicable.

7 Immigration Issues

7.1 What restrictions or qualifications does India impose for entry into the country?

A valid passport and a valid Indian visa are required for entry into India. A visitor visa is granted for 180 days (multiple-entry, non-extendable). A business visa is granted for 5 years while an employment visa is for 1 year or for the period of the contract, whichever is shorter. Both are multiple-entry and extendable visas. Highly skilled IT and ITeS personnel may be granted an employment visa for up to 3 years. PIOs are granted a 5-year visa (multiple-entry, extendable). For visas beyond 180 days, registration is compulsory within 14 days of arrival. An NRI does not require a visa to enter India. Foreign nationals who hold the Overseas Citizen of India (OCI) card are entitled to a multiple-entry, multi-purpose, lifelong visa. A current or former citizen of Pakistan or Bangladesh is not eligible to be an OCI card holder.

7.2 Does India have any investor and other special categories for entry?

There are no investor or other special categories.

7.3 What are the requirements in India in order to qualify for nationality?

Indian citizenship can be acquired by birth, descent, registration and naturalisation. The website of the Ministry of Home Affairs, Foreigners Division provides a summary of these requirements:

- "By birth: Eligibility to citizenship is based on date of birth and nationality of parents.

Date of birth	Additional condition
Between 26 January 1950 and 1 July 1987	No other conditions. Nationality of parents is not relevant.
Between 1 July 1987 and 3 December 2004	Either of the individual's parents is a citizen of India at the time of the individual's birth.
After 3 December 2004	Both the parents of the individual must be citizens of India or one of the parents must be a citizen of India and the other must not be an illegal migrant at the time of the individual's birth.

- By Descent: Eligibility to citizenship is based on date of birth and nationality of parents.

Date of birth	Additional condition
Between 26 January 1950 and 10 December 1992	The individual's father must be a citizen of India by birth at the time of the individual's birth. If the father was an Indian citizen by descent only, the individual shall not be a citizen of India, unless his birth is registered at an Indian Consulate within one year from the date of birth or with the permission of the Central Government, after the expiry of one year.
Between 10 December 1992 and 3 December 2004	Either of the individual's parents was a citizen of India by birth at the time of the individual's birth. If either of the parents was a citizen of India by descent, the same condition as above applies.
After 3 December 2004	The individual's parents must declare that the minor does not hold passport of another country and his birth is registered at an Indian consulate within one year of the date of birth or with the permission of the Central Government, after the expiry of the said period.

- By Registration: Individuals who meet the resident criteria specified below are eligible to apply for citizenship:
  - PIOs who are ordinarily resident in India for 7 years before making the application.
  - PIOs who are ordinarily resident in any country or place outside undivided India.
  - Persons who are married to a citizen of India and who are ordinarily resident in India for 7 years.
  - Minor children both of whose parents are Indian citizens.
  - Persons of full age both of whose parents are registered as citizens of India.
  - Persons of full age whose both or either of the parents were earlier citizen of Independent India and residing in India for 1 year immediately before making application.
  - Persons of full age and capacity who has been registered as an overseas citizen of India for five years and residing in India for 1 year.
  - A minor child who establishes that there are special circumstances justifying its registration.
- By Naturalisation: Citizenship of India by naturalization can be acquired by a foreigner who is not an illegal migrant and is ordinarily resident in India for 12 years."

7.4 Are there any taxation implications in obtaining nationality in India?

India taxes on the basis of residence and there should be no taxation if the residence criterion is not satisfied.

8 Taxation of Corporate Vehicles

8.1 What is the test for a corporation to be taxable in India?

See question 2.4.

8.2 How are branches of foreign corporations taxed in India?

Branches of non-resident companies are taxed at 40% on India-sourced income. Currently India does not impose a branch profits tax but it is proposed to be introduced under the DTC.

9 Tax Treaties

9.1 Has India entered into income tax and capital gains tax treaties and, if so, what is their impact?

India has entered into income tax and capital gains tax treaties with around 88 countries, of which around 85 are in force. The ITA provides that in relation to the taxpayer to whom such treaty applies, the provisions of the ITA or the treaty would apply to the extent they are more beneficial to that taxpayer. These treaties provide relief or reduce withholding tax rates. Treaty eligibility is based on the entity being a resident of India. Treaty eligibility criteria need to be satisfied including filing a TRC and Indian tax returns, as the case may be, depending on whether an immediate disposition or a later one is being considered. Further, a TRC issued by a foreign government as per its domestic norms would be sufficient. Form 10F contains specific particulars which must also be filed to obtain treaty benefits. Entities must hold a Permanent Account Number (a tax identification number), failing which withholding tax would be at the rate of 20% or the highest rate applicable to that income, whichever is greater. Some treaties contain limitations of benefits clauses generally or for specific income streams.

Around 45 Indian tax treaties have been renegotiated to include/enhance provisions on exchange of information. India has also entered into Tax Information Exchange Agreements with 10 countries including Bermuda, Bahamas, Isle of Man, British Virgin Islands, Cayman Islands, Jersey, Guernsey and Liechtenstein.

9.2 Do the income tax and capital gains tax treaties generally follow the OECD or another model?

India generally follows the UN Model Convention, being a developing economy. That said, some of its treaties follow the OECD Model Convention as well, while some depart from both Model Conventions (e.g. Greece and Egypt).

9.3 Has India entered into estate and gift tax treaties and, if so, what is their impact?

The only such treaty in force is the Inheritance Tax treaty with the UK. Since India does not impose inheritance tax, the treaty's impact is reduced. The treaty lays down clear rules for determining the *situs* of different kinds of property but overall does not provide significant relief.

9.4 Do the estate or gift tax treaties generally follow the OECD or another model?

This is not applicable.

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NDA is a full-service law firm with offices in India, Palo Alto, Munich and Singapore. Our private client team provides structuring and advisory services to individuals, business families, trustees, banks and funds on cross-border wealth management. Examples of previous instructions are: structuring of carried interest in relation to the use of hybrid entities such as US LLCs/S-corps for investment holding; structuring for succession of IP assets; and characterisation of Hindu Undivided Families from a US trust law perspective or civil law private foundations for Indian succession law purposes.

While we are only authorised to practise Indian law, our team consists of professionals who are qualified in India, the UK and the US and who have an understanding of foreign estate, trust and tax laws as well as conflict of laws issues. As a research-based law firm, we also constantly update our capabilities through comparative research and analyses, which enables us to manage wealth planning projects spanning multiple jurisdictions.

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