Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI SILICON VALLEY BANGALORE SINGAPORE MUMBAI BKC NEW DELHI MUNICH NEW YORK

Road Platforms in India

Primer

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concierge@nishithdesai.com

Contents

1. Introduction

The Government of India, while emphasising that *"railways, roads and rivers are the lifeline of the country"*[1], in budget for FY 17-18 allocated a budget of INR 64,000 crores for development of road sector across the country. During the FY ending March 31, 2016, India ranked second in terms of largest road network in the world, spanning over 5.23 million kilometres. While formulating the Twelfth Plan, the Government was mindful of the implementation problems faced by projects and therefore pushed for structural reforms. Therefore, the total investment in infrastructure sector in the Twelfth Plan was estimated to be INR 55.7 lakh crore.[2] Further, the National Institution of Transforming India (NITI) Aayog has projected an investment of 1 trillion USD in the infrastructure sector during the Twelfth Five Year Plan (2012–2017). Considering that half of this investment was projected to be from the private sector, a need for alternative sources of finance, in addition to traditional financing by banks, was essential to be developed. Therefore, new sources of financing for upheaving stalled projects and investment in 'road platforms' in the private sector gained popularity.

Private funding essentially refers to investments made for building a road asset for which the financial return is the right to levy an agreed toll from the users for an agreed period of time. Ownership of the asset usually returns to the government upon expiry of the contracted period. Agreements between government and private agencies that determine the precise contours of the latter's funding of road infrastructure come in a very wide variety of flavours.[3]

1. Finance Minister Arun Jaitely's budget speech 2017
2. Twelfth Five Year Plan (2012-2017) available at http://planningcommission.gov.in/plans/planrel/12thplan/pdf/12fyp_vol1.pdf
3. Report of the National Transport Development Policy Committee (2013); available at http://planningcommission.nic.in/sectors/NTDPC/volume3_p1/roads_v3_p1.pdf

2. Government Initiatives

I. National Highways Development Programme ("NHDP")

NHDP is the largest ever highway project being undertaken in India and is being implemented by the National Highways Authority of India **("NHAI")** in a phased manner.

II. Viability Gap Funding Scheme ("VGF")

This scheme of investment provides financial help in the form of capital infusion to PPP (Pubic Private Partnership) projects in various infrastructure sectors including roadways. VGF Scheme is intended to support projects which are commercially unviable but have high economic or essential benefit. The empowered institution sanctions projects for VGF upto INR100 crore (USD 20 million) for each eligible project subject to the budgetary ceiling indicated by the Finance Ministry.[4] The Empowered Institution also considers other proposals and places them before the Empowered Committee. Funding upto 20% of the project cost is provided. If required, an additional 20% can be made available by the sponsoring Ministry/agency.

III. Cabinet Committee on Economic Affairs Initiatives

In order to provide a renewed thrust to the highway sector and to bring the private sector back on board, the Cabinet Committee on Economic Affairs **("CCEA")**, has approved two major policy initiatives aimed at improving the availability of equity in the market.

- Exit Policy: The CCEA has approved a comprehensive exit policy framework that permits concessionaires/developers to divest 100% equity, two years after completion of construction. This policy change has been brought about to enable public private partnership projects to attract bids. This policy change would help unlock equity from completed projects making it potentially available for investment into new projects.
- Fund Infusion to Salvage Languishing Projects: In a bait to revive stalled projects, CCEA approved special intervention for the projects that are in the advanced stage of completion but are stuck due to either lack of additional equity or lender's inability to disburse further. NHAI has been authorized to provide funds to such projects from within its overall budget/corpus on a loan basis at a pre-determined rate of return. NHAI has been directed to develop a robust mechanism to determine eligibility of the project as also the extent of funds required to complete projects, in time-bound manner.[5]

IV. Promoting innovative project implementation models

The CCEA has approved the Hybrid Annuity Model for implementation of highway projects.[6] As per this model, 40% the project cost is to be provided by the Government as 'Construction Support' to the private developer during the construction period and the balance 60% as annuity payments over the concession period along with interest at market linked rates on outstanding amount to the concessionaire. There is separate provision

4. http://pib.nic.in/newsite/PrintRelease.aspx?relid=145415

5. http://pib.nic.in/newsite/PrintRelease.aspx?relid=121628

6. http://pib.nic.in/newsite/printrelease.aspx?relid=135821 (January 27, 2016)

for O&M payments by the Government to the concessionaire. Three projects have already been awarded under the model.

V. Other Initiatives

The government has adopted a road development policy setting out the Guidelines for investment in road sector under Ministry of shipping, Road Transport and Highways.[7]

Notably, the government has permitted 100 per cent foreign equity in construction and maintenance of roads, highways, tunnels etc. Other relevant measures relating to same are following:-

a. Grant upto 40% of project cost to make project viable;

b. 100% tax exemption in any 10 consecutive years within a period of 20 years after completion of the project;

c. Agreements to avoid double taxation with a large number of countries;

d. Concession period upto 30 years;

e. For expediting resolution of disputes, the government has proposed that a separate dispute resolution mechanism will be put in place to address issues in the infrastructure space and the (Indian) Arbitration and Conciliation Act, 1996 shall be suitably amended to provide institutionalised resolution of such disputes;

f. Return on investment through toll in build-operate-transfer **("BOT")** models;

g. The government permits duty free import of high capacity equipment required for highway construction;

h. Government support for land acquisition, resettlement and rehabilitation; and

i. Announcement for abolishment of foreign investment promotion board to streamline processing of Foreign Direct Investment **("FDI")** applications.

7. Guidelines Sector available for Investment in Road at http://www.nhai.org/doc/28Oct09/NHAI-Final.pdf

3. Investment Structures

An investor may invest through any of the following models explained below along with operator of the road platform **("Operator")**[8]:

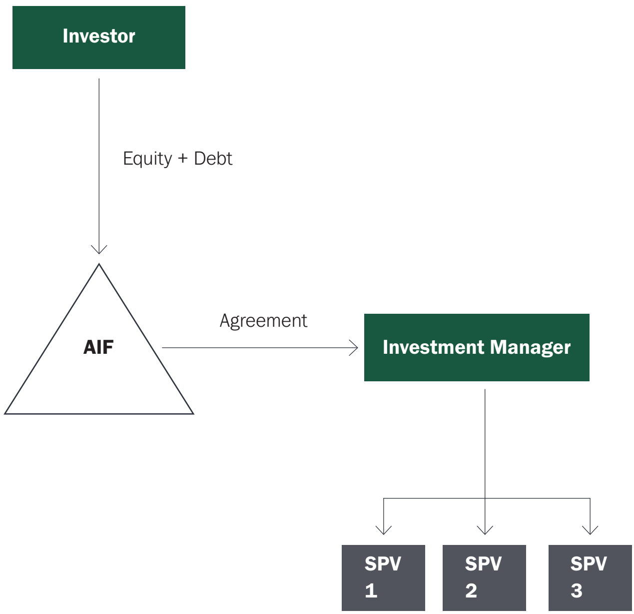
I. Investment in Alternative Investment Funds

An Alternative Investment Fund **("AIF")** means any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which:

a. is a privately pooled investment vehicle which collects funds from investors, whether Indian or foreign, for investing it in accordance with a defined investment policy for the benefit of its investors; and

b. is not covered under any other regulations apart from Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 **("AIF Regulations")**.[9]

Further, the AIF Regulations define an 'investment fund' as an AIF which invests primarily in unlisted securities or partnership interest or listed debt or securitized debt instruments of investee companies or special purpose vehicles **("SPV")** engaged in or formed for the purpose of operating, developing or holding infrastructure project.[10] Further, pension fund managers are also allowed to invest in such AIFs in instruments like infrastructure bonds, infrastructure debt funds etc. This enables diversification of portfolio, thus ensuring attractive returns on investments. Described below is a pictorial description of the structure to be followed in case the investor invests through this method.



8. For the purposes hereof, we have assumed that the Operator shall be an entity incorporated in India

9. Regulation 2(b) of AIF Regulations

10. Regulation 2(m) of AIF Regulations

An AIF is of three categories. The investment restriction relevant to each category is summarized below:

Category I AIF	Category II AIF	Category III AIF
Category I AIFs are funds with strategies to invest in start-up or early stage ventures or social ventures or SMEs or infrastructure or other sectors or areas which the government or regulators consider as socially or economically desirable.	Category II AIFs are funds which cannot be categorized as Category I AIFs or Category III AIFs. These funds do not undertake leverage or borrowing other than to meet day-to-day operational requirements and as permitted in the AIF Regulations.	Category III AIFs funds are which employ complex or diverse trading strategies and may employ leverage including through investment in listed or unlisted derivatives.
Under the AIF Regulations, the following funds are designated as sub- categories of Category I AIFs - venture capital funds, SME funds, social venture funds, infrastructure funds and such other AIFs as may be specified. In September 2013, SEBI introduced 'angel investment funds' as a sub-class of the venture capital fund sub- category.	AIFs such as private equity funds or debt funds for which no specific incentives or concessions are given by the Government of India or any other regulator are included in the Category II AIF classification	AIFs such as hedge funds or funds which trade with a view to make short-term returns or such other funds which are open ended and for which no specific incentives or concessions are given by the Government of India or any other regulator are included in the Category III AIF classification
AIFs which are generally perceived to have positive spillover effects on the economy and therefore, SEBI, the Government of India or other regulators may consider providing incentives or concessions shall be classified as Category I AIFs.		

Category I AIF and Category II AIF is the most conducive option to investors in term of road platforms.

The AIF Regulations contemplate the establishment of funds in the form of a trust, a company, an limited liability partnership **("LLP")** or a body corporate.

II. Infrastructure Investment Trusts

The Securities and Exchange Board of India **("SEBI")** has notified the SEBI (Infrastructure Investment Trust) Regulations, 2014 **("InvIT Regulations")**. An investment infrastructure trust **("InvIT")** is an investment vehicle that enables infrastructure developers to monetize completed assets. The need for such InvITs was felt for providing options for long term refinancing of debt obligations in existing projects to boost liquidity in infrastructure sector. Such InvITs shall act as platform for institutional investors like sovereign funds, pension funds and individual investors to invest in infrastructure sector. The main focus of InvITs is financing and re-financing of the infrastructure projects in the country in the prescribed manner either directly or through the mode of a special purpose vehicle **("SPV")**.

An InvIT shall be required be set up as a trust and is required to be registered with SEBI. The trust deed should have its main objective as undertaking activity of InvIT in accordance with the InvIT Regulations. The InvIT shall have a (i) Trustee, (ii) Sponsor(s), (iii) Investment Manager and (iv) Project Manager, all of which shall be separate entities. Each of the participants described above have fixed role and responsibilities. The Project Manager is required to conduct operations and management of a particular InvIT asset with a concessionaire SPV.

An InvIT can invest in both completed projects as well as under projects under construction stage in a manner as provided under the InvIT Regulations. An InvIT can raise funds by way of an initial offer and subsequently through follow-on-offer. InvITs can raise funds by way of both publicly offered and privately placed InvITs.[11]

An InvIT is also permitted to invest in completed and revenue generating Infrastructure assets. Where such investments are proposed for at least 80% (eighty percent) of the value of the assets, the investment shall be subject to the following conditions:

a. if the investment has been made through a SPV, only the portion of direct investments in eligible infrastructure projects by such SPV shall be considered; and

b. If the project is implemented in stages, the part of the project which can be categorised as completed and revenue generating project shall be considered.[12]

Benefits: Investment through InvITs shall facilitate the following:

a. Easy entry and exit options for investors; and

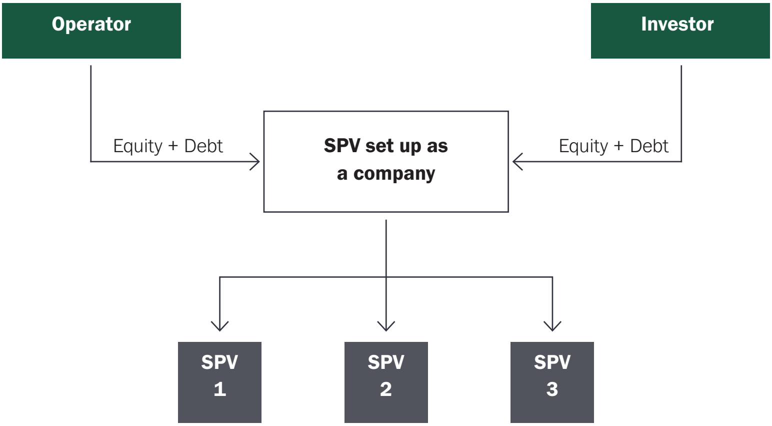
b. Low-risk investments to attract long-term investors such as insurance and pension funds.

III. Investment in an SPV established as a Company

Under this model, the investor shall pool their capital contributions in a SPV set up as a company. Investment in such case may be made through a mix of debt and equity depending upon the commercial arrangements between the parties. The arrangement under this model would effectively be similar to that typically seen in joint venture arrangements. The applicable FDI policy shall have to be adhered to while investing under this model. A diagrammatic representation of investment under the referenced structure is given below:

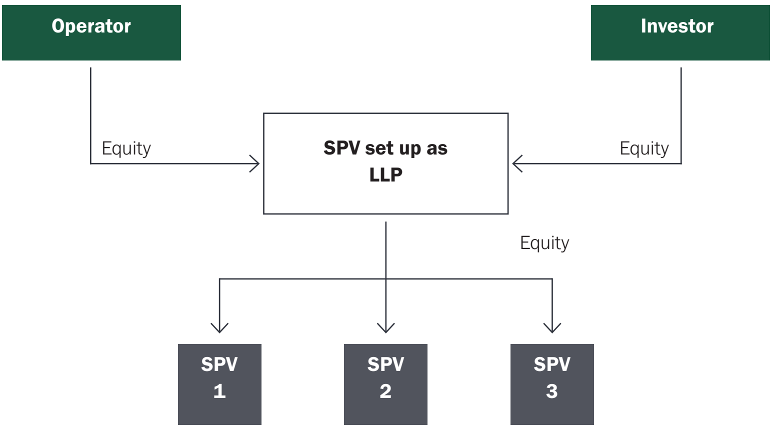
11. Regulation 14 of InvIT Regulations

12. Regulation 18(5) of InvIT Regulations



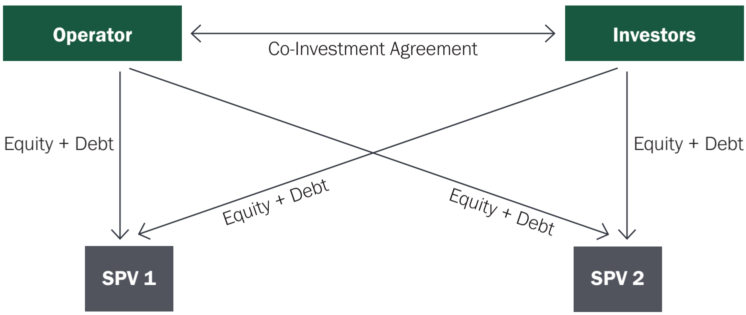
IV. Investment in an SPV established as a limited liability partnership

Under this model, the Investors would pool their capital contributions in an SPV set up as a limited LLP. Investment in the SPV may only be through contributions to the LLP against a partnership interest, as an LLP may not avail External Commercial Borrowings under the extant FDI policy. The arrangement under this model would effectively be similar to that typically seen in joint venture arrangements.



V. Direct investment in SPV without pooling of funds

Under this model, the Investors would enter into a mutual platform agreement with operators by virtue of which the investors would undertake co-investment into identified portfolio projects. The operator may also be entitled to operator fees depending on the terms between the Investors. The arrangement in this model would effectively be similar to that typically seen in co-investment agreements.

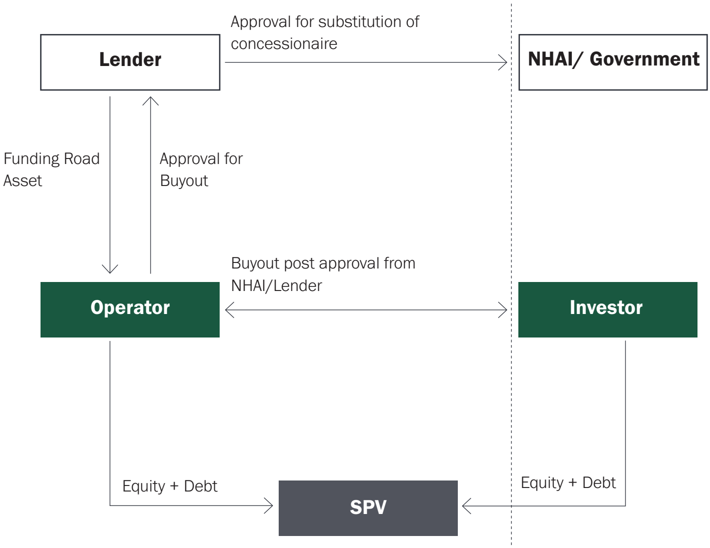


VI. Strategic Buyouts

Under this dynamic model, one company or LLP acquires another company or LLP through buyouts. Entities combine their synergies and resources to reap out higher profits and reducing cost of operation and risk probability. In the recent past, India witnessed high range of stalled projects in infrastructure sector including road & highway projects. The speed of constructing national highways and roadways slightly melted down due to many fiscal and non-fiscal matters such as delay in land acquisition, environmental and forest clearances, re-settlement, utilities shifting, tolling issues and lack of capital and funds with the developers etc.

The delay in the project completion and its execution resulted in serious and chronic crisis of non- payment of loans and debt which were duly acquired by some of the large infrastructure companies in India. Many banks which catered this high risk loan facility to such projects feared of their rising of number of non-performing assets and sub- standard loans in the coming years. In order to mitigate the issue in concern, the Government of India permitted stake selling option to the road developers in their respective highway projects. Under this scheme, a concessionaire who is looking to exit would have to approach the lender allowing him for a substitution. The lender would then have further to seek NHAI's permission and once both are satisfied, the former can seek an alternative concessionaire by any such prescribed mode of tender, auction or in consultation with the exiting party. Such buyouts will positively initiate in completing all those long stalled projects in India that were stuck either due to financial constraints or any other specified reason in the region. With this under the same route, the market witnessed around 13-14 strategic deals happening in the last fiscal year itself.

Vital projects of around 787 km in length, belonging to varied developers such as L&T Infrastructure Development Projects Limited, Gammon Infrastructure Projects Limited and Era Infra Engineering Limited were holding road contracts in the states like Rajasthan, Haryana, Karnataka, Odisha, Tamil Nadu, Andhra Pradhesh, Uttarakhand and West Bengal. Some of such key contracts were re-tendered by the government and NHAI by this model to global investors such as Australia based Macquarie Group Limited (Macquarie), acting through Macquarie-SBI Infrastructure Fund, Brookfield Asset Management etc. in 10 highway projects worth INR 4,150 crore from which private promoters have exited.



4. Bidding

In order to monetize road assets, NHAI has amplified bidding process to unlock money that can be used to build more roads. Initially, investments in the road sector were undertaken by the government due to the need of a huge amount of resources. However, the government has formulated a comprehensive policy for private sector participation in the highways sector. Private players and prospective investors can now bid for projects being awarded on BOT model. NHAI has decided that all the sub-projects in NHDP phase-III to Phase-VII would be taken up on the basis of PPP on BOT mode or annuity mode. Several foreign companies are participating in these projects and the government has set up a Public Private Partnership Approval Committee for servicing such proposals.

As early as 2009, NHAI started inviting bids from private sector players for projects on operations, maintenance and tolling model. In September 2016, the Ministry of Road, Transport and Highways, has identified 100 high traction highways owned by the NHAI to be leased out to private players through competitive bidding. The highway projects will be leased to private players for maintenance and toll collection for 30 years in exchange. Several foreign companies have, in the past, successfully bid for road projects. In such bidding, the foreign companies provide technical expertise and financial assistance to the project while the Indian partners handle the domestic aspects of implementing the project.

Recently, China Railway Construction Corporation evinced interest in bidding for hybrid annuity projects comprising of BOT and engineering, procurement and construction (EPC) models in the same project. The Government has also approved bidding in the toll-operate-transfer model **("TOT")**. Under the TOT model, the right of user collection fee in respect of selected operational national highway stretches is assigned for a specific period to investors against upfront payment of a lump sum amount to the Government. During the tenure of such contract, the responsibility of operation and maintenance remains in the investor.

5. Taxation of Road Platforms

With a view to promote investment in infrastructure sector, the Government has brought substantial policy changes in the taxation regime for the sector. The taxation treatment of each of the structures explained above shall be different. However, the scheme of taxation under Indian law as regards certain types of income is set out below:

- *Corporate tax and Minimum Alternate Tax*

Resident companies are taxed at approximately 33% (if net income is in the range of INR 1 crore – 10 crores) and around 34.5% (if net income exceeds INR 10 crores). A Minimum Alternate Tax **("MAT")** at a rate of around 20% (18.5% plus surcharge and education cess) is chargeable in the cases where income tax payable on the total income of a company, computed under the ITA, is less than the MAT.

- *Taxation of Limited Liability Partnerships*

LLPs are taxed at a rate of 30% (plus surcharge and cess as applicable). An Alternate Minimum Tax **("AMT")** at a rate of around 20% (18.5% plus education cess) is chargeable on the adjusted total income of the LLP in cases where the regular income tax payable for a previous year by the LLP is less than the AMT.

- *Taxation of Category II AIF*

The taxability of Category II AIFs (collectively, the **"Investment Funds"**) is governed by s. 10(23FBA), s. 10 (23FBB), s. 194LBB and s. 115UB (Chapter XII – FB - *Special Provisions Relating to Tax on Income of Investment Funds and Income Received from such Funds*) of the ITA, as inserted by the Finance Act, 2015 and has taken effect from the assessment year 2016-2017.

As per section 10(23FBA) of the ITA, income of an Investment Fund, other than chargeable under the head profit and gains from business and profession, should be exempt from tax. Further, as per the s. 115UB (1) to the ITA, any income accruing or arising to, or received by, a unit-holder of an Investment Fund out of investments made in the Investment Fund should be chargeable to income-tax in the same manner as if it were the income accruing or arising to, or received by such person, had the investments made by the Investment Fund been made directly by the unit-holder.

Further, in terms of section 197A (1F) of the ITA, any income receivable / received by the Investment Fund from the investment made in portfolio companies would be exempt from withholding tax provisions and the portfolio companies should not be liable to withhold tax at the time of credit or at the time of payment, whichever is earlier, of such income to the Investment Fund.

In other words, the income of a holder of Units in the Investment Fund should take the character of the income that accrues or arises to, or is received by the Investment Fund.

Taxation at the *Fund level – Profits and gains of business and profession*

As per s. 10(23FBA) and s. 10(23FBB) of the ITA, income chargeable under the head 'profits and gains of business and profession' should be taxed at the Investment Fund Level and the tax obligation will not pass through to the unit-holders.

As per s. 115UB (4) (ii) of the ITA, the total income of an investment fund which is neither set-up as a company nor as a firm should be taxed at the maximum marginal rate ("MMR") of 30% (exclusive of applicable surcharge and education cess). However, in the Union Budget for FY 2017-2018, the MMR for companies whose turnover is less than INR 500 million (approx. USD 7.4 million) been reduced to 25%.

Carry forward of loss under any head of income of the Investment Fund

Also, as per s. 115UB (2) to the ITA, where the total income of an Investment Fund in a given previous year (before making adjustments under section 10(23FBA) of the ITA) is a loss under any head of income and such loss cannot be, or is not wholly, set-off against income under any other head of income, such loss is allowed to be carried forward and set-off in accordance with the provisions of Chapter VI (Aggregation of Income and Set Off or Carry Forward of Loss) of the ITA. The loss should not pass through to the unit holders of an investment fund and accordingly, the unit holders will be precluded from off-setting their proportionate loss from the investment fund against other profits and gains that they may have accrued.

Deemed credit of income

As per s. 115UB (6) of the ITA, if the income of an investment fund in a given previous year is not paid or credited to the account of its unit-holders at the end of the previous year, such income should be deemed to have been credited to the account of its unit-holders on the last day of the previous year in the same proportion in which the unit-holders should have been entitled to receive the income had it been paid in the previous year.

- *Taxation of Dividends*

Dividends distributed by an Indian company are subject to a Dividend Distribution Tax **("DDT")** at the rate of 15% calculated on a gross-up basis, in the hands of the Indian company. A surcharge at the rate of 12% of the DDT payable is also applicable, along with a cess of 3% of the sum of the DDT and surcharge payable. The effective rate of DDT is therefore 20.36%. DDT is a tax at the level of the company and there should be no further tax in the hands of the shareholders upon receiving of such dividends. Since this is taxed at the level of the company, no credit is allowed against the DDT paid by the Indian company.

In case of any dividend received and distributed back in the same year, there is no cascading effect; in other cases, however, there is an increased cost.

- *Taxation of income received from a Limited Liability Partnership*

As stated above, income of an LLP should be subject to tax at the rates mentioned above. There is no further tax on the profits distributed by the LLP to its partners.

- *Taxation of Interest Income*

Interest income received by, a non-resident company should be subject to a withholding tax at the time of payment by the Indian borrower. The rates at which tax is to be withheld vary between 5% - 40%. For example:

i. Income by way of interest payable to a non-resident in respect of foreign currency denominated borrowings, borrowed by way of issue of any long term[13] bond, including long term infrastructure bonds issued on or after October 1, 2014 but before July 1, 2017 by an Indian company, should be subject to a withholding tax rate of 5%[14], provided that the interest rate does not exceed the rate approved by the Central Government in this behalf.[15]

ii. Income by way of interest payable to a Foreign Institutional Investor or a Qualified Foreign Investor in respect of rupee denominated bonds issued by an Indian company **("NCDs")** or Government securities should be subject to a withholding tax rate of 5%[16], provided that the interest rate does not exceed the rate approved by the Central Government in this behalf.

13. The term "long term" means that the bond to be issued should have an original maturity term of three years or more.

14. Section 194LC of the ITA

15. The Central Government has approved the interest rate as any rate of interest which is within the All-in-cost ceiling specified by the Reserve Bank of India under the External Commercial Borrowing **("ECB")** regulations, as applicable, having regard to the tenure of the borrowing. Presently, the interest rate ceiling is: (i) 300 basis points per annum over 6 month LIBOR (for ECB with average maturity period of 3 – 5 years); (ii) 450 basis points per annum over 6 month LIBOR (for ECB with average maturity period of more than 5 years); (iii) 500 basis points per annum over the bench mark (for ECB with average maturity period of 10 years and more.

16. Section 194LD of the ITA

iii. Income by way of interest payable to a non-resident in respect of foreign currency denominated borrowings, not falling within the above mentioned category should be subject to a withholding tax rate of 20%.

The above rates are the rates prescribed under the ITA. To the extent the rates provided under an applicable Double Taxation Avoidance Agreement ("**DTAA**" or "**Tax treaty**") are beneficial, such rates should apply.

Interest received by the lending entity should be considered to be income in its hands and should be taxable accordingly.

- *Taxation of capital gains*

Tax on capital gains depends on the period of holding of a capital asset. As a general rule, short term gains may arise if the asset is held for a period lesser than 3 years. Long term gains may arise if the asset is held for a period more than 3 years. Gains from listed shares which are held for a period of more than 12 months are categorized as long term. Unlisted shares are treated as long term only when they are held for more than 24 months. If the holding period for unlisted shares is lesser than 24 months, then it is in the nature of short term gains. Long term capital gains earned by a non-resident on sale of unlisted securities may be taxed at the rate of 10% (provided no benefit of indexation has been availed, excluding surcharge and cess) or 20% (if benefit of indexation has been availed, excluding surcharge and cess) depending on certain considerations. Long term gains on sale of listed securities on a stock exchange should be exempt from tax, provided securities transaction tax **("STT")** on them has been paid. Short term capital gains arising out of sale of listed shares on the stock exchange are taxed at the rate of 15%, while such gains arising to a non-resident from sale of unlisted shares is 40%.

Section 9 of the ITA provides for when income is deemed to accrue or arise in India and a non-resident's taxability in India would generally be determined under this provision. According to Section 9(1), income earned by a non-resident from the transfer of a capital asset situated in India is deemed to accrue in India (i.e., sourced in India). Therefore, a non-resident should be liable to tax in India if it earns income from the transfer of a capital asset situated in India. Shares of an Indian company are considered to be assets situated in India.[17]

- *Withholding Tax*

Under Section 195 of the ITA, any person making a payment of a sum to a non-resident that is chargeable to tax under the ITA (read with the relevant provisions of the applicable tax treaty) is required to withhold tax on such sum at the appropriate rate. Such withholding is required to be made either at the time of payment or at the time of credit of income to the account of the non-resident, whichever is earlier. However, if the amount paid is not taxable in India (either under the domestic law or in light of relief available under an applicable tax treaty), there should be no requirement to withhold tax on such payments.[18]

In case of any distributions by a scheme of a Category II AIF of any income not being profits and gains from business or profession, the person making the payment shall deduct tax at the rate of 10% in case the payee is resident and at the rates in force in case the payee is a non-resident, taking into account any treaty benefit.

Further, the CBDT has issued a notification (Notification No. 51, dated June 25, 2015) stating that no deduction of tax under Chapter XVII of the ITA will be made on any payments other than the payments in the nature of "profits and gains of business or profession" received by any Investment Fund.

- *Deduction of interest as an expense*

Under Section 36 of the ITA, the amount of interest paid by the borrowing entity in respect of capital borrowed for the purposes of business

17. *Vodafone International Holdings v. Union of India*, (2012) 341 ITR 1

18. *GE Technology Centre Ltd. v. CIT, [2010] 327 ITR 456*

and profession is deductible from such assessee's total income subject to tax under the ITA. Such deduction should be available at the rates and conditions prescribed under the ITA. In this context, reference must be made to Section 14A of the ITA. Section 14A(1) of the ITA provides that for the purposes of computing the total income, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the ITA. Accordingly, where the tax officer is not satisfied with the assessee's claim with respect to determination of amount liable for disallowance under Section 14A, Rule 8D of the Income Tax Rules, 1962 **("Rules")** provides for the mechanism to determine the quantum of such disallowance. Considering the spate of dispute in relation to the application of the formula under Rule 8D of the Rules, the CBDT has amended Rule 8D and has provided for a revised method for determining the amount of disallowance of expenditure on earning exempt income.

- *Benefits under tax treaties*

Under Section 90(2) of the ITA, if a non-resident is a resident in a country with which India has a tax treaty, the taxpayer should be taxable according to the provisions of the tax treaty or the ITA, whichever is more beneficial.

Relief under a tax treaty should normally be available as long as the non-resident entity satisfies the eligibility criteria prescribed under the relevant tax treaty. Under most tax treaties, this criteria involves being a resident of the relevant country and being liable to tax under its laws. Further, under the domestic law of India, particularly Section 90(4) of the ITA, a non-resident is required to satisfy the following conditions as a pre-condition for claiming tax treaty relief:

- Furnish a valid tax residency certificate **("TRC")** issued by the government of its country of resident in relation to the relevant year; and
- Provide certain additional information in Form 10F, to the extent such information is not captured in the TRC.

Further, a non-resident claiming treaty relief is required to file tax returns in India. For filing tax returns in India, the non-resident taxpayer is required to obtain a Permanent Account Number **("PAN")** which is an Indian tax identification number.

Some of the advantages offered by tax treaties in commonly preferred jurisdictions are set out below:

	Mauritius	Singapore	Netherlands
Capital gains tax on sale of Indian securities	No local tax in Mauritius on capital gains. Mauritius residents not taxed on gains resulting from the transfer of shares in an Indian company acquired prior to April 1, 2017. Gains arising to Mauritius residents from alienation of Indian shares (acquired after April 1, 2017), between April 1, 2017 and March 31, 2019 should be subject to tax at 50% of the Indian tax rate, provided the limitation of benefits clause under the treaty is fulfilled.	No local tax in Singapore on capital gains (unless characterized as business income). Singapore residents not taxed on gains accruing before the date on which the India-Mauritius Protocol comes into force. Gains accruing after such time should be subject to tax in India at local Indian tax rates	Dutch residents not taxed if sale made to non-resident. Exemption for sale made to resident only if Dutch shareholder holds lesser than 10% shareholding in Indian company. Local Dutch participation exemption available in certain circumstances.
Tax on dividends	Indian company subject to DDT at the rate of 15% (exclusive of surcharge and cess) on a gross basis. No further Indian tax on receipt of dividends by the shareholders.		
Withholding tax on outbound interest	No relief. Taxed as per Indian domestic law. Under the protocol recently entered into which amends the tax treaty w.e.f April 1, 2017. the withholding tax rate should be 7.5%.	15%	10%

6. Market Status

In the recent years, the road sector has witnessed significant increase in private investments. This of course has been driven by multiple policy changes which has resulted in creation of lucrative investment opportunities for potential investors. Given below is a brief of the deals concluded recently in road sector.

- **Reliance Infrastructure-SU Toll:** In October 2016, Reliance Infrastructure Limited **("RIL")** acquired more than 5% voting rights in following companies, SU Toll Road Private Limited, TD Toll Road Private Limited and TK Toll Road Private Limited. The total percentage of RIL's holding in all three companies has increased from 49% to 100%.

- **Cube Highways- Andhra Pradesh Expressways Limited:** In August 2016, Cube Highways and Infrastructure Pte. Ltd. (Cube Highways), a portfolio company of I Squared Capital and the International Finance Corporation, signed an agreement to acquire a 100 percent interest in an operational, annuity-based NHAI road project, Andhra Pradesh Expressways Limited (APEL) from IL&FS Transport Networks Limited.

- **Cube Highways- Madhucon Agra Jaipur Expressways Limited and Western UP Tollway Limited:** Cube Highways completed two acquisitions acquiring a 74% interest in Madhucon Agra Jaipur Expressways Limited **("MAJEL")** and 100 percent of Western UP Tollway Limited. Acquisition of the remaining 26 percent of MAJEL is subject to approval from NHAI.

- **Brookfield- Gammon Infrastructure:** In August 2015, Gammon Infrastructure Project Limited **("GIPL")** has sold stake in nine projects valued at INR 6,750 crore to Brookfield and Core Infra India Fund. Projects divested by GIPL includes Sikkim Hydro Power Venture Limited, Andhra Expressway Limited, Rajahmundry Expressway Limited, Kosi Bridge Infrastructure Limited and Gorakhpur Infrastructure Company Limited.

- **Canada Pension Plan Investment Board-Larsen & Toubro Infrastructure Development Projects Limited ("L&T IDPL"):** Canada Pension Plan Investment Board **("CPPIB")**, the largest Canadian public pension fund, invested INR 1,000 crores in L&T IPDL, a wholly owned subsidiary of Larson and Tubro Limited through compulsorily convertible preference shares in December, 2015. This formed the second tranche of its total investment of INR 2,000 crores in L&T IDPL. The first tranche investment was made on December 16, 2014.

- **Sadbhav Infrastructure Project Limited-Ahmedabad Ring Road Infrastructure Limited:** Sadbhav Infrastructure Project Limited **("SIPL")**, a wholly owned subsidiary of Sadbhav Engineering Limited, is an infrastructure sector player primarily involved in the development of highways and road projects. It has acquired 20% equity stake in Ahmedabad Ring Road Infrastructure Limited (in which SIPL already held an 80% stake) from its JV partner, Patel Infrastructure Private Limited in 2014. Ahmedabad Ring Road Infrastructure Limited was formed as an SPV to strengthen and widen the Ahmedabad Ring Road.

- **InVITs:** Following the notification of the InVIT Regulations, infrastructure trusts such as India Grid Trust, IRB InVIT Fund and Reliance Infrastructure InVIT Fund have already initiated process for listing.

7. Conclusion

Various policy changes, implemented in the recent past, have augmented the growth of foreign investment in infrastructure sector in India. Road platforms, especially, have attracted foreign investors to invest in road space, due to mitigated risk, easy exit options and diversified portfolio investments. Considering the vision of the government to boost investment in infrastructure and revival of stalled projects, magnitude of investments in road platforms is sure to witness a splurge over the years.

About NDA

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Palo Alto (Silicon Valley), Singapore, New Delhi, Munich and New York. We provide strategic legal, regulatory, and tax advice coupled with industry expertise in an integrated manner.

As a firm of specialists, we work with select clients in select verticals on very complex and innovative transactions and disputes.

Our forte includes innovation and strategic advice in futuristic areas of law such as those relating to Bitcoins (block chain), Internet of Things (IOT), Aviation, Artificial Intelligence, Privatization of Outer Space, Drones, Robotics, Virtual Reality, Med-Tech, Ed-Tech and Medical Devices and Nanotechnology.

We specialize in Globalization, International Tax, Fund Formation, Corporate & M&A, Private Equity & Venture Capital, Intellectual Property, International Litigation and Dispute Resolution; Employment and HR, Intellectual Property, International Commercial Law and Private Client. Our industry expertise spans Automobile, Funds, Financial Services, IT and Telecom, Pharma and Healthcare, Media and Entertainment, Real Estate, Infrastructure and Education. Our key clientele comprise marquee Fortune 500 corporations.

Our ability to innovate is endorsed through the numerous accolades gained over the years and we are also commended by industry peers for our inventive excellence that inspires others.

NDA was ranked the 'Most Innovative Asia Pacific Law Firm in 2016' by the *Financial Times - RSG Consulting Group* in its prestigious FT Innovative Lawyers Asia-Pacific 2016 Awards. While this recognition marks NDA's ingress as an innovator among the globe's best law firms, NDA has previously won the award for the 'Most Innovative Indian Law Firm' for two consecutive years in 2014 and 2015.

As a research-centric firm, we strongly believe in constant knowledge expansion enabled through our dynamic Knowledge Management ('KM') and Continuing Education ('CE') programs. Our constant output through Webinars, Nishith.TV and 'Hotlines' also serves as effective platforms for cross pollination of ideas and latest trends.

Our trust-based, non-hierarchical, democratically managed organization that leverages research and knowledge to deliver premium services, high value, and a unique employer proposition has been developed into a global case study and published by John Wiley & Sons, USA in a feature titled 'Management by Trust in a Democratic Enterprise: A Law Firm Shapes Organizational Behavior to Create Competitive Advantage' in the September 2009 issue of Global Business and Organizational Excellence (GBOE).

A brief below chronicles our firm's global acclaim for its achievements and prowess through the years.

- IDEX Legal Awards: In 2015, NDA won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm<http://idexlegalawards.in/ArticlePage.aspx?aid=6>". Nishith Desai was also recognized as the 'Managing Partner of the Year' in 2014.
- Merger Market: has recognized NDA as the fastest growing M&A law firm in India for the year 2015.
- Legal 500 has ranked us in tier 1 for Investment Funds, Tax and Technology-Media-Telecom (TMT) practices (2011, 2012, 2013, 2014, 2017)

- International Financial Law Review (a Euromoney publication) in its IFLR1000 has placed Nishith Desai Associates in Tier 1 for Private Equity (2014, 2017). For three consecutive years, IFLR recognized us as the Indian "Firm of the Year" (2010-2013) for our Technology - Media - Telecom (TMT) practice.
- Chambers and Partners has ranked us # 1 for Tax and Technology-Media-Telecom (2014, 2015, 2017); #1 in Employment Law (2015 & 2017); # 1 in Tax, TMT and Private Equity (2013, 2017); and # 1 for Tax, TMT and Real Estate – FDI (2011).
- India Business Law Journal (IBLJ) has awarded Nishith Desai Associates for Private Equity, Structured Finance & Securitization, TMT, and Taxation in 2015 & 2014; for Employment Law in 2015
- Legal Era recognized Nishith Desai Associates as the Best Tax Law Firm of the Year (2013).

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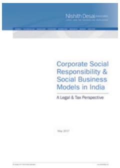

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Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our *"Hotlines"*. These *Hotlines* provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our *NDA Insights* dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction.

We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with a much needed comparative base for rule making. Our *ThinkTank* discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports.

Please feel free to contact us at
research@nishithdesai.com

Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI

93 B, Mittal Court, Nariman Point
Mumbai 400 021, India

tel +91 22 6669 5000
fax +91 22 6669 5001

SILICON VALLEY

220 S California Ave., Suite 201
Palo Alto, California 94306, USA

tel +1 650 325 7100
fax +1 650 325 7300

BANGALORE

Prestige Loka, G01, 7/1 Brunton Rd
Bangalore 560 025, India

tel +91 80 6693 5000
fax +91 80 6693 5001

SINGAPORE

Level 30, Six Battery Road
Singapore 049 909

tel +65 6550 9856

MUMBAI BKC

3, North Avenue, Maker Maxity
Bandra–Kurla Complex
Mumbai 400 051, India

tel +91 22 6159 5000
fax +91 22 6159 5001

NEW DELHI

C–5, Defence Colony
New Delhi 110 024, India

tel +91 11 4906 5000
fax +91 11 4906 5001

MUNICH

Maximilianstraße 13
80539 Munich, Germany

tel +49 89 203 006 268
fax +49 89 203 006 450

NEW YORK

375 Park Ave Suite 2607
New York, NY 10152

tel +1 212 763 0080