

Establishment of Branch Office, Liaison Office, Project Office in India by Foreign Entities

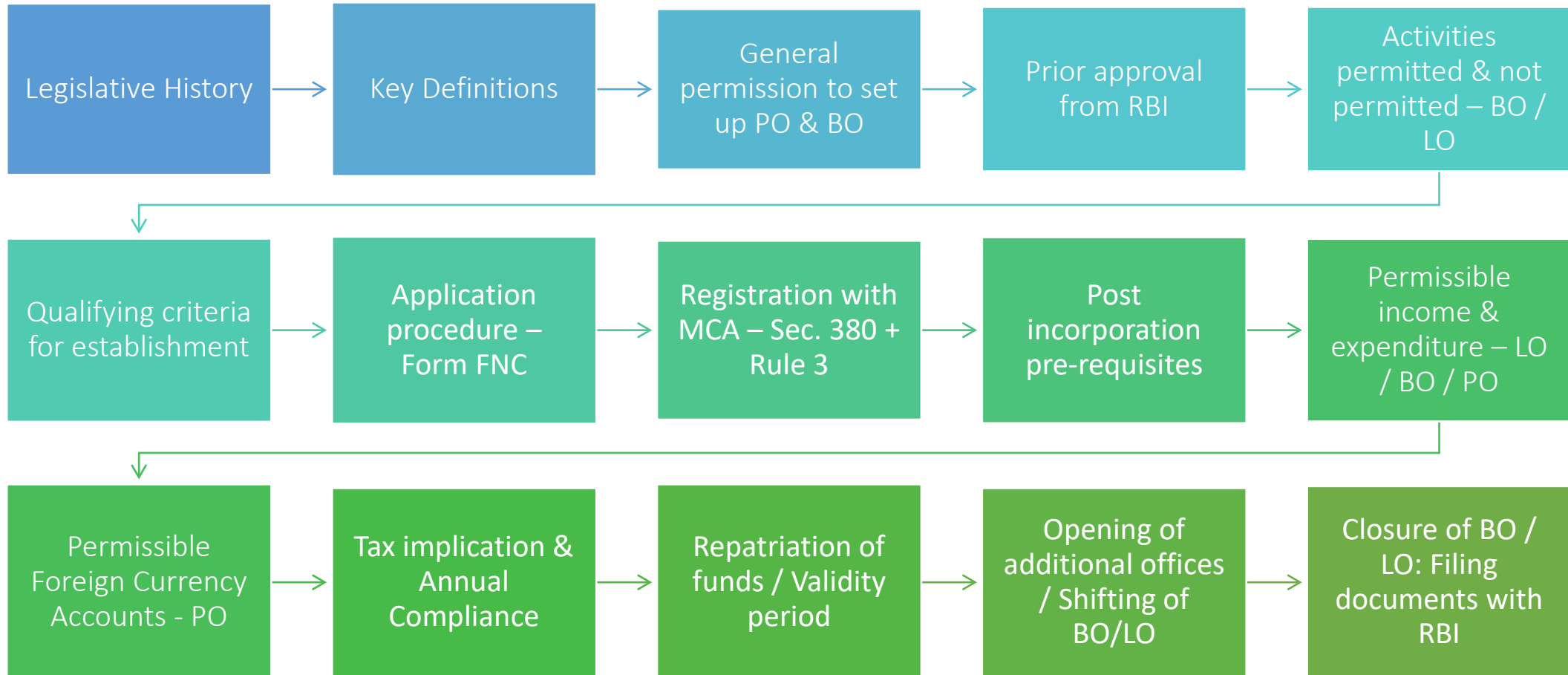
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Presentation Schema



Legends used in Presentation

AD – Authorised Dealer

BO – Branch Office

FDI – Foreign Direct Investment

FEMA – Foreign Exchange Management Act, 1999

IT – Income Tax

LO – Liaison Office

MCA – Ministry of Corporate Affairs

PRI – Person Resident in India

PO – Project Office

PRO – Person Resident Outside India

RBI – Reserve Bank of India

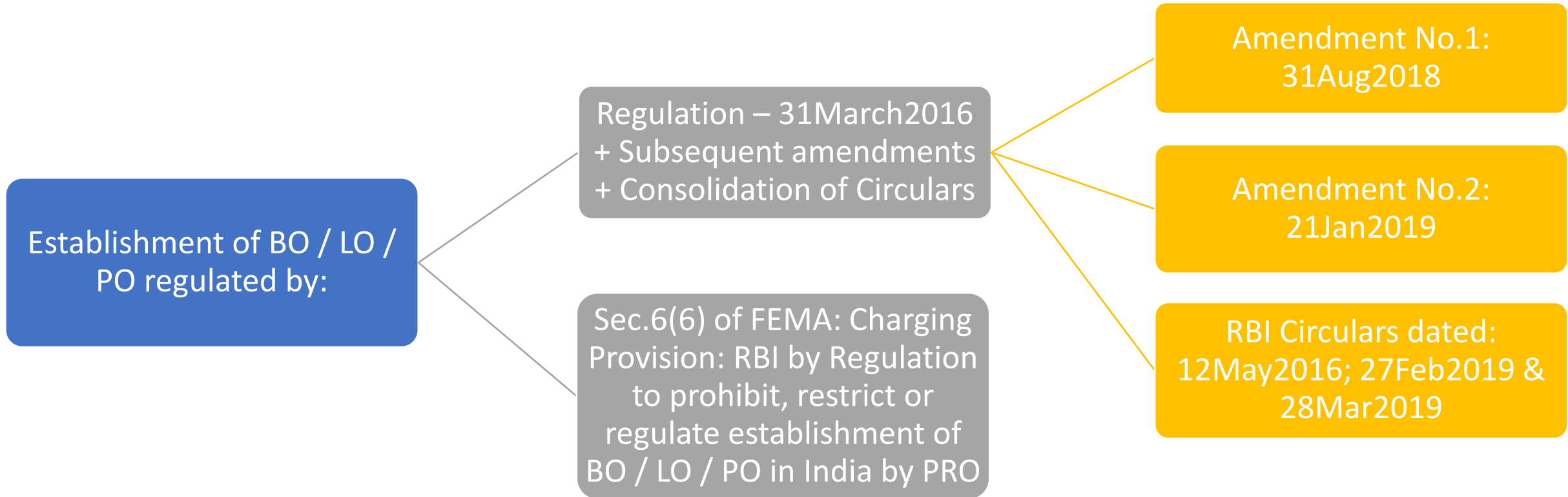
Regulation – Foreign Exchange Management Regulations, 2016

SEZ – Special Economic Zone

UIN – Unique Identification Number

Note: Reference to Sec. refers to Sections of the corresponding Act

Legislative History



Key Definitions

Branch Office Regulation 2(d)

- Means any establishment described as such by the company

Liaison Office Regulation 2(e)

- Means a place of business to act as a channel of communication
- between the principal place of business or Head Office and entities in India
- not to undertake any commercial/trading/industrial activity

Project Office Regulation 2(f)

- Means a place of business in India to represent the interests of the foreign company
- executing a project in India but excludes a Liaison Office

Synopsis of recent amendments

Amendment to Regulation – 21JAN2019

Need for an amendment:

- To improve the ease of doing business, the ministry relaxed the norms for opening of BO / LO / PO in India.

Essence of the amendment:

- Prior to this amendment,

Prior approval from RBI was required when the principal business of the applicant falls in the four sectors, Defence, Telecom, Private Security & Information and Broadcasting.

- *After this amendment,*

Such prior approval shall not be required in cases where Govt. Approval or license / permission has been granted by the concerned Ministry / Regulator.

Amendment to Regulation – 31AUG2018

Need for an amendment:

- To curtail unlawful activities & alleged illegal diversion of funds by various entities with RBI approval in violation of Foreign Contribution (Regulation) Act, 2010 (FCRA).

Essence of the amendment:

- Prior to this amendment,

Prior approval from RBI was required when the applicant is *inter alia* a NGO/ NPO.

- After this amendment,

Such NGO / NPO engaged in activities covered under FCRA, shall obtain FCRA certificate & shall not seek permission from RBI for setting up BO / PO / LO in India. A declaration to be made by the applicant.

General Permission to set up PO

a. A foreign Co. may open PO subject to:

b. Secured a contract in Indian Company to execute a project in India;

c. Project fulfills the specified criterion

Project funded by inward remittance from abroad

Project cleared by an
appropriate authority

Public Financial Institution /
Bank granted term loan for
the Project

Project funded by bilateral /
multilateral International
Financing Agency

General Permission to set up BO

RBI approval not required to set up **BO in SEZs** to undertake manufacturing & allied activities subject to:

Units functioning in sectors where 100% FDI is permitted

Units comply with Chapter XXII of Companies Act, 2013 (Companies registered outside India)

Units function on a standalone basis

RBI approval not required to set up **BO by a banking company / insurance company** resident outside India if:

such banking company has obtained approval under Banking Regulation Act, 1949

such insurance company has obtained approval under Insurance Regulatory & Development Authority Act, 1999

Prior approval from RBI

Applications forwarded to RBI, Central Office by AD and considered in consultation with Govt. Of India

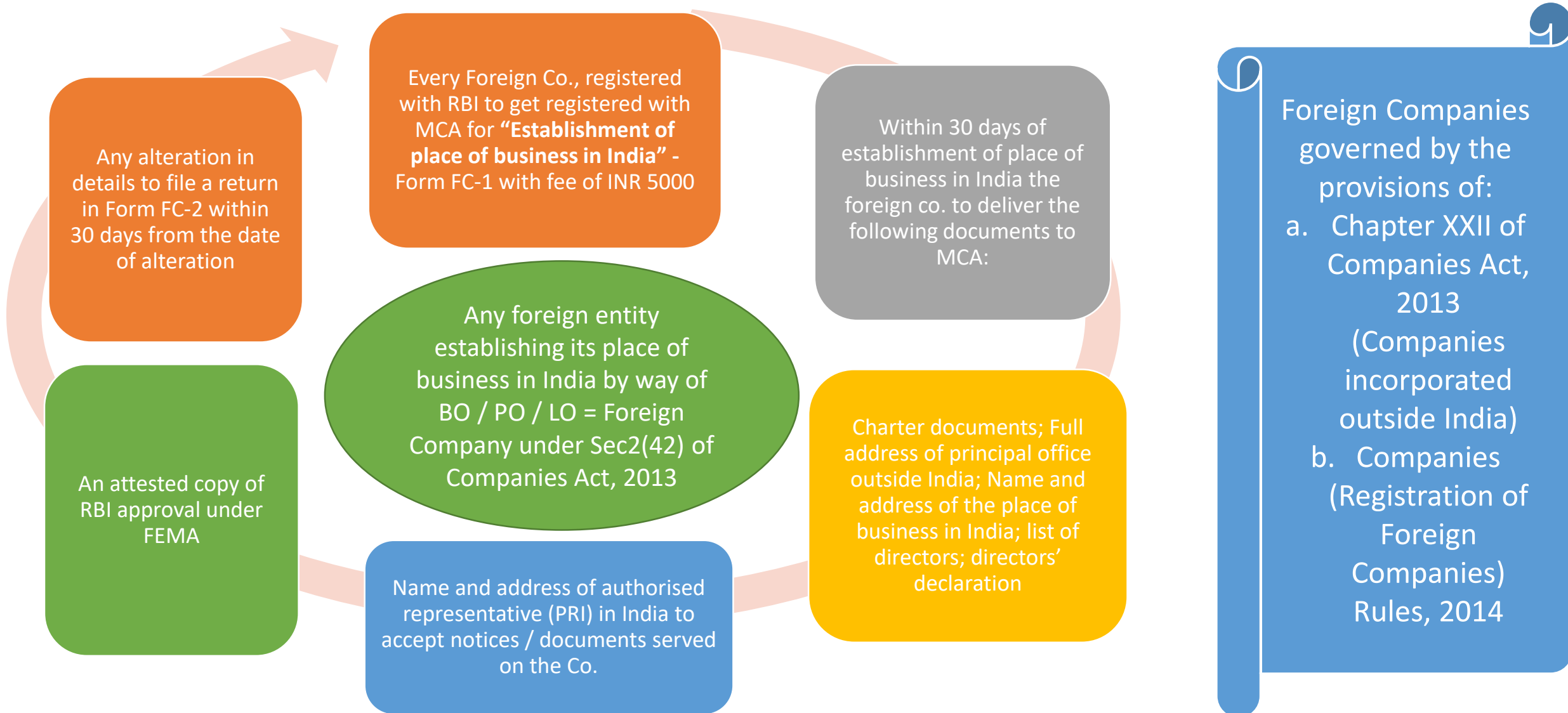
Applicant is a Citizen / registered in Pakistan

Applicant is a Citizen / registered in Bangladesh, Pakistan, Srilanka, Iran, a Citizen / registered in China, Afghanistan, Macau, Hong Kong & to open BO/LO/PO in J&K, North East region, Andaman and Nicobar Islands

Applicant is a Non-Government Organisation, Non-Profit Organisation, Body/ Agency/ Department of a foreign government.

Principal business falls in four sectors: Defence, Telecom, Private Security & Information and Broadcasting. For opening a PO relating to defence sector, no separate reference or approval of Government of India shall be required if the applicant has been awarded a contract by Ministry of Defence / Service Headquarters or Defence PSUs.

Registration with MCA – Sec. 380 + Rule 3



Application procedure – Form FNC

PRO to submit application in Form FNC + prescribed documents for BO / LO / PO establishment to AD Category – 1 Bank

AD Category – 1 Bank to forward a copy of Form FNC + details of approval proposed to RBI, Central Office for UIN allotment

AD Category – 1 Bank may grant approval as per RBI Directions issued

PRO to open foreign office within 6 months from the date of approval. After expiry, approval shall lapse. Further extension requires RBI prior approval.

Prescribed Documents with Form FNC

- Certification of Incorporation, charter docs.
- Audited financials of the applicant co.
- Banker's report with no. of years of banking relation
- POA in favour of signatory of Form FNC
- Letter of Comfort from parent co.
- Details of Activity carried out in Home Country by the applicant
- Details of directors / shareholders

Activities Permitted – BO / LO

BO

Export/import of goods; Representing Foreign Airline / Shipping Co.

Rendering professional or consultancy services

Carrying out research work in which parent co. is engaged

Promoting technical / financial collaborations between Indian co. & parent co.

Representing parent co. in India & acting as buying/ selling agent in India

Rendering services in IT & development of software in India; technical support to products supplied by parent co.

LO

Representing overseas head co. in India

Promoting export / import between countries

Promoting technical / financial collaborations between Indian co. & overseas parent co.

Acting as a communication channel between parent co. & Indian co.

For carrying out other activities, RBI permission required – Application may be submitted through AD justifying its need.

Activities not Permitted – BO / LO

BO

Not to undertake retail trading activity

Not to carry out manufacturing or processing activities in India (But, can subcontract to Indian manufacturer)

RBI / MCA / IT closely monitor activities performed by BO / LO –
Thereby, ensuring that the activities not permitted are not performed

LO

Not to undertake commercial activity

Not to undertake trading / industrial activity

Not to earn income in India

Not to place orders and / or sign documents on behalf of Head Office

Qualifying Criteria for establishment

BO

- 5 years track record of profitable operations in the home country
- Minimum net worth of USD100,000
- As per recent audited balance sheet or account statement

LO

- 3 years track record of profitable operations in the home country
- Minimum net worth of USD50,000
- As per recent audited balance sheet or account statement

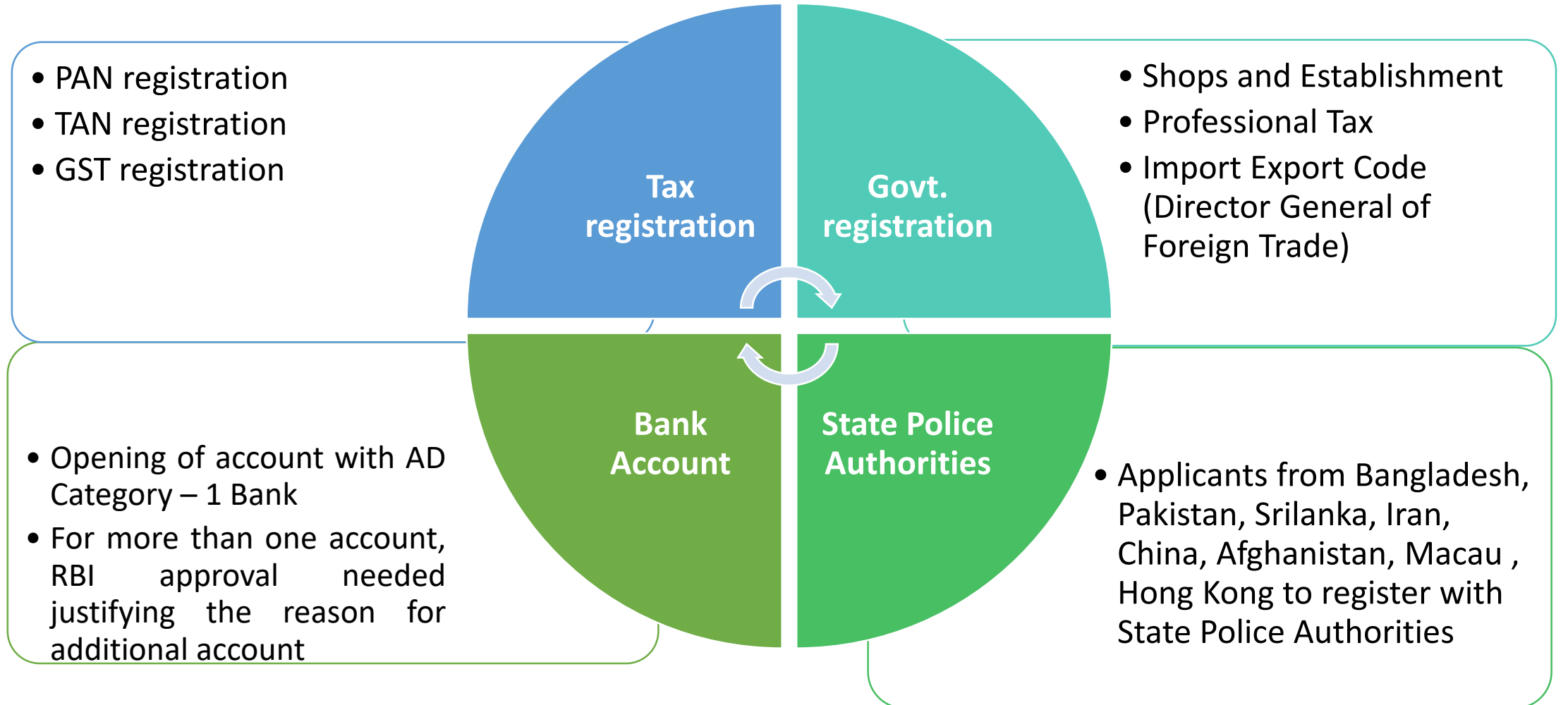
PO

- Foreign Company to be eligible as per the criterion specified for general permission to set up PO

Letter of
Comfort

- BO / LO not satisfying the above criteria, can submit Letter of Comfort in prescribed format
- LOC from parent company (which satisfies the criteria)

Post incorporation prerequisites



Permissible Income & Expenditure - LO

Entire expenses will be met from the funds received from Head Office through normal banking channels

No income accrual in India. Hence, no income tax.

No borrowings in India

Unlimited liability. Assets of parent co. are at risk of attachment for expenses incurred by LO

Permissible Income & Expenditure - BO

Credit to BO's account will be from **income generated in India** or from funds received from Head Office through normal banking channels

Debit to BO's account will be for the expenses incurred by BO and towards remittance of profits

No borrowings in India. Generally engaged in activities of parent co.

Unlimited liability. Assets of parent co. are at risk of attachment where liabilities > assets of BO

Permissible Income & Expenditure - PO

Credit to PO's account will be foreign currency receipts from Project Sanctioning Authority & remittance from parent co. / multilateral financing agencies

Debit to PO's account will be payment of project related expenses

Opening bank account - Entity from Pakistan will need prior approval of RBI to open a bank account.

Opening bank account - Entity from country other than Pakistan for a project by Govt. / PSU may open a bank account without prior approval of RBI

Permissible Foreign Currency Accounts - PO

POs can open **non-interest bearing foreign currency accounts** with AD Category – 1 Bank subject to the following:

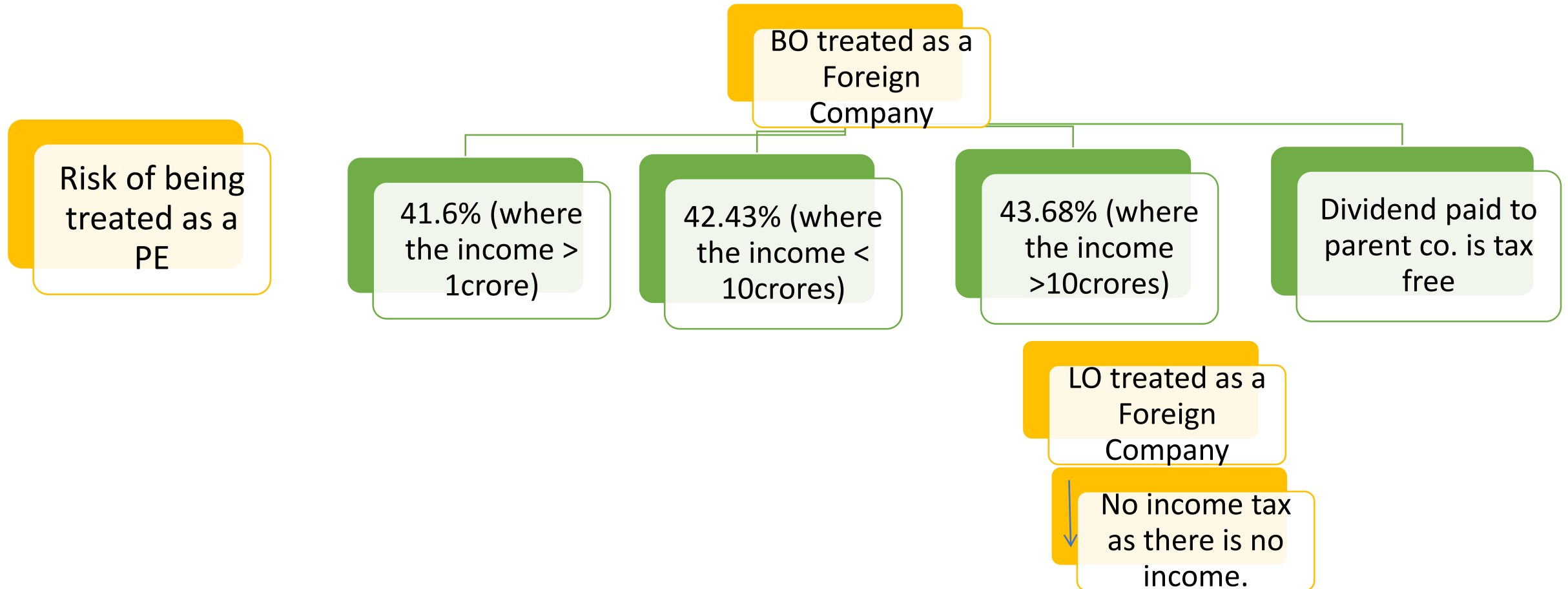
PO has been established in India as per the Regulation

Contract governing the project provides for payment in foreign currency

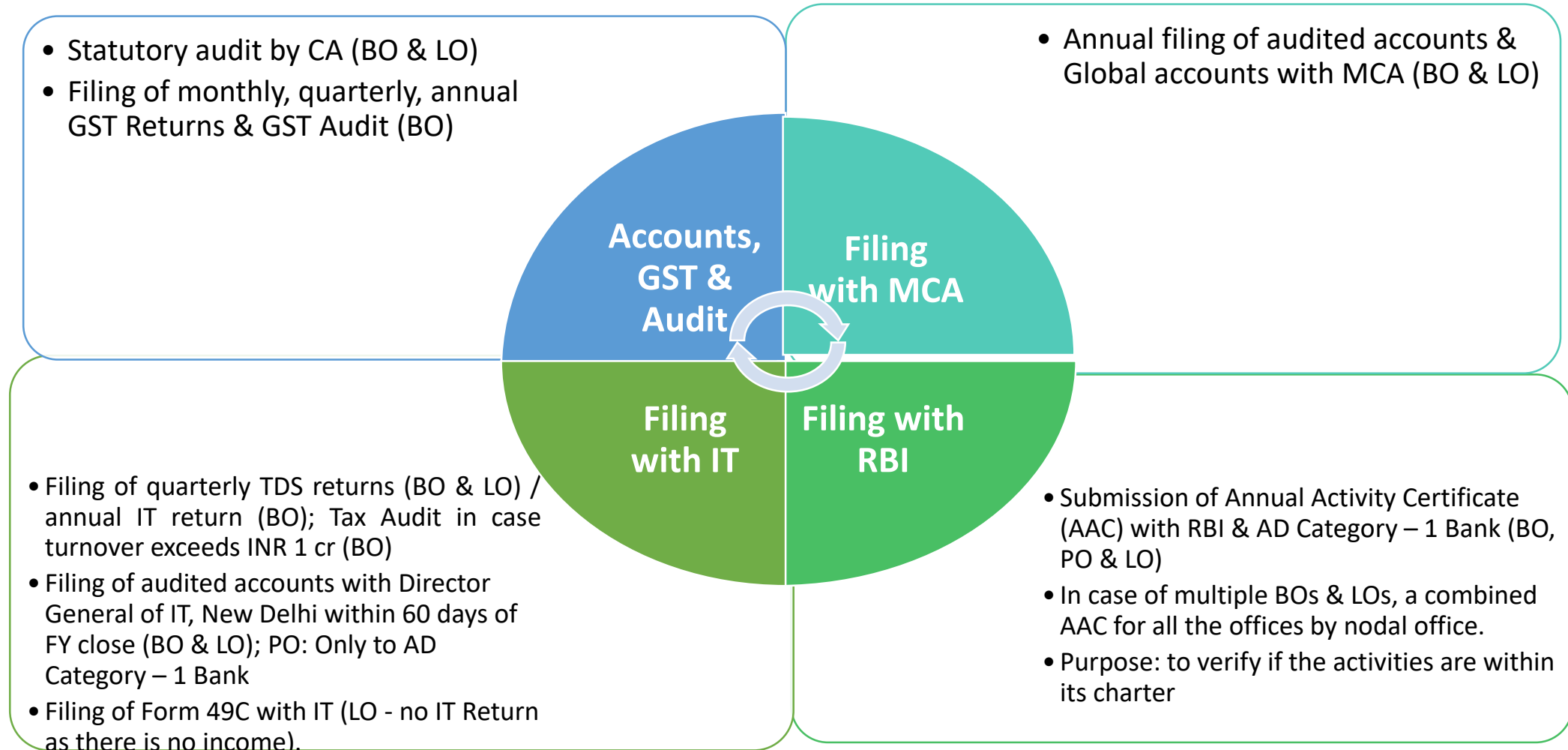
Can open two foreign currency accounts, one denominated in USD & other in home currency, maintained with same AD Bank

Foreign currency accounts to be closed after completion of the project

Tax implication - BO



Annual Compliance



Repatriation of funds / Validity period

LO
<ul style="list-style-type: none"> • Only on closure • Funds can be repatriated to parent co.

BO
<ul style="list-style-type: none"> • Easy repatriation of funds to parent co. • Profits can be freely repatriated subject to payment of applicable taxes in India • On production of prescribed documents

Entity
<ul style="list-style-type: none"> • Engaged in construction and development sectors, Non-banking finance companies • Others

Validity period to establish LO
<ul style="list-style-type: none"> • 2 years • 3 years

Repatriation of funds to parent co.: POs permitted to make intermittent remittances subject to production of prescribed documents.

Validity period: Can be extended for further period of 3 years subject to compliance of the following:

- LO should have submitted AAC for the previous years;
- LO account is being operated as per the terms and conditions in approval letter.

Opening of additional offices / Shifting of BO/LO

Opening of additional BO / LO

- May be permitted
- By submission of additional Form FNC
- If there are no changes to the documents submitted earlier, Form FNC need not be resubmitted
- To identify one office as Nodal Office to coordinate the activities of all offices in India
- Where the number of additional offices exceeds 4, applicant to justify the need and to seek prior approval of RBI

Shifting of BO/LO

- Shifting of LO / BO within the same city: may not require prior approval from AD Category – 1 Bank. New address be intimated.
- Shifting of LO / BO to another city: may require prior approval from AD Category – 1 Bank

Closure of BO / LO: Filing documents with RBI

Approval Letter

- **RBI approval** for establishment of BO / LO;
- **Sectoral regulator's approval** (in case of banking co. / insurance co.)

Auditor's Certificate

- Manner in which remittable amount is arrived at
- Confirming that all liabilities have been fully met or adequately provided for;
- Confirming that no income accruing from sources outside India have remained un-repatriated to India

No objection / Tax Clearance Certificate

- From Income tax Authority

No legal proceedings

- Confirmation from the management that there are no legal proceedings in any Court and
- No legal impediment to the remittance

Report from MCA

- Regarding compliance with the provisions of Companies Act, in case of winding up of office in India.
- No need to go through winding up process for closure.

LO of Foreign Law Firms

Bar Council of India vs A.K. Balaji & Ors.

- The Hon'ble Supreme Court vide its interim orders dated July 4, 2012 and September 14, 2015, passed has directed RBI not to grant any permission to any foreign law firm, on or after the date of the said interim order, for opening of LO in India. Hence, no foreign law firm shall be permitted to open any LO in India till 2018
- Judgement pronounced on March 13, 2018
 - Casual Practice allowed
 - Fly in and fly out allowed
 - LPO/BPO – pith and substance pertinent for relevance of Advocates Act, 1961
 - International Arbitration allowed

Credits and Acknowledgments

Meenakshi Jayaraman

DVS Research Team

Thank You

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